

SWEDEN

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I. DEFINITION - PRESENTATION

1.1 General

In order to understand the concept of legal privilege in Sweden one has to understand the system of the legal profession in this country.

In Sweden, a lawyer (Swe: jurist) is generally a person who has completed the legal education and who provides general legal service. There are however no legal requirements for education or experience in order to call oneself a lawyer. The title "lawyer" is not exclusive and there are no barriers for anybody, to provide legal services or to represent clients in court. There are no licensing requirements, regulations, or ethical rules for practicing lawyers. There is no control over the persons who call themselves lawyers and no supervising body that ensures that the services provided by lawyers meet a minimal professional standard.

A lawyer who has completed the legal education can obtain the title "Advokat" (Eng: Attorney) if the lawyer fulfils certain statutory requirements and if he is accepted as member of the Swedish Bar Association. A lawyer may apply for membership in the Bar Association and become an attorney if a) he is domiciled in Sweden or in another state within the EU, the EEA, or Switzerland, b) he has passed proficiency examination required for competency to a judge's office, i.e. in Sweden a so called jur. kand. (LL.B.) degree, c) he has a minimum of three years' experience of practising law, and he is offering legal services to the public at the time of the application, d) he has passed the Swedish Bar Examination after completing the mandatory training courses, and e) he has reputation for integrity, and is also otherwise considered suitable for the legal profession. He shall furthermore have sound financial standings. Special rules apply for applicants from other EU or EEA states, or from Switzerland. Such applicants shall fulfil the training requirements necessary for becoming a lawyer in their home countries. An attorney is obliged to follow strict ethical rules set by the Bar Association and certain regulations in the Procedural Code. The Bar Association also works as a supervising body ensuring a very high professional and ethical standard amongst the attorneys.

The legislation on legal privilege differs depending on if the person giving legal advice is an attorney (Swe: Advokat) or not. Attorneys are given a full legal privilege while non-attorneys that are representing parties in litigation are given a limited legal privilege.

1.2 The legal privilege for attorneys (Swe: Advokater)

Attorneys enjoy several particular privileges. Confidentiality forms an important legal privilege and is based on two grounds; partly the client's right of defence, partly the attorney's particular independent position in the judiciary.

The general principle is that the legal privilege of an attorney is absolute (the so called duty of confidentiality and duty of discretion). This legal privilege involves information which is confided in the attorney within the frame of the advocacy or which the attorney

receives knowledge of in connection therewith. The scope of this definition is quite extensive. Attorneys shall always, in every aspect and situation, observe strict confidentiality and discretion regarding their clients. The only exemption from the attorneys' duty to observe such confidentiality and discretion is when the client consents thereto or when there is a legal obligation for the attorney to provide the confidential information in question.

An attorney is in certain cases exempted from the obligation to give testimony in trial. The Procedural Code states that an attorney and his assistants may testify about something which was confided in them within the frame of the advocacy or which they received knowledge of in connection therewith only if they are required to do so by law or if the person to whom the confidence is owed has consented thereto. With "assistant of the attorney" is meant an employee to the attorney.

According to the Procedural Code, the information encompassed by legal privilege can be given to the attorney by the client, a legal representative of a client or even an employee by the client. For information received by third parties, see section 3.2.

Legal privilege for attorneys also provides an exemption from the duty to produce subpoenaed documents and works, also as a prohibition to take privileged documents from attorneys during searches and seizures by different authorities. This extended legal privilege hinders the attempt to find out confidential information about a client by simply requesting to see the documents that contain the information. A general rule is that if an attorney is not allowed to testify on the content of the document in question, the document itself is encompassed by legal privilege.

The legal privilege applies in regular courts, special courts and in administrative proceedings that resembles a trial.

1.3 The legal privilege for non-attorneys

As mentioned above, only attorneys have obtained a full legal privilege. There is no duty of confidentiality or duty of discretion regarding non-attorneys. However, the Procedural Code contains a limited privilege that prohibits persons that are not attorneys but are representing litigants from testifying about client confidences entrusted in them when representing a party in litigation or criminal cases. Information given prior to litigation, which is not litigation related, is therefore not covered by the legal privilege and can freely be testified on.

One should notice that anyone can represent a person in court; there is no demand that such a person shall be legally trained. However, the general principle in criminal cases is that an attorney shall be appointed to be the public defender (Sw. offentlig försvarare) of a person. Particular reason is required in order to appoint a non-attorney to be the public defender of someone. Nevertheless, private defenders may be non-attorneys. Anybody representing a party in court obtains the limited privilege notwithstanding if the person is an employee of the litigant, a family member, or a lawyer.

As for attorneys, the limited privilege also provides litigation representatives with an exemption from the duty to produce subpoenaed documents and works as a prohibition to take privileged documents during searches and seizures by different authorities. The difference is that the documents in question must regard client communication given when conducting the litigation or the criminal case. All other documents are not covered by legal privilege.

The limited privilege applies in regular courts, special courts, and in administrative proceedings that resembles a trial.

2. SOURCES OF LAW

2.1 Relevant statutes

The legal privilege in Sweden is codified in the Procedural Code.

2.2 Relevant Case Law

According to older case law, an attorney did not have to give testimony about the names of his clients or their contacts and the burden of proof regarding which documents were encompassed by the legal privilege was considered to be low. It was enough that the attorney claimed them to be covered by legal privilege.

