

GIR PRIVILEGE KNOW-HOW 2020

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# France

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I N S I G H T

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## Scope of the privilege

### 1 Are communications between an attorney and client protected? Under what circumstances?

Any communication between an attorney (member of a recognised French Bar) and a client is protected by what in France is known as le secret professionnel (professional secrecy). The protection applies as soon a professional relationship between the attorney and the client has been established, even if the relationship has not been formally documented. This protection is considered “general and absolute” and is zealously enforced.

Professional secrecy also applies to any communications between or among attorneys, even an adversary, unless it is clear that such a communication is specifically designated as “official” and is permitted to be shared with others.

### 2 Does the privilege only protect legal advice? Does it also protect non-legal communications between an attorney and client, such as business advice?

The protection applies to advice and any communication between attorney and client, and any information that the attorney has obtained, from whatever source, in the course of his or her professional work for the client.

### 3 Is a distinction made between legal advice related to litigation and other legal advice?

The protection applies to communications in the context of both litigation and other advice. Communications between a defence counsel and a client in a criminal matter may have a particularly high degree of protection against compelled disclosure.

### 4 What kinds of documents are protected by the privilege? Does it cover documents that were prepared in anticipation of an attorney–client communication? Does it cover documents prepared during an attorney-led internal investigation?

The protection is not focused on “kinds of documents”, but rather applies to all communications of any sort and any information that the attorney maintains that were obtained in the context of a professional relationship. Thus, all kinds of documents in the possession of, or transmitted by, an attorney are covered. This includes preparatory and internal documents, as well as ones communicated to a client.

When an attorney engages in an internal investigation for a corporate client, he is held by professional secrecy in his relations with the legal entity – but not with the client’s employees. The fruits of his investigation are covered by professional secrecy. But the client, who is not held by professional secrecy, may use the information gathered by the attorney. In May 2020, the Paris Bar issued updated guidelines on that topic; and in July 2020, France’s National Bar Council released an 80-page white paper providing best practices to attorneys carrying out internal investigations in France.

### 5 To what extent must the communication be confidential? Who can be privy to the communication without breaking privilege?

The client is at liberty to give third parties access to information protected by professional secrecy; but cannot authorise an attorney to divulge protected material to third parties. Once an attorney–client relationship has been established, the protection cannot be “broken” by the attorney; however, the protection can under certain circumstances be lifted or inapplicable, eg, the unauthorised recording of an attorney–client conversation by a third party has been admitted as evidence in criminal court.

In addition to lawyers themselves, their employees performing functions for their legal practice – such as secretaries and legal assistants – are subject to the same confidentiality obligations and rights as the lawyers for whom they work.

If a lawyer hires a specialist to help in a legal representation – such as a forensic accountant or an investigator – their communications may be confidential (as per a confidentiality agreement) but will not be protected by the professional secrecy. Because such persons may be more vulnerable to dawn raids or other state actions to obtain information from them than are attorneys (which is discussed in answers to questions 7 and 22), in sensitive cases it may be advisable for the non-lawyer professionals to work, and to maintain their documents and notes, in the lawyer’s office.

### 6 Is the underlying information privileged if it can be obtained from a non-privileged source?

Yes, but only in the sense that an attorney cannot disclose to any third party any information he or she has obtained in the course of a professional relationship. A client cannot resist disclosure of publicly available information on the ground that it was shared with, or obtained from, an attorney.

## 7 Are there any notable exceptions or caveats to the privilege?

An attorney cannot advise a client how to commit a crime; any effort to do so risks being considered complicity in the crime or an attempt. Communications between attorney and client that are themselves evidence of a crime are not protected. Hence, a phone conversation between attorney and client will not be protected if the contents give rise to a presumption that the attorney was involved in an offence. Under certain circumstances, search and seizure of a lawyer's office may also be authorised. As set forth further below, a representative of the Bar must be present.

## 8 Are there laws unrelated to privilege that may protect certain communications between attorney and client?

These are:

- information related to intellectual property and copyright infringement;
- medical secrecy;
- banking secrecy; and
- general laws relating to personal privacy and access to databases.

