Law Council
OF AUSTRALIA

Office of the President

28 January 2022

Senator the Hon Kim Carr
Committee Chair
Senate References Committee
Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator Carr

Inquiry into the adequacy and efficacy of Australia's AMLCTF regime – IBA Statement

I refer to our letter dated 3 December 2021 to Committee Secretary Ms Sophie Dunstone enclosing answers to questions taken on notice by the Law Council of Australia.

I am writing to draw your attention to a recent Statement published only last week by the International Bar Association Presidential Task Force on Lawyer-Client Confidentiality.

The Statement explains how authorities may (already) obtain otherwise confidential information in appropriate circumstances by seeking judicial authorisation, and how money laundering and terrorist financing can be addressed without contradicting professional obligations and ethical principles.

The Statement explains from first principles how lawyer-client confidentiality and client legal privilege work, and helpfully situates these explanations within the context of terrorism, money laundering and organised crime. It contains sections on *How we Strike a Balance* and *The Way Forward*, which may be of particular assistance.

I respectfully attach a copy for your consideration.

Thank you again for the opportunity to contribute to the Inquiry.

Yours sincerely

Mr Tass Liveris
President

Attached: *IBA Statement in Defence of the Principle of Lawyer-Client Confidentiality*, January 2022

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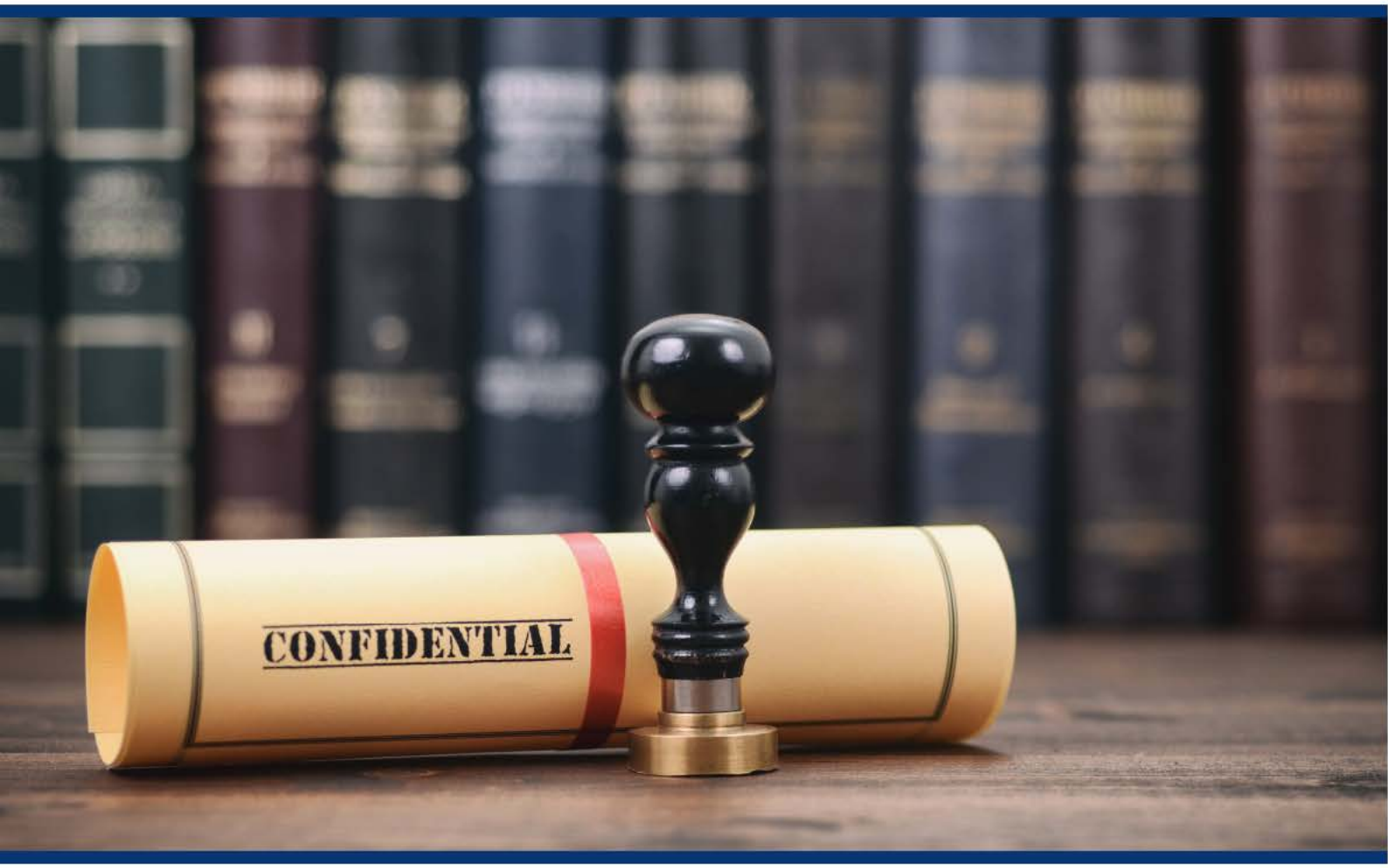
International Bar Association

