

Chapter 2

International Attorney-Client Privilege

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§ 2:1 Introduction

One of the most significant principles of the legal profession relates to the confidentiality that is afforded to the communications between a legal professional and his or her client. The approach to this concept varies from country to country depending on the particular legal system adopted. However, the differences of approach or method have little impact on the result: Almost everywhere in the world, rights, duties, and privileges of attorneys are recognized uniquely among professions. It is part of a wider concept of guarantees to citizens of such fundamental rights as the right to a fair trial, the inviolability of the home, and the right to individual privacy.

The overview contemplated in this chapter of this traditional principle does not attempt to deal with every aspect of this vast and complex subject, but to highlight the main concept in different jurisdictions worldwide.¹ In some of the jurisdictions researched, the law also protects from disclosure information communicated to other persons, such as doctors. But in the vast majority of countries, lawyers are the only category of private professional persons upon whom such rights, duties, and privileges are conferred.

In the countries that adopt the Roman-Germanic Law—the “civil law” system—the concept and the rules relating to it are similar. In the countries that adopt the common law system, the concept of secrecy is very different from that of the civil law system. However, in both systems, the ethical standards converge into the concept that the attorney’s secrecy duty is a necessary corollary to the trust that characterizes the relationship between attorney and client.

Thus, the subject of this chapter is an exception to the principle that the law is entitled to every man’s evidence. In the civil law system, it is characterized as a duty, an obligation of the attorney to keep confidential the secrets confided in him or her by a client. In the common law system, it is rather an exceptional privilege that the relationship between attorney and client is afforded.

Given the distinction in the concept and approach of both systems to the attorney-client privilege and the duty of professional secrecy, for ease of reference this chapter may at times refer to the attorney-client privilege jointly with the professional duty simply as the Principle.

§ 2:1.1 Civil Law System

In the civil law system, the duty of confidentiality is a public matter that must be respected not only by attorneys but also by the state and the courts in order to preserve trust in the legal system, the legal profession, and justice itself. Thus, the duty of confidentiality transcends the private interests of clients and attorneys and is an essential element in the protection of individual liberty in a free society.

As a corollary, the client cannot waive the duty of confidentiality to which the attorney is subject. As mentioned, the principle of confidentiality duty is not a private matter but a public one, and thus,

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1. For more information, the following are recommended: In-House Counsel and the Attorney-Client Privilege—A Lex Mundi Multi-Jurisdictional Survey (2005); Regulated Legal Professionals and Professional Privilege within the European Union, the European Economic Area and Switzerland, and certain other European Jurisdictions: A Report by John Fish, Former President of the Conseil des Barreaux de L’Union Européenne—Council of the Bars and Law Societies of the European Union (2004).

cannot be waived by the client or the attorney. The duty can be disregarded only in strict circumstances, which vary from country to country. Typical examples would be the need to disclose the secret because of a threat to the right of life and honor or self-defense.

The duty of secrecy does not have the purpose of serving the individual interests of the client but the public interest. In many jurisdictions, professional secrecy is protected by criminal laws. It is a crime to reveal information that the client confided to the attorney. The attorney's obligation is absolute and may not be released by the client, the court, or any other authority.

There is also an additional logic behind the concept of secrecy (shared by the common law): an incentive towards compliance with the law, since the insulation of communications between client and attorney assures citizens that their communications cannot be used against them. Individuals are encouraged to be more candid with their attorneys, who will be more informed and better able to give accurate and clear advice to the client—leading ultimately to greater compliance with the law.

The duty sometimes is transformed into a right of the attorney, such as the right to refuse to give testimony and evidence on matters related to the secret communicated by the client and the right to withhold from seizure by the police and judicial authorities any document which contains information covered by the professional secret.

§ 2:1.2 Common Law System

As mentioned, the privilege has been developed so that the ordinary citizen would be more willing to communicate information to the attorney that he or she otherwise would suppress. It is a benefit to allow people to quiet their fears of negative repercussions from their open communications with their attorney.

It is in the society's interest to preserve the privilege, which is protected to encourage citizens to seek an attorney's advice on legal matters, by promoting full, frank, honest, and unconditional communications between clients and their attorneys. As a consequence, the citizen who is properly advised by a professional is expected to voluntarily comply with laws and regulations.

Generically, the attorney-client privilege affords a direct protection to confidential communications from the client to the attorney when the client seeks legal advice or assistance. The privilege is a *personal* right of the client who, as a result, has control over the privilege protection. The client owns the privilege and only he or she may waive it, that is, consent to the disclosure of information the attorney has received from the client.

In the common law system, the attorney-client privilege is a *privilege* and not a legal right. Thus, the application of this privilege is not absolute and occurs on certain conditions that vary from country to country.

The privilege is applicable when the client is seeking advice from the legal professional with the specific purpose of being counseled and obtaining legal counsel or assistance. In other words, social conversations with an attorney are not necessarily protected by the privilege. The context of the conversation must be one in which the intent to obtain legal advice or services can be evidenced.

Interesting questions are raised for criminal lawyers. As a rule, the privilege does not protect any communication aiming at furthering criminal or fraudulent conduct or facilitating or concealing crime or fraud whether or not a crime actually occurs, and whether or not the attorney is aware of the illegality that may occur.

As a general rule, in most jurisdictions as discussed later in this chapter, the applicability of rules and procedures relating to professional privilege to persons involved in the provision of legal services for a client or employer is largely determined by the question whether such a person is registered with the relevant bar or the competent legal authority, but not in all jurisdictions.

In many countries of the common law system, privilege rules are not compiled or codified so the interpretation of the attorney-client privilege is left to principles of the common law as they may be interpreted in light of reason and experience.

Thus, it is not unusual to find misinterpretation of the attorney-client privilege even by attorneys themselves. A common misconception is that the privilege protects *all* communications and any information imparted by the client to the attorney.

To the contrary, the privilege focuses on the communication and not on the information. In fact, the principle in the common law system protects only communications and not necessarily *information*. The information may not be confidential but the communications are confidential. Thus, the protection is afforded for the fact that the information was communicated, not the information itself.

Most importantly, it is fundamental to understand whose communications are protected by the privilege. In certain countries, the basic privilege protects only what the client communicates *to* the attorney. But this concept has evolved in other countries so as to protect communications *from* the attorney in response to the client as long as they relate to the client's previous communications. Thus, the loose interpretation that all communications from the attorney to the client are protected is not correct. The determination of which

communications are privileged can be a more complex exercise than expected—thus, the importance of “labeling” correspondence between the attorney and the client in the common law jurisdictions.

In the case of legal entities, the “client” may comprise hundreds of people. In such case, for example a company, the privilege is clearly held by the corporation and not by any of the employees and only the legal entity may waive it.

§ 2:1.3 Civil Law System Versus Common Law System

Although civil law and common law share basically the same principle of loyalty in the relationship between counsel and client, the issue of common law privilege and the right to assert privilege is different from professional secrecy in civil law jurisdictions.

In the civil law system, the concept is of a *duty* of the *attorney* in relation to the client. In the common law system, it is a *privilege* that the *client* has as a result of this relationship with the attorney.

In the civil law system, the privilege is usually afforded only to the attorney and not to all professionals involved in his or her practice. All communications between the personnel assisting the attorney do not carry his or her privilege, even if the communication is confidential.

In the common law system, depending on the jurisdiction, the privilege extends to other persons who work with the attorney, especially legal assistants and paralegals—in sum, all employees of the attorney that have access to the confidential information of the client.