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## Protected parties

### 9 To what extent does the privilege extend to in-house counsel?

In-house counsel are not considered members of a "bar" (in large part because they are deemed incapable of being "independent" of their employer), and professional secrecy does not protect their communications with officers or employees of their employer or information obtained from them.

However, in a notable decision dated 8 November 2017, a judge from a Paris court held that the professional secrecy extends to internal documents drafted by employees summarising a defence strategy drawn up by the company's lawyer. It remains to be seen whether this decision will be confirmed by higher courts.

In any event, an in-house counsel is often the client representative with whom an attorney communicates and from whom the lawyer takes directions. Thus, their communications will be considered confidential as set forth in the next question, but it is solely because of the attorney's status as such.

This issue is the subject of current debate and discussion. A well-publicised parliamentary report of June 2019 recommends protecting all internal communications of in-house counsel amounting to legal advice, "including legal consultations concerning the preparation or conduct of the company's defence in legal proceedings". It still remains to be seen what the French government will now make of that recommendation.

### 10 Does the privilege protect communications between an attorney and a corporate client's employees? Under what circumstances? And who possesses the privilege - the corporate client, the employee or both?

Communications of an in-house counsel with employees of a corporation are not covered by professional secrecy (see, however, the recent Paris court decision mentioned in question 9).

Communications by a member of a Bar to a corporate client are protected. Since corporations only act through individuals, communications between an attorney and a corporate employee are protected if the employee is acting for the corporation in his or her communications with the attorney.

The corporate client "possesses" the privilege, in the sense that the client is the only one allowed to disclose communication protected by the professional secrecy.

Special circumstances arise when an attorney engages in an "internal investigation" for a corporate client. Updated guidelines of the Paris Bar issued in May 2020 and the white paper of France's National Bar Council released in July 2020 clarify that members of the Bar can perform internal investigations, even for regular clients; and that the fruits of such an investigation are covered by professional secrecy; and provide best practices to attorneys carrying out internal investigations in France

### **11 Does the privilege protect communications between non-lawyer employees of a corporate client if they are acting at the direction of counsel or gathering information to provide to counsel?**

No. Communications between employees of a corporate client are not covered by professional secrecy, even if they are acting at the direction of counsel or gathering information to provide to counsel (see, however, the recent Paris court decision mentioned in question 9). If an attorney in the course of a professional engagement obtains information from a non-lawyer outside of his or her professional organisation, the lawyer's copy or knowledge of that information is covered by professional secrecy, but a non-lawyer outside of the organisation may have difficulties being able to assert that protection, or at a minimum may be the object of a search and seizure.

### **12 Must the attorney be qualified to practise in your country to invoke the privilege?**

A communication obtained in France by a person who is neither a member of a French Bar nor an attorney admitted to practise elsewhere in the European Union would not be covered by professional secrecy. A court in France would probably respect an assertion of protection by an attorney from another country who obtained information from his or her client in that country under circumstances where the information would be considered protected under the laws applicable to that relationship.

### **13 Does the privilege extend to non-lawyer third parties? In which circumstances does the privilege protect communications with third parties if they are providing advice related to a legal matter? What measures in such circumstances should an attorney take to protect those communications?**

Information covered by professional secrecy cannot be shared with any third party, even with the client's permission. Accordingly, the information requested by the client's auditors can only be transmitted by the attorney to his or her client. Communications between attorneys and non-lawyer third parties are otherwise not covered by professional secrecy, even if the latter are providing advice related to a legal matter.

### **14 Does the privilege apply to communications with potential clients?**

A communication between a member of a Bar and a potential client in anticipation of a professional relationship is covered by professional secrecy even if a formal engagement is not reached.

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## **Ownership of the privilege**

### **15 Does the attorney or the client hold the privilege? Who has rights under the privilege?**

It is conceptually inaccurate to say that either the attorney or the client "holds" or "owns" the "privilege" (see next paragraph on waiver). Professional secrecy is an obligation on the attorney imposed by law, designed to protect the client and more broadly to defend the principles, and particularly the independence, of the legal profession.