Recent case law has slightly changed this view on legal privilege. Even though the court stated that an attorney normally is forbidden to hand out the riante of his client, it is no longer enough with only an attorney's statement that the information or document is encompassed by legal privilege, but an objective evaluation of the client's interest of the information not being revealed shall be made in each individual case. It should be noted that this evaluation is rather client-friendly, and so far has not resulted in an attorney being forced to reveal the name of his clients.

According to another court ruling regarding taxes, invoices from an attorney to his client were not considered to be encompassed by legal privilege although the information in the invoices regarding the client's name, the name of the opponents, and the subject matter of the case as such was covered. In reality, this meant that only the different invoicing amounts were not covered by legal privilege.

It could be noticed that even if a court does not find that an attorney's acts constitutes a breach of legal privilege, the Bar Association is still entitled to give a disciplinary ruling in the matter as the handling of the case could in itself violate the regulation on attorney-ethics.

3. SCOPE AND LIMITS

As described above, the legal privilege of an attorney is absolute. Such legal privilege

involves information which is confided in the attorney within the frame of the advocacy or which the attorney receives knowledge of in connection therewith. The limited privilege on the other hand only encompasses client confidences entrusted in a person when representing a party in litigation or in a criminal case. For both kinds of legal privilege the information must have been received when the person was acting within his professional role as attorney or litigation representative and not in some other manner. However, as mentioned above, the scope of the definition of this is quite extensive. Information received by an attorney or litigation representative outside his line of business is therefore not covered by legal privilege and can be freely testified on.

Legal privilege also provides an exemption from the duty to produce subpoenaed documents and is also a prohibition for authorities to take privileged documents during searches and seizures.

For attorneys, legal privilege prohibits them from testifying about confidences received in the context of giving legal service and about matters that they have come to know as a consequence thereof. The communication must have been made with some expectations that it would be confidential and in the context of a client and attorney relationship. The facts and information are not prohibited to be asked about as such by the court. For example, an attorney may be asked questions on the facts of a certain case but not of what the client had told the attorney about the case. Not all communication with an attorney is encompassed by legal privilege but only such which might reveal confidences. However, the duty of confidentiality must be observed. This means that the attorney, according to the general principle, shall not disclose any information about his clients at all. Written documents may be redacted to remove parts that reveal client confidences and thereafter handed in to the court or authority requesting them.

Legal privilege, for both attorneys and non-attorneys, can be waived by the person to whom the confidence is owed. There are no formal demands on how this shall be made, but for the sake of clarity it is recommended that such waiver is made in a written document. Most often, the waiver is made by the client simply requesting the attorney or litigation representative to testify in a court proceeding.

The exemption from legal privilege for attorneys and non-attorneys applies firstly when the testimony is to be given in criminal cases involving serious crimes, which naturally does not apply to defenders, and secondly in cases of child abuse, which is relevant mostly for social workers and not to legal service providers.

3.1 Between lawyers

The correspondence between lawyers is not specifically protected.

3.2 Third parties

According to the Procedural Code, the information must be a confidence by a client to be encompassed by legal privilege. Information given to an attorney not consisting of such confidential information can therefore be freely testified on. It is not possible to generally include an attorney in all meetings or in a board of a company, and then claim that all information and documents handled at the board meetings are covered by legal privilege.

As mentioned above, the information must be given in a client-attorney relation and be a confidence by a client. Therefore information given by third parties, which could reveal confidential client information when testified on, should be encompassed by legal privilege. The decisive is the kind of information or documents in question, not the source from which the information or documents were received.

In-house Counsel

Lawyers that are employed as in-house counsels cannot have the attorney title and may not be a member of the Swedish Bar Association. If an attorney chose to work as an in-house counsel, he must terminate his membership in the Bar Association and may no longer call himself an attorney. In-house lawyers are therefore treated as regular lawyers regarding legal privilege and can only be granted limited legal privilege as litigation representatives.

In 2010, the regulation regarding legal privilege in the Procedural Code was amended to also grant patent agents (Sw. patentombud) working with intellectual property law, who are not attorneys or lawyers, the same legal privilege as attorneys have. This amendment was made at the same time as the Act on Authorization of Patent Attorneys came into force and was motivated by the fact that patent agents and lawyers working with intellectual property law need to be given full legal privilege so that they would not have a competitive disadvantage in relation to e.g. attorneys. As for attorneys, the legal privilege only involves information that has been received when the person is acting within his professional role.

Other lawyers who are not attorneys or working with intellectual property law have also demanded the same legal privilege rights as attorneys have, although no legislative proposal with this content has been, or is expected to be, presented for the time being. To the contrary, the Swedish Bar Association is very keen to keep the Association closed for attorneys only and keep the exclusiveness connected to the title attorney (Advokat).

5. PROSPECTIVE

There is a regulation in the Procedural Code that provides an obligation for attorneys to maintain the client's confidence according to the ethical regulations of the Bar Association. A violation of client confidentiality by an attorney constitutes a crime and may be prosecuted by the Chancellor of Justice. The attorney may also be subject to disciplinary sanctions by the Bar Association.

The Code of Procedure provides no regulation on maintenance of client confidence for legal service providers that are not attorneys. There is some legislation regulating the confidentiality of clients, both specialized, for example bank lawyers; and general, such as the Public Access to Information and Secrecy Act that applies, among others, to employees of the state. However, there is no protection of general client information such as for attorneys. Most confidentiality requirements regarding non-attorneys are contractual.

One should notice that the regulation on legal privilege does not coincide with documents or information that are encompassed by the regulation on client confidence. However, most often what is considered to fall under the regulation on legal privilege is information encompassed by client confidence, at least regarding attorneys.