The privilege exists from the beginning of the relationship covering the initial consultation, whether written or oral, and extends even beyond the death of the client. A subtle but necessary element of this equation is that the client must be seeking legal counsel in order for the privilege to arise.

As to the waiver of the Principle, as mentioned, in the civil law system, it simply does not exist. The general rule in the civil law system is that disclosure may not be ordered even by the court, whereas in the common law system the revelation of certain information may be ordered by the court.

Violation of the Principle is also treated differently in the two systems. In the common law system, in many jurisdictions, if the attorney breaks the privilege without the client’s prior approval, the client can seek to suppress the attorney’s testimony or to have the case dismissed. The client may further sue the attorney for malpractice for invoking the privilege without his or her consent or absent a court ruling.

In the civil law system, a violation of the duty of secrecy is typically ruled by criminal laws, which generally provide that it is an offense

punishable by imprisonment or a fine or both, in addition to the disbarment of the lawyer. In the civil law system, breaching the duty of secrecy is a criminal offense, since the duty is not simply a professional or contractual issue, but a matter of public order.

§ 2:2 Analysis of the Principle in Selected Jurisdictions

While there are many similarities among the laws of many countries both in the civil law system and in the common law system, there are important differences as well. In the globalized world in which the corporate attorney works, having to deal with all sorts of cross-border transactions, the differences among the various countries' laws have become an increasing challenge to all those practicing in the international arena.

§ 2:2.1 United States

This chapter only intends to analyze the principle of attorney-client privilege or the duty of secrecy as it is generally applied internationally and thus does not have the pretense of analyzing the subject in the United States specifically.

However, suffice it to say that the attorney-client privilege is part of the common law heritage of the United States. The U.S. Supreme Court has held that the purpose of the attorney-client privilege, which is the oldest common law privilege governing confidential communications, is to "encourage full and frank communication between attorneys and their clients [that] promotes broader public interests in the observance of law and the administration of justice."²

In *United States v. Chen*,³ the Ninth Circuit Court of Appeals traced the attorney-client privilege back to the early days of the country, holding that

so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in the courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal advisor and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed.

2. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

3. *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996).

§ 2:2.2 Europe

In the European Union, the duty of professional secrecy and the privilege have also been long-standing traditions, although, as discussed later in this chapter, certain jurisdictions have been revising their laws after the impact of the 1990s financial scandals and the worldwide efforts to combat money laundering and terrorist financing.

The methods of protection of attorney-client relationship may differ from a member state to another but the principle of privilege is solid. Naturally, the protection in the European Union varies also depending on whether the member state is a country of the civil law or of the common law system. Thus, as this distinction has been detailed, in some states legal duties are imposed on the lawyer and the relevant rights are conferred on him or her, while in other states the client himself controls the privilege.

In most of the member states, the protection of the privilege is by rules of professional conduct and not by rules of law. But in two member states (the United Kingdom and Ireland) the protection is achieved by the same rules of law that protect communications between the client and the lawyer.

In the common law countries, as mentioned earlier, the issue of privilege and the right to assert privilege is in essence different in concept to that of the duty of professional secrecy in civil law jurisdictions. As a general rule, privilege belongs to the client and can be waived by the client in certain circumstances. Thus, the application of professional privilege is based upon the legal relationships between lawyer and client and is not necessarily dependent on whether the legal professional is or is not registered with the relevant bar or other legal authority in those jurisdictions.

A word of caution in relation to the expression “in-house counsel”: In the European point of view, the expression must be viewed in respect to the “independence” of the legal professionals who provide legal services solely for their employers, especially since, within many European jurisdictions, a distinction is made between legal professionals who are regarded as “independent” and those who are regarded as employees.

In general, we find in the European Union a prevalence of the concept that the privilege is a benefit for the society as a whole and not necessarily a protection for the individual lawyer or his or her individual client. Any person who needs the advice and assistance of a lawyer in order to understand his or her rights and vindicate them deserves to have these interests protected by the recognition that the relationship between the lawyer and his or her client is a relationship of confidence. As a consequence, this person will be ensured the fair and proper administration of justice.

In the European Union, the principle of protection also contemplates the relationship between lawyers acting for different parties in certain circumstances, mainly in the interest of their clients. Thus, written correspondence and even oral communications of attorneys are protected if they are negotiating a settlement for their clients avoiding litigation.

However, the Principle is not automatically extended to a legal professional. In the United Kingdom, whether the Principle is conferred upon the professional is a function of the nature of the relationship between the professional and the client. Thus, in the jurisdictions of the United Kingdom, in order to confer privilege the communication must be made to or by a lawyer during the course of a professional legal relationship or with the intention of establishing that relationship. And as such the lawyer includes not only solicitors and barristers but also generic legal professionals and even sometimes foreign lawyers. However, it does not include persons without a professional legal qualification who give legal advice or persons who have ceased to practice as a lawyer. In fact, in one specific case in England, the court held that “privilege should be strictly confined to legal advisers such as solicitors and counsel who are professionally qualified, who are members of professional bodies, who are subject to the rules and etiquette of their professions, and who owe a duty to the court.”⁴

In other countries, the concept of a regulated salaried legal professional simply does not exist and the attorneys’ activities are regulated by statutory provisions that provide for the duty of secrecy in the clients’ relationships.

[A] Austria

Thus, in Austria, for example, the duty to maintain a client’s secrets is imposed upon legal professionals who are authorized to pursue their professional activities under the professional title of *Rechtsanwalt*. *Rechtsanwalt* encompasses the concept of an independent lawyer and includes employees of an independent lawyer only if they are members of the bar and subject to the statutory provisions that comprise the attorney-client privilege. However, as the concept of the privilege is conferred upon those authorized to practice as *Rechtsanwalt*, those who are not authorized, for example, in-house attorneys, are not afforded the same protection. Thus, there is no attorney-client privilege for communications between in-house counsel and his or her employers, the officers or directors of a corporation.

4. New Victoria Hosp. v. Ryan, [1993] IRLR 202.

The attorney-client privilege in Austria protects any information relayed in confidence by the client to the *Rechtsanwalt*, and the client is the one to assert the nature of the secret to the attorney.

[B] Germany

In Germany, “privilege,” in the form of duty of confidentiality (as described in the introductory paragraphs above), rests on three foundations which essentially further the same goal but to some degree complement each other and, in some details, are not entirely consistent.

First is the duty of the attorney to keep confidential, that is, not to disclose to any third person any information which the attorney has obtained in exercising his or her profession. This deliberately broad definition (excluding only private information that becomes known to the attorney apart from professional activities), which does not require an active attorney-client relationship, is contained in a specific statute and further specified in the professional rules. This duty is limited by other statutes requiring the disclosure of certain information, such as the obligation to notify the authorities of serious crimes being planned, particular scenarios in the context of money laundering, and the like. Apparently differing from the approach in some other civil law jurisdictions, under German law the client clearly controls this duty of confidentiality and therefore may waive it at the client’s discretion but, as the master of such right of confidentiality, the client is also free to revoke any such waiver.

Second, this duty is complemented and reinforced by criminal liability of the attorney for breaching the duty of confidentiality (similar provisions exist for doctors, pharmacists, auditors, tax advisers, social workers, and public officials). This criminal responsibility runs quite parallel to the professional obligation, including the possibility of waiver, except that it requires intent, whereas negligence suffices for a breach of the professional obligation. It is subject to punishment of up to one year of imprisonment (in special scenarios even two years) and fines.