### **16 Can the privilege be waived? Who may waive it?**

An attorney cannot waive the application of professional secrecy. A client cannot "waive" it in the sense of authorising an attorney to divulge material covered by professional secrecy to a third party (absent, under extreme circumstances, the explicit permission of the local Bar). On the other hand, once an attorney provides advice or any work product to a client, the client can choose to share that information with third parties (and does not need the consent of the attorney to do so).

### **17 Is waiver all or nothing? Is it possible to waive the privilege for certain communications but not others?**

See the previous response. If a client discloses material or information that, for an attorney, would be covered by professional secrecy, the client's ability to share some but not all such information would depend on the circumstances of the disclosure and the rules applicable to it.

## **18 If two defendants are mounting a joint defence, can they share privileged information without waiver? What about two parties with a common interest?**

If properly observed, professional secrecy applies to attorneys working together in a joint defence or for clients with a common interest.

## **19 Is it common for attorneys and clients to agree to a confidentiality provision in a contract?**

There is no need to address professional secrecy if it clearly applies because of the status of the attorney and his client. Attorneys often include in professional engagement letters mutual understandings concerning confidentiality. Mutual understandings are particularly important when attorneys are members of the Bars of multiple countries to assure clarity on which laws apply.

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## **Enforcement considerations**

### **20 Describe the legal basis of the rules governing the privilege. Are these rules found in a constitution or statute, or in case law?**

The various Bars in France have clearly expressed rules of professional conduct (déontologie), and provide mechanisms for their enforcement. These rules are also set forth in national bar groups and are reflected to some degree in the European Convention on Human Rights. Legislation recognises the legal force of these rules (article 66-5 of Law No. 71-1130 dated 31 December 1971), and under certain circumstances criminalises their violation (under article 226-13 of the French Criminal Code, violation of the professional secrecy is a criminal offence punishable by up to one year's imprisonment and a €15,000 fine).

### **21 Is the privilege primarily characterised as a procedural or evidentiary rule, or is it characterised as a substantive right?**

Professional secrecy is a statutory obligation imposed on an attorney to protect the client, which can give rise to a criminal penalty in the case of breach.

### **22 Describe any differences in how the privilege is applied in the criminal, civil, regulatory or investigatory context.**

See question 7. There are special rules relating to criminal investigations where information held by a member of the Bar is sought: The police or investigating magistrate must inform the local Bâtonnier (head of the local Bar) of any such effort, and the Bâtonnier or a delegate must be present at a search of a lawyer's premises or at an interview to limit the search and to assure that protected information is not obtained.

Fuelled by decisions from the Criminal Division of the Cassation Court, French criminal enforcement authorities tend to restrict the professional secrecy protection to attorney-client communications made for the sole purpose of the client's defence. That interpretation is controversial as it comes in conflict with article 66-5 of Law No. 71-1130 dated 31 December 1971 providing that the professional secrecy protects all attorney-client communications, whether made in the context of a legal advice or for the purpose of the client's defence.

### **23 Are the rules regarding the privilege uniform nationwide or are there regional variations within your country?**

While local Bars supervise the exercise of professional secrecy within their geographic region, the rules are essentially the same nationwide.

### **24 Does a professional organisation enforce the maintenance of the privilege among attorneys? What discipline do attorneys face if they violate privilege rules?**

The local Bar supervises the observance by its members of professional secrecy; this is taken very seriously by the Bars, which set up a special committee or group for this purpose. An attorney violating professional secrecy can face sanctions from the Bar, including a public announcement and possible disbarment.

## 25 What sanctions do courts impose for violating the attorney–client privilege?

In extreme circumstances, an attorney who has violated professional secrecy can be prosecuted criminally, facing up to one year in prison and a fine of €15,000. A client who has been harmed by a violation by an attorney may seek compensation.

## 26 How can parties invoke the privilege during investigations or court proceedings? Can the privilege be invoked on the witness stand?

