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Professional Secrecy and Legal Privilege: Issues in Applying a Fundamental Principle

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En este artículo se analiza la importancia del secreto profesional a través de un análisis comparativo entre diferentes ordenamientos jurídicos.
Se destaca la evolución de la obligación de guardar el secreto y su relación con una sociedad cada vez más compleja y global, en la que confluyen distintos derechos y la irrupción del concepto de transparencia.
Se enfatiza que el secreto no está establecido como un privilegio del abogado sino del cliente para su adecuada defensa y correcto asesoramiento.

Introduction

Professional secrecy constitutes one of the most important pillars of our juridical system. Rule of Law and Justice are two of the cornerstones of a democratic society. Without defence, Rule of Law does not exist and without lawyer, there is no defence. Defence is not possible without the right of the client to express himself/herself freely and confide in his/her advocate. Besides, a lawyer is also a counsellor and therefore has to obtain all necessary information in order to fulfil his duty. The client expects that all data supplied is to be kept confidentially and intimately. For these reasons, professional secrecy has been considered the guarantee of fundamental rights of defence, intimacy and privacy of the citizens, and as a last resort, freedom. In addition, it protects the social interests of the legal profession. However, recently the erosion of the concept has been a cause of concern within the legal field.

The duty of professional secrecy between client-lawyer dates back to Roman Law and has evolved during centuries. In some periods the concept has been seriously affected by the aim of obtaining a false security by applying coactive methods.

Professional secrecy is part of the correct administration of justice, the need of a citizen to be able to trust another, the lawyer in this case, without the fear of being denounced, imprisoned or tortured. An authoritarian state has used the system of abolishing the professional secret to obtain full control of its subjects.

The first thing that would need to be stated is that professional secrecy is not and has never been established in favour of the lawyers, but exclusively for the society who is entitled to live and develop in an environment of freedom and justice.

We are living an era where transparency is considered as a virtue and prima facie professional secrecy may be regarded as a way to hide all sorts of harmful actions. Transparency is sometimes and often contrary to personal privacy. Besides, it is imposed by the states and the authorities, who want to know everything about our private lives in order to control our behaviours, despite of the right to privacy.

Professional secrecy is not conceived to hide illegal activities. If the advice of the lawyer is to assist the client to perform a criminal activity, knowing it to be illegal, the lawyer should be subject to criminal and disciplinary sanctions.

Legal privileges and professional secrecy are not identical in all jurisdictions. In civil law jurisdictions, to keep professional secrecy is an obligation imposed on lawyers by law, and at the same time it is their right to not reveal what they have learned through their activity. It applies normally to lawyers with independent practice. *In-house* lawyers are usually subject to a different treatment. In common law, legal privilege includes the contents of documents issued by a lawyer to the client and also applies to in-house lawyers, but it is normally imposed by contractual relationship with the client. At present, professional secrecy and privilege in the law profession is an evolving topic that concerns all legal professionals worldwide in a variety of fields. The theoretical debate surrounding professional secrecy has saturated legal forums with the purpose of developing a complete understanding of the topic by means of addressing a variety of questions including: (1) the unwillingness to go to court, for fear of disclosing the trade secrets that are defended; (2) the right of confidentiality that clashes with the need to access information for a proper defence; (3) arbitration helping lawyers to manage data access through establishing the degree of confidentiality of the information accessed; (4) harmonization as a beneficial factor for companies and individuals, and (5) unwillingness of companies to advise on privacy and secrecy policy. These are all subjects that differ greatly from culture to culture and that have changed over time.

The situation in Europe

Across Europe, communications between lawyers and their clients are confidential

and protected. This is vital to protecting the **rule of law** and **access to justice.**

In common law jurisdictions, professional secrecy is referred to as 'legal professional privilege', and protects communications between professional legal advisers.

In England and Wales, legal professional privilege applies to communications between lawyer and his/her client, but is imposed by the client when contracting the services of the lawyer. No privilege arises if a lawyer's assistance is sought to advice a crime or fraud; money laundering reporting and anti-terrorism are the most important exception in practice. The lawyer's duty of confidentiality is wider than privilege and refers to any information received by a lawyer in the course of their legal practice.

In civil law, professional secrecy is understood as a duty of the lawyer and not as a right of the client, who cannot liberate the lawyer from keeping the secrecy of what he/she may have learned during the relationship. The duty of confidentiality differs from professional secrecy as it protects communication between lawyers.

In both systems, a negligent failure of the duty can give rise to criminal penalties, civil damages or disciplinary sanctions. In addition, in certain countries professional secrecy does not cover the advice given by in-house counsel. France, Italy and Sweden categorically refuse to protect the confidentiality of advice provided by in-house legal counsel. In the United Kingdom, Denmark, Spain, Portugal, Ireland, Greece and Scotland in-house counsel has the same status and regulation as a lawyer employed by a law firm.

