THE LEGAL PRIVILEGE

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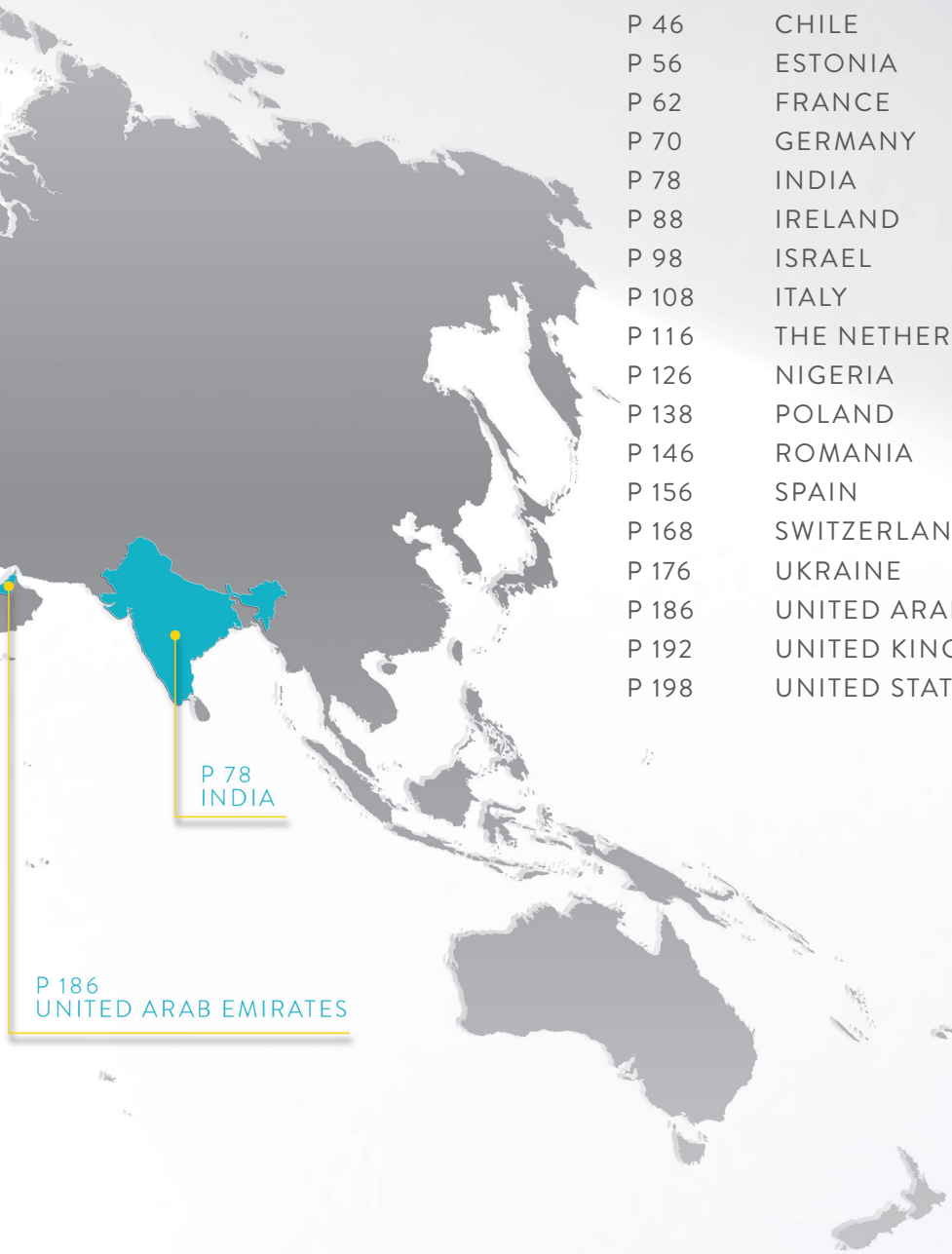
P 116
THE NETHERLANDS
P 28
BELGIUM
P 70
GERMANY
P 192
UNITED KINGDOM
P 22
AUSTRIA
P 88
IRELAND
P 198
UNITED STATES OF AMERICA
P 56
ESTONIA
P 176
UKRAINE
P 168
SWITZERLAND
P 62
FRANCE
P 11
ARGENTINA
P 156
SPAIN
P 126
NIGERIA
P 108
ITALY
P 138
POLAND
P 38
BRAZIL
P 146
ROMANIA
P 98
ISRAEL
P 46
CHILE

TABLE OF CONTENTS



If you are missing a chapter on legal privilege in your own country and would like to contribute to the next edition of this book please email to book@thelegalprivilegeuncovered.com.

TABLE OF CONTENTS

PREFACE

Legal Privilege (un)covered!

It is of great importance that everyone can contact a lawyer in complete confidentiality, without having to fear that what has been discussed will become public. Legal privilege is an important part of our constitutional state. In fact, it is so important that the public interest of having the truth being revealed in court must give way to it.

This book is about that confidentiality, secrecy and non-disclosure. Experts from various countries with different legal systems discuss their legal privilege. Not only because it is interesting to know how this privilege is arranged elsewhere, but particularly also to gain knowledge about legal privilege in other countries, so that in the event of international collaboration between lawyers, it is clear how the client's interests can best be safeguarded. After all, legal privilege is there for the client, not for the lawyers themselves.

This book was made possible with the help of friends and colleagues from various parts of the world, to whom we are very grateful. Through this book, we all aim to contribute to awareness of legal privilege in various countries, in the interests of (future) clients.

Mareş & Mareş Avocați

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NAVIGATING LEGAL PRIVILEGE IN ARGENTINA

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1. INTRODUCTION

Legal privilege ensures that individuals can speak freely and candidly with their attorneys without fear that their communications will be disclosed. By protecting the confidentiality of communications between attorney and client, the privilege encourages people to seek legal advice and guidance, ensuring they understand their rights and obligations. At the same time, frankness allows the attorney to provide the best possible legal advice and representation.

The privilege promotes trust between clients and their attorneys, reinforcing the idea that the legal profession operates in the best interests of those it serves. It underscores the principle that the legal system must maintain a zone of privacy to facilitate open and honest communication between lawyers and clients, which is essential for effective legal representation and the administration of justice.

Argentina has experienced periods where human rights were severely compromised. The aftermath required extensive legal processes, including trials related to crimes against humanity. Legal privilege was and remains crucial to ensure that victims, witnesses, and defendants can speak openly with their attorneys without fear of retaliation or prejudice.

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2. LEGAL BASIS

In Argentina, the concept of legal privilege is woven into both substantive laws and regulations, as well as procedural legislation.

Section 18 of the Argentine Constitution reads: "*...No person may be compelled to testify against themselves, nor be arrested except by virtue of a written warrant issued by a competent authority. The defense by trial of persons and rights may not be violated. The domicile may not be violated, as well as the written correspondence and private papers; a law shall determine in which cases and for what reasons search and seizure are allowed*".

According to the National Supreme Court, Section 18 serves as the constitutional basis for legal privilege in Argentina.[2]

This constitutional provision is bolstered by laws governing the legal profession, which mandate attorneys to uphold the confidentiality of client communications.

Law No. 23,187 covers the practice of law at a federal level. As relevant to legal privilege, Section 6 provides that lawyers are required to *"...faithfully observe professional secrecy, unless authorized by the party at interest..."*. Section 7 further clarifies that lawyers have the right *"...to maintain professional secrecy"*.

Substantive laws also contemplate criminal sanctions for the violation of professional secrecy obligations.

In this sense, Section 156 of the Argentine Criminal Code imposes fines and professional debarment or disqualification on anyone who "*...by reason of their status, office, employment, profession, or art, having knowledge of a secret whose disclosure could cause harm, discloses it without just cause*".

Regulations issued in furtherance of substantive legislation include additional clarifications to the scope and implication of legal privilege.

2 in re Clementi, Edgar Omar and other v. Embassy of the Russian Federation et al; April 17, 2007.

Specifically, the Code of Ethics of the Bar Association of the City of Buenos Aires states that: "*...lawyers must strictly respect all professional secrets and object release of their secrecy obligations by judges or any other authority, refusing to answer questions that may expose them to potential violations. The only exceptions are (a) when the client waives privilege and (b) when necessary for their own defense".* This regulation also stipulates that: *"The lawyer must defend the right to the inviolability of his/her law office and of the documents that have been entrusted to them".*

In interpreting these provisions, Argentine courts held: "*The waiver of professional secrecy duties -and the lawyers involved in these proceedings should be aware of this- is a matter that concerns the beneficiary of legal privilege older of the secret and is not -in principle- within the judge's sphere of decision*".[3]

Procedurally, the National Code of Criminal Procedure ("NCCP") coexists with -and will be replaced by- the Federal Code of Criminal Procedure. This is an ongoing transition without a definitive timeframe.

Both codes delineate the application of privilege within judicial proceedings. They provide additional legal basis for lawyers to object to the disclosure of privileged information, thus maintaining the integrity of attorney-client communications throughout the course of criminal litigation.

Section 244 of the NCCP states that attorneys are barred from testifying about facts or circumstances in their knowledge on account of or by reason of their profession. Section 232 of the NCCP limits the court´s subpoena powers, stipulating that a subpoena may not be directed to any person bound by a duty of professional secrecy. Also, Section 237 of the NCCP precludes seizure of letters or documents exchanged between an attorney and his/her client, for purposes of legal counseling.

In similar terms, Section 160 of the FCCP bars attorneys from testifying in connection with information known to them on account of their legal profession. Section 149 of the FCCP states that individuals bound by professional secrecy duties may refuse court document subpoenas. Finally, pursuant to Section 147 of the FCCP those individuals bound by the prohibition to testify are likewise exempt from the duty to produce relevant documents upon court or prosecutor request.

3 National Civil Court of Appeals, Section I, in re Vara, Pedro (2010).

These laws and regulations apply at a federal level. Argentine provinces regulate the legal profession and criminal proceedings within the realm of each jurisdiction. Generally, local legislation mirrors the protections provided at the federal level. This means that while each province enacts its own rules and procedures, they typically adopt the fundamental principles of attorney-client privilege as established in federal legislation, ensuring a consistent level of confidentiality and legal safeguard across the nation.

3. SCOPE OF PROTECTION

In general terms, privilege is aimed at protecting communications and information exchanged in private between an attorney and its client with the purpose of the attorney providing legal advice.

Case law establishes that attorney-client privilege applies to all communications between legal professionals and their clients when seeking legal advice, and that the protection is in place regardless of whether the attorney had independent knowledge of the facts in question.[4]

Not all interactions with lawyers are covered by attorney-client privilege. In Argentina, as in many jurisdictions, the privilege specifically protects exchanges that are made for the purpose of obtaining legal advice. This means that communications must be intended for legal counsel to be considered confidential. Casual conversations or communications unrelated to the provision of legal services do not enjoy this protection.[5]

Lawyers typically can offer legal counsel if they: (1) hold a law degree recognized by an authorized institution; (2) have been granted the license to practice law within the applicable legal region; and (3) are clear of any disqualifications or restrictions, such as holding a high-ranking government position, serving in the military, facing disciplinary action from the Bar Association, or having a criminal conviction. It's essential to verify any additional conditions in the pertinent laws that govern the specific attorney's practice.

When considering who is a client, a broad approach should be applied. Such concept does not only cover actual clients, but also those who communicate with the attorney seeking legal advice even though they later do not retain the relevant attorney to provide legal assistance in the context of legal proceedings.

4 Court of Appeals in Economic Crimes, Section A, in re Seferian et al; August 23, 2007.
5 Court of Appeals in Economic Crimes, Section B, in re Nils Schutt et al; October 12, 2023.

The condition requiring that interactions between attorneys and clients be private dictates that these exchanges remain out of the public domain. For example, discussions held in open or other setting where privacy isn't assured, may not qualify for attorney-client privilege protection.

Attorney-client privilege extends to in-house counsel just as it does to external attorneys. However, the privilege is contingent upon the communication being for legal advice. For instance, if someone with a law degree and bar admission serves as a company's in-house counsel but engages in providing a commercial, rather than legal, analysis, the privilege would not be in effect. The protective cloak of privilege is reserved for legal, not business, communications.

Holding a bar admission is a prerequisite for legally practicing law and, by extension, for dispensing legal counsel. Nevertheless, there are instances where unbarred lawyers offer advice without appearing in court. It is advisable to ensure that for privilege to be applicable, the lawyers involved should be members of the bar.

Residence is not a requisite of privilege.

4. CRIME-FRAUD EXCEPTION

The doctrine of the "crime-fraud exception" to attorney-client privilege is not explicitly mentioned in either the National or Federal Codes of Criminal Procedure in Argentina. However, some case law has acknowledged that attorney-client privilege does not protect interactions where the attorney acts as an accomplice in an ongoing crime. Essentially, the crime-fraud exception applies when legal representation is perverted into a tool for committing or concealing criminal activity, thereby stripping away the confidentiality typically afforded by attorney-client privilege.

Certain precedents have limited ACP protection in cases where the attorney was personally engaged in the commission of a crime.

Relevant case law holds that protection "*...extends only to the attorney´s activities as legal counsel, which is not the case as* [the lawyer] *is named as a defendant together with his client*".[6]

In a similar precedent, criminal courts held that "*...the protection afforded to a law office (...) is established to protect the client´s rights and not the attorney´s own interests. Professional secrecy does not mean personal privilege*".[7]

6 National Criminal Court of Appeals, Section I, in re C.F. (2011).

7 National Criminal Court of Appeals, Section VII, in re Fernández Segura (2017).

This contrasts with communications seeking legal advice on past unlawful acts, which remain protected.

5. COUNSEL BY FOREIGN ATTORNEYS

The legal privilege of foreign lawyers is not codified at a national level. There is a lack of specific national legislation or judicial precedents that directly addresses whether the attorney-client privilege applies to legal advice given by lawyers from other countries under the auspices of foreign laws.

While certain provincial statutes stipulate that communications between an Argentine lawyer and a foreign lawyer are afforded attorney-client privilege within Argentina, these regulations clarify that local counsel are advised to take appropriate measures to secure privilege in foreign jurisdictions.

It is therefore unclear how Argentine courts would treat privilege in cases where the legal advice is provided by foreign lawyers under the legal frameworks of their respective countries. In this context, intervention of Argentine counsel is recommended to ensure privileged status of cross-border legal communications.

6. TESTING THE SCOPE OF LEGAL PRIVILEGE

Argentine legislation does not provide for the use of “taint teams” within the legal framework. There are no regulatory provisions for the establishment of such teams to review documents and determine the applicability of attorney-client privilege in the event of government seizures during investigations. This means that the specific mechanism of separating privileged information from non-privileged material via a taint team, as seen in some other jurisdictions, is not a recognized or regulated practice in Argentina.

If the prosecution seeks to include materials in an investigation that may be covered by attorney-client privilege, the court is required to conduct an in camera review. During this confidential process, a judge examines the materials in question to ascertain whether they are indeed protected by privilege and should be excluded from the case to maintain confidentiality.

Should a court determine to admit into the record materials that could potentially fall under the protection of privilege, interested parties are entitled to challenge such a ruling. Attorneys, alongside their clients, are empowered to submit requests to dismiss

any evidence that breaches this privilege. Moreover, when lawyers are summoned to provide testimony or submit documents that might reveal privileged information, they are authorized to resist the summons or subpoena by asserting legal privilege.

The National Supreme Court held that all exceptions to legal privilege must be narrowly construed, and that any challenge to the protection requires the intervention and opinion of the person who could be potentially affected by the disclosure of the relevant material.[8]

7. CURRENT TRENDS

In May 2023, the National House of Representatives of Argentina took a decisive step by approving an amendment to Anti-Money Laundering Law No. 25.246. This amendment is poised to significantly alter the legal landscape by introducing customer due diligence, record-keeping obligations, and suspicious transaction reporting requirements for attorneys.

The intent is to bolster the fight against money laundering, but it has sparked considerable debate within the legal community. The core of the contention lies in the potential clash with the deeply rooted principle of legal privilege, enshrined in the National Constitution.

As explained above, in Argentina legal privilege has an expansive scope, safeguarding virtually all communications between a client and their attorney. Consequently, the amendment's efficacy is under scrutiny; critics argue that its application is likely to encounter insurmountable hurdles. Implementing such measures could lead to serious breaches of constitutional principles, suggesting that the amendment might create more issues than it resolves.

The practicality of enforcing this amendment is questionable, as it challenges the very tenets of attorney-client confidentiality without clear guidelines on circumventing the constitutional protections in place.

The amendment is yet to be reviewed and voted on by the National Senate.

8 in re Abdala v. Farrall; February 16, 2012.

8. IMPACT ON INTERNAL INVESTIGATIONS

Under Argentine law, the scope of legal privilege applies uniformly across the legal profession, without differentiating between external counsel and in-house lawyers. Consequently, when an internal investigation is conducted or overseen by a licensed Argentine attorney, the findings and communications related to that investigation are afforded the same privilege protections as those conducted by external legal advisors. This uniform application ensures that all legal advice and the fruits of legal inquiries, whether they occur within a corporate entity or through consultation with external law firms, are safeguarded from compulsory disclosure.

9. BEST PRACTICES

Although legal privilege is not regulated in detail, there are some best practices that can be distilled from existing statutes, legal principles, and case law to safeguard protection to the fullest possible extent.

As a first step, it is prudent to involve Argentine legal counsel early promptly. This ensures that the protection of privilege is established from the start. It is also important to comprehend the extent of legal privilege in your region, which generally shields confidential communications between a lawyer and their client.

Storing privileged or potentially privileged documents separately from other business records is also a good practice, as it simplifies the process of asserting privilege in court and reduces the risk of contamination of protected material. To maintain clarity and intent for confidentiality, marking interactions with legal counsel as “Privileged and Confidential”.

Finally, individuals and organizations should be judicious in sharing privileged material; it should only be accessible to those who absolutely need to know, as broader distribution may inadvertently waive the privilege.

Lastly, in collaborations involving multiple parties, a clear understanding of joint privilege and its effects on shared communications is crucial to uphold the integrity of privileged information.

10. CONCLUSIONS

In Argentina, the concept of legal privilege has not been defined with extensive specificity in applicable laws and regulations, leaving the courts to shape its application through a broad interpretation that traditionally favors robust protection. This expansive judicial construction ensures that without a client's explicit waiver, the likelihood of forced disclosure of confidential communications is significantly limited.

Privilege extends to both independent legal practitioners and in-house corporate counsel, provided they are duly accredited by the relevant bar association.

Both attorneys and their clients have standing contest the admission of materials into the court record that may fall under the umbrella of privilege, preserving the protection of their confidential exchanges.

Despite this strong precedent of stringent protection, recent legislative initiatives suggest a shift could be on the horizon. These changes, geared towards intensifying disclosure requirements, potentially signal a departure from the established trend, leaning towards an environment where legal privilege may face novel constraints, challenging the balance between confidentiality and compliance with legal obligations.

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LEGAL PRIVILEGE IN AUSTRIA

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The Austrian Attorney's Code protects attorney's right to keep secret confidential information provided by the client. This right is expressed in procedural laws as attorney's right to refuse to testify. It is also protected against any circumvention. In Austria's political discussion, the legal privilege currently finds attention in connection with the seizure of mobile phones during house searches by prosecuting authorities and with the analysis of the data stored on them that often contain privileged correspondence.

THE REGULATION OF THE LEGAL PRIVILEGE IN AUSTRIA

The legal privilege, also called attorney-client-privilege, is the attorney's confidentiality obligation. It is intended to protect confidential ("privileged") information that clients disclose to their attorney within the framework of the attorney-client-relationship and during the initiation of this relationship.

In Austria, the legal privilege is designed as an attorney's **obligation** to maintain confidentiality. The attorney-client privilege is regulated in the Austrian Attorney's Code (*Rechtsanwaltsordnung*; "RAO"). Paragraph 9 Section 2 RAO states that attorneys shall keep secret matters entrusted to them as well as facts, which are otherwise made known to them in their professional capacity if the client is interested in keeping such facts confidential. Violation of this confidentiality obligation may lead to disciplinary consequences and may give rise to claims for damages too.

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Moreover, attorneys have the **right** to maintain the confidentiality of privileged information in court and other administrative proceedings in accordance with the respective provisions of procedural laws. Accordingly, the different procedural regulations (e.g. Austrian Code of Criminal Procedure, Austrian Code of Civil Procedure[2]) provide for attorneys' right to refuse to testify as a witness.

This legal privilege is an essential precondition for practicing as an attorney. The historical starting point is the protection of defense. Everyone must be able to trust that he does not create evidence against himself by commissioning an attorney.[3] Clients must be able to trust that no information shared with their attorney will be disclosed to third parties by the attorney or by his assistants. Only this trust enables the client to disclose everything to his attorney and, at the same time, enables the best possible representation. Nowadays, the legal privilege in Austria not only applies to defense attorneys, but to any attorney at law.

THE SCOPE OF THE LEGAL PRIVILEGE

For the attorney's confidentiality obligation, it does not matter whether a mandate has already been established or not. Anyone who consults a lawyer with the intention of being represented by him has the right that all information (oral and written) entrusted to the attorney **in his professional capacity** is covered by the attorney-client-privilege. This privilege even applies if the attorney refuses to accept the mandate.[4] For example (and particularly) if divorce proceedings are anticipated, from time to time, clients approach the "most feared" divorce attorneys and provide them with confidential information in an initial meeting. Even if no client relationship is subsequently established, these attorneys are then no longer available to the other spouse due to their confidentiality obligation.

The legal privilege not only includes attorneys' right to refuse to testify, the attorney-client-privilege is **also protected against any circumvention**. As information disclosed to the attorney often is reflected in physical documents, these documents must be protected from confiscation. Part of the attorney-client-privilege and therefore protected are documents that contain knowledge entrusted to the attorney (eg correspondence between attorney and client) and everything the attorney elaborated based on this

2 Paragraph 157 section 1 clause 2 Code of Criminal Procedure (*Strafprozessordnung*); paragraph 321 section 1 clause 4 Code of Civil Procedure (*Zivilprozessordnung*); paragraph 49 section 1 clause 2 General Act on Administrative Procedure (*Allgemeines Verwaltungsverfahrensgesetz*); paragraph 171 section 1 clause c) Federal Fiscal Code (*Bundesabgabenordnung*); paragraph 104 section 1 clause d) Financial Crimes Act (*Finanzstrafgesetz*) .

3 *Univ.-Prof. Dr. Ingeborg Zerbes*, Anwaltsverschwiegenheit: überkommenes Privileg oder rechtsstaatliches Erfordernis?, Österreichisches Anwaltsblatt 2013/10, Page 565.

4 RIS-Justiz RS0119488; OGH 25.10.2004, 4 Bkd 3/04.

knowledge (e.g. meeting notes). Thus, the prevailing view in Austria is, that even files from an internal investigation of a company – as output of attorney's work – cannot be seized (although there is a lack of reliable case law for various scenarios in the context of internal investigations).[5] On the other hand, evidence that already existed before the attorney-client relationship was established cannot be withheld from prosecuting authorities by simply handing them over to the attorney.

In order to fully protect the legal privilege, paragraph 9 Section 3 RAO states that the attorney's right to confidentiality may not be circumvented by court order or other official measures, in particular by questioning attorney's employees and assistants or by ordering disclosure of documents, of visual, audio or data media or by confiscating them. This protection from circumvention is particularly implemented in the Austrian Code of Criminal Procedure. Paragraph 157 section 2 states that the right to refuse to testify may not be circumvented, by whatever process, otherwise the judgement using results of such circumventing investigative measures is void. Paragraph 144 Section 2 of the Code of Criminal Procedure states that the **ordering and execution** of investigative measures (by the public prosecution's office) are inadmissible to the extent that they circumvent the right to refuse to testify.

Finally, the prohibition on circumventing the right to refuse to testify by accessing records is protected by the **right to object** to the seizure (section 112 of the Code of Criminal Procedure). This right to object is (only) the attorney's right, not the client's. If an attorney objects to the seizure of documents or data containing privileged information, he achieves the "sealing" of the data media in question, which are subsequently deposited with the court and reserved for a judicial viewing procedure. This procedure allows that protected information gets sorted out by a judge who is not involved in the investigations. Only documents released by the court as not-classified are included in the case file. Documents containing privileged information are returned without the public prosecutor's office having access to their content.

LIMITS OF THE LEGAL PRIVILEGE

By its very nature, the attorney's confidentiality obligation does not apply if the client releases the attorney from this duty. However, attorneys do **keep their right to refuse** to testify even if they got released from their confidentiality obligation by the client.[6]

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5 *Pollak* in *Soyer*, Handbuch Unternehmensstrafrecht 14 Kapitel, page 22; *Univ.-Prof. Dr. Ingeborg Zerbes*, Anwaltsverschweigenheit: überkommenes Privileg oder rechtsstaatliches Erfordernis?, Österreichisches Anwaltsblatt 2013/10, Page 567.

6 *Kirchbacher/Keglevic* in *Fuchs/Ratz*, WK StPO § 157, margin note 18.

Another exception can be found when a lawyer drafts a contract on behalf of two contracting parties. Such a lawyer may not invoke the fact that he was not released from his confidentiality obligation by (only) one of the contracting parties when it comes to testifying about agreements made when the contract was drafted. What had been agreed between the parties in the lawyer's presence is not regarded as entrusted to him by one of the contracting parties.[7]

Another important exception to the attorney-client-privilege occurs in cases when there is a suspicion of money laundering or financing of terrorism. If the attorney works on certain transactions (e.g. real estate transactions), the attorney is obliged to provide the Federal Criminal Police Office (*Bundeskriminalamt*) with information on all circumstances known to him, as far as this is necessary to clarify a suspicion of money laundering or terrorist financing directed against the party. In case of reasonable suspicion, the attorney is even obliged to report his suspicion with the Federal Criminal Police Office However, the attorney is **not** obliged to report suspicions regarding such facts which he has learned from or about a party in the course of providing legal advice or in connection with his representation before a court or an upstream authority or public prosecutor's office, unless the party, apparent to the attorney, obviously uses the legal advice for the purpose of money laundering or financing terrorism.[8] However, even if there is a duty to report a suspicion, the attorney's right to refuse testimony pursuant to paragraph 157 of the Code of Criminal Procedure remains valid.[9]

PERSONS AFFECTED BY THE LEGAL PRIVILEGE

The attorney-client-privilege must not only be observed by the attorney himself but by his employees and assistants as well. Therefore, the confidentiality obligation applies to associates, trainees, student assistants, secretarial staff, etc. Out-sourcing of secretarial work or telephone support is possible and generally covered by the confidentiality obligation.[10] Therefore, paragraph 9 Section 2 RAO states that attorneys must oblige their employees to observe confidentiality. Also attorneys must take sufficient measures to ensure that this confidentiality obligation is complied with. Usually, service contracts of law firm employees provide for confidentiality obligations or separate confidentiality agreements are signed. It is recommended, that attorneys also instruct their employees orally and in detail about the importance and scope of the confidentiality obligation that must be observed.

7 RIS-Justiz RS0040559.

8 Paragraph 9 Section 6 RAO.

9 Österreichischer Rechtsanwaltskammertag, Verhinderung von Geldwäsche und Terrorismusfinanzierung - Information und Leitfaden für Rechtsanwälte - Stand 05/2020, page 31.

10 *RA Hon.-Prof. Mag. Dr. Peter Csoklich/RAin Dr. Nina Huber*, Anwaltliche Verschwiegenheit und ihre Durchbrechung, insbesondere bei den Anwaltsgehilfen, AnwBl 2015, 80.

The attorney-client-privilege should be protected on different levels. In the past, lawyers' common tip to protect privileged information was to ensure that privileged information is recognizable as such, meaning e.g. to label folders, so in case of house searches it is clear, that those documents/folders are protected and won't be inspected by the prosecuting authorities. Nowadays, the biggest risk in terms of a possible breach of the legal privilege can be found in electronic devices, especially in mobile phones (see next chapter). Lawyers must carefully consider how to communicate internally and externally. There are plenty of options to protect shared information, reaching from using password-protected (cloud) solution to self-deleting messages. It is the attorneys' duty to instruct not only his employees but also his clients on how to properly protect confidential information – of course, depending on law firm structure but also on the client.

With regard to lawyers from other countries, it is to be said, that the Austrian law does not explicitly distinguish between Austrian and foreign lawyers. Based on the fact that the attorney-client-privilege is regulated in national procedural provisions in Austria, having regard to the intent of those provisions and taking into account that the legal privilege is protected at least in the form of a general legal principle,[11] it can be assumed that the Austrian courts also grant foreign lawyers the right to refuse to testify – at least, as long as their position equals an Austrian lawyer.[12]

PROSPECTS REGARDING THE LEGAL PRIVILEGE

In the current political debate in Austria, the legal privilege particularly attracts attention in connection with the seizure of mobile phones by the prosecuting authorities and the analysis of the data stored on the phones. In accordance with their regulation in an age before "Big Data" existed, the seizure powers of the investigating authorities relate to **all** objects. Therefore, mobile phones can easily be accessed by the prosecuting authorities through seizure. With the seizure of the phone comes the seizure of all data stored on it. That seems unjustified having regards to the fact that usually the same data (stored on phones) is only accessible through certain investigative measures that are bound to the character of such data as "communications and information". Those specific investigative measures are subject to demanding constitutional bounds whereas the seizure of phones and the analysis of data stored on them are not. The latter only require the evidential value of the phone (the expectation that one message is stored on the phone is sufficient) and an order by the public prosecutions office.

11 *Clemens Beckenberger*, Abschied von den Grundrechten als allgemeine Rechtsgrundsätze? – Die Rechtsprechung des Gerichtshofs nach Inkrafttreten der GRC, EuR 2023, 252.

12 This clearly is the case for European Lawyers who work in Austria according to the provisions of the European Lawyers Act (*Europäisches Rechtsanwaltsgesetz*).

A judicial authorization of the order is not necessary, the suspicion does not need to be urgent and the investigated offence must not be of a certain severity. The requirements for the seizure are very low, while the severity of the impact is high.[13]

As already mentioned, the right to object to a seizure in order to protect privileged information can only be exercised by the attorney. If the accused client is in possession of a data carrier (mobile phone) that contains privileged information (eg correspondence with his attorney), he cannot object to seizure. This means that privileged information is passed to the investigating authorities without prior review by a judge. As the prohibition of circumvention must be observed *ex officio*, privileged information cannot be taken into the public prosecutor's file anyway and therefore are not included in the proceedings. Nevertheless, the public prosecutor still gains an insight into and thus knowledge of the privileged information (which the law actually wants to avoid).

This unsatisfactory current situation gives cause for various reform proposals. These proposals range from increasing the requirements for the admissibility of seizures to excluding access to externally stored data (e.g. data stored on a cloud). With regard to the protection of the legal privilege, it is being discussed if the accused client shall have a right to object to a seizure in order to protect privileged information.[14] From a lawyer's perspective (see the claims of the Austrian Bar Association[15]) but also for reasons of the rule of law, it seems necessary and very likely that the current legal and very likely that the current legal situation will be changed in one way or another soon or another soon.

13 *Ingeborg Zerbes/Shirin Ghazanfari*, Stellungnahme im Auftrag des Instituts für Anwaltsrecht der Universität Wien zur Sicherstellung und Auswertung von Daten und Datenträgern, Anwaltsblatt 2022/329, page 646.

14 *Ingeborg Zerbes/Shirin Ghazanfari*, Stellungnahme im Auftrag des Instituts für Anwaltsrecht der Universität Wien zur Sicherstellung und Auswertung von Daten und Datenträgern, Anwaltsblatt 2022/329, page 650.

15 *Danijela Dworzak/Bernhard Hruschka*, ÖRAK fordert tiefgreifende Reformen bei der Sicherstellung und Auswertung von Daten und Datenträgern, Anwaltsblatt 2023, 61.

Tuerlinckx Tax Lawyers

UNVEILING BELGIUM'S LEGAL PROFESSIONAL PRIVILEGE

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1. INTRODUCTION

As in many other countries, also Belgium attaches great importance to legal privilege and attorney-client privilege. It is considered to be pivotal to ensure that clients can communicate freely and honestly with their attorneys,[2] knowing that their information will be treated under the seal and protection of confidentiality. It protects the rights and interests of clients and is a fundamental principle in the Belgian legal profession. This article discusses the obligations related to the legal privilege applicable to lawyers in Belgium, the exceptions and limitations to this privilege, as well as the impact of legal professional privilege in specific cases, such as a criminal investigation involving an attorney or a tax investigation.

2. (LACK OF) LEGAL BASIS AND CONSTITUTIONAL PRINCIPLE

The scope of legal privilege of attorneys is not explicitly regulated in any Belgian legal text but has been developed in Belgian (and international) jurisprudence. However, a legal basis can be found in Article 458 of the Criminal Code (hereinafter "BCC").[3] The legislator's intention with this criminal provision was to create trust

1 www.tuerlinckx.eu/en.

2 With attorney is meant an attorney that is member of a recognized bar association in Belgium.

3 Artikel 458 Criminal Code, *B.O.G.* 9th of June 1867, err., *B.O.G.* 5th of October 1867.

through professional secrecy, which also includes the legal privilege of attorneys. This trust is necessary to avoid discouraging those in need of legal assistance from seeking it.[4] The protection of this relationship of trust between a confidant and their client is deemed of such societal importance that its violation can lead to the criminal sanctions mentioned in Article 458 of the Criminal Code.[5] The attorney is logically a targeted confidant under Article 458 of the Criminal Code.

Before delving into Article 458 of the Criminal Code and its consequences and exceptions, it is important to note that legal professional privilege of the attorney exists and would continue to exist even if it were not subject to criminal sanctions. Respected legal doctrine states that the Belgian legal professional privilege is a criminal, contractual, quasi-delictual, human rights, and also a deontological norm.[6]

The highest courts in Belgium have given additional special value to an attorney's legal privilege. The Constitutional Court and its predecessor, the Arbitration Court, the highest court overseeing the application of the Belgian Constitution, have repeatedly confirmed that an attorney's legal privilege has a special and exceptional character and is a fundamental principle of the right to defense, requiring stronger protection than that of other confidants.[7] In 2008, the Constitutional Court explicitly ruled that an attorney's legal privilege is even a constitutional principle, as it is a general principle related to the observance of fundamental rights.[8] The Court of Cassation, the Belgian supreme court, also ruled that an attorney's legal privilege serves the general interest and is based on the necessity to provide essential guarantees of trust.[9]

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4 Cass. 16th of December 1992, *T.Gez.* 1996-97, 25; F. BLOCKX, *Beroepsgeheim*, Antwerp, Intersentia, 2013, 178; T. MOREAU, "La violation du secret professionnel" in M. BEERNAERT, H. BOSLY, M. CESONI, C. CLESSE, I. DE LA SERNA, P. DE POOTER, C. DE VALKENEER, M. GIACOMETTI, F. KUTY, P. MAGNIEN, T. MOREAU, G. RANERI, N. VAN DER EECKEN, D. VANDERMEERSCH and I. WATTIER (eds.), *Les infractions contre l'ordre public*, Brussels, Larcier, 2013, 685-726.

5 Artikel 458 Criminal Code, *B.O.G.* 9th of June 1867, err., *B.O.G.* 5th of October 1867; E. LEMMENS and R. DEMEUSE, "Les droits fondamentaux des agents de la fonction publique à l'épreuve des réseaux sociaux (obs. sous C.E. (b.), arrêt ‹Bridoux', 28 novembre 2017)", *Rev.trim.DH* 2019, afl. 117, 129-146; I. VAN DER STRAETE and J. PUT, *Beroepsgeheim en hulpverlening*, Bruges, die Keure, 2005, 12; P. LAMBERT, "Le devoir de réserve et les notions voisines: le secret professionnel et l'obligation de discrétion" in X., *Le devoir de réserve: l'expression censurée?,* Brussels, Bruylant, 2004, 9-19.

6 J. STEVENS, *Advocatuur: Regels & Deontologie*, Mechelen, Wolters Kluwer, 2015, 846-847.

7 *Inter alia*: Constitutional Court 27th of March 1966, nr. 26/96, *RW* 1966-97, 427; Constitutional Court 3rd of May 2000, nr. 46/2000; Constitutional Court 14th of June 2006, nr. 100/2006; Constitutional Court 13th of July 2005, nr. 126/2005.

8 Constitutional Court nr. 10/2008, 23rd of January 2008.

9 Cass. 18th of June 1974, *Pas.* 1974, I., 1065 ; Cass. 9th of June 2004, *Arr.Cass.* 2004; Cass. 13th of June 2010, *Arr. Cass*. 2010.

In summary, it can be stated that an attorney's legal privilege is particularly protected as it serves the general interest, affects public order, and is even a constitutional principle, the violation of which is subject to criminal sanctions.[10] As a result, neither the attorney nor the client can waive legal privilege fully. The attorney will have to maintain his legal privilege even without any contractual obligation, besides explicit legal exceptions.[11]

3. ARTICLE 458 BCC

Article 458 of the BCC states that *"persons who by virtue of their state or profession acquire knowledge of secrets entrusted to them and disclose them"* are punishable. This article thus establishes a duty of confidentiality for those who acquire confidential knowledge in the course of their profession.

The term 'secret' in this legal provision is interpreted broadly and contextually.[12] The scope of the term 'secret' traditionally encompasses, on one hand, information that is naturally confidential because it relates to the private sphere, and on the other hand, entrusted information, with the explicit or implicit intention that it will not be further disclosed.[13] It is assumed that not only confidential communications from a client to its attorney are covered by legal privilege but also any contact a person has with an attorney in the exercise of their profession, regardless of whether the attorney has accepted the interests of this person and whether or not, following this contact, this person will or will not become a client.[14]

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10 Constitutional Court 2nd of April 1992, nr. 24/1992; Constitutional Court 27th of March 1996, nr. 26/1996; Constitutional Court 23rd of January 2008, nr. 10/2008; Cass. 18th of June 1974, Pas. 1974, I. 1065; Cass. 9th of June 2004, *Arr.Cass* 2004, nr. 313; Cass. 13th of July 2010, *Arr.Cass* 2010, nr. 480; E. JAKHIAN, "Le secret professionnel: un principe nomade" in *Liber Amicorum Lucien Simont*, Brussels, Bruylant, 2002, 1042; J. STEVENS, *Advocatuur: Regels & Deontologie*, Mechelen, Wolters Kluwer, 2015, 845-846; L HUYBRECHTS, "Gebruik en misbruik van het beroepsgeheim inzonderheid door revisoren, accountants en advocaten", *THB* 1995, 672-677.

11 Constitutional Court 3rd of May 2000, nr. 46/2000; TvB (F) 25th of January 2012, *JLMB* 2012, 352; J. STEVENS, *Advocatuur: Regels & Deontologie*, Mechelen, Wolters Kluwer, 2015, 847; L. DE CAEVEL and P. DEPUYT, "Le secret professionnel de l'avocat à l'égard de l'assureur", *Rev.dr.ULB* 2000, afl. 1, 44; P. VAN NESTE, "Kan het beroepsgeheim absoluut genoemd worden?", *RW* 1977-78, 1288.

12 B. ALLEMEERSCH, "Het toepassingsgebied van art. 458 Strafwetboek. Over het succes van het beroepsgeheim en het geheim van dat succes", *RW* 2003-04, 1-19; J. PUT and T. OPGENHAFFEN, *Wegwijzers Beroepsgeheim: Beroepen in de grijze zone: Een stappenplan om na te gaan wie beroepsgeheim heeft*, Leuven, SWVG, 2018, https://www.law.kuleuven.be/isr/alle-wegwijzers, 1-2; P. LAMBERT, *Secret professionnel*, Brussels, Bruylant, 2005, 151-152.

13 Cass. 24th of July 2007, *Pas*. 2007, afl. 6-8, 1348; B. ALLEMEERSCH, "Het toepassingsgebied van art. 458 Strafwetboek. Over het succes van het beroepsgeheim en het geheim van dat succes", *RW* 2003-04, 1-19; I. VAN DER STRAETE, J. PUT and E. LEENAERTS, "Het beschikkingsrecht over het beroepsgeheim. De hulpverlener wikt, de cliënt beschikt", *TPR* 2003, 1123-1129.

14 KI Brussels 31st of May 1999, *P&B* 2000, 46.

The same as 'secret' is broadly defined, 'disclosure' is also interpreted broadly and contextually. Any transfer of information concerning a 'secret' constitutes a disclosure within the meaning of Article 458 BCC.[15] The reasons for disclosing the information are irrelevant, as long as the duty of confidentiality is intentionally breached, it is a punishable offense.[16] However, there is no criminally sanctionable breach of legal privilege if the information is disclosed solely due to negligence or carelessness, but this does not preclude disciplinary sanctions.[17]

The Belgian Deontological Code for Attorneys clarifies that the attorney's legal privilege is purpose-bound. Thus, the attorney may, with the client's consent and only if the information is relevant to the client's interest, disclose confidences and secrets of a client in negotiations, agreements, and legal proceedings, as this is inherent to the exercise of the attorney's profession.[18]

4. NOT ABSOLUTE

Legal professional privilege in Belgium is not absolute.[19] The most relevant exceptions are summarized below.[20] Article 458 BCC provides an exception to legal professional privilege when the law, decree, or ordinance obliges or allows the disclosure of secrets. Legal professional privilege can be set aside by a right to report or speak out and must be set aside when there is an obligation to report or speak out. These are the practical legal translations of higher societal interests, specifically, the pursuit of truth and the safety or integrity of individuals.[21]

15 A. TANS and J. PUT, "Horen, zien en handelen: beroepsgeheim en kindermishandeling" in J. PUT (ed.), *Themis Jeugdbeschermingsrecht*, Bruges, die Keure, 2014, 52-66; B. ALLEMEERSCH, "Het toepassingsgebied van art. 458 Strafwetboek. Over het succes van het beroepsgeheim en het geheim van dat succes", *RW* 2003-04, 1-19; J. PUT and T. OPGENHAFFEN, *Wegwijzers Beroepsgeheim: Beroepen in de grijze zone: Een stappenplan om na te gaan wie beroepsgeheim heeft*, Leuven, SWVG, 2018, https://www.law.kuleuven.be/isr/alle-wegwijzers, 1-2; P. LAMBERT, *Secret professionnel*, Brussels, Bruylant, 2005, 151-152.

16 Cass. 14th of June 1965, *Pas*. 1965, I., 1102; Cass. 26th of September 1966, *Pas*. 1967, I., 89; B. ALLEMEERSCH, "Het toepassingsgebied van art. 458 Strafwetboek. Over het succes van het beroepsgeheim en het geheim van dat succes", *RW* 2003-2004, 12-18; P. LAMBERT, *Secret professionnel,* Brussels, Bruylant, 2005, 151-152.

17 Cass. 14th of June 1965, *Pas*. 1965, I., 1102; Cass. 26th of September 1966, *Pas*. 1967, I, 89; B. ALLEMEERSCH, "Het toepassingsgebied van art. 458 Strafwetboek. Over het succes van het beroepsgeheim en het geheim van dat succes", *RW* 2003-2004, 12-18; P. LAMBERT, *Secret professionnel,* Brussels, Bruylant, 2005, 151-152.

18 Article 18 en 19 Belgian Code of Ethics of Lawyers (Codex Deontologie van de Advocaten), *B.O.G.* 31st of Augustus 2021; P. HOFSTRÖSSLER, "Beroepsgeheim, geheim van het onderzoek en persmededelingen door een advocaat" in *Geboeid door het strafrecht*, Brussels, Larcier, 2011, 40.