A client can at any time refuse to provide information that was obtained from an attorney in the course of that attorney's professional relationship. An attorney must refuse to provide protected information; including testify about facts received in the context of an attorney–client relationship.

In June 2019, the French Financial National Prosecutor (PNF) and the French Anticorruption Agency (AFA) published guidelines on the use of the French-style deferred prosecution agreement (CJIP) in cases of domestic and transnational corruption or influence peddling. The guidelines state that if a company wishes to assert the professional secrecy as a basis to refuse to share material with the PNF, the latter will assess whether this refusal seems justified; and in the event that it considers the assertion unjustified, the PNF will consider the extent to which any continued refusal should negatively affect the company's cooperation credit. However, acknowledging the thorny problem of differing rules for professional privileges, the guidelines state that prosecutors will take into consideration the impact that a waiver of any foreign privilege as a result of sharing the material with the PNF may have on the company's position.

## 27 In disputes relating to privilege, who typically bears the burden of proof?

In the absence of formal evidentiary rules relating to burden of proof, as a practical matter a client asserting a right not to disclose information or advice obtained from attorney must demonstrate that right.

## 28 Does the privilege protect against compulsory disclosures such as search warrants or discovery requests? Is there a distinction between documents held by the client and documents held by the attorney?

There are few formal rules concerning, or frequent practice of, “discovery” in the US sense of the term. A party to a civil litigation would not be expected, or ordered by a court, to disclose information or advice received from an attorney, nor could such information be obtained directly from an attorney. As noted in questions 7 and 22, a search warrant may be obtained with respect to the premises of a client or the professional offices of an attorney. In both cases, to the extent that authorities obtain information covered by professional secrecy, the return of such information can be demanded, other than if access to professional advice has been specifically authorised as noted above. As also noted, a representative of the Bar should be present at any search of a lawyer's office.

## 29 Describe the choice-of-law rules applied by your courts to determine which country's privilege laws apply. To what extent does your country recognise the validity of choice-of-law provisions in contracts, particularly as they apply to privilege?

In their relationships with other attorneys in the European Union, French attorneys often consult but are not bound by the Code of Ethics of Lawyers of the European Union, which applies to every EU lawyer. When a French attorney communicates with any foreign attorney outside the EU, there is no rule. As a consequence, it is recommended for the parties to contractually agree upon a confidentiality provision. With respect to information exchanged between an attorney and a client entirely outside of France, French courts (and, generally, arbitrators acting under French law) will respect the rules applied by the place where the relationship took place.

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## Termination of the privilege

### 30 Does the privilege terminate on the death of either the attorney or the client?

The protection does not terminate on the death of either the attorney or the client. The heirs cannot terminate it, and the attorney cannot disclose any privileged communication.

**31 Does the privilege terminate on the conclusion of the attorney–client relationship?**

No.

**32 Is the privilege destroyed if the client communicates information to the attorney to further a crime or perpetuate a fraud?**

Neither an attorney nor a client can protect from disclosure communications between them designed to further a crime or perpetuate a fraud. Under certain circumstances where the risk of an imminent infraction is serious, an attorney may be excused from professional secrecy to report it. In addition, attorneys have an obligation to report suspicious transactions to the Bâtonnier, notably in relation, among others, to offences of money laundering, terrorist financing or tax fraud. The Bâtonnier will in turn assess whether or not such a suspicious transaction report can be conveyed to the Financial Intelligence Unit (Tracfin) without violating professional secrecy.

**33 Is the privilege terminated if the attorney makes an inadvertent disclosure? If such a disclosure is made, can the attorney retrieve the privileged information or otherwise correct the error?**

No disclosure by an attorney – whether inadvertent or intentional – will terminate the protection afforded by professional secrecy.

**34 Is the privilege terminated if a third party is included in the communication or is subsequently forwarded the communication?**

Yes, French courts hold that the protection is terminated if a third party is included in the communication or is subsequently forwarded the communication. They also hold that an email from a client to a third party where the attorney would only be copied is not protected.



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