As a third element, a number of procedural provisions constitute the right of the attorney not to testify and protection against search and seizure in relation to any attorney’s files kept under the control of the attorney; attorney-client communications kept at the client’s premises may be searched and seized there. However, German constitutional and procedural law as well as the European Convention for the Protection of Human Rights recognize and protect the right of any accused to an effective defense; this excludes the search and seizure of documentation prepared in the context of such a defense, even if held at the premises of the accused. Although basically similar, some variations to the above apply in relation to civil, administrative, tax, and other procedures.

These mechanisms to protect confidentiality extend not only to the registered attorney (*Rechtsanwalt*) but also to his or her employees and others who collaborate in the attorney's exercise of his or her profession.

The legal situation as regards in-house counsel changed at the beginning of 2016. At that time, a new regulatory framework was established that allows for bar admission of registered in-house counsel (*Syndikusrechtsanwälte*) if it is shown that they provide legal advice to their employer independently (*unabhängig*) and based upon their own judgment (*eigenverantwortlich*), that is, similar to outside counsel advising a client. Such registered in-house counsel may advise only their employer and affiliates (or members in case of trade associations or unions). In principle, registered in-house counsel are subject to the same obligations and privileges as outside counsel. However, some important exceptions apply. They must not represent their employer in court in civil matters where representation by counsel (*Rechtsanwalt*) is required and they are excluded from acting in criminal proceedings against their employer or its employees. Although in-house counsel have lobbied during the legislative process to be afforded the full protection of privilege, the legislature has specifically decided otherwise, as privilege attaches to registered in-house counsel only in civil proceedings. In relation to criminal proceedings, however (including those involving administrative fines as in case of alleged antitrust violations), in-house counsel are not protected by privilege. In this regard only limited protection applies as constitutional law and human rights conventions ensure the right of the accused to an effective defense which may prohibit, depending upon specific circumstances, the search and seizure of documentation prepared by in-house counsel as part of such defense. An in-house counsel admitted to the bar as a regular attorney (*Rechtsanwalt*) in addition to working for the employer is, in principle, subject to all pertinent obligations and privileges. Details will evolve as the new regulations are applied in practice.

[C] Belgium

In Belgium, the concept is similar to that of Germany in that the duty to preserve the professional secret is required for legal professionals who are authorized to practice under the professional title of *Avocat/Advocaat/Rechtsanwalt*.

In addition, Belgian law distinguishes “professional secrecy” (an obligation imposed by criminal laws on everyone holding professional secrets), “document confidentiality” (conferred on the document itself), and “privilege” (a concept that encompasses both professional secrecy and document confidentiality).

In Belgium, in-house lawyers (*juriste d'entreprise/bedrijfsjurist*) are expressly regulated and must be registered with a specific organization that establishes ethical rules that encompass the duty of confidentiality for the in-house counsel.

[D] France

Members of a French Bar practice law under the professional title of *Avocat* (attorney). The rules of privilege which apply to the *Avocat* are governed by the law that sets out the public order principle of professional secrecy (*secret professionnel*).

As a civil law country, France has an in personam approach to the attorney-client privilege which strictly protects any information exchanged between a client and his attorney regardless of the nature or content of the information. This is different from the in rem approach which prevails in common law jurisdictions, where the attorney-client privilege protects only the communication of legal advice.

A further distinction is that professional secrecy in France does not apply to in-house counsel. In order to act as in-house counsel, a French attorney must be excluded from the bar during the time that he works as a salaried employee within a company. Thus, French attorneys can only “practice law” in a law firm. In other words, communications by employees of a company (who in France cannot be active members of the bar), even if they provide legal advice, are not covered by professional secrecy.

In practice, the duty of confidentiality applies to the content of the communications whether oral or in writing (including mail, emails, faxes, legal opinions, and memoranda). More generally, it applies to all the exhibits of a file, as well as to any information that the *Avocat* receives in the context of the relationship with his or her client. It also includes handwritten notes and covers the correspondence exchanged between attorneys admitted to a French bar unless such correspondence is labeled as “official.”

Professional secrecy is a general and absolute rule that is not limited in time. The client cannot waive the duty of confidentiality applicable to his or her attorney.

Moreover, French law strictly limits the circumstances under which the professional secrecy can be lifted by the *Avocat* for the purposes of his or her defense in judicial proceedings in which the *Avocat* is a party.

Pursuant to the French Criminal Code, the disclosure of confidential information or correspondence by a regulated professional (for example, an *Avocat*) is punishable by one year's imprisonment and a fine of €15,000. The violation of the professional secrecy principle will also subject the concerned professional to disciplinary sanctions (which may include the dismissal from the bar).

In recent years, however, anti-terrorist and anti-money-laundering legislation has begun to erode the scope of the professional secrecy.

Pursuant to a recent law, when an *Avocat* represents a client in a financial or real estate transaction, or assists a client in the preparation or execution of such transactions or in the management of the client's funds, the *Avocat* has an obligation to issue a notice of suspicion (*déclaration de soupçon*) to the Dean of the bar (the *Bâtonnier*) setting out any facts or circumstances that lead the *Avocat* to suspect that the client may be involved in money laundering and/or terrorist financing activities. The filing of a *déclaration de soupçon*, however, does not apply in matters where the role of the *Avocat* is to represent the client in legal proceedings or is limited to providing legal opinions (unless the subject matter of the legal opinion directly relates to the commission of prohibited acts). Any violation of this obligation of notification by an *Avocat* is subject to both disciplinary sanctions from the bar council and criminal liability.

A new law called Sapin II has imposed a new obligation for companies with more than fifty employees to set up an internal whistleblowing procedure. However, information protected by professional secrecy cannot be disclosed by a whistleblower.

[E] Italy

In Italy, the legal privilege is regulated not only by the Rules of Professional Conduct but also by the law (the Code of Criminal Procedure, Criminal Code, and Code of Civil Procedure). Moreover, the scope of professional privilege differs from the common law system, in that the rules are designed more to protect the attorney than the client: the rules protect the attorney and his or her place of work from searches and seizure of documentation, but that privilege is conferred upon the attorney and cannot be controlled by the client. However, since the regulation on legal privilege aims at protecting the right of defense, it applies to attorneys formally appointed by the defendant or, in any case, involved for a specific matter or proceeding.

The regulated legal professionals who pursue their professional activities under the professional title of *Avvocato* are obliged to preserve professional secrets; the same duty applies to their employees, collaborators, and trainees, and the *Avvocato* must assure that this duty is respected (Law 247 of 2012). According to anti-money laundering regulations (Legislative Decree 90 of 2017, which amended Legislative Decree 231 of 2007), an *Avvocato* who discloses a professional secret to competent public authorities in connection with a suspicious transaction does not incur any liability, even if the ability to abstain from such disclosure exists. The disclosure (or use for personal profit or profit of a third party) of a professional secret without a lawful

reason is a crime punishable by imprisonment or a fine. Such professionals (as well as their employees, collaborators, and trainees) cannot be required to give testimony on any facts or circumstances known by reason of their activity as attorneys or to disclose to a judicial authority documents or any other information that are in their possession by reason of their activity as attorneys. Additionally, there are specific limits concerning interception of conversations and communications between an *Avvocato* and his or her client, as well as search and seizure of documents at an *Avvocato's* office. Furthermore, seizure of the correspondence between the client and his or her attorney is forbidden, unless the correspondence constitutes *corpus delicti*; however, such correspondence has to be clearly identifiable as attorney-client correspondence.