19 Cass. 29th of October 1991, *Pas*. 1992, I, 162; Cass. 19th of January 2001, *Rev.trim.dr.fam.* 2002, afl. 1, 135, annotation I. MASSIN; Cass. 7th of March 2002, *T.Gez*. 2002-03, afl. 2, 85, annotation W. DIJKHOFFZ; Cass. 18th of January 2017, *JLMB* 2017, afl. 11, 509.

20 It is beyond the scope of this contribution to provide a detailed overview of all possible situations.

21 Cass. 29th of October 1991, *Pas*. 1992, I, 162; A. TANS and J. PUT, "Horen, zien en handelen: beroepsgeheim en kindermishandeling" in J. PUT (ed.), *Themis Jeugdbeschermingsrecht*, Bruges, die Keure, 2014, 52-66; B. ALLEMEERSCH, "Het toepassingsgebied van art. 458 Strafwetboek. Over het succes van het beroepsgeheim en het geheim van dat succes", *RW* 2003-04, 1-19; J. PUT and T. OPGENHAFFEN, *Wegwijzers Beroepsgeheim: Beroepen in de grijze zone: Een stappenplan om na te gaan wie beroepsgeheim heeft*, Leuven, SWVG, 2018, https://www.law.kuleuven.be/isr/alle-wegwijzers, 1-2; P. LAMBERT, *Secret professionnel*, Brussels, Bruylant, 2005, 151-152.

The legislature, jurisprudence, and legal doctrine have developed various exceptional situations over the years. A basic distinction must be made between speaking and reporting rights and speaking and reporting duties. The rationale for a speaking or reporting right is that the confidant is best placed to assess concrete situations. The confidant must weigh the protection of the confidant's relationship with the client against the protection of the integrity and safety of the client or other individuals.[22] If there is a speaking or reporting duty, it takes precedence over legal professional privilege and a speaking or reporting right.[23]

The mandatory disclosure of confidential information is considered an intrusion into the client's private life. Article 22 of the Belgian Constitution foresees that such intrusion implying the interference with a fundamental right which is also anchored in the European Treaty of Human Rights, can only be justified by the applicability of a formal statutory or decree provision.[24]

5. TESTIMONIES

Article 458 BCC itself contains another relevant exception to legal privilege, namely when the attorney is summoned to testify in court or before a parliamentary investigative committee. The attorney then has the right to speak, not the duty. The attorney himself assesses the appropriateness of disclosing information, even if he is released from his legal professional privilege and must be guided by the interests of his client and weigh the interests at stake in that context. He cannot be compelled to testify, even if the court rules that he is released from his legal privilege, provided the court considers that by maintaining silence the legal professional privilege is not diverted from its purpose.[25] However, the attorney is obliged to appear and make its choice known, even if he decides not to testify.[26] This right to speak does not apply when being questioned by police officers or members of the public prosecutor's office, as they are not judges.[27] In such scenario, the duty to respect the legal professional privilege is absolute.

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22 A. TANS, J.PUT and T. OPGENHAFFEN, "Informatie-uitwisseling tussen artsen en hulpverleners: het beroepsgeheim als splijtzwam of bindmiddel", *T.Gez*. 17/18, 6-24.

23 D. VERHOEVEN, "Aangifte van een misdrijf aan een gerechtelijke overheid en civielrechtelijke aansprakelijkheid", *T. Gez.* 2012-2013, 27.

24 Article 22 Belgian Constitution, *B.O.G.* 7th of Februari 1994; K. HERBOTS and J. PUT, "Vertrouwen en maatschappelijk verantwoordelijkheid. Beroepsgeheim als ijkpunt" in B. HUBEAU, J. MERTENS, J. PUT, R. ROOSE, K. STAS and F. VANDER LAENEN (eds.), *Omgaan met beroepsgeheim*, Mechelen, Kluwer, 2013, 23-24.

25 Cass. 23rd of September 1986*, Arr.Cass.* 1986-87, 96.

26 Article 458 Criminal Code, *B.O.G.* 9th of June 1867, err., *B.O.G.* 5th of October 1867; Article 929 Judicial Code (Gerechtelijk Wetboek), *B.O.G.* 31st of October 1967; F. BLOCKX., *Beroepsgeheim*, Antwerp, Intersentia, 2013, 136.

27 KI Antwerp 2nd of November 2000, *Limb.Rechtsl.* 2002, 192; KI Luik 10th of December 2007, *JLMB* 2008, 1419.

6. RIGHTS OF DEFENCE

The obligations imposed by legal professional privilege are waived if the attorney invokes its rights of defense: the attorney may break his silence for his own civil or criminal defense.[28] However, the principle of proportionality always applies, and the attorney can only disclose 'secrets' that are necessary for this defense taking into account the specific context and the underlying facts to it.[29]

The rights of defense also play a significant role for the client who is entitled to legal privilege. The client can disclose and use all documents of the attorney, correspondence with the attorney, and even recorded telephone conversations with the attorney if it is necessary for his defense.[30]

7. ARTICLE 458BIS CRIMINAL CODE

Article 458bis BCC introduced a statutory reporting right in 2011. This reporting right applies to the attorney who becomes aware of specific offenses committed against a minor or a person who is vulnerable due to their age, pregnancy, partner violence, illness, or physical or mental disability. In such a situation, the attorney may report the offense to the Public Prosecutor. The condition is that there is a serious and imminent danger to the physical or psychological integrity of the minor or the vulnerable person, and he cannot protect his integrity himself or with the help of others. The attorney can also do this when there are indications of a serious and real risk that other minors or vulnerable individuals may become victims. Again, the requirement is that the attorney cannot protect their integrity himself or with the help of others.[31]

However, the Constitutional Court invalidated this exception for the attorney of the perpetrator, insofar as it related to information provided by the perpetrator himself.[32]

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28 Cass. 23rd of December 1998, *AJT* 1998-99, 541; Cass. 18th of January 2017, AR P.16.0626.F, *Pas.* 2017, nr. 39; Brussels 15th of September 1993, *RW* 1994-95, 850; Adviezen Departement Deontologie VVB nr. 20 (1999), 36 (1999) en OVB nr. 467 (2013).

29 Bergen 14th of May 2009, *JLMB* 2010, 1423; Advies Departement Deontologie VVB nr. 69 (2000); J. STEVENS, *Advocatuur: Regels & Deontologie*, Mechelen, Wolters Kluwer, 2015, 859-860; L. VANHEESWIJCK, "Het beroepsgeheim en het recht van verdediging", *Nullem crimen* 2011, 348.

30 Cass. 12th of November 1997*, Arr.Cass.* 1997, 1115; Cass. 17th of November 2015, AR P.15.0880.N, concl. A. WINANTS, *RABG* 2016, 518, annotation V. VEREECKE, *NC* 2017, 57.

31 Article 458*bis* Criminal Code, *B.O.G.* 9th of June 1867, err., *B.O.G.* 5th of October 1867; A. TANS and J. PUT, "Horen, zien en handelen: beroepsgeheim en kindermishandeling" in J. PUT (ed.), *Themis Jeugdbeschermingsrecht*, Bruges, die Keure, 2014, 51-74; M. HIRSCH and N. KUMPS, "Secret professionnel et violence à l'égard des mineurs" in D. KIGANAHE and Y. POULLET (eds.), *Le secret professionnel*, Brussels, La Charte, 2002, 231-250.

32 Constitutional Court 26th of September 2013, nr. 127/2013.

8. EMERGENCY

An emergency situation is a justification that provides a reporting right to the confidant. It applies when someone has no other option but to violate a criminal provision to preserve a higher or equal value to the one protected by the criminal provision. The unlawful act resulting from such an actual, certain, and serious danger to a higher or equal value is no longer a crime.[33] However, the attorney must always consult the bar association before being able to exercise this reporting right.[34]

9. INVESTIGATIVE MEASURES

It is beyond the scope of this article to provide a detailed overview of all possible civil, tax, or criminal investigative measures against or involving an attorney and the consequences thereof for its legal professional privilege. The president of the bar association plays an important role in maintaining the required balance in these matters. Illustratively, a search and seizure at an attorney's office is briefly discussed here.

There is no explicit legal regulation defining the implementation modalities for a search and seizure at an attorney's office,[35] but it is a common practice and generally accepted that the investigating judge personally participates in the search and seizure, both when the attorney himself is the suspect and when a third party, whether or not a client, is the suspect. To guarantee the respect of the legal professional privilege, without curtailing the investigation possibilities, the Belgian bar associations and the competent prosecutors-general agreed that[36] the investigating judge will request the presence of the president of the bar association or its representative at the search and seizure.[37] The Court of Cassation also demands that the attorney in whose office the search will take place would be informed, including about the prosecutions justifying

33 Cass. 13th of May 1987, *Vl. T. Gez.,* 1987-88, 173; A. DE NAUW, "La consécration jurisprudentielle de l'état de nécessité (noot onder Cass. 13 mei 1987)", *RCJB* 1989, 602 ; A. DIERICKX, "Over de (putatieve) noodtoestand", *NC* 2007, 395; M. FORTHOMME, "Etat de nécessité (et ses liens avec la légitime défense)" in Post Mémorialis, *Lexique du droit pénal et des lois spéciales 2011*, E153/01-E153/16; A. TANS and J. PUT, *Het beroepsgeheim uitgehold? Een versoepeld meldrecht voor geheimplichtigen, werknota Steunpunt Welzijn, Volksgezondheid en Gezin*, Leuven, SWVG, 2013, http://steunpuntwvg.be/images/rapportenen- werknotas/het-beroepsgeheim-uitgehold, 3; C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht in hoofdlijnen*, Antwerp, Maklu, 2011, 238-246.

34 Advies Departement Deontologie OVB nr. 265 (2006); J. STEVENS, *Advocatuur: Regels & Deontologie*, Mechelen, Wolters Kluwer, 2015, 859-860 – It is beyond the scope of this article to discuss all nuances in detail.

35 T. OPGENHAFFEN, "De huiszoeking en inbeslagname bij advocaten. Voldoet België aan het Europees Verdrag voor de Rechten van de Mens?", *T.Strafr.* 2014, afl. 6, 348.

36 J. STEVENS, *Advocatuur: Regels & Deontologie*, Mechelen, Wolters Kluwer, 2015, 892-894; M. WAGEMANS and Y. OSCHINSKY, *Recueil des règles professionelles*, Brussels, Barreau de Bruxelles, 2011, nr. 245-248.

37 D. VAN GERVEN, "Het beroepsgeheim van de advocaat", *TPR* 2012, afl. 4, 1483, nr. 68; T. OPGEHAFFEN, "De huiszoeking en inbeslagname bij advocaten. Voldoet België aan het Europees Verdrag voor de Rechten van de Mens?", *T.Strafr.* 2014, afl. 6, 350.

the search.[38] During the search, only the investigating judge himself is allowed to inspect documents covered by the legal privilege.[39]

The seizure is limited to the *corpus delicti* namely documents directly linked to the alleged crime or prosecutions justifying the search.[40] The Court of Cassation ruled that it is for the investigating judge, under the supervision of the investigating and adjudicating court, to assess in fact whether, in light of the details of the case, a document is covered by legal privilege.[41] This position is disputed by the Belgian Bar Associations.[42]

Violating these practices and agreements will not cause a nullity, unless it is proven that legal professional privilege was breached.[43]

Another interesting example of the protection of the attorney's legal professional privilege in Belgium, that is also regulated by law, is the prohibition of the security and intelligence services from exploiting or analyzing data and information covered by the attorney's legal professional privilege during an investigation, except where there are serious indications that the attorney in question personally and actively cooperates or has cooperated in the creation or development of a potential threat.[44]

10. ARTICLE 334 INCOME TAX CODE.

When an attorney's client is subject to a tax investigation and the tax administration requests information from the attorney, Article 334 Income Tax Code provides for a specific protection rule that safeguards the attorney's professional secrecy. The tax administration must then contact the President of the Bar Association, in order for the latter to assess whether, and possibly to what extent, the request for information or the submission of books and records is reconcilable with respect for legal privilege.[45]

38 Cass. 24th of April 2012, *Arr.Cass.* 2012, afl. 4, 1049.

39 D. VAN GERVEN, "Het beroepsgeheim van de advocaat", *TPR* 2012, afl. 4, 1483, nr. 68; J. STEVENS, *Advocatuur: Regels & Deontologie*, Mechelen, Wolters Kluwer, 2015, 892-894.

40 D. VAN GERVEN, "Het beroepsgeheim van de advocaat", *TPR* 2012, afl. 4, 1483, nr. 68; J. STEVENS, *Advocatuur: Regels & Deontologie*, Mechelen, Wolters Kluwer, 2015, 892-894; M. WAGEMANS and Y. OSCHINSKY, *Recueil des règles professionelles*, Brussels, Barreau de Bruxelles, 2011, nr. 245-248.

41 Cass. 2nd of November 2011, AR P.10.1692.F.

42 J. STEVENS, *Advocatuur: Regels & Deontologie,* Mechelen, Wolters Kluwer, 2015, 895.

43 KI Luik 26th of February 2004, *Journ.proc.* 2004, afl. 479, 19, annotation S. D'ORAZIO; T. OPGENHAFFEN, "De huiszoeking en inbeslagname bij advocaten. Voldoet België aan het Europees Verdrag voor de Rechten van de Mens?", *T.Strafr.* 2014, afl. 6, 352.

44 Article 2, §2 Law of the 30th of November 1998 regulating the intelligence and security services, *B.O.G.* 18th of December 1998, 40.312; J. MEERTS, *De advocaat?! Een oud beroep in een modern landschap. Actualia Deontologie*, Antwerp, Intersentia, 2021, 34.

45 Article 334 Income Tax Code 1992, *B.O.G.* 30th of July 1992.

In a recent judgment of the court of appeals of Antwerp, the court did not only confirm the important role of the President of the Bar, but also reprimanded the tax authorities for copying entire hard disks of taxpayers.[46] The court of appeals deemed that the mere eventuality that correspondence and files protected by legal professional privilege were copied and it therefore plausible is that the legal professional privilege, the right of defense and the right to respect for private life have been or will be violated in the use of the copied file prohibits the tax authority from copying information that might entail legally privileged information.

11. UNLAWFUL EVIDENCE

Evidence obtained through a breach of legal professional privilege is inherently unlawful and violates the right to a fair trial. As such, it cannot contribute to a civil, administrative, tax, or criminal conviction, regardless of the legality of its acquisition and whether the acquirer is itself bound by legal professional privilege.[47]

12. EROSION?

In practice, especially in the criminal defense practice, attorneys are increasingly viewed as potential accomplices of (drug) criminals, which threatens the safety net of the legal professional due to searches and seizures of files at law firms. Despite the very important function of legal professional privilege, it is at the same time under pressure due to the creation of new and often far-reaching exceptions. However, the judiciary continues to highly regard legal professional privilege. For example, the Constitutional Court invalidated the transposition[48] of the DAC6 directive for attorneys on September 15, 2022, to the extent that it provided that attorneys cannot invoke legal professional privilege with regard to the periodic reporting requirement for marketable arrangements.[49]

Since the transposition and entry into force of the Preventive Money Laundering Directive (2001/97/EC, transposed into the Law of 12 January 2004), attorneys have been subject to anti-money laundering regulations, whereby the transposing law (hereinafter "the Anti-Money Laundering Law") provided for an obligation for attorneys

46 Antwerp 7th of September 2021, nr. 2021/RK/6, annotation S. CASSIMON, "Eerbiediging beroepsgeheim kan men ook achteraf nog afdwingen", *Fisc. Act.* 2021/30, 1.

47 Cass. 10th of March 2008*, Pas.* 2008, I. 652; Cass. 30th of March 2010*, T. Strafr*. 2010, 276, annotation K. BEIRNAERT; J. STEVENS, *Advocatuur: Regels & Deontologie,* Mechelen, Wolters Kluwer, 2015, 861.

48 Law of the 20th of December 2019 transposing Council Directive (EU) 2018/822 of the 25th of May 2018 amending Directive 2011/16/EU as regards compulsory automatic exchange of information in the field of taxation with respect to notifiable cross-border construction, *B.O.G.* 30th of December 2019.

49 Constitutional Court 15th of September 2022, nr. 103/2022.

to report when they suspected that their client was involved in a money laundering operation, albeit with the mandatory intervention of the President of the Bar.[50]

Following the ruling of the Court of Justice, the Constitutional Court partially annulled the reporting obligation, to the extent that information obtained while defending or representing the client in court and providing legal advice, even outside any litigation, remain covered by legal professional privilege and therefore cannot be disclosed.[51]

The Anti-Money Laundering Law had a new amendment in 2017 and now provides for the duty to report suspicions, whereby the attorney is obliged to report to the Financial Intelligence Processing Unit in certain cases and under certain conditions. Again, the intervention of the President of the Bar is mandatory.[52] The Constitutional Court once more partially annulled the obligation to report suspicions transaction when the client, following the advice of his attorney, refrains from carrying out this intended transaction. Consequently, that information is covered by legal privilege.[53]

13. CONCLUSION

In Belgium, legal professional privilege of attorneys remains a crucial and indispensable cornerstone in the legal practice, ensuring trust between attorneys and their clients. The legal professional privilege of attorneys is also considered a promotion of the integrity of the entire legal system. Therefore, it remains an unshakable principle that strengthens the foundations of the legal profession and is held in high regard by the judiciary inter alia by recognizing a functional role of the President of the Bar in situations where legal professional privilege might be at stake. Despite the very important function of legal privilege, it is at the same time under pressure due to the creation of new and often far-reaching exceptions.

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50 Law of the 12th of January 2004 amending the Law of the 11th of January 1993 preventing the use of the financial system for money laundering, *B.O.G.* 23rd of January 2004; J. STEVENS, T. BAUWENS and A. CLAES, "Het beroepsgeheim van de advocaat" in T. BAUWENS, E. BOYDENS, H. BUYSSENS, P. CALLENS, V. COIGNIEZ, B. COPPEIN, A. CLAES, P. DE JAEGERE, L. KENIS, T. QUEVA, J. MEERTS, J. STEVENS, I. VANDEVELDE, S. VERHERSTRAETEN and N. VERMEERSCH (eds.), *Handboek voor de advocaat-stagiair. Deontologie*, Mechelen, Wolters Kluwer, 2020, 329, nr. 155.

51 Constitutional Court 23th of January 2008, nr. 10/2008; J. STEVENS and G. DAL, "Het arrest van het Grondwettelijk Hof van 23 januari 2008 en de preventie van het witwassen: de Ordes halen hun gelijk", *RW* 2008-09, afl. 3, 101.

52 Article 47 and 52 of the Law of the 18th of December 2017 on the prevention of money laundering and terrorist financing and on the restriction of the use of cash, *B.O.G.* 6th of October 2017.

53 Constitutional Court 24th of September 2020, nr. 114/2020; R. VAN HERPE, "Beperkte vernietiging preventieve witwaswetgeving wegens onverantwoorde beperking van vertrouwensrelatie tussen advocaat en cliënt", *NJW* 2021, afl. 436, pagina.

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THE LEGAL PRIVILEGE (UN)COVERED PERSPECTIVE FROM BRAZIL

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1. INTRODUCTION

Legal privilege[1] is considered in Brazil as an attorney's inherent and necessary right to perform its constitutional function. Different than in other jurisdictions, legal privilege does not belong to the client, which means it cannot be waived at the client's discretion. Legal privilege applies to communications held between an attorney and its client and documents or information that were shared by any means by the client to the attorney, as long as those relate to the legal advice being rendered. This means all information of which attorneys become aware by virtue of his/her professional relationship with the client (or former client), including verbal and/or written communications (electronic or not) is protected by legal privilege in Brazil.

On this article, we will address the importance, scope, and limits of legal privilege in Brazil, as well as explore practical situations, main concerns, recent cases, and best practices in general and specifically in the scope of internal investigations.

1 Also called as attorney client privilege for purposes of this article.

2. SCOPE AND LEGAL BASIS

Before talking about legal privilege in Brazil, it is important to understand who qualifies as an attorney according to Brazilian legislation. The Brazilian Bar Association ("OAB") requires that in addition to passing the OAB exam, an attorney must have either graduated from a Brazilian Law School or validated his/her foreign diploma before the OAB (we discuss more about foreign attorneys on topic 2.2. below).

Considering that Brazil is a civil law country it is important to explore a little bit what the laws and regulations provide for in terms of attorney client privilege.

Before being regulated by the OAB, legal privilege was already protected by the Brazilian Federal Constitution, the Criminal Code, and other federal laws. The Brazilian Federal Constitution sets fort that the exercise of any type of work is allowed if subject to the conditions and limitations regulated in further laws.[2] It also indicates that the access of information should be limited to the professional activities, when necessary – which applies to the legal privilege.[3] Moreover, the Brazilian Federal Constitution has a section specifically dedicated to the legal profession, which states that attorneys are essential to the administration of justice and that their acts practiced within the exercise of their profession cannot not be violated.[4]

The OAB plays a very important role in protecting the attorney client privilege and it does so in a very clear way. It establishes that it is the right of every attorney not to have its: (i) office or workplace; (ii) work instruments; (iii) written, electronic or telephonic communications violated if those relate to the exercise of legal profession.[5] This includes, but is not limited to, the prohibition of an attorney's office/workplace being subject of search and seizure warrants. An exception should be made, however, whenever there is reasonable doubt that an attorney has committed a crime (in collusion or not with his/her client). In this case, attorneys and their office/workplace could be subject to search and seizures upon: (i) a justified judicial decision; (ii) a specific search and seizure warrant and (iii) the presence of an OAB representative who shall make sure that the attorney's rights are being protected. Even under this circumstance, all materials and information that belong to clients (not involved with the alleged investigation) should have their confidentiality protected.[6]

2 Article 5, XIII of the Brazilian Federal Constitution.
3 Article 5, XIV of the Brazilian Federal Constitution.
4 Article 133 of the Brazilian Federal Constitution.
5 Article 7, II of the OAB's Article of Association, which reflects Federal Law n. 11.767/2008.
6 Article 1, § 7o of Federal Law n. 11.767/2008.

The OAB also dedicates a full section of its code of ethics to the topic of attorney client privilege, reinforcing that the attorney client privilege can only be waived in situations of serious threats of life, honor or when an attorney finds him/herself affronted by his/her own client and, in his/her own defense, must reveal a secret.[7]

Last but not least, attorneys cannot testify as witnesses before court unless they are willing and their clients allow them to, according to the Brazilian Code of Criminal Procedure and the OAB.[8]

Attorneys that violate the attorney client privilege, without cause, could be subject to detention or fines as set forth by the Brazilian Criminal Code.[9]

2.1. IN HOUSE ATTORNEYS

Unlike at various European countries, legal privilege in Brazil can also be applied to in-house attorneys in case the activities performed by these attorneys serve the purpose of providing legal advice to the company.

During the Car Wash Operation[10], a lot of companies were targets of search and seizures measures and authorities would indiscriminately seize documents located in the company's legal department. This raised a lot of questions and in 2015 led the OAB to clarify that documents located at company's legal departments were also protected by attorney-client privilege and, therefore, could not be violated (unless the in-house attorneys themselves were targets of the criminal investigation). Now, the common instruction for public agents that execute search and seizure warrants is to analyze the documents and, when it comes to those located in the legal department, seize only those that are strictly business related and do not contain any legal opinion or advice.

This means, in house-attorneys are protected by legal privilege as long as their activity serve the purpose of providing the company legal advice. On the other hand, in house attorneys whose activities are focused on the company's business performance will not be subject to the same protection. It is true that making this distinction can not always be an easy task, that is why it is important for in-house attorneys to reflect on their daily activities and make sure those that serve the purpose of providing legal advice are treated with the due caution (e.g., including a disclaimer of "protected by attorney-client privilege" in the exchanged communications, etc.).

7 Article 25 of the OAB's Code of Ethics.
8 Article 207 of the Brazilian Code of Criminal Procedure and articles 26 and 27 of the OAB's Code of Ethics.
9 Article 154 of the Brazilian Criminal Code.
10 A government investigation conducted by means of a task force of multiple Brazilian authorities launched in 2014 and that uncovered a widespread scheme involving corruption, cartel, and money laundering in state-owned companies (mainly Petrobras).

2.2 FOREIGN ATTORNEYS (*I.E.*, CONSULTANTS IN FOREIGN LAW)

According to the OAB, foreign attorneys are not allowed to render legal advice in relation to Brazilian law, which means they are not considered as Brazilian attorneys. According to OAB's Provision n. 91/2000, foreign attorneys are only allowed to render consulting services in relation to foreign law if they are duly recognized and allowed by OAB to do so.

When performing consulting activities in Brazil, the OAB requires that foreign attorneys should observe and respect the conduct and ethic rules applicable to attorneys in Brazil.[11] Moreover, all OAB's rules and provisions are applied to foreign attorneys when performing consulting activities in Brazil.[12] However, considering that foreign attorneys are not classified as Brazilian attorneys, but rather as consultants, the legal privilege provisions is not applied to their activities.

3. INTERNAL INVESTIGATIONS

3.1 LEGISLATION

Until recently, there was no specific rule or legislation regulating the attorney client privilege within the scope of internal investigations. However, in 2018 the OAB enacted Provision n. 188/2018 ("Provision") and set a milestone in this universe. It established, among other things, that internal investigations: (i) are an exclusive activity of attorneys and (ii) should not be subject to any censorship or impediment by any authority. The Provision also explicitly sets forth that during the internal investigations, attorneys should preserve the confidentiality of the information obtained in the course of it.

Another important aspect of the Provision is that it expressly states that neither the attorneys conducting the internal investigation, nor any professionals retained by these attorneys have the obligation to report any violations uncovered by the investigation to public authorities – which reinforces the importance of attorney client privilege.

11 Article 6 of OAB's Provision n. 91/2000.
12 Article 8 of OAB's Provision n. 91/2000.

3.2 BEST PRACTICES

In light of the above, we explored below some challenging situations that are commonly faced in the context of internal investigations and best practices that, according to our experience, can help mitigate the risk of jeopardizing attorney client privilege and, consequently, the investigation's confidentiality.

The situations explored below consider the assumption that the internal investigation is being conducted by attorneys, which is our first and most important recommended best practice to ensure the confidentiality of the investigation is preserved during all its existence.

3.2.1. Hiring technical experts

It is common for companies to have to hire third parties with expertise on technical issues to assist on the internal investigation activities - this includes, but is not limited to forensic companies, accountants, economists, etc. While the decision to hire a technical expert is usually evident considering its need and context, the fact that such experts should be directly hired by the attorneys is not so much.

The Provision[13] expressly indicates that attorneys who are leading an internal investigation can rely on such expert third parties to assist them on the investigative activities. This means such third parties are essential for the legal advice to be rendered by the attorney to its client in the scope of the investigation and that, therefore, they are also covered by attorney client privilege.

To ensure privilege will be applied in these situations, it is paramount to guarantee that: (i) the activities being rendered by these experts are connected and necessary to the investigation and that were indeed requested by the leading attorneys for purposes of providing the legal advice (ii) their deliverables are addressed to the leading attorneys.

3.2.2. Preparation and disclosure of documents

Although legal privilege is applied to documents considering their nature and context (and not considering their format), it is important for attorneys to always mark confidential documents as so (e.g., by including the standard "confidential document – subject to attorney-client privilege" disclaimer). This is especially important when it comes to: (i) in-house attorneys, who can sometimes perform business-oriented activities that are typically not protected by legal privilege and (ii) mitigating the risks of confidential documents being seized by authorities during search and seizure operations.

13 Article 04 of OAB's Provision n. 91/2000.

But, sometimes, even when companies have taken all the above steps to ensure legal privilege is respected, it can face challenging and common requests for disclosure of confidential documents protected by legal privilege, for example by external auditors, shadow investigators or even by government authorities in connection with legal proceedings. Special attention must be paid to these requests, as disclosing documents to external parties that are not covered by attorney-client privilege can be interpreted as a waiver of such privilege.

It is important to keep in mind that there is no Brazilian law or regulation that expressly obliges companies to provide investigative reports or other confidential documents for purposes of auditing its financial statements. Auditors are bound, however, to the recently enacted Regulation n. 30/2021 of the Brazilian Federal Accounting Council (Conselho Federal de Contabilidade) which provides guidance for the identification of non-compliance or suspected non-compliance with laws and regulations by independent auditors. This Regulation is also applicable to internal investigations and sets forth, among other things, what are the sufficient evidence obtained and measures adopted by auditors to identify potential irregularities. After this Regulation has been enacted, auditors' requests have become more thorough and frequent also in the scope of internal investigations – even if there is no formal obligation for them to request any specific document under this situation.

This means, external auditors may, at their own discretion, request or expect the sharing of documents protected by legal privilege, such as investigation reports. However, they are not obligated to do so and may obtain the necessary information and evidence by other means.

If a company shares any information or document related to the internal investigation with a third party that is not working at an attorney's direction, this company may risk losing not only the privilege on that information or document, but also on the entire internal investigation. This becomes especially relevant in cases where matters are still under investigation. Even the partial disclosure of an information may put the privilege of the whole investigation at stake.

It is important to bear in mind, that if a company needs to share information from the internal investigation with a third party, there are alternatives of doing so in a way to keep a higher control of who accessed the document and to try to mitigate the risk of losing the privilege of the entire investigation, such as (i) conveying the information

needed through a phone/video call or meeting; (ii) showing only physical documents and allowing the third party to take notes, instead of sending a copy of the investigation report or other confidential documents; or (iii) as a last resource, provide an executive summary of the investigation report.

The same concerns apply to sharing documents and information with government authorities with an aggravating factor that such government authorities usually leverage the information disclosed for purposes of sanctioning third parties – which poses an additional lawyer of risk to confidentiality. Under those circumstances, the recommendations above are also applicable and in case the company needs to share information anyways, our usual recommendation is for the company to only share factual documents/reports rather than those that were prepared by attorneys and are covered by attorney client privilege.

3.2.3. Interviews

There are also no specific instructions or legal provision in relation to interviews and legal privilege in Brazil, which means the same principles and recommendations above apply in this scope.

Our recommendations are usually aligned with common international internal investigations best practices, which provide that whenever notes are taken during interviews it is important that a disclaimer is included to indicate that such notes are not a transcript and contain the attorney's mental impressions and opinions on the fact. By doing that, the notes (which will no longer be just notes, but rather a product of the attorney's work) will be protected by legal privilege.

This is also why we usually do not recommend recording interviews, as such record will not contain attorney's impressions and will be a literal reproduction of the meeting – which, in Brazil, would not be covered by legal privilege.

4. CONCLUSION

Although attorney client privilege has always been an undisputable, essential, and intrinsic part of the exercise of legal profession in Brazil, it is still (and in our opinion will continue to be) subject to relevant discussions in relation to how, when and to whom it should apply in practice. The Car Wash precedents about the scope and application of attorney client privilege as well as OAB's Provision on internal investigations are a proof of that.

For now, both attorneys and clients (whether individuals or companies) should keep in mind the importance attorney client privilege has on the confidentiality of information and that certain situations (e.g., companies relying on in house attorneys, foreign attorneys, search and seizure operations, public or internal investigations) affect how it can be applied.

Cariola, Díez, Pérez-Cotapos (Chile)

ATTORNEY-CLIENT PRIVILEGE IN CHILE

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INTRODUCTION

In Chile, professional secrecy and attorney-client privilege are regulated in different ethical and legal instruments. While in Chilean legal system there is no explicit distinction between both concepts, it is generally admitted that professional secrecy is the duty of attorneys to maintain the confidentiality of the information regarding their client; and privilege is "as a procedural immunity that enables lawyers to comply with [their confidentiality duty] when the State demands them to provide information".[1]

The most comprehensive regulation is found in the Code of Professional Ethics of the Chilean Bar Association (2011) and although affiliation is not mandatory and its rules do not impose enforceable sanctions,[2] they do set the standard or *lex artis* that the courts of justice follow when settling an issue related to professional secrecy and attorney-client privilege.

1 Novoa, Álvaro Anríquez, & Vargas Weil, Ernesto. (2021). Bases conceptuales para una doctrina del secreto profesional del abogado en Chile. Revista Chilena de Derecho, 48(1), 133-150.

2 Regardless of the criminal and/or civil liabilities that may be attributed to the lawyer for his/her misconduct, for which the courts of justice are competent, not the Bar Association.

Regarding its legal regulation, it has been understood that the cornerstone of professional secrecy can be found in the Chilean Political Constitution as an element of due process, guaranteed and protected under Article 19 No. 3. The violation or abuse of professional secrecy is regulated in articles 231, 247 and 247 bis of the Chilean Criminal Code, while the way in which professional secrecy operates in legal proceedings is regulated in the Chilean Criminal Procedure Code and Civil Procedure Code.

I. REGULATORY FRAMEWORK OF PROFESSIONAL SECRECY AND ATTORNEY-CLIENT PRIVILEGE IN CHILE

A. CODE OF PROFESSIONAL ETHICS OF THE CHILEAN BAR ASSOCIATION ("CODE OF ETHICS")

The Code of Ethics states that attorneys owe strict confidentiality to their clients. For the correct fulfilment of this obligation, attorneys shall demand the recognition as having the right to professional secrecy which they are entitled to by law. The confidentiality due extends to all information relating to the client's affairs that the attorney has become aware of in the exercise of his/her profession, this includes information produced by the attorney in confidence, whether it is in he/her possession or that of their client.

In this regard, Article 46 of the Code of Ethics details that the duty of confidentiality, and therefore professional secrecy, includes:

- Prohibition of disclosure. The attorney must refrain from disclosing information covered by professional secrecy, as well as from handing over, displaying or providing access to any type of media containing such information and which is in the attorney's custody.
- Duty of care. Attorneys shall take reasonable measures to ensure that the conditions under which they receive, obtain, maintain or discloses information subject to professional secrecy are such as to safeguard the confidentiality of that information.
- Duty of care with respect to actions of collaborators. Attorneys must take reasonable measures to ensure that the confidentiality owed to the client is maintained by those who collaborate with them.

Ethical regulation in Chile is not absolute and recognizes situations in which the attorney is entitled or obliged to disclose information subject to professional secrecy without committing a professional misconduct. On the one hand, disclosure of information consented to by the client is authorized, provided that such authorization does not oblige the attorney to disclose if he or she does not consider it necessary.

On the other hand, situations where the attorney may reveal information subject to secrecy without the client's consent are also regulated. In this last scenario, an attorney must and is ethically bound to disclose information subject to secrecy in order to prevent the commission of a serious crime.[3]

Moreover, attorneys are entitled, if they deem it necessary and without being under an ethical obligation, to disclose information subject to professional secrecy under the following circumstances[4]:

- To avoid death or serious bodily harm to one or more individuals.
- To prevent the commission of a criminal offence punishable by more than 3 years up to 5 years of imprisonment.
- To obtain professional ethical advice, provided that the disclosure is made to another attorney in confidence.
- To defend from a serious allegation made against them or against associates in connection with the professional service rendered to the client.
- To collect the fees due to the attorney.
- To comply with a legal duty to make a statement during a judicial proceeding only when (i) has reasonable grounds to consider that the professional service rendered was used by the client to commit a crime;[5] or (ii) if the information concerns a deceased client and its disclosure may prevent an individual from being wrongly convicted of a criminal offense.
- In other cases expressly authorized by the rules of professional ethics.

In all of the above-mentioned scenarios, the Code of Ethics states that for the disclosure a criterion of necessity –understood as the disclosure necessary for the achievement of the purpose justifying it, provided that the lawyer has no other practicable means at his/her disposal that are less prejudicial to the client– and proportionality must be followed.

3 The legal statute uses the Spanish word "crime", which in Chilean law refers to offences sanctioned with a penalty of more than 5 years of imprisonment.

4 Article 54, Code of Ethics.

5 The legal statute uses the Spanish expression "crimen o simple delito", which in Chilean law refers to offences sanctioned with a penalty of more than 60 days of imprisonment.

Concerning ethical control for lawyers who fail to comply with their obligations, with the enactment of the 1980 Political Constitution –and subsequent amendments– it was prohibited to mandate affiliation to an organization or entity as a requirement to carry out an activity or occupation. However, professional associations, such as the Chilean Bar, can be empowered to hear complaints lodged concerning the ethical misconduct of their members. In this scenario, the disciplinary sanctions to which members may be subjected to are verbal reprimand, written reprimand, fine, suspension and expulsion from the association. In any case, none of these sanctions burdens the ability to practice law in Chile.

Since no material sanction can be executed, the main available way for those affected by a non-fulfillment of a lawyer's duties is to file a claim for breach of contract before civil courts.[6] In this context, courts have ruled that while for these attorneys the Code of Ethics is not binding in a strict sense, it is applicable in terms of setting the standard of conduct that courts of law follow in deciding whether or not there has been a breach of general duties of care.[7]

B. CRIMINAL OFFENCES RELATED TO THE BREACH OR ABUSE OF PROFESSIONAL SECRECY

Traditionally, the sanction for the general misconduct of a lawyer, including the breach of professional secrecy, was punishable under Article 231 of the Criminal Code. In this sense, the provision punishes the attorney who, with malicious abuse of his/her profession, harms his/her client or discloses his/her client's secrets.

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6 There has been some discussion as to whether a non-affiliated attorney can be liable for ethical related misconduct in accordance with the provisions of Article 19 No. 16 of the Political Constitution and Article 4 of the Decree Law No. 3621. For further explanation, see Moreno, R., & Vander Schraft, M. (2017). Chile. In J. Silkenat & D. Van Gerven (Eds.), Attorney-Client Privilege in the Americas: Professional Secrecy of Lawyers (pp. 187-202). Cambridge: Cambridge University Press. doi:10.1017/9781316759882.014.

7 Supreme Court Ruling, July 19, 2021, case No. 150257-2020: "9° Although it is true that the Code of Ethics -approved in its new version in 2011 by the General Council of the Bar Association of Chile A.G. and in force as of August 1, 2011- cannot be considered a law in a formal sense, since it has not been issued by the legislative body subject to the requirements and the procedure for the elaboration of the law provided by the Political Constitution for its validity**, it is a law in a material sense as it substantively imposes general, permanent, abstract and certainly mandatory rules of conduct for all lawyers in the country, whether or not they are members of the respective professional association**, beyond the body that ultimately exercises the ethical guardianship of the professional in the specific case, be it the corresponding Professional Association subject to the Disciplinary Regulations that govern it or the special court that the Constituent mandated the legislator to create so that non-member professionals may be judged before it and while these are not established, before the ordinary justice system".

Depending on the seriousness of the damage suffered by the client, the conduct of malfeasance is punishable by the prohibition to practice law in Chile, ranging from 61 days to perpetuity. Also, a fine between USD$780 to USD$1,400 approx. is applicable.

It is important to point out that on August 17, 2023, with the enactment of the Economic Crimes Law, several amendments were introduced to Chilean criminal legislation. Among these changes is the inclusion of a new crime specifically referring to the violation of secrecy.

Thus, the new article 247 bis of the Criminal Code punishes those who, exercising any of the professions that require a degree, obtain an economic benefit for themselves or for a third party by making use of the secrets that by reason of their profession have been entrusted to them. In these cases, the general penalty is between 61 days to 3 years of imprisonment, plus a fine of up to USD$700. In the case of attorneys, the law expressly states that if the conduct also caused harm to the client, the penalties of prohibition to practice the profession indicated in Article 231 above may also be imposed.

The Economic Crimes Law also created of a new category of "economic crimes" and a special regime of penalties for individuals who commit them. In this regard, the crime of violation of secrecy contained in Article 247 bis may be classified as an economic crime if it is perpetrated (i) in the exercise of a post, function, or position within a company (which may include law firms); (ii) or perpetrated for the benefit of the company, either financially or any other kind of benefit. The main consequence of this classification for the perpetrator is the application of a special regime of sanctions and of mitigating and aggravating circumstances for criminal liability.[8]

In any case, the criminal offences described in this chapter may be applicable to any lawyer, regardless of whether or not they are members of the Chilean Bar.

8 Under this new regulation, since one year after its enactment (which happened on August 17th 2023), this crime of breach of professional secrecy will be able to trigger criminal liability of the legal entity within which (or in benefit of which) the crime is committed, as long as such entity fails to control that legal risk and the requirements stated on Law 20,393 –which establishes the criminal liability for legal entities– are fulfilled.

II. CRIMINAL PROCEDURE RULES ON PROFESSIONAL SECRECY AND ATTORNEY-CLIENT PRIVILEGE

A key aspect of professional secrecy lies in its practical effects, and especially the way in which it operates in court. Chilean law regulates it in the Criminal Procedure Code: it is there that the arguments about the admissibility of privilege as a ground for opposing certain evidentiary procedures are developed. In the civil procedure these rules are much less elaborate, so that it is the criminal process that serves as the standard for assessing the status of secrecy and privilege.

The rules of evidence refer both to the gathering of evidence by the public prosecutor and the acceptance of evidence by the judge. These are rules that on the one hand limit the actions of the Public Prosecutor's Office in its investigation, and on the other regulate the probative value of the evidence collected.

In this context, criminal procedural legislation refers to professional secrecy, directly or indirectly, in relation to three main aspects:

- When regulating witness statements and authorizations not to testify;
- When regulating investigative measures, and more precisely the seizure of documents and their limitations;
- When regulating the use of documentation already part of the investigation as evidence in the trial.

In what follows we will address these three aspects, indicating, when pertinent, what happens with procedural regulation in other areas.

A. THE RIGHT NOT TO TESTIFY

In criminal procedural matters, the law recognizes that certain professionals, including lawyers, are authorized to refrain from testifying on matters entrusted to them by their clients. This is explicitly stated in Article 303 of the Code of Criminal Procedure. As previously said, this rule, which authorizes abstention, complements the substantial rule referred to above, which regulates the obligation to maintain the confidentiality of information, and it ceases only if the client relieves them of such duty.

In other proceedings, such as civil or labor proceedings, there is no regulation on the faculty to abstain from testifying. However, jurisprudence has consistently and uniformly admitted that secrecy is valid as an excuse for not testifying, considering the substantial regulation on the matter.

B. SEIZURE OF PRIVILEGED DOCUMENTS

As a general rule, the Public Prosecutor's Office has broad investigative powers, including the power to seize documents. However, communications between the individual accused of a crime and his attorney, their notes and other documents to which the power not to testify is naturally extended, may not be seized, according to Article 220 of the Code of Criminal Procedure.

For this prohibition of seizure to apply, it is necessary that the communications, notes and other documents are in the possession of the person who has the right not to testify. In other words, the prohibition of seizure is always linked to such right. Although this rule refers to lawyers and other professionals who may refuse to testify, it should also be understood as extending to the accused himself, since according to the law he/she also has the right not to testify because of the right to remain silent.

There are a few remaining ambiguities regarding this regulation since it comes from the original version of the Criminal Procedure Code of 2000, when there was no criminal liability of legal entities in Chile. However, since 2009, this liability does exist. This poses a problem in cases where the defendant is a company, for at least two reasons.

First, it is highly controversial whether the company as such has the "right to remain silent". In comparative law this is a controversial issue[9], and in Chile there is no specific regulation. The point is that if this right is in dispute, then it can be questioned whether the company is one of the individuals who cannot be seized. This is certainly counter-intuitive, but at least there is a normative ambiguity. However, in our opinion, it is not reasonable to consider that a privileged document can be seized if it is in the possession of the "client", which in this case may be the company.

9 Hernández Basualto, Héctor. (2015). ¿Derecho de las personas jurídicas a no auto-incriminarse?. Revista de derecho (Valparaíso), (44), 217-263.

