|  |  |
| --- | --- |
| **Memorandum****From:** Thomas Rouhette / Sylvie Gallage-Alwis**Date:** September 11, 2019**Subject: Subject: Attorney-Client Privilege under French law** |  |

The below paper intends to clarify attorney-client privilege under French law for correspondence between a US client ("the Client") and a law firm based in France ("the Law Firm") (**1.**), and for correspondence between the Client and others (**2.**).

In this paper, we will mention what the position of French Courts is likely to be when faced with different types of correspondence. This should be compared with what US Courts would consider and how US Courts would treat the French position in the case of a discovery request in the US.

**Summary**

Advice is to use "**Privileged & Confidential – Strictly confidentia**l" at the beginning of each email.

Under French Law:

* All exchanges between the Law Firm / the Client's legal team and the Client's employees are privileged & confidential;
* All exchanges between the Law Firm and legal teams of other companies belonging to the Client's group are privileged & confidential;
* All exchanges between the Law Firm and any employee of the Client's group should be deemed privileged & confidential;
* As soon as a third party (which is not someone or a company from the Client's group) is added to the chain of email, the privilege does no longer applhy;
* Exchanges between the Client's legal team and the Client's employees should be considered as privileged & confidential if they are deemed as such by US law;
* Exchanges between the Client's legal team and legal teams of other companies of the Client's group may or may not be deemed privileged & confidential – will depend on the law of the other local in-house Counsel;
* Exchanges between the Client's legal team and other companies of the Client's group will likely not be considered as privileged & confidential;
* Key point to check with US Counsel: if the Law Firm acts as an intermediary inbox between EU local teams and the Client's legal team, does this trigger privilege when normally such exchanges would not have been covered by privilege?

\*\*\*\*\*\*\*\*\*\*\*\*\*\*

It is our understanding that the doctrine of attorney-client privilege in the US belongs to the client and is a "*protection provided for certain communications between the client and the client's attorney to encourage full disclosure of information between the client and the attorney*"[[1]](#footnote-2).

Attorney-client privilege called the "*secret professionnel*" also exists under French law. It is defined as "*the obligation for attorneys not to disclose confidential information of which they became aware in the course or in connection with their duties, except when the law imposes or authorizes its disclosure*[[2]](#footnote-3)". Numerous French regulations establish this privilege, such as the French Criminal Code[[3]](#footnote-4), the French National Internal Regulations of the Legal Profession (*Règlement intérieur national de la profession d'Avocat* – hereafter "**RIN**"), or the Law of December 31, 1971 reforming certain legal and judicial professions.

According to Article 2.2 of the RIN, "*attorney-client privilege covers all matters, whether for advice or for defense, and whatever the medium, tangible or intangible (paper, fax, electronic means of communication..):*

* *Consultations sent by an attorney to his/her client or intended for his/her client;*
* *All correspondence exchanged between an attorney and his/her client;*
* *All correspondence exchanged between French attorneys, except those bearing the mention "official" (in which case, the relevant correspondence will not be considered confidential);*
* *Interview notes and more generally all documents in the case file;*
* *All information and confidences the client shared with the attorney;*
* *Clients' names and the attorney's agenda*

(…)"

As in the US, only attorneys are bound by the attorney-client privilege doctrine. Clients are only the beneficiaries. Therefore, they can decide to break attorney-client privilege, for example, by producing, as evidence, letters they exchanged with their attorneys. They cannot however release the attorney from the privilege.

Moreover, attorney-client privilege does not apply to any third party. **In France, third parties would include in-house Counsels**. Indeed, under French law, when an attorney decides to work as an in-house Counsel, he/she is considered as an employee of the company and his/her attorney status is suspended. As a consequence, his/her correspondence or documents in the case file, are no longer protected by attorney-client privilege. Caution should therefore be taken whenever an e-mail is sent out to someone outside our firm.