Nowadays, the fight against terrorism, cross-border organized crime and money laundering has tended to take priority over the protection of confidentiality, and the proliferation of new communication technologies is likely to keep the topic of lawyer-client confidentiality in the spotlight.

The situation in Spain

The professional secrecy is recognized in the Spanish Constitution, in which it is promulgated as the right of professional secrecy. The judgment of the Supreme Court of Justice *delivered on 17th February 1998* ruled that professional secrecy was the basis of the right to be defended, which means that the lawyer is not only a defender but he is also a consultant and an adviser.

The ultimate basis of the lawyer's professional confidentiality is therefore two-pronged. On one hand, it is based on the right of the client to privacy and on the other, to not give evidence against his/her client.

The duty to abide by secrecy is objectively absolute, that is, it embraces all facts or information, but it is not universal. In other words, not all lawyers, whatever function they are performing, are subject to such an obligation. The general consensus is that professional secrecy is not only in the interest of the client but also of society as a whole and a matter of public policy.

Violation of the obligation of keeping facts confidentially may cause damages to the client and in certain cases to a third party. Violation of the obligation of keeping confidentiality is punishable by criminal sanctions and disciplinary measures.

To conclude, it can be affirmed that no one in Spain, not even a judge nor the president of the Bar Association, no authority, no matter how high-ranking and important it might be, can intervene and relieve the lawyer from his obligation to keep secret the information that may have come to him as a consequence of his professional practice. Neither can the client, with the exception of what is foreseen in some areas such as Barcelona, for example. And, over time, when the legal professional secrecy rule was conceived, it was not done to cover conduct, but to guarantee that the truth can only be obtained by following the straight path while respecting the presumption of innocence.

The situation in North America

In the United States, lawyers do not reveal information relating to the representation of a client unless the client gives informed consent. The only exception to this general rule occurs when the lawyer reveals the information to prevent harm, crime or per court order. Attorney-client privilege can be invoked in respect of communication between privileged persons in confidence, and for the purpose of obtaining or providing legal assistance for the client.

The fundamental principle is that trust encourages full and frank discussion including embarrassing or legally demanding subjects, to enable lawyers to effectively represent clients. Generally, in-house counsel in the United States has attorney-client privilege for legal, but not business advice. Furthermore, it is possible to extend privilege to third parties sharing a common legal interest.

Attorney-client privilege is a matter of state procedural law from the federal standpoint, but determining which state's privilege applies is still the subject of a choice of law analysis; state courts will also undergo that analysis.

The attorney-client privilege can be waived if the information, subject to certain exceptions relating essentially to physical or economic harm, is disclosed to third parties. At this point, it is important to remark that attorney work doctrine may vary state to state.

The situation in Latin America: Argentina – Colombia - Peru

Professional secrecy in Latin America is not only considered a moral duty, but also a legal obligation. The protection of professional secrecy is justified in 1) the need to protect people from the harm that may be caused by the disclosure of private information, especially in the course of a trial, 2) the confidence, because it is necessary to be sure that information can be trusted, and 3) the Human Right to Privacy that everyone has.

Since the beginning of the current year in Argentina and other South American countries, the Financial Intelligence Unit (UIF) began to investigate attorneys of the defendant in cases related with corruption, drug trafficking and money laundering. In effect, UIF asked them to report collected, pending or agreed fees, as well as the date, form of payment and the name of the payer. The organism has the clear purpose of determining the origin of the funds. These requests are openly unconstitutional, since they damage the code of rights and basic guarantees. The same unconstitutionality can be applied to telephone tapings which occurred periodically in Latin America.

Finally, the current situation in South America is worth mentioning: in Argentina in the current year, telephone hearings have been spread between lawyers and clients. The indiscriminate dissemination of this eavesdropping represents serious violations of human rights. In Colombia, attempts are being made to adapt the rules of professional secrecy contained in the Constitution to international standards after its entry into the OECD. Finally in Peru, certain lawyers have been required to implement an asset laundering prevention system.

To conclude, in most of the Latin America countries, they have created standards and policies that jeopardize the basic guarantees of a state of law, as well as affect the free exercise of our profession.

The situation in North Africa

In several countries of North Africa, the French Criminal Code is directly applicable, but other countries have their own legislation regarding legal privilege. It is worth highlighting the huge differences across Africa, which makes it difficult to create a general view of the entire continent. However, many North African countries apply similar practices as in Europe.