Under Italian law, legal privilege applies only to lawyers duly registered with the Bar Association as *Avvocati*. Thus, those who are not entitled to pursue their activities under this professional title and do not fall within the relevant statutory provisions are not bound by the duty of professional secrecy. Since the Italian law provides that the profession of *Avvocato* is incompatible with any public or any private employment, salaried legal professionals may not be *Avvocati*. Therefore, the legal privilege and the above principles do not usually apply to them. In particular, the legal privilege does not apply to in-house counsel of a company. Nevertheless, certain salaried legal professionals who work in the legal department of a public body are entitled to be admitted to the bar and are subject to the same statutory provisions imposing the duty of keeping professional secrets. Other than that, the in-house counsel is subject to the confidentiality rules applicable to any other employee.

[F] Portugal

In Portugal, another civil law system, a strict duty of secrecy is imposed upon legal professionals who are members of the Portuguese Bar Association and who, as such, practice under the professional title of *Advogado*. Pursuant to the conduct rules imposed by the Portuguese Bar Association, professional secrecy must be maintained with regard to every fact brought to the *Advogado's* knowledge during the course and as a result of the exercise of his or her profession.

Therefore, the *Advogado* in Portugal has the obligation to maintain secrecy regarding not only the information obtained as a result of the attorney-client relationship but also the information received from the opposing attorneys and third parties during the course of either court litigation or out-of-court settlement. Furthermore, the *Advogado* is under a duty not to disclose any documents related to the facts subject to confidentiality.

It is also important to mention that the obligation of professional secrecy does not exist only in the case of the exercise of proper advocacy. Indeed, an *Advogado* practicing functions in the Portuguese Bar Association is also covered by this obligation. Similarly, the duty of confidentiality will always exist regardless of whether the *Advogado* accepts or does not accept the sponsorship of the event. However, an *Advogado* may waive his or her duty of secrecy insofar as it is absolutely necessary to preserve his or her reputation and legal rights, provided that the Portuguese Bar Association has given prior authorization to such disclosure.

It should also be noted that in Portugal in-house *Advogados*, as well as everyone who works or collaborates with the *Advogado* during the exercise of his profession, are also subject to the duty of secrecy, to the same extent as described above.

Portuguese law is clear on penalizing the *Advogado* who fails to comply with this duty of secrecy. The law provides criminal penalties for those who do not comply.

[G] Spain

In Spain, another civil law jurisdiction, regulated legal professionals are referred to by the professional title of *Abogado*. *Abogados* are bound by the duty to preserve professional secrets, as are legal professionals with the title of *Abogado* who are in the employment of another party. These *Abogados* employees must be members of the bar in order to be treated similarly to the *Abogado* and be subject to the duty of secrecy.

The *Abogado* in Spain has both the right and the obligation to maintain secrecy regarding not only information obtained as a result of the relationship with his or her client but also information received in the course of litigation from the opposing attorneys and parties.

[H] The Netherlands

As in other European jurisdictions described above, in the Netherlands, regulated legal professionals who are authorized to pursue their professional activities under the professional title of *Advocaat* have the duty to preserve professional secrets. *Advocaten* may be employed by other parties (sometimes called "*Cohen-Advocaat*") and are also bound by the duty to maintain professional secrets. The salaried *Advocaten* must, however, commit to independence from their employer by executing an appropriate undertaking with the employer.

[I] England and Wales

The United Kingdom is naturally the most representative area where the common law system is adopted. It is worth emphasizing that privilege and the right to assert privilege is conceptually different

than that of professional secrecy in the civil law system. In the civil law system, the obligation to observe the professional secret is a duty imposed by law, while in the common law system, the concept is one developed by the courts as a privilege to be asserted by clients. Thus, the rules as to the application of professional privilege, whether in civil or criminal proceedings, are as determined by the courts.

In England and Wales, legal professionals practice their activities as barristers and solicitors.

Barristers may be salaried but may assist clients only if their employer is a solicitor. Solicitors, in turn, may practice law under that title once they are enrolled on the roll of solicitors and hold practicing certificates. Whether a salaried legal professional or not, communications with and advice from legal professionals are subject to privilege.

In addition, certain rules relating to the recognition of privilege may also be statutory, as for example, those relating to the production and disclosure of privileged communication, which is defined as a communication between what the statute refers to as a “professional legal adviser” and his or her client or originated from legal proceedings and for the purpose of those proceedings.

It should be noted that in England and Wales, the legal profession is also practiced by persons who are not subject to regulation by the competent bar authorities. This includes people who, at the courts’ discretion, are legally qualified to assist clients, who, in turn, can assert professional privilege regarding their communications with such people.

[J] Scotland

In Scotland, legal professionals practice their activities as advocates and solicitors.

Advocates may be employed and still use the title of advocate, but they lose those rights the bar affords to independent practicing members. As to solicitors, they may likewise be employed and continue using the title as long as they are enrolled on the roll of solicitors and hold practicing certificates.

The attorney-client privilege is conferred upon the client and afforded both to a solicitor and to an in-house lawyer, but not to a legal professional performing legal work for an employer who is not a solicitor or advocate.

In Scotland, privilege is called confidentiality and is afforded to certain types of communications between legal professionals and clients both for information supplied by the client to the adviser and for advice provided by the latter to the client.

As in England, certain rules relating to the recognition of privilege are statutory, and communications between a professional legal adviser and

a client are protected from disclosure if protected by privilege in proceedings before the court. The court, however, has discretionary power to lift the privilege and order the disclosure of information.

[K] Ireland

In Ireland, legal professionals practice their activities as barristers and solicitors, who are afforded the attorney-client privilege as are any salaried legal professionals whether regulated or not. Only those persons giving legal advice without a professional legal qualification do not receive the protection of the privilege.

The privilege is conferred upon the client in connection with confidential legal advice and confidential documentation prepared for litigation. As in the common law system, it is within the client's discretion to waive the privilege.

[L] Switzerland

Traditionally in Switzerland, the attorney-client privilege is available only to outside attorneys and not to in-house counsel admitted to the bar. In some instances, confidential information entrusted to in-house counsel may be protected by Swiss precepts of general business secrecy or special business secrecy, such as bank and securities dealers' secrecy.

Despite considerable argument from legal scholars that the attorney-client privilege should extend to in-house counsel, since they meet the same professional standards as outside counsel, the prevailing notion in Switzerland is that in-house counsel are not entitled to the protection of the privilege. Swiss courts will not exclude from evidence documents drafted by in-house counsel, or their testimony. Thus, special precaution should be taken to protect confidential information, for example, by having an outside lawyer draft documents and conduct investigations in preparation for litigation.

[M] Turkey

In Turkey, information obtained as a result of the attorney's practice is deemed confidential and enjoys a privilege of nondisclosure by the attorney. However, disclosure may happen in two situations: if the client revokes such privilege or if a law requires the information to be disclosed to government bodies and offices specifically identified in such law. If such communications include legal opinions prepared by the attorney, the information is deemed secondary evidence before a court of law in the event that its disclosure by the attorney is permissible. Furthermore, the attorney is allowed by law to refuse to testify with regard to such information before a court even if the client has waived the privilege and such refusal to testify does not subject the attorney to any legal or criminal repercussions.

[N] Greece

The attorney-client privilege in Greece has the meaning of the “duty of secrecy,” that is, a duty of confidentiality that transcends the private interests of clients and attorneys and is considered an essential element in the protection of individual liberty. Greek legislation does not make a distinction between in-house counsel and independent legal counsel with respect to the protection of their communications with corporate officers and employees.