This, in any case, leads us to a second problem, which is that even when the company is a defendant, the executives who represent it are not necessarily defendants too, nor are they covered by professional secrecy. It may happen then that a company keeps information subject to professional secrecy (communications with its lawyers), but it is requested to an executive in his/her capacity as a witness. In this case, the regulations are not explicit, and it is not at all clear that the executive can be excused from handing the information over to the public prosecutor. This is a matter to be interpreted on a case-by-case basis, but we have no illustrative case law on the issue.

In view of this uncertainty, there are certain measures that are usually taken with respect to the specific person within the company who safeguards the inside information and the place where this safeguarding is done. Although, as mentioned above, this is not specifically regulated, the safeguarding should be greater if, in the case of physical information, it is located in the office of the legal representative (who is called to act on behalf of the company) or of the head of the internal legal team (who, although it can be argued –since it is also an unregulated area– , holds the legal privilege for legally advising the company).

C. EXCLUSION OF ILLICIT EVIDENCE

Finally, the law establishes mechanisms to exclude evidence from the trial that has already been added to the investigative file. One of the grounds for exclusion is that the evidence or its collection affects the fundamental rights of the accused. If professional secrecy is part of the constitutionally enshrined right of defense (Article 19 number 3 of the Political Constitution), then information that is part of that secrecy can be excluded. Thus, even in the case of seizure of privileged documents, during the investigation it is possible to exclude such documentation as unlawful evidence, as it relates to communications, notes or protected documents. In other words, the fact that a document is seized does not mean that it can necessarily be used in the process.

D. CIVIL PROCEDURAL REGULATIONS

Finally, in the context of a civil proceeding, in the case of requests for the production of documents, Article 349 of the Code of Civil Procedure (which is supplementary applicable to proceedings in other matters) establish that in the event that such production is required, the requested party may decline to produce confidential documents. Therefore, since the documents that constitute communications between the lawyer and his/her client can be considered as secret, they should not be exhibited at trial if requested.

III. CONCLUSION

- The Chilean regulation on professional secrecy and attorney-client privilege does not cover all the details or possible hypotheses that may be relevant in the matter.
- Most of the substantive and detailed regulation on professional secrecy is found in the Code of Ethics of the Chilean Bar, which is not binding for lawyers in general, but is often used by the courts of justice as a parameter of *lex artis* when settling disputes on this matter.
- The most serious consequences for breach of professional secrecy are defined as criminal offenses in the Criminal Code.
- In terms of its practical application, professional secrecy translates into a right not to testify by the lawyer with respect to matters related to his client. Likewise, the possibility of seizing documents or instruments is limited by the secrecy. However, there are complex or borderline hypotheses in which professional secrecy could be affected, as for example when dealing with clients who are legal entities. For these cases the regulation is not sufficiently clear or explicit.
- Despite the above, in Chile there is a general respect and understanding for professional secrecy despite certain regulatory shortcomings.

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LEGAL PRIVILEGE UNDER ESTONIAN LAW

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I INTRODUCTION

Estonian system of legal privilege is based on a mechanism of different procedural and substantive law mechanisms obliging the state to render sufficient protection and the attorney to deploy a level of care to protect the legal privilege. Legal privilege is acknowledged and is developed to comply with relevant CCBE and other rules having cross-border nature. Rules enabling possible infringements are stipulated by law, but in often cases lack the clarity that would be needed in a world of changing law firm management.

II GENERAL RULES ON INDEPENDENCE OF THE LEGAL PROFESSION

Estonian legal profession is organized through one single Bar Association (in Estonian: *advokatuur*) open to all legal professionals with a law degree and havingpassed relevant bar exams.[2] Members of the Estonian Bar are attorneys (in Estonian: *advokaat*). Special rules also apply to foreign practitioners who can become members of the Estonian Bar if certain requirements have been met. The relevant procedural laws also allow

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2 **The author of this article has been deployed by the Estonian Bar on lecturing legal privilege principles to other bar members. The positions and arguments provided in this article are to be attributed to the author solely and not to be regarded as the official position of the Estonian Bar.* See Bar Association Act in English, laying down main principles - https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/524012023005/consolide.

other legal practitioners who are not members of the Estonian Bar to participate in proceedings as representatives of clients. Legal privilege is nevertheless made fully available only to Estonian Bar members, but communication regarding legal services with non-members is also protected in some proceedings.

As an overarching principle it has been declared in the relevant Estonian law provisions that when providing a legal service, the attorney is independent and follows the law, the legal instruments, and resolutions of the bodies of the Bar, the rules of professional ethics, good manners, and their own conscience (Section 43 Subsection 1). The manifestation of the independence lies within the express right provided in the Bar Association to collect evidence (Section 41 Subsection 1 Para 1) and to receive information required for the provision of a legal service from a state authority and municipality, access documents and receive copies and extracts thereof, unless it is prohibited by a statute to provide an attorney with information and documents (Section 41 Subsection 1 Para 1). Such right of collecting evidence is often used in criminal proceedings by defence teams to collect evidence. However, a handful of restrictions exist that entitle refusal from handing in such information, either from personal data protection, banking secrecy, state secret rules, but also rules on not disclosing the state government information. The practice of relevant courts in criminal and civil cases has been that in case of refusal to issue evidence to the attorney, the relevant counsel can ask the court to assist in collecting evidence and issue a separate decree to obligate the relevant authority to issue information. In addition, the Bar Association Act provides the right of an attorney to process the personal data of a person other than a client which has been obtained on the basis of a contract or a statute, including personal data of special categories, without the person's consent where it is necessary for the provision of a legal service, and also access to state secrets must be provided to the attorney in criminal proceedings (Criminal Procedure Code Section 224 Subsection 7).

In case the court has assisted in obtaining information, there are no rules to protect the received information from other parties to the dispute or proceedings, although such information may in turn be of detriment to the interest of the client and thus part of legal privilege. There is no initiative to have any such provisions for not disclosing the information to the relevant court or other parties (say, the prosecutor's side).

It has been stressed that the principle of independence for the attorney does not only mean the right of independence to choose the means to act in the client's interest but also the right to external protection of the attorney's activities.[3]

3 M. Tamme. A. Soo (ed.) Eesti Advokatuuri Eetikakoodeks. Kommenteeritud vln. Tallinn, 2018, § 4 para 1, 1.3.

III RULES ON CONFIDENTIALITY

Rules on confidentiality are twofold, they provide the obligation to the relevant attorney and the law firm to provide sufficient level of protection and also the right of the client to dispose of the confidentiality, either by demanding full protection or exercising the right of waiver of such confidentiality, whenever deemed necessary by the client. The restrictions are either of material nature (such as money laundering notification rules), but also of procedural: possible search of the premises of the law firm, demanding information or exercising surveillance measures.[4]

Pursuant to Section 45 of the Bar Association Act, an attorney is required to maintain the confidentiality of data disclosed to him in the course of provision of a legal service, the fact that he has been addressed for the purpose of providing a legal service and the size of the fee paid for a legal service. The attorney-client privilege does not have a time limit and it remains in force also after the attorney's legal practice has terminated. The attorney-client privilege also applies to the employees of the law firm and to the employees of the Bar and to civil servants who have learned information subject to the attorney-client privilege in the course of performance of their service duties. The duty to maintain confidentiality of the fact that the attorney has been addressed for the purpose of providing a legal service and the size of the fee paid to the attorney for a legal service does not apply to the provision of state-funded legal aid and the fee paid for it.

The client or their legal successor may discharge the attorney from the attorney-client privilege by written consent. It is assumed that in case such a situation arises, it is the obligation of the attorney to provide sufficiently clear explanations to the client on the legal consequences of such waiver. The attorney cannot refuse from disclosing the information to whatever parties in case the waiver has been granted.[5] Also, recent case law has stated that a legal opinion provided to a public body, such as a ministry, cannot be withheld from the public and must be provided to whomever asks.[6] All procedural acts provide the attorney the right to refuse from providing statements to the court or other authorities when statements would contain any information that is protected by legal privilege. The attorney must nevertheless disclose to the court or the relevant authority when questioned that he/she refuses to provide information on such grounds. No more details, i.e. regarding the length of the client relationship etc., are required.

4 A. Alvin. Advokaadi kutse-eetika reason d'etre. – Juridica 2014, 3, p 242.
5 M. Tamme. A. Soo (ed.) Eesto Advokatuuri Eetikakoodeks. Kommenteeritud vln. Tallinn, 2018, § 4 para 2.1.1.
6 Supreme Court decision 3-20-1265, 18.04.2022, para 28-29.

The main restrictions to legal privilege are related to the apprehension of data through search or through (electronic) surveillance measures. The following two chapters will concentrate on the possible issues related to these restrictions.

IV SEARCH OF PREMISES OF A LAW FIRM AND THE ATTORNEY

In principle, although ECHR has not excluded the possibility to search a law firm in case there is no suspicion raised, Estonian law only provides the possibility to search the premises of a law firm in case there is a (clear) suspicion that the attorney associated with the law firm is linked to a criminal offence.[7] Such principle has been bolstered by a clear position of the courts taken in case law, stressing that evidence on correspondence between an attorney and client can only be used in case the attorney himself or herself is directly linked with the commission of a crime.[8] Unfortunately, there have been quite a few recent cases where the prosecutor's office has still ordered searches of law firms without a clear indication that an attorney is suspected of some criminal offence.

As a principle, Section 45 (3) of the Bar Association Act states that an attorney cannot be arrested, searched or taken into custody based on circumstances arising from their legal practice, except on the basis of an order issued by a district court or a city court. Based on circumstances arising from the legal practice of an attorney, the law firm via which the attorney provides legal services cannot be searched either.

In practice, the search of a law firm must be authorized by the court and the contents of the suspicion must be indicated. In addition to the requirement that the attorney suspected of a crime must be present during the search (Section 91 (8) of the Criminal Procedure Code), recent practice (most likely due to numerous ECHR cases indicating such need) has also developed that an independent member of the Bar is also appointed to be present during the search. The rules on how a search should be conducted, i.e. to indicate privileged materials, also how to avoid intrusion of non-related client information, are vague and disputes on admissibility are unfortunately common in courts.[9] As an example, there are now rules on which keywords should be used during the search, as was indicated in the *Särgava v. Estonia* ECHR case.[10]

7 H. Sepp. Advokaadibüroo läbiotsimisest Euroopa Inimõiguste Kohtu praktikas. Juridica 20, 6, 507, p 518.
8 Circuit Court 17.05.2010 decision 1-08-15079.
9 H. Sepp. Advokaadibüroo läbiotsimine: probleemid Eestis ja võimalikud lahendused. – Juridica 2029, 3, 580, p 581ff.
10 ECHR stressed it is unclear why such keywords were used and how possible dispute between attorney and the the police authorities would have been solved. – ECHR 698/19, Särgava vs Estonia, 16.11.2019, p 107.

The most evident problem is obvious – there are still no restrictions or special provisions on the search of the attorney's home premises, the vehicle used by the attorney or the attorney himself or herself and it is deemed very problematic.[11] The problem is even more evident with remote working arrangements when the home premises of the attorney are being searched and the computer or other IT devices used for remote work are collected by the relevant authorities. Existing provisions only provide protection regarding the search of premises but not the collection of IT devices that may hold legal privilege materials outside of the premises of the law firm. Legislative initiatives have been brought by the Bar to regulate such situations but no changes in the relevant laws are pending in the viable timeframe. The only existing procedural safeguard in place is the aforementioned case law declaring any client communication inadmissible as evidence in case it has been taken without the attorney himself or herself being suspected of participating in the criminal offence and also aforementioned Section 43 (3) stating that 'Data media related to the provision of a legal service by an attorney are privileged'. The safeguard does not, however, blanket situations where other materials, such as electronic data, have been taken by the authorities. Nor does this provide any practical avoidance to use the information gathered not as evidence but for 'informational purposes' by the authorities. Lastly, it is unclear whether such gap in the relevant rules provide the possibility to search the attorney and their whereabouts (without the prosecutor being required to indicate any suspicion of crime) and not the law firm itself.

V SURVEILLANCE ACTIVITIES

The main surveillance activities that may infringe legal privilege are the interception of telephone or other electronic communication and cover examination of e-mails. As a general principle, such measures can only be executed on the basis of a court decree and the prosecutor must indicate to the court clearly that the person subjected to such surveillance activities is suspected of a criminal offence and no other means of evidence gathering is possible (See Chapter 31 of the Criminal Procedure Code).[12] Thus, the surveillance activities must be strictly allowed by the court in situations where there is clear suspicion of a criminal offence and there are no other means available to gather evidence. Any other ways of surveillance are illegal, such as videotaping (even without a sound recording) a private meeting between an attorney and a client at the police station.[13]

11 M. Tamme. A. Soo (ed.) Eesti Advokatuuri Eetikakoodeks. Kommenteeritud vln. Tallinn, 2018, § 5 para 5.1.
12 Supreme Court decision 3-1-1-14-14, pära 787.
13 T. Hallas. Kaitsja üleaanded seoses kahtlustatava kohtueelse ülekuulamisega. Juridica 2023, 1, 61, p 63.

The Code of Criminal Procedure clearly forbids the use of client privilege communication as evidence – Section 1267 (2) states clearly that information that is obtained by secret interception is not used as evidence provided the substance of such information consists in facts that have become known to the person in the course of the person's official or professional activities. In practice the problems have not arisen with attorneys subjected to such surveillance measures directly, i.e. as suspects of possible criminal offence, but in situations where communication between attorneys and persons subjected to such measures have also been recorded.

The peculiarity of the Estonian system for the ECHR lies in the fact that the law does not require collected tapes of correspondence with the attorney to be deleted. The correspondence cannot be used as evidence, but no obligation to delete the tapes exists.[14] The attorney whose correspondence has been made subject to surveillance, should ask this information to be excluded from the case file. In case the attorney is not part of the proceedings, it is the obligation of the court.[15] In addition, there is no post-GDPR practice on how to determine whether any data collected is actually deleted and what the coherent procedure for doing so is. The authorities have no obligation under Estonian law to delete gathered information that is protected by legal privilege. Thus, it is possible that even without having been used as evidence, such communication is used by the authorities to gather additional information or to use this data as source for future proceedings.

VI CONCLUSION

Although a clear emphasis on protecting legal privilege, with a framework grounded in both procedural and substantive law, is provided - the independence of the legal profession, as governed by the Estonian Bar Association, ensures a commitment to ethical standards and client confidentiality. While the rules on confidentiality are comprehensive at least in their wording, challenges arise in the face of searches of law firm premises and surveillance activities, especially in the context of evolving work arrangements. Efforts to address these challenges and enhance legal protections are ongoing, emphasizing the need for a nuanced and adaptable legal framework to safeguard legal privilege in a rapidly changing legal landscape.

14 U. Lõhmus. Jälgimine ja põhiõigused. – Juridica 2020, 4, 279, p 281.
15 K. Namm. Probleemid jälitustegevusega – ühe kaitsja vaatenurk. Kohtute aastaraamat 2015, lk 95.

BONIFASSI AVOCATS

LEGAL PROFESSIONAL PRIVILEGE IN FRANCE

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Legal professional privilege exists in French law in the form of *"professional secrecy"*, provided for by article 226-13 of the Criminal Code, which states that:

"The revelation of secret information by a person who is in possession of it either by virtue of his status or profession, or by virtue of an office or temporary assignment, is punishable by one year of imprisonment and a fine of 15,000 euros".

Thus, professional secrecy is different from the common law notion of legal professional privilege, as it does not apply solely to lawyers, but to any person who is bound by it *"by virtue of their status or profession"*. For example, doctors and health professionals are subject to professional secrecy in the same way as lawyers.

However, this provision was completed by article 66-5 introduced by Law no. 71-1130 of 31 December 1971, which attempted to *"clarify"* the concept of the professional secrecy of lawyers:

"In all matters, whether in the field of advice or defence, consultations sent by a lawyer to his client or intended for the client, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues, with the exception of correspondence marked "official", interview notes and, more generally, all documents in the file are covered by professional secrecy".

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But the scope of this article is so wide that it, in fact, weakens the principle of legal privilege as will be demonstrated below.

In any case, it is considered as a fundamental protection of the client[2], it is also a matter of public policy that has a general interest foundation: the proper functioning of the rule of law.[3] Article 226-13 of the Criminal Code provides for criminal sanctions for any disclosure of information covered by professional secrecy.

The scope of professional secrecy is very broad. However, this notion maintains a certain distance from the concept of legal professional privilege implemented in common law legal systems.

This article will therefore explore the field of application of professional secrecy, examining its scope in French law (I) and then adopting a comparative approach (II).

I. THE SCOPE OF PROFESSIONAL SECRECY IN FRANCE

In France, professional secrecy is both an obligation for lawyers (i), and a form of protection, particularly with regard to requests from administrative, criminal and civil authorities (ii).

i. PROFESSIONAL SECRECY, AN OBLIGATION FOR LAWYERS

Professional secrecy is generally conceived as an obligation for lawyers not to reveal, in both the fields of advice and defence of their client, confidential elements of their clients' files.[4]

Professional secrecy requires lawyers not to reveal[5]:

- Consultations sent by a lawyer to his client or intended for his client;
- Correspondence exchanged between the client and his lawyer, and between the lawyer and his colleagues, with the exception of correspondence bearing the mention "official";
- Interview notes and, more generally, all file documents, information and confidences received by the lawyer in the course of his practice;

2 Constitutional Council, "*The lawyers' professional secrecy*", 10 April 2023.
3 Ibid.
4 Article 66-5 of law no. 71-1130.
5 Article 2.2 of the National Internal Rules of the Legal Profession; Article 66-5 of Law no. 71-1130.

- Names of clients and the lawyer's agenda;
- Financial payments and all handling of funds pursuant to article 27 paragraph 2 of law no. 71-1130 of 31 December 1971;
- Information requested by the statutory auditors or any other third party (information which may only be communicated by the lawyer to his client).

As lawyers' professional secrecy is a matter of public policy[6], it may only be breached in specific and exceptional cases where the interests at stake outweigh those justifying the lawyer's duty of confidentiality.[7] There are only a few exceptions that justify the lifting of professional secrecy.

Firstly, under Article 226-14 of the French Criminal Code, the sanctions for revealing confidential information[8] do not apply to: "*anyone who informs the judicial, medical or administrative authorities of deprivation or abuse, including sexual assault or mutilation, of which he or she has knowledge and which has been inflicted on a minor or on a person who is unable to protect himself or herself by reason of his or her age or physical or mental incapacity*".

Secondly, as part of the fight against money laundering and the financing of terrorism, lawyers are subject to a series of obligations, which in certain circumstances require derogations from professional secrecy. From the moment a business relationship is established with a client, the lawyer is required to verify: the identity of the client, the identity of the beneficial owner of the business relationship, and the nature and purpose of the relationship.[9] In addition, if the lawyer has any doubts about that some form of money laundering is occurring, he or she must send a *"report of suspicion"* to its *"bâtonnier"* who will decide whether or not to forward it to Tracfin (the financial intelligence unit).[10] This obligation to report suspicions of money laundering is only applicable in respect of certain professional activities.[11] In particular, it doesn't apply to judicial activities. The European Court of Human Rights has ruled that this obligation does not constitute a disproportionate breach of professional secrecy, insofar as the report is forwarded by the lawyer to the President of the Bar Association, who then decides whether to forward it to the tax authorities (Tracfin).[12]

6 Article 2.1 of the National Internal Rules of the Legal Profession.
7 Constitutional Council, "*The lawyers' professional secrecy*", 10 April 2023.
8 Article 226-13 of the Criminal Code.
9 Lexbase, "*Professional secrecy and the fight against money laundering*".
10 Lexbase, "*Study: the secrecy and confidentiality of exchanges*".
11 Article L561-3 of the Monetary and Financial Code.
12 ECHR, 6 December 2012, no. 12323/11, Michaud v/France.

Thirdly, lawyers are authorised to waive professional secrecy in order to defend themselves.[13] The Ministry of Justice has pointed out that:

"A lawyer may, however, waive professional secrecy in order to meet the needs of his own defence. In this case, he may extract from his file information enabling him to defend himself in the event of a challenge to his professional civil liability, a criminal complaint or disciplinary proceedings".[14]

The lifting of professional secrecy is therefore rare, as it is authorised only in limited cases. This also applies to requests from the judicial authorities, who are therefore constrained to respect the lawyer's obligation.

ii. PROFESSIONAL SECRECY: PROTECTION FOR THE LAWYER'S CLIENT AGAINST THE AUTHORITIES

While professional secrecy is generally defined as an obligation for lawyers, it can sometimes also be seen as a form of protection against the authorities. Indeed, the administrative, criminal, tax and civil authorities are limited in the actions they can take against lawyers.

In order to protect professional secrecy, the possibility for the judicial authorities to seize and consult documents protected by this secrecy, whether through a search of the lawyer's office or home, telephone tapping or a breach of the confidentiality of the lawyer's correspondence, is in principle limited.

For example, with regard to searches, article 56-1 of the Code of Criminal Procedure provides that:

"Searches of a lawyer's office or home may only be carried out by a magistrate in the presence of the President of the Bar or his delegate, following a written, reasoned decision taken by the liberty and custody judge to whom the matter has been referred by that magistrate, which states the nature of the offence or offences being investigated, the reasons justifying the search, the purpose of the search and its proportionality with regard to the nature and seriousness of the facts".

13 Constitutional Council, "*The lawyers' professional secrecy*", 10 April 2023.
14 JO Sénat, "*Rules of professional conduct applicable to lawyers*", 22 July 2021.

As well as defining the conditions required to carry out such a search, article 56-1 and the following ones also set out the procedure. In particular, the search must be proportionate to the objective pursued: only those items that are necessary to provide evidence of the offences covered by the decision of the liberty and custody judge may be seized.[15]

Then there is the matter of correspondence between lawyers and their clients. While in principle such correspondence is protected by absolute secrecy[16], the Court of Cassation considers that these documents may be seized if they are *"of such a nature as to establish proof of the lawyer's involvement in the offence"*.[17]

The same solution applies to telephone tapping, which is in principle covered by professional secrecy. Thus, as set out in article 100-7 of the Code of Criminal Procedure:

"No interception may take place on a line depending on a lawyer's office or home without the President of the Bar being informed by the examining magistrate".

The Court of Cassation has specified that in order to authorise the tapping of a lawyer's telephone, *"prior plausible evidence of his involvement in an offence"* is required.[18]

Professional secrecy is also protected in tax and administrative matters. For example, case law has established that the tax authorities' right of inspection cannot derogate from a lawyer's professional secrecy.[19] Thus, a lawyer cannot be asked to provide invoices showing the identity and address of a client, or the nature of the service provided.[20]

However, this protection of professional secrecy is sometimes criticised, as many lawyers consider it to be insufficient. In fact, the criminal courts rarely impose sanctions on judicial and police authorities that fail to respect the guarantees protecting professional secrecy.[21] The penalty for such a breach, such as the seizure of correspondence

15 Lexbase, "*Professional secrecy and judicial searches*".
16 Cass. 1st Civ. 2 Oct. 2007, No. 04-18.726, Bull. 2007, I, No. 314; Lexis 360 Intelligence, JurisClasseur Procédure Civile, "*Fasc. 300-90: AVOCATS. - Obligations et prerogatives*", 11 September 2023.
17 Constitutional Council, "*The lawyers' professional secrecy*", 10 April 2023; Cassation Crim, 12 March 1992, Bull. crim. no. 112, and established case law.
18 Constitutional Council, "*The lawyers' professional secrecy*", 10 April 2023; Cassation Crim, 15 January 1997, Bull. crim. no. 14, and established case law.
19 CAA Lyon, 5th Chamber, 16 May 2013, no. 11LY01009 and no. 11LY01011.
20 Ibid.
21 Gazette du Palais, " *Penalties for breaches of the lawyers' professional secrecy*", 18 January 2022.

between a lawyer and his client, should be the nullity of the seizure.[22] However, in practice, this nullity has a very limited scope,[23] because it is only pronounced if the documents seized concern *"the exercise of the rights of the defence"*.[24]

In addition, the protection of professional secrecy is also called into question by article 56-1-2 of the Code of Criminal Procedure, under which *"the professional secrecy of counsel is not enforceable against measures of investigation or enquiry"*, when these relate to a number of offences. Offences covered by this derogation include tax fraud, financing a terrorist undertaking, corruption and influence peddling.[25]

Its protection may sometimes be deemed inadequate, but professional secrecy has a very broad scope in French law, and it is only in specific and limited circumstances that lawyers may derogate (or be forced to derogate) from this obligation. But as explained above, protection against authorities in criminal proceedings has been eroded and it could be argued that if its scope was more strictly defined, it would be easier to argue that it should not be circumvented by criminal authorities.

II. PROFESSIONAL SECRECY VERSUS LEGAL PRIVILEGE

The concept of *"legal professional privilege"* implemented in common law systems is quite different from French professional secrecy, which has a wider scope of application. Although there are several types of privilege in common law countries, their scope is generally less extensive than the French professional secrecy.

In the United Kingdom, for example, privilege takes two forms: legal advice privilege and litigation privilege[26], while in the United States, the two most common forms are attorney/client privilege and the work-product doctrine.[27] However, none of these forms cover everything that is covered by professional secrecy under French law.

The first major difference concerns the very definition of these concepts. In France, professional secrecy is a confidentiality "*in personam"*, i.e., linked to the status of lawyer.[28] Thus, professional secrecy is, by definition, an obligation imposed on the lawyer not to reveal protected information.[29]

22 Ibid.
23 Ibid.
24 Cass. criminal court, 24 April 2013, no. 12-80331.
25 Gazette du Palais, " *Penalties for breaches of the lawyers' professional secrecy*", 18 January 2022.
26 Thomson Reuters Practical Law, "*Legal professional privilege in civil litigation*".
27 Thomson Reuters Practical Law, "*A world tour of the rules of privilege*".
28 Editions législatives, Lefebvre Dalloz, *"Recognition of the confidentiality of consultations by in-house lawyers: the text* has *finally been passed!"*.
29 Thomson Reuters Practical Law, "*A world tour of the rules of privilege*".

In common law systems, on the other hand, legal privilege is defined as a confidentiality "*in rem*"[30], which is a form of protection attached to documents and communications between lawyers and their clients.[31] Thus, legal privilege is not seen as an obligation on lawyers, but rather as a mechanism for protecting confidential documents, which cannot be seized by a court or by opposing parties during discovery or disclosure procedures.[32]

It can therefore be argued that professional secrecy, which is in itself both an obligation and a protection for lawyers, has a wider scope than litigation privilege or the work-product doctrine.

This statement can also be explained by the fact that, under French law, clients cannot waive their lawyer's professional secrecy. Not only is this confidentiality a matter of public policy, it is also considered to be *"general, absolute and unlimited in time"*.[33] For this reason, the client cannot release the lawyer from the obligation of professional secrecy imposed on him.[34] This does not prevent the client, who is not himself bound by this obligation, from revealing and making public some information that is considered confidential and protected by secrecy.[35]

However, in common law systems, privilege is a right of the client[36], who may therefore decide to waive it. Thus, with the client's consent, the lawyer may disclose confidential documents/communications.[37]

There is one final major difference between the common law legal privilege and French professional secrecy, relating to the persons that the concept applies to. On this point, the scope of legal privilege in common law seems to be broader. In fact, in the United Kingdom and the United States, legal privilege is not reserved solely for outside lawyers, but it also applies for in-house lawyers/counsels.[38]

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30 Délégation des Barreaux de France, «*The protection of lawyers' professional secrecy by the CJUE and the ECHR*".
31 Thomson Reuters Practical Law, "*A world tour of the rules of privilege*".
32 Ibid.
33 Article 2.1 of the National Internal Rules of the Legal Profession; Constitutional Council, "*The lawyers' professional secrecy*".
34 Cass.crim. 10 January 2023, n°22-80.969.
35 Lexbase, "*Study: the secrecy and confidentiality of exchanges*".
36 Thomson Reuters Practical Law, "*A world tour of the rules of privilege*".
37 Thomson Reuters Practical Law, "*Legal professional privilege in civil litigation*".
38 Ibid. and "*Attorney-Client Privilege for In-House Counsel*", American Bar Association, December 2017.

In France, on the other hand, Article 66-5 of Law No. 71-1130 imposes an obligation of professional secrecy only on outside lawyers. This means that in-house lawyers are not subject to professional secrecy. However, this is changing. A new law was recently passed, before being, that aimed to introduce a variant of *"legal privilege"* for in-house lawyers under French law.[39] However, for technical reasons, this provision was quashed by the Constitutional Council, but the matter is still open for discussion.

39 Gazette du Palais, "*Confidentiality of in-house counsel's legal opinions: the draft is the subject of an interministerial consultation*", 24 March 2023.

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NO "LEGAL PRIVILEGE" IN GERMAN LAW AND NO COMPREHENSIVE PROTECTION OF LAWYER-CLIENT CONFIDENTIALITY

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INTRODUCTION

The common law principle of "Legal Privilege" or "Attorney Client Privilege", which derives from the Anglo-Saxon and US legal systems, is alien to the German legal system, in which civil procedure is entirely different. In particular, there is no obligation of disclosure known in German civil procedure and in consequence, there is no need for privilege over correspondence between the client and their legal advisors.

By contrast, in criminal proceedings investigating authorities may, in principle, demand the disclosure of all documents that could be considered as evidence. However, the professional duty of confidentiality exists in all legal areas, including criminal procedures, and covers all information obtained by the lawyer in connection with his client mandate. Breach of this duty of confidentiality constitutes a criminal offence under Section 203 (1) no. 3 Criminal Code (StGB).

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German criminal procedural law protects this confidentiality, but there is no absolute protection of any communication between lawyer and client in German law.

I. PROTECTION OF CONFIDENTIALITY REGARDING INDIVIDUALS AS DEFENDANTS

1. RIGHT OF PROFESSIONAL SECRECY HOLDERS TO REFUSE TO TESTIFY

The defence lawyer has a right to refuse to testify under Section 53 (1) no. 2 of the Code of Criminal Procedure (StPO), as do other lawyers, patent attorneys, notaries, chartered accountants etc. under Section 53 (1) no. 3 StPO. The right to refuse to give evidence also applies to lawyers working outside of Germany and outside the EU.[2]

In-house lawyers do not, in principle, have a right to refuse to testify with regard to what they are entrusted with or otherwise become aware of in this capacity according to Section 53 (1) sentence 1 no. 3 StPO.[3]

The right to refuse to give evidence relates to facts that have become known to the lawyer in their professional capacity but does not apply if the client has released them from the obligation to maintain confidentiality in accordance with Section 53 (2) sentence 1 StPO.

The right already applies to the initiation of a mandate[4] and is unlimited in time; in particular, it does not end with the termination of the client-lawyer relationship[5] or the death of the client.[6]

2 The professional status must be comparable to that of German lawyers (see Sections 4, 11, 13 EuRAG and Sections 206, 207 BRAO).
3 Unless their activities fall under Section 53a StPO in individual cases.
4 Established case law, e.g. *BGH*, 18.2.2014 – StB 8/13, NJW 2014, 1314.
5 E.g. *LG Düsseldorf* 18.3.1058 – IIIa Qs 107/58, NJW 1958, 1152.
6 *Kreicker*, Münchener Kommentar zur StPO, 2. Edition 2023, § 53 margin 16.

2. PROHIBITION OF SEIZURE OF EVIDENCE WITHIN THE SCOPE OF THE LAWYER-CLIENT RELATIONSHIP

To prevent information which is protected by a lawyer's duty of confidentiality and the lawyer's right to refuse to testify falling into the hands of the public prosecutor's office and the criminal courts, Section 97 (1) StPO[7] prohibits its seizure. The provision differentiates between the accused's communication with defense attorneys and the accused's communication with lawyers as such (e.g. also lawyers in civil or administrative matters).

For documents that are not original defence documents as well as for "transfer items" ("Überführungsstücke"), which were used in the context of committing the offence and were originally in the possession of the client or another person, like e.g. accounting documents relating to a tax evasion, the Federal Supreme Court (Bundesgerichtshof) denies protection: the defence lawyer should not be allowed to use his mandate to hide such items of evidence, which are targeted by state access, in his offices.[8]

Whereas Section 97 StPO only refers to communications in the custody of a lawyer, Section 148 StPO[9] extends its protection to documents in the custody of the accused if they were prepared for his criminal defense.

However, the prohibition of confiscation only applies in the case of the client being the accused. Under German law, the status of an accused person ("Beschuldigter") is acquired with the initiation of criminal investigation proceedings against him or her.

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7 Section 97 StPO says: "*Prohibition of seizure*
(1) The following objects are not subject to seizure:
1. written correspondence between the accused and those persons who, under section 52 or section 53 (1) sentence 1 nos. 1 to 3b, may refuse to testify;
2.notes made by the persons referred to in section 53 (1) sentence 1 nos. 1 to 3b concerning confidential information confided to them by the accused or concerning other circumstances covered by the right to refuse to testify;
3.other objects, including the findings of medical examinations, which are covered by the right of the persons referred to in section 53 (1) sentence 1 nos. 1 to 3b to refuse to testify.
(2)These restrictions only apply if these objects are in the custody of a person entitled to refuse to testify, unless the object concerned is an electronic health card as defined in section 291a of the Fifth Book of the Social Code (Sozialgesetzbuch V). The restrictions on seizure do not apply if certain facts give rise to the suspicion that the person entitled to refuse to testify participated in the offence or in handling stolen data, aiding after the fact, obstructing prosecution or punishment, or handling stolen goods, or if the objects concerned were derived from an offence or have been used or are intended for use in committing an offence or if they emanate from an offence.
(3) Subsections (1) and (2) apply accordingly insofar as those persons who are involved, pursuant to section 53a (1) sentence 1, in the professional activity of the persons referred to in section 53 (1) sentence 1 nos. 1 to 3b have the right to refuse to testify...."

8 *BGH*, 08.08.2018 – 2 Ars 121/18, AnwBl. Online 2018, 925 (https://anwaltsblatt.anwaltverein.de/files/anwaltsblatt.de/anwaltsblatt-online/2018-925.pdf).

9 The wording of Section 148 (1) is as follows: "*Accused's communications with defence counsel The accused is entitled to communicate with defence counsel in writing and orally even when he or she is not at liberty.*"

This only requires the existence of an initial suspicion ("Anfangsverdacht") without any further formal act (Section 152 (2) StPO). On the other hand, it is generally assumed that this protection can apply even before the formal initiation of preliminary proceedings, provided that the client has already obtained advice with regard to imminent criminal proceedings.[10]

3. PROHIBITION OF OTHER INVESTIGATIVE MEASURES DIRECTED AGAINST LAWYERS

In addition to Section 97 StPO, Section 160a (1) StPO[11] prohibits investigative measures directed against defense lawyers if such measures are expected to produce information in respect of which the lawyer would have the right to refuse to testify. For information obtained contrary to this provision, the law provides for a prohibition on the use of evidence.

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10 LG Gießen, 25.06.2012 – 7 Qs 100/12, WiJ 2013, 104 (https://openjur.de/u/433557.html) concludes this from the rule of law requirement to be derived from Art. 6 para. 3 of the Human Rights Convention, Art. 2 para. 1, Art. 20 para. 3 of the German Basic Law to give the accused the possibility of an orderly and effective defence; see also Hauschild, Münchener Kommentar zur StPO, § 93, margin 8.

11 The wording of Section 160a StPO reads as follows:
"Measures directed at persons entitled to refuse testimony on professional grounds
(1) An investigation measure directed at a person designated in section 53 (1) sentence 1 no. 1, 2 [note: = defense counsel] *or 4, a lawyer or a non-lawyer provider of legal services who has been admitted to a bar association is inadmissible if it is expected to produce information in respect of which such person would have the right to refuse to testify. Any information which is obtained nonetheless may not be used. Any recording of such information is to be deleted without delay. The fact that the information was obtained and deleted is to be placed on record. If information about a person referred to in sentence 1 is obtained through an investigation measure which is not aimed at such person and in respect of which such person may refuse to testify, then sentences 2 to 4 apply accordingly.*
(2) Insofar as a person designated in section 53 (1) sentence 1 nos. 3 [note: includes other lawyers then defense counsels] *to 3b or no. 5 would be affected by an investigation measure and it is to be expected that information would thereby be obtained in respect of which the person would have the right to refuse to testify, particular consideration is to be given thereto when examining proportionality; if the proceedings do not concern an offence of substantial significance, then, in principle, no overriding interest in prosecuting the offence is to be presumed. Insofar as is expedient, the measure should be dispensed with or, to the extent possible for this type of measure, restricted. Sentence 1 applies accordingly to the use of information for evidential purposes. Sentences 1 to 3 do not apply to lawyers and non-lawyer providers of legal services who have been admitted to a bar association.*
(3) Subsections (1) and (2) apply accordingly insofar as the persons designated in section 53a would have the right to refuse to testify.
(4) Subsections (1) to (3) do not apply if certain facts give rise to the suspicion that the person who is entitled to refuse to testify participated in the offence or in handling stolen data, aiding after the fact, obstruction of prosecution or punishment, or handling stolen goods. If the offence may be prosecuted only upon request or only upon authorisation, sentence 1 applies in the cases under section 53 (1) sentence 1 no. 5 as soon as and insofar as the request to prosecute has been filed or the authorisation granted.
(5) Section 97, section 100d (5) and section 100g (4) remain unaffected."

For other lawyers Section 160a (2) StPO provides for special consideration in the context of the proportionality test.

The relation between Section 97 StPO and Section 160a (1) sentence 1 StPO was the subject of dispute in German legal texts. The Federal Constitutional Court held in the VW-case that it did not violate constitutional law that the courts did not consider the prohibition of evidence collection under § 160a (1) sentence 1 StPO to be applicable in the area of seizure.[12]

At the same time, it has been concluded that Section 160a (1) sentence 1 StPO does not preclude searches of lawyers' offices insofar as these are aimed at seizures permitted under Section 97 StPO. Section 160a StPO therefore only applies to other investigative measures, such as telephone surveillance.

II. PROTECTION OF COMPANIES IN CRIMINAL PROCEEDINGS

In general, all this also applies to correspondence between companies and their lawyers, although, formally, companies cannot be accused in criminal proceedings under German law.

In certain circumstances, a company can be sanctioned for their representatives' criminal offenses, i.e. under Section 30 of the Act on Regulatory Offenses (OWiG). Section 444 StPO allows the court to order the company's participation in the respective criminal proceedings (so-called: co-participation). In such cases, the company has a position similar to that of an accused person and consequently, enjoys similar protections to those of other defendants.

This protection also prohibits the confiscation of relevant communication between the company and its lawyers under Section 97 (1) no. 3 StPO. Whereas the scope of protection is more or less the same as for individuals, the determination of the exact point at which a company may be considered to be in a "similar position to that of an accused person" is much more difficult and remains in legal flux.

12 *BVerfG*, 27 June 2018 as in FN 9. The reasoning leading to this conclusion is that Section 97 StPO is a special provision for seizures, which in principle supersedes the provision of Section 160a (1) sentence 1 StPO. This follows from Section 160a (5) StPO, according to which Section 97 StPO remains unaffected. See also BT-Drs. 16/5846.

The leading case in this regard was handed down by the Federal Constitutional Court in 2018, when the Court upheld the seizure of legal correspondence produced by an internal investigation.[13] In 2017, the Munich public prosecutor's office had searched the American law firm Jones Day in connection with the diesel scandal and seized documents from internal investigations conducted by Jones Day on behalf of VW at the VW subsidiary Audi.

Firstly, the Court reiterated that Section 97 (1) no. 3 StPO only protects communications between the lawyer and the accused from confiscation. Extending its protection to all communications between a client and his lawyer would open the door to abuse. In mala fides the court explicitly addressed the risk of "large companies in particular having a variety of interest keeping certain records out of the reach of law enforcement through internal investigations".

Secondly, it was not arbitrary for the lower court to assume that a company is not only protected by Section 97 (1) StPO if it is already considered a co-participant. At the same time, the mere fear of a future investigation procedure would not suffice either. Accordingly, the lower court reasonably focused on the criterion that there must be sufficient suspicion of a criminal offense or breach of a supervisory duty by a company's representative, therefore giving rise to the risk of being sanctioned in the future.

In the context of internal investigation this decision has dire consequences: if the company is not yet in a position similar to an accused individual, all work products acquired by the investigating lawyers can be legally seized. Therefore, the company might find itself under the obligation to carry out investigations in the event of suspicious circumstances and at the same time must fear that the relevant documents or reports will be seized and used by the state later on.

However, as the Federal Constitutional Court only focused on the fact whether the actions by the lower court were arbitrary, its judgment should be considered as a guideline rather than a clear settled standard.

Also, both, the lawyers (Application No. 1022/19) and the law firm itself (Application No. 1125/19) have lodged an appeal against this decision with the ECtHR which has accepted the case for decision.[14]

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13 *BVerfG*, 27 June 2018 as in FN 9.

14 ECtHR – Applications nos. 1022/19, 1125/19 Kock and Jones Day v. Germany (https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-210688%22).

III. THE LAWYER HIMSELF BEING ACCUSED OF A CRIMINAL OFFENCE

Legal privilege does not apply if the lawyer himself is suspected of involvement in the alleged offence. This applies equally to situations where the lawyer is suspected of aiding and abetting, obstruction of justice and receiving stolen goods (not money laundering).[15] The abrogation of legal privilege in this way requires that the suspicion of the lawyer's involvement is based on sufficiently probative facts.

If a defence lawyer knowingly makes false statements about his possession of documents in order to frustrate their seizure by investigating authorities, he exceeds the limits of lawfulness. Such behaviour would constitute the offence of obstruction of justice (Section 258 StGB) if it delays criminal proceedings against the client, at least for a considerable period of time. Simple suspicion of such an offence is enough to override the legal privilege.

If the lawyer is himself an accused person in connection with a client relationship, he does not commit a betrayal of secrets pursuant to Section 203 StGB by revealing information in his own defence. Rather, he is permitted under professional law pursuant to Section 2 (3) of the Professional Code of Practice for Lawyers (BORA) to make such statements in his defence, even if he thereby discloses secrets from the client relationship.

IV. BAN OF ILLEGALLY OBTAINED EVIDENCE ("BEWEISVERWERTUNGSVERBOT" AND „BEWEISVERWENDUNGSVERBOT")

Under the German Code of Criminal Procedure, there is no principle that violations of a ban on the collection of evidence necessarily preclude the use of that evidence. Rather, the interests of the state in prosecuting the offence and the rights of the accused must be weighed up in each individual case. When conducting this balancing exercise, the seriousness of the offence and the interference with fundamental rights on the part of the accused are considered. In practice, it is only in exceptional cases, for example where investigating officers have acted arbitrarily, that a prohibition on the use of evidence may be assumed.

15 Meyer-Goßner, StPO,66. edition, 2023, § 160a, marginal no. 15; *Kreicker*, as in FN 5, § 53 margin 23.

An exception in this respect is Section 160a (1) sentences 2 and 3 StPO, which stipulate that information obtained contrary to the prohibition in paragraph 1 may not be used and must be deleted immediately.

In the rare cases where evidence is determined to be inadmissible, evidence derived from that evidence will not be excluded; the so-called “Fruit of the Poisonous Tree Doctrine” known especially from the US legal system, is an unknown concept in German law.

V. CONCLUSION

Even if German criminal law does not provide comprehensive legal privilege, the current standards do guarantee extensive protection of legal correspondence and defence documents. The protection can be lost if the lawyer himself is suspected of committing a criminal offence.

