

LEGAL PRIVILEGE IN GREECE

Takis G. Kommatas
T.G. Kommatas & Associates
10 Vasilissis Sofias Avenue
Athens 106 74
GREECE
Phone: (+30) 210 7238812
Fax: (+30) 2107251114

Email: info@kommataslaw.com

1. DEFINITION-PRESENTATION

What attorney/ client privilege is and what it is not.

a. General Introduction Both legal theory and case law in Greece are rather poor concerning the analysis of legal privilege as they have not attributed it the appropriate significance.

The legal privilege aims at the protection of the free and trustful contact and communication between the lawyer and the client. However, the protection provided by the legal privilege is not absolute, but may be limited or waived in light of certain circumstances.

b. Definition-presentation of the legal privilege in Greece.

i) The Greek definition of legal privilege revolves around the professional capacity of lawyers and requires the existence of a causal nexus between the information provided by the client and the professional capacity of the lawyer, meaning that the provision of information should take place within the context of a professional relationship. Therefore, any information provided within the context of a friendly or other kind of relationship with a lawyer is not covered by the legal privilege.

The legal privilege covers not only lawyers but also those providing assistance before courts who are not necessarily lawyers¹, as well as the associates and the employees of lawyers.

ii) The protection afforded by legal privilege starts as from the initial contact with a lawyer, be it in writing or orally, and continues irrespective of the termination of the professional relationship between the client and the lawyer or the payment of lawyer's fees, the retirement of the lawyer, the client's death or the use of the services of a different lawyer.

It should be noted that the professional capacity and the required causal nexus between the disclosure and the professional capacity of the lawyer must be in place at the time of disclosure by the client to the lawyer.

¹ In Greek Law there are certain cases, where assistance before Court by a non-professional, i.e. a person other than a lawyer is permitted, such as in labor disputes etc.

iii) The legal privilege covers any communication between the client and the lawyer, if such communication refers to the provision of legal advice and has a legal content, and therefore, it also covers information relating to the “criminal activity” of a person.

iv) The information covered by legal privilege mostly relates to facts not publicly known and information not publicly available, not to issues such as the engagement of the services of a lawyer by the client, the financial relationship among them, the name of the client (unless of course the disclosure of the name would result in the disclosure of a secret), his/her profession or address.

2) SOURCES

From which sources is the legal privilege derived?

2.1. Relevant statutes

Provisions relating to the legal privilege are included in several legislative texts. The main provisions referring to the legal privilege are analyzed in brief below:

1) Articles 49 and 50 of the Greek Lawyers’ Code.

Article 49 of the above code establishes the legal privilege. More specifically, lawyers are obliged to maintain the secrecy of any disclosures made to them by their clients, while it “rests with their conscience” to judge if and to what extent they will testify (in case they are summoned) as regards any facts they became aware of upon the exercise of their duties. In any case, the lawyer may not testify with respect to any case in which he was involved in a professional capacity, without the prior permission of the Board of Directors of the competent Bar Association. In case of emergency, such permission is granted by the Chairman of the Bar. Article 49 par. 3 prohibits the search of the house and office of a lawyer as well as the confiscation of documents held by lawyers who represent those accused of a criminal offence.

However, pursuant to Greek legal theory, such searches may be permitted where lawyers do not act in their professional capacity or in order for an item used in a crime to be found, under the condition that there is sufficient evidence that such item is hidden in the law office.

Pursuant to article 50 of the Greek Lawyers’ Code, the statement made by a lawyer that his testimony would violate the legal privilege, discharges him of his obligation to testify as a witness.

2) Article 36 par. 3 of the Lawyers’ Code of Conduct.

Pursuant to said article, a lawyer is obliged to keep strict professional confidence regarding all information confided to him by the client, irrespective of whether their

disclosure would damage the client or if the relevant facts disclosed to him by the client were made public by another source or even if the client himself has discharged the lawyer from the obligation for confidentiality. Such obligation also covers information the lawyer became aware of by studying the documents entrusted to him by the client, by examining witnesses of his client or through his colleagues. The lawyer's secrecy obligation continues to apply even after the death of the client and extends to the associates and the employees of the lawyer as well. Finally, in case a lawyer is involved in a case against an old client, he is not entitled to disclose to the new client professional secrets entrusted to him by the old client nor use them against him in court.

3) Articles 232, 233 and 371 of the Criminal Code

Article 232 stipulates the circumstances under which the legal privilege may be waived (see below under section 3).

Article 233 ("breach of trust") establishes the criminal liability of lawyers who intentionally harm their clients or provide their services, simultaneously or successively, to both litigants in the same case.

According to Article 371, lawyers, as well as their assistants, are punished by a money penalty or by imprisonment up to 1 year, in case they disclose private secrets entrusted to them by their clients or made known to them during the exercise of their profession.

4) Article 212, 261 and 262 of the Code of Criminal Procedure

Article 212 prohibits the examination of lawyers during preliminary criminal procedures and court proceedings, under the penalty of invalidity of the respective procedure. Said prohibition applies even in case the client has provided his consent to the examination of the lawyer². The prohibition covers facts disclosed to the lawyer by his client, while it rests with the lawyer's judgment whether he will testify about facts he became aware of in the exercise of his duties.