According to the Code of Ethics of the Legal Profession, the attorney’s obligation binds him or her to strictly maintain professional confidentiality for all the information the client has entrusted him or her with—even if the client is not endangered by a possible disclosure of such information; even if the information became public by another source; and even if the client releases the attorney from such obligation. This duty of secrecy also covers the attorney’s access to the client’s documents as well as information gathered from the examination of the client’s witnesses. The confidentiality to which the attorney is subject with respect to information concerning his or her client binds the attorney even after the termination of the client-attorney relationship.

In view of the above, the attorney is obliged to maintain the required duty of secrecy with respect to any information the client has confided in him or her. However, it is up to the attorney to decide whether or not to testify as a witness about any information obtained in exercising his or her profession. Also, the attorney cannot be examined as a witness in a case he or she has been involved in professionally, unless he or she is granted the required permit by the Bar Association or by the client. The defense attorney is also subject to the duty of secrecy. Although he or she must not mislead the court on the guilt of the accused (client), the attorney should not reveal any information that the accused (client) has confided in him or her or any information obtained in exercising his or her profession—or the attorney may face charges under the Criminal Code. In criminal cases, the attorney should be excluded from the witness examination procedure even if the client releases him or her from the obligation of confidentiality, and it is up to the attorney whether and to what extent he or she will disclose any information during his testimony as a witness that he has obtained in exercising his profession.

Documentation at the attorney’s premises is covered by the attorney-client privilege, and therefore “search” and “seizure” of such documents (as described in the Code of Criminal Procedure) are prohibited. However, the person who conducts the inquiry may demand from the attorney the delivery of documents or of other

items he possesses as a result of exercising his or her profession, unless the attorney declares in writing that those documents or items involve a secret related to his or her profession. Such mechanisms to protect confidentiality extend not only to the registered attorney but also to his associates in exercising his profession.

[O] Scandinavia (Denmark, Sweden, and Norway)

The attorney-client privilege that is generally recognized in the Scandinavian countries (all of which are civil law jurisdictions) is based on professional etiquette/standards, legislation, or a combination of the two.

The attorney-client privilege usually comes into play during litigation or when public authorities request access to documentation or other kinds of information in the attorney's possession.

Due to the duty of confidentiality, courts are as a rule not in a position to order attorneys to give evidence—and the attorneys are prohibited from giving it—where such evidence is against the wishes of a person having a right of confidentiality.

Under extraordinary circumstances, however, courts may order attorneys to give evidence, provided that such evidence is deemed essential for the outcome of the case, and the merits of the case and its importance to the party concerned or to society are considered to justify ordering attorneys to set aside their duty of confidentiality. In a 2016 judgment of the Danish Supreme Court, the court did not order an attorney to give evidence as the court did not think fit to assume that the attorney's deceased client would have given the attorney permission to give evidence. Furthermore, in its judgment, the court stated that, as the case concerned legal advice of a personal nature, the evidence was not deemed essential for the party concerned or for society and so there was no justification for ordering the attorney to give evidence.

The deviation from the predominant rule does not apply to defense attorneys in criminal proceedings regarding information about their own clients. Furthermore, in civil proceedings, an order compelling an attorney to give evidence may not extend to information which the attorney has obtained during legal proceedings conducted by him or her or in which the attorney's advice has been obtained.

In general, courts may, in lawsuits and at the request of a party to the case, instruct a third party, including an opposing or a third-party attorney, to submit documents which are in the third party's possession. Courts may not, however, instruct such an attorney to submit documents containing information that would have entitled the attorney to refuse to give evidence due to the duty of confidentiality.

Special legislation may authorize public authorities, typically the police or competition or tax authorities, to get access to documentation possessed by a party, whether a natural person or an entity, or a third party, including an attorney. Such an authorization is usually conditioned upon the authority's prior obtaining of a court order.

Court orders obtained by police authorities with the purpose of seizing documentation are subject to similar restrictions as with respect to attorneys giving evidence, as described above. Hence, only under extraordinary circumstances can police authorities secure evidence in the form of documents held by an attorney. This protection, however, includes only documentation which the attorney or the client has produced, including, for example, minutes of meetings, information concerning the client obtained by the attorney, and the attorney's procedural memoranda.

Under EU competition law, a special attorney-client privilege principle applies. Even if the authorities have obtained a court order that allows them to secure evidence from either the attorney or the client, the authorities are prevented from seizing documentation that relates to the attorney's assessment of legal questions from the client and material that has been produced especially for the attorney's legal assessment.

In the event that a court order is not specifically provided for in particular legislation, it must be considered if and to what extent such legislation is or is not intended to set aside the general attorney-client privilege.

Pursuant to the EU Money Laundering Directive (Directive 2005/60), an attorney may report suspicious transactions, that is, transactions that have a potential connection to money laundering or financing of terrorism. All the Scandinavian countries have implemented the directive. If an attorney reports a suspicious transaction to the local bar association, this will not be considered a breach of the attorney-client privilege.

The general duty of confidentiality binds not only the attorney, but also colleague attorneys, assistants, paralegals, and all other staff members of the attorney's law firm.

The attorney's duty of confidentiality is not limited in time: The duty of confidentiality continues to apply after the attorney no longer practices law, after the attorney no longer acts for the client, after a client's death, etc.

Compared to the legal privilege recognized in common law jurisdictions, the Scandinavian countries do not in general recognize an attorney-client privilege based simply on adding "confidential—legal privilege," "attorney-client privilege," or similar statements on letterheads, in emails, etc.

Breaching the attorney-client privilege is an offense punished by a fine or imprisonment for a term of up to six months, depending on the actual circumstances. Additionally, under aggravated circumstances, the maximum penalty may increase to imprisonment for up to two years. The maximum penalty usually comes into play when the duty of confidentiality is breached for the purpose of obtaining illegitimate benefit personally or for others or if the breach causes considerable damage to others.

In addition, breaching the secrecy obligation will usually constitute a disregard of the applicable professional etiquette/standards of the local bar association's code of conduct.

§ 2:2.3 North America (Other than United States)

[A] Canada

The attorney-client privilege in Canada extends to the communications between not only the lawyer and his or her client but also all assisting the lawyer when the client has sought legal advice. There is no distinction under Canadian law between solicitors and in-house counsel, provided that the communications between the in-house lawyer are in his or her capacity as solicitor to his or her employing company. For both the solicitor and the in-house counsel, in order for the attorney-client privilege to exist, the individual must be acting in his or her capacity of counsel giving professional legal advice. The privilege ceases in communications where the solicitor acts as an executive or director.

The provinces in Canada have specific regulations. For example, Alberta follows the common law system regarding in-house counsel; thus, communications between this solicitor and directors, officers, and other employees of the company are privileged only if the solicitor acts in his or her capacity as a solicitor of the company in the course of either requesting or providing legal advice that is intended to remain confidential. Ontario takes the same position.

In British Columbia, attorney-client privilege applies to direct communications between a solicitor and client or their agents made for the purpose of obtaining professional legal advice, but also exists in circumstances involving communications made to nonclients contemplating litigation.

In Québec, however, the attorney-client privilege is considered a fundamental right in that every person has the right to the non-disclosure of confidential information, and no person bound to professional secrecy by law may disclose confidential information revealed to him or her by reason of his or her profession, unless with the confidant's consent or by law.

[B] Mexico

Mexico's privilege rules are applicable to all professionals in general rather than specifically to attorneys. Thus, all professionals in Mexico are bound not to disclose the information confided in them by their clients as confidential or secret information.