In recent years, however, there has been a tendency in case law to restrict this protection. The high point so far in this respect has been the repeatedly cited decision of the Federal Constitutional Court in the VW case. The tendency, both within Germany and elsewhere to restrict defence rights, raises concern that further restrictions will follow in future.

In addition, when defending companies, great care must be taken to identify the parties to the defence relationship.

KHAITAN & Co, India

LEGAL PRIVILEGE IN ATTORNEY-CLIENT COMMUNICATIONS: INDIA

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1. INTRODUCTION

It is often remarked, never hide anything from your doctor and lawyer, but unfortunately, the conversations with your doctor may not get you the same level of privilege protection from law enforcement agencies and courts in India, the way it extends to that with your lawyer.

The attorney-client privilege or the rule of privilege is a critical legal concept that ensures that conversations between a client and their attorney are kept confidential and protected. This privilege covers not only conversations between attorney and their client, but also any documents or messages shared with attorneys when they are acting in their professional capacity.[2] The rule of privilege says that all the discussions of the client with the attorney should stay private, so one can get protected legal advice.[3] The attorneys are not permitted, at any point, to disclose any confidential information/documents of the client without the express consent of the client. Further,

1 www.khaitanco.com.
2 Sweet & Maxwell, Phipson on Evidence (15th edition, paragraphs 20-05, 20-06), (2000).
3 Jones v. Great Central Railway Co. [1909] UKHL 1039 (02 April 1909).

the client cannot be coerced into divulging to the Court any confidential and privileged communication that he had with his attorney.[4] The privilege commences post the attorney-client relationship is established, typically through an engagement letter or a verbal agreement.[5]

This concept of privileged communication has been debated and developed over time. In some jurisdictions, legal privilege is seen as a fundamental right,[6] whereas in others, it is seen more as a procedural issue. However, not all conversations with an attorney can be protected by privilege.[7] In today's world, where business and legal issues often cross borders, understanding how attorney-client privilege works in different jurisdictions becomes significant. The laws and rules about legal privilege in different parts of the world can be very different, making it complex for global corporations facing legal investigations in multiple countries.

This chapter aims at providing an understanding of legal privilege in India, by underscoring the significance of legal privilege within the legal framework, and covering significant issues and evolving standards in India. The chapter also discusses best practices for maintaining confidentiality, addressing common issues while presenting practical solutions, and emphasizing the importance of securely exchanging sensitive information within the ambit of legal privilege.

2. EVOLUTION OF THE JURISPRUDENCE OF THE ATTORNEY-CLIENT PRIVILEGE

The concept of attorney-client privilege dates back to the 16th century.[8] Originally it was a principle that relied on the integrity of attorneys. This privilege was based on what is known as the "theory of attorney exemption", where attorneys were morally bound by their profession's oath and honor to safeguard their clients' secrets. Consequently, by the end of the 18th century, a new perspective emerged, emphasizing client-focused confidentiality as the primary rationale for the attorney-client privilege.

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4 Section 129, Indian Evidence Act, 1872.

5 *Kalikumar Pal v. Rajkumar Pal*, (1931)58 Cal 1379.

6 Stefanelli, Justine N., "*THE NEGATIVE IMPLICATIONS OF EU PRIVILEGE LAW UNDER 'AKZO NOBEL' AT HOME AND ABROAD*" The International and Comparative Law Quarterly, vol. 60, no. 2, 2011, pp. 545–56. JSTOR, http://www.jstor.org/stable/23017013.

7 Epstein, Edna Selan, "*A Modest Proposal to Address the Costs of the Attorney-Client Privilege*" Litigation, vol. 44, no. 3, 2018, pp. 16–20, JSTOR, https://www.jstor.org/stable/27171276.

8 Geoffrey C. Hazard Jr., *An Historical Perspective on the Attorney-Client Privilege*, California Law Review, vol. 66, no. 5, 1978, pp. 1061–91, *available at*- https://doi.org/10.2307/3479905.

This new justification focused on ensuring the client's freedom to share their concerns with their legal advisor without fear. This shift marked the evolution of the modern attorney-client privilege.[9] Over time, this privilege has evolved to cover all legal advice consultations.

Today, the debate surrounding attorney-client privilege isn't whether it should exist or not, but rather what should be the scope of it. There is a widespread consensus that the rule of privilege should not be completely abolished, as doing so would entail significant consequences. Total abolition would mean that individuals accused in criminal cases would not be able to freely discuss their version of events with their attorneys without risking their conversations being disclosed to the prosecution. This would infringe upon a person's right to legal counsel and their privilege against self-incrimination.[10] The rule of privilege has now become an integral part of common law and is recognized worldwide.

3. THE SCOPE OF PRIVILEGE

In India, professional communications between attorneys and their clients are protected by a legal framework that includes the Indian Evidence Act of 1872, the Advocates Act of 1961 ("**Advocates Act**"), and the Bar Council of India Rules. Sections 126-129 of the Indian Evidence Act ("**Evidence Act**") establish the common law principles governing professional communications between attorneys and clients. The rule of privilege also finds mention in the Code of Civil Procedure, 1908 and the Companies Act, 2013.[11]

Section 126 of the Evidence Act provides protection for any communication between a client and their attorney, documents shared during their professional work, and advice given by the attorney. Such communication or document exchange should have taken place during the course, and for the purpose, of their engagement. Thus, legal advice is protected by privilege, and so are communications/documents prepared in anticipation of litigation.[12] However, when the advice given by the attorney to the client has no real or substantial connection to any law, the same would be considered non-legal

9 *Supra* note 8.

10 Elizabeth G. Thornburg, *Sanctofying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, Notre Dame Law Review (1999), *available at-* https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1960&context=ndlr.

11 Order XI, Rule 19(2), Code of Civil Procedure, 1908.

12 *Larsen & Toubro Limited v Prime Displays (P) Ltd* (2003) 114 CompCas 141 (Bom); *Gurunanak Provisions Stores v Dulhonumal Savanmal and Ors*, AIR 1994 Guj 31.

communication, and would not be protected.[13] It should be borne in mind that privilege does not extend to communications made in furtherance of any illegal purpose, or any communication that shows that crime was committed since the commencement of the attorney's employment.[14]

Section 129 of the Evidence Act provides protection for the client when it comes to the disclosure of private conversations that have taken place between them and their legal advisor. Generally, such conversations are not required to be revealed to the court, except if the client decides to testify in the case.

Under section 227 of the Companies Act, 2013, any privileged communication made to a legal advisor in their professional capacity is protected, with the exception of disclosing the name and address of the client. Such communications should not be disclosed to the Tribunal, the Central Government, the Registrar, or an inspector appointed by the Central Government. Additionally, section 23 of the Evidence Act protects admissions made by parties during negotiations referred to as 'without prejudice.' In such negotiations for settlement, parties agree not to disclose these admissions in court.[15] This ensures that one party cannot use another party's admission against them during legal proceedings, promoting open and honest negotiations in pursuit of reaching settlements.

When an individual seeks advice from an attorney who is registered under the Advocates Act, an attorney-client privilege is established, and information during these interactions is protected under section 126 of the Evidence Act[16]. The attorney must be qualified to practice and be enrolled as an advocate under the Advocates Act, 1961 to invoke the privilege. Section 29 of the Advocates Act explicitly states that the practice of law in India is exclusively reserved for advocates, whereas section 2(a) of the Advocates Act precisely defines the term.[17] Thus, non-attorneys, such as accountants and business consultants, do not fall under the umbrella of this privilege.[18] However, if the attorney engages any external intelligence and/or forensic experts for the purposes of the legal case, then the privilege would extend to the work of these external experts as well.

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13 *Municipal Corporation of Greater Bombay v Vijay Metal Works*, AIR 1982 Bom 6.

14 *Kameswara Rao v. Satyanarayana,* C.R.P Appeal No. 1357 of 1983 before Andhra Pradesh High Court (decided on 29 November 1983).

15 *Supra* note 13.

16 Section 126, Indian Evidence Act, 1872.

17 Section 2(a) of the Advocates Act, 1961 states that an "advocate" means an advocate entered in any roll under the provision of the Advocates Act, 1961.

18 *Id.*

In *Kalikumar Pal v. Rajkumar Pal,*[19] it was held that privilege under section 126 of the Indian Evidence Act, 1872[20] applies exclusively once an attorney-client relationship has been established and does not extend to any period before such a relationship is formed. The attorney-client relationship is typically established when an individual or entity seeking legal representation formally engages the services of an attorney. This can occur through the signing of an engagement letter, which outlines the terms of the legal representation, responsibilities, and fees. Alternatively, it can be established through an oral agreement between the client and the attorney, where both parties agree to work together on a specific legal matter. In either case, this relationship is characterized by confidentiality and privilege, ensuring that the attorney can provide legal advice and the client can openly discuss their legal concerns, creating a foundation for effective legal representation. The Hon'ble Supreme Court of India, in the case of ***V.C. Rangadurai v. D. Gopalan***[21], has also held that if an attorney discerns a potential conflict of interest when taking on a new client, they should refrain from accepting the case if it goes against the interests of their previous client. This legal principle emphasizes that breaching the fiduciary duty that arises from the attorney-client relationship constitutes misconduct and a conflict of interest.

Interestingly, in *Tamil Nadu Information Commission and M Sivaraj*[22], it has been held that even public prosecutors are unequivocally bound by legal privilege under section 126 of the Evidence Act, and parties seeking information relating to the state must approach the state government itself, as public prosecutors cannot disclose such information.

19 *Kalikumar Pal v. Rajkumar Pal* (1931)58 Cal 1379.
20 Section 126, Indian Evidence Act, 1872.
21 V.C. Rangadurai v. D. Gopalan (1979) 1 SCC 308.
22 2010 (5) CTC 238.

4. COMMUNICATIONS WITH IN-HOUSE COUNSEL

In-house counsels in India do not enjoy the same legal privilege as external attorneys. Professional communications between an in-house counsel and officers, directors and employees of a company are also not protected as privileged communications between an attorney and the client.[23]

The Evidence Act recognizes barristers, attorneys, pleaders, or vakils but does not explicitly include the in-house counsel. Section 2(a) of the Advocates Act defines an advocate as someone who is registered with the State Bar Council. Attorneys in India who become full-time employees of a company are generally required to surrender their license.[24] In such cases, the legal privilege afforded to external attorneys do not apply, as they are considered to be the employees of their respective company. However, if an in-house counsel retains their advocate status and continues to provide legal advice, then legal privilege becomes a subjective analysis, depending on factors such as the content of communication and the nature of their employment.

The Supreme Court in ***Satish Kumar Sharma v. Bar Council of Himachal Pradesh***[25] has held that if a full-time employee of a company does not represent the employer or engage in advocacy but is required to do other kinds of functions, they lose their advocate status, becoming mere employees without legal privilege. In line with this, various High Courts in India have suggested that in-house counsels should be granted legal privilege for legal communications with their employer, provided the discussions pertain to legal advice or potential litigation and not administrative or executive matters.[26] Thus, based on judicial precedents, communications between an attorney and a corporate client's employees, communicating on behalf of, and seeking legal advice for the company, would be protected by privilege, however, the in-house counsel's communication with a corporate client's employees would only be protected by privilege if it pertains to legal advice or potential litigation.

Usually, to circumvent the ambiguity in the law, the employment contracts of in-house counsels in India usually contain a confidentiality clause which shields any information disclosed by the employees/directors of the company to the in-house counsel during the course of his/her employment.[27]

23 Susmit Pushkar and Bhavna Mishra, *GIR privilege Know-How 2020, India Chapter,* available at https://globalinvestigationsreview.com/insight/know-how/privilege/report/india.

24 Part VI, Chapter II, Section VII, Rule 49 of the Bar Council of India Rules.

25 AIR 2001 SC 509.

26 *Municipal Corporation of Greater Bombay v Vijay Metal Works*, AIR 1982 Bom 6; *Larsen & Toubro Ltd v Prime Displays (P) Ltd,* [2003] 114 Comp Cas 141 (Bom).

27 *Supra* note 21.

5. EXCEPTIONS AND WAIVER TO THE ATTORNEY-CLIENT PRIVILEGE

The Indian legal landscape surrounding attorney-client privilege is characterized by a delicate interplay of exceptions and the concept of waiver. These exceptions, clearly defined in section 126 of the Evidence Act, delineate the boundaries of the legal safeguard, underlining that it does not extend to communications involving illegal activities. Additionally, the pivotal concept of waiver takes center stage, with express and implied forms offering clients different paths to relinquish their privilege. While express waiver necessitates clear and explicit client consent, implied waiver relies on a nuanced interpretation of a client's actions. This intricate legal framework seeks to strike a balance between safeguarding confidentiality and addressing potential misuse of attorney-client privilege.

5.1 EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE IN INDIA:

The provisos under section 126 of the Evidence Act enumerate the exceptions to the rule of privilege. Any communications made in furtherance of an illegal purpose or any fact coming to the knowledge of the attorney since the commencement of his employment showing that any crime or fraud has been committed are not protected. It is settled law that illegal purpose prevents the privilege from attaching.[28]

Further, in *Memon Hajee Haroon vs. Abdul Karim*[29], it has been held that that in order to claim privilege under section 126 of the Evidence Act, information must be "confidential" in nature. Thus, information obtained from a non-privileged source is not protected by attorney-client privilege, even though the said information could also be part of the attorney-client communication. If the underlying information is available with third parties, such third parties not bound by the attorney-client relationship can be compelled to tender evidence as regards the underlying information.[30]

Communication of legal advice to accountants and auditors, for instance, may not be protected by privilege. However, as per section 127 of the Evidence Act, interpreters and clerks or servants of the attorney can be privy to the communication without breaking privilege.

Also, as mentioned before, privilege doesn't attach to a communication made before the creation of an attorney-client relationship.

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28 *Supra* note 9.
29 [1878] 3 Bom. 91.
30 *Supra* note 21.

5.2 WAIVER AND TERMINATION OF ATTORNEY-CLIENT PRIVILEGE IN INDIA:

In India, legal privilege does not terminate on the death of either the attorney or client, or by the termination of the litigation. However, once the client, either expressly or impliedly, waives the privilege, the privilege is considered terminated.[31]

The concept of waiver assumes a pivotal role, with two distinct forms: express and implied.[32] In India, the privilege is the privilege of the client and not of the attorney. The attorney is bound by that privilege, unless waived by the client.

Section 126 of the Evidence Act is the legal provision that permits the waiver of attorney-client privilege, stipulating the need for the "express consent" of the client. However, despite this statutory framework, there is limited jurisprudence in India that provides clarity on the scope of waiver, particularly in cases where express consent is absent, leaving room for legal ambiguity and debate.[33] The crux revolves around establishing a clear and unequivocal intent to waive the privilege.

In contrast, implied waiver can be inferred from a client's conduct or actions that manifest an intention to waive the privilege. Such consent can be inferred from the facts and circumstances of each case. Such situations may arise when clients seek legal advice in the presence of third parties or if the client discloses information to third parties. However, privilege will not be considered waived if the attorney makes an inadvertent disclosure. If an inadvertent disclosure is made, the attorney can request the recipient to delete any copies of the privileged communication inadvertently disclosed to a third party or request return of the privileged material. The attorney can put the third party to notice regarding the privileged and confidential nature of the information and liability in the case of misuse of privileged information.[34]

Further, Section 128 provides for waiver of privilege if the client questions his own attorney in any court proceedings regarding disclosures which he would otherwise not be at liberty to disclose. Section 129 provides for waiver of privilege if the client volunteers himself as a witness, and the court believes that disclosure of any privileged communications with the attorney are important to explain evidence provided by such client in the proceedings.

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31 *Supra* note 21.
32 *Kanchan Udyog Ltd. v. United Spirits Ltd.*, (2017) 8 SCC 237.
33 *Bernad Thattil v. Ramachandran Pillai*, 1987 Cri LJ 739.
34 *Supra* Note 21.

6. CONCLUSION

Despite relatively limited discussions and legal precedent surrounding attorney-client privilege in the Indian context, this rule of privilege remains a crucial and formidable shield for protecting individuals and their confidential legal communications. While the attorney-client privilege is recognized in Indian law, its application and nuances are often subject to ambiguity and inconsistency. The Indian Evidence Act, 1872, provides some protection for attorney-client communications, but the rules lack specific guidelines, leading to uncertainty. Overall, the development of attorney-client privilege in India is ongoing, and addressing the nuances and gaps in its application is essential for a more robust and consistent legal framework.

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THE LAW OF PRIVILEGE IN IRELAND

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1. INTRODUCTION

Honest, free and open communication between a client and their lawyer is a key tenet of the Irish legal system, necessary in order to uphold the rule of law.[4] Indeed, the Irish Court of Appeal has previously referred to the right to claim legal professional privilege and the right to protect privileged documents from disclosure as *"one of the great bulwarks of our legal system"*.[5]

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4 "The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice systemdepends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it." University College Cork v ESB [2014] IEHC 135, Finlay Geoghegan J at 31 referring to Fish J at 26–27 of Blank v Canada 2006 SCC 39, [2006] 2 SCR 319.

5 IBRC & Ors v Quinn & Ors [2015] IECA 84.

There are two categories of legal professional privilege recognised in Ireland, namely:

- Legal advice privilege, which protects confidential information contained in communications between a lawyer and their client in the context of a professional legal relationship where the communication is made for the dominant purpose of seeking, giving or receiving legal advice; and
- Litigation privilege, which applies to communications between persons engaged in or preparing for litigation or, in more recent times, a regulatory investigation and which protects confidential communications between a lawyer and a client or between one of them and a third party, the dominant purpose of which is use in connection with actual or contemplated litigation or a regulatory investigation.

This chapter provides a broad overview of each of these categories of legal professional privilege in turn. It also offers some practical guidance on the best practice to attract and maintain legal professional privilege under Irish law.

All references are to the Irish courts unless otherwise stated.

2. LEGAL ADVICE PRIVILEGE

The High Court set out the features of legal advice privilege (**LAP)** in Irish law in O*chre Ridge Ltd v Cork Bonded Warehouses Ltd.*[6] In summary, in order for LAP to apply:

- There must be a **communication** made between a person and their lawyer for the purpose of obtaining legal advice;
- The **dominant purpose** of the communication must be to give or receive **legal advice;**
- The communication at issue must be **made in confidence** and be **confidential** in nature; and
- A professional **lawyer-client relationship** must exist between the person and the lawyer.

We address each of these criteria in turn.

6 [2004] IEHC 160.

2.1 COMMUNICATION

The term *'communication'* is interpreted broadly and can generally capture all correspondence and conversations between lawyer and client. In addition, in *Hurstridge Finance v Lismore Homes*, LAP was held to apply to notes made by a solicitor of a telephone conversation between the solicitor and their client and to notes made by a solicitor for the purposes of preparing a draft letter because the purpose of these notes was to advise the client as to the correct legal step to take.[7]

The application of LAP to information communicated between a person and their lawyer is not usually controversial. However, the issue can be less straightforward in relation to drafts and preparatory materials (i.e. other than those created by or commented on by lawyers). In *Ryanair v Channel 4 Television Corporation & anor, Channel 4 asserted LAP over draft scripts of a television programme in defamation proceedings taken by Ryanair about the content of that programme.*[8] Ryanair had argued that the drafts of the scripts were not created for the purposes of receiving legal advice. However, the court identified that the issue for consideration was whether the draft scripts would disclose legal advice sought or given about their content.[9] It was held that LAP did apply to material that, due to various changes made to successive versions of the document, would reveal legal advice given by lawyers to a client.

2.2 DOMINANT PURPOSE

A key requirement necessary in order for a communication to attract LAP is that it must be made for the 'dominant purpose' of the seeking or giving of legal advice. The dominant purpose test has been endorsed in *Ochre Ridge*[10], in *Hansfield Developments v Irish Asphalt Ltd*[11] and in *Prendergast v McLoughlin*.[12] In the latter, the court also noted that where the dominant purpose of a communication is for the purposes of obtaining legal advice, then it is not appropriate to engage in a detailed analysis of the communication in order to identify whether minor elements of the communication might not have been designed for the purposes of seeking legal advice.[13]

7 Hurstridge Finance Ltd v Lismore Homes, Unreported, High Court, Costello J., 15 February 1991 at 2, 3 and 4.
8 [2017] IEHC 651.
9 Ibid, at 78.
10 See footnote 6.
11 Hansfield Developments v Irish Asphalt Ltd [2009] IEHC 420.
12 Prendergast v McLoughlin [2008] IEHC 296, at 4.7.
13 Ibid.

Legal advice vs legal assistance

Irish law draws a distinction between the provision of legal advice, which attracts legal privilege, and legal assistance, which does not.

In practical terms, legal advice comprises advice to a client regarding what should prudently be done in a given legal situation, whereas legal assistance comprises the conduct of administrative tasks often carried on by lawyers. For example, a lawyer communicating with their client regarding the legal risks attaching to a prospective agreement would qualify as legal advice, which would be privileged. By contrast, a lawyer communicating with their client regarding arrangements for the execution of the agreement would only constitute legal assistance, which would not be privileged.

The Irish courts have previously held that instructions as regards drafting of transaction documentation[14] and instructions for the drafting of a will[15] constituted legal assistance, not legal advice.

This distinction between legal advice and legal assistance is a particularly significant concern for in-house lawyers (on which, see further below), who often fulfil both legal advisory and operational functions.

2.3 CONFIDENTIALITY

A communication must be confidential as between the client and their lawyer in order to attract LAP. In *Bord na gCon v Murphy,* the Supreme Court said that *"the protection which extends to communications between a solicitor and client depends upon the confidential nature of the communication."*[16] In a later case, *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd,* the respondent claimed that correspondence with its solicitor regarding a transaction was privileged.[17] This correspondence contained instructions in relation to the drafting of the transaction documentation but did not seek or contain legal advice concerning the transaction. On appeal, the Supreme Court upheld the High Court's decision and dismissed the appeal concluding that the documentation contained no information nor remarks that could be regarded in any way as being confidential.

14 See footnote 17. Endorsed by Laffoy J in Martin v Legal Aid Board [2007] 2 IR 759.
15 See footnote 12.
16 [1970] IR 301.
17 [1990] IR 469 at 473.

In most circumstances, loss of confidentiality will defeat a claim of privilege. The professional legal relationship was considered in the High Court in *Sports Direct International plc v Minor & Ors.*[18] The court stated that privilege may be waived by disclosure and that it will be lost where a privileged document comes into the public domain, implying that privilege only exists as between the lawyer and the client.[19] However, the court noted that privilege will not be lost where there is limited disclosure for a particular purpose or a disclosure to parties with a common interest in the privileged material[20] (on which, see further below).

Therefore, as discussed further below, parties wishing to assert privilege should be extremely careful about sharing confidential legal advice outside of a lawyer/client relationship, as the presence of a third party—i.e. someone outside the professional legal relationship—will most often preclude a showing of confidentiality. Where it is necessary to share privileged documents outside a relevant client group, this should only be done subject to a suitable limited waiver or common interest privilege agreement.

2.4 LAWYER-CLIENT RELATIONSHIP

The final element of LAP is that the communication must be made within the course of a professional legal relationship between a client and their lawyer.[21]

'Lawyer'

Irish law defines *'lawyer'* relatively widely for the purposes of interpreting the professional legal relationship. It covers solicitors, barristers, salaried in-house legal advisers and foreign lawyers.[22]

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18 [2015] IEHC 650.

19 Ibid, at 44. The High Court also added that there is no universal rule that the disclosure of documents produced for the purposes of seeking legal advice or in contemplation of litigation, to a stranger, constitutes a waiver of the privileged nature of that material.

20 Ibid, at 45: "If legal advice obtained by one person is passed on to another person for the sake of informing that other person in confidence of legal advice which that person needs to know by reason of a sufficient common interest between them, it would be contrary to the principle upon which all legal professional privilege is granted to say that the legal advice which was privileged in the hands of the first party should be lost when passed over in confidence to the second party, merely because it was not done in the context of pending or contemplated litigation."

21 "In Minter v Priest, the Court of Appeal explained that the confidential relationship between a solicitor and client is established from the moment the solicitor invites that prospective client to tell him about matters on which he seeks advice and which are within the scope of that solicitor's particular expertise." G v G [2015] EWHC 1512 (Fam) per Roberts J at 87.

22 McMahon v Irish Aviation Authority [2016] IEHC 221.

Irish law does not draw any distinction in principle between external lawyers and in-house counsel. However, importantly, privilege will only apply to communications containing legal advice and made by in-house counsel *in their capacity as legal advisor to their corporate client* (i.e. the business that employs them). Communications made by in-house counsel in any of the other capacities in which they can frequently act (e.g. business, commercial, administrative, executive) or the discharge of any function besides that of providing legal advice are not protected by privilege.[23]

It is also important to note that Irish law diverges from EU law as the latter does not afford the protection of privilege to legal advice provided by in-house lawyers. The CJEU has held that privileged communications must **"***emanate from independent lawyers, that is to say lawyers who are not bound to the client by a relationship of employment*".[24] Consequently, as recently confirmed in *Orde van Vlaamse Balies and Others v Vlaamse Regering,* privilege does not apply in Ireland as between an in-house legal adviser and a client in the context of any competition law investigations by the European Commission.[25]

As regards foreign lawyers, there is English jurisprudence (which is generally considered persuasive by the Irish courts, in view of the shared common law tradition) that states that a foreign lawyer can construct a professional legal relationship and provide advice regardless of whether they advise on the law of the location in which they are situate or the law of their own jurisdiction.[26]

'Client'

The issue of who constitutes the 'client' for the purposes of a lawyer-client relationship is generally straightforward when it comes to individuals instructing lawyers to advise them personally, but is more complex when it comes to corporate clients.

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23 Ochre Ridge Ltd v Cork Bonded Warehouses Ltd [2004] IEHC 160; F&C Reit Property Asset Management plc v Friends First Managed Pension Funds Ltd. [2017] IEHC 383.

24 Case C-155/79, AM&S Europe Ltd v Commission, at 21; see also Case C-550/07 P, Akzo Nobel Chemicals Ltd v Commission.

25 Case C-694/20.

26 "The fact that the advice was given [by American lawyers] related predominantly to English law is irrelevant. It was advice of foreign lawyers, acting as lawyers, to be used by Phoenix to decide what strategy to adopt in carrying on business." IBM Corp v Phoenix International (Computers) Ltd [1995] 1 AIIER 413.

The position in English case law is that not all employees of a corporate entity will be considered clients for the purposes of privilege. Rather, only employees who are tasked with seeking or receiving legal advice will be considered to be *'clients'*.[27] This position has been widely criticised. Though the Irish courts have not, to date, expressly adopted it, there is a reasonable prospect that they could do so.[28] Therefore, the prudent approach is for corporate entities to assume that *'client'* could be interpreted restrictively in Ireland and to take steps to ensure they attract and preserve privilege accordingly.

For example, they should identify a core client group who will be responsible managing the particular project to which the legal advice relates. This group should be responsible for the following:

- determining the issues in respect of which legal advice is needed, whether internally via in-house counsel or externally;
- considering how that advice should be implemented correctly (i.e. as distinct from simply executing its implementation); and
- determining when it is appropriate to seek advice from external counsel and instructing them where appropriate.

The membership of the client group should be documented and kept under review. Rights to access privileged information should be limited to this client group, at least in the first instance.

3. LITIGATION PRIVILEGE

Litigation privilege protects confidential communications where the communication came into existence for the sole or dominant purpose of preparing for, or for being used in connection with, ongoing or reasonably apprehended litigation or regulatory investigation. Litigation privilege is wider than LAP. It can apply not only to communications between a lawyer and a client, as occurs with LAP, but may also apply as between either the lawyer or the client and other third parties. For example, it can attach to confidential communications with, and documents prepared by, e.g. expert witnesses or non-legal functions within a business who do not form part of the 'client' group.

27 Three Rivers District Council v Bank of England [2003] EWCA Civ 474.

28 See in particular University College Cork v ESB [2014] IEHC 135, at 47, where the Irish High Court noted that "it appears necessary to consider whether the individual making the communication is a person engaged or employed to obtain or receive legal advice on behalf of the client."

Unlike LAP, which applies on a *"once privileged, always privileged" basis, litigation privilege will apply to a document only for the duration of the relevant litigation or regulatory investigation, and any closely related matters.*

3.1 DOMINANT PURPOSE TEST

Certain of the elements of LAP apply equally to litigation privilege, such as the requirement that communications be confidential in nature. *'Lawyer' and 'client' in this context also have the same meanings as set out above.*

However, for litigation privilege to attach, the dominant purpose of the communication at issue must be for use in or to prepare for litigation or a regulatory investigation. [29]

The test has recently been articulated by the High Court as requiring consideration of the following factors:

A. Whether litigation / regulatory investigation was reasonably apprehended at the time the documents in question were brought into being;
B. Whether the documents in question were brought into being for the purpose of that litigation / regulatory investigation;
C. If the documents were created for more than one purpose, the documents will be protected by litigation privilege in the event that the litigation / regulatory investigation was the dominant purpose;
D. The party claiming privilege has the onus of proving that the documents are protected by privilege.

In determining a claim of privilege, the courts will assess evidence given as to the purpose of communications and will form their own view. For example, in *Gallagher v Stanley, the Supreme Court* rejected a hospital's claim of litigation privilege over statements prepared by nurses pursuant to an incident of alleged medical negligence. The court recognised that apprehension of litigation was a reasonable consideration in preparing the statements, but that the dominant purpose of the statements was not in apprehension of this litigation and was instead to ensure that a factual account of the incident from the perspective of hospital staff was made contemporaneously.

29 Silver Hill Duckling Ltd v Minister for Agriculture [1987] 1 IR 289.

In *University College Cork v ESB,* the High Court rejected a claim of litigation privilege over reports of ESB staff made after litigation had been threatened. The court reasoned that, though one of the purposes for the preparation of the documents was the apprehended litigation, at least an equal purpose was the preparation of a flood report. Therefore, litigation was not the *dominant purpose.*[30] This **'***equal purpose'* analysis was also used in Hansfield Developments where Hansfield claimed litigation privilege over communications with a third party.[31]

If not actually live, the proximity of the litigation is such that it must be reasonably apprehended or threatened, beyond a mere possibility.[32]

3.2 LITIGATION AND REGULATORY INVESTIGATIONS

The term '*litigation'* applies to any legal proceedings issued before the courts. It also extends to tribunals and commissions of inquiry. This was confirmed in *Ahern v Judge Mahon & Ors,* where the High Court held that Bertie Ahern, then-Taoiseach (Prime Minister) of Ireland, was entitled to claim privilege in respect of communications between his legal advisers and a banking expert that he had engaged for the purposes of his appearance before a State tribunal.[33] The court also held that the fact that the tribunal was inquisitorial in nature, as opposed to adversarial or engaged in the administration of justice, would not affect the application of litigation privilege and that a witness appearing before such a tribunal is covered by litigation privilege.[34]

The Irish courts have also confirmed that litigation privilege equally extends to communications made for the dominant purpose of a regulatory or criminal investigation.[35]

4. COMMON INTEREST PRIVILEGE

Ordinarily, the absence or loss of confidentiality in privileged communications defeats privilege, such that it will either not attach in the first place or will be waived.

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30 See footnote 4, at 22.

31 The court stated that "having read the documents in this application, I am not satisfied that they were created for the dominant purpose of preparing for litigation, but that this purpose (if it existed) was secondary or equal to another purpose." Hansfield Developments & Ors v Irish Asphalt Ltd & Ors [2009] IEHC 90, at 14.

32 Gallagher v Stanley and the National Maternity Hospital [1998] 2 IR 267.

33 [2008] IEHC 119.

34 Ibid, at (F) and (I).

35 Quinn & Ors v Irish Bank Resolution Corporation Ltd & Anor [2015] IEHC 315.

So-called common interest privilege operates as an exception to this. It arises where material that would be privileged in the hands of one person is provided to a third party, but the privilege is nonetheless maintained due to a '*common interest' in the legal advice or the litigation to which the privileged material pertains as between the client and the third party.*

The following two conditions, which were set out in *Hansfield,* must be met in order for common interest privilege to attach to documents:[36]

- it must be shown that either legal advice or litigation privilege attach to the documents in the possession of the proper individual; and
- it must be established that the recipient of the document has a sufficiently close interest in the subject matter of the primary privilege.

5. BEST PRACTICE TO SEEK TO ENSURE THAT PRIVILEGE IS CREATED AND / OR MAINTAINED

The following are some general points to seek to ensure best practice in terms of both legal advice privilege and litigation privilege under Irish law:

- Mark documents '*Privileged and Confidential'* if the document contains legal advice or if it is in contemplation of litigation / regulatory investigation.
- Do not assume that any document handled or seen by a lawyer is automatically protected by privilege.
- Avoid creating documents that have multiple purposes. Ensure that privileged communications are separate to non-privileged communications in order to satisfy the dominant purpose test.
- If necessary to share privileged information, consider and note the reasons for sharing (common interest, limited waiver, etc.) and limit dissemination on a need-to-know basis, keeping the recipient group small. Depending on the circumstances, it may also be prudent / necessary to put in place a common interest privilege agreement.
- Only share privileged documents where there is a legitimate business need to do so.
- If sharing documents outside Ireland, it is important to remember that legal privilege can vary per jurisdiction so what is privileged in Ireland might not remain privileged abroad.
- Where litigation and/or a regulatory investigation is reasonably foreseeable in respect of an issue, consider creating a specific client group.

36 See footnote 11, at 37.

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THE IMPORTANCE AND SCOPE OF ATTORNEY-CLIENT PRIVILEGE IN ISRAEL

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INTRODUCTION

The principle of attorney-client privilege is an integral component of the legal systems around the world, founded on the fundamental right to a fair trial and effective representation.[1] This principle has been embraced and protected by legal frameworks to ensure that every individual has the ability to communicate freely with their legal representatives, secure in the knowledge that these communications will remain confidential.[2] As such, attorney-client privilege plays a crucial role in upholding justice, fostering trust, and promoting honest and open communication.[3]

In Israel, the importance of attorney-client privilege is no less significant. Rooted in the country's Evidence Ordinance and further reinforced by various case laws and ethical guidelines set out by the Israeli Bar Association, this privilege is recognized and respected for its contribution to the effective functioning of the justice system.

1 Hodás, M. (2017). Attorney-client privilege (History and aim–constitutional view). *Studia Iuridica Toruniensia, 21,* 119-144.

2 Hazard Jr, G. C. (1978). An Historical Perspective on the Attorney-Client Privilege. *Calif. L. Rev., 66*, 1061.

3 Rice, P. R. (1997). Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be *Abolished. Duke LJ, 47*, 853.

However, as with any legal principle, the application of attorney-client privilege in Israel is not without its complexities and challenges. Understanding its nature, scope, and limitations requires an exploration of the country's legal statutes, regulatory guidelines, and judicial decisions. This paper aims to provide a comprehensive examination of attorney-client privilege in Israel, elucidating its importance, legal foundations, and scope. It will also examine how this privilege corresponds with similar principles in other countries, the procedures for testing its scope, and recent developments in the field. Additionally, we will discuss the application of this privilege in internal investigations and offer best practices to ensure confidentiality.

THE IMPORTANCE OF ATTORNEY-CLIENT PRIVILEGE

At its core, the attorney-client privilege is a cornerstone of the legal profession, fundamental to ensuring effective legal representation and upholding the integrity of the justice system.[4] It allows clients to communicate with their attorneys openly and honestly, secure in the knowledge that the information they disclose will remain confidential. This free flow of information is critical for attorneys to provide accurate and comprehensive legal advice, advocate effectively on their clients' behalf, and uphold their clients' rights.[5]

In the context of the Israeli legal system, the importance of attorney-client privilege is profound. It is not only crucial for safeguarding individual rights but also instrumental in upholding societal values, such as the rule of law and the administration of justice. By fostering trust and facilitating communication between attorneys and their clients, this privilege allows for the diligent pursuit of justice.

Moreover, the attorney-client privilege also upholds the rights of the accused. In criminal cases, it ensures that defendants can fully disclose all relevant facts to their attorneys without fear of self-incrimination, enabling the attorneys to construct the most robust possible defense. As such, attorney-client privilege is indispensable for maintaining the balance of power in the adversarial legal system and ensuring that every individual, regardless of the accusations against them, has access to fair and competent legal representation. In the next section, we will delve into the legal foundations of attorney-client privilege in Israel, exploring the statutes, regulations, and case laws that define and protect this fundamental legal principle.

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4 Allen, R. J., Grady, M. F., Polsby, D. D., & Yashko, M. S. (1990). A positive theory of the attorney-client privilege and the work product doctrine. *The Journal of Legal Studies, 19(*2), 359-397.

5 Thornburg, E. G. (1993). Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege. *Notre Dame L. Rev., 69*, 157.

LEGAL FOUNDATIONS OF ATTORNEY-CLIENT PRIVILEGE IN ISRAEL

The legal basis for attorney-client privilege in Israel is rooted in the country's Evidence Ordinance (New Version) [1971], which implicitly recognizes the concept of professional confidentiality. Despite the absence of explicit statutory language, Israeli courts have consistently upheld the principle of attorney-client privilege, further reinforcing its standing in the legal landscape.[6]

Article 48 of the Evidence Ordinance provides a general rule of confidentiality for professionals. While this article does not explicitly mention attorneys, it has been interpreted to extend its application to the attorney-client relationship.[7] This interpretation is further supported by the rulings of the Israeli Supreme Court, which has consistently emphasized the critical role of attorney-client privilege in ensuring the effective administration of justice.[8]

Moreover, Rule 22 of the Israeli Bar Association's Code of Ethics explicitly outlines the duty of an attorney to preserve the secrets of their clients. This ethical guideline underscores the imperative for attorneys to uphold the confidentiality of all communications and information relating to their clients, further fortifying the principle of attorney-client privilege in Israeli law.

The Israeli legal framework also provides for certain exceptions to the attorney-client privilege, such as when the attorney's services are sought to commit a crime or fraud, or when the client has waived the privilege. Such exceptions are consistent with the principles of attorney-client privilege as recognized in many other jurisdictions.

SCOPE OF ATTORNEY-CLIENT PRIVILEGE AND ITS APPLICABILITY

In Israel, attorney-client privilege applies to all communications between an attorney and their client that are made for the purpose of obtaining legal advice. This includes both oral and written communications, as well as documents prepared in anticipation of litigation. The privilege extends to cover not only the content of the communications but also the fact that a communication took place.[9]

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6 Shiv, Y., & Berman, A. (2017). Israel: Attorney-Client Privilege – Board Minutes. *Sharir, Shiv & Co. Law Offices. Mondaq.*

7 **Heinz Israel Ltd. v. State of Israel**, (2007). PCA 8873-07.

8 **Oriah, Yonatan v. State of Israel,** (2021). AHC 1062-21.

9 Urlus, H., & Haramati, I. (2015). Attorney-client privilege: Overview of United States, Israeli, and Dutch rules. *Lexology*. Retrieved from: https://www.lexology.com/library/detail.aspx?g=e1f8ae3e-a34a-46be-9432-fc084a9b-31c7#:~:text=Israeli%20attorney,Israeli%20privilege%20also%20extends%20to; Haramti, I, & Urlus, H. (2015). Attorney-Client Privilege: Overview of United States, Israeli, and Dutch Rules. GT Israel Law Blog. Retrieved from: https://www.gtlaw-israelpractice.com/2015/07/27/attorney-client-privilege-overview-of-united-states-israeli-and-dutch-rules/#:~:text=Israeli%20attorney,and%20in%20anticipation%20of%20litigation.

It's important to note that attorney-client privilege in Israel applies to both individual clients and corporate entities. In the case of corporate clients, the privilege extends to communications between the corporation's attorneys and its employees, provided that the communication was made for the purpose of obtaining legal advice.[10]

Attorney-client privilege applies not only to attorneys but also to other legal professionals, such as law clerks and paralegals, who are involved in providing legal advice or services.[11] However, it does not apply to communications made in the presence of third parties or those made for a purpose other than obtaining legal advice.[12] Additionally, the privilege does not protect communications that are made in furtherance of a crime or fraud.[13]

HANDLING OF ATTORNEY-CLIENT PRIVILEGE FROM OTHER JURISDICTIONS

The Israeli legal system respects and upholds attorney-client privilege for communications made under the laws of other jurisdictions. This means that if a communication is considered privileged under the laws of the jurisdiction in which it was made, it will also be treated as privileged under Israeli law.[14] This principle is in line with the international comity doctrine, which promotes mutual respect and recognition of the legal principles and judgments of other jurisdictions.[15]

The Israeli courts have also recognized the need to protect attorney-client privileged communications in the context of international legal proceedings, such as in cases involving extradition or mutual legal assistance. In these cases, the courts have stressed the importance of upholding the principle of attorney-client privilege to ensure the fair administration of justice and respect for the rights of individuals involved in these proceedings.[16]

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10 Harston, A. H. (2021). Pitfalls of Attorney-Client Privilege and Tips for Corporate Officers and Employees. *RF Emerge*. Retrieved from: https://www.rfemerge.com/2021/06/16/pitfalls-of-attorney-client-privilege-and-tips-for-corporate-officers-and-employees/#:~:text=However%2C%20a%20corporate%20entity%20can,client%20privilege%20versus.

11 Legal professional privilege – Global Guide. (2019). Legal professional privilege in Israel. *DLA Piper*. Retrieved from: https://www.dlapiperintelligence.com/legalprivilege/insight/?c=IL.

12 *Ibid*.

13 Justia. (2023). The Crime-Fraud Exception to the Attorney-Client Privilege. *Justia*. Retrieved from: https://www.justia.com/criminal/working-with-a-criminal-lawyer/the-crime-fraud-exception/#:~:text=The%20crime,on%20whether%20the%20exception%20applies.

14 Foreignjudgmentsinisrael.com. (2021). *Foreign Judgments in Israel*: Recognition and Enforcement. Foreign Judgements in Israel. Retrieved from: https://foreignjudgmentsinisrael.com/#:~:text=Integration%20of%20a%20foreign%20judgment,integrates%20lucid%2C%20theoretical%20analysis.

15 Carmon, H. (2019). Israeli Foreign Judgment Recognition & Enforcement. *National Law Review*. Retrieved from: https://www.natlawreview.com/article/foreign-judgments-israel-recognition-and-enforcement.

16 Eyal, L. (2019). Ethical Issues—The Eroding Attorney–Client Privilege in Israel. *Trusts & Trustees,* 25(1), 48-51.

In the next section, the paper will discuss the procedures available under Israeli law for testing the scope of attorney-client privilege and the recent developments in this field.

TESTING THE SCOPE OF ATTORNEY-CLIENT PRIVILEGE

The scope of attorney-client privilege in Israel can be tested in several ways, and any disputes regarding the applicability of the privilege are resolved by the courts.

When a claim of attorney-client privilege is raised, the onus is on the party asserting the privilege to demonstrate its applicability. The party must present a prima facie case that the communication in question was made in the course of a professional relationship, with the expectation of confidentiality, and for the purpose of obtaining legal advice.

If the other party disputes the applicability of the privilege, the matter is brought before a court, which conducts an in-camera review of the material to determine whether the privilege applies. During this review, the court considers several factors, including the nature of the relationship between the attorney and the client, the circumstances surrounding the communication, and the purpose for which the advice was sought.

In addition to this, Israeli courts have also adopted a mechanism to protect attorney-client privilege in the context of computer searches.[17] The courts have emphasized the importance of creating a buffer between the confidential information and the investigating authority.[18] This is typically achieved by entrusting the sorting and classification of the material to a neutral party, usually the court itself, in the absence of a different arrangement or agreement.

