FRANCE

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1. DEFINITION – PRESENTATION

What attorney/client privilege is and what is not.

Two fundamentally different principles are often confused with one another: *"professional secrecy",* a concept mainly encountered in civil law countries, and *"legal privilege",* a concept specific to common law countries. These two notions cover slightly different areas and involve rights and obligations, which are not exactly interchangeable.

In France, the protection of legal opinions and documents, which support them is only guarantied by virtue of the professional secret for lawyers. Legal privilege is a very different concept since in-house lawyers also benefit from legal privilege, and since the content of the communication (it is an approach *in rem* to confidentiality) is more important than the author or the recipient, as is the case for the professional secret for lawyers, which is based upon an approach *in personam* to confidentiality.

Under French law, *"professional secrecy"* is a principle of public policy included in the Criminal Code. According to this principle, certain professionals such as priests, lawyers or doctors may obtain confidential information from their congregation members, clients, or patients, which the law considers necessary for the exercise of their profession. In return, the law imposes on such professionals an unconditional and unqualified obligation not to disclose confidential information.

Legal *"professional secrecy"* is a general and absolute principle that has no limitation in time. In contrast with the situation in many other countries, in France there are no exceptions whatsoever to this principle. Lawyers cannot breach their obligation of *"professional secrecy"* to either clients, authorities of any kind, or, more generally, to any person whomsoever. An essential difference is that unlike *"legal privilege", "professional secrecy"* does not belong to the client, who cannot therefore release the lawyer from his obligation. *"Professional secrecy"* is a lawyer's right and duty by reason of his/her position, and must be respected under threat of criminal or disciplinary sanctions. It is a right that covers all confidential information given to a lawyer for the purpose of advice or defence.

The duty of the lawyer carries with it corresponding rights, in particular, the right to refuse to give evidence on matters covered by the professional secret, and the right to withhold from seizure by the police and judicial authorities any document which contains information covered by the professional secret.

The secret thus enjoys both positive and negative protection: positive protection, in that the lawyer is bound to keep the secret and not to divulge it; negative protection, in that the courts and other authorities cannot force him to divulge it.

The law of the professional secret only protects information communicated to the lawyer. It does not protect advice or information communicated by the lawyer to his client, since the law of the professional secret is only concerned with the duties and

corresponding rights of the person to whom a secret has been communicated. Freedom of communication between accused persons and their defence lawyers is protected in other ways.

The purpose of the law is, first, to protect every person who requires the advice and assistance of a lawyer in order to vindicate his rights and liberty, and second, to ensure the fair and proper administration of justice. This cannot be achieved unless the relationship between the lawyer and his client is a relationship of confidence.

2. SOURCES

From what sources is the legal privilege derived?

2.1 Relevant statues

The legislator has first introduced provisions in the law to punish violations by the professional of his obligation of secrecy before determining the precise scope of such professional secrecy.

Article L. 226-13 of the Criminal Code provides as follows: *"The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine in an amount of 15,000 €"*

Article 66-5 of Law No. 71-1130 of 31 December 1971 on the reform of certain judiciary and legal professions: *"In all areas, whether with regard to advice or in the matter of defence, written opinions sent by a lawyer to his/her client or intended for the latter, correspondence between a client and a lawyer, between a lawyer and other lawyers with the exception, for the latter, of correspondence marked "official", meeting notes and generally all documents held in a file are covered by professional secrecy".*

Article 160 of Decree No. 91-1197 of 27 November 1991 organising the legal profession *(Official Journal* of 28 November 1991) states that: *"the lawyer must not disclose any information in contravention of professional secrecy ... ".*

Article 109 alinéa 1 of the Criminal Proceeding Code states that : "*A lawyer duly cited as a witness must therefore appear, take the oath and answer all questions which can be answered without violating the professional secret.*"

Finally, The European Code of Conduct in 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.

2.2 Relevant Case Law

The criminal division of the *Cour de cassation* has held as follows:" *the professional secrecy obligation incumbent on a lawyer cannot prevent such lawyer, when defending him/herself against an accusation resulting from the disclosure by a client of correspondence exchanged between them, from producing other items of this same correspondence for use in such defence", Cour de cassation,* criminal chamber, order of 29 May 1989, Bull. crim. No 218. Even if the principle of a free defence requires that the confidentiality of lawyer-client correspondence be respected, the courts may order the seizing of such correspondence, in exceptional circumstances, provided that *"the seized documents can provide evidence of a lawyer's involvement in an offence".*

The Criminal Chamber of the French supreme Court also insists in excluding professional secrecy in matters of legal counselling (since in-house counsels are not registered within the Bar in France), considering that professional secrecy must be reserved for the exercise of defence rights. (Cass. 5 fév. 1985, *Pas.,* I, 670; Cass. 23 décembre 1998, *J.LMB.,* 1999, p. 61).

The Commercial Chamber of the French *Cour de cassation* held in a judgment dated 6 June 2001 that: *"Considering that one of the parties had voluntarily provided the court with a letter which it had sent to its lawyer, the Court of Appeal was correct in holding that such party was not entitled to claim the benefit of professional secrecy to protect information which it had itself disclosed in the first place".*

3. SCOPE/LIMITS

Can be attorney /client privilege be waived?

3.1 General observations

In France, the duty to preserve the professional secret is general and absolute even where the facts are capable of being known.

The lawyer must determine according to his own conscience whether, and if so to what extent, it is his duty to speak. Even if his client consents to disclosure of the secret, the lawyer cannot be forced to disclose it. The obligation therefore extends, not only to information communicated to a lawyer by his client, but also to information communicated by the opposing party, by his lawyer or by a third party, provided that the information constitutes a secret and has been communicated in confidence.

