

DENMARK

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1. DEFINITION – PRESENTATION

What attorney/client privilege is and what is not.

In order to understand the concept of "attorney/client privilege" it is necessary to explain the system of the legal profession in Denmark.

The legal profession in Denmark

An attorney in Denmark (In Danish "jurist") is a general service provider who has completed a legal education. There are no licensing requirements, regulations or ethical rules for such attorneys and there is no control over the persons who call themselves attorneys. Furthermore, there is no supervising body to ensure that the legal services provided by the attorneys meet a minimal professional standard.

An attorney may obtain the title "Advokat" (in English "lawyer") if he or she meets certain statutory requirements according to the Danish Administration of Justice Act ("the Act"). An attorney may only become a lawyer if he or she has completed a law degree and has worked for a minimum of three years providing legal services, typically as a junior associate at a law firm. Furthermore, the attorney shall pass a theoretical and practical examination to become a lawyer.

All Danish lawyers are subject to the rules of the Act covering, among other things, the code of conduct for lawyers. The General Council of the Danish Bar and Law Society supervise that the code of conduct for lawyers is followed, and they have made Ethical Rules for Lawyers that impose strict demands on the professional standard and ethics of lawyers.

The concept of "attorney/client privilege" in Denmark

The legal concept "attorney/client privilege" is well-known and integrated in the legal systems in the United States, England, Canada, Australia and other common law jurisdictions. The "attorney/client privilege" is a legal concept that protects communications between a client and his or her attorney.

In Denmark we do not have such a legal concept. However, every Danish lawyer (and their partners, associates and employees) are under a duty to keep information confidential. The duty of confidentiality is closely connected to the legal concept "attorney/client privilege".

The duty of confidentiality implies that a Danish lawyer must treat all information that he or she acquires in the course of his or her business as confidential. According to section 129 of the Act and the Danish code of conduct for lawyers, lawyers and their partners, associates and employees are under a duty to keep information confidential.

Furthermore, section 152b of the Danish Penal Code sets out that any person who is exercising or who has exercised a trade or business by virtue of authorisation and who unlawfully forwards or exploits information which he has obtained in connection with his trade or business, and which is confidential with respect to private interests, will be liable to a fine or imprisonment.

The protection is rather broad and extends to every type of communication between the lawyer and his or her client. The purpose of this broad protection is to encourage the client to speak freely with the lawyer and build up trust and confidence.

The duty of confidentiality is not limited in time.

2. SOURCES

From which sources is the legal privilege derived?

2.1 Relevant statutes

The Danish Administration of Justice Act (sections 126, 129, 170 and sections 298-300) and the Danish Penal Code (section 152b).

2.2 Relevant case law

In regard to the extent of a lawyer's duty to keep information confidential, the judgment made by the Danish Supreme Court on 23 April 2002 in case no. I 101/2001 is of importance.

The Supreme Court stated in this case on a discretionary basis that a Danish lawyer was entitled to breach his confidentiality and pass on confidential information to the Copenhagen Stock Exchange. The majority in the Supreme Court emphasized that the passing of confidential information from the lawyer to the Copenhagen Stock Exchange was acceptable due to, among other things, social considerations – here a potential white collar crime.

3. SCOPE/LIMITS

Can the "attorney/client privilege" be waived? If yes, how?

The "attorney/client privilege" or the duty of confidentiality can be waived by the person to whom the confidential information is owed. There are no formal requirements on how such a waiver should be made.

Is the privilege limited? Which documents/information are involved?

The duty of confidentiality is restricted to information – oral as well as written – that the lawyer acquires in the course of his or her business. Information received by a lawyer outside his or her business is not covered by the obligation to keep such information confidential.

As a general rule, everyone has a duty to give evidence. However, in order to avoid potential conflicts with the duty to keep information confidential the Act contains specific rules about lawyers and their duties to give evidence.

Section 170 of the Act

It follows from section 170 of the Act that lawyers are privileged as regards to information that they have acquired in the course of their business. However, the court may on a discretionary basis limit the privilege and order the lawyer (except defence counsels in criminal cases) to testify as witness in a case under certain conditions. The lawyer's testimony must be deemed to be essential to the outcome and nature of the case, and the importance to the persons concerned or to the society must legitimise the evidence.

Furthermore, section 170 of the Act sets out the rule that lawyers cannot be compelled to give evidence on matters concerning information that has been obtained or given to them in confidence in connection with work related to legal proceedings. Nor can lawyers be compelled to give evidence concerning legal advice provided in connection with litigation. If lawyers have rendered general legal advice, the lawyers can be compelled to give evidence.

If privilege is granted by statute or by order of the court, the privilege applies also to documents such as correspondence, memos, and other documents and the lawyer cannot be ordered to disclose such memos or correspondence with

his client as well as such documents may not be searched by the police in criminal cases.

Sections 298-300 of the Act

The duty of confidentiality is further modified by sections 298-300 of the Act according to which the court may by motion from a party order another party or a third party to disclose specific documents in a litigation. However, it follows from section 298 of the Act that if a party is exempt from the duty to give evidence under the Act, the party is likewise exempt from providing documents of the same content.

If a party does not comply with the court's order to disclose information, the court will take the non-compliance into consideration in favour of the other party when weighing the evidence which may give prejudice to the non-compliant party's case. If a third party does not comply with the order the court may force him to do so by using remedies under section 178 of the Danish Administration of Justice Act.

3.1 Between lawyers

Is the correspondence between lawyers protected?

The correspondence between lawyers is not specifically governed by the "attorney/client privilege" or the duty of confidentiality and there are no provisions in the Act or in the Ethical Rules for Lawyers about this issue. However, correspondence between lawyers, which could reveal confidential client information when testified on, is probably encompassed by the duty of confidentiality.

3.2 Third parties

With regards to information and documents received from third parties, it should be noted that the information and documents must be given in an attorney-client relation. This implies that information and documents received from third parties are not governed by the duty of confidentiality. However, information or documents given by third parties, which could reveal confidential client information when testified on, are probably encompassed by the duty to keep information confidential.

4. In-house lawyers

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

There are no specific regulations to in-house lawyers regarding the duty of confidentiality.

As mentioned above, lawyers have a duty of confidentiality. This duty applies equally to internal and external lawyers. Further, section 170 of the Act sets out the general rule that lawyers cannot be compelled to give evidence on matters concerning information that has been obtained in connection with their work.

It is not clarified under Danish law to what extent section 170 of the Act is applicable to in-house lawyers. A guideline may be that, to the extent that an in-house lawyer performs the same tasks and responsibilities as an external lawyer, communications in this respect may be given privilege.

With regards to the field of competition law, it should be noted that correspondence with an in-house lawyer probably would not be privileged cf. judgment of 17 September 2007 in the joined cases T-125/03 and T-253/03 Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. against the Commission of the European Communities.

5. Prospective

Does professional secrecy tends to be more or less protected?

The duty of confidentiality is a fundamental and essential obligation for every Danish lawyer and has existed for hundreds of years. However, there are regulations which allow certain limitation in a lawyer's duty to keep information confidential.

The most significant example of this 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) implemented in Denmark by the Act on Measures to Prevent Money Laundering and Financing of Terrorism (Act no. 806 of 6 August 2009). Under the Directive, lawyers may

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