17 **Heinz Israel Ltd. v. State of Israel**, (Israel Supreme Court 2007). PCA 8873-07.
18 *Ibid*.

RECENT DEVELOPMENTS AND CURRENT CHALLENGES

Recently, there have been significant developments in the Israeli legal framework pertaining to attorney-client privilege. A significant one is the proposal of a new bill concerning search and seizure in criminal proceedings. This bill seeks to provide clearer guidelines on how attorney-client privilege should be handled during investigations, particularly in relation to digital evidence and covert searches.

The bill aims to establish clear guidelines for handling attorney-client privilege during criminal investigations, with a particular focus on digital evidence and covert searches. This is in response to the evolving nature of legal practice and the challenges posed by digitalization.

However, the bill has sparked considerable debate, with critics arguing that it could potentially infringe on attorney-client privilege. The Israel Bar Association, in particular, has expressed concerns about the bill's provisions allowing covert searches and the potential violation of confidentiality they entail.[19]

Despite these controversies, the bill presents an opportunity to refine and clarify the legal framework surrounding attorney-client privilege in Israel, and to address the challenges posed by the increasing digitalization of legal practice and the evolving nature of crime. The Israel Bar Association has put forth recommendations to ensure that attorney-client privilege is upheld, even in the face of new legal challenges brought about by digitalization and changes in investigative practices.

While the bill presents an opportunity to update and clarify the legal framework, there is a need to strike a balance between facilitating criminal investigations and protecting attorney-client privilege. The Israel Bar Association plays a crucial role in this discourse, advocating for the rights of attorneys and their clients. Its suggestions were to revise the bill so that it will be clear that client-attorney privilege cannot be violated, even when the one being searched is the client, whether it is about its computer, its belongings, or its apartment.

The proposal of this bill highlights the ongoing changes in the Israeli legal framework, showcasing the need for continuous dialogue and adaptation to ensure that attorney-client privilege is preserved in the digital age.

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19 Shohat, N. (2018). Bill Proposal Concerning Search and Seizure in Criminal Proceedings. *Israel Bar Association.*

INTERNAL INVESTIGATIONS AND CONFIDENTIALITY

In the context of internal investigations, the scope of attorney-client privilege in Israel remains an area of ongoing debate. Generally, communications made during internal investigations are protected by attorney-client privilege, provided they meet the usual criteria. However, the applicability of the privilege in this context can be complex, particularly when the investigation involves multiple stakeholders with potentially conflicting interests.

To ensure confidentiality during internal investigations, it is essential to establish clear guidelines from the outset. This includes defining the scope of the investigation, identifying the individuals involved, and setting out the procedures for handling and storing confidential information. It is also crucial to educate all participants about the importance of attorney-client privilege and the need to maintain confidentiality.

In conclusion, attorney-client privilege plays a vital role in the Israeli legal system, underpinning the administration of justice and the protection of individual rights. While the digital age and evolving nature of crime present new challenges to the protection of this privilege, the Israeli legal system continues to adapt and evolve to meet these challenges, ensuring that the fundamental principles of justice and fairness are upheld.

BEST PRACTICES TO ENSURE CONFIDENTIALITY

Maintaining the confidentiality of attorney-client communications is a cornerstone of legal practice. This is critical not only to protect the rights of clients but also to uphold the integrity of the legal system. Here are some best practices that can be adopted to ensure confidentiality:

1. Clear Communication: Lawyers should clearly explain the concept of attorney-client privilege to their clients, including its importance, scope, and limitations. This will help clients understand the nature of the privilege and the need to maintain confidentiality.
2. Secure Communication: Channels: Lawyers should use secure and private channels for communicating with their clients. This includes using encrypted email services, secure video conferencing tools, and private meeting rooms.
3. Document Management: Lawyers should have robust systems in place for storing and managing confidential documents. This includes using secure document storage solutions, implementing access controls, and regularly reviewing and updating security measures.

4. Training and Education: Lawyers and their staff should receive regular training on the importance of attorney-client privilege and the steps they need to take to maintain confidentiality. This should include training on data protection laws, professional conduct rules, and the use of secure communication and document management systems.
5. Response to Breaches: Lawyers should have a plan in place to respond to any potential breaches of confidentiality. This could include notifying the client, reporting the breach to the relevant authorities, and taking steps to mitigate the impact of the breach.

In conclusion, attorney-client privilege is a fundamental component of the Israeli legal system and is essential to maintaining the integrity of the attorney-client relationship. Despite the challenges posed by technological advancements and the evolving nature of crime, Israel continues to uphold this privilege and adapt its legal framework to protect it.

LEGAL PRIVILEGE AND INTERNAL INVESTIGATIONS

In the context of internal investigations, attorney-client privilege plays a pivotal role in ensuring the confidentiality of legal advice provided during the course of the investigation. This is particularly important in cases where the investigation may lead to potential litigation or regulatory proceedings.

In Israel, attorney-client privilege extends to internal investigations conducted by lawyers. This means that confidential communications between a lawyer and a client made for the purpose of obtaining or providing legal advice in relation to the investigation are protected by privilege. This can include advice on potential legal risks, compliance with laws and regulations, and strategies for responding to potential litigation or regulatory action.

However, the application of attorney-client privilege in internal investigations is not without its complexities. One of the key issues is determining what constitutes 'legal advice' in the context of an investigation. While advice on legal risks and strategies is likely to be covered by privilege, other types of advice, such as business or strategic advice, may not be protected.

Another issue is the potential for waiver of privilege. In some cases, companies may choose to waive privilege over certain documents or communications in order to cooperate with regulators or law enforcement agencies. However, this can have significant implications for the company's legal position and should only be done after careful consideration.

Given these complexities, it is crucial for companies to carefully plan and manage internal investigations to ensure the protection of attorney-client privilege. This can include steps such as clearly defining the scope and purpose of the investigation, ensuring that communications are made for the purpose of obtaining legal advice, and carefully managing the disclosure of privileged information.

CONCLUDING REMARKS

Attorney-client privilege plays a crucial role in the Israeli legal system, underpinning the relationship between attorneys and their clients and contributing to the integrity of the legal process. Despite the challenges posed by developments in technology, changing patterns of crime, and the increasing complexity of legal practice, Israel has been successful in upholding and protecting this privilege.

As we have seen, the principles of attorney-client privilege are deeply embedded in Israeli law and judicial decisions, and the Israeli legal community continues to advocate for strong protections for attorney-client communications. This commitment to preserving attorney-client privilege is reflective of the value that the Israeli legal system places on the rights of individuals and the pursuit of justice.

In an increasingly interconnected and globalized world, the protection of attorney-client privilege is more important than ever. As such, it is incumbent on the legal profession to remain vigilant in safeguarding this privilege and to continue to adapt and evolve in response to changing circumstances and challenges.

Cagnola & Associati Studio Legale

THE LEGAL PRIVILEGE UNDER ITALIAN LEGAL SYSTEM: A MATTER TO BE HANDLED WITH CARE

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1. INTRODUCTION

A proper understanding of how legal privilege works in Italy implies significant practical consequences. Many foreign companies or lawyers often tend to misconstrue or to misunderstand the extent of legal privilege in Italy, mistakenly assuming it aligns with what they are familiar with in their home Countries. However, it is essential to point out, as a very preliminary remark, that legal privilege in Italy operates with notable restrictions on its scope and coverage.

It happens quite frequently that clients assume that legal opinions (or the relevant email correspondence) drafted by attorneys or other professionals (as, for instance, tax advisors) and delivered to them are protected by attorney-client privilege and thereby are immune from any seizure by the Prosecutor and, more in general, from any use against them in the course of a criminal proceedings pending in Italy. However, in light of the Italian legal framework, such an assumption is completely erroneous: the mere inclusion of the phrase “legally privileged and confidential” in a document, or its privileged nature in its home jurisdiction, does not automatically confer legal privilege to a document under the Italian legal system.

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Moreover, the relevant legal framework is more complicated since the introduction of judicial cooperation tools at an international level and, in greater detail, at the European Union level. For instance, in relation to the latter context, it should be borne in mind that with the European Investigation Order[3] (EIO), the Italian Public Prosecutor, with the cooperation of the foreign authority, can seize documents stored on servers located abroad. Indeed, the relevant EU directive provides that the executing authority shall recognize the EIO without any further formality being required and shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in the Directive and provided that such formalities and procedures are not contrary to the fundamental Rule of Law principles of the executing State. In such a scenario, a document covered by legal privilege in a foreign Country may end up constituting evidence in a criminal proceeding enrolled in Italy, because it is not considered privileged under the Italian legal framework. In this perspective, it is important to highlight that, from a European perspective, there is no common definition of what constitutes an immunity or privilege in EU law and the precise definition of these terms is therefore left to the Law of the single member States.

That said, the aim of this paper is, on the one hand, to provide a clear overview of the regulations governing the private and confidential nature of professional communications in Italy and, on the other hand, to clarify what can be considered as "legally privileged and confidential" within the Italian legal system. This is essential in order to understand which communications and documents can be covered by legal privilege and, therefore, are not disclosable or cannot be seized.

2. THE LEGAL FRAMEWORK

In general terms, information gathered by lawyers/technical experts appointed by lawyers and their clients are protected by professional secrecy: Italian lawyers and technical experts must keep confidential all documents given to them and information known from any source in the context of their professional activities. Indeed, the violation of the professional secrecy is punished by section 622 of the Italian criminal code.[4]

3 As clarified in EU Directive 2014/41/EU a European Investigation Order *"is to be issued for the purpose of having one or several specific investigative measure(s) carried out in the State executing the EIO ('the executing State') with a view to gathering evidence. This includes the obtaining of evidence that is already in the possession of the executing authority".*

4 This rule provides that: "a*ny person who, having been informed, by the reason of his state or office, or of his profession or art, of a secret, reveals it, without just cause, or uses it for his own profit, is punished, with the imprisonment up to one year or with a fine between EUR 302 to EUR 5.163 if a damage results from the fact*".

However, even though if this is the regulation characterizing the documents gathered by the lawyer/expert in relation to the activities required by his/her mandate, information between lawyers/technical experts and their clients are covered by legal privilege only under certain conditions, generally different from the ones characterizing other legal systems (especially the Common Law ones).

In fact, from a general point of view, any advice coming from lawyers (e.g., legal opinions, written assessments, etc.) is not covered by any kind of privilege at all and can be searched and seized by the Public Prosecutor without any limitation. These documents are covered by privilege only and exclusively if (a) they are provided by a defence counsel appointed with a specific power of attorney ("PoA" - not a mere engagement letter) pursuant to the provisions of the Italian Code of Criminal Procedure (from now, "ICCP") and within a specific criminal proceedings (or during preventive investigations in light of a specific PoA, according to the **ICCP**) or if (b) the advice is provided by a technical expert appointed by a defence counsel appointed with a specific power of attorney (not a mere engagement letter) pursuant to the provisions of the ICCP and within a specific criminal proceedings (or during preventive investigations in light of a specific PoA, according to the ICCP).

The relevant provisions related to the attorney-client information in the context of a criminal proceedings pending in Italy are contained in the Lawyers' Code of Professional Conduct (from now on, also "**Code of Conduct**" - sub par. 2.1.), in the ICCP (sub par. 2..2.) and in the Directive regarding the European investigation order (sub par. 2.3.).

2.1 The lawyers' code of professional conduct

One of the primary provisions outlining the duty of secrecy and confidentiality is represented by section 13 of the Italian Code of Conduct. This section states that lawyers are obliged, in the interest of their clients, to strictly observe professional secrecy and maintain the highest level of confidentiality regarding facts and circumstances learned during their professional activities. Such obligation extends to all the aspects of their mandate, including legal advice, extrajudicial assistance, and any other professional activities.

Similarly, section 28 of the Code of Conduct reinforces the lawyer's duty to maintain secrecy and confidentiality. It not only emphasizes the duty, but also categorizes it as a primary and fundamental right. Lawyers are required to keep confidential all work performed, and information provided them by their clients, as well as any information they become aware because of their professional mandate. Said duty persists even

after the termination or conclusion of the legal mandate and applies to employees, trainees, advisers and collaborators which work in the law firm.

Furthermore, the importance of preserving the confidentiality of the client information is underlined by section 51 of the Italian Code of Conduct which states that lawyers should refrain from providing evidence or acting as witnesses regarding circumstances they have learned during their professional activities. The same regulation is provided for also by sect. 200[5] and sect. 256 of the ICCP.[6] According to sect. 200 ICCP, should a lawyer be summoned as a witness in a criminal proceeding, he/she can oppose the existence of the professional secrecy on the facts known in exercising his/her profession. However, as clarified by the Court of Cassation, the testimony rendered by a lawyer in violation of the ethics' duties on the professional secrecy can be used as evidence in Court, since it does not amount to a violation of the procedural provision provided by non-usability sanction.[7] Under section 256, any lawyer can refuse to hand over documents and other materials in his or her possession upon request by judicial authorities, by declaring in writing that such documents are protected by professional secrecy. However, the Judge always has the power to verify whether there is any ground to invoke the professional secrecy, but the Judge should cautiously investigate the matter prior to compelling the testimony or to authorising the seizure of the documents.

The aforementioned provisions make it clear that confidential information gathered by lawyers and technical experts during their professional activities should not be disclosed to third parties, whether in the context of a witness statement or as part of a request for disclosure in civil, criminal, or regulatory proceedings, unless there is a specific and well-grounded order from a competent authority. This duty of confidentiality remains valid even when the lawyer-client relationship has concluded, been waived, or not accepted.

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5 Sect. 200 of the Italian code of criminal procedure: "1. "*The following individuals shall not be obliged to testify on what they know due to their mandate, service or profession, without prejudice to the cases in which they must report these facts to the judicial authority: [...] b) attorneys, authorised private investigators, technical consultants and notaries [...].*

6 Section 256 Italian Code of Criminal Procedure: "*1. The persons referred to in Articles 200 and 201 must immediately hand to the requesting judicial authority the documents and documentary evidence, even the original ones if they are ordered to do so, as well as data, information and software, also by coping them on a suitable medium, and anything else they possess by virtue of their function, job, service, profession or art, except if they declare in writing that they are covered either by State, public service or professional secret [...]".*

7 see Crim. Court, section VI, n. 15003/2013.

2.2. The Italian code of criminal procedure

In addition to the provisions set out in the Code of Conduct, the Code of Criminal Procedure (ICCP) also expressly regulates the matter of privilege.

First, it has to be noted that the Italian legal system places a strong emphasis on safeguarding the rights and interests of individuals, as enshrined in section 24 of the Italian Constitution. This constitutional provision explicitly states that anyone can sue for the protection of their legitimate rights and interests, and defense is considered an inviolable right at every level of legal proceedings.

Section 103, paragraph 2 ICCP is a direct application of the constitutional guarantee of the right to defense. In detail, it states that *"at the attorneys and technical consultants' premises it is not possible to proceed with the seizure of papers or documents relating to the object of the defence, unless they constitute the body of the crime".* This rule guarantees the freedom of the lawyer, who has the power to object to the authorities, which are freezing papers and documents related to the subject of the defence; unless these pieces of evidence can be categorized as *corpus delicti* ("body of crime"). In this sense, by guarantying the criminal defense lawyers, the law guarantees also the defendant represented by the lawyer himself/herself.

It has to be noted that said provision applies to lawyers who have been **formally appointed** in the criminal proceedings (or in a preventive investigation according to ICCP) as well as to private investigators and technical experts appointed by the defence counsel for the purposes of the criminal proceedings. For what concerns the *object of the defence*, the documents that cannot be seized are papers and documents: the notion of papers comprehends the whole written material that the lawyer accepts in delivery or on which the lawyer writes his/her notes; whilst for the *documents* the definition is taken from section 234 ICCP and it includes not only papers and documents but also photographs, chats, albums (also magnetic ones) representing facts, people or things. In such a definition also, computer material is included. Documents other than the one above listed are not protected by privilege. In particular, papers and documents concerning extrajudicial relations between the defendant and the criminal lawyer are not included in the definition at stake.[8] As per the ambit of application, the Supreme Court of Cassation clarified that the rule applies not only to the office of the lawyer/private investigator/technical expert but every place (also the residence) where the lawyer/ private investigator/technical expert keeps the documents related to the defense activity.[9]

8 Crim. Court, section II, 22/05/1997, n. 3513 and Crim. Court, 25/02/2010, n.15208.

9 Crim Court, 12/11/1993, n. 25. Recently, Crim. Court, sect. II, 25/10/2022, n. 44893.

Turning policy into practice, if during the preliminary investigations the Public Prosecutor orders the seizure of documents at the criminal defence lawyer's premises (lawyer appointed by a defendant in a criminal proceeding or **appointed** in view of the possible commencement of a criminal proceedings, i.e. preventive investigations) and, during the search, a document relevant for the defence strategy of the criminal case is found, the lawyer shall oppose that the document itself is related to the defence strategy of the case and therefore is covered by the professional secrecy. Therefore, the Public Prosecutor shall not seize that document and the latter could not be used as an item of evidence of the crime that is triggered in the case. In other words, the lawyer has the right / power / duty to oppose the seizure of papers and documents related to the subject of the defence that are retained at the defence lawyer's premises, unless they are *corpus delicti*. If the Public Prosecutor rejects the objection and decides to seize the document, the lawyer will have the possibility to challenge its future use in the criminal proceedings, arguing before the Judge that the evidence was collected in violation of Law. On the contrary, part of the scholars believes that this provision does not apply to the defendant. According to this view, if during the preliminary investigations the Public Prosecutor orders the search and seizure of documents at the client's premises (i.e., the defendant in a criminal proceedings), and, during the search, a document relevant for the defence strategy of the criminal case is found, the defendant cannot oppose that the document is related to the defence strategy of the case and the Public Prosecutor can seize that document and the latter can be used as an item of evidence also in Court.

Two additional provisions concerning privilege are contained in sect. 103, par. 5 and in sect. 103, par. 6 ICCP. These provisions aim to preserve the confidentiality of communications between an attorney and his client during legal proceedings.

Sect. 103, par. 5, establishes that communications between the attorney and their clients are protected and cannot be subject to wiretaps or unauthorized disclosure.

It should be noted that the prohibition of wiretappings, provided for by section 103, paragraph 5, operates even in cases where the defensive activity concerns a different proceedings than the one in which the wiretapping is ordered. According to the Italian case-law, such prohibition only concerns conversations and communications relating to the affairs in which the lawyer performs his defensive activity and does not extend to conversations which integrate themselves a crime. The breach of these provisions leads to the legal voidance of the wiretaps and the destruction of the related documentation.

For what concerns sect. 103, par. 6, ICCP, it states that *"the **seizure** and **any form of control** of the correspondence between the defendant and his defender as he can be recognized by the prescribed indications are prohibited, unless the judicial authority has reason to believe that they are the body of the crime"*.

The objective area of application of the provision at stake is the correspondence between the defendant and his/her attorney. For what regards the correspondence between lawyers and their clients, Italian regulation protects only the paper correspondence when particular conditions are met. Conversely, there is no legal provision protecting the mere correspondence.

The conditions upon which the paper's correspondence is protected and, therefore, cannot be seized even at the Italian client's premises are that on the envelope of the paper correspondence should be indicated, pursuant to section 35 of the implementing provisions of the ICCP, (i) the name and the surname of the defendant, (ii) the name, the surname and the professional qualification of the lawyer, (iii) the indication that is a correspondence for reasons of justice, with the indication of the criminal proceedings and (iv) the signing of the sender.

The limitation to the seizure and to any other form of control is removed if there is a well-grounded reason that the correspondence constitutes itself the body of the crime, even if the crimes are different from the one for which the proceeding was commenced. After the seizure, if it is considered that the correspondence does not constitute the body of the crime, it must be returned to the owners and the content cannot be used in the proceeding.

3. CONCLUSIONS

In conclusion, on the one hand it is true that the results of inspections, searches, seizures and wiretappings of conversations or communications carried out in breach of the provisions mentioned above shall not be used, on the other hand it is crystal clear that legal privilege in Italy is subject to very strict limits and it applies only to documents exchanged between the client and the criminal defence lawyer (or the consultant appointed by the criminal defence lawyer). In this sense, unlike in other jurisdictions where the protection afforded by privilege is quite extensive, the questionable choice of the Italian Law-maker has been to protect only conversations and documents gathered in the presence of a formal power of attorney during a criminal proceeding or in view of a preventive investigations activity, within the narrow limits of the ICCP provisions. In light of the above, if you have any doubt on whether your conversation is privileged or not in Italy, please feel free to reach out and remember...that email will be not covered by privilege!

VOI advocaten

LEGAL PRIVILEGE IN THE NETHERLANDS (COVERED)

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1. INTRODUCTION

International cooperation between investigative authorities is increasing. Within the European Union alone, various authorities have been set up to tackle cross-border crimes. For example, the European Public Prosecutor's Office was formed a number of years ago.[1] Because investigative authorities are collaborating more internationally, lawyers from different countries are also increasingly working together. In order to be able to represent the interests of the (joint) client in the best possible way, knowledge of the legal privilege of both parties is of great importance.

This contribution provides an overview of the current state of affairs regarding the legal privilege of lawyers in the Netherlands. This contribution will first discuss the background of legal privilege. We will then discuss who is entitled to legal privilege and also discuss the current legal framework. Next, we will discuss the scope of legal privilege and what procedure applies in the event of a (possible) violation of legal privilege. We conclude with a summary.

1 The European Public Prosecutor's Office has been operational since 1 June 2021: https://www.consilium.europa.eu/nl/policies/eppo/.

2. BACKGROUND OF LEGAL PROFESSIONAL PRIVILEGE

Legal privilege (in Dutch: *verschoningsrecht*) is an important part of our constitutional state and is based on a legal principle generally applicable in the Netherlands, that the public interest in having the truth revealed in court must give way to the public interest in everyone being able to turn to legal professionals for assistance and advice, freely and without fear of disclosure of the matter that is discussed.

This ground was issued by the Supreme Court in 1985[2] and remains valid to this day.

3. WHO CAN RELY ON LEGAL PRIVILEGE?

3.1 Dutch lawyers and in-house counsel

In the Netherlands, legal privilege is granted to civil-law notaries, doctors, clergy and lawyers. In this contribution, we will only discuss lawyers (in Dutch: *advocaten*) as professional confidants entitled to this privilege.

In our society, the confidentiality of communication between a lawyer and his client is considered of paramount importance for the proper fulfilment of the lawyer's essential role in our constitutional state. Legal privilege accrues to the lawyer[3] and is in the interest of the client. It ensures that whatever the client discusses with his lawyer remains private and confidential.

Legal privilege applies to lawyers who, in accordance with Article 1 of the Act on Advocates, are listed on the register of The Netherlands Bar Association (hereinafter referred to as NOvA) and who practise law through a firm in the Netherlands.[4]

There are also lawyers in the Netherlands listed on the register of the NOvA who are employed by an employer, other than a law firm; the so-called "*Cohen lawyers*" or "*in-house* counsels".[5] Additional requirements apply to guarantee the independence of these employed lawyers. For example, the employed lawyer must have a professional statute[6] and may only act for his or her employer.[7] They are only entitled to legal privilege if these conditions are met.

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2 The Supreme Court, 1 March 1985, ECLI:NL:HR:1985:AC9066 (*Civil-Law Notary Maas*).
3 The Supreme Court, 3 April 2020, ECLI:NL:HR:2020:600.
4 Article 12 of the Act on Advocates.
5 Article 5.9 of the Legal Profession Bye-Law.
6 The Netherlands Bar Association has made a model professional statute available on its website for use by employed lawyers. The model can be found at https://www.advocatenorde.nl/document/20160107-bijlage-4-professioneel-statuut-voor-de-advocaat-in-dienstbetrekking.
7 Article 5.13 of the Legal Profession Bye-Law.

3.2. Foreign lawyers and in-house counsel

In 2022, the Supreme Court ruled in a case that concerned the legal privilege of fifteen foreign in-house counsels of (a subsidiary of) Shell.[8] In that judgment, the Supreme Court also devoted more general considerations to the legal privilege of foreign lawyers (other than in-house counsels).

According to the Supreme Court, legal privilege applies to foreign lawyers in the Netherlands if they (*a*) are also entitled to legal privilege in their country of origin and (*b*) if the work in the Netherlands would be covered by legal privilege if it had been performed by a lawyer registered in the Netherlands.

According to the Act on Advocates, foreign lawyers from the European Union, from a state that is party to the Agreement on the European Economic Area or from Switzerland and who perform work in the Netherlands by way of providing services, are classified as "*visiting lawyers*".[9] They must comply with the professional rules applicable to lawyers registered in the Netherlands, as a result of which legal privilege also applies to them.[10]

According to the Supreme Court, legal privilege for foreign in-house counsels depends on the regulations of the NOvA and/or on foreign regulations. It must be clear that the lawyer's independence is guaranteed, even if he or she is employed.

According to the Supreme Court, *"visiting lawyers"* working in the Netherlands as in-house counsel must have a professional statute (which also applies to Dutch in-house counsel) or have entered into an agreement with the employer under the law of the country of origin offering equivalent guarantees of independence.

For foreign in-house counsels who cannot be regarded as visiting lawyers, the same applies as stated above for foreign lawyers. In order for legal privilege to apply, they must also be entitled to legal privilege in the country of origin and their activities in the Netherlands must be deemed covered by legal privilege. In addition, the requirement is set that they must have an agreement with their employer that offers guarantees for independent practice equivalent to the aforesaid statute and undisturbed compliance with the professional and practice rules by the lawyer.

8 The Supreme Court, 24 May 2022, ECLI:NL:HR:2022:760.

9 Article 16b of the Lawyers Act in conjunction with Article 16c of the Act on Advocates.

10 Article 16d, paragraph 2, and Article 16f of the Act on Advocates. For work relating to defence in court or before a government agency, the Dutch professional rules must be observed. The professional rules apply to other activities *"insofar as they can be observed by an attorney at law who is not established in the Netherlands and the observance thereof is objectively justified so as to ensure the proper undertaking of the activities of attorneys at law, the dignity of the profession and the observance of the rules with regard to incompatibility"*.

In all cases, it is up to the lawyer to demonstrate that the conditions are met and, if necessary, to ensure the translation of the necessary documents for this purpose.

4. LEGAL FRAMEWORK

4.1. Act on Advocates

Dutch legislation does not provide for a comprehensive definition of legal privilege. However, there are various legal provisions mentioned below that regulate the duty of confidentiality and legal privilege. The scope of legal privilege is specified further in Dutch case law.

The Act on Advocates stipulates that lawyers are obliged to maintain confidentiality. Pursuant to Article 10a of the Act on Advocates, the lawyer is responsible for the legal protection of his client with confidentiality being one of the core values[11] for the legal profession.

Article 11a, paragraph 1, of the Act on Advocates stipulates that the lawyer has a duty of confidentiality with regard to everything he becomes aware of in the course of his professional practice. Rule 3 of the Legal Profession Regulations states that a lawyer must, among other things, remain silent about any details of the cases he handles, the person of his client and the nature and extent of his client's interests. Not only does this statutory duty of confidentiality apply to the lawyer, but also to the lawyer's associates and staff, as well as other persons involved in the practice of the profession, such as an expert engaged by the lawyer. This group of people are also covered by legal privilege[12] (whether or not derivative). The distinction between independent and derivative client confidentiality is relevant, because the holder of confidential information from whom the right is derived should decide whether the privilege is at stake and whether it should be invoked.[13]

The duty of confidentiality continues after the termination of the professional practice or the position in which the work was performed.[14]

11 Article 10a of the Lawyers Act: independence, partiality, expertise, integrity and confidentiality.
12 Article 11a, paragraph 1 of the Lawyers Act and Article 28 of the Legal Profession Regulations.
13 This follows from, among others, the Supreme Court, 12 February 2002, ECLI:NL:HR:2002:AD4402 and the Supreme Court, 3 April 2020, ECLI:NL:HR:2020:600.
14 Article 11a, paragraph2 of the Lawyers Act.

The lawyer is furthermore obliged to take appropriate measures to maintain confidentiality and communication with the client or third parties.[15] Relevant in this context is that the Netherlands has a telephone number recognition system containing all numbers of holders of confidential information. Lawyers, their associates and staff must register their business numbers (mobile, landline and fax) to ensure the confidentiality of communications with clients. The number recognition system ensures that the police and the Custodial Institutions Agency[16] recognise lawyers' numbers, i.e. numbers of holders of confidential information, which are then not intercepted. The General Intelligence and Security Service, the Military Intelligence and Security Service and the NOvA recently signed an agreement to ensure that, even with national security being at stake, guarantees apply with regard to the legal privilege of lawyers.[17]

4.2. Criminal law

In criminal law, the legal privilege of lawyers can be found, among other things, in the provisions regarding witness examinations. Article 218 of the Dutch Code of Criminal Procedure states:

"Those who are obliged to maintain secrecy by virtue of their position, profession or office may also be excused from giving testimony or answering certain questions, but only insofar as this concerns the knowledge they have been entrusted with as such".

As stated above, the lawyer has a statutory obligation of confidentiality. A lawyer must therefore refrain from making statements in respect of what has been entrusted to the lawyer by the client. A breach of this duty of confidentiality is punishable by law under Article 272 of the Dutch Criminal Code. It states that anyone violating his or her duty of confidentiality will be punishable with a custodial sentence of up to one year or a fine.

4.3. Civil law

Article 165 of the Code of Civil Procedure stipulates in civil procedural law that every individual (who has been lawfully summoned) is obliged to give testimony. The following people are excluded from this obligation: *"those who are obliged to maintain confidentiality by virtue of their office, profession or employment in respect of what has been entrusted to them in that capacity."* This includes lawyers.

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15 Rule 3 Code of Conduct for the Legal Profession.

16 The Custodial Institutions Agency (DJI) implements penalties and custodial measures imposed by the courts on behalf of the Minister of Justice and Security. In addition, the DJI is responsible for the daily care of inmates and the preparation of inmates for return to society (https://www.dji.nl/over-dji).

17 https://www.aivd.nl/actueel/nieuws/2023/09/22/betere-bescherming-geheimhoudernummers-advocaten.

4.4. Tax law

The tax inspector is authorised to request information from parties that are obliged to keep records[18] about a third party. These parties are at the request of the tax inspector obliged to provide (potentially) tax-relevant information about this third party. Article 53a, paragraph 1, of the General Tax Act (hereinafter referred to as AWR) includes a provision that exempts the lawyer (as the person required to keep records) from this obligation. That article stipulates that:

"With regard to any refusal to comply with the obligations for the purpose of levying taxes of third parties only ministers of a faith, notaries, solicitors, lawyers, attorneys, physicians and chemists are entitled to appeal to the circumstances that they in the duty of their status, office or profession are bound to secrecy".

Given the lawyer's duty of confidentiality, the lawyer may therefore refuse a request for information from the tax inspector with regard to his client (the third party).

This does not apply if the tax inspector requests information regarding the lawyer's own taxation. According to Article 47 of the AWR, the lawyer is obliged to provide information at the request of the tax inspector, which information may be relevant for his or her own taxation. Of course, confidentiality with regard to his or her clients must continue to be observed when doing so. The obligation under Article 47 of the AWR also applies if the tax inspector asks questions to the client himself. According to the Supreme Court[19], the client is in his right to refuse to comply with a request for information from the tax inspector, if it concerns the confidentiality of contacts with a professional entitled to privilege (such as the lawyer).

In the Netherlands, we also have a so-called informal privilege (informeel verschoningsrecht). Informal, because this is not regulated by law whatsoever. This informal privilege applies to tax advisors and accountants involved in tax consultancy, but who are not holders of a legal privilege. In 2015, the Supreme Court decided[20] that the so-called fair play principle (general principles of good governance) precludes an inspector from using his authority under Article 47 of the AWR to gain knowledge of reports from third parties insofar as these reports are intended to shed light on the tax position of the taxpayer or to advise him on this matter. This informal privilege only applies when dealing with the Tax Authorities. In criminal investigations, for example, tax advisors and accountants cannot rely on legal professional privilege, unless the aforementioned derivative legal privilege applies.

18 Article 52 of the General Tax Act.
19 The Supreme Court, 27 April 2012, ECLI:NL:HR:2012:BV3426, *BNB* 2012/231.
20 The Supreme Court, 23 September 2005, ECLI:NL:HR:2005:AU3140.

5. SCOPE OF LEGAL PRIVILEGE

The basic principle is that the lawyer determines what is covered by legal privilege.[21] Even if a client gives the lawyer permission to disclose a certain document to the authorities, it remains the lawyer's responsibility to decide whether this is desirable or not.

According to Article 218, paragraph 1 of the Dutch Code of Criminal Procedure, legal privilege extends to: *"(...) the knowledge they have been entrusted with as such"* as a lawyer. From the words *"as such"* it must be concluded that it must concern information that has been shared with a lawyer in the performance of his duties as a lawyer. What has become known to the lawyer as a holder of confidential information outside of his work has not been entrusted to the lawyer in that capacity.

Legal privilege includes, for example, advice, memoranda, (telephone) notes and other documents from the lawyer. Written and verbal correspondence between the lawyer and the client is of course also covered by legal privilege. That is why guarantees have been provided in the Netherlands for telephone communication between lawyers and clients.

There may be situations in which a lawyer is involved without it being possible to successfully invoke legal privilege, for example, because the information was not entrusted to the lawyer *"as such"*. For example, the mere copying in of a lawyer in an email in the form of a carbon copy (cc) for no purpose other than to make the content of the e-mail confidential does not cause legal privilege to apply.[22] Nor can invoking legal privilege be successful if a lawyer participates in a conversation for the sole purpose of keeping what is discussed during the meeting confidential.[23]

Very exceptional circumstances may arise in which the interest of the truth being revealed, also with regard to which the knowledge as such has been entrusted to the professional entitled to privilege, must prevail over the right of non-disclosure.[24] The mere circumstance that a lawyer is regarded as a suspect is not sufficient to deem such an exceptional circumstance to exist.[25] However, the suspicion of a serious criminal

21 The Supreme Court, 12 February 2002, ECLI:NL:HR:2002:AD4402 and the Supreme Court, 21 May 2021, ECLI:NL:HR:2021:751.
22 The Supreme Court, 26 January 2016, ECLI:NL:HR:2016:110 and the Supreme Court, 6 June 2017, ECLI:NL:HR:2017:1018.
23 Explanation of Rule 3 of the Legal Profession Regulations: https://regulation.advocatenorde.nl/content/conductsrules-advocatuur.
24 The Supreme Court, 14 October 1986, *NJ* 1987/490 and The Supreme Court, 30 November 1999, *NJ* 2002/438.
25 The Supreme Court, 12 February 2002, ECLI:NL:HR:2002:AD9162.

offence, such as the formation of a criminal association between a lawyer and certain clients, may well be sufficient.[26] The court tasked to assess whether very exceptional circumstances exist cannot confine itself to a marginal assessment, but must form its own independent judgment.[27] Lastly, the scope of the duty of confidentiality (and therefore legal privilege) does not extend to: *corpora et instrumenta delicti*, i.e. letters or documents that are the subject of the criminal offence or that served to commit it.[28]

In addition, there are some laws that limit legal privilege, or that did so in the past. For example, under the Money Laundering and Terrorist Financing (Prevention) Act, a lawyer may be obliged to report an unusual transaction to the authorities. This obligation does not apply to a lawyer who performs work for a client regarding the determination of his legal position, his legal representation, providing advice before, during and after legal proceedings or giving advice on instituting or avoiding legal proceedings.

Furthermore, the Netherlands implemented Mandatory Disclosure Rules (MDR or DAC6, hereinafter referred to as MDR) in the International Assistance (Levying of Taxes) Act. The MDR obliges intermediaries to report potentially aggressive cross-border tax planning constructions to the Tax Authorities (obligation to notify). Lawyers who qualify as intermediaries are exempt from this obligation to notify. However, the lawyer-intermediary initially had to inform any other intermediaries of their reporting obligations. On 8 December 2022, the Court of Justice of the European Union, at the request of the Belgian Constitutional Court, delivered a judgment on this matter.[29] The Court of Justice ruled that the obligation to notify is not a requirement and that it conflicts with the right to respect for confidential communications between a lawyer and his client. This judgment clarified[30] that the lawyer-intermediary can indeed invoke his professional duty of confidentiality and legal privilege. Only when the client himself is obliged to report, the lawyer will have to point this out to his client.[31]

26 Court of East Brabant, 24 April 2015, ECLI:NL:RBOBR:2015:2390.
27 The Supreme Court, 15 May 2007, ECLI:NL:PHR:2007:BA0491.
28 The Supreme Court, 28 June 2016, ECLI:NL:HR:2016:1343.
29 Court of Justice of the EU, 8 December 2022, ECLI:EU:C:2022:963.
30 https://www.advocatenorde.nl/nieuws/notificatieplicht-bij-grensoverschrijdende-fiscale-constructies-implicaties-voor-de-advocatuur.
31 Decree on reportable cross-border arrangements.

6. PROCEDURE IN CASE OF SEIZURE OF (POSSIBLY) PRIVILEGED MATERIAL

In the event that letters or documents (which are subject to confidentiality and legal privilege therefore applies) are nevertheless seized from a lawyer, the regulation of Article 98 of the Code of Criminal Procedure applies. This stipulates that letters or other documents[32] may not be seized without the consent of the professional entitled o privilege, unless an examining magistrate decides otherwise.[33] If the examining magistrate decides that documents may be seized, the lawyer can object to this. If the examining magistrate then decides that seizure is permitted, the lawyer in question can submit a notice of complaint to the court and, if this is declared to be unfounded, appeal to the Supreme Court.[34] During this time, the investigative authorities are not allowed to take cognizance of these documents.

The same rules apply if the documents are seized from the client or someone with derived legal privilege (such as an expert engaged by the lawyer). In that case too, the examining magistrate will have to enable the professional entitled to privilege to rely on his right of non-disclosure. If the professional entitled to privilege subsequently does not file a complaint against the decision of the examining magistrate that seizure was permitted, the lawyer is deemed not to be invoking his legal privilege.[35]

7. SUMMARY

In the Netherlands, legal privilege is seen as an important part of the constitutional state and the rules of law. In the Netherlands, legal privilege is granted to, among others, lawyers. This legal privilege guarantees the confidentiality of communications between a lawyer and his or her client. The public interest of being able to speak confidentially with a lawyer outweighs the importance of the truth being revealed in court. In this context, the Netherlands has also taken measures to prevent confidential communications and telecommunications between lawyers and their clients from being intercepted.

The duty of confidentiality and legal privilege of the lawyer is enshrined in the law in various provisions. This has been further specified in case law.

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32 For the recording of digital data, see the Supreme Court, 16 October 2018, ECLI:NL:HR:2018:1960.

33 For an example of where this regulation was not complied with and the consequences for the Public Prosecution Service, see https://www.om.nl/actueel/nieuws/2023/10/06/om-seponeert-strafrechtelijk-onderzoek-naar-brabantse-balansbeheer.

34 See for example, the Supreme Court, 18 February 2022, ECLI:NL:HR:2022:223.

35 The Supreme Court, 22 December 2015, ECLI:NL:HR:2015:3714.

Although in principle it is always up to the professional entitled to privilege to determine whether something falls under his or her right of non-disclosure, in exceptional circumstances, privileged material can still be seized. In that case, the (Supreme) court will have the final say, through a procedure containing safeguards.

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LEGAL PRIVILEGE IN NIGERIA

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Legal privilege, also known as attorney-client privilege, is a fundamental legal concept that protects the confidentiality of communications between lawyers and their clients. It ensures that clients can speak openly and honestly with their attorneys, disclosing all relevant information without fear of it being disclosed to others. The privilege is designed to encourage clients to share information with their lawyers and to enable effective representation. Attorney-client privilege has long been thought of as one of the oldest and most sacrosanct privileges in the law of evidence.

In its basic definition, privilege ensures *"that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered"*.[1] The aim of this privilege is to ensure that the client is more willing to communicate to counsel things that might otherwise be suppressed. Theoretically, the client can feel secure in the knowledge that his remarks to his lawyer won't be interpreted as an adverse admission or used against him, and the lawyer will be able to provide more accurate, well-reasoned professional advice.[2]

Under Nigerian law, legal privilege and its exceptions are provided for in Section 192 of the Evidence Act and under section 19 of the Rules of professional Conduct regulating legal practitioners in Nigeria. However, the application of legal privilege particularly as

1 United States v. Grand Jury Investigation, 401 F. Supp. 361, 369 (Western District of Pennsylvania, United States District Court. 1975).

2 Paul R. Rice, Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated, 48 AM. U. L. REV. 967, 969-70 (1999).

it relates to money laundering has been a contentious issue which may seem to have been finally settled by the recent enactment of the Money Laundering (Prevention and Prohibition) Act, 2022.[3]

REGULATION OF THE LEGAL PROFESSION IN NIGERIA: OVERVIEW OF THE REGULATORY FRAMEWORK

In Nigeria, the legal profession is regulated by several legislations and rules. The main legislations are the Legal Practitioners Act[4], the Rules of Professional Conduct 2007 (RPC) and the Legal Practitioners Accounts Rule 1964 (specifically Rule 3). Seven principal bodies are also involved in the training, management, control and regulation of the legal profession in Nigeria. They are:

I. The Council of Legal Education;
II. The Body of Benchers;
III. Legal Practitioners Privileges Committee;
IV. Legal Practitioners Remuneration Committee;
V. Legal Practitioners Disciplinary Committee;
VI. General Council of Bar and [Bar Council];
VII. Nigerian Bar Association.[5]

Lawyers are regarded as Ministers in the temple of justice. Unarguably, as ministers in this hallowed temple, lawyers must possess attributes, character, and personality devoid of any dent or be of unquestionable character.

The Rules of Professional Conduct for legal Practitioners 2007[6] (RPC Rules) specifies that the duty of a lawyer is tripartite. He owes a duty to his client, duty to the court and duty to the state. In summary, the duty of a lawyer is to uphold and observe the rule of law, promote, and foster the cause of justice, maintain high standard of professional conduct, and portray the legal profession in a good light (*Rule 1, RPC*). In his relationship with its client, Rule 19 of the RPC Rules provides for privilege and confidence of a client. Thus, all oral or written communications made by a client to his lawyer in the normal course of professional employment are privileged. Subject to the exception stated in sub rule 3, a lawyer shall not knowingly reveal a confidence or secret of his client. Lawyers are bound by client confidentiality rules.[7] The rule also extends to other

3 'Federal Republic of Nigeria Official Gazette' <https://placng.org/i/wp-content/uploads/2022/05/Money-Laundering-Prevention-and-Prohibition-Act-2022.pdf> accessed 19 November 2023.
4 2004 CAP L11 Laws of the Federation of Nigeria (LPA).
5 Available online at http://www.blog.lawrepository.com.ng/2017/09/controlling-bodies-in-legal-profession.html accessed 08/07/2021.
6 Now Rules of Professional Conduct for legal Practitioners 2023.
7 Rule 19, RPC; section 192, Evidence Act 2011, Cap E14 LFN 2004.

lawyers in the lawyer's firm and non-legal staff within the firm. This may arise from oral or written communication from the client.

It should be noted that the main legislations regulating legal practitioners in Nigeria do not, presently, place any client due diligence obligations upon lawyers. Lawyers in Nigeria are under no legal or professional obligation to inquire into sources of wealth of clients as none of the above legislations have provided for such. Also, reporting obligations do not apply to lawyers in Nigeria as this has not been envisaged by the above legislations. Reporting obligations apply to financial institutions and Designated Non-Financial Institutions (DNFIs) and by virtue of the decision in *Central Bank of Nigeria v Registered Trustees of The Nigerian Bar Association & Anor*[8] lawyers have been excluded from the definition of DNFIs in the Money Laundering (Prohibition) Act, 2011.