IBA Statement in Defence of the Principle of Lawyer-Client Confidentiality



IBA Presidential Task Force on Lawyer-Client Confidentiality

The International Bar Association (IBA), established in 1947, is the world's leading international organi-sation of legal practitioners, bar associations, law societies, law firms and in-house legal teams. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 lawyers, 190 bar associations and law so-cieties and 200 group member law firms, spanning over 170 countries. The IBA is headquartered in Lon-don, with offices in São Paulo, Seoul, The Hague and Washington, DC.

The IBA Legal Policy & Research Unit (LPRU) undertakes research and develops initiatives that are rele-vant to the rule of law, the legal profession, and the broader global community. The LPRU engages with legal professionals, law firms, law societies and bar associations, governments, non-governmental organi-sations, and international institutions to ensure innovative, collaborative and effective outcomes.

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Forewords

We are pleased that two of the world's leading judges have written forewords to this document. Their words help to demonstrate the depth of support for the principle of lawyer-client confidentiality that can be found within the judiciary, as well as the legal profession more broadly.

The rule of law consists of a number of principles. Some vary from time to time, and from country to country. Others are as timeless as they are universal; an independent judiciary and the presumption of innocence being two obvious examples. The rule of law is one of the fundamental foundation stones upon which a civilised and effective society is based. Without it, society quickly becomes unjust, violent and poor.

And yet the rule of law is under attack across the world. Why is this the case, and perhaps more importantly, why does it matter?

First, governments in many countries (and not only those with totalitarian or military regimes) view important aspects of the rule of law as limitations on their power (as indeed they are), and thus seek to undermine them. Sometimes this happens openly, other times more subtly.

Second, in many countries, conditions are such that the rule of law seems unimportant. This is either because people have never enjoyed it, or, conversely, because they have enjoyed it for so long that they take it for granted.

Third, the justification for some fundamental aspects of the rule of law is not obvious to non-lawyers. They can often be made to appear arcane and technical, or as existing only for the benefit of lawyers: 'rules for lawyers' or even worse, the 'rule of lawyers', not the rule of law.

Yet these assaults on the rule of law, judicial independence and the legal profession more broadly are not being driven by governmental desire for power or public apathy alone; in recent years, attacks have also started to come from international non-governmental organisations. These entities, previously supportive of the rule of law, have become increasingly frustrated at the apparent barriers that the rule of law poses to strong executive political action to solve various global crises, such as climate change, terrorism and corruption.

The people responsible for these attacks do not appear to appreciate the essential function performed by the rule of law in ensuring that individual rights and freedoms are protected from the misuse of that same executive political power. Nor do they realise that without these rights and freedoms, any attempts to remedy the world's problems are doomed to failure. Once the rule of law is seriously undermined, the world will find itself in a dark and dangerous place, and as with the erosion of all such standards, once compromised, it will be very difficult, if not impossible, to restore.

