

**Sir Shinzo Abe**

Prime Minister- Government of Japan  
Cabinet office of Examination of Anti-  
monopoly Act Investigation Procedures  
1-6-1 Nagata-cho, Chiyoda-ku,  
Tokyo 100 - 8968, JAPAN

July 3<sup>rd</sup>, 2014

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***Re: Confidentiality of communications between  
clients and lawyers***

Mr. Prime Minister,  
Sir,

We are most honored to enter into contact with you and your cabinet, for the following purpose. Our colleagues of the Japan Federation of Bar Associations informs us that the Japanese Prime Minister's Cabinet formed a group of experts to study various issues of the due process of investigations under the Anti-Monopoly Act, including the recognition of attorney-Client Privilege, and solicits public comments on that matter.

In that perspective, the Conseil National des Barreaux (French bars Council) which is a public interest institution which represents all the 60 000 practicing French lawyers registered in one of 161 local bars, would like to introduce you in this letter the scope of the professional secrecy and the legal protection of communications between clients and lawyers as it is in France.

### **Preliminary note**

The legal profession in France is governed primarily by Act 90-1259 of December 31, 1990, which amends Act 71-1130 of December 31, 1971, and by its Implementing Decree 91-1197 of November 27, 1991. Ethics and jurisprudence are also important to define the roles of lawyers. The Conseil National has made it possible for the various local regulations to be aligned and merged into a single text, the National Internal Regulations (RIN), which lays down the ethical rules for all lawyers practicing in France, along with Decree 2005-790 of July 12, 2005 concerning the ethical rules which apply to lawyers. It should be noted that the Code of Conduct for Lawyers in the European Community, which applies to cross-border activities within the EU, and was adopted in Strasbourg in 1988 by the Council of Bars and Law Societies of Europe, was incorporated into the RINs, and is, therefore mandatory for all French attorneys.

Lawyers admitted to practice in a French Bar are subjected to professional secrecy, which is a concept mainly encountered in civil law countries and has conceptual differences with the legal privilege. The professional secrecy is not so much a privilege for the client as an obligation for the professional to keep secret all the information received from his client. It is an obligation upon the lawyer who cannot therefore be released from his obligation, contrary to legal privilege which, in



common law country, is a right of the client to withhold details of confidential communications with a legal adviser.

## 1. The scope of the lawyers' professional secrecy and the confidentiality of communications in France

Under French law, "professional secrecy" is a principle of public policy included in the Criminal Code. According to this principle, certain professionals such as priests, lawyers or doctors may obtain confidential information from their congregation members, clients, or patients, which the law considers necessary for the exercise of their profession. In return, the law imposes on such professionals an unconditional and unqualified obligation not to disclose confidential information (Article 226-13 of the Criminal Code: *'The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of € 15,000'*.)

Lawyers' professional secrecy obligations are general, absolute and unlimited in time. In contrast with the situation in many other countries, in France there are no exception whatsoever to this principle. Lawyers cannot breach their obligation of "professional secrecy" to either clients, authorities of any kind, or, more generally, to any person whomsoever. The obligation therefore extends, not only to information communicated to a lawyer by his client, but also to information communicated by the opposing party, by his lawyer or by a third party, provided that the information constitutes a secret and has been communicated in confidence.

The duty of the lawyer carries with it corresponding rights, in particular, the right to refuse to give evidence on matters covered by the professional secret, and the right to withhold from seizure by the police and judicial authorities any document which contains information covered by the professional secret.

The basis can be found in various legal, regulatory and professional texts :

Article 66-5 of Law No. 71-1130 of 31 December 1971 on the reform of certain judiciary and legal professions: *"In all areas, whether with regard to advice or in the matter of defence, written opinions sent by a lawyer to his/ her client or intended for the latter, correspondence between a client and a lawyer, between a lawyer and other lawyers with the exception, for the latter, of correspondence marked "official", meeting notes and generally all documents held in a file are covered by professional secrecy"*.

Article 2 RIN : « (...) The professional secrecy covers in all areas, in the domain of advice or defense, and irrespective of the format, material or intangible (paper, fax, electronic media etc.) (...) »

Article 3 RIN : « All exchanges between lawyers, whether verbal or in any kind of written form (paper, fax, electronic media, etc.), are by their nature official by nature. Correspondence between lawyers, in whatever form, may not under any circumstances be produced in evidence, nor may it be the subject of an order to withdraw confidentiality (...) »

Article 109, section 1 of the Criminal Procedure Code states that : *"A lawyer duly cited as a witness must therefore appear, take the oath and answer all questions which can be answered without violating the professional secret."*

Decree No.2005-790 of July 12, 2005 :

- Article 4 : *«Subject to the strict requirements of their own defense before any court and the cases of declaration or disclosure prescribed or authorized by law, lawyers may not make, in any matter, any disclosure in violation of lawyer-client privilege. »*



- Article 5 : « *Lawyers must respect the confidentiality of the inquiry and investigation in criminal matters, by refraining from communicating, except for the exercise of the rights of defense, information extracted from the file, or from publishing documents, papers or letters relating to an inquiry or investigation in process(...)* »

European Code of Conduct (General principles) : « *the confidentiality between lawyer and client is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client (...).* »

## 2. Limitations

- Article 3.2 RIN : « *The following may be marked "official" and are not covered by professional secrecy, within the meaning of article 66.5 of the Act of December 31, 1971:*
  - *correspondence amounting to a procedural formality;*
  - *correspondence that makes no reference to any confidential written document, remark or background materials (...)* »
- In France, the lawyer may not be relieved of his obligation of secrecy by his client, or by anyone else, and in particular no authorities have such power. Professional secrecy can only be suspended to permit the lawyer to defend himself against accusations or other claims. The criminal division of the Cour de cassation has held that " *the professional secrecy obligation incumbent on a lawyer cannot prevent such lawyer, when defending him/ herself against an accusation resulting from the disclosure by a client of correspondence exchanged between them*" (Cass. Crim, order of 29 May 1989, Bull. crim. No 218). The articles 2.1 RIN and 4 of the Decree of July 12, 2005 allow the disclosure only on what is strictly necessary.
- The seizure of the correspondences exchanged between a lawyer and his client can in exceptional circumstances be ordered or maintained only if the seized documents provide evidence of a lawyer's involvement in an offence (Criminal chamber of the Appeal Court December 3, 1992).
- Article 226-14 1° of the Criminal code allows to disclosure professional secrecy to judicial, medical or administrative authorities concerning matter of physical or sexual abuse inflicted on minors or people are not able to protect themselves.

**The Conseil National des Barreaux wishes to draw the Japanese Government attention on the necessity to protect the confidentiality of communications between lawyers and clients. The state have the duty to protect every person who requires the advice and assistance of a lawyer in order to vindicate his rights and liberty, and to ensure the fair and proper administration of justice (rights to a fair trial, to privacy and not to incriminate oneself). This cannot be achieved unless the relationship between the lawyer and his client is a relationship of confidence. The lack of protection can discourage clients to seek legal advice that is necessary to enhance compliance with the law.**

Should you need any additional information, please contact the Legal Department of the CNB: [international@cnb.avocat.fr](mailto:international@cnb.avocat.fr) (+33 (0)1 53 30 85 41)

Sincerely yours,

**Bâtonnier Bertrand Debosque**  
President of the European and International Affairs Committee