

ITALY

Valerio VALLEFUOCO

Studio Legale ValleFuoco
Viale Regina Margherita n. 294
00198 Rome
ITALY

Tel (+39) 06 44251509
Fax (+39) 06 8412205

Email: v.vallefuoco@studiovallefuoco.it

1. DEFINITION – PRESENTATION

What attorney-client privilege is and what is not.

The relationship between a lawyer and his client, created with the dominant purpose of seeking or obtaining legal advice, is based on a mutual reliance, which assumes fiduciary obligations, especially confidentiality of communications and loyalty.

The power of attorney can only be granted by the client itself or by his attorney, in fact an attorney can be granted by a third party only with the client's prior consent.

The attorney must refrain from any relation with the client which could in any way interfere with client's interest itself.

Legal advice privilege protects disclosure of communications between a legal advisor and his client provided that they are confidential and in relation to seeking or giving legal advice.

Legal advice privilege will apply whenever a legal advisor is advising in a legal context. The rationale for lawyers' professional secrecy lies in a relationship of trust between lawyer and client. Preserving such a relationship is, in actual fact, useful in two respects:

- to the client, the holder of the secret, who can thus be confident that he is placing it in the hands of a trusted third party, his lawyer;
- useful to society as a whole, in so far as, by promoting knowledge of the law and the exercise of the rights of the defence, it contributes to the sound administration of justice and the manifestation of truth;

Professional secrecy cannot be the property of lawyers. It should, rather, be regarded as a value and as a responsibility. In other words, secrecy is not the privilege of the lawyer but of his client. That privilege has meaning only if it serves the interests of justice and respect for law. It is entrusted to the lawyer solely in his capacity as an agent of justice.

2. SOURCES

From what sources is the legal privilege derived?

It may be extremely difficult to identify a specific source of law which enshrines lawyers' professional secrecy. It is possible to find traces of it in all democracies and in all eras: present in the Bible, it appears again in the writings of ancient history and from century to century.

Lawyers' secrecy has its roots in the very foundations of European society. Secrecy is inherent in the very profession of lawyer, as it is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

The rule of professional secrecy is designed, from that point view, as an obligation of discretion forming part of the ethics of a profession.

2.1 Relevant statutes

The European Code of Conduct in the number 2 of the general principles states that the confidentiality between attorney and client is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence.

As without the certainty of confidentiality there cannot be trust, confidentiality is therefore a primary and fundamental right and duty of the lawyer.

In Italian legislation the disclosure of client's confidential communications, without legitimate cause, is strictly forbidden both under the Italian Penal Code and the Ethical Code for Italian Lawyers.

Article 622 of the Italian Criminal Code punishes with a year-long imprisonment and a fine the professional which discloses client's confidential communication without legitimate clause, or uses the information for his own or others profit, if damage to the client can result. In compliance with article 9 of the Italian *Codice Deontologico Forense* (Ethical Code for Italian Lawyers), both in judicial and prejudicial fields, the attorney – client privilege amounts to a lawyer's fundamental right, the right to obtain advice in confidence, and also a duty to his client, which entails information:

- directly given by the client
- discovered in acting for and on behalf of him

Attorney-client privilege is also owed to ex-client and survives client's death, non-disclosure duty also attaches to a person seeking legal advice or aid without obtaining it. Legal privilege includes lawyers and their employees.

The article 7 of the Italian *Codice Deontologico Forense* (Ethical Code for Italian Lawyers), concerning attorney-client relationship, has been recently amended with a reference to the lawyer's obligation to serve the interests of justice as well as those

whose rights and liberties he is trusted to assert and defend, and it is his duty not only to plead his client's cause but to be his adviser.

This provision introduces a superior interest which overrules client's non disclosure right and discharges the attorney from fulfilling in some specific hypothetical

2.2 Relevant Case Law

There are different examples of the legal privilege:

- A lawyer who has been informed of criminal intention of his client against the opposite party disclosed that information in exchange of money. This misconduct was punished by the Consiglio Nazionale Forense –Italian Bar Association* - with a year-long suspension from the bar.
- A lawyer who records a conversation with another lawyer and gives the tapes to his client as a proof against the colleague, breaches the duty of loyalty and honesty as not only disclosure of “classified” or “without prejudice” communications between counsel is forbidden, but also the disclosure of conversation.
- A lawyer has provided the police with the identity of a murderer revealed by his client in order to prevent an innocent person from being held guilty for that crime. The Consiglio dell'Ordine of Milano – Bar Association of Milano – found the lawyer not guilty, on the contrary the Consiglio dell'Ordine di Catania – Bar Association of Catania – in the same situation, cancelled from the bar the lawyer which only several years recovered his reputation and was called again to the bar.
- A lawyer who was revoked of his power of attorney breaches the legal privilege if discloses information to creditors of the ex-client, as attorney-client privilege is also owed to ex-client.