NIGERIAN ANTI-MONEY LAUNDERING LAWS/REGULATIONS AND ITS APPLICATION TO LAWYERS

To combat money laundering in Nigeria certain legislations have been put into place. They are:

I. Money Laundering (Prohibition) Act, 2011 now repealed by Money Laundering (Prevention and Prohibition) Act, 2022;
II. Money Laundering (Prohibition) (Amendment) Act 2012;
III. Economic Financial Crimes Commission (Establishment) Act 2004;
IV. Central Bank of Nigeria (Anti-Money Laundering and Combating the Financing of Terrorism in Banks and Other Financial Institutions in Nigeria) Regulations;
V. Terrorism Prevention (Freezing of International Terrorist Funds and Other Matters) 2013;
VI. The CBN Act of 2017;
VII. CBN Risk-Based Supervision Framework for AML/CFT 2011;
VIII. CBN Circulars and other regulatory messages;
IX. Banks and Other Financial Institutions Act (BOFIA) of 1991.

8 CA/A/202/2015 (Unreported).

In addition, some key institutions are involved in enforcing AML compliance. They include, the Central Bank of Nigeria (CBN), the Economic and Financial Crimes Commission (EFCC), and the Nigerian Financial Intelligence Unit (NFIU). These institutions collaborate to ensure a robust AML regime that adheres to international standards and best practices.

No legislation in Nigeria has defined money laundering. However, section 15(1) of the Money Laundering (Prohibition) Act, 2011 prohibits money laundering and makes it an offence for any person to:

I. control or disguise the origin of;
II. convert or transfer;
III. remove from Nigeria; or
IV. acquire, use, retain or take possession of such fund or property that the person knew or ought reasonably to have known "is or forms part of the proceeds of an unlawful act".

Also, The Money Laundering (Prohibition) Act, 2011 created numerous offences captured by the Act. It is an offence to, other than through a financial institution, make or accept cash payments exceeding N5,000,000.00 or its equivalent, in the case of an individual and N10,000,000.00 in the case of a body corporate.[9]

The *"unlawful act"* referred to in section 15(1) is also stated to include *"participation in an organized criminal group, racketeering, terrorism, terrorist financing, trafficking in persons, smuggling of migrants, sexual exploitation, sexual exploitation of children, illicit trafficking in narcotic drugs and psychotropic substances, illicit arms trafficking, illicit trafficking in stolen goods, corruption, bribery, fraud, currency counterfeiting, counterfeiting and piracy of products, environmental crimes, murder, grievous bodily injury, kidnapping, hostage taking, robbery or theft, smuggling (including in relation to customs and excise duties and taxes), tax crimes (related to direct taxes and indirect taxes), taxes crimes (related to direct taxes and indirect taxes) extortion, forgery, piracy, insider trading and market manipulation or any other criminal act specified in this Act or any other law in Nigeria"*.[10]

Further, the Money Laundering (Prohibition) Act, 2011 specifically stated who the Anti-Money Laundering regulators are, which include the National Drug Law Enforcement

9 The Money Laundering (Prohibition) Act, 2011 Section 10.
10 The Money Laundering (Prohibition) Act, 2011 Section 15(6).

Agency, the Central Bank of Nigeria (CBN) the Economic and Financial Crimes Commission (EFCC), the National Financial Intelligence Unit (NFIU) and the Federal Ministry of Commerce.[11]

By the provisions of the Money Laundering (Prohibition) Act 2011, any Designated Non-Financial Institutions (DNFI) that is involved in cash transactions is to provide declaration of its activities to the Federal Ministry of Finance. According to this law, Designated Non-Financial Institutions (DNFI) are dealers in jewelry, cars and luxury goods, chartered accountants, audit firms, tax consultants, clearing and settlement companies, legal practitioners, hotels, casinos, supermarkets, or such other businesses as the Federal Ministry of Commerce or appropriate regulatory authorities may from time to time designate.[12]

The Federal Ministry of Industry, Trade and Investment[13] in 2013 expanded the meaning and list of business/professionals referred to as Designation of Non-Financial Institutions from what is provided in the Money Laundering (Prohibition) Act 2011. By the 2013 Regulations, adding to the existing list, DNFI extended to professions including;

I. Law firms, notaries, and other independent legal practitioners;
II. Accountants and Accounting firms;
III. Trust and Company Service Providers;
IV. Estate Surveyors and Valuers;
V. Mortgage Brokers;
VI. Non-Profit Organizations.

Also, to businesses including;

VII. Dealers in precious stones and metals;
VIII. Dealers in Real Estate, Estate Developers, Estate Agents and Brokers;
IX. Hospitality Industry;
X. Consultants and Consulting Companies;
XI. Construction Companies;
XII. Importers and dealers in cars or any other automobiles;
XIII. Dealers in mechanized farming equipment and machineries;
XIV. Practitioners of mechanized farming.[14]

11 Available online at https://www.anti-moneylaundering.org/Africa/Nigeria.aspx, Accessed 06/07/2021.
12 Sections 1, 2, 5, 6, 25 and 26 of the Money Laundering (Prohibition) Act 2011.
13 (Designation of Non-Financial Institutions and Other Related Matters) Regulations, 2013.
14 Regulations 1, 2, 4, 33 and 34 of the Federal Ministry of Industry, Trade and Investment (Designation of Non-Financial Institutions and Other Related Matters) Regulations, 2013.

On the 15th of December 2016, Federal Ministry of Industry, Trade and Investment (Designation of Non-Financial Institutions and Other Related Matters) Regulations, 2016 was made by Honorable Minister of Industry, Trade and Investment, Dr Okechukwu Enyinna Enelamah, in exercise of the powers conferred on him by sections 5(4) and 25 of the Money Laundering (Prohibition) Act, 2011 (as amended). By the 2016 Regulations, the list of Designated Non-Financial Institutions (DNFI) was expanded to include pool betting and lottery businesses.[15] The 2016 Regulation further expanded the list and meaning of Designation of Non-Financial Institutions (DNFI) to include dealers in jewelry, cars and luxury goods, precious stones and metals, real estate, rstate developers, rstate surveyors and valuers, estate agents, chartered accountants, audit firms, tax consultants, clearing and settlement companies, legal practitioners, hotels, casinos, pool betting and lottery business, supermarkets and such other business as undertaking as other businesses as the Federal Ministry of Trade and Investment or appropriate regulatory authorities may from time to time designate.[16]

To summarize the importance of the classification of a Legal Practitioner as a non-designated financial institution. By virtue of the provision of Section 5 of the Money Laundering (Prohibition) Act 2011, all non-designated financial institutions are required (amongst others) to keep a record of all cash transactions involving a sum exceeding US$ 1,000 and are periodically required to submit a report of such transactions to the Ministry of Trade and Commerce. A designated non-financial institution that fails to comply with the provisions of the law, is liable to be convicted and exposed to the possibility of the suspension or revocation of his/her license.

It is also clear that lawyers are listed both by law and regulations as professionals that need a SCUML (Special Control Unit on Money Laundering) certificate, which is issued by the Economic Financial Crimes Commission (EFCC) as a proof that a bank account is not being used for money laundering activities and this is issued after a thorough background check.[17]

However, the professional body of Nigerian lawyers (Nigerian Bar Association) had obtained a valid court judgment against the import of Money Laundering (Prohibition) Act 2011 and its related regulations in the case of Central *Bank of Nigeria v Registered*

15 Federal Ministry of Industry, Trade and Investment (Designation of Non-Financial Institutions and Other Related Matters) Regulations, 2016, R. 2 (1)(a).

16 Ibid R. 2 (3).

17 The National (Money Laundering & Terrorist Financing) Risk Assessment Forum, *"NIGERIA ANTI MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM NATIONAL STRATEGY 2018 – 2020"* (SCUML, 2018) accessed 07/07/2021.

Trustees of The Nigerian Bar Association & Anor.[18] The judgment delivered on the 14th of June, 2015, where the Court of Appeal upheld the decision of the Federal High Court which held that Legal Practitioners are excluded from the definition of designated non-financial institutions as contained in the Money Laundering (Prohibition) Act, 2011.

The court in reaching its decision in *Central Bank of Nigeria v Registered Trustees of The Nigerian Bar Association & Anor*[19] examined the contention of the Nigerian Bar Association *"NBA"* (as Plaintiff at the Federal High Court and Respondent at the Court of Appeal) urging the Court to nullify the provisions of Sections 5 and 25 of the Money Laundering (Prohibition) Act, 2011. The Nigerian Bar Association also argued that the inclusion of Legal Practitioners in the definition section of the Money Laundering (Prohibition) Act, 2011 makes the law incongruent, in conflict and repugnant to the provisions of the existing law regulating the practice of law in Nigeria, especially as it relates to accountability and professional obligations to clients under the Legal Practitioners Act of 1976. In pushing its contentions against the inapplicability of Section 5 of the Money Laundering (Prohibition) Act, 2011 to Legal Practitioners, the Nigerian Bar Association placed heavy reliance on the import of the provisions of Section 192 of the Evidence Act, 2011 which protects privileged communications between lawyers and clients.

The exclusion of lawyers from the definition of designated non-financial institutions as contained in the Money Laundering (Prohibition) Act, 2011 as held in *Central Bank of Nigeria v Registered Trustees of The Nigerian Bar Association & Anor*[20] was reiterated in a recent Judgment which was delivered by the Court of Appeal on the 14th of May, 2021 in the case of *Federal Republic of Nigeria v Chief Mike Ozekhome (SAN).*[21]

In *Federal Republic of Nigeria v Chief Mike Ozekhome (SAN)*[22], the Appellant approached the Federal High Court, Lagos, seeking an ex-parte order of interim attachment and to freeze for a period of 120 days, an account belonging to and operated by the Respondent's law firm domiciled with Guaranty Trust Bank Plc. By the said one-sided application and lone (ipse dixit) evidence of the Appellant, the court made an interim order freezing the Respondent's account.

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18 CA/A/202/2015 (Unreported).
19 Supra note 39.
20 Supra note 39.
21 App No: CA/L/174/19).
22 Ibid.

The Appellant opposed the application by way of counter-affidavit, further affidavit and written address, while the Respondent reacted by filing a further affidavit and written address. The court heard arguments of parties on the application, and delivered its ruling, setting aside the interim order freezing the account belonging to and operated by the Respondent's law firm.

The court relied on the decision of *Registered Trustees of The Nigerian Bar Association v A-G. Federation & CBN*.[23] The court held that legal practitioners are excluded from the definition of designated non-financial institutions as contained in the Money Laundering Prohibition Act (which the court held was inconsistent with Section 192 of the Act). This decision defines the law until same is set aside.[24] Appeal was dismissed and the Ruling of the lower court was affirmed.[25]

It should be noted that issues connected to Lawyer's remuneration and professional fees, are stipulated in Rules 48 to 54 of the Rules of Professional Conduct 2007. There is no provision in the Rules that require a Lawyer to ascertain the source of funds deployed to pay his fees by a prospective client. Therefore, the Court of Appeal's pronouncement in the Chief Mike Ozekhome, SAN case would appear unimpeachable based on the applicable regulations.

Therefore, flowing from the decisions of the court in *Central Bank of Nigeria v Registered Trustees of The Nigerian Bar Association & Anor* and *Federal Republic of Nigeria v Chief Mike Ozekhome (SAN)* as enunciated above, the above listed legislations are all of general application, with none specifically applicable to lawyers, who have been excluded from the definition of DNFIs in the Money Laundering (Prohibition) Act, 2011.

RECENT UPDATE ON NIGERIAN'S ANTI-MONEY LAUNDERING LAWS/ REGULATIONS

Nigeria, in its continuous attempt to curb money laundering and other evolving financial crime activities, recently updated its anti-money laundering laws/regulations by passing the Money Laundering (Prevention and Prohibition) Act of 2022.[26] The Act which replaces the Money Laundering (Prohibition) Act of 2011, imposes more stringent

23 FHC/ABJ/173/2013.

24 Akintogun v LPDC (2014) LPELR-22941.

25 https://thenigerialawyer.com/applicability-of-the-money-laundering-act-to-legal-practitioners-in-the-court-of-appeal-of-nigeria/, accessed 06/07/2021.

26 Federal Republic of Nigeria Official Gazette' <https://placng.org/i/wp-content/uploads/2022/05/Money-Laundering-Prevention-and-Prohibition-Act-2022.pdf> accessed 19 November 2023.

anti-money laundering measures.[27] The Money Laundering Act 2022 introduces some innovative statutory requirements and dynamics within Nigeria's anti-money laundering landscape. Notably, the Money Laundering Act 2022 expands the scope of Designated Non-financial Businesses and Professions ("DNBPs")[28] to include legal practitioners and notaries, expands the definition of funds to include virtual assets and financial institution to include Virtual Asset Service Providers[29], introduces new money laundering offenses[30], imposes additional measures for transactions with Politically Exposed Persons ("PEPs")[31], requires the assessment of certain new products or business practices for money laundering risks[32], mandates financial institutions and designated non-financial businesses and profession to report to the Nigerian Financial Intelligence Unit and Special Control Unit against Money Laundering any single transaction in excess of N5,000,000 or its equivalent for individuals and N10,000,000 or its equivalent for corporate bodies[33], and the Act prescribes additional penalties for violation of the Money Laundering Act.[34]

THE CURRENT STATE OF APPLICATION OF ANTI-MONEY LAUNDERING LAWS/REGULATIONS TO LAWYERS IN REGARD TO ATTORNEY-CLIENT PRIVILEGE

Before the enactment of Money Laundering (Prevention and Prohibition) Act of 2022 (MLA 2022), and as enunciated above, it was settled by the Court of Appeal in *CBN vs. Registered Trustees of the NBA & Anor*[35] that legal practitioners are excluded from the definition of designated non-financial institutions as contained in the Money Laundering Prohibition Act, 2011. The Court held that Section 25 of the repealed Act[36] which purports to extend the definition of DNFIs to include legal practitioners is inconsistent with Section 192 of the Evidence Act 2011 which though upholds counsel-client privileged communication, however imposes an obligation on legal practitioners to disclose (x) any such communication made in furtherance of any illegal purpose;

27 COMPLIANCE REQUIREMENTS in NIGERIA'S ANTI-MONEY LAUNDERING LANDSCAPE – Legal Developments' (www.legal500.com) <https://www.legal500.com/developments/thought-leadership/compliance-requirements-in-nigerias-anti-money-laundering-landscape/> accessed 19 November 2023.

28 Section 30 Money Laundering (Prevention and Prohibition) Act, 2022.

29 Ibid.

30 Sections 18 and 19 Money Laundering (Prevention and Prohibition) Act, 2022.

31 Section 4(8) & (9) ibid.

32 Section 13 ibid.

33 Section 11 (1) ibid. financial institutions to report to the Nigerian Financial Intelligent Unit while designated non-financial business and profession are obligated to report such transactions to the Special Control Unit Against Money Laundering (SCUML).

34 Sections 18 & 19 Money Laundering (Prevention and Prohibition) Act, 2022.

35 (unreported) Appeal No. CA/A/202/2015.

36 Money Laundering (Prevention and Prohibition) Act 2011.

and (y) any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment[37]. The Court of Appeal in this case ruled in favor of the Nigerian Bar Association, by holding that the provisions of Sections 5 and 25 of the repealed MLA, insofar as they purport to apply to Legal Practitioners are invalid, null and void. This decision of the Court of Appeal was reaffirmed in *Federal Republic of Nigeria v Chief Mike Ozekhome (SAN) 2021*.[38]

However, MLA 2022 has once again legislatively sought to impose disclosure obligations on legal practitioners and notaries.[39] By the MLA 2022, where financial transactions are mandated to be disclosed, legal professional privilege and the invocation of client confidentiality shall not apply in connection with: the purchase or sale of property; the purchase or sale of any business; the managing of client money, securities or other assets; the opening or management of bank, savings or securities accounts; the creation, operation or management of trusts, companies or similar structures; or anything produced in furtherance of any unlawful act.[40]

This new provision of the MLA 2022 may seem to have overturned the decisions of the court in *CBN vs. Registered Trustees of the NBA & Anor*[41], *Nigeria v Chief Mike Ozekhome (SAN) 2021*[42]. Additionally, it seems that the MLA 2022 took a different approach in including legal practitioners such that legal practitioners are not only included within the definition of DNBP[43] which was the central point of contention in *CBN vs. Registered Trustees of the NBA & Anor*, but also have their attorney-client privilege waived in specific instances listed in the Act. In essence, aside from the specific disclosure obligations placed on legal practitioners stated in section 11 (4) MLA 2022, the other obligations applicable to DNBPs generally would be applicable to legal practitioners.

In furtherance to the above, NBA's national president, Mr. Yakubu Maikyau at NBA-SLP Annual Conference which held in Abuja on 16th-19th July 2023 disclosed that a new law on anti-terrorism financing, proliferation, and money laundering will take effect on January 1, 2024, as part of NBA efforts to ensure the legal profession takes part in the country's development. Following the president's announcement, NBA officials

37 Section 192 (x) & (y) of the Evidence Act 2011.
38 CA/L/174/19.
39 Section 11 (4) Money Laundering (Prevention and Prohibition) Act 2022.
40 Ibid.
41 Supra footnote 40 at page 16.
42 Supra footnote 43 at page 17.
43 The definition of DNBPs in Section 30 (l) Money Laundering (Prevention and Prohibition) Act 2022.

revealed the NBA decided to add an anti-money laundering law to the legal practice to strengthen its war on corruption.[44]

CONCLUSION

A key concept in law that safeguards the privacy of communications between attorneys and their clients is attorney-client privilege. The applicability of anti-money laundering laws and regulations to Nigerian lawyers in regard to attorney-client privilege has been a contentious issue. The Court of Appeal had in fact previously ruled that legal practitioners are excluded from the definition of designated non-financial institutions as contained in the Money Laundering Prohibition Act, 2011. However, this contentious matter has clearly been settled by the enactment of the Money Laundering (Prevention and Prohibition) Act 2022 as it expressly includes legal practitioners and notaries in its application, and it states circumstances where legal privilege shall be waived. The Act is also commended for its innovations, as it takes into account the current global trends and the changes in the Nigerian economy. The Act provides a comprehensive legal and institutional framework for preventing and prohibiting money laundering in Nigeria. It imposes specific compliance requirements on individuals and entities operating within Nigeria, including lawyers, and failure to comply can result in sanctions and penalties.

44 Richard M, 'The Nigerian Bar Association (NBA) Introduces Anti-Terrorist Financing, Anti-Money Laundering Laws' (18 July 2023) <https://shuftipro.com/news/the-nigerian-bar-association-nba-introduces-anti-terrorist-financing-anti-money-laundering-laws/> accessed 19 November 2023.

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LEGAL PRIVILEGE IN POLAND

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INTRODUCTION

Polish law defines 'legal privilege' as the obligation imposed on a professional lawyer to keep secret everything he has learned from a client in connection with the performance of his profession.

Professional secrecy is a condition for building trust between a professional lawyer and a client and it is rooted in constitutional values, such as the right to a fair trial and defence.

Professional legal assistance is provided by lawyers and legal advisors, - two, separate legal professions. The functioning of each of them is regulated by a separate act (Act on the Bar of May 26, 1982 and Act on Legal Advisors of July 6, 1982).

Historically, only lawyers were defenders in criminal cases and provided legal assistance to individuals. The profession of legal counsel was created in the 80ies to support state-owned enterprises.

Currently, in practice, the performance of these professions does not differ; both are partners in law firms providing legal services.

SCOPE OF PROTECTION

Pursuant to both acts, everything that a lawyer or legal advisor learns about in connection with the provision of legal assistance is confidential. The obligation to maintain secrecy cannot be limited in time. Both acts state that a lawyer or advisor cannot be released from secrecy regarding facts learned from the client. But in this respect, the reservations mentioned in the next subsections are important.

Interpretation of the above-mentioned provisions is that the client is the holder of confidential information, it is to his interest, and has the right to disclose it on his own initiative.

The laws governing the exercise of both professions do not distinguish between types of secrecy, e.g. the same scope of protection covers advice on inheritance (ordinary advice) and conducting a court case for payment (representation in a court case).

However, there is a type of "qualified" secrecy, which concerns the relationship between a defence attorney in a criminal case and his client - a detained person, a suspect or an accused person (discussed below).

PROTECTION OF PROFESSIONAL SECRECY

The professional obligation of lawyers and advisors is to protect confidential information in an adequate manner, i.e. taking into account all potential threats, including physical.

In accordance with the principles of performing both professions, lawyers and legal advisors are obliged to ensure: appropriate physical protection of the law firm office, an appropriate level of cybersecurity, and to ensure that the law firm's staff properly protects information covered by professional secrecy. This applies not only to people with professional qualifications or trainee status, but also to people who deal with administrative and technical matters.

Protection also means, on the part of the lawyer, the need for full control of information that flows in any form from the law firm to the outside world.

In practice, more and more often, especially corporate clients, require a specific level of security from the law firms they cooperate with: electronic control of access to rooms, encrypted communication, multi-level, authenticated access to data, control over the content of mobile devices, etc.

An expression of special protection of information covering professional secrecy is the prohibition resulting from the Code of Advocates' Ethics to apply for evidence from the testimony of a witness who is a lawyer or legal advisor, in order to disclose circumstances that he or she learned about in connection with the practice of the profession (§ 19 (8) of the Code of ethics of legal profession and dignity of the profession). Attorneys and legal advisors cannot initiate a process that would jeopardize professional secrecy.

If a search takes place in a law firm (an activity aimed at obtaining evidence in criminal proceedings), then - in accordance with the internal regulations of the Bar - the lawyer in whose law firm the search takes place, is obliged to notify a representative of the bar association and ask enforcement agency officers to wait until the representative of the local bar arrives.

If, during the search, materials covered by attorney-client privilege or defence secrecy are seized (discussed below), the person whose data/documents was detained, should inform the authority conducting procedural activities about this. Depending on the type of secrecy and credibility of the information provided, the materials should be returned or placed at the disposal of the court or prosecutor, in order to make further decisions regarding their use in criminal proceedings.

EXEMPTION FROM SECRECY

The Code of Criminal Procedure states that a defence attorney cannot be released from confidentiality, regarding facts he or she learned about while providing legal advice. This is an absolute prohibition.

Only in criminal proceedings it is possible, for the purposes of taking evidence, either from witness testimony or from confidential documents, to apply a procedure in which, if certain conditions are met, a lawyer or advisor may be released from professional secrecy.

The exemption may only concern facts (not the content of the advice) and is possible if the two conditions are met: (i) when other possibilities of taking evidence have been exhausted and (ii) obtaining testimony from a lawyer is in the interest of justice.

The court decides on release - in preparatory proceedings - at the request of the prosecutor. The lawyer may appeal against such a decision.

Court jurisprudence indicates that issuing a decision on exemption from secrecy should be of an absolutely exceptional nature, and the circumstances to which the

exemption applies should be precisely defined. In practice, many decisions of this type are overturned due to their impreciseness and failure to demonstrate the two above-mentioned conditions. An example is the ruling whose thesis is quoted below:

"Revocation of the legal advisor's confidentiality, using the solutions provided for in Art. 180 § 2 of the Code of Criminal Procedure should be used, due to the functions and importance of this secrecy, only incidentally, after careful consideration of the circumstances of a specific case and with the obligatory fulfilment of statutory requirements. In particular, the possibility of taking evidence based on information covered by the legal counsel's privilege must always be preceded by a thorough analysis of whether, in concreto, the interest of justice, by way of exception, justifies the violation of the public and private interest protected by it. The court, as the body guarding the rule of law in a democratic state of law, taking into account the fact that this secrecy constitutes the essence of the profession of a legal advisor, must in such a case guarantee compliance with both the appropriate formula of the procedure and the substantive validity of the prosecutor's application, and the procedural decision made, aimed at exceptionally lifting the evidentiary ban in the name of the administration of justice, must in its logic take into account the essence of civil rights and freedoms contained in the Constitution of the Republic of Poland" (resolution of December 30, 2019, Court of Appeal in Łódź, II AKz 870/19, OSAŁ 2020/1/136).

CIVIL AND ADMINISTRATIVE PROCEEDINGS

Another type of regulation in the context of protecting professional secrets include civil and administrative procedures.

In both proceedings, the provisions on evidentiary proceedings indicate that a person called as a witness may refuse to answer a question if testifying would involve a violation of professional secrecy.

In practice, this means that a lawyer or legal advisor summoned to court as a witness should appear and only by giving testimony and answering specific questions will he be able to assess which of the questions concern confidential information (in which case he should refuse to answer).

The same mechanism applies to documents requested by the court at the request of one of the parties to the proceedings or a participant in the proceedings.

There are no legal instruments that would make it possible to question the position of a lawyer/legal advisor in such a situation, while there is no procedure for releasing him from secrecy in civil or administrative proceedings.

EXCEPTIONS

Pursuant to the provisions of the law on the bar and the law on legal advisors, the obligation to maintain professional secrecy does not apply to: (i) information made available pursuant to the provisions on counteracting money laundering and terrorism financing, and (ii) provided pursuant to the provisions of Chapter 11a, Section III of the Act of August 29, 1997 - Tax Ordinance in the scope specified in these provisions.

In the first case, these are situations in which a lawyer or advisor provides legal assistance regarding:

- purchase or sale of real estate, an enterprise or an organized part of an enterprise,
- management of the client's cash, financial instruments or other assets,
- concluding an agreement for maintaining a bank account, securities account or performing activities related to maintaining these accounts,
- making a contribution to a capital company or increasing the share capital of a capital company,
- establishing, conducting business or managing capital companies or trusts.

Pursuant to these regulations, a lawyer is obliged to notify the competent financial information authorities if there is a suspicion of money laundering in connection with the above-mentioned activities. In case of failure to fulfil or improper fulfilment of this obligation, the lawyer may be subject to an administrative penalty.

This does not apply to situations in which a lawyer acts as a legal representative in court matters relating to these transactions.

The second mentioned limitation results from the implementation of EU regulations regarding reporting tax schemes that can be applied by clients of professional lawyers. This solution is criticized because it undermines trust in the relationship between the client and his attorney/advisor.

FOREIGN LAWYERS

The act on the provision of legal assistance by foreign lawyers in the Republic of Poland, in force since 2002, which regulates the principles of providing legal assistance by foreign lawyers, does not contain specific regulations regarding professional secrecy. However, to the extent not regulated therein, it refers to the acts on lawyers and legal advisors, which means that foreign lawyers should be entitled to the same level of protection as Polish lawyers.

PROFESSIONAL SECRECY OF A LEGAL ADVISOR EMPLOYED IN THE COMPANY (IN-HOUSE COUNSEL)

Basically, the form of practicing the profession, whether as an employed person or as a lawyer running his own business, does not affect the scope of protection of information covered by legal counsel's privilege. However, in practice, there are views referring to the case of Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission, judgment of the CJEU of September 14, 2010 in case C-550/07 P, in which the independence of an in-house lawyer employed in the company was questioned as well as protection of the company's internal communication that takes place with the participation of an internal lawyer.

SECRECY OF INTERNAL INVESTIGATION

There are no regulations in Poland regarding the rules according to which internal investigations should be conducted. They are a legal practice/service, based on the experience of international corporations and law firms that operate under various legal regimes (labour law regime, commercial law regime, criminal law regime) and other regulations that may constitute reference points in this type of cases, e.g. concerning personal data protection (GDPR) or employee's termination without notice.

The lack of specific regulations also applies to the issue of keeping secret information collected during the internal investigation. One of the main reasons for engaging law firms in internal investigation is the need and desire to keep the findings secret, under the protection of the provisions applicable to attorneys and advisors.

In such a situation, it is crucial to entrust the entire internal investigation to a law firm. Conducting the investigation will then be understood as a complex form of providing legal assistance. The documentation and data from such proceedings, stored in the law firm office will also be protected by professional secrecy.

CONCLUSION

Nowadays, statistically, cases in which law enforcement agencies try to gain access to information covered by attorney-client privilege are becoming more and more common. This is partly due to the huge increase in the number of people practicing the legal profession professionally, but unfortunately also to the fact that lawyers and legal advisors increasingly often give reasons for such actions through their behaviour.

Mareș & Mareș Avocați

THE EXTENT OF THE NOTION OF LEGAL PRIVILEGE IN ROMANIA

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I. INTRODUCTORY CONSIDERATIONS

The legal privilege is an unregulated concept under this title in Romanian legislation, yet it is undoubtedly recognized as such at the international and European levels, and in the technical-legal language of the domestic legal community, it is increasingly used by practitioners and legal professionals.

Stricto sensu, this concept can be defined as the practical means by which the confidentiality and professional secrecy of the attorney can be invoked against third parties (individuals or legal entities, public authorities, or private entities, etc.) when they are violated or about to be violated, and the defence of the client is at concrete risk or is concretely affected.

In other words, the attorney-client privilege constitutes a means of protecting the professional secrecy and confidentiality that characterize the attorney-client relationship. Confidentiality and professional secrecy are regulated by Romanian legislation from a dual perspective, both as rights and as obligations of the attorney in the exercise of the profession.

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The attorney-client privilege, or as it is also called, the professional secrecy privilege and, essentially, the respect for the confidentiality of any aspect of the attorney-client relationship are fundamental elements for any professional activity in which the attorney is engaged.

As stated in the Permanent Committee of the Council of Bars and Law Societies of Europe (CCBE), the attorney-client privilege is an ethical value of the legal profession, an absolutely essential principle without which there would be no adequate protection for the client, and without which the attorney could not practice the profession.[2] The fundamental reasoning for invoking professional secrecy through the attorney-client privilege is, therefore, to protect the client against interference that could jeopardize their defence.

Furthermore, respecting the attorney-client privilege and the confidentiality of this professional relationship is intended to ensure and strengthen society's trust in the legal profession and its role as an indispensable participant in the administration of justice.

In the member states of the European Union (EU), professional secrecy does not enjoy uniform protection in similar terms; there are different national approaches regarding the interpretation and application of the professional confidentiality principle or the manner in which the confidentiality of data and information that the attorney becomes aware of during the professional relationship is ensured.

This article aims to analyse the methods and means by which this legal privilege is ensured in Romania and the differentiated nature of the general approaches of other states regarding the standard of professional confidentiality protection.

II. THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE

In Romania, the regulation of legal privilege is based on two of the principles governing the legal profession, namely, the principle of respecting professional secrecy and the principle of professionalism and loyalty to the client. These are provided for in Article 8(2)(c) and (f) of the Code of Ethics of the Romanian Lawyer adopted by the Decision of the UNBR Council no. 268/June 17, 2017.

2 In the same sense, see the CCBE Declaration on Professional Secret / Legal Professional Privilege (LPP) adopted by the CCBE Standing Committee on 15 September 2017, available here. https://www.unbr.ro/wp-content/uploads/2017/09/EN_DEON_20170915_Statement-on-professional-secrecy_LPP.pdf.

According to Article 11 of the same code, "*Professional secrecy is both a right and a professional obligation of the attorney. The primary beneficiary of professional secrecy is the attorney's client. Protecting and respecting professional secrecy constitutes a guarantee of the client's right to defence and the right to a fair trial.*".

Professional secrecy encompasses all information and data of any kind, in any form and on any medium, exchanged between the attorney and their client, such as: matters for which a person has requested legal assistance, data concerning the person who has requested assistance, the contract between the attorney and the client, the strategies and tactics of defence or representation, correspondence between the attorney and their client or fellow attorneys, notes taken during the professional interview conducted by the attorney with their client for the analysis of facts, or a judicial file or legally relevant documents, testimonies received by the attorney in the exercise of the profession, etc.

Confidentiality extends to both the information that the client has provided to the attorney "confidentially" and to any other information or evidence obtained by the attorney in the performance of their duties in connection with the specific case, which are not known to the public.

In this sense, in a recent case (C-694/20 – Orde van Vlaamse Balies), the Court of Justice of the European Union ruled that the professional privilege of lawyers in the European Union ("EU") applies not only to legal advice in general but also to communications between the attorney and the client, irrespective of whether it pertains to the client's defence rights in judicial proceedings.

To reach this conclusion, the CJEU took into account, among other things, that the specific protection of attorney professional secrecy is justified by the fact that lawyers are entrusted with a fundamental mission in a democratic society, namely, the defence of litigants.[3]

The Court clarified that this protection covers not only the defence activity but also legal counselling (such as compliance advice) and guarantees the confidentiality of this legal counselling, both in terms of content and existence. Thus, as the European Court of Human Rights (ECHR) also pointed out, individuals consulting an attorney can reasonably expect that the matters discussed, and the communications made will remain private and confidential.[4]

3 Protection conferred, inter alia, by art. 7 of the Charter of Fundamental Rights of the European Union and art. 8 (1) of the ECHR.

4 Case of Altay v. Turkey (No. 2), para. 49.

Regarding this subject, we recall the highly publicized case of Volkswagen AG (Volkswagen), headquartered in Germany, the parent company of the Volkswagen Group, which included Audi AG (Audi), also headquartered in Germany. In this case, the attorneys of Volkswagen, practicing within the Munich law firm of an international law firm, were deprived of the protection of professional confidentiality in a criminal procedure regarding documents produced by them during an internal investigation requested by their client, Volkswagen (the parent company), which also pertained to one of its affiliated companies, Audi.

At least declaratively, in Romania, such a professional relationship should have been subject to the legal privilege. National legislation contains no provisions limiting the invocation of this privilege in the manner found in the German Code of Criminal Procedure, i.e., only when the attorney-client product is created in the defence of a client who is accused in the criminal procedure where the privilege is invoked.

According to local legislation, as we will see further, professional secrecy and the confidentiality of data and information can even be opposed to the prosecutor. Moreover, the Romanian attorney is obliged to maintain professional secrecy regarding any aspect of the entrusted case, and the correspondence and information exchanged between the attorney and the client, regardless of the type of medium, cannot be used as evidence in court and cannot lose their confidential character.

Also, the information included by attorneys in documents drafted during internal investigations cannot be considered to have a legal nature other than that of confidential information subject to communications between the attorney and their client.

Additionally, another aspect of the scope of this privilege includes the information that an attorney may provide to the mass media. According to the Statute of the Legal Profession adopted by the Decision of the UNBR Council no. 64/2011, in their relationship with the mass media, the attorney shall exercise caution and restraint without disclosing the obtained information. Exceptionally, if their client is subjected to abuse, and the client's interest requires it, the attorney may present the situation to the press, "*requesting the restoration of legality and the adoption of fair procedural measures*".

Another aspect related to the scope of the attorney-client privilege is the moment when the attorney's obligation to maintain professional secrecy arises. According to Romanian legislation, this obligation may arise during any telephone, electronic, postal communications, preliminary consultations, or during negotiations with the client or another person authorized by the client to conclude the legal assistance contract, and its duration is unlimited, meaning that the obligation of professional secrecy continues even after the termination of professional services.

The obligation to maintain professional secrecy extends to all activities of the attorney, their associates, collaborating attorneys, and even to their relationships with other attorneys. Beyond the individuals mentioned, this obligation also extends to those with whom the attorney collaborates, with the attorney being responsible for informing them in advance about the duty to maintain professional secrecy.

In the relationship between a Romanian attorney and an attorney from another European Union member state or a non-EU state, the former must exercise additional diligence to ensure compliance with confidentiality obligations. Thus, in the relationship between a Romanian attorney and an attorney from another EU member state, the Romanian attorney is obligated to adhere to the legal provisions set forth in the Code of Conduct for European Union Lawyers. Conversely, in the relationship between a Romanian attorney and an attorney from a non-EU state, due to the absence of international regulations concerning professional secrecy, it is necessary for the Romanian attorney to inform the other party about the existence of norms in the foreign state that allow for confidentiality to be maintained.

III. INVOCATION OF THE LEGAL PRIVILEGE

To safeguard the attorney's professional secrecy, the law establishes guarantees regarding the right to refuse testimony, the inviolability of the professional office, the special regime for searches and the seizure of documents from the professional office.

The Criminal Procedure Code does not outright prohibit the hearing of an attorney as a witness. The absolute prohibition applies only to matters falling under attorney-client privilege or confidentiality and that were known to the attorney during the provision of legal assistance to the client.

According to art. 114 para. (3) of the Criminal Procedure Code, the status of being a witness takes precedence over that of being an attorney concerning facts and circumstances

that the person knew before acquiring this status. Therefore, with respect to facts and circumstances known by the attorney prior to initiating the attorney-client relationship, the prohibition against questioning the attorney as a witness does not apply, and the attorney may, in principle, be compelled to testify even against their client.

Regarding facts and circumstances acquainted by the attorney during the course of providing legal assistance to the client, the attorney's status takes precedence over the witness status in any case involving their client, without exception. According to art. 116 para. (3) of the Criminal Procedure Code, facts or circumstances whose secrecy or confidentiality can be protected by law cannot be the subject of a witness statement.

Furthermore, the provisions of art. 306 para. (6) of the Criminal Procedure Code highlight the enhanced protection provided by criminal procedural law for attorney-client privilege compared to banking secrecy and professional secrecy in other legal domains. The provisions establish the limits of the applicability of banking secrecy and professional secrecy to law enforcement agencies in the collection of information and the administration of evidence.

Before the initiation of criminal proceedings, both banking secrecy and professional secrecy can be invoked against prosecution body, and this protection continues even after that moment against criminal investigation body. However, after the commencement of criminal proceedings, banking secrecy and professional secrecy cannot be invoked against the prosecutor.

In contrast, attorney-client privilege can be invoked against the prosecutor, as expressly provided in art. 306 para. (6). This exception is designed to protect the attorney-client privilege and the successful invocation of this privilege, as the essence of this privilege includes the attorney's duty to keep confidential information in which the attorney provided legal services to the client.

Moreover, the confidentiality of the attorney-client relationship is ensured by establishing special conditions that must be met when conducting technical surveillance of the relationship between the attorney and the client. According to art. 138 para. (13) of the Criminal Procedure Code, technical surveillance involves the use of any of the following methods: intercepting any type of remote communication, accessing a computer system, video, audio, or photographic surveillance, location tracking, or tracking through technical means, and obtaining data regarding a person's financial transactions.

The conditions that must be met when ordering technical surveillance of the attorney-client relationship are provided in art. 139 para. (4) of the Criminal Procedure Code. One condition requires that technical surveillance of the attorney-client relationship can only be conducted if there is information that the attorney is committing or preparing to commit a specific serious offense listed in para. (2) of the same article. This includes offenses such as corruption, money laundering, tax evasion, offenses against the financial interests of the European Union, or other offenses for which Romanian law imposes a prison sentence of 5 years or more.

Therefore, in the absence of information from law enforcement agencies regarding the commission or preparation of such offenses by the attorney, technical surveillance of the attorney-client relationship is not permitted.

Furthermore, since 2015, the Parliamentary Assembly of the Council of Europe adopted a resolution emphasizing that intercepting privileged communications between lawyers represents a threat to fundamental rights, especially the right to privacy and the right to a fair trial.[5]

If, however, during or after the execution of technical surveillance, it is revealed that the surveillance activities targeted the attorney's relationship with the suspect or defendant being represented by the attorney, the evidence obtained cannot be used in any criminal proceedings and must be immediately destroyed by the prosecutor. In such cases, the sanction of excluding evidence obtained in violation of legal provisions and derivative evidence, as per art. 102 para. (4) of the Criminal Procedure Code, applies.

However, although the legal framework of protection still existed from the Old Code of Criminal Procedure, in 2015 Romania was convicted by the European Court of Human Rights (ECHR) in Pruteanu v. Romania case for violating Article 8 of the Convention on the respect for private and family life and the protection of correspondence. This violation occurred through the interception of phone conversations between the attorney and the client.

In this case, twelve phone conversations between attorney Alexandru Pruteanu and his client, who had hired him to represent him in a criminal procedure, were intercepted. Attorney Pruteanu, acting in his own name and not as a representative of his client, filed

5 Resolution no. 2045, dated 21 April 2015, available https://www.unbr.ro/wp-content/uploads/2017/09/EN_DEON_20170915_Statement-on-professional-secrecy_LPP.pdf.

an appeal against the decision to authorize the inclusion of the intercepted conversation transcripts in the case file and requested the appellate court to order the destruction of the transcripts of his conversations with his client. However, the appeal was rejected as inadmissible because there was no legal avenue for it.

The Court highlighted that intercepting conversations between an attorney and a client undoubtedly constitutes an infringement on attorney-client privilege, which is the basis of the trust relationship between the two individuals. Therefore, the client could file a complaint about the violation of their right to have a confidential relationship with their attorney. Additionally, the Court considered it necessary for the attorney to be able to file a complaint for the violation of privacy and correspondence, independent of the client's right to file a complaint.

Moreover, Law no. 51/1995 on the organization and exercise of the profession of lawyer regulates aspects related to the inviolability of the lawyer's office, and in conjunction with the provisions of the Criminal Procedure Code, it defines how this privilege operates.

According to art. 34 para. (1) of the Law, to ensure professional secrecy, acts and professional documents in the possession of the lawyer or in their office are inviolable. Furthermore, according to the provisions of Article 33(1) of the Law, the search of the lawyer's office, domicile, workplace, or place of work can only be carried out by a prosecutor based on a warrant issued by a judge.

Thus, the protection of the attorney-client privilege is manifested through the establishment of special rules concerning the search of the attorney's office. According to Romanian legislation, this search can only be conducted by a prosecutor and not by law enforcement or other authorities responsible for maintaining public order and security.

In this situation, documents containing communications between the attorney and their client and documents containing notes made by the attorney regarding the defence of a client are exempted from the measure of lifting documents and from the measure of confiscation.

Therefore, at least in principle, Romanian law provides a triple guarantee to protect the attorney-client privilege: first, only a prosecutor has the authority to conduct a search; second, there is a prohibition on technical surveillance of the attorney-client relationship, with immediate destruction of any evidence obtained in violation of this privilege; and lastly, evidence obtained through the violation of professional secrecy cannot be used in any criminal proceedings.

IV. CONCLUSIONS

From the considerations above, it can be concluded that Romania has established regulatory provisions aimed at protecting attorney-client privilege and ensuring its enforceability.

However, from an objective standpoint, the guarantees mentioned may sometimes prove minimal. This is particularly relevant when considering the potential interception of attorney-client communications, which can result in immediate harm to the party communicating with their attorney, as the information is already exposed to law enforcement authorities. Even if subsequent measures involve the destruction of such evidence, this may inadvertently facilitate the identification of other pieces of evidence that could be admitted into the case file.

Therefore, it is imperative that national legislations, as well as the legal frameworks of European Union member states, not only contain legal provisions relating to attorney-client privilege but also provide robust safeguards to effectively uphold the sanctity of attorney-client confidentiality. Such safeguards should actively prevent actions by authorities or other parties that may compromise attorney-client privilege. This is particularly crucial given the indispensable role that attorneys play in the administration of justice and the exercise of individuals' right to legal defence.

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LEGAL PRIVILEGE IN SPAIN

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1. INTRODUCTION

The confidentiality of communications between a lawyer and a client is an issue of great relevance and sensitivity in the legal, and as expected, also in the Spanish jurisdiction. In our legal system, legal privilege is a fundamental principle that protects the privacy of the information exchanged and ensures that a client receives effective representation. However, there are some specific situations in which authorities may consider the interception of these communications appropriate (either electronically or through an authorisation to enter and search professional offices). This paper examines the limits and legal protections related to legal privilege, as well as its importance in the Spanish legal system.

