

PORTUGAL

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I. DEFINITION - PRESENTATION

Protection of communications between attorneys and clients (or, in general of any client related information obtained by lawyers) exists in the Portuguese jurisdiction.

However, such a system is not built for the benefit of both parties imposing them reciprocal duties and benefits.

In fact, the system consists of a set of professional rules and principles addressed to lawyers imposing them a strict duty of keeping confidential the information obtained from clients in the exercise of their work.

It is a professional/public duty which derives from the social and public perspective the Bar Association rules have of the profession.

Thus, our law does not (at least directly through the wording of the relevant provisions) contemplate a duty of secrecy by the client in favour of the lawyer.

The sources of the protection are the following:

- The basis of the professional secrecy

- Article 87 number 1 of Law 15/2005 of 26th January (THE PORTUGUESE BAR ASSOCIATION STATUTE “ESTATUTO DA ORDEM DOS ADVOGADOS” hereinafter referred as “EOA”) states that: *A lawyer is obliged to maintain professional secrecy over all facts brought to his knowledge as a result of the exercise of his profession, namely: a) facts related to professional matters, revealed by the client or by his order (.....).*

- Protection of documents from arrest

- Article 71 of the EOA states that the correspondence and documents traded between client and attorney cannot be arrested by the courts, unless they are related with a criminal offence, in which proceedings the lawyer has been constituted as defendant.

- Criminal offence

- Article 195 of the Portuguese Criminal Code states that the violation of secrecy by a person obliged to respect it (which includes lawyers *via* article 87 of the EOA) commits a crime punished with prison until 1 year or a financial penalty.

The professional secrecy, in accordance with Article 87 of the EOA, applies to all facts as well as to all documents or other objects related, directly or indirectly, with the facts under secrecy.

The lawyer is bound to respect such secrecy both in court and extra court services, whether he has accepted and/or commenced the service or not and it is also extended to other lawyers who

had intervened in the matter as well as to the lawyer's employees from whom the lawyer is obliged to demand respect for such duty prior to the start of their functions.

If the professional secrecy is breached, the revelation of such information has no value in court as evidence (article 87/5 of the EOA).

On the other hand, both the criminal and the civil proceedings codes provides that the lawyer is entitled to refuse to testify about facts covered by professional secrecy (thus this being a valid cause of refusal to comply with the duty to testify and to co-operate with the courts) .

As a clear result of the public and social nature of the professional secrecy, the exceptions/waivers foreseen in our law are only the following: ***a lawyer may reveal facts covered by professional secrecy as long as such is absolutely necessary for the defence of his dignity, for the defence of his, or of the client, rights and legitimate interests*** – article 87/4 of the EOA.

However, the lawyer is bound to obtain a prior authorization from the Portuguese Bar Association (there is a special statute ruling the proceedings to obtain such authorization and defining the members of the Bar Association who have such competence).

There is another situation in which a waiver or exception may be at stake. It is the situation when a lawyer receives from the client information that, if revealed, may avoid a crime (only to *avoid* and not to *report* or to *reveal*. In these latter cases it is clear that no exception exists). This is a very complex situation. The EOA does not specifically address it.

As previously referred, our Criminal Code states that the revelation by a lawyer of a fact under professional secrecy is a crime. However, the same code addresses the matter of the *conflict of duties*, stating that if there are two duties in opposition (in this case, to avoid a crime versus to keep a professional secret), the person may choose to comply with the duty that protects a higher value, thus not complying with the lower one, without committing a crime.

There is no need to say that it will be quite difficult to establish the higher-lower relation in this case. The majority of the opinions tend to consider that a lawyer is entitled (but not obliged) to breach the secrecy based on conflict of duties depending of the crime that is at stake. For example, the Portuguese Bar Association and Portuguese lawyers in general have violently reacted against the EU rules on the combat to “money laundry” which tend to impose to lawyers the duty to report client's information leading to a possible crime. The argument is simple: lawyers are not investigation police! Thus, the general notion is that, in the majority of the cases, a lawyer shall maintain secrecy even if the revelation of the information may avoid a crime. Of course, there are limited situations in which a lawyer may breach it: for example, if he is convinced that the client is ready to commit murder and the revelation may save a human life! It is a complex matter to be analysed case by case, in accordance with the lawyer's conscience.