*The Italian Bar Association is built under public law and made up of all the representatives of all the Bar Associations of Italy.

In relation with what was said above it is important to read the decision 11082/2010 of the Italian Supreme Court, which stated that “the only information that should be known by the lawyer is to protect the position of the client”. This judgment confirmed the need for the Guardia di Finanza (Italian Financial Police), when objected to professional privilege, justified the authorization of the Public Ministry, the permission may be challenged and assessed by the tax court judge in Italy is a special purpose other than Judge normal and is called the Tax Commission.

Supreme Criminal Court No. 17674/2009

“the ratio meant in the art. 622 of the Italian criminal code, consists of the safety of the freedom of the client; the lawyer who finds out or is told secrets of his client has to protect his client’s privacy and secrets.” The same opinion was expressed by the Italian Constitutional Court with the decision no. 87/1997: all the rules of confidentiality and the correlative right 'to refuse to testify in court about what is known during the practice of a legal profession, it is not meant to ensure a state of personal privilege to those who practice a profession, but rather is intended to ensure full explanation of the right to defend the confidentiality, referring to what is known in the practice of forensics held by those who are entitled to acts, assumes an objective value, and, therefore, it can be extended to those who entered in the registers of practitioners by a resolution of the Council of the Bar, in order to fulfill the obligations of law practice with the professionals with whom they collaborate.

3. SCOPE/LIMITS

Can attorney /client privilege be waived?

In respect to the particular facts of non-disclosure, duty infringement is allowed, but not eroded, as strictly necessary in order to give a proper and complete defence to the client, to prevent the client from committing a serious crime and to allege circumstances in a dispute with a client in a negligence proceeding in representing clients. Also in this scenario, disclosure has to be limited as strictly necessary.

3.1 Correspondence between lawyers

If a lawyer sending a communication to another lawyer wishes that it remain confidential or without prejudice he should clearly express this intention when sending the document.

If the recipient of the communication is unable to ensure its status as confidential or without prejudice, he should return it to the sender without revealing the contents to others. The disclosure of “classified” or “without prejudice” communications between counsel is forbidden, as clearly stated by the article 28 of the Code of Legal Ethics and by number 5 of the European Code of Conduct.

Communications can be produced if has lead to an agreement or if amounts to an undertaking. If the attorney resigns from a case, he cannot deliver communications directly to the client but only to the succeeded lawyer.

From the various judgements mentioned and by thorough studies that have been conducted on the professional privilege, few guidelines were inferred encouraging a further defense of professional secrecy:

- Documents relating to a particular practice of the trade, must be kept or maintained, so it is unequivocal that they are intended to request legal advice;
- The drafting of such documents, must adhere strictly to the facts without any assessment of the motives and goals of the commercial practice in question;
- It is necessary that the outside lawyer is a member of a Bar of one of the states belonging to the European Economic Area;
- All attorney-client communications must contain the words "Confidential Communication-confidential attorney-client, or of similar wording;
- The statements from the outside lawyers should always be written on the letterhead of the law firm that which he/she has an affiliation with;
- If you wish to circulate within the external communication of the company lawyer, it is not necessary to alter the content, but at most one can do a summary or accompany it with a note;
- If there is no communication within the commercial information, we must separate the facts in order to identify the opinions and obligations of professional secrecy;
- The documents that have a legal privilege should not have a high circulation but should be limited to only those individuals who need to take distribution, otherwise the document may not be protected by professional secrecy;
- In the event of an investigation, further investigation is necessary to oppose the legal privilege in a timely manner as in the manner described above.

3.2 Correspondence between third parties

A lawyer shall not communicate about a particular case or matter directly with any person, not even a person whom he knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications).

4. IN-HOUSE LAWYERS

The legal privilege, as any other provision of the Code of Legal Ethics, is also inherent to in-house lawyer if they are registered in the special bar.

Lawyers working in Public Institutes or Private Companies providing general services, such as government or companies with public participation, which provide services of public interest in Italy as railways, mail, telecommunication, energy, or water, that in the past were public companies and that are still characterized by a strong public interest,

can be registered in a special section of the bar conferring a power of attorney limited to their assignments.

On the contrary, legal privilege is not inherent to lawyers working in private companies as they are not allowed to be registered in the special section of the bar.

