Conseil National des Barreaux

LE PRÉSIDENT

**Kazuhiro NAKAMOTO**
President
Japan Federation of Bar Associations
Japan

Paris, May 12, 2017

*Object: Comments on reviewing the surcharge system*

Dear President,

I am most pleased to write you upon your request for our comments on reviewing the surcharge system. This exchange we are having is an excellent example of cooperation which can exist between our two institutions and more generally in the international legal community.

Just like my predecessor, Bertrand Debosque did, you will find below our comments and examples of the legal system in France regarding more specifically the confidentiality existing between a lawyer and his client.

*1.Question from the Japan Federation of Bar Associations (JFBA):* Does your jurisdiction respect ACP (Attorney/Client privilege) and, if so, what are the purposes behind ACP? Do you foresee disadvantages to clients if ACP is not recognized?

*Answer from the French national bar council (CNB):*

Under French law, "professional secrecy" is a principle of public policy provided for 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/mission. 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".*).



Conseil National des Barreaux - *Etablissement d'utilité publique - Art. 21-1 de la loi n° 71-1130 du 31 décembre 1971 modifiée*
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Lawyers' professional secrecy obligations are general, absolute and unlimited in time. In contrast with the situation in many other countries, in France there is no exception whatsoever to this principle. Lawyers cannot breach their obligation of "professional secrecy" due 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 a lawyer brings it corresponding rights, in particular, the right to refuse to give evidence on matters covered by the professional secrecy, and the right to retain from seizure by the police and judicial authorities any document containing information covered by the professional secrecy.

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

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 later, of correspondence marked "official", meeting notes and generally all documents held in a file are covered by professional secrecy".*

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 (…) »*

CCBE. 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 (…).*

- The correspondences between lawyers are confidential by nature and cannot be produced in evidence (Article 3.1 RIN). However, some correspondences amounting to a procedural formality or that makes no reference to any confidential written document, remark or background materials may be marked "official" and are not covered by professional secrecy (Article 3.2 RIN). Only these official correspondences can be produced in evidence.
- In France, the lawyer cannot be relieved from 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



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- of the Cour de cassation 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 ("Règlement Intérieur National"; i.e. professional provisions) and 4 of the Decree of July 12, 2005 allow the disclosure of what is strictly necessary, exclusively.
- The seizure of 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 disclose professional secrecy to judicial, medical or administrative authorities concerning matter of physical or sexual abuse inflicted on minors or people being not able to protect themselves.

*2.Question from the JFBA:* Would the purpose of ACP be achieved if communications are not guaranteed or recognized as a right of defense and are only to be "taken care of", which means it may be subject to the discretion of the authority? Would it be meaningful protection if, as proposed, the communications are protected in relation only to the consultation in the new leniency program and to the extent that JFTC's fact-finding ability is not impeded?

*Answer from CNB:*

The confidentiality of correspondence and communication is essential in order to comply with the ethics rules of the legal profession.

The basis can be found in the National professional provisions (RIN) of our profession.

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 3.1 RIN: *« All exchanges between lawyers, whether verbal or in any kind of written form (paper, fax, electronic media, etc.), are by their nature confidential. 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 (…) »*

*3.Question from JFBA:* Does your jurisdiction permit the attendance of attorneys, recording and/or videotaping, or taking notes during the deposition (i.e., the investigatory interview) procedure and, if so, what is the rationale and how it is carried out in practice? The study group found that the defense right is sufficiently protected if a client is allowed to use break times to take notes and consult with his or her attorney. What is your comment on such finding?

*Answer from CNB:*

According to the criminal procedure Code,



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Article 63-4: "*At the start of the custody period, the person may request to talk to an advocate. Where he is not in a position to choose one, or if the advocate chosen cannot be reached, he may request an advocate to be appointed to him officially by the president of the bar. (…)*

*The advocate chosen may communicate with the person under police custody under conditions which ensure the confidentiality of the conversation. He is informed of the type and believed date of the offence investigated by the judicial police officer or by a judicial police agent under the officer's supervision.*

*Following the conversation, which may not extend beyond thirty minutes, the advocate, if there is occasion to do so, presents written observations which are attached to the proceedings. (…)*

However, in case of searches, the presence of a lawyer is not compulsory. This basis can be found on a Judgement of the French Supreme Court in 2003 (Crim. 3avr. 2013, F-P+b, n°12-88.428. *"Article 6, §3 of the European convention for the Protection of Human Rights and Fundamental Freedoms does not require that a person who has been formally notified that he or she is suspected of having committed an offense is assisted by a lawyer when he is present in acts (in the present case, a search) in which he is neither deprived of his liberty, nor heard on the facts alleged against him."*

On the other hand if, on the occasion of that search, the person is heard on the facts alleged against him/her, then, the presence of a lawyer is requested.

French Supreme Court, Criminal chamber, March 10, 2015, 14-86.650, Inédit

*"Given that, in order to rule out the plea of nullity according to which Mr. Nacer X… was prevented from obtaining the assistance of a lawyer by virtue of the immediate execution of a search carried out at this residence, during which he would have been heard by the police, the judgment states that the lawyer's assistance is legally provided only for hearings and confrontations and not for searches.*

*However, given that in so deciding, without further explanation, as it had been asked to do, on the content of the remarks contained in the search report which might constitute a hearing under Article 63-4-2 of the Code of criminal procedure, requiring the presence of a lawyer, the investigating chamber did not justify.*

**The French national bar council wishes to highlight the necessity of protecting the confidentiality of communications between lawyers and clients. The State has 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.**



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I hope that these comments will help you to improve the confidentiality between a lawyer and his/her client, as it is one of the most essential principle of our profession and a prerequisite for democracy.

Should you need any additional information, please contact the international department of the French national bar council: international@cnb.avocat.fr

Sincerely yours,

Bâtonnier Philippe-Henri Dutheil
President of the European and
International Affairs Committee



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