Mexican criminal laws, specifically the Federal Criminal Code, provide that the disclosure of a secret or reserved communication without cause or consent from the relevant party, by a person who possesses such information by reason of his or her employment or position, is a felony punishable by the obligation to do community work. In the event the disclosure is made by a professional service provider, the punishment for the felony is imprisonment for one to five years, payment of fines, and the suspension of the service provider's professional license, if any, for at least two months and as much as one year. These rules encompass professional service providers generally, requiring that they must, with certain exceptions, keep as confidential any matters entrusted to them by their clients.

Additionally, there is a law regulating professions in Mexico that provides that all professionals are bound to strictly keep as confidential all matters entrusted to them by their clients, unless expressly requested by authorities and except for the reports that are mandatorily required under the applicable legal provisions.

Finally, it is important to mention that aside from the above-mentioned provisions, confidential information under privilege may be subject to specific contractual obligations under the applicable civil legal provisions.

§ 2:2.4 South America**[A] Argentina**

In Argentina, all attorney-client communications and documentation are protected from disclosure. Under Argentine law, the attorney has both the right and the duty to preserve and not disclose the communications maintained with a client.

The Argentine Penal Code establishes that it is a crime for legal professionals to disclose without just cause any information revealed to them by their clients.^{4.1} The secrecy comprehends the information revealed by the client as well as all the facts related to the legal case that the attorney learns as a result of the exercise of his or her profession.

Article 10 of the Code of Ethics of the Public Bar Association of the Federal Capital sets down only two exceptions to the strict rule of

4.1. ARGENTINE PENAL CODE art. 156.

maintaining professional secrecy: (1) where there is previous authorization by the client; and (2) where it is used for self-defense.^{4.2} The first exception also comes from the obligation imposed on the lawyer by article 6, subsection (f) of Law 23,187.^{4.3}

The Code of Ethics of the Province of Buenos Aires is much more rigid, since it does not admit either of the above exceptions.

The privilege exists also for communications between in-house attorneys and the corporate management if the corporate counsel holds his or her position officially and publicly and is duly admitted to the bar in the jurisdiction where the company has its legal seat.

The right and ethical duty of legal professionals to preserve and not disclose the communications maintained with a client is recognized by law No. 23.187, which governs the exercise of the legal profession in the City of Buenos Aires; the Code of Ethics of the Legal Profession of the Province of Buenos Aires; and the Rules of Professional Ethics of the Argentinean Bar Association, among many others.

[B] Brazil

According to Brazilian law and rules of conduct, the duty of confidentiality is a public matter that must be respected by the attorneys and the state.

Within the classic concept of the civil law system, a client cannot waive the duty of confidentiality to which a Brazilian attorney is subject. As mentioned above, the confidentiality duty is not a private matter but a public one, and thus cannot be waived by the client or the attorney.

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The ethical and disciplinary code of the Brazilian Bar Association expressly provides that the confidentiality duty cannot be waived. And case law on this matter appears to be settled in Brazil. An attorney

4.2. "A lawyer must strictly respect all professional secrecy and oppose before judges or other authority inquiries into matters of professional secrecy, by refusing to answer the questions that expose him to a possible violation. He is only exempt from the obligation when the client so authorizes or when it is used for self-defense."

4.3. "There are the specific duties of lawyers . . . to observe with fidelity professional secrecy, unless [there is] previous authorization of the interested party."

is not obliged to testify in legal, administrative, or arbitration proceedings about facts that should be kept secret. The attorney must also maintain secrecy when exercising the functions of mediator, conciliator, and arbitrator. Furthermore, the principle is mentioned in the Federal Constitution, the Civil and Criminal Codes, and procedural codes.

As all attorneys in Brazil must be admitted to and registered with the Brazilian Bar Association, the laws regulating their profession are applicable to all attorneys, whether in-house or independent.

There are exceptions to this absolute obligation. In cases of serious threat to life and to honor, or involving self-defense, the confidentiality duty can be waived.

[C] Chile

In Chile, the privilege is ruled by the Code of Professional Ethics for the Legal Profession enacted by the Chilean Bar Association. As in the above-mentioned South American countries, the privilege is both a right and an obligation of the Chilean attorney. It also applies to the corporate counsel, provided that the in-house lawyer holds the privilege in his or her official position as corporate counsel for the employer.

Further, the attorney in possession of a client's confidential information is barred from trying any case that directly or indirectly involves such information except with the client's prior consent.

The only exception to the privilege is for the attorney's self-defense, when sued by his or her client for malpractice or for a cause directly related to the services rendered.

[D] Colombia

Attorney-client confidentiality is expressly regulated by Colombian law. The Colombian Constitution provides for the inviolability of the professional confidentiality, and the Lawyers Disciplinary Code regulates in more detail the duty of an attorney to preserve confidential information revealed by the client, as well as the circumstances under which, in a limited and bounded way, lawyers may justify revealing confidential information to prevent a crime. Thus, the duty and right to keep information under secret is the fundamental tenet of Colombian law, and such information may be revealed only after a considered decision based on principles of necessity, adequacy, proportionality, and reasonableness, in order to stop or prevent a crime being committed.

Professional confidentiality is regulated by several different statutes, each dealing with a profession required to privilege certain information.

The Colombian Constitution provides that professional confidentiality is "inviolable," as stated in article 74: "All persons have the

right to access to public documents except for those cases established by law. Professional secret is inviolable.”⁵ This constitutional provision applies to all professionals who by the nature of their activities receive sensitive information that must be kept confidential. Thus, physicians, nurses, bankers, journalists, and lawyers, among others, are professionals covered by the obligation to maintain confidential their clients’ information.

The attorney-client relationship of confidentiality is regulated in detail in the Lawyers Disciplinary Code, adopted by Law 1123 of 2007. Article 28 of the Code expressly requires lawyers to maintain confidential information revealed to them by their clients, even after having ceased rendering services to those clients.⁶

The Constitutional Court examined in detail the application of the above-quoted constitutional provision to the legal profession, in a 2012 judgment resulting from a petition to declare the unconstitutionality of paragraph (f) of article 34 of the Lawyers Disciplinary Code.⁷ Paragraph (f) prohibits lawyers from revealing or using privileged information a client may have entrusted them with, unless the client has authorized them to reveal the information, or the lawyer needs to reveal the information to avoid the commission of a crime.⁸

In its analysis, the Constitutional Court issued a series of useful guidelines in the application of Law 1123, and in particular when lawyers may be exempted from the “inviolable” constitutional obligation to maintain secrets.

The Court had previously defined the professional secret as “the confidential or reserved information known through the exercise of certain profession or activity.”⁹ Professional confidentiality, the Court explained, arises from a relation of trust between the professional and the client, which, if broken, may result in the professional’s loss of reputation and business. Confidential information is also related to the right to privacy, which is also guaranteed by the Constitution.

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5. Constitución Nacional, Artículo 74 (“Todas las personas tienen derecho a acceder a los documentos públicos salvo los casos que establezca la ley. El secreto profesional es inviolable.”).
 6. Ley 1123 de 2007, Artículo 28 (“DEBERES PROFESIONALES DEL ABOGADO. Son deberes del abogado: . . . 9. Guardar el secreto profesional, incluso después de cesar la prestación de sus servicios.”).
 7. Judgment No. C-301/12 (Apr. 25, 2012) (Justice Jorge Ignacio Pretelt Chahub).
 8. Ley 1123 de 2007, Artículo 34 (“Constituyen faltas de lealtad con el cliente: . . . f) Revelar o utilizar los secretos que le haya confiado el cliente, aun en virtud de requerimiento de autoridad, a menos que haya recibido autorización escrita de aquel, o que tenga necesidad de hacer revelaciones para evitar la comisión de un delito.”).
 9. Judgment T-073 A of 1996 (Justice Vladimiro Naranjo Mesa).