It should also be noted that correspondence between non-attorneys is not considered to be protected by attorney-client privilege **even when an attorney is in cc**[[4]](#footnote-5).

1. **Correspondence between the Client and the Law Firm**
	1. **Correspondence between all employees of the Client and the Law Firm**

According to Article 2.2 of the RIN, stated above, all correspondence between an attorney and his/her client is protected by attorney-client privilege. As such, **any exchange between a member of the Client's legal team or any employee of the Client (even if such employee is not a member of the legal team) and the Law Firm is automatically protected**.

As a precautionary measure, in an international context, we would recommend that all e-mails exchanged between the Law Firm and the Client be labeled as "***Strictly confidential***", "***Privileged and Confidential***" or "***Attorney-Client Privilege***".

* 1. **More specifically, correspondence between the Client's in-house Counsels and the Law Firm**

According to Article 3.1 of the RIN, "*all correspondence between attorneys, oral or written, whatever the medium (paper, fax, electronic means of communication…) is confidential. Correspondence between attorneys, whatever the medium, may, under no circumstances, be produced in Court, or be subject to a waiver of confidentiality*".

The Paris Bar Service of Professional Conduct has issued an opinion[[5]](#footnote-6) in which it states that correspondence between French attorneys and non-EU foreign attorneys is strictly confidential, as long as it is labeled as such.

It explains that "*the rule, provided by Article 21.5.3 of the Code of Conduct for European Lawyers according to which correspondence between attorneys becomes confidential if mentioned as such, also applies to correspondence exchanged with a* [non-EU] *foreign attorney*".

Here French Courts will look at (1) whether or not the person the French *Avocat* is exchanging with benefits from attorney-client privilege in his/her country and (2) whether or not both wanted their respective "privileged & confidential" rules to apply by mentioning it.

Therefore, all correspondence the law Firm may exchange with the Client and the Client's legal team is not only protected by attorney-client privilege on the basis that the Client is a client of the Law Firm, but is also protected by the confidentiality between attorneys as the Client's legal team benefits from privilege in the US.

**→ To summarize**, all the e-mails to be exchanged between the Law Firm and the Client should mention "**Privileged & Confidential – Strictly Confidential**". Note that if the Client includes a third party (i.e. someone outside the Client's group) that is not another outside Counsel in a communication, the privileged is waived.

* 1. **Correspondence between the Law Firm and legal teams of other companies of the Client's group**

It seems that there is no case law in this respect but the common view is that the correspondence between the law Firm and the legal teams of all companies of the Client's group should be covered by attorney-client privilege as is the case for the Law Firm's correspondence with the Client itself. This is notably supported by the fact that the Law Firm should have carried out a conflict check against all companies of the Client's group and that the Law Firm's communications with the other legal teams will be part of the Law Firm's mission as attorneys for the Client.

Correspondence between the Law Firm and employees (not just legal teams) of other companies of the Client's group should also be considered as privileged and confidential for the same reasons. This position however remains to be tested.

1. **Correspondence between the Client and others**
	1. **Correspondence between the Client's legal team and the Client's employees**

In our view, whether or not the correspondence between the Client's legal team and the Client's employees is considered as privileged will depend on what US rules state. Indeed, the French Bar will look at whether or not the Client's legal team is considered as attorneys or employees under US rules and will also look at whether or not they have expressly presented themselves as attorneys. *Question should therefore be asked to US outside Counsel as to the conditions under which this type of correspondence will be deemed confidential*.

This being said, please note that under French Law, if the legal team's e-mails aim at summarizing or conveying the legal opinion of their outside Counsel, French Courts will consider that these e-mails are confidential[[6]](#footnote-7). The same applies to notes taken by the legal team or employees during meetings or conference calls with the outside Counsel as long as they are identified as such.

On the other hand, just copying the Law Firm on all the Client's e-mails will not be considered as sufficient, under French Law, to provide legal privilege when it should not be there.