2. LEGAL PRIVILEGE IN SPAIN

The confidentiality of communications between a lawyer and a client should be a fundamental pillar in the legal system of any country in the world, and Spain is no exception, where the adversarial system and equality of arms between parties in legal proceedings prevail. Legal privilege is essential to foster trust and ensure that clients

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can communicate fully with their lawyers without fear of the disclosure of sensitive information. Confidentiality allows a client to share all the details of their case and receive comprehensive legal advice. As noted by the Criminal Chamber of the Supreme Court, *"the right to confidentiality of communications and information transmitted between lawyer and client is an inherent requirement of the right to a defence. It corresponds to the fundamental role of lawyers in the defence of litigants in a democratic society and the relationship of trust that must exist between both to achieve that goal effectively (Michaud v. France, judgment of 6 December 2012 (JUR 2012/382735))"*.[3]

Enshrined in the Spanish Constitution ("**SC**") as the result of the intersection of two fundamental rights: the right to the confidentiality of communications and the right to effective judicial protection, and more specifically, the right to a defence,[4] Spanish case law has consistently reinforced the importance of legal privilege, defending the confidentiality of communications between lawyers and clients, and emphasising that this protection is essential and fundamental in a State governed by the rule of law.

The right to confidentiality of communications has a broad scope and protects the privacy of all individuals, but in the legal context, Article 18 SC is a crucial cornerstone of professional secrecy. Communications between lawyers and clients, whether oral or written, are covered by this right, which means that neither authorities nor third parties can intercept or disclose these communications without the client's consent. This creates an environment of confidentiality that is essential for the relationship of trust between a client and their lawyer.

Similarly, Article 24.2 SC guarantees the right of every person to be advised by a lawyer and to have an effective defence during any legal proceedings.

3 Supreme Court Judgment No. 1023/2022 of 26 April.

4 Article 18.3 SC: "*It guarantees the confidentiality of communications, especially postal, telegraphic, and telephone communications, except by court order.*" Article 24.2 SC: "*Likewise, everyone has the right to a judge predetermined by law, to a defence and legal assistance, to be informed of the charges against him/her, to a public trial without undue delays and with all guarantees, to use relevant means of evidence for his/her defence, not to incriminate himself/herself, not to confess guilt, and to the presumption of innocence. The law will regulate cases in which, due to kinship or professional secrecy, one will not be obliged to testify about allegedly criminal acts.*"

Professional secrecy is inextricably linked to this right and ensures that communications between a lawyer and their client are unimpeded and can be conducted without fear of the disclosure of sensitive information, which is the basis of the right to privacy and defence. This represents an essential element of the independence of lawyers.[5] Without professional secrecy, trust in the lawyer-client relationship would be undermined, which, in turn, would negatively impact the right to an effective defence.

Legal privilege in Spain is primarily governed by the following legislation and legal texts:

I. The Organic Law on Judicial Power ("**OLJP**"): The OLJP addresses the issue of legal privilege in Article 542.3[6], which establishes the inviolability of communications between lawyers and clients.

II. Spanish Criminal Procedure Act ("**SCPA**"):

- Article 118.4[7]: This Article governs the right to a defence of the individuals under investigation in criminal proceedings, mentioning the confidentiality of communications between the individuals under investigation in the criminal proceedings and their lawyers, highlighting, therefore, the significant relationship that exists between the right to a defence and communications between lawyers and clients as parties under investigation.
- Article 263[8]: Under this provision, lawyers are exempt from the obligation to report those facts of which they have become aware due to their professional duties.

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5 Supreme Court Judgment No. 451/2018, dated 10 October: *"Revealing what should be kept secret thus translates into an infringement of the client's right to privacy, but also the right to legal protection without suffering defencelessness. The extent of defence possibilities is linked to the pre-trial stage, as in it, the future party to potential legal proceedings must be free to provide all information, including harmful information, to the assisting lawyer to ensure an effective defence. It should not be forgotten that lawyers are also exempt from the duty to report under Article 263 of the Spanish Criminal Procedure Act. Of course, this is, in any case, subject to legal limitations concerning the configuration of such professional secrecy, which are unnecessary to consider here."*

6 Article 542.3 OLJP: *"Lawyers must maintain confidentiality of all facts or information they become aware of due to any of the modalities of their professional practice and cannot be compelled to testify about them."*

7 Article 118.4 SCPA: "*All communications between the suspect or accused and their lawyer shall be confidential. If these conversations or communications have been intercepted during the execution of any of the proceedings regulated by this law, the judge shall order the deletion of the recording or the delivery to the recipient of the detained correspondence, making note of these circumstances in the proceedings.The provisions of the first paragraph shall not apply when there is objective evidence of the lawyer's involvement in the criminal act under investigation or their involvement with the suspect or accused in the commission of another criminal offence, without prejudice to the provisions of the General Penitentiary Law."*

8 Article 263 SCPA: *"The obligation imposed in the first paragraph of the previous Article shall not apply to lawyers or solicitors with respect to the instructions or explanations received from their clients. Nor shall it apply to clergy and ministers of dissenting religious groups with respect to the information revealed to them in the exercise of their ministry."* The obligation referred to in Article 262 SCPA is the duty to report those professionals who have knowledge of any crime by virtue of their positions, professions, or trades.

- Article 416[9]: This Article establishes the duty of lawyers to maintain lawyer-client privilege in matters related to criminal proceedings.

III. Spanish Criminal Code ("**SCC**"): In Spain, the disclosure of professional secrets is classified as a criminal offence[10], with sanctions for its infringement.

IV. Royal Decree 135/2021, of 2 March, which approves the General Statute of the Spanish Bar ("**Statute of the Spanish Bar**"): This is a document issued by the General Council of Spanish Lawyers with the status of law that establishes the ethical principles and conduct that lawyers in Spain must follow. It contains specific guidelines on the duty to maintain legal privilege and the circumstances under which confidential information can be disclosed.[11]

V. Code of Ethics for Spanish Lawyers: This is a set of rules that establishes the mandatory obligations for members of the Spanish Bar. Although it is not a law with legal status, its infringement does carry penalties.[12] The Organic Law on the Right of Defence is currently pending approval by the Spanish Parliament,[13] where, in a more detailed manner and in an Organic Law, the configuration of legal privilege and the guarantee of confidentiality of communications between lawyer and client are among the aspects addressed.

This intersection between fundamental rights and legal practice is essential for justice and fairness in the Spanish judicial system.

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9 Article 416 SCPA: "*They are exempt from the obligation to testify: 2. The lawyer of the defendant regarding the facts that he/she has confided to the lawyer in his/her capacity as a defence counsel.*"

10 Article 199 SCC: "*1 One who discloses the secrets of others, of which they have knowledge through their profession or employment relationships, shall be punished with imprisonment from one to three years and a fine from six to twelve months". 2. A professional who, in breach of their duty of confidentiality or secrecy, discloses the secrets of another person, shall be punished with imprisonment from one to four years, a fine from twelve to twenty-four months, and a special disqualification from their profession for a period of two to six year".*

11 Article 21 Statute of Spanish Bar: "*1. Trust and confidentiality in relationships with clients impose on legal professionals, in accordance with the provisions of Organic Law on Judicial Power, the duty and right to maintain the confidentiality of all facts or information that they become aware of due to any of the modalities of their professional practice, and they cannot be compelled to testify about them. 2. The provisions in this chapter shall be understood without prejudice to what is provided in each case by Organic Law on Judicial Power, by procedural laws, and other applicable legislation.*" Article 22.1 Statute of Spanish Bar: "*The duty and right of professional secrecy of legal professionals encompass all facts, communications, data, information, documents, and proposals that, as a legal professional, they have become aware of, issued, or received in the course of their professional practice.*"

12 Article 5 of the Code of the Ethics for Spanish Lawyers – Scope of Professional Practice.

13 Article 15: of the Organic Law on the Right of Defence, which in turn refers to Articles 21 to 24 of the General Statute of Advocacy.

3. REQUIREMENTS AND OBLIGATIONS FOR LEGAL PRIVILEGE IN SPAIN

The requirements and obligations established for legal privilege in Spain are twofold, as the client has the right to have their rights to privacy and a defence respected, and for the lawyer not to disclose anything confided to him/her. On the other hand, the lawyer has the duty not to disclose the facts he/she has become aware of in the course of his/her professional practice:

I. Lawyer-Client relationship: legal privilege applies to the relationship between a lawyer and his/her client. To establish this duty of confidentiality, there must be a legally recognised relationship between both parties.

II. Absolute confidentiality: Lawyers are obliged to keep all confidential information obtained from their client's secret. This means not only refraining from disclosing, without the client's consent, any information related to the case or legal advice but also ensuring that clients can fully communicate with their lawyers, which is essential for effective legal representation and informed decision-making.

III. Period of secrecy: The duty of confidentiality persists even after the lawyer-client relationship has ended. This obligation is ongoing to ensure the continued protection of the client's privacy.

IV. Exceptions: While professional secrecy is a general rule, there are limited exceptions in which a lawyer may be compelled to disclose confidential information. These exceptions will be discussed in Section 4.

V. Client's consent: In certain cases, the client can provide their express consent to the lawyer to disclose confidential information. However, this consent must be voluntary and based on a full understanding of the implications.

VI. Duty of loyalty and professional ethics: Lawyers have a duty of loyalty to their clients and must act ethically at all times. This includes not using confidential information to the detriment of the client's interests and avoiding conflicts of interest.

4. EXCEPTIONS TO LEGAL PRIVILEGE: ABSENCE OF LEGAL REGULATION

As previously mentioned, legal privilege is based on the intersection of two fundamental rights that must be respected in a State governed by the rule of law. However, the exercise of a fundamental right is never absolute and can come into conflict with other rights, and this is where the limits of legal privilege are found because there are certain cases in which it will have to yield.

On one hand, there is a duty to prevent crimes by the lawyer himself/herself: Article 450.1 SCC also imposes on the lawyer the duty to prevent crimes that affect people's lives, integrity, health, freedom, and sexual freedom[14], and they may be considered the active subject of the crime if they are aware of the possibility of the commission of a crime and do not prevent it.[15]

However, judicial intervention can lead to a breach of legal privilege, and this can arise in two ways: (i) the interception of communications between the lawyer and his/her client[16], and (ii) a warrant for the entry and search of a lawyer's professional office.

However, in the latter case, the interference of the State in the fundamental rights of a citizen is adequately regulated, but we lack specific regulations for the breach of legal privilege when both the entry and search of a lawyer's professional office and the authorisation for the interception of telecommunications, including those of his/her lawyer, occur.

14 Article 450. 1 SCC: "*The one who, being able to do so with their immediate intervention and without personal or other risk, does not prevent the commission of a crime affecting people's lives, integrity, health, freedom, or sexual freedom, shall be punished with a prison sentence of six months to two years if the crime is against life, and a fine of six to twenty-four months in other cases, unless the unpunished crime corresponds to an equal or lesser penalty, in which case the lower penalty will be imposed.*"

15 If a lawyer were accused of the crime of disclosing professional secrets, his/her action would be protected under Article 20.5 SCC, exempting him/her from criminal liability, due to a state of necessity to avoid his/her own or another's harm, fulfilling the requirements of the aforementioned Article.

16 Regulated in Articles 588 *bis* to 588 *octies* of the SCPA.

(i)

The requirements[17] and general principles for the interception of communications of any person under investigation are as follows:

- Prior judicial authorisation is required, which involves the existence of prior legal proceedings, regardless of their nature or kind, preventing pre-trial or non-judicial interventions.
- Judicial authorisation must be sufficiently justified and must be based on evidence that justifies the measure by serving to uncover some significant circumstance of the case.
- The intercepted communications should be those "of the person under investigation", a term that, for the Public Prosecutor's Office, should be understood in a broad sense, extending also to the defendant, the plaintiff, or the implicated party.[18]
- This investigative measure must be related to the investigation of a specific crime (the principle of specificity).
- The scope and the length of the measure should be defined beforehand on the basis of its usefulness (principle of adequacy).
- The principle of exceptionality frames the investigative measure in that, as it involves a breach of a fundamental right (the right to confidentiality of communications), prior and sufficient police investigation is required, which, due to the difficulties of the case, requires the interception of telecommunications.
- The principle of proportionality requires the court to conduct a prior analysis of (i) the suitability of the measure to achieve the intended purpose; (ii) whether less restrictive means have been considered in view of the fundamental right that is to be breached; and (iii) the balance between the benefits to the general interest from adopting the measure and the harm to the fundamental right being breached.

Despite this regulation, concerning the interception of communications that include those of a lawyer, the lack of specific regulations has had to be supplemented by case law.

17 Interception of communications is allowed in the following cases as specified in Article 579.1 of the SCPA and Article 588 *ter* letter a) of the same law: Intentional crimes punishable with a maximum penalty of at least three years of imprisonment; Crimes committed within a criminal group or organisation; Terrorism-related offences; Crimes committed through computer or any other information or communication technology or communication service (588 *ter letter a*).

18 Constitutional Court Judgment No. 49/1999 of 5 April.

In this regard, the legislation is limited to what is stated in Article 118.4 SCPA, and no specific regulation has been introduced. This provision establishes the confidentiality of communications between a lawyer and a client, stating that if such communications are intercepted, they must be immediately deleted, with a record made by court order that this has occurred.

On the other hand, the second paragraph of that Article provides for the only circumstances in which the interception of a lawyer's communications can be allowed. Such interception will be possible when *"there are objective indications of his/her (the lawyer) involvement in the investigated criminal* act*, or his/her involvement with the person under investigation or accused in the commission of another criminal offence."* In other words, a lawyer's communications can only be intercepted by a court order when there are reasonable grounds to believe that he/she is involved in the case under investigation or in another criminal offence with the person under investigation, leading the lawyer to lose his/her status as a lawyer and become a person under investigation.

Therefore, judicial authorisation must be particularly well-founded regarding the suspicions of the lawyer's criminal activity, the limits of the interception, and the reasons justifying the proportionality of the investigative measure, taking into account the impossibility of investigating such activities through means that are less invasive to the rights and fundamental freedoms of the person under investigation and, above all, their client.

The interception of communications can only refer to the facts under criminal investigation, and under no circumstances can communications (or even documents) between a lawyer and their client unrelated to their alleged criminal activity be intercepted. Any other type of generic communication interception would be unconstitutional and procedurally invalid.

Due to the lack of regulation, it will be the judge's responsibility to implement the investigative measure, for which the judge must provide a very rigorous justification for the reasons that warrant its implementation. The judge must determine whether the investigative measure is appropriate for the intended purpose, whether it is the only way to clarify the facts, whether the benefits of its implementation outweigh the harm to the legal privilege, and most importantly, whether this measure will only be used to gather information related to a specific crime and will not be abused to investigate new criminal offences discovered as a result of the interceptions.

(ii)

Article 18.2[19] of the Spanish Constitution establishes the inviolability of the home, and the entry or search of a residence cannot be conducted without the consent of the owner or a court order.[20]

From a procedural point of view, the court order authorising the entry and search must be served at the same time the search is carried out. The presence of the Court Clerk is required to document the result of the judicial activity, and the presence of both (i) the person whose residence is entered and searched, and (ii) his/her lawyer is also mandatory.

Additionally, the Constitutional Court has established six requirements to ensure the protection of the fundamental right to the inviolability of the dwelling.[21] These requirements are:

I. A constitutionally legitimate purpose, understood as the public interest, as the purpose of the procedure is to determine relevant facts for the criminal proceedings.

II. Necessity of specific and detailed legal provisions.

III. Jurisdiction. The SC reserves absolute jurisdiction over judgments, without prejudice to police involvement where there are reasons of urgency and necessity.

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19 Article 18.2 SC: "*The home is inviolable. No entry or search may be conducted in it without the consent of the owner or a judicial order, except in the case of a flagrant offence.*"

20 Supreme Court Judgment No. 113/2018, dated 12 March: *"Every individual shall be protected by Article 18.2 of the Spanish Constitution in those places where they carry on their private life, permanently or temporarily, shielded from the intrusion of third parties, including unauthorised public authorities."*

21 One aspect to consider is whether it would be necessary to notify the Dean of the corresponding Bar Association and have their presence during entry and searches of lawyers' offices. According to the Supreme Court Judgment No. 540/2017, dated 12 July, the Article 32.2 of the previous Statute of the Spanish Bar, approved in 2001, stated that *"In the event that the Dean of a Bar Association, or whoever statutorily substitutes for them, is required by legal norms or notified by the competent judicial or administrative authority to conduct a search of a lawyer's office, they must appear at the office and assist in the proceedings carried out there, ensuring the safeguarding of lawyer-client privilege." The literal wording of this provision does not contemplate, as it is apparent from its reading, the obligation of the Judicial Authority to notify or communicate to the Dean of the corresponding Bar Association the search and seizure of every law firm. Instead, it places the obligation on the latter to be present if the Judicial Authority requests it."* In summary, if the Judge does not consider it necessary to have the Dean present, it will not be necessary to notify or have the Dean present.

IV. Grounds for the court order. A formal requirement of the proportionality rule, balancing the fundamental right in question and the constitutionally protected interest.

V. Proportionality. The measure must be adequate to achieve the intended goal (adequacy test), there must be no other less restrictive measure that would be equally effective in achieving the objective (necessity test), and the measure must be balanced in such a way that it is more beneficial to the general interest than harmful to other interests (strict proportionality).

VI. The resolution must be issued in ongoing criminal proceedings.

However, regarding the procedure of entering and searching a law office,[22] which is also considered a domicile,[23] it has not been subject to specific regulation in the SCPA either, although attempts have been made to regulate it through the Statute of the Spanish Bar, with limited success.

The Supreme Court has increasingly granted greater constitutional protection to law offices and, accordingly, it has recognised the necessity for a sufficiently well-founded authorisation to carry out the entry and search, not from the perspective of a physical space where the lawyer goes about their private life, but, rather, due to the lawyer-client relationship and its impact on legal privilege. In other words, this is viewed from the standpoint of the right to a defence under Article 24 SC and the right to the confidentiality of communications under Article 18(2) SC.

Similarly, in its judgment of 25 February 2004, the Criminal Chamber of the Supreme Court considered the entry and search of a lawyer's office in light of comparative law, specifically concerning the existing regulations in French law.[24]

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22 Article 545 *et seq*. SCPA.

23 Article 554 SCPA: "*The following are considered domiciles, for the purposes of the previous articles: (...) 4.ºThe physical space that constitutes the centre of their management, whether it is their registered office or a dependent establishment, or any other places where documents or other records of their daily activities are kept, is considered a domicile reserved for third-party knowledge.*"

24 Paragraph 11 of the Judgment of the Supreme Court, Criminal Chamber, of 25 February 2004: "*Unlike French law, Spanish law does not specifically regulate the procedure for entering and, especially, searching a lawyer's professional office in the Spanish Criminal Procedural Act. There are references in the Statute of the Spanish Bar and the Assembly of Deans of the Bar Associations of Spain, which proposed a text that has not become part of the procedural law. Comparative legislation does not find obstacles to entry and search, provided there is the possibility of finding relevant data for the investigation of crimes committed by one of the lawyer's clients or, when applicable, by the lawyer himself as the suspected perpetrator. In the present case, not only was legal professional privilege safeguarded for those clients who were not involved in the investigation, but the search was carried out in the presence of a person who, being a lawyer as well, was safeguarding the interests of the law firm to which they belonged.*".

Although, in 2012, the Supreme Court[25] conducted a detailed analysis of the legal requirements for entering and searching a lawyer's office, it has consistently maintained[26] that the search of a law office does not have the same protection as a private residence under Article 18.2 SC.

5. CONCLUSIONS

Despite the many amendments to the SCPA, full recognition of legal privilege has not yet been achieved, and there is still no mechanism in place to guarantee all its different aspects.

While the Spanish legislature has attempted to establish the concept of legal privilege in various legal texts (such as the OLJP, the Statute of the Spanish Bar, or the Draft of the Organic Law on the Right of Defence), its true and real scope must be reflected from the perspective of Criminal Law and, more specifically, in the SCPA. The latter is the only legal framework that binds investigative judges in Spain regarding entry and search procedures and the authorisation of the interception of communications. In both cases, fundamental rights are limited within the context of a criminal investigation.

It is essential to address this issue, starting from the principle of the primacy of European Law and under the case law of the ECHR, also bearing in mind the Supreme Court judgments, which consider it essential that the entry and search of a lawyer's office must be strictly accompanied by special guarantees, as well as the preservation of legal privilege over the interception of communications. All potential circumstances surrounding the raised assumptions, whose procedural safeguards are "foreign" to our procedural law due to the lack of provisions, should be established through legal regulations rather than relying on judicial interpretations.

It is advisable to establish methods, procedures and criteria for preventive action for the investigative courts in order to avoid situations in which legal privilege (as a nexus of the exercise of two fundamental rights) could be in jeopardy, completing the legal framework to guarantee with more accuracy the legal privilege and, thus, the right of defence.

25 Third Legal Ground of the Judgment of the Supreme Court (Criminal Chamber) of 5 December 2012.
26 Supreme Court Judgment (Criminal Chamber) of 26 March 2013.

We may conclude that there is no effective tool in Spanish criminal law that specifically ensures the integrity of legal privilege in the interception of communications or for the entry and search of lawyers' professional offices, in circumstances where the current relevant legislation is insufficient, and, consequently, the Courts' oversight must be invoked.

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SWISS LEGAL PROFESSIONAL PRIVILEGE AND ITS LIMITATIONS

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I INTRODUCTION

When navigating the legal professional privilege under Swiss law, particular attention must be paid to the conditions under which it applies and, more importantly, to the conditions under which it does not apply. This article leads through this exercise by first identifying the sources of the legal professional privilege under Swiss law and then focusing on its personal and factual scope of application, first in a general manner and subsequently with a focus on internal investigations.

II SOURCES OF THE SWISS LEGAL PRIVILEGE

The legal professional privilege under Swiss law has two fundamental cornerstones: (i) the attorney's duty to maintain confidentiality about all client matters of which he or she becomes aware through the mandate, (ii) the prohibition for authorities to seize anything subject to the legal professional privilege, and (iii) the right of attorneys (and of clients) to refuse to disclose documents or to testify on matters subject to the privilege.

1 THE ATTORNEY'S OBLIGATION TO MAINTAIN CONFIDENTIALITY

There are three sources under Swiss Law, based on which the attorney is obliged to maintain confidentiality. First of all, the obligation arises from (i) the contractual relationship between the attorney and the client. The attorney-client relationship under Swiss law is a mandate-relationship within the meaning of Art. 394 of the Swiss Code of Obligations ("CO"). This section of the CO does not set forth statutory confidentiality obligations for attorneys. Nevertheless, it is undisputed that attorneys owe their clients confidentiality as an (auxiliary) duty arising from the mandate agreement and are liable for damages in the event of a breach of their duty of confidentiality. This obligation is mirrored in the Swiss Criminal Code, where Art. 321(1) penalizes as a criminal offence disclosure of information subject to professional secrecy. In Switzerland, professional secrecy applicable to attorneys is set forth in the laws governing the legal profession. In particular, Art. 13(1) of the Federal Act on the Free Movement of Attorneys (AFMA)[1] and Art. 15(1) of the Regulations of the Swiss Bar Association provide for such a duty of confidentiality. Violation of these provisions may lead to disciplinary measures against the attorney concerned. The sanctions range from a warning to a fine to permanent disbarment and a ban on practicing law (Art. 17 AFMA).

2 PROHIBITION TO SEIZE—RIGHT TO REFUSE PRODUCTION AND/OR TESTIMONY

In order to ensure comprehensive protection of the attorney-client relationship, Swiss law not only imposes confidentiality obligations on attorneys, but also establishes protection against governmental interference. As such, the legal professional privilege would be ineffective if the attorney's duty of confidentiality could be breached by governmental order, such as a search warrant or an order that the attorney has to testify in court about matters covered by the legal professional privilege. For this reason, the authorities are prohibited from seizing documents or information subject to the legal professional privilege.[2] The refusal to disclose and to testify on matters protected by the legal professional privilege is not only a right, but also a legal obligation for attorneys.[3]

1 Federal Act on the Free Movement of Attorneys of 23 June 2000 (SR.935.61).

2 For criminal proceedings, see articles 264(1)(a), (c), (d), 265 of the Swiss Code of Criminal Procedures; for civil litigation, see article 160(1)(b) of the Swiss Code of Civil Procedures; for administrative proceedings, see article 13(1bis) of the Swiss Code of Administrative Procedures.

3 For criminal proceedings, see articles 171(1), 265(2)(b) of the Swiss Code of Criminal Procedures; for civil litigation, see articles 163(1)(b), 166(1)(b) of the Swiss Code of Civil Procedures.

3 WAIVER OF LEGAL PROFESSIONAL PRIVILEGE

However, the legal professional privilege is not absolutely impermeable.

On the one hand, an attorney may be exempted from his duty of confidentiality. The competent cantonal supervisory authority for attorneys may upon request release an attorney from professional secrecy: (i) if there is a justified reason for such a request; and (ii) if, on balance the interests of the requesting attorney in being released from professional secrecy outweigh the client's interest in maintaining secrecy. In practice, the bulk of the situations where such release occurs is where attorneys try to collect outstanding fees from their clients and therefore must disclose the client relationship to the competent debt enforcement agencies and courts.[4]

Of course, the client may waive professional secrecy unilaterally. That said, such waiver does not in itself oblige the attorney to disclose matters previously protected by the legal professional privilege (Art. 13(1) AFMA).[5] However, the authorities may not, conversely, expect a client to waive the legal professional privilege for the purpose of cooperation with the latter. On the contrary, no adverse conclusions may be drawn from a client's refusal to waive privilege, because the existence of and the reliance on the legal professional privilege is legitimate in its own right and does not need to be justified.

III SUBJECT MATTER AND EXTENT OF LEGAL PROFESSIONAL PRIVILEGE

Following the above, it is important to highlight, that the scope of application of the legal professional privilege under Swiss law is not without limitations and reaches its boundaries in two respects in particular. The limitations namely consist in (i) the personal capacity of the attorneys who are protected by the legal professional privilege; and (ii) the factual scope of what is protected.

1 PERSONAL SCOPE OF LEGAL PROFESSIONAL PRIVILEGE

With regards to the personal capacity of the attorneys, the protection of legal professional privilege under Swiss law applies only if the client's relationship is with an attorney who:

4 See, e.g., BGE 142 II 307; BGer, Jan. 6, 2017, 2C_704/2016.

5 13(1) AFMA: "*Lawyers shall be bound by professional confidentiality that is unlimited in time and applies to dealings with any person in relation to anything entrusted to them by their clients in the course of their professional activities. Release from this obligation does not require the lawyers to disclose anything entrusted to them.*"

A. is admitted to the Swiss bar and is registered in one of the cantonal bar registers; or

B. is admitted to the bar in an EU/EFTA member state, provides legal services in Switzerland under the freedom to provide service between Switzerland and the EU/EFTA, and is not registered in any cantonal bar register; or

C. is admitted to the bar in an EU/EFTA member state, provides legal services in Switzerland on a permanent basis and is registered for this purpose in one of the cantonal registers of attorneys

The scope of this restriction is illustrated by a recent decision of the Swiss Federal Supreme Court (1B_333/2020 of 22 June 2021, also published as leading case nr. BGE 147 IV 385), in which it held that prosecutors may inspect communications between a Swiss company and its U.S. attorneys. The decisive factor behind this court ruling was, in particular, that the wording of Art. 264 para. 1 let. d of the Swiss Criminal Code of Procedure, which prohibits the seizure of objects and documents from the dealings of third persons (meaning persons other than the accused) with his or her attorney (who is not himself or herself accused in the same factual context), is limited to attorneys who are entitled to practice under the AFMA, which is not the case for non-CH/EU/EFTA-attorneys.

Another important consequence of this personal scope is that, in stark contrast to the legal situation in the U.S., under current Swiss law the legal professional privilege does not apply to in-house attorneys.[6] Such attorneys cannot be registered in any of the cantonal bar registers due to their lack of independence and are therefore not subject to the legal professional privilege.

2 SUBJECT MATTER SCOPE OF LEGAL PROFESSIONAL PRIVILEGE

The subject matter scope of the legal professional privilege under Swiss law has three components: it must concern (i) confidential information that (ii) has been entrusted to the attorney or has come to the attorney's knowledge in (iii) the course of his or her professional capacity.

6 This will change for civil proceedings as of 1 January 2025 under the revised Swiss Civil Procedure Code (CCP), which will include art. 167a (revised)CCP, stating: *"A party may refuse to cooperate and to hand over documents relating to the activities of its in-house legal service if (a) it is registered as a legal entity in the Swiss Commercial Register or in a comparable foreign register; (b) the legal service is headed by a person who is admitted to the bar of a canton or who fulfils the professional requirements to practice as a lawyer in his or her country of origin; and (c) the activity in question would be considered profession-specific if carried out by a lawyer."*

2.1 CONFIDENTIAL INFORMATION

In order to fall within the material scope of application of the legal professional privilege under Swiss law, it is imperative that confidential information forms the subject matter of the privilege. The legal professional privilege under Swiss law is based on the concept that only confidential information is worthy of protection, and the factual scope of application is accordingly limited to this object of protection. However, it is not necessary for the information in question to be a secret known only to the client. The fact that the information in question is known only to a very limited circle of persons and that the client seeks to keep this information confidential is in itself sufficient. Furthermore, the right to protection does not require that the information is relevant to the client's mandate. It is not necessary that the information in question is relevant or even necessary for the attorney to advise and/or represent the client.

The form of the confidential information is irrelevant for the scope of legal privilege. It is insignificant whether confidential information is transmitted or received orally, in writing, electronically, on paper or in any other form. Accordingly, confidential letters, e-mails, texts, chat messages, etc. exchanged between the client and the attorney are covered by the legal professional privilege under Swiss law. The legal professional privilege also protects all memoranda, strategy papers, minutes of meetings (including hand notes), draft contracts, corrections/revisions of documents, memos, etc. prepared by the attorney. Further, where or how the confidential information is kept is also inconsequential. Thus, it is not of interest whether this information is kept with the client, in the attorney's office, or in the possession of a third party.

Finally, it is also not decisive who is the originator of the confidential information, i.e. whether the client or the attorney has created the confidential information. This means that, to the extent that the client prepares confidential documents within the scope of the client-attorney relationship, these are protected if they become part of the correspondence between the attorney and the client. It is important to emphasize, however, that Swiss law's legal professional privilege does not protect pre-existing documents that the client did not create specifically for the client-attorney relationship. Even by including such documents in correspondence with the attorney, such documents cannot be subsequently brought within the scope of legal professional privilege. This is a very well-established case law of the Swiss Federal Criminal Court.[7]

7 Federal Criminal Court, Oct. 24, 2013, BE 2013.1, Cons. 6.5.

2.2 CONFIDED IN OR COME TO THE KNOWLEDGE OF THE ATTORNEY

It is true that the client will in many cases have actively entrusted the attorney with the confidential information (e.g. by providing documents, assessments, etc.). However, for the applicability of legal professional privilege, it is not relevant how the confidential information reached the attorney. It is also worthy of protection if it has come to the attorney's knowledge by other means. Thus, in particular, confidential information that the attorney obtains in the course of internal investigations (e.g. when interviewing employees) is protected by the legal professional privilege under Swiss law (more on this in chapter IV).

2.3 IN THE ATTORNEY'S PROFESSIONAL CAPACITY OR THE ATTORNEY'S PRACTICE OF THE PROFESSION

Although it is not relevant how the confidential information came to the attorney's attention, i.e. whether through active disclosure or through other means, it is all the more relevant what gave rise to the attorney's knowledge of the information. Thus, for confidential information to be protected by legal professional privilege, it must have reached the attorney in the course of his professional activity or practice. This distinction is particularly important with regard to the applicability of the legal professional privilege in internal investigations.

The decisive factor is whether a particular service is typical of the attorney's activity. Services such as advice on legal matters, representation in contentious matters or transactions and the like fall within the scope of typical attorney activity, meaning that the legal professional privilege protects confidential information obtained in the course of such activity. However, when holding positions on company boards, merely collecting debts, managing assets and the like, this criterion is usually not met.

IV PRIVILEGE ISSUES IN INTERNAL INVESTIGATIONS

In practice, the criterion of typical attorney activities highlighted above (cf. chapter III2.3) is particularly important and is at the centre of current discussions on the scope of legal professional privilege in internal investigations.

In its judgment of the 20 September 2016 (BGer 1B_85/2016), the Swiss Federal Supreme Court set guiding principles for the qualification of the attorney-client privilege in the context of internal investigations. The case concerned a former bank employee who was

accused of document forgery and money laundering. As part of the bank's investigation into the matter, an external legal counsel reviewed internal guidelines, conducted interviews, prepared written analyses of the information viewed and took notes during the interviews. In the subsequent proceedings, the bank refused to release these documents and invoked the legal professional privilege.

In this specific case, the Swiss Federal Supreme Court held that no privilege existed if the bank de facto delegated its duties under the Swiss Anti-Money-Laundering Act (AMLA) and the relevant regulations to external advisors. Such a general obligation of the bank (i.e. compliance with the legal provisions including their monitoring/control and documentation), as held by the court, was not a typical attorney's activity and information obtained in performance of such obligation could, therefore, not be placed under the protection of legal professional privilege by outsourcing it to external attorneys.

The path taken in the decision described above was consolidated by the Swiss Federal Supreme Court in its judgment of 21 March 2018 (BGer 1B_433/2017). In this case the Federal Supreme Court stated that in the case of so-called "mixed" mandates, legal advice by attorneys must be distinguished from actual compliance as well as the clarifications and corresponding documentation obligations under the AMLA. Here, too, the court denied the protection of the report by the legal professional privilege on the grounds that a law firm would not have been necessary for most of the investigative activities and that the report could therefore not be considered a typical attorney's activity. In an even more recent case of 2 March 2023, (1B_509/2022), the Swiss Federal Supreme Court confirmed this case law and ruled that the legal professional privilege was protected in the specific case of a "mixed mandate" by refusing to unseal individual documents, covered by the typical attorney-activity and therefore by the legal professional privilege, as requested by the public prosecutor's office and exempting them from seizure under criminal procedure.

Overall, with regard to internal investigations, it should be noted that under Swiss law, legal professional privilege does not per se protect internal investigations conducted by law firms and the work products produced in the course of such investigations in their entirety.

Nevertheless, it is a matter of legal principle that legal advice, and thus the typical activity of a attorney, remains protected by legal professional privilege. This also applies to internal investigations. Information obtained in the course of an internal investigation is thus protected if it is directly relevant to the basis of the legal advice.

However, if it is a product of mere review and control activities that the company would have to undertake in any case and the result of which would have to be submitted to the authorities in the context of its legal obligations (including obligatory self-reporting under the AMLA), the legal privilege does not apply. In conclusion, it can be said that, in view of the Federal Supreme Court's case law, special precautions must be taken when conducting internal investigations under Swiss law.

V CONCLUSION AND KEY ISSUES OF THE SWISS LEGAL PROFESSIONAL PRIVILEGE

In conclusion, it is the question of its scope of application that is of particular interest with regard to legal professional privilege under Swiss law. Both the personal and the factual scope of application contain important limitations, which lead to the fact that, on the one hand, in-house attorneys as well as some foreign attorneys are not covered by the legal professional privilege and, on the other hand, that, in the case of internal investigations, careful consideration must be given to whether legal professional privilege can be applied.

For the important consequence of whether or not the results of internal investigations are covered by the legal professional privilege, it must be specifically clarified when the law firm is commissioned which specific legal questions the investigation relates to and which legal questions the law firm is to answer on the basis of the facts to be investigated. It is particularly important that fact-finding and legal assessment be separated. This clear distinction should be strictly drawn and, if possible, law firms should even produce two separate work products: The dual structure should be such that, on the one hand, an objective factual report, not going beyond a summary of the documents and information already available, should be prepared, consisting of direct quotations from the documents examined, avoiding that this product could be understood as any kind of interpretation of the assessment; and, on the other hand, a legal analysis of the facts, including legal risks and recommendations should be produced.

In this sense, the key take-aways for Swiss law are that i) the attorney's capacity (e.g. registration in the register of attorneys) as well as ii) his or her type of activity (e.g. whether or not it can be classified as a typical attorney's activity) have important consequences for the applicability of legal professional privilege.

Arzinger

LEGAL PRIVILEGE IN UKRAINE

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(WHY) IS THE LEGAL PRIVILEGE IMPORTANT?

The institution of attorney-client privilege in Ukraine is one of the fundamental and underlying practices of law, which, on the one hand, requires attorneys to comply with the rules of professional conduct, and, on the other hand, demands that the state and the third parties refrain from interfering with attorneys in the course of practicing law.

The Rules of Attorneys' Ethics, approved by the decision of the Congress of Advocates of Ukraine dated June 09, 2017, stipulate that compliance with the principle of confidentiality is the most essential prerequisite for a trusting relationship between an attorney and a client, the absence of which makes it impossible to provide proper professional legal assistance, defense, and representation. Therefore, maintaining the confidentiality of any information that is defined as the subject of the attorney-client privilege or constitutes an individual's personal data protected by the legislation on personal data protection is a right of the attorney in relations with all entities that may require disclosure of such information and an obligation towards the client and those persons to whom this information concerns.

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Thus, in Ukrainian law, attorney-client privilege is both a right and an obligation of an attorney, as well as a guarantee of practicing law, for violation of which one is held liable.

Hence, in order to preserve information protected by the attorney-client privilege, the Law of Ukraine "On the Bar and Practice of Law" in Article 23 sets forth guarantees of practicing law. In particular, the law **expressly prohibits**:

- To demand from the attorney (and other persons listed above) the provision of information that is protected by the attorney-client privilege;
- Inspect, disclose, request, or seize documents related to attorney's practicing law;
- Involve the attorney in confidential cooperation with law enforcement authorities, provided this may lead to the disclosure of the attorney-client privilege;
- Interfere with private communications between the attorney and the client.

Separately, Art. 65 of the Criminal Procedure Code of Ukraine provides for a direct prohibition to interrogate an attorney about the information constituting the attorney-client privilege.

Should the attorney, in their turn, face the dawn raid and search activities or investigative actions requiring a court order, those may be carried out only on the basis of a court decision made at the request of the Prosecutor General, heads of regional prosecutor's offices, and their deputies.

The violation of such guarantees and legal privilege is subject to criminal liability under Article 397 of the Criminal Code of Ukraine.

On the other hand, the Law of Ukraine on the Bar and Practice of Law and the Rules of Professional Conduct prohibit the attorney from disclosing information that constitutes attorney-client privilege. In particular, Art. 34 of the above-mentioned law refers to *"disclosure of the attorney-client privilege or actions that led to its disclosure"* to disciplinary offenses. Upon committing such a disciplinary offense, the attorney may be deprived of the right to practice law.

WHERE CAN LEGAL PRIVILEGE BE FOUND IN LAWS AND REGULATIONS?

The main legal act that regulates the concept and peculiarities of attorney-client privilege and guarantees of practicing law is the Law of Ukraine "On the Bar and Practice of Law".[4] Besides, some guarantees of practicing law in terms of maintaining the attorney-client privilege are also enshrined in the Criminal Procedure Code of Ukraine.[5]

In addition, the definition of attorney-client privilege and the requirements for its observance by an attorney are set forth in the Rules of Attorneys' Ethics approved by the Congress of Advocates of Ukraine on June 09, 2017.[6]

WHAT IS THE SCOPE OF THE LEGAL PRIVILEGE? WHO DOES THIS (NOT) APPLY TO?

The scope of the attorney-client privilege

In order to determine the scope of information protected by the attorney-client privilege, one should refer to the definition of the attorney-client privilege set forth in Article 22 of the Law of Ukraine "On the Bar and Practice of Law":

"Attorney-client confidential information includes any information about a client that an attorney, an assistant to an attorney, an attorney's trainee, or a person in the employment relationship with an attorney became aware of, as well as the matters on which a client (a person who was denied conclusion of an agreement on the provision of legal services on the grounds established by this Law) applied to an attorney, attorney bureau or attorney company, as well as the contents of the recommendations, advice, or explanations provided by an attorney, documents drafted by an attorney, information stored on electronic media, and any other documents or information received by an attorney while practicing law".

Let's turn to the actual scope of information protected by the attorney-client privilege. It follows from the above provision that the attorney-client privilege covers:

- Information about the client per se (individual or legal entity);
- Issues on which the client contacted the attorney. In this case, it does not matter whether the request was oral or written. It is also worth mentioning that even if the person who applied does not become a client of the attorney, his or her request is all the same protected by the attorney-client privilege.
- The content of the advice, consultations, and explanations (oral or written) and documents drawn up by the attorney;

4 https://zakon.rada.gov.ua/laws/show/5076-17#Text.
5 https://zakon.rada.gov.ua/laws/show/4651-17#Text.
6 https://zakon.rada.gov.ua/rada/show/n0001891-17#Text.

- Documents received by the attorney while practicing law;
- Information concerning the above, which is stored on the attorney's electronic media.

In other words, the scope of information and documents protected by the attorney-client privilege is quite broad. At the same time, not all information or documents retained by an attorney are protected by the attorney-client privilege, but only those related to the provision of legal aid to a client.

The attorney is prohibited from disclosing the legal privilege. It's the consent of the client alone that allows the attorney to disclose information.

To whom the attorney-client privilege applies

As noted above, according to Article 22 of the Law of Ukraine "On the Bar and Practice of Law", the attorney-client privilege applies to:

- an attorney-at-law;
- an attorney's assistant;
- an attorney's trainee;
- a person who is in an employment relationship with an attorney.

According to Ukrainian law, an attorney, in their turn, is considered to be a person who has taken the oath of an attorney and received a certificate of the right to practice law.

To put it differently, in Ukraine, the attorney-client privilege protects communication and exchange of client documents not with any lawyer, but only with a lawyer who has the status of an attorney obtained in accordance with the procedure established by law. Interaction with a lawyer in Ukraine who does not have the status of an attorney-at-law is not protected by the attorney-client privilege.

Similarly, an assistant to an attorney, a trainee, or a person in an employment relationship with an attorney in the context of the above-mentioned Article 22 of the Law of Ukraine "On the Bar and Practice of Law" shall be deemed persons having such a relationship with a person who has the status of an attorney-at-law under Ukrainian law.

It's pertinent to emphasize that the attorney bureaus and attorney companies referred to in the definition are legal entities established and registered by one attorney (attorney bureau) or two or more attorneys (attorney company). The key point is that such legal entities can be established only by attorneys, i.e., persons who have the right to practice law (as mentioned above). Therefore, the requirements for attorney-client privilege apply to such companies in the same way as to an attorney.

In other words, if a law firm provides services in the form of an ordinary limited liability company, the information received from and for clients will not be shielded by the attorney-client privilege.

HOW IS THE LEGAL PRIVILEGE OF LAWYERS FROM OTHER COUNTRIES HANDLED?

The above guarantees of attorney-client privilege apply to attorneys who have obtained the right to practice law in accordance with the requirements of the Law of Ukraine "On the Bar and Practice of Law". That is, for instance, correspondence of companies located in Ukraine with foreign legal advisers and documents prepared by such advisers will not be protected by the attorney-client privilege in Ukraine.

In the meantime, the law provides for the possibility of applying the relevant guarantees to foreign lawyers, as long as they practice law in Ukraine in accordance with the Law of Ukraine "On the Bar and Practice of Law".