It is for these reasons that we need to be reminded of the vital role played by the rule of law in protecting and guaranteeing our fundamental rights and freedoms. They are not inevitable. Indeed, they are fragile, hard-won and must be preserved as a vital counterweight to state power. Accordingly, the international legal community, which is well placed to appreciate the importance of all aspects of the rule of law, has a duty to speak out in support of them.

One of the key aspects of the rule of law currently under attack, and which needs such support, is lawyer-client confidentiality, the focus of this document. As I have seen during my 21 years as a judge, such confidentiality, or legal privilege as it is often known, can cause inconvenience or even apparent unfairness in a particular case. But, as I also appreciate from my judicial experience, the general benefit of the principle of lawyer-client confidentiality far, far outweighs any occasional disadvantage to which it gives rise.

Why does lawyer-client confidentiality matter? In a free and democratic society, it is essential that everyone has access to independent and confidential legal advice, whether in connection with a private dispute, a dispute with government, a family dispute or a criminal dispute. A vital component of the right to legal advice (and legal representation) is that communications between lawyers and their clients remain confidential. Such confidentiality is a client's right. It is the shield that protects citizens' right of access to an independent lawyer in that it ensures that clients and their lawyers are able to communicate freely so that lawyers can act for and advise their clients in the clients' best interests.

It is not right for governments to start deciding on the extent or nature of the privilege to be enjoyed in any particular case. It is for the courts to enforce the well-established principle of legal privilege against attacks from all comers, including, but not limited to, governments.

The International Bar Association (IBA) is to be congratulated for explaining and justifying the importance of the principle of lawyer-client confidentiality in this document. I strongly encourage everyone interested in the rule of law, and, even more so, anyone contemplating changing the law on legal privilege, to read this document.

David Neuberger, Lord Neuberger of Abbotsbury
(Former President of the Supreme Court of the United Kingdom)
Lincoln's Inn

'United in Diversity' is the motto of the European Union. In my view, it could equally well reflect the spirit of the clear and condensed comparative analysis of lawyer-client confidentiality that the IBA presents in this document. Good lawyers have a well-trained eye for the detail that distinguishes one situation, case or legal order from another. This skill is perfectly well documented on the following pages. However, a further challenge for the lawyer is recognising the details that may tend to separate us, without losing sight of the common ground that unites us across legal orders, as well as national, political or economic borders. This IBA document also passes that test equally well.

The right to independent and confidential legal advice is a fundamental principle in any free and democratic society, and closely linked to the right to a fair trial, and the rule of law. At its most simple, the main beneficiary of the principle is the client who may be under investigation or prosecution by the state. It is the client who would suffer most from a breach of confidentiality between him or her and the client's lawyer. Yet confidentiality is also a principle that helps to protect the very independence of the legal profession itself, as this document shows.

That lawyer-client confidentiality is a fundamental principle does not preclude the fact that carefully limited and well-balanced exceptions to it may be justified. This document demonstrates how both national legislators and courts have struck this balance in different legal orders belonging to different legal traditions. Whether such balances are the outcome of delicate legislative work or carefully considered judicial developments, these many differences and nuances should not make us lose sight of the core importance of the fundamental principle of lawyer-client confidentiality.

This fundamental principle that protects us all requires timely attention and care. That we often do not know – and fully appreciate – what we have until it is gone, is unfortunately not new wisdom. The fact that such fundamental principles related to the rule of law are not currently being questioned, or even flagrantly violated in our own country or legal order, should not bring us any great comfort. In a globalised world and economy, violations of the rule of law in one country inevitably have repercussions and immediate negative effects in others, not least the risk that the breaches to the rule of law in one country may sadly serve as inspiration elsewhere.

It is against this background that the reflections and recommendations of the IBA should be read and discussed, particularly with regard to the fundamental principle of confidential legal advice. Certainly, it is healthy for such discussions to take place among lawyers and other professionals within judicial systems. Still, it seems essential that these issues are not only debated in such professional or academic circles, but are equally given due consideration when and where policy choices are made, choices that affect us all.