The question of the *in-house counselling* in Portugal is basically related with the admissibility of lawyers working, not as independent services providers (alone or in law firms), but under an employment contract, thus subject to the (non lawyer) employer's directives.

The EOA address the matter clarifying that such lawyers' employment contracts are admissible but *the employer's power cannot restrain the independence of the lawyer or violate the principles of the profession* – article 76/3 and 4 of the EOA.

Since the above explained professional secrecy regime is a principle of the profession, the result is that *in-house counsellors* (provided that they are lawyers duly registered in the Bar Association and not mere legal advisors) are bound to respect such rules in the exact same way as other lawyers.

As previously said, the nature of the protection in Portugal is social and public and the perspective is of the lawyer acting as a justice servant as well as a professional bound to be loyal to his client. Bearing that in mind, as well as the above described legal framework, we must conclude that the client is one of the beneficiaries of the protection but not the *owner*.

In fact, the client does not own the power to declare a waiver. In this particular, the Portuguese Bar Association has already declared that: ***The obligation of professional secrecy is not established in the direct benefit of each client, since it bounds the lawyer even against the client's will and intentions. The obligation of professional secrecy is a public order duty, that can only be waived in the situations specially foreseen in the Law.*** – Report of the General Council of the Portuguese Bar Association n° E-14/02, approved in 12.04.02.

The client's will to obtain a waiver in order to have his lawyer testifying or revealing in his favour facts covered by secret is, of course, foreseen as one of the possible causes that may determine the declaration of a waiver by the Bar Association but it is one among others.

Inherently, from the clients' point of view, there is no space to analyse the question of the protection against a waiver the lawyer may obtain. The lawyer is entitled to obtain it provided that it falls under the scope of article 87/4 of the EOA and the right procedure is followed.

We can conclude in this matter that both the protection and the waiver are of public nature, thus outside the client's direct hands.

In which regards the protection of the lawyer against any client's disclosure which can affect him, we must conclude that such protection does not exist, at least through a direct and systematic legal framework.

Eventually, one could say that the nature of the lawyers' profession and of its duty of loyalty before the client implies, by itself, a confidentiality of communication in their favour. Such would be a condition for the free exercise of the lawyers' profession. However, although this may be a very good theoretical legal thesis, the fact is that it is not implemented in terms of legal provisions.

Bearing that in mind, from a practical point of view, in our opinion, a Portuguese lawyer shall safeguard his position regarding sensitive information by implementing two actions/principles of action:

1) In the presence of a sensitive information scenario, he shall always act and orientate his relation with the client in a defensive way, bearing in mind the lack of a systematic and direct protection in his favour;

2) Additionally, the lawyer may use the possibility to declare in writing to the client the confidentiality of his communications (nowadays, the emails, faxes, or letters normally includes a standard disclaimers which, in general, are sufficient). In accordance with articles 75 and 76 of the Portuguese Civil Code, any person may declare/impose to the addressee the confidentiality of a letter (or of any other type of communication). If such is made, the addressee becomes bound by such confidentiality and may not reveal it. A violation of this duty may generate civil or even criminal liability *via* the above referred article 195 of the Portuguese Criminal Code. This will confer a certain protection to the lawyer and act in a dissuasive way upon the client. However, in our opinion, it will not raise the level of protection up to a level equivalent to the one the client benefits against the lawyer as a result of the above described system. For instance, we do not have in our law a provision declaring that sensitive information brought to a file by a client in violation of a duty of confidentiality cannot be used against the lawyer as evidence. On the contrary, in accordance with the above described article 71 of the EOA there is no prohibition of arresting client-attorney documents if they are to be used in a criminal file against the lawyer. For this reason, recommendation 1) must be considered by the lawyer above all.