That being so, in accordance with Article 59 of the Law on the Bar, a foreign lawyer may practice law in Ukraine only if his or her data is included in the Unified Register of Lawyers of Ukraine. In this case, he or she is subject to all the rights, obligations, and guarantees of practicing law in the same way as Ukrainian attorneys, including attorney-client privilege.

That is to say, the guarantees of the attorney-client privilege apply to foreign attorneys only if their data is included in the Unified Register of Lawyers of Ukraine.

If a foreign lawyer provides legal assistance in Ukraine without their data being entered into the Unified Register of Lawyers, the information provided by the client to the lawyer, their further communication, and the lawyer's documents are not subject to the guarantees of legal privilege. And while the non-disclosure of confidential information by such an attorney can be ensured by concluding a non-disclosure agreement, it is impossible to protect confidential information from being accessed to, for example, by law enforcement agencies.

WHAT PROCEDURES EXIST TO HAVE THE SCOPE OF LEGAL PRIVILEGE (BY A JUDGE) TESTED?

As it was mentioned above, the scope of attorney-client privilege is quite broad and enjoys a high level of protection and guarantees. Namely, documents and information protected by the attorney-client privilege cannot be requested by third parties or law enforcement bodies. However, should the search warrant at the attorney's office be granted by the court, then respective risks arise.

In case of a search of the attorney's office, the Bar Council of the relevant region should be immediately informed of the fact. The latter is obliged to send its representative to participate in such an investigative action. Their presence will be an additional guarantee that law enforcement officers will comply with the requirements of the law and preserve the client's information. In practice, a representative of the regional Bar Council checks files and defines whether the attorney-client privilege protects this exact document or not.

Please note that the abovementioned procedure is not applicable to files stored by a client. For example, if legal advice or any other documents produced by an attorney are stored at the client's place, it is highly likely that law enforcement bodies would seize such documents in the course of a dawn raid. Unfortunately, current legislation does not establish a clear legal procedure to challenge such actions.

Introducing judicial control over attorney-client privilege is being actively discussed. The idea behind this is that if law enforcement bodies want to seize documents that may be subject to attorney-client privilege protection, respective documents are transferred to the judge, who shall review them and establish if they are protected by the attorney-client privilege. However, no respective bills have been introduced to the Parliament yet.

ARE THERE ANY DEVELOPMENTS REGARDING LEGAL PRIVILEGE IN OUR COUNTRY?

To date, there are a number of problematic issues to be resolved. To be specific, Ukrainian legislation needs to harmonize the provisions of the Law of Ukraine "On Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crime, Terrorist Financing and Financing of Proliferation of Weapons of Mass Destruction" with the provisions of the Law of Ukraine "On the Bar and Practice of Law" in the part concerning attorney-client privilege.

Along these lines, in accordance with the rules of financial monitoring, attorneys, attorney bureaus, and companies, in case they provide legal services in the field of real estate and corporate rights, asset management, bank accounts, funds, trusts, etc., are subject to financial monitoring. This means that attorneys, attorney bureaus, and companies must ensure arranging and carrying out initial financial monitoring, namely, identifying suspicious financial transactions (activities) and reporting them to the State Financial Monitoring Service of Ukraine. This provision is aimed at preventing the use of legal services for illegal purposes.

Besides, Article 22 of the Law of Ukraine "On the Bar and Practice of Law" clearly defines the cases when disclosure of attorney-client privilege is not a violation. In particular, it is the submission of information by an attorney to the State Financial Monitoring Service. However, the inconsistency in the provisions lies in the fact that according to the Resolution of the Cabinet of Ministers of 16.06.2023 No. №662[7], which regulates the procedure for state supervision in the field of prevention and counteraction to legalization (laundering) of proceeds from crime, the Ministry of Justice carries out scheduled, unscheduled, on-site and off-site inspections of attorneys, attorney bureaus, and companies for compliance with the rules of financial monitoring.

Thus, the Ministry of Justice may be granted access to information that constitutes attorney-client privilege. At the same time, the officials of the Ministry of Justice are not the persons who, in accordance with the Law of Ukraine "On the Bar and Practice of Law", are obliged to keep the attorney-client privilege.

Under the circumstances, compliance with the financial monitoring legislation threatens the preservation of the attorney-client privilege and requires additional regulation.

TO WHAT EXTENT DOES THE LEGAL PRIVILEGE APPLY TO INTERNAL INVESTIGATIONS BY LAWYERS?

Attorney-client privilege in internal corporate investigations is well worth being outlined separately. The practice of conducting such investigations in Ukraine is relatively new, and there is no clear legislative regulation of their conduct.

The law does not set formal requirements for persons conducting such investigations. These can be either internal departments of companies or external advisors.

7 https://zakon.rada.gov.ua/laws/show/662-2023-%D0%BF#Text.

Consequently, the crucial point here is the status of the persons/companies conducting the investigation.

As seen above, the attorney-client privilege in Ukraine protects communication only between a client and an attorney/attorney bureau/attorneys' company.

Furthermore, in order to protect the materials of such an investigation, a legal aid agreement must be signed between the attorney/attorney's company and the client (since, according to the requirements of Article 26 of the Law of Ukraine "On the Bar and Practice of Law", the attorney's practice of law is carried out on the basis of a legal aid agreement).

In a nutshell, if an internal investigation is carried out by an internal department of a company, the results of such an investigation are not protected by attorney-client privilege in the event, for example, that they are seized by law enforcement agencies. Moreover, the law does not provide for liability for the dissemination of investigation materials - liability may arise only for failure to comply with the company's internal policies.

The same is true with engaging external advisors who are not attorneys/attorneys' companies.

For that reason, it is recommended to engage attorneys/attorneys' companies to conduct internal investigations in Ukraine. This will provide an additional level of protection for the course and results of such investigations in the form of attorney-client privilege.

WHAT IS THE BEST PRACTICE TO ENSURE CONFIDENTIALITY (PROBLEMS AND SOLUTIONS)?

Ukraine is a bureaucratic state and that requires formalistic approaches to ensure the protection of legal client privilege.

Despite the guarantees provided by the Law of Ukraine "On the Bar and Practice of Law", attorneys, on their behalf, should also take measures to protect information shielded by the attorney-client privilege.

As it was mentioned, the legal form is of importance. That is why local law firms that wish their clients to be able to enjoy the attorney-client privilege protection, should register in the form of an attorney bureau or attorney company. That may be a challenge for foreign law firms establishing their presence in Ukraine in terms of attorney-client privilege. The problem is that an attorney bureau or attorney company can be set up by attorneys admitted to the Ukrainian Bar only. Other individuals, as well as legal entities, cannot be founders of an attorney bureau or attorney company.

Another important recommendation is to have a legal assistance agreement in place. This type of agreement should not be confused with a legal services agreement. The latest will not provide attorney-client privilege protection.

It is recommended to identify the information protected by the attorney-client privilege. For example, folders with clients' documents can be marked by corresponding stickers saying "*protected by attorney-client privilege*". It is also advisable to mark your correspondence respectfully.

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LEGAL PRIVILEGE IN THE UNITED ARAB EMIRATES

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INTRODUCTION

The United Arab Emirates (**UAE**) is a federation of seven emirates, compromising of Dubai, Abu Dhabi, Ajman, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain. The UAE is a civil law jurisdiction, with its legal regime drawing on various sources of law including Islamic Sharia law, as well as French and Egyptian law. The UAE also has various free zones which have, to varying degrees, different laws and regulations from the onshore UAE.

A separate regime exists in the Dubai International Financial Centre (**DIFC**); a financial free zone in Dubai with its own body of laws and its own independent judicial authority and courts, which deal with matters arising in the DIFC. The Courts of the DIFC (**DIFC Courts**) apply common law legal principles and follow common law court procedure rather than those of the civil law tradition. Much of DIFC Law is codified in statute, including laws dealing with civil and commercial matters, and court procedure. Although the jurisdiction of the courts was initially limited to the geographical area of the DIFC, Dubai Law No. 16 of 2011 (as amended) allows the DIFC Courts to hear local or international cases and to resolve commercial disputes provided certain jurisdictional gateways are met.

The Abu Dhabi Global Market (**ADGM**) is another financial free zone situated in Abu Dhabi, which has its own body of laws and its own independent judicial authority and courts, which deal with matters arising in the ADGM. The foundation of the civil and commercial law in the ADGM is provided by the Application of English Law Regulations of 2015 which makes English common law directly applicable in the ADGM. In addition, a wide-ranging set of well-established English statutes on civil matters are also made applicable in the ADGM.

The application of privilege is different in the "onshore" UAE and in the financial freezones.

SECTION 1 - ONSHORE UAE

In the onshore UAE, privilege is not a recognised concept, as is the position in most other civil law jurisdictions. As such, there is generally no recognised concept of legal privilege which would allow parties to withhold documents from disclosure produced in contemplation of litigation nor any lawyer-client communications.

With regard to the rules on disclosure in civil litigation, there is no general obligation to disclose documents in the onshore UAE courts. Documentary disclosure and production do not form a formal part of onshore court proceedings. Parties are, instead, required to submit the documents on which they intend to rely and a party to a dispute is not under a legal obligation to disclose all documentation or information in its possession which may be relevant to a case. Parties generally cannot apply for orders for their opponents to disclose documents. Parties can admit any document into evidence which may support their position and refrain from producing documents which are not. Therefore, withholding documents on the basis on privileged material does not arise.

In addition to the lack of recognition of legal privilege, the onshore UAE courts generally do not recognise the concept of "without prejudice" protection, afforded to lawyer-client communications in common law jurisdictions.

However, lawyers in the onshore UAE are bound by duties of confidentiality, which does incorporate concepts similar to legal professional privilege. Communications between lawyer and client are treated as confidential in accordance with Article 45 of the UAE Federal Law No. 34 of 2022 (the **Lawyers Law**), whereby:

"*A Lawyer is prohibited from disclosing a secret entrusted to him/her, whether orally or in writing, or by email, technological means, or any other means, or which he/she has*

learned through his/her Profession, unless the divulgence thereof would prevent the commission of a crime affecting human life or his/her safety or would cause serious damage to funds, or he/she is required to do so under the laws in force in the State".

The UAE Ministry of Justice Decree No. 666 of 2015 on the Rules of Professional Conduct and Ethics of the Legal Profession in the UAE (the **Code of Ethics**) further states that all information relating to a lawyer's professional representation of a client is to be kept confidential, regardless of whether the representation is non-contentious or contentious in nature, as per Article 3(c). Importantly, this obligation not to disclose confidential information not only applies to the lawyer, but also to their respective partners, as well as the law firm's employees.

The disclosure of confidential communication between lawyer and client is only permissible in limited cases under Article 3(c) of the Code of Ethics, namely where:

A. The written consent of the client or the written consent of the rightful owner of the confidential information has been obtained;
B. An express court judgment ordering such disclosure has been obtained, and then only to the extent needed by the court; or
C. The lawyer, their partners or employees are accused of a criminal charge or a civil claim arising from the relationship with the client or of negligence or professional misconduct.

Confidential information communicated to a lawyer by a third party with proprietary rights in such information, which is meant to be confidential, is also protected. Article 3(c) of the Code of Ethics states that the acquisition of any information by an attorney from a client or a third party which the author or possessor of such information intends to share solely with the attorney is to be treated as confidential by the attorney.

Further, lawyers are also exempt from reporting a suspicion that a transaction and/or funds to a transaction relates to the proceeds of crime "*if the information related to such Transactions was obtained under professional confidentiality*" in accordance with Article 15 of Federal Decree Law No. 20 of 2018 (the **AML Law**) and lawyers will not face sanctions should they fail to disclose their suspicion.

Should lawyer-client confidentiality be breached, the onshore UAE criminal courts have jurisdiction to consider sanctions. Under Article 3(c) of the Code of Ethics, a lawyer may be liable to pay compensation for any damages caused by the violation of their

obligation to maintain confidentiality. Additionally, for criminal claims, the sanctions would be governed by Article 432 of the Federal Decree Law No. 31 of 2021 (the **UAE Penal Code**), whereby the lawyer may be sentenced to not less than one year in prison, a fine of not less than AED 20,000, or both.

It is important to note that the provisions on lawyer-client confidentiality only apply to advocates, and in-house counsel are not subject to these rules. However, as employees, they are subject to the duty to refrain from sharing the secrets of their employer. In-house Counsel may also be liable under Article 432 of the Penal Code should they disclose such information.

SECTION 2 - DIFC

In contrast, the concept of privilege does exist in the DIFC, whose legal regime draws heavily on English law.

Unlike the onshore UAE courts, litigants in proceedings before the DIFC Courts are ordinarily required to produce documents relevant to the issues in dispute (if requested by opponents) as well as the documents on which they rely to make out their case. A litigant may resist in providing such documents to their opponent(s) on the grounds of "*legal impediment or privilege*" (Rules of the DIFC Court (**RDC**) 28.28(2)).[1]

There is, however, limited further guidance in the RDC or practice directions, and there is no statutory regime in the DIFC that otherwise defines the scope and limits of legal privilege. This issue has also only required consideration by the DIFC Court in a very limited number of cases to date. It is therefore open to the DIFC Court judicial officers and/or judges to make a finding of legal privilege *"under the legal or ethical rules determined by the Court to be applicable",* as per RDC 28.28(2). This provides wide discretion to the DIFC Courts to refer to an existing or create a new set of privilege rules applicable to disputes before the DIFC Courts. However, it is perhaps to be expected that the DIFC Courts will fall back on common law notions of privilege as developed in other common law jurisdictions. The case of *Georgia Corporation v Gavino Supplies (UAE) FZE* [2016] DIFC ARB 005, is one of the few published cases in the DIFC Courts on privilege, where the English test of "without prejudice" privilege was applied. This seems to indicate that common law and English legal principles of privilege will be very persuasive in the DIFC Courts.

1 "Privilege" is defined in the Schedule of Definitions to RDC Part 2 as "*the right of a party to refuse to disclose a document or to product a document or to refuse to answer questions on the ground of some special interest recognised by law*".

In circumstances where the production of documents is disputed, applications can be made to the DIFC Courts to rule on whether such production should take place (and on what terms). The DIFC Courts will usually be guided by whether the document in question is relevant to the issues in dispute and meets other requirements, such as existence and proportionality of the request. While the DIFC Courts ultimately have wide discretion (as conferred by the RDC) as to the application of privilege rules, the DIFC Courts will typically adopt the common law notions of privilege.

The DIFC Court may draw adverse inferences for a failure to disclose documents, however where documents are protected by lawyer-client privilege, there are no specific rules for drawing adverse inferences for non-disclosure of privileged information in the RDC.

As to lawyer-client correspondence, Part C-19 of the Code of Conduct of Legal Practitioners (**DIFC Code of Conduct**) imposes a duty on practitioners to keep information communication by the client confidential, unless such disclosure is authorised by the client, ordered by the DIFC Court or required by law. Notably, this duty continues even after the practitioner has ceased to act for the client. This obligation is general in nature with no distinction made between legal and non-legal correspondence or advice.

There is no legislation within the DIFC dealing with the confidentiality obligations of in-house Counsel, and it is likely that the DIFC Courts would rely on English law when determining the reach of the concept of privilege on in-house Counsel.

Should a lawyer breach the DIFC Code of Conduct, sanctions may be imposed by the DIFC Court through the Registrar, the Chief Justice, the Director of the Academy of Law or any nominee of the Chief Justice as per Part F-38(A) of the DIFC Code of Conduct. The sanctions that may be imposed include the following:

A. Private or public warnings;
B. Payment of a fine (limited to US$5,000 for individuals and US$15,000 for firms); or
C. Suspension from the Register of Practitioners for up to three years; and
D. Removal from the Register of Practitioners.

SECTION 3 - ADGM

There is no definition of privilege under ADGM law or in the ADGM Civil Procedure Rules (**ADGM CPR**). Due to the application of English law in the ADGM Courts, it is likely that common law and English law principles of privilege will be applicable.

As to lawyer-client communication, pursuant to Article 7(6) of the ADGM Rules of Conduct 2016 (**ADGM Rules of Conduct**), lawyers are required to keep information communicated to them by their client confidential, unless such disclosure is authorised by the client, ordered by the ADGM Courts, or required by law. Additionally, pursuant to Article 8 of the ADGM Rules of Conduct, a lawyer may not disclose confidential information that was provided to them by another lawyer, or by some other person who is aware that the disclosure was inadvertent.

Similar to the DIFC, there are no rules in the ADGM that legislate for the confidentiality obligations of in-house Counsel, and it is likely that the ADGM Courts would rely on English law when determining the reach of the concept of privilege on in-house Counsel.

Should a lawyer violate Article 7(6) of the ADGM Rules of Conduct, the ADGM Court may sanction the lawyer who knowingly and intentionally breached the Article by making an order under Rule 203 of the ADGM CPR.

CONCLUSION

Privilege does not exist in the onshore UAE, but lawyers should be mindful of their obligations under professional secrecy and confidentiality. Common law applies in the financial freezones of the DIFC and ADGM, and therefore, concepts of privilege are commonly applied by the respective Courts.

Due to the rather complex framework on legal regimes within the UAE, it is always prudent to seek local law advice should issues of privileged communications arise.

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NAVIGATING LEGAL PROFESSIONAL PRIVILEGE IN ENGLAND AND WALES

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The concept of legal professional privilege is a central pillar of any functioning legal system and the proper administration of justice, as, amongst other things, *"…[i]t is of the highest importance […] that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone else with an adverse interest."*[1]

Reliance on legal professional privilege in the England and Wales is not restricted to civil or criminal proceedings; its application is much wider and can be made against any demand for documents possessing the necessary qualities, more particularly described below.

In England and Wales, legal professional privilege broadly consists of legal advice privilege and litigation privilege.

1 Per Lord Millett in Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 A.C. 222 at 236; [1999] 1 All E.R. 517 [528].

THE DISTINCTION BETWEEN LEGAL ADVICE PRIVILEGE AND LITIGATION PRIVILEGE

LEGAL ADVICE PRIVILEGE

The components of legal advice privilege, identified by Lord Rodger, in Three Rivers (No 6)[2] can be summarised as:

I. all communications;
II. between lawyers and clients;
III. made in confidence; and
IV. for the dominant purpose of giving or obtaining legal advice.

Civil Aviation Authority v R (Jet2.Com)[3] confirmed that giving or obtaining legal advice must be the *dominant* purpose.

LITIGATION PRIVILEGE

The components of litigation privilege can be summarised as:

I. all communications;
II. between the lawyer (acting in a professional capacity) and the client, or between either of them and a third party;
III. made in confidence; and
IV. for the dominant purpose of litigation, which is pending, reasonably contemplated or existing.

The essential differences are therefore that:

I. unlike litigation privilege, legal advice privilege can apply regardless of whether litigation is pending or contemplated; and
II. legal advice privilege only applies to communications between a lawyer and client, whereas litigation privilege is more widely applicable to communications between a client or the client's lawyer and a third party.

2 Three Rivers District Council and others v Governor and Company of the Bank of England (No.6) [2004] UKHL 48 [50].
3 [2020] QB 1027.

The distinction between the two types of privilege is borne out of the varying interests which each seeks to protect. With regards to litigation privilege, in Three Rivers (No.6), Lord Rodger goes on to say that "*each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations*".[4] Conversely, legal advice privilege is bought about by the need to ensure accessibility of legal advice, which is not possible in circumstances where information is withheld for fear it will be disclosed. Articulating this, in Upjohn Co. v United States[5], a decision of the US Supreme Court, Justice Rehnquist stated that "*privilege recognises that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client*".

TAKING THESE COMPONENTS IN TURN

CAN IT REALLY BE "ALL COMMUNICATIONS"?

The communications, which are not limited to written communications, must have been prepared either for the dominant purpose of giving or obtaining legal advice; or for the dominant purpose of litigation, which is pending, reasonably contemplated or existing. It necessarily follows that privilege cannot attach to pre-existing communications which were previously unprivileged; the communication's existence must be attributable to the requisite dominant purpose.[6]

DEFINING THE "LAWYER"

In respect of the "lawyer" in question, this definition is broad, capturing non-legally qualified employees and making no distinction for in-house lawyers. However, simply that a person happens to *be* a lawyer is insufficient in the context of the client- lawyer relationship. The lawyer must be being consulted in that professional capacity.[7]

DEFINING THE "CLIENT"

In circumstances where the client claiming privilege is an individual, the position is generally unproblematic. However, determining who should be considered the "client" within a corporate body, and how far that interpretation can be stretched, has been the topic of considerable judicial debate.

4 [52].
5 (1981) 449 US 383 at page 389.
6 Pearce v Foster (1885) 15 QBD 114 [118]–[19].
7 Minster v Priest [1930] AC 558 [58].

The Court of Appeal in Three Rivers (No.5)[8] took a restrictive approach which limited the "client" to individuals within a company who had been authorised to communicate with the lawyer and, importantly, receive advice on behalf of the company. In The RBS Rights Issue Litigation[9] this meant that notes of witness interviews did not benefit from legal advice privilege, notwithstanding the fact that the interviewees had been authorised to communicate with lawyers. The issue being that it was not the interviewees themselves receiving advice on behalf of the corporate.

The restrictive approach therefore creates practical issues in the context of an investigation which has not yet entered the territory of litigation privilege, as companies are prevented from conducting thorough investigations without compromising confidentiality. This is particularly true where interviews are no more than a verbatim account of facts.

This issue was further discussed in The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Limited[10] as being a discrimination issue against larger organisations, for whom this issue would present more frequently: "*if a multi-national corporation cannot ask its lawyers to obtain the information it needs to advise that corporation from the corporation's employees with relevant first-hand knowledge under the protection of legal advice privilege, that corporation will be in a less advantageous position than a smaller entity seeking such advice. In our view, at least, whatever the rule is, it should be equally applicable to all clients, whatever their size or reach*". The Court of Appeal expressed dissatisfaction with the current restrictive interpretation but noted that this cannot be reconsidered unless and until the issue reaches the Supreme Court.

8 Three Rivers Council v The Governor and Company of the Bank of England (No 5) [2002] EWCA 2730.
9 [2017] 1 WLR 1991.
10 [2019] 1 WLR 79 at [127].

REQUIREMENT FOR THE COMMUNICATION TO BE MADE IN CONFIDENCE

To attract legal professional privilege, communication must be confidential. Lord Scott in Three Rivers (No.6) explained that "*unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising*." However, he went on to clarify that "the confidential character of the communication or document is not by itself enough to enable privilege to be claimed but is an essential requirement". Lord Hoffman NPJ in PCCW-HKT Telephone Services Ltd v Aitken and Hong Kong CSL Ltd took this to mean that the communication took place in "*confidential circumstances*"[11], notwithstanding that the communication itself does not contain confidential information.

IDENTIFYING THE "DOMINANT PURPOSE"

In respect of litigation privilege, the position is settled. In Waugh v British Railways Board[12], the House of Lords held that a communication with two separate purposes will be covered by litigation privilege only if it came into existence for the *dominant purpose* of being used in connection with litigation.

The Court of Appeal in Three Rivers (No.5) supported a similar test in relation to legal advice privilege, however, the House of Lords in Three Rivers (No.6) shifted the goal posts by favouring a "relevant legal context" test instead. The House of Lords adopted a statement by Lord Justice Taylor in Balabel v Air India[13] that *"advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."* Lord Rodger interpreted this as asking "*whether the lawyers are being asked qua lawyers to provide advice*".[14]

WAIVING OR LOSING PRIVILEGE

The right to claim legal professional privilege over communications may be lost or restricted. Once this has happened, notwithstanding that it may have been accidental, it is not possible to reinstate the claim to privilege.

11 (2009) 13 February 2009, FACV No.27 of 2008 at [60].
12 1979 UKHL 2.
13 [1988] 1 Ch 317.
14 At [58].

LOSS OF CONFIDENTIALITY

As noted above, a key ingredient of legal professional privilege is confidentiality. Therefore, in circumstances where information has been disclosed, intentionally or unintentionally, privilege ceases to exist. However, there are permitted circumstances in which disclosure to a third party does not forgo a party's right to privilege. This was explored in British Coal Corporation v Dennis Rye Ltd (No.2)[15] in which disclosure was made to the criminal justice authorities as part of their criminal investigation. When British Coal later sought to use the privileged communications to bring a civil claim, Neill L.J. in the Court of Appeal held that *"the plaintiff made the documents available for a limited purpose only, namely, to assist in the conduct first of a criminal investigation and then of a criminal trial. This action of the plaintiff, looked at objectively as it must be, cannot be construed as a waiver of any rights available to them in the present civil action for the purpose of which the privilege exists"*.[16]

WAIVING PRIVILEGE

As Passmore has identified, waiver is an imprecise term which generally has two characteristics:

I. *"the notion that the beneficiary of the privilege has engaged in conduct that is inconsistent with the underlying confidentiality that is the hallmark of all privileged communications; and*

II. *that thereby, on the facts of the particular case, it is unfair to an opponent in litigation to allow the privilege to continue to be asserted. It is therefore convenient to examine waiver by reference to the different types of factual situations that the case law periodically throws up in order to understand the various approaches the courts have devised for resolving waiver disputes and the situations where a third party seeks to adduce secondary evidence of a privileged document."*[17]

Considering the above, it is clear that the concept of legal professional privilege in England and Wales is a multi-faceted issue. The stringent requirements of legal professional privilege often undermine its very purpose. Clients and pracitioners alike should be cautious of falling foul of what, in many instances, may be taken as given.

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15 [1988] 1 W.L.R. 1113.
16 [1988] 1 W.L.R. 1113 at 1121-1122.
17 C Passmore, Privilege (4th edn, Sweet & Maxwell 2019).

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ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES

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In the United States, two doctrines protect the confidentiality of communications and information shared between lawyers and clients: the attorney client privilege and the work product doctrine. The doctrines overlap; a practitioner needs to understand how both doctrines work to preserve the confidentiality of the work of lawyers.[2]

In broad terms, the attorney client privilege protects communications from a client to an attorney, where the communications are for the purpose of obtaining legal advice. The work product doctrine protects the attorney's work on a matter, including the attorney's written outputs and mental impressions.[3]

Here, we talk about the elements of each doctrine, how the protections of each doctrine can be overcome, and try to provide practical advice for attorneys on the best way to ensure that confidential information stays confidential.

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2 The work product doctrine functions in the United States, in some ways, like privilege in other jurisdictions. *See, e.g., Three Rivers District Council and others v. Governor and Company of the Bank of England (No. 6) [2005] 1 AC 610 (HL) 642 (describing the established division of "legal professional privilege" into "legal advice privilege" and "litigation privilege," wherein the latter covers documents "brought into being for the purposes of litigation").*

3 In the strictest doctrinal sense, under U.S. law, only the attorney client privilege is a "privilege." The work product doctrine is not a privilege because, as we discuss below, it is easier to overcome. As a result, we use the term "privilege" only to refer to the attorney client privilege.

ATTORNEY CLIENT PRIVILEGE

Generally, the attorney client privilege protects communications between a lawyer and client from disclosure.

THE ELEMENTS OF ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES

Information is covered by the attorney client privilege only if it:

1. Is or reveals the content of a communiction from a client or a client's representative;
2. Is addressed to a lawyer or the lawyer's representative;
3. Is confidential; and
4. Was made for the purpose of getting legal advice.[4]

The elements of the privilege are straightforward but can become complicated in their application. For example, a communication from a client's representative to an attorney on the client's behalf is generally privileged. However, when a client gives information to another person (who is not deemed the client's representative) to relay to a lawyer, that can render the information no longer confidential, such that the privilege would not apply.[5] Similarly, there has been recent litigation in the United States about whether information given to a public relations agency hired by a lawyer is privileged. Some courts have held that such communications are privileged because it is inherently untenable to separate legal and PR functions in high profile matters. Other courts have disagreed and adopted a narrower understanding of the requirement that the

4 Upjohn Co. v. United States, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981) (discussing applicable tests for attorney client privilege); *see also Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."); *see generally Restatement (Third) of the Law Governing Lawyers § 68 (2000) (summarizing through the four elements).*

5 *Att'y Gen. of U.S. v. Covington & Burling, 430 F. Supp. 1117, 1121 (D.D.C. 1977) ("to say that a person is an 'agent' of the client does not necessarily mean that he is the equivalent of the client for purposes of the attorney-client privilege ... [the lawyer] has not suggested and this Court does not see how it could suggest that the privilege should be extended with full force to communications from a person whose function is simply to aid the attorney in rendering legal assistance"); but see Santrade, Ltd. v. Gen. Elec. Co., 150 F.R.D. 539, 545 (E.D.N.C. 1993) ("A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds."); see also von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 146-147 (2d Cir. 1987) (reiterating that privilege generally includes "attorney's agents," but the client's close friend, who attended a lot of the conferences, was not such an agent).*

information be for the purpose of getting legal advice.[6] Because different United States jurisdictions have resolved the intricate factual questions around when privilege applies to communications through agents for the client and for the lawyer, practitioners should consult the law in their specific U.S. jurisdiction before they or their client use an agent co communicate.

HOLDER OF PRIVILEGE

The privilege is held by the client, making it the client's sole decision whether to assert the privilege. Under the rules of professional conduct that apply to U.S. lawyers, a lawyer may not reveal a client's confidential information provided to the attorney by the client for the purposes of obtaining legal advice.

EFFECT OF THE PRIVILEGE

If information is covered by the attorney client privilege, then a court cannot compel its disclosure to a third party. There are, however, several exceptions to the attorney client privilege with which a practitioner in the United States has to be familiar.

THE CRIME FRAUD EXCEPTION

If the lawyer's services were used to further a crime or a fraud of the client, then courts have held that the attorney client privilege cannot prevent disclosure of the client's confidences.[7] A party trying to use the crime fraud exception to defeat privilege is not required to show that the attorney knew that the client was using the legal services to further a crime or fraud.[8]

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6 *Texas Brine Co., LLC & Occidental Chem. Corp., 879 F.3d 1224, 1227, 1230-1231 (10th Cir. 2018) (rejecting a claim of privilege by a PR firm for failing to submit a supporting privilege log, "absent a specific showing of the legal nature of each withheld communication."); see also United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (attorney-client privilege "must include all the persons who act as the attorney's agents"); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001) (denying motion to compel production of documents by PR firm, holding them to be covered by either attorney-client or work-product privilege); but see *Dorf & Stanton Commc'ns, Inc. v. Molson Breweries*, 100 F.3d 919 (Fed. Cir. 1996) (PR firm failed to properly establish and waived privilege).

7 *In re Grand Jury Investigation,* 842 F.2d 1223 (11th Cir. 1987) (establishing the two-prong test for the crime-fraud exception); see also Clark v. United States, 289 U.S. 1, 15, 53 S. Ct. 465, 77 L. Ed. 993 (1933) ("There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law."); United States v. Zolin, 491 U.S. 554, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989).

8 *In re Grand Jury Proc.,* 102 F.3d 748, 751 (4th Cir. 1996) (collecting cases throughout other circuits that established that the client's knowledge and intent, not the attorney's, are determinative); see also United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971) ("The attorney need not himself be aware of the illegality involved; it is enough that the communication furthered, or was intended by the client to further, that illegality.").

Generally, a party seeking to destroy privilege by invoking the crime fraud exception has to meet its burden by a preponderance of the evidence, even though they may later have to show that the conduct was criminal beyond a reasonable doubt.[9]

ADDITIONAL CONSIDERATIONS

There are two mechanisms in the United States which allow two or more represented parties to share information and still have that information sharing enjoy the protection of attorney client privilege: common interest agreements or joint defense agreements on one hand and joint representation agreements on the other.

Common interest agreements or Joint Defense Agreements

*Often, two or more represented parties will want their lawyers to be able to share otherwise priv*ileged information without that exchange resulting in a waiver of the privilege.[10] Generally, this is permissible and is not frequently litigated. That said, there can be wide variation among U.S. jurisdictions about the limits of common interest or joint defense agreements, particularly how closely related the common interests must be, whether the clients can talk among themselves without the lawyers present, and whether such agreements must be in writing.[11]

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9 In re Napster, Inc. Copyright Litig. (9th Cir. 2007) 479 F3d 1078, 1094-1095 (abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter (2009) 558 US 100, 105, 130 S.Ct. 599, 604, fn. 1); *but see United States v. Chen,* 99 F.3d 1495 (9th Cir. 1996) ("The test for invoking the crime-fraud exception to the attorney-client privilege is whether there is reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme. ... Reasonable cause is more than suspicion but less than a preponderance of evidence." (internal citations omitted))

10 *Weil Ceramics & Glass, Inc. v. Work,* 110 F.R.D. 500, 502-503 (E.D.N.Y. 1986) (discussing the requirements for a "community of interest" rule to apply); *but see In re Teleglobe Commc'ns Corp.,* 493 F.3d 345, 364-366, 387 (3d Cir. 2007), as amended (Oct. 12, 2007) (distinguishing between joint defense and common interest agreements); see also United States v. BDO Seidman, LLP, 492 F.3d 806, 817 (7th Cir. 2007) (holding a consultation between in-house counsel and outside counsel to fall under the common interest doctrine).

11 *Duplan Corp. v. Deering Milliken, Inc*., 397 F. Supp. 1146, 1172 (D.S.C. 1974) (requiring an "identical legal interest with respect to the subject matter of a communication"); *see also In re Pac. Pictures Corp.,* 679 F.3d 1121 (9th Cir. 2012) ("a shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception."); but see SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 513 (D. Conn. 1976) ("the shared interest necessary to justify extending the privilege to encompass intercorporate communications appears most clearly in cases of co-defendants and impending litigations but is not necessarily limited to those situations."); *see also In re Bevill, Bresler & Schulman, Inc., 802 F.2d 445 (3d Cir. 1986) (denying privilege for lacking evidence of an agreement); but see In re Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001) (upholding an oral agreement).*

Joint representation agreements

If one lawyer is representing two or more clients, generally the lawyer does not waive privilege by sharing information between the jointly represented clients. This rule applies as long as the clients agree that the lawyer has joint, rather than separate, representations and the sharing of confidential information is permitted.[12]

Waiver and the subject matter waiver doctrine

Attorney client privilege can be waived either knowingly, constructively, or unintentionally. A knowing waiver would be a decision made by a client to share information that is otherwise privileged because it is in the client's interest.[13]
Privilege can be constructively waived if the client, or attorney, takes an action which would require privileged information to respond to.[14] For example, if a client sues her lawyer for professional negligence, the lawyer would generally be able to use and disclose privileged information to the extent reasonably necessary to respond to that lawsuit.

Unintentional waiver can happen when the client or the lawyer does not take care to make sure privileged information is safeguarded.[15] If, for example, a lawyer leaves client documents in a taxi and others find those documents, that can result in a waiver of privilege.

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12 *United States v. Gonzalez,* 669 F.3d 974 (9th Cir. 2012) (discussing the requirements for a joint defense agreement, including implied agreement); but see United States v. Almeida, 341 F.3d 1318 (11th Cir. 2003) (holding that the protections of the agreement were waived when co-defendants decided to testify against each other).

13 *Tennenbaum v. Deloitte & Touche,* 77 F.3d 337, 341 (9th Cir. 1996) ("waiver occurs ... only when the holder of the privilege has, in fact, voluntarily disclosed or consented to a disclosure made, in fact, by someone else" (citing Lohman v. Superior Court (Weissich), 81 Cal.App.3d 90, 146 Cal.Rptr. 171 (1978))); *but see United States v. Gurtner,* 474 F.2d 297, 299 (9th Cir. 1973) ("failure to assert the privilege when the evidence [which encompassed privileged communications] was first presented constituted a voluntary waiver of the right"); *see also United States v. Jones,* 696 F.2d 1069 (4th Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege. Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter.").

14 *See, e.g., GAB Bus. Servs., Inc. v. Syndicate 627,* 809 F.2d 755 (11th Cir. 1987) ("a party who bases a claim on matters which would be privileged, the proof of which will necessitate the introduction of privileged matter into evidence, and then attempts to raise the privilege so as to thwart discovery, may be deemed to have waived that privilege"); *see also Byers v. Burleson,* 100 F.R.D. 436, 440 (D.D.C. 1983) (in a suit by a former client against attorney for legal malpractice, "plaintiff has waived the privilege because the information which the defendant seeks is necessary to resolve the precise statute of limitations issue which the plaintiff has interjected into the case.").

15 *In re Grand Jury (Impounded),* 138 F.3d 978, 981 (3d Cir. 1998) ("In determining whether a party has waived the privilege through an inadvertent or involuntary disclosure, courts consider, among other factors, the steps taken by a party to remedy the disclosure and any delay in doing so."); *see also United States v. de la Jara,* 973 F.2d 746, 750 (9th Cir. 1992) ("When the disclosure is involuntary ... we will deem the privilege to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter."); *but see Carmody v. Bd. of Trustees of Univ. of Illinois, 893 F.3d 397, 406 (7th Cir. 2018) (privilege was not waived after inadvertent disclosure, among others because the party took "reasonable steps to prevent the disclosure").*

In most U.S. jurisdictions, if attorney client privilege is waived as to one communication, it is waived as to every communication on the same subject, under a doctrine called subject matter waiver.[16] This is to discourage, for example, a client from waiving privilege over one document but not others on the same topic, which could create an incomplete sense of the legal advice sought or given. Nonetheless, subject matter waiver rules have been applied outside of cases of intentional waiver of the privilege.[17] In general, a waiver, even an unintentional one, can result in a much broader waiver of information than just the specific communication that was disclosed.

WORK PRODUCT DOCTRINE

The work product doctrine protects against the disclosure of an attorney's work product or an attorney's mental impressions about a case and applies to "tangible material or its intangible equivalent" prepared in anticipation of litigation.[18] Traditionally, materials are only covered by the work product doctrine if there is identifiable litigation that they are prepared in anticipation of – it the specter of litigation is inchoate, work product protection has been held not to protect material.[19]

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16 *Bowles v. Nat'l Ass'n of Home Builders*, 224 F.R.D. 246 (D.D.C. 2004) ("a waiver of the attorney-client privilege for a document is not confined to that document alone, but extends to all other documents involving the same subject matter as well" (citing In *re Sealed Case*, 676 F.2d 793, 809-818 (D.C. Cir. 1982)); see also In re *Keeper of Recs. (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 24 (1st Cir. 2003) ("Implying a subject matter waiver in such a case [involving a lawyer's advice as a defense] ensures fairness because it disables litigants from using the attorney-client privilege as both a sword and a shield."); but *see Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005) ("There is no bright line test for determining what constitutes the subject matter of a waiver, rather courts weigh the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the parties of permitting or prohibiting further disclosures.").

17 *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409 (Fed. Cir. 1997) (finding subject matter waiver after an inadvertent disclosure, but collecting cases that could limit the scope of disclosure); but see In *re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989) (remanding a finding of subject matter waiver after inadvertent disclosure because the court did not properly apply the "same subject matter" test); *see also Salmon v. Lang,* 57 F.4th 296 (1st Cir. 2022) (finding no subject matter waiver when counsel promptly requested return of inadvertently disclosed material).

18 Restatement (Third) Of The Law Governing Lawyers § 87 (2000); see also *Hickman v. Taylor,* 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451, 500-511 (1947) (establishing the doctrine and discussing the circuit split in defining the work product doctrine); see also Fed. R. Evid. 502(g)(2).

19 *Hickman, supra,* at 511 (requiring that material be prepared "with an eye toward litigation"); see also *Jordan v. U.S. Dep't of Just.,* 591 F.2d 753, 775-776 (D.C. Cir. 1978) (refusing to apply the work product doctrine to internal guidance documents because "the privilege focuses on the integrity of the adversary trial process itself and seeks to ensure that such proceedings do not degenerate into mere 'battles of wits.' This focus on the integrity of the trial process is reflected in the specific limitation of the privilege to materials 'prepared in anticipation of litigation or for trial.' ... The guidelines and instructions set forth in these documents do not relate to the conduct of either on-going or prospective trials; they do not include factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to any on-going or prospective trial." (internal citations omitted)).

Unlike attorney client privilege, the work product doctrine is held by the attorney; it is the attorney's decision whether to disclose materials covered by the attorney work product doctrine.[20] Moreover, a document may be covered by both attorney client privilege and the work product doctrine such as, for example, an attorney's notes from a meeting with a client.

DEFEATING THE WORK PRODUCT DOCTRINE

The work product doctrine can be defeated more easily than the attorney client privilege. A party can overcome the protections of the work product doctrine by making a showing that the materials are necessary and otherwise unattainable.[21] The classic example of this is an attorney's memorandum of a witness interview. While such a memorandum would be protected from disclosure, if the witness is dead or otherwise completely unavailable, courts have required disclosure of the work product materials.[22]

BORDER SEARCHES IN THE UNITED STATES

For both work product materials and attorney client information, the protection is only as good as a lawyer's ability to keep the materials confidential.

Practitioners coming to the United States from other jurisdictions need to be aware of the dangers associated with entering the United States while in possession of confidential client information. U.S. immigration authorities take the position that they are permitted to search and seize the electronic devices of anyone entering the United States.[23] Of course, when lawyers cross the border, they very often have client files and emails on their laptops and phones. If US authorities search an attorney's devices, the attorney must immediately identify the materials that are protected by attorney client

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20 Though, of course, a lawyer should consult with her client in most situations where she would waive work product protections. Certain jurisdictions limit the interplay of this doctrine with attorney-client privilege to mean that either the attorney or client can waive its protection, but only as to themselves. *See, e.g., Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 294 (4th Cir. 2004) (citing In re Doe, 662 F.2d 1073, 1079 (4th Cir. 1981)).

21 *Hickman, supra,* at 511 ("Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration."); *see also In re Grand Jury Investigation*, 599 F.2d 1224, 1231-1233 (3d Cir. 1979) (finding that the government has demonstrated sufficient necessity to overcome the privilege in obtaining contents of an interview with an employee who died thereafter, but did not demonstrate necessity for interviews with other employees).

22 *In re Grand Jury Investigation, id.; see also Copperweld Steel Co. v. Demag-Mannesmann-Bohler,* 578 F.2d 953, n. 14 (3d Cir. 1978) (granting access to memorandum of interview with crucial witness by plaintiff's counsel because the witness died after the interview and the memorandum was essential).

23 U.S. Department of Homeland Security, DHS/CBP/PIA-008(a) Privacy Impact Assessment Update for CBP Border Searches of Electronic Devices (January 2018); *see also CBP Directive No. 3340-049A, Border Searches of Electronic Devices (January 2018).*

privilege or the work product doctrine and direct U.S. authorities to segregate those materials in order to preserve confidentiality. Similarly, the U.S. Department of Justice can give instructions to immigration authorities to seize client devices at the border for a search; if a client's devices are taken and searched, counsel should immediately identify the documents that may be privileged on a client's device and direct authorities to segregate those materials to preserve confidentiality. Very quickly engaging U.S. counsel if devices are taken at the border that contain client confidences is strongly recommended.

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THE LEGAL PRIVILEGE

The internationalisation of society is also noticeable in the legal practice. Lawyers from different countries are increasingly working together in, for example, criminal cases, because investigative authorities from different countries are also increasingly cooperating with each other. But what about legal privilege in the country of origin of fellow lawyers? Is communication with the client sufficiently guaranteed in such cases?

This book is intended for lawyers, their clients and other interested parties. Experts across the globe explain the rules regarding legal privilege in the country in which they practise law.

If you are missing a chapter on legal privilege in your own country and would like to contribute to the next edition of this book, please email us at book@thelegalprivilegeuncovered.com.