Judge Lars Bay Larsen
Court of Justice of the European Union

Introduction

The International Bar Association (IBA) is the leading international organisation for the global legal profession. It represents over 80,000 individual lawyers worldwide, as well as 190 bar associations and law societies from more than 170 countries.

On 25 May 2019, the IBA updated its *International Principles on Conduct for the Legal Profession*. Principle 4, which addresses the concept of lawyer-client confidentiality, states: 'A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct'.

IBA Principle 4 neatly captures the two elements underpinning the concept of lawyer-client confidentiality.

The first is that, depending on the jurisdiction, lawyer-client confidentiality is either a right afforded to the client and/or an obligation placed on the lawyer by the law, applicable rules of professional conduct, and/or the judicial and legislative system of that country. In certain jurisdictions, such as England, lawyer-client confidentiality is even viewed as a human right.[1] Whether a right, ethical duty or professional rule of conduct, lawyer-client confidentiality is vital for the protection of individual freedoms in a fair and democratic society. Legal services, and justice itself, cannot be delivered if crucial information is not shared by clients for fear that their lawyers might divulge that information to third parties, including, but not limited to, law enforcement and other authorities.

The second element of the principle balances out the first. While defending the principle itself, IBA Principle 4 also recognises the need for lawyer-client confidentiality to be disapplied (as it currently is) in certain circumstances, either by law and/or rules of professional conduct, including when tackling illegal actions predicated on, or involving, its misuse. This point, and the relationship between these two elements, is dealt with in more detail in Section 6 of this document: 'How we strike a balance'.

In this document the IBA seeks to:

- stress the importance of lawyer-client confidentiality in relation to the administration of justice, the independence of the legal profession and the rule of law;

1 The right belongs to the client and has been recognised as an aspect of Arts 6 (right to a fair trial) and 8 (respect for private and family life, home and correspondence) of the European Convention on Human Rights: see, eg, *S v Switzerland* - 12629/87 [2006] ECHR 984 (28 November 1991); *Andre and others v France* (unreported), 24 October 2008 (ECtHR); and *Michaud v France* - 12323/11 [2012] ECHR (2030). In some jurisdictions, lawyer-client confidentiality is also seen as a right implied by Art 14 of the International Covenant on Civil and Political Rights.

- underscore the opinions of practising lawyers, leading judges and bars and law societies around the world regarding the integral purpose of lawyer-client confidentiality in a fair and democratic society;
- highlight the vital role that the retention and protection of lawyer-client confidentiality plays in practice in the public's perception of the legal profession and their own justice system; and
- emphasise the risks of any disproportionate international reaction to perceived misuse of lawyer-client confidentiality.

The IBA also wishes to affirm (as reflected in Principle 4) that:

- there are indeed circumstances provided by law and/or applicable rules of professional conduct that provide exceptions, whether mandatory or permissive, to lawyer-client confidentiality;
- these exceptions must be kept to a minimum, and only be applied in extreme cases; and
- the IBA supports efforts to eradicate any abuse or misuse.

Section 5 of this document addresses the exceptions to lawyer-client confidentiality in more detail.

Overall, this document will address the following themes:

Section 1: What is meant by lawyer-client confidentiality.

Section 2: Why lawyer-client confidentiality exists.

Section 3: An explanation of how lawyer-client confidentiality works, including:

1. when, and under what circumstances, lawyers have an obligation to maintain lawyer-client confidentiality; and
2. under what circumstances lawyers do not have an obligation to maintain lawyer-client confidentiality.

Section 4: The differences between common law and civil law jurisdictions with respect to their approach to lawyer-client confidentiality.

Section 5: The exceptions in law and/or applicable rules of professional conduct.

Section 6: How we strike a balance.

Section 7: The way forward.