**→ To summarize**, please refer to US rules to determine what is privileged and what is not and whether "Privileged & Confidential" should be mentioned.

* 1. **Correspondence between the Client's legal team and legal teams of other companies of the Client's group**

As mentioned above, French Courts are ready to consider that correspondence between in-house Counsels be deemed privileged & confidential if the national laws of each in-house Counsel consider the latter's exchanges as confidential and if it is expressly mentioned "Strictly Confidential".

The confidentiality of the Client's exchanges with other legal teams of other companies of the Client's group will therefore depend on whether or not the in-house Counsel the Client's legal team exchange with works in a country where he/she benefits from legal privilege.

If it is a French company's in-house Counsel, the Client's exchanges will not be covered by privilege by French Courts. The position may differ from one European country to the other. Local advice should always be taken to assess the position.

For instance, according to our research, Belgian in-house Counsels benefit from privilege if they are members of a specific association. On the other hand, Luxembourg seems to be the same as France: in-house Counsels are not considered as attorneys and are not protected by privilege.

**→ To summarize**, to be on the safe side, the Client should assume that exchanges with the legal teams of other companies of the Client's group in Europe will not be covered by privilege under the relevant local Law, unless confirmed otherwise by local Counsel. As a matter of precaution, the Client can still mention "Privileged & Confidential – Strictly Confidential" at the beginning of each correspondence.

* 1. **Correspondence between the Client's legal team and other employees of the Client**

For the same reasons as mentioned in 2.2, it will all depend on the country where the in-house Counsel is located. If it is in France or Luxembourg, correspondence between local in-house Counsels and other employees of the Client will not be considered as privileged. Even copying the Law Firm on all e-mails will not be deemed sufficient.

**→ To summarize**, to be on the safe side, the Client should assume that these exchanges will not be covered by privilege, unless confirmed otherwise by local Counsel. As a matter of precaution, the Client can ask for "Privileged & Confidential – Strictly Confidential" to be added at the beginning of each correspondence.

* 1. **Correspondence between the Client's legal team and employees of other companies of the Client's group**

In our view, in light of all the principles set forth, this correspondence will not be deemed as protected by privilege. It will however be important here to analyze each national law. Again, as mentioned above, the mere fact of having an attorney copied on all the emails will not be deemed sufficient to consider that the correspondence are privileged.

**→ To summarize**, to be on the safe side, the Client should assume that such exchanges will not be covered by privilege. As a matter of precaution, the Client can still mention "Privileged & Confidential – Strictly Confidential" at the beginning of each correspondence.

For **Sections 2.2, 2.3 and 2.4**, the Law Firm could be used as an intermediary as far as France is concerned. For instance, if the EU local legal team of the Client forwards a chain of emails it had with its employees to the Law Firm, this forward will be protected by privilege in France as well as the Law Firm's forward to the Client. *It should be checked witho US Counsel if the fact that the Law Firm transfers to the Client an exchange of emails which would not have been privileged if transferred directly by the local team is considered as privileged and confidential in the US*. ***In other words, if the Law Firm acts as an intermediary inbox, does this grant privilege in the US?***

1. *2017. Published in Landlide, Vol. 10, No. 2, November/December 2017, by the American Bar Association* [↑](#footnote-ref-2)
2. G. Cornu, Dictionary of legal terms, Henri Capitant, 2016, PUF [↑](#footnote-ref-3)
3. See Article 226-13 of the French Criminal Code [↑](#footnote-ref-4)
4. Paris Court of Appeal, March 8, 2017, no. 15/17136 & no. 15/17136 (two Court decisions) [↑](#footnote-ref-5)
5. Opinion of the Paris Bar Service of Professional Conduct, July 10, 2012, no. 227010 [↑](#footnote-ref-6)
6. Paris Court of Appeal, November 8, 2017, no. 14/13384, Whirlpool France [↑](#footnote-ref-7)