An in-house attorney is considered in a different way from an outside lawyer. This difference is due to the fact that the in-house lawyer cannot face the problems of his client with the right objectivity, because he has to make the interests of the company for which he works. Therefore, the information that originated from the in-house lawyer does not maintain the same professional privilege as the communications which originate from an outside law firm.

The judgment no. C-550/07 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd*

V European Commission states the impossibility to enjoy the professional privilege for a lawyer that is not independent from the company for which he works: "...notwithstanding the professional regime applicable in the present case in accordance with the specific provisions of Dutch law, an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.....It must be added that, under the terms of his contract of employment, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer..... it follows, both from the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer."

5. PROSPECTIVE

Does professional secret tends to be more or less protected?

Is it consistent with attorney-client privilege, as a fundamental right in the European Society, to impose on lawyers, as is provided for by Directive 2001/97 of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, the obligation to inform the competent authorities of any fact of which they are aware which might be an indication of money laundering.

The Third Anti-Money Laundering Directive in fact, formally adopted on the 26th October 2005, has entered into force on the 15th December 2005, meaning that it will need to implement by the 15th December 2007, introduces more specific and detailed provisions relating to the identification of the customer and of any beneficial owner and the verification of their identity, potentially interfering with national data protection and professional secrecy legislation.

The directive applies, among other subjects, to independent legal professionals , when they participate, whether by acting on behalf of and for their client, in any financial or real estate transaction, or by assisting in the planning or execution of transactions for their client concerning:

- buying and selling of real property or business entities;
- managing of client money, securities or other assets;
- opening or management of bank, savings or securities accounts;
- organisation of contributions necessary for the creation, operation or management of companies;
- creation, operation or management of trusts, companies, or similar structures;

Suspicious transactions, in fact, should be reported to the financial intelligence unit (FIU), in Italy UIC (Ufficio italiano dei cambi) which serves as a national centre for receiving, analysing and disseminating to the competent authorities suspicious transaction reports and other information regarding potential money laundering or terrorist financing.

The directive at issue seems, *prima facie*, to adopt an intermediate position between the Commission that considers the substance of lawyers' secrecy lies entirely in the 'contentious' field, and the Parliament that had sought to extend the derogation expressly to the activity of providing legal advice as it provides that lawyers are to be exempt from any obligation to inform not only when '*performing their task of defending or representing that client in, or concerning ... proceedings*' but also '*in the course of ascertaining the legal position for their client.*'

For the purpose of answering the question if legal privilege has been waived or not by the Directive, in the field of legal advice, the meaning of that concept (*in the course of ascertaining the legal position for their client*') must be clarified, as in practise it appears difficult to distinguish, in the context of the performance of the task incumbent on a legal professional, between the time spent on advice and the time spent on representation.

It seems that the concept of '*ascertaining the legal position for a client*' used by the directive can easily be construed as including that of legal advice, by the matter of fact that this interpretation is consistent with the wording of the 17th recital in the preamble

to the Directive, which provides that, in principle, “*legal advice remains subject to the obligation of professional secrecy.*”

The summary of judgment c-305/05 can help to understand what was said above.

The obligations of information and cooperation with the authorities responsible for combating money laundering, laid down in Article 6(1) of Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering and imposed on lawyers by Article 2a(5) of that directive, account being taken of the second subparagraph of Article 6(3) thereof, do not infringe the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights and Article 6(2) EU.

It is clear from Article 2a(5) of Directive 91/308 that the obligations of information and cooperation apply to lawyers only in so far as they advise their client in the preparation or execution of certain transactions – essentially those of a financial nature or concerning real estate, as referred to in Article 2a(5)(a) of that directive – or when they act on behalf of and for their client in any financial or real estate transaction. As a rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial.

Moreover, as soon as the lawyer acting in connection with a transaction as referred to in Article 2a(5) of Directive 91/308 is called upon for assistance in defending the client or in representing him before the courts, or for advice as to the manner of instituting or avoiding judicial proceedings, that lawyer is exempt, by virtue of the second subparagraph of Article 6(3) of the directive, from the obligations laid down in Article 6(1), regardless of whether the information has been received or obtained before, during or after the proceedings. An exemption of that kind safeguards the right of the client to a fair trial.

Given that the requirements implied by the right to a fair trial presuppose, by definition, a link with judicial proceedings, and in view of the fact that the second subparagraph of Article 6(3) of Directive 91/308 exempts lawyers, where their activities are characterized by such a link, from the obligations of information and cooperation laid down in Article 6(1) of the directive, those requirements are respected.