

LEGAL PRIVILEGE FOR IN-HOUSE LAWYERS

BRIEFING PAPER :

LEGAL PRIVILEGE versus SECRET PROFESSIONNEL :

Is there a real difference ?

"In a democracy governed by the rule of law, every individual and company has a duty to obey the law, and a right to be advised by a lawyer about the extent of his or her freedom within the law, without creating evidence which can be used against him" (J.Temple Lang, Professional ethics and commission proceedings - some questions, talk for the CCBE, September 1993)

Or, as put by P.H. Burkard (Attorney-client privilege in the EEC: the perspective of multinational corporate counsel in *International Lawyer*, spring 1986) : "one of the basic underpinnings of most legal systems, including the EEC, is the ancient axiom that everyone is presumed to know the law, and it therefore follows that everyone can ascertain the law by consulting a lawyer. The communication must be privileged or else the inquiry will not be made in the first place, which means that the law will remain a sealed book. In that case, the presumption that everyone knows the law becomes an absurdity and the very foundation of the legal system is put into question."

This right to proper legal advice is reflected in the principle of legal privilege, as it is known in common law countries, and the principle of the "secret professionnel" of the civil law countries.

Both concepts, in current legal thinking, are mainly based on the principle of a client's right of defence, and therefore a proper functioning of the administration of justice. In the common law countries an added emphasis is placed on the fact that legal privilege contributes to the rule of law. Furthermore, an evolution can be seen in the civil law countries in the direction (though not fully) of the UK situation where the solicitor and barrister are officers of the Court. In German law the Rechtsanwalt has an obligation to cooperate in bringing the truth before the Courts. In Belgian and French law the (outside) lawyer is increasingly considered to be a public servant of the justice system (A.Kohl, *Les notes internes du juriste d'entreprise peuvent-elles bénéficier de la confidentialité accordée aux membres du barreau?* - cahier de droit européen, 1989, p 213)

The European Court in *A.M.&S.* recognised that the principle of protection of written communications between (outside) lawyer and client (provided they are pertaining to legal advice) is generally accepted, although its scope and the criteria for its application vary.

The difference between legal privilege and "secret professionnel" largely comes down to the difference in approach between the way the common law and civil law systems approach civil litigation.

In the common law system the concept of legal privilege was developed mainly by reference to the discovery process in civil cases.

All materials in the hand of both parties, whether beneficial or detrimental to their case, must be produced to the Court in order for such Court to have all relevant information.

In order to allow a party to seek proper legal advice, to negotiate settlements and to prepare for litigation, documents under these headings will not have to be disclosed.

A distinction is made between advice privilege and litigation privilege. In both cases the document will be protected from disclosure if its dominant purpose is to seek or give legal advice.

Documents carrying legal privilege are also protected from seizure in criminal prosecutions.

This rule is mitigated by the fact that a solicitor or barrister may not aid a client to commit a felony.

As civil law systems do not have this concept of discovery in civil cases there is no need for a theory of legal privilege in such cases. The principle of “secret professionnel” is, however, a general principle providing for an obligation of secrecy for persons who through their functions are the depositories of the secrets of others.

“Secret professionnel” is perceived as of essence of the profession of “avocat”, as it is necessary to allow a client to seek legal advice in full confidence that the information given to the lawyer will not be used against him. The principle is reflected in the criminal codes of the countries concerned and a breach by the lawyer is sanctioned under criminal law. However, latterly the absolute character has been mitigated. Thus a lawyer, if consulted by a client on how to execute a crime, should be in a position to disregard his obligation of confidentiality (f.ex. by talking to the bâtonnier) in order to try and avoid the crime in question (J. Stevens, *regels en gebruiken van de advocatuur in Antwerpen*, p 420).

While in criminal cases there is a right for the Authorities to seize documents, the outside lawyer can invoke the “secret professionnel” in order to refuse to hand over documents in his possession and in order to refuse to testify before the courts both in criminal and civil cases. (Holland : right to refuse to testify :art 218 code of Penal Procedure; art 191 Code of Civil Procedure; art 8:33 Administrative Code. Belgium : obligation of secret professionnel :no specific provision for lawyers; art 458 Criminal Code by extension. Germany : a) right to refuse to testify : Sec.53 par 1 nr 3 Code of Penal Procedure; Sec 383 par 1 nr 6 Code of Civil Procedure and equivalent provisions of other procedural codes; b) protection against seizure of documents in the actual custody of the attorney: Sec 97 Code of Penal Procedure. France obligation of secret professionnel : art 378 Penal Code, Denmark Administration of Justice Act §§ 168 and 170 (oral evidence) and § 299 (document production)).

Thus there is not only a right but an obligation for the lawyer to thus refuse.

The documents concerned are also protected by the “secret professionnel” when in the hands of the client (except in Germany).

In addition it should be noted that certain civil law systems (e.g. French, Belgian...) provide for the confidentiality of correspondence between (outside) lawyers in all cases except where they have been produced expressly as 'public' documents whereas in other civil law systems (e.g. Germany) and in the common law system this is not the case.

As in the common law system, in the civil law system "secret professionnel" cannot be invoked in order to help a client commit a felony.

Also in the civil law systems secret professionnel is limited to those cases where the lawyer is acting in his capacity as a lawyer i.e. giving legal advice or preparing a defence (J. Stevens, *ibidem*, 421). If he is acting for example in his capacity of board member of one of his clients he cannot invoke secret professionnel for that advise. Thus although not expressly stated as is the case in common law, secret professionnel will only attach to documents containing legal advice.

Conclusion

While the basis for the two principles is different, the overall effect of both is to protect documents containing legal advice and/or information concerning the preparation defence from communication to the authorities or the other party in a case.

ECLA submits therefor that any difference in these principles should not have as its effect to differentiate between In-House lawyers according to the legal system they are practising in. For all In-House lawyers the issue is the same.