Legal Professional Privilege

The Netherlands

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1. DEFINITION - PRESENTATION

What attorney privilege is and what is not

In pursuance of the Dutch Code of Conduct for Attorneys, an attorney is obliged to confidentiality, and he may not disclose any characteristics of matters handled by him, the person of his client and the nature and scope of the interests of the client (rule of conduct5 under 1). Of course it is irrelevant in which way the attorney has learned this information (written, verbally, electronically etc.) This obligation of confidentiality also means that attorneys have a legal privilege. The legal privilege has been laid down in Section 218 of the Code of Criminal Procedure, for criminal matters, and Section 163 paragraph 2 under 2 of the Code of Civil Procedure. This legal privilege is restricted to the situation that the attorney obtained the information in the exercise of his profession.

The attorney must impose an equal obligation of confidentiality on his employees and staff.

The obligation of confidentiality lasts also after suspension of the relation with the client.

The good processing of a case requires frequently that the attorney discloses information about the client, which means that he can disclose this information insofar his client has no objection.

2. SOURCES

2.1 **Relevant Statutes**

2.1.1. Relevant statues.

The obligation of confidentiality has been laid down in Section 5 of the Dutch Code of Conduct for Attorneys and is acknowledged by Section 218 of the Code of Criminal Procedure (for criminal matters) and Section 163 of the Code of Civil Procedure (for civil matters). This means that the attorney may refuse to answer any questions or produce any written information when he is questioned as a witness.

Since attorneys have the right and not the obligation to invoke this legal privilege in a criminal or civil lawsuit, they are "free" to invoke this legal privilege or not. The attorney who does not invoke his legal privilege, takes the risk of an official complaint by his client lodged against him.

2.1.2. Civil cases;

This means that an attorney has no obligation to disclose any information under Dutch law, but it does not release his client from the client's legal obligation, according to Section 22 of the Code of Civil Procedure to inform the court and to produce any document required by the court. But to produce these documents the attorney needs the approval of his client. If the client refuses this approval, than the court can draw the conclusions it deems fit.

2.1.3. Criminal cases:

In criminal cases the public prosecutor has the right to conduct a search of a person's premises, not only the premises of the suspect but also the premises of other persons. In general searching for seizure of documents in the office of an attorney, without his authorisation, is only lawful as far as this occurs without violation of his legal privilege. However, strong indications or suspicions must exist in such a case that these documents are the object of an indictable offence on which the research is related or that these documents have served in committing this offence. Such a search is also lawful if the documents are in the possession of the attorney not in his profession as an attorney, in which case the documents do not fall under his obligation of confidentiality. Thereby it is required that the searching is purposeful. This means a concrete description of the nature of the documents which will be searched for is communicated clearly in advance and that the search operation

takes place in the least inconvenient manner. It could also mean that the search takes place in the presence of the Dean of the local Bar Association.

2.1.4. Criminal offence

Violation of the obligation of confidentiality is punishable according to section 272 of the Dutch Penal Code.

2.2 Relevant Case Law

None cited.

3. Scope/limits

Can the attorneys/client privilege be waived? Yes and how?
Is this privilege limited? Which documents/information is involved?

Waiver:

3.1.1 The obligation to confidentiality of all confidential data of the client is a fundamental principle that belongs to the attorney to observe while exercising his profession, on which clients must be able to trust unconditionally as a basis for a correct protection of their interests and their right to privacy.

As explained above, the legal privilege is a logical consequence of the obligation of confidentiality and legally acknowledged in civil and criminal cases. However, it is the attorney's decision to invoke his right not to testify, nor to disclose privileged documents or object to seizure of privileged documents. Although the court has to point out to the attorney that he has a legal privilege, it is up to the attorney to decide whether he wants to invoke this legal privilege or not. Even if the court forgets to point out this legal privilege to the attorney, the testimony of the attorney can be used as evidence by the court. The client can lodge an official complaint with the local Bar.

3.1.2 Of course the client is free to waive his attorney's confidentiality and in civil lawsuit he is even obliged to do so, if the court asked for specific information or documents which are (also) in the possession of the attorney. This waiver could be given expressly or impliedly. Before delivering any procedural document to the court the attorney confers with his client

about the contents of a procedural document. If the client agrees the waiver is given impliedly.

Limitations to the privilege

3.1.3 It is obvious that the legal privilege only relates to information received by the attorney in the exercise of his profession.

3.1.4. In some jurisdictions legal privilege is limited if the attorney receives information in exercise of his profession with regard to certain felonies such as murder, manslaughter, kidnapping, and robbery. According to Dutch criminal law, anyone who has learnt about specific criminal acts (criminal acts against the safety of the State; criminal acts that would endanger the general safety of persons or goods, if these criminal acts could cause danger to life; criminal acts against a person's life; abortion; manstealing and rape) is obligated to report such a criminal act to an investigating official. This obligation does not exist for a person who could endanger himself for prosecution or could endanger someone else for prosecution at whose prosecution he could invoke a legal privilege. So, even in such cases, an attorney is not obliged to testify against his client if the client confesses a criminal act to its attorney, but denies the accusation in court.