As in other countries, legal privilege in North Africa is considered a duty for the lawyer but also considered a right for the client. In these countries, legal privilege covers the conversations and meetings held between the lawyer and his/her client, the information that comes from third parties regarding the issues under defence on behalf of the client, the correspondence held between the lawyer and the client, but also between lawyers themselves.

There are some exceptions to this principal rule: when the lawyer has to defend himself from their own client; criminal offence; security of the country or money laundry regulation. Negligent failure of this duty will imply deontological and criminal consequences; imprisonment and fines.

The situation in South Africa - Congo

Professional secrecy and corollary confidentiality of correspondence between lawyers remain the basis of the profession of the lawyer. From the point of view of comparative law, the regime that applies to professional secrecy and the confidentiality in Congo is closer to the Belgian and French systems on which it is based.

The obligation of confidentiality is general and absolute. A decision of *Barreau de Kinshasa* of 22 January 1970 and the decision of *Conseil National de l'ordre* n° CNO/8/87 of 19 August 1987 on the rules of procedure of the Bar Associations of the Democratic Republic of the Congo establish that: 1) correspondence between lawyers is strictly confidential; 2) its submission to the courts is only exceptionally allowed with the prior authorization of the President of Lawyers; 3) the term " non-confidential" is inoperative, 4) only the commitments, agreements or acquiescence noted in correspondence between lawyers are excluded from the confidentiality if they have acted as agents of the clients. The *Conseil National de l'Ordre des avocats de la République Démocratique du Congo* has introduced a one-year waiting period, which seems too short a time.

All in all, it is up to the profession to preserve this right to secrecy and confidentiality, the result of a long, distant and painful conquest.

The situation in Asia - Japan

In Japan, the concept attorney-client privilege is somewhat brand-new. In some circumstances, it may sometimes be adversely interpreted as the attorney's right to conceal unfavourable evidence. Some people unreasonably argue that any documents undesirable for the client and provided to an attorney would automatically come under the umbrella of privilege and that the truth would accordingly be hindered from revelation in administrative or judicial proceedings. Therefore, the existence of such privilege would not unreasonably hinder the revelation of truth at all.

Nowadays, some people who generally distrust the attorney as a defender of evil argue that attorneys may abuse the privilege by alleging or advising the client that certain documents outside the scope of privilege are to be protected against disclosure. Yet the Tokyo Bar Association firmly believes that such risks should be hedged by reinforcing disciplinary sanctions against violation of professional ethics or by establishing tough and effective in-camera procedures in the event of differences as to the scope of coverage under privilege.

The situation in Oceania – Australia

In Australia, professional secrecy and privilege is more frequently called "legal professional privilege," or "client legal privilege". Both refer to a common law right that protects the confidentiality of communications made between a lawyer and his/her client. However, this privilege can be lost either by deliberate waiver or by inadvertent oversight. Lawyers have a duty to assert the privilege even though the privilege is a protection afforded to the client.

In Australia, legal professional privilege is considered a fundamental protection and pillar of the legal system. However, to call it "fundamental" isn't to say it is uncontested - far from it. Recent doctrine has revealed underlying tensions around this issue. Lawyers show the complexities of legal professional privilege, at both an individual and institutional level. Also, the development of a new protocol, announced in July by the Law Council of Australia concerning legal professional privilege, highlights the sometimes-tense relationship between members of the legal profession and regulators.

Conclusion

All things considered, in performance of the obligation to ensure the protection of the fundamental human right of confidentiality of the attorney-client relationship, it is necessary to remind all individuals, governments and lawyers that client privilege is a fundamental human right and a lawyer's obligation to maintain since legal professional privilege belongs to and protects the client. This right is pivotal to protect access to a proper administration of justice, and along with the independence of the lawyer, client privilege is integral to the preservation of the rule of law and the right to a fair trial.

The importance of the attorney-client privilege and confidentiality to preserve the frankness and honesty in the conversations

between the client and his/her lawyer with the finality of preserving this right has been observed, as well as to guarantee a proper advice and defence. The lawyers are the only professionals that, through the practice of professional secrecy, sufficiently and necessarily guarantee the right of defence to the citizens and legal entities.

As previously exposed, some aspects greatly differ from culture to culture and have changed over time. The constant evolution of our society, increasingly more sophisticated and complex must also be considered. It has been the purpose of this article to develop a complete understanding of the concept.

In light of all the positions exposed and taking into account UIA and its collective member's statement, it is certain that all Bars and Law Societies and all lawyers' associations globally must promote awareness of the right of all citizens to legal professional privilege. Furthermore, all national governments, European and international institutions must respect this fundamental human right, as any attack upon the integrity of this confidential and trusted attorney-client relationship would undermine the rule of law.

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