Finally, in the case of lawyers and their clients, confidentiality is also important to the right to a defense in court, another constitutional guarantee. The Court also observed that keeping information confidential is not only a duty, but also a right, whereby the lawyer may abstain from revealing the client's information even to the authorities.

The Court found that article 34 of Law 1123 permits revealing information from a client, in exceptional cases. There must be a present or imminent danger to a legally protected right. Revealing the information must be preceded by a considered decision, balancing the legal rights involved.

In particularly complex cases, the analysis should be made on the basis of criteria such as necessity, adequacy, proportionality, and reasonableness. Whether there is a state of "necessity" must be evaluated in light of the existence of other means to avoid the crime that impinge less on the right to confidentiality; "adequacy" refers to the effectiveness of the action to prevent a crime; "proportionality" is measured as a comparison between the harm caused by the crime that the lawyer intends to prevent and the harm caused by the revelation of the secret; and the "reasonableness" test requires that the conclusions of the analysis be coherent and properly argued.

It is not always the case that the lawyer must reveal the secret to avoid the commission of a crime. In some cases, it will be sufficient for the professional to make every effort to stop the client from carrying out a criminal activity; in that regard, the Court made express reference to administrative, tax, commercial, customs, environmental, or financial matters.

Thus, a systematic interpretation of Law 1123, taking into account paragraph 4 of article 22,¹⁰ allowed the Court to reach the conclusion that, if due care is taken to consider the criteria of necessity, adequacy, proportionality, and reasonableness, article 34(f) is constitutional; thus, lawyers may reveal information provided to them by their clients, if a crime will be prevented.

A recent decision of the Constitutional Court reviewed the constitutionality of a bill about the right of petition. Article 24 of the bill refers to the right to obtain information that may be privileged or reserved on the basis that it is a professional secret. The court concluded that the attorney-client confidentiality is a constitutional guarantee for the practice of a profession, even when third parties are interested

10. Ley 1123 de 2007, Artículo 22 ("CAUSALES DE EXCLUSIÓN DE LA RESPONSABILIDAD DISCIPLINARIA. No habrá lugar a responsabilidad disciplinaria cuando: . . . 4. Se obre para salvar un derecho propio o ajeno al cual deba ceder el cumplimiento del deber, en razón de la necesidad, adecuación, proporcionalidad y razonabilidad.").

in accessing such information. Thus, the attorney-client confidentiality is a valid limitation to the right of petition, set forth in Article 23 of the Constitution, and individuals and legal entities are entitled to refuse the delivery of information that may be covered under this confidentiality.¹¹

[E] Peru

In Peru, the attorney-client privilege is protected by the Code of Ethics of the Lawyer approved by the Deans' Meeting of the Peruvian Bar Associations. It establishes that the privilege is both a right and an obligation of the attorney. The professional secrecy survives the end of the attorney's representation of the client, unless the client releases the attorney from this obligation. The secrecy duty can be lifted when the attorney relies on the express and prior informed consent of the client in writing. Also, the secrecy duty can be lifted when it is necessary for the defense of the attorney's legitimate interests against the authority, within or outside a disciplinary process. Moreover, the attorney must reveal to the competent authority the information protected by the secrecy duty where the disclosure is necessary to avoid the client's causing serious damage to the physical or psychological integrity or the life of a person.

The rules in the Code of Ethics of the Lawyer apply not only to attorneys but also to in-house attorneys, who are advised to execute specific confidentiality agreements with the corporations for which they work to ensure a clear understanding of the privilege.

[F] Venezuela

All communications between an attorney and his or her client are protected by Venezuelan law, even after the attorney discontinues assistance to the client. The attorney may refuse to testify on matters of which he or she has knowledge acquired in the course of professional actions. In addition, if the attorney has gained knowledge from a client that a crime has been committed, the Code of Criminal Procedures releases the attorney from the obligation to give notice to the authorities.

The Venezuelan Code of Professional Ethics establishes the attorney's obligation to keep secret all matters related to the attorney's practice. The bar association may sanction attorneys when they reveal confidential information. Venezuelan law does not make a distinction between in-house counsel and independent attorneys.

11. Judgment No. C-951/14 (Dec. 4, 2014) (Justice Martha Victoria Sáchica).

§ 2:2.5 Asia**[A] China**

In China, the laws provide that attorneys, whether in-house or outside counsel, must maintain the confidentiality of their clients' commercial secrets and other personal information. However, the Chinese laws on the subject do not refer specifically to communications between client and attorney, except that in criminal cases the conversations between the suspects and their attorneys shall be confidential.

It is worth noting that the Chinese laws allow attorneys to disclose confidential information of their clients if the attorneys believe that disclosure is necessary for the prevention of serious crimes involving personal injury or fatality, or serious damage to the state or the public interest. Moreover, the legal duty of confidentiality owed by attorneys to their clients does not appear to afford protection where documents are sought directly from the client, rather than the attorney.

[B] Japan

In Japan, the privilege as specifically described in this chapter does not exist, although in general *Bengoshi* (lawyers admitted in Japan) and *Gaikokuho Jimu Bengoshi* (foreign-law business attorneys licensed in Japan) are bound by the duty, and entitled to the right, of confidentiality with respect to secret information obtained by them during the practice of their legal activities. The duty of confidentiality may be waived or exempted. The rules relating to the right and obligation of secrecy are well defined both in the Civil Procedure Code and the Criminal Procedure Code.

[C] Korea

In Korea, the concept of privilege is that of both a right and an obligation. A specific statute provides that a lawyer, whether actively practicing law or no longer practicing, may not disclose his or her clients' secrets except as permitted by law.

Breach of the secrecy obligation by the lawyer is punishable by imprisonment for up to three years and suspension of the rights to practice for up to ten years, in addition to fines.

[D] Hong Kong

As Hong Kong was until 1997 an English colony, the principles of the common law still prevail. Thus, in order to be privileged, communications between the client and the attorney must be within the context of the client's obtaining legal advice from the lawyer in the latter's official capacity. Further, the communications must unequivocally be given in confidence to the lawyer alone.

The in-house lawyer is treated the same as the independent attorney and is also afforded the attorney-client privilege even for communications between the in-house attorney and other people in the employment of the same company.

[E] Thailand

In Thailand, it is a breach of regulations governing attorney ethics to reveal a client's confidential information obtained while representing the client, unless the client or the court grants permission. Under the penal code, it is also a criminal offense (punishable by a small fine and/or up to six months imprisonment) for legal professionals or their staff to disclose a client's information under circumstances that could cause injury to the client.

Thai law protects the confidentiality of attorney-client communications, including communications involving licensed in-house counsel. However, since the courts are reluctant to subpoena unspecified documents or other unspecified evidence, the concept of protecting documents and information by declaring them attorney-client privileged is probably not currently as pertinent in Thai litigation as it might be elsewhere.

[F] India

India follows common law principles and the attorney-client privilege is statutory. Thus, the lawyer has the duty to maintain the secrecy of communications between him or her and the client and any documentation of which he or she has knowledge, and this duty can be waived by the client.

The in-house lawyer, however, is not afforded the same privilege; once in the employment of a third party, he or she is not considered as an attorney entitled to the privilege.

