« The Attorney-Client Privilege »

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French practice of attorney-client privilege

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Before we deal with the specific issue of attorney-client privilege we need to clarify **the notion of « attorney » in France.**

Before 1990 two legal professions coexisted in France: the « conseils juridiques » (similar to solicitors) who were legal advisers who did not have the right of advocacy and the « avocats » (similar to barristers) who were authorized to appear in court but also have direct relations with their clients unlike the Barristers in England.

The law of 31 December 1990 merged the two types of legal professions into one single function referred to as « avocats » who could continue to act as advisers as former « Conseils juridiques » as well as a court activity as former « avocats » had.

Since then, the scope of activities for avocats has been further widened, they may act as: intermediary, custodian, mediator, arbitrator, fiduciary (trustee), lobbyist, sportsperson agent.

At the national level the professional body governing the whole profession of « avocats » is the « Conseil national des Barreaux » (National Council of the Bars) . However individual Bars themselves can issue rules and regulate the activities of its members.

Many Bars have also incorporated the European code of conduct adopted by the Council of the European Bars (CCBE) in their own rules.

There are about 60000 avocats (attorneys) in France spread out in 182 bars and about the half of the French lawyers are in Paris.

What do we mean by « attorney-client privilege » ?

In France as generally in Europe, we consider that confidentiality is of the essence of the attorney's function. The attorney is the necessary confidant of the client. The attorney's obligation of confidentiality serves the interest of the administration of justice. The protection of the client's confidence in his or her attorney is at the heart of the Rule of law, and is an essential part of the notion of fair justice – as has been recalled many times by the Court of Justice of the European Union and the European Court of Human Rights ;

Any individual, in order to prepare his or her defence or to protect his or her rights, should be able, without fear, to share their thoughts and actions with their lawyer in absolute secrecy. The exchange between an attorney and the client should permit the attorney to assess the situation

towards the truth of the confidence of the client. No defence without trust and no trust without legal privilege.

The Court of Justice of European Union explained that legal privilege corresponds to the requirement according to which anyone should have the possibility to address his lawyer in total liberty. Accordingly the correspondence between the lawyer and the client is confidential as soon as it is exchanged in the framework of the defence of the client's rights and it comes from an independent lawyer – to emphasise that the lawyer and the client are not bound by an employment contract.

It should be pointed out that in this relation, the attorney takes the role the debtor of the obligation of confidentiality and the balance in this relation tilts to the benefit of the client.

Article 2.3 of the European code of conduct adopted by the Council of the European Bars (CCBE) provides that:

« the lawyer's obligation of confidentiality serves the interest of the administration of Justice as well as the interest of the client. It is therefore entitled to special protection by the State. »

In France the attorney-client privilege is governed by several texts :

Law of 31 December 1971 :

Article 66.5 : In any matter, whether in the field of the counsel or in the one of defence, opinions provided by a lawyer to its client or for it, the correspondence exchanged by the client and his lawyer, between the lawyer and his colleagues unless the bear the mention 'official' , the meeting notes and more generally, all the documents of the file are covered by legal privilege.

Decree 12 July 2005 :

Article 4 : Unless it is required for his or her own defence before any jurisdiction and or authorised by the law, the attorney cannot disclose in any matter any information that is covered by legal privilege.

National rules of the profession ***:***

Article 2:

Article 2.1 deals with the principles as follows :

The attorney is the necessary confidant of the client

The legal privilege of the attorney is mandatory . It is general, absolute and not limited in time.

Unless it is required for his or her own defence before any jurisdiction and or authorised by the law, the attorney cannot disclose in any matter any information that is covered by legal privilege.

Article 2.2 deals with the scope of the legal privilege.

Article 2.3 deals with the legal privilege and the law firm.

Criminal code

Under article 226-13, disclosure of any secret information by the attorney who is bound by legal privilege is punishable by one-year imprisonment and a 15000€ fine.

Code of criminal procedure

Article 100.5 - 3rd paragraph : « correspondence with a lawyer in connection with defense rights cannot be transcribed otherwise they would be void »

Article 100.7 - 2nd paragraph, for tapping a phone line of a law firm of an attorney or of his residence, the judge may inform previously the President of the Bar.

It is to be noted however, that in spite of the importance of the notion of attorney-client privilege, no provision of the Constitution deals with this issue and or guarantees any protection in this regard.

The persons bound by attorney-client privilege

This privilege evidently, applies to the attorney –but also their associates and the staff of the law firm. The attorney is responsible for any violations of the legal privilege by the associates or the staff

Law students enrolled at the bar school, who train at law firms, are also bound by the attorney-client privilege.

The structure of the law firm may have consequences on the issue of the attorney-client privilege. When several law firms share the same premises and have some staff in common, the legal privilege is extended to all lawyers with whom its shares the premises.

The new corporate structures of law firms such as inter-professional structures raise new questions with regard to the issue of attorney-client privilege.

The client and third parties are not bound by the attorney-client privilege and the client waive privilege and submit in court any correspondence sent by the attorney – whether to other attorneys or to his client.