The lawyer may not be relieved of his obligation of secrecy by his client, or by anyone else, and in particular no authorities have such power. However, the law provides for an exception strictly for the purposes of his own defence in contentious proceedings, and in restricted cases (implication in criminal proceedings, civil proceedings in professional negligence, dispute on amount of fees).

Professional secrecy is so absolute that even the client may not discharge his lawyer of it. Such strictness precludes a lawyer from disclosing information regarding a matter to third parties at the request of his client.

However, recently:
Crim. 28 oct. 2008, n° 08-81.432, F-P+F, AJ pénal 2009. 26, obs. C. Porteron; RSC 2009. 97, obs. Y. Mayaud

There are two exceptions to these rules. First, the court may require a witness to answer a question, even where he has claimed the protection of the professional secret, if the question is precise and relates to information which could not in any circumstances be considered as covered by the professional secret. Second, a secret may be revealed where this is necessary to protect the *"dépositaire du secret"* against an unjustified accusation.

The procedure for search of the office of an Avocat is regulated by agreement between the Bar and the Procureur Général. The search must be carried out by the *"juge d'instruction"* (rather than the police) and in the presence of the Bâtonnier or his delegate. The Bâtonnier or his delegate determines what documents are protected by the professional secret.

The Code of Criminal Procedure expressly requires the police and the *"Juge d'instruction",* before instituting a search, to take all appropriate steps beforehand to ensure that the professional secret and the rights of the defence are protected. In such case, the seizure of communications exchanged between a lawyer and his client may, by way of exception, be authorised or maintained, provided that the confiscated documents may potentially contribute to establishing the involvement of the lawyer in an offence. It is worth noting that the judge may only search the premises to seize the correspondence if he already has reasons to believe that the lawyer is involved in an offence.

It has, however, been held that there is no violation of the professional secret in the case of seizure, after search of the home of an avocat, of documents relating to Company administration which is not confidential in character.

3.2 Correspondence between lawyers

The terms of the Penal Code are such that any "secret" communicated in confidence to a lawyer in his professional capacity by any person is covered by the obligation of professional secrecy. The obligation (and the corresponding rights) therefore extend, not only to information communicated to a lawyer by his client, but also to information communicated by the opposing party, by his lawyer or by a third party, provided that the information constitutes a "secret" and has been communicated in confidence.

And, since correspondence between lawyers is in principle confidential, the obligation covers information contained in such correspondence. It follows also that a lawyer is not completely free to disclose information derived from others to his own client. The question of whether an item of information is a "secret" is a pure question of fact in each case. The obligation of professional secrecy applies even where the

facts are susceptible of being known by others.

3.3 Correspondence between third parties

Professional secrecy is also relevant to third parties because anyone seeking to obtain disclosure or to use a document protected by professional secrecy would be guilty of a breach of professional secrecy or of using stolen information, except in cases such as the one described in the 6 June 2001 decision (see above), where the beneficiary of professional secrecy has himself made public the document covered by professional secrecy beforehand.

4. INHOUSE LAWYERS

The professions of lawyer and in-house legal counsel are distinct. A lawyer cannot practice as an in-house legal counsel without losing the title and status of lawyer and all related rights and obligations. Similarly, in-house legal counsel cannot be members of the Bar, unless they qualify under the rule that allows for the acquisition of lawyer status after 8 years' experience as in-house counsel.

As the law currently stands, such professional may only be an independent lawyer who is a member of a Bar. It therefore seems that the criterion for determining the applicability of professional secrecy is the existence of a certain category of relationship (the relationship between an independent legally skilled professional and his client), rather than the underlying legal advice.

Consequently, legal advice given by an in-house lawyer to his employer is not covered by any kind of secrecy (other than, possibly, trade secrets).

The *Conseil National des Barreaux* (National Bar Council), the body representing lawyers *("Avocats'* in France, adopted a strategic report presented on 24 April 2004 which spelled out the possible means of linking of the two professions, although without really reaching any decision.

5. PROSPECTIVE

Does professional secret tends to be more or less protected?

There has been a development of legislation increasing the means of coercion or the investigation methods mainly in economic, tax, and financial matters such as money laundering or revenue enquiries, investigations by the competition authorities. This statutory intrusion is motivated by the search of a total transparency in the economic and financial transactions and the suspicion that lawyers may be involved in illegal matters or permit themselves to be used for illegal purposes.

The most significant example of this statutory development would be the European Directive on money laundering (Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EC on prevention of the use of the financial system for the purpose of money laundering, OJ L344, p. 76-81 of 28 December 2001). Under the Directive, lawyers may have the

obligation to breach confidentiality in an attempt to make investigations more efficient. This clearly shows that professional secret tends to be less protected.

However, in a decision of April, 10 2008, the Conseil d'Etat (State Council which is the Supreme Court in public matters) decided that:

Article 60-1 Du Code de Procédure Pénale : « Le procureur de la République ou l'officier de police judiciaire peut, par tout moyen, requérir de toute personne, de tout établissement ou organisme privé ou public ou de toute administration publique qui sont susceptibles de détenir des documents intéressant l'enquête, y compris ceux issus d'un système informatique ou d'un traitement de données nominatives, de lui remettre ces documents, notamment sous forme numérique, sans que puisse lui être opposée, sans motif légitime, l'obligation au secret professionnel. Lorsque les réquisitions concernent des personnes mentionnées aux articles 56-1 à 56-3, la remise des documents ne peut intervenir qu'avec leur accord.

A l'exception des personnes mentionnées aux articles 56-1 à 56-3, le fait de s'abstenir de répondre dans les meilleurs délais à cette réquisition est puni d'une amende de 3 750 euros.

A peine de nullité, ne peuvent être versés au dossier les éléments obtenus par une réquisition prise en violation de l'article 2 de la loi du 29 juillet 1881 sur la liberté de la presse. »