3.1.5. If an attorney is charged by his client in a civil suit or in disciplinary proceedings, he is entitled to disclose all the information received from and about his client in order to put up his defence against the claim or complain of his client.

3.2 **Between attorneys**

3.2.1. An attorney may not refer to letters or any other statements from one attorney to another attorney in court, unless the interests of his clients require this specifically, but not without previous consult of the attorney involved. If this consult does not lead to a solution, the attorney has to obtain the advice of the dean of the local bar. This rule does not only apply to letters or announcements which are sent or made under the restriction that they were strictly between colleagues, but to all letters and announcements.

3.2.2. If the correspondence between attorneys constitutes an agreement, it is allowed to refer to the contents of these letters, as long as these letters are not specifically mentioned. This also applies to a demand letter.

3.2.3 It is not permitted according the Code of Conduct to call an attorney as a witness and to take off a deposition about facts that he observed in the exercise of his profession as an attorney without consulting the Dean of the local Bar Association in advance. The reason for this rule is that the Dean can judge whether or not the attorney would break his obligation of confidentiality by testifying.

4. **In-house Lawyers**

If in-house lawyers are admitted to the Dutch Bar, they are attorneys and can represent their client/employer in court, and thus, they have in principal the same obligations and privileges as any other attorney as described above, but the decision of the European Court of Justice of 14 September 2010 (case C-550/07 P) might have changed their position fundamentally. The employer involved and among others, the Dutch Bar, argued:

> *Akzo and Akcros, and a number of the interveners, submit that the criterion that the lawyer must be independent cannot be interpreted so as to exclude in-house lawyers. An in-house lawyer enrolled at a Bar or Law Society is, simply on account of his obligations of professional conduct and discipline, just as independent as an external lawyer. Furthermore, the guarantees of independence enjoyed by an 'advocaat in dienstbetrekking',*(attorney in employment GJdeL) *that is an enrolled lawyer in an employment relationship under Dutch law, are particularly significant.*

The key arguments for the court were, in my opinion:

> *42. As to the second condition, the Court observed, in paragraph 24 of the judgment in AM & S Europe v Commission, that the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, is based on a conception of the lawyer's role as* ***collaborating in the administration of justice*** *(in bold GJdeL) and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. The counterpart to that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest. The Court also held, in paragraph 24, that such a conception reflects the legal traditions common to the Member States and is also to be found in the legal order of the European Union, as is demonstrated by the provisions of Article 19 of the Statute of the Court of Justice.*
>
> *47 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.

Conclusion of the Court*:*

53 The Commission takes the view that the General Court, in paragraph 174 of the judgment under appeal, rightly held that in-house lawyers and external lawyers are clearly in very different situations, owing, in particular, to the personal, functional, structural and hierarchical integration of in-house lawyers within the companies that employ them.

This decision caused quite a stir in the ranks of in-house lawyers in The Netherlands and the chairman of the Dutch Association of In-house Lawyers finds the decision disappointing and unjustified. Presently, there is a discussion about what the consequences of the decision are for the LPP of in-house lawyers in other situations. The case only relates to a European competition proceeding, but the decision is so generally formulated that it is expected that it will also affect other privileges of in-house lawyers in proceedings on other issues before other courts. Presently, the Dutch Bar Association is studying whether the Dutch Bar Regulation has to be adapted or not.

5. PROSPECTIVE

Since 1 June 2003 the Identification (Provision of Services) Act (IPSA) and Disclosure of Unusual Transactions (Financial Services) Act (DUTFSA) are applicable on the services of certain free occupational groups, among which is the legal profession. As from that date an attorney is legally obliged to identify clients in accordance with the provisions of the IPSA and furthermore in accordance with the DUTFSA; the attorney has to identify the (planned) transactions or a composition of transactions of a client related to the purchase or the granting of a service of the attorney. By means of guidelines in the DUTFSA, the attorney has to determine whether theses transactions are uncommon or not and has to report eventual uncommon transactions to the Office for the Disclosure of Unusual Transactions. In this manner it seeks to prevent the legal profession from involvement in money laundering or a possible financing of terrorism. This could constitute a restriction on the legal privilege.

The legal privilege relates to both the identity of the client and all the data which are related to the case of the client. The Dutch Bar is of the opinion that the supervision may not infringe the legal privilege of an attorney and that within the framework of this supervision and in

pursuance of this regulation, examination of the information to the Office for the Disclosure of Unusual Transactions can only be granted if the data are anonymised. That doesn't alter the fact that the attorney is still obliged to keep the non-anonymised data. To restrict a possible violation on the legal privilege in advance as much as possible, the data that has to be kept according to the IPSA, must be kept in a separate part of the file separated from all the other information about the case and the client.

Even in criminal cases the position of the attorney is discussed but still intact.