However, attorney-client privilege does not prevent the lawyer from disclosing correspondence to third parties to the case at stake.

As the attorney-client privilege is not limited in time, it survives both whether the death of the attorney or the client.

The information covered by the attorney-client privilege

The information covered by the privilege should be understood very broadly. Article 2.2 provides that:

The attorney-client privilege covers, in any matter, in the function of advice or in that of defence and irrespective of the medium , hard copies and electronic versions (paper, fax or electronic communication…)

After setting out this broad spectrum comprising the description of the information to be protected, Article 2.2 continues with a list of the type of documents which could be covered by in this description:

- Opinions provided by the attorney to his or her client
- Correspondence exchanged between the client and his or her attorney, between the lawyer and his/her colleagues except for those marked « official ».
- Interview and meeting notes and more generally any documents of the file, any information or communication received by the attorney in the framework of his/her practice.
- The client's names and the lawyer's planner
- The financial settlements and any transfer of funds
- The information requested by the auditors or any third party.

Through a recent decision, a further addition was made to this list – invoices as they might include confidential information which should be protected. Moreover, the invoices covered by the attorney-client legal privilege cannot be examined by tax administration.

Accordingly, an attorney should be cautious in his/her correspondence and take special care in verifying the addressees in any email or letter so that no confidential information is accidentally disclosed to third parties. Otherwise the attorney could be found liable of violation of its obligation of confidentiality.

The exceptions to the attorney-client legal privilege

The notion of attorney-client privilege disappears when the attorney needs to use the information exchanged with the client for his/her own defence.

There are also some situations provided by the law where exceptions are made to confidentiality.

New fields of activity of the attorney such as lobbying or acting as an agent to a sportsperson require that information regarding the client be disclosed.

Further, legal privilege may be lifted in case of efforts made in the fight against money-laundering or terrorism.

French Avocats (attorneys) are subject to the provisions of the European Directives against money-laundering and must alert the authorities on suspicion of any such activity, and under the third Directive, are expressly prohibited from tipping off their clients about harbouring such suspicions. Certain Bars have challenged the validity of these provisions. Not all the European Bars took the same position.

Differences may exist as to the nature of the alert that has to be raised by the attorneys. In France the attorneys have to alert the president of their Bars who will decide whether an alert should

be raised to the governmental body in charge of the fight against money laundering (TRACFIN).

In a decision dated 6 December 2012 made in the case *Michaud v/ France*, the European Court of Human rights found that the waiving of confidentiality in that situation was permissible as the disclosure was made to the President of the Bar who had the opportunity to assess the extent of the disclosure required and the ability to contain it.

In order to ensure that attorney-client privilege does not, even unintentionally, contribute in any manner to terrorism, lawyers have agreed to an increase, and slightly greater normalisation of agreeing to search warrants which may affect the attorney-client privilege. The European Cour of Human Rights in its judgment *Niemietz v/ Allemagne* of 16 December 1992 and *Roemen & Schmit v/ Luxembourg* of 25 February 2003 found that the law firm can be considered as a residence and therefore, conducting an investigation or search may be seen as an intrusion within the meaning of article 8 of the Convention.

Since investigations and searches are considered to be violations of the legal privilege and a violation of private life, if the authorities need to investigate or inspect or search the offices of a law firm, the firm has the power to ask for authorities' reasons to do so and check whether they are relevant, whether the search is permitted by law, whether it aims at a legitimate goals and whether it is necessary.

The evolution of technology and the generalisation of the electronic methods of communication has led the profession to reflect about protection of data exchanged electronically. In France the Conseil National des Barreaux (CNB) set up in 2016 a platform containing a tailor-made private cloud which guarantees attorney client privilege.

The increasing requirement of transparency also constitutes a threat to the attorney-client privilege as it leads to an increase of telephone tapping.

Under Article 100.7 2nd paragraph, the judicial authority is required to inform the President of Bar before intercepting or tapping the phone line of a law firm or the residence of an attorney.

The French Supreme court does not permit the tapping or intercepting of an attorney's phone line to get information on his client. For tapping an attorney's phone line, there has to be reasonable suspicion or signs that the attorney is complicit and is participating in in the offence (Crim. 15 janv. 1997, n°96-83.753, Bull.crim. n°14 ; RCS 1997. 668, obs. J.P. Dintilhac ; Dr. Pénal 1997. Comm 55, obs. A. Maron) . The French Supreme court allows correspondence between the person tapped and his or her attorney to be transcribed when the authorities suspect that the attorney is a participant in the offence (Crim. 1er oct. 2003. Crim. 18 janv. 2006; Crim. 17 Sept. 2008). This also applies to the correspondence between the President of the Bar and an attorney.

Facing the abovementioned scenarios, the CCBE has issued recommendations on the protection of client confidentiality within the context of surveillance activities. These recommendations aim at informing legislators and policy makers about standards that must be upheld in order to ensure that the essential principles of professional secrecy and legal professional privilege are not undermined by practices undertaken by the state involving the interception of communications and access to lawyer's data for the purpose of surveillance and/or law enforcement.