§ 2:2.6 Other Countries

[A] Australia

The attorney-client privilege in Australia reflects the common law tradition inherited from Britain. The privilege protects communications between attorneys and clients from disclosure, such as during the discovery process. This protection is known as the "legal professional privilege" or the "client legal privilege" and it cannot be easily superseded except by clear legislative enactment. Although there is no federal statute establishing the privilege, some states in Australia have enacted statutes protecting the privilege and others have promulgated the privilege via common law decisions. As a result, the scope of the privilege varies slightly from jurisdiction to jurisdiction.

Broadly defined, the privilege covers confidential communications between client and attorney for the purpose of providing legal advice, or communications concerning ongoing litigation or litigation contemplated by the client. If either of those purposes is the “dominant” purpose of the communication, it will usually be protected. However, with in-house counsel, the closer connection between lawyer and client draws more rigorous scrutiny from Australian courts applying the dominant-purpose test. Thus, it may be more difficult to establish that the in-house counsel is genuinely acting in the capacity of a lawyer or that the dominant purpose of the communication is of the requisite legal advisory nature as described above.

As stated, the legal professional privilege can be nullified by legislation; this area of the law has not been completely settled by Australian courts. Therefore, proper caution must be taken in order to maintain the privileged status of communications.

[B] Russia

In Russia, a “lawyer” is anyone with a law degree, while an “advocate” is a lawyer qualified to represent clients in Russian courts. Only communications with advocates are protected.

The attorney-client privilege does not exist under Russian procedural law. Nor is there any obligation on parties to disclose documents unless the court specifically compels them to do so. However, Russian legislation recognizes the right to privacy of any information or communications between an advocate and a client if made with the purpose of providing legal assistance. The advocate may not disclose the client’s confidential information and cannot appear as a witness in court proceedings concerning the client. Nor can the advocate be questioned on information attained during the course of performing professional duties as an attorney.

In contrast to the advocate, the lawyer does not have protection against disclosure compelled by an authorized regulatory or investigative body. A client should verify the credentials of the legal advisor in Russia to assure that he or she is, in fact, a qualified advocate, with rights to privacy of communications.

[C] South Africa

South Africa’s legal system comprises both civil law (Roman-Dutch) and common law. The legal professional privilege that exists in South Africa can be claimed by in-house counsel for confidential communications with private corporations. There are several conditions necessary for this privilege to attach, including: (1) the legal advisor must be acting in a professional capacity; (2) the communication must be made in confidence; (3) the legal advisor must have been

approached for the purpose of providing legal advice; and (4) the communication must not be used for criminal or fraudulent purposes.

[D] United Arab Emirates (UAE)

The attorney-client privilege exists in the UAE via statutory enactment prohibiting an advocate from providing testimony on any matters concerning a client without that client's consent. The statute protecting the privilege for advocates is particularly broad and prohibits the interrogation of an advocate or the searching of his or her office without the knowledge of the public prosecutor. There is an exception to this prohibition in cases where the advocate has knowledge that the client intends to commit a crime.

However, the privilege protection afforded by the statute does not necessarily apply to in-house counsel, whose relationship with their employer is governed by UAE labor law, which does not recognize the attorney-client privilege between in-house counsel and the corporate employer. This contradiction could present a problem for companies wishing to maintain the privacy of their communications with in-house counsel.

[E] Egypt

In Egypt, the Egyptian Bar Association Law establishes that the attorney-client privilege is a fundamental legal principle. An attorney is prohibited from disclosing any privileged information received from a client, unless he or she is requested to do so by the client in order to protect his or her interests before a court of law.

The attorney-client privilege in Egypt also applies to in-house counsel.

[F] Israel

In Israel, all matters or documents exchanged between a client (or someone acting on the client's behalf) and an attorney, related to the professional service granted by the attorney to the client, are privileged. Equally privileged are communications between in-house counsel and the officers, directors, or employees of the company, related to legal services rendered by the in-house counsel to the company. The fact that the in-house counsel is an employee of the company is irrelevant and does not influence the privilege.

[G] Saudi Arabia

The Kingdom of Saudi Arabia (KSA) recently promulgated a new law called "Regulation of the Legal Profession" (the Regulation).

The Regulation provides for a limited attorney-client privilege. It prohibits lawyers from disclosing any secret entrusted to them or of which they have become aware through their profession, even after

termination of their mandate, unless this violates a principle of Islamic law. Therefore, if a lawyer's client violates a principle of Islamic law, no attorney-client privilege would exist and the lawyer would be obligated to report the client's actions to the appropriate local authorities.

In KSA, almost all licensed "advocates" (who may appear before the courts of the KSA) are KSA nationals, while legal consultants (largely foreigners) are not extended the privilege of appearing in court.

§ 2:3 The Threat to the Principle

The attorney-client privilege and the duty of professional secrecy are becoming a more complex subject given the difficulties and the suspicions generated by the financial scandals surrounding the collapse of Enron, WorldCom, and other public companies in the United States as well as the increase of worldwide efforts to combat money laundering and terrorist financing.

The legal community worldwide has increasingly been aware of the threats to the privacy of the relationship with the client. The concern is that rules enacted or being considered by certain jurisdictions would impinge on clients' rights to fair and effective representation, the independence of the legal profession, and the administration of justice. It is feared that if the state has access to the communications between client and lawyer, the lawyer becomes a government agent or spy.

The privilege has been under clear attack in many parts of the world. In the United States, the accounting firm KPMG was in trouble as a result of the Department of Justice's demand that the firm waive the attorney-client privilege for communications between lawyers and KPMG employees involved in marketing tax shelters that the IRS had challenged.

In Brazil, in 2005, several law firms were raided by the police following court orders that allowed the police officers to seize documentation of clients allegedly involved in tax frauds. These attacks on the legal profession were unprecedented in the country, even during the worst times of dictatorship.

Further, the attacks on the Principle have also taken another form, in the enactment in many jurisdictions of new norms of compliance. Post-Enron regulations, such as the Sarbanes-Oxley Act of 2002, required the Securities and Exchange Commission to implement minimum standards of professional conduct for lawyers appearing and practicing before the Commission. These efforts by the government or governmental agencies have become known as "gatekeeper" initiatives.

In the United Kingdom, lawyers are required to file reports regarding suspicious client activity without telling their clients they have

made a report. These requirements have been challenged by the U.K. legal community, which succeeded in having them modified to provide an exception to the reporting requirements for information obtained through privileged communications. A similar situation occurred in Canada, where the Supreme Court of British Columbia enjoined the implementation of a gatekeeper statute and the government had to cancel the relevant regulations.

Another threat comes as a result of the European Union anti-money laundering regulations that require lawyers to report to designated national authorities confidential information disclosed by their clients that might be indicative of money laundering.

These threats have raised the concern of associations of legal practitioners all over the world. The American Bar Association, for one, although supporting efforts by all governments to prevent money laundering, is very concerned that such efforts not interfere with legitimate relationships between lawyers and their clients. The ABA has in fact approved a resolution opposing the efforts by the government to require lawyers to disclose or otherwise make any report concerning the activities of their clients, compel lawyers to disclose confidential information, or otherwise compromise the lawyer-client relationship or the independence of the bar.

§ 2:4 Conclusion

The principle of the attorney-client privilege in the common law system and the duty of professional secrecy in the attorney-client relationship in the civil law system have historically been a unique and fundamental trait of the legal profession all over the world. Although there are differences between the two systems with respect to the Principle, the differences are of approach or method rather than differences of result.

The Principle is a guaranty to citizens of their individual civil liberties and as such understood as an immunity from governmental interference. Any threat to the confidential relationship between lawyer and client is, truly, a threat to the liberty of the individual in a free society governed by the rule of law.