Articles 261 and 262 regulate the issue of confiscation of documents, files, and correspondence held by lawyers in their offices. Documents covered by the legal privilege may only be confiscated and delivered to judicial authorities under exceptional circumstances.

The lawyer may state in writing to the officials proceeding to such confiscation that the documents are covered by legal privilege, without any further justification. In case the officials have reasonable grounds to believe that this statement is untrue, they have to seal the documents without examining their contents. Only the Board of Directors of the competent Bar Association is entitled to examine the documents and to decide whether they are covered by legal privilege.

² The legal privilege and subsequently the above prohibition does not apply in case the testimony relates to issues prior to the engagement of the services of a lawyer by the client, since in such a case, the knowledge of the lawyer was not obtained within the frame of his capacity as a lawyer.

5) Articles 400 et seq. of the Code of Civil Procedure, deal with the discharge of lawyers from their obligation to testify as witnesses before Civil Courts.

The exception from testimony applies only if a relevant objection by the client is raised. When an objection is not raised, the lawyer may testify regarding the information disclosed to him by the client, upon the prior permission of the Board of Directors of the competent Bar Association.

Pursuant to article 400, lawyers are not examined as witnesses regarding facts disclosed to them by their clients, while pursuant to article 401, lawyers are entitled to deny testimony for facts they became aware of in the exercise of their profession. The latter facts are not covered in principle by legal privilege, but it rests with the lawyers to decide about their disclosure.

6) Article 26 of the Law 3691/2008 on money laundering, which transposed into Greek Law are the provisions of the European Union Directives 2005/60/EC and 2006/70/EC (the “**Greek Money Laundering Legislation**”).

Pursuant to said article lawyers are discharged from the obligation to:

(i) report to the competent authorities, on their own initiative, any transactions which they consider as suspicious for money laundering and/ or

(ii) provide, whenever required by the competent anti-money laundering authorities, as well as the prosecuting or judicial authorities, any relevant information,

in so far as such information is received from, or relate to, their clients when determining the clients’ legal position or when defending or representing them in the context of, or in relation to, a trial, including any advice given regarding the initiation or the avoidance of a trial, regardless of whether the information is received before, during or after the trial.

7) Article 7A par. 1 (e) of the Law 2472/1997 re “the protection of the individual from the processing of personal data”

Pursuant to said article, lawyers are discharged from the obligation to notify and/ or seek permission by the Hellenic Data Protection Authority in order to process personal data regarding the provision of legal services to their clients, under the condition that they are bound by the legal privilege and such data is not announced nor notified to any third parties.

2.2. Relevant Case Law

The case law in Greece on matters related with the legal privilege is rather poor. Therefore, only a brief reference to relevant rulings can be attempted herein.

1. In the context of the discharge of lawyers from their obligation to testify as witnesses before civil courts, it was ruled that exceptionally, the legal privilege may be waived only if it is absolutely necessary in order to find evidence which cannot be found

otherwise. If the above condition is not met and the lawyer testifies, such testimony constitutes a disciplinary offence.

Pursuant to the relevant case law of the Lawyers' disciplinary councils, the disciplinary offence of article 49 of the Lawyers' Code is committed only in case the legal privilege is waived by the lawyer himself, who testified on his own initiative, and not when the lawyer is called by the court for testimony.

2. It has been ruled that the breach of professional secrecy by a lawyer is not illegal and therefore not punishable, when such breach is imperative in order for a reasonable material interest of the lawyer or any other person to be protected, which cannot be protected otherwise (namely in case such protection cannot be achieved by some less damaging way). This applies mostly in the following cases:

- a) in case the client or a third party sues the lawyer and/ or
- b) in case the lawyer files a lawsuit against his client for the payment of his fees, which the client denies to pay.

3. Pursuant to the rulings of Lawyers' disciplinary councils, the lawyers must deny to testify on any facts made known to them during the execution of their duties, while such an obligation does not exist with regard to facts they became aware of in any other way, not falling within the frame of their profession and therefore, if summoned, they may not deny to testify.

3. SCOPE/ LIMITS

Can the attorney/ client privilege be waived? If yes, How? Is the privilege limited? Which documents/ information are involved?

These matters are dealt with in the above sections regarding the definition of the legal privilege and articles 261 and 262 of the Code of Criminal Procedure.

3.1. Between lawyers.

Is the correspondence between lawyers protected?

On the basis of articles 49 of the Lawyers' Code and 371 of the Criminal Code, the legal privilege covers the relationship between the lawyer, his associates and assistants, and the client, but it does not extend to the correspondence between lawyers of different parties (save in the case of more lawyers acting for the same client). Therefore the correspondence between lawyers is not protected by the provisions on legal privilege. Such correspondence may only be protected within the framework of the general provision of article 19 of the Constitution which establishes a general right of secrecy of the correspondence and does not relate with the legal privilege per se.

3.2. *Third parties*

Pursuant to Greek legislation, the legal privilege is either limited or may be waived in the following cases:

a) By virtue of article 232 of the Criminal Code (in combination with article 371 par. 4 of the Criminal Code, pursuant to which the violation of professional secrecy is not illegal when such violation constitutes an execution of duty imposed by the law), in case somebody (including lawyers) finds out that a serious offence is about to be committed, he should report it to the authorities or else he is punishable by imprisonment. In this context the legal privilege may be waived by the lawyer himself. The above provision applies solely with respect to serious offences and not with respect to minor offences, for which the legal privilege may not be waived.

b) Upon the Client's consent, but only where such waiver is permitted by virtue of the relevant provisions of law, as there are cases where the consent of the client does not waive the legal privilege. The consent of the client constitutes a waiver in the cases of article 400 and 403 of the Code of Civil Procedure, as well as in the case of article 371 of the Criminal Code. On the contrary, the consent of the client does not supersede the prohibition of examination of the lawyer in the case of article 212 of the Code of Criminal Procedure.

c) For the safeguarding of lawyers' (or others') material interests, which may not be safeguarded otherwise (see above under 2.2.2).

d) Pursuant to the provisions of article 5 of the Greek Money Laundering Legislation, the provision of legal advice remains subject to legal privilege, unless a lawyer i) participates in money laundering activities himself or ii) provides legal advice with a view to committing money laundering or while being aware that his client is asking for legal advice in order to commit such an offence.

Furthermore, pursuant to article 29 of the Greek Money Laundering Legislation, when it comes to tax and customs offences, lawyers may submit their reports regarding suspicious transactions to a special committee consisting of lawyers, which checks whether such reports are submitted according to the law and then forwards them to the competent Authority.

e) In Greek insolvency law, the bankruptcy administrator (who must be a lawyer by profession) when called to testify in a criminal trial for the prosecution of the bankrupt party, may testify on any facts he became aware of during the execution of his duties, without the prior permission of the Bar Association. This practice is doubted by the Greek legal theory.

4. INHOUSE LAWYERS

Which regulations regarding legal privilege apply to in-house lawyers?

Greek legislation does not contain any specific provisions on in-house lawyers. Furthermore, in Greek legal practice, in-house lawyers are not usually occupied on an exclusive basis, nor are they considered as personnel of the business and therefore legal theory and case law has not dealt so far with issues relating specifically with in-house lawyers.

In any case, the Lawyers' Code does not make any distinction between in-house lawyers and "independent" lawyers; therefore legal theory takes the view that the provisions relating to legal privilege covers in-house lawyers as well.

When the client is a legal entity, the legal privilege applies with respect to any disputes between the legal entity and any third party, but with respect to any internal disputes, i.e. disputes between the members of the legal entity, lawyers do not have a confidentiality obligation and it is up to them to decide whether to disclose information with respect to the matters they have become aware of.

5. PROSPECTIVE

Does professional secrecy tend to be more or less protected?

Greek legal practice has already run into problems in relation to the scope, the limits, and the implementation of the legal privilege, which are anticipated to increase in the future. The complexity of modern life makes the scope of legal privilege narrower, but at the same time more necessary than ever. The reason of existence and establishment of the legal privilege as well as its limits are doubted more than ever.

The example of the Greek Money Laundering Legislation depicts clearly that the ambit of legal privilege is constantly being restricted, despite the strong opposition of Greek legal theory.

The above are combined with the increasing efforts made by public authorities on an international level to interfere in the private and professional lives of individuals, thus damaging any form of privacy, including legal privilege.

Bibliography:

- 1) Calliopi Makridou, *"The Legal privilege"*, Editions Sakkoula/ Thessaloniki, 1989.
- 2) El. Vourvahis, *"Lawyer and Morality"*, Editions A. Sakkoula, Athina-Komotini, 2005, p. 86-87.
- 3) E. Simeonidou- Kastanidou, *"Studies of Substantial Criminal Law"*, Editions "Nomiki Vivliothiki", 2003, p. 731-740.
- 4) Ch. Chrysanthakis, *"The Legal Privilege"*, in *"The Legal Profession today"*, Editions Sakkoula, Athina- Komotini, 2003, p. 161-170.
- 5) A. Konstantinidis, *"Duty of truth, professional secrecy and private inquiries of the lawyer"*, in *"The institutional role of the lawyer in criminal proceedings. Tradition and Perspective"*, Minutes of the 1st International Congress, Athens 28-29 March 1997, Editions Sakkoula, Athina-Komotini 1998, p. 33-61.
- 6) S. Tsatsoni, *"The Disciplinary law of the lawyers"*, Athens, 1970, p. 135-147.
- 7) E. Simeonidou-Kastanidou, *"Legal privilege and money laundering"*, published in *"Criminal Chronicles"* 2006, p. 289-301.
- 8) K. Beis, *"The professional duties of the lawyer under the shadow of a corrupted judge"*, published in *"Dike International"* 2006, p. 637-642.
- 9) N. Sarls., *"The professional secrecy of the witnesses in the criminal trial"*, published in the *"Greek Justice"* 1987, p. 261-274.