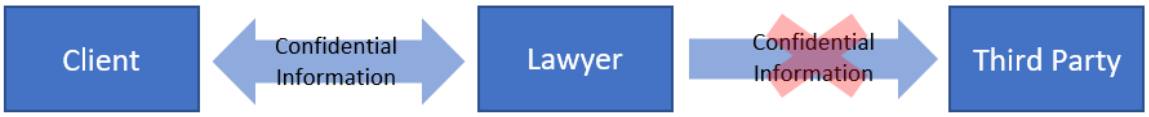
1. What is meant by lawyer-client confidentiality?

Lawyer-client confidentiality goes by different names and is governed by different rules in different jurisdictions. However, the underlying principle is the same everywhere.

Confidentiality

The overriding principle, applying in both common and civil law jurisdictions, is that *a lawyer is not permitted (by law in many countries) to disclose information given to the lawyer by his or her client in confidence to any third party,* including to governmental and judicial authorities.

Sometimes the scope of this principle is even broader. In the United States, for instance, a lawyer must hold confidential *all* information relating to legal representation, unless the client provides informed consent or disclosure is impliedly authorised. This information could be in the public domain, but the lawyer must still not disclose it, including the client's name, in some circumstances. This is the case, unless there is an exception (permissive or mandatory).



In some jurisdictions, lawyer-client confidentiality laws and professional conduct rules expressly impose obligations on the lawyer. In other jurisdictions, the protection of confidential information from disclosure is achieved by the creation of 'evidentiary privileges' (also called exemptions) from the ordinary rules requiring information to be disclosed; these privileges are limited to information given as part of legal, not business, advice. In some countries, both concepts apply as confidentiality is broader in scope than evidentiary privileges/exemptions.

The basic and essential proposition in almost every country is that a lawyer must not disclose information given to the lawyer by his or her client in the course of legal representation without there being a clear exemption to the lawyer-client confidentiality principle. The assumption therefore is that *information cannot be disclosed unless*:

- the lawyer is permitted to disclose it;
- the client discloses it; or
- a governmental body or the court is permitted to require its disclosure.

In many countries, the permitted route for law enforcement and other government agencies to obtain information subject to lawyer-client confidentiality is to apply for a court order. This process can be contested by lawyers on behalf of their clients. It therefore provides the principle of lawyer-client confidentiality with the protection of the courts and judicial system, while also allowing the authorities to obtain confidential information in appropriate circumstances.

The IBA believes that the importance of this near-universal existing route of access by authorities is given insufficient weight in the comments from various supranational agencies found in Annex A. These comments also fail to engage with the broader question of why prosecution authorities are so reluctant to seek judicial authorisation to obtain such information if they reasonably believe it should be disclosed.

Professional secrecy

Professional secrecy is a term used in civil law jurisdictions (ie, countries in which laws are based primarily on codified statute). It refers to the overriding obligation of a lawyer to preserve client confidentiality such that disclosure is not permitted.

In some civil law countries, a breach of professional secrecy by a lawyer is a criminal offence.

Legal professional privilege (LPP)/lawyer-client privilege

These terms are used in common law jurisdictions (ie, countries in which the laws have been developed through precedent and decisions of the courts, in conjunction with statute).

LPP is a specific obligation that is part of the wider lawyer-client relationship. It may also be referred to as 'legal advice privilege' or 'litigation privilege'.

LPP protects written (including electronic format) or oral lawyer-client communications (and in some circumstances, their communication with third parties) from disclosure in a dispute on the basis that the communication is 'privileged'.

Note, however, that privilege and confidentiality are two distinct concepts. While LPP represents a specific exemption from the lawyer's ordinary duty to disclose materials to the court or law enforcement agencies, the lawyer's wider obligations of confidentiality still apply to other information relating to the representation of his or her client, even if not covered by the special evidentiary rules of LPP.

2. What is the rationale behind lawyer-client confidentiality?

Lawyer-client confidentiality should be distinguished from more general obligations of confidentiality that may be owed in other professions, such as accountancy or medicine, because of its function in underpinning the integrity and independence of the justice system. The purpose of lawyer-client confidentiality is not simply to protect a specific lawyer or individual client. It underpins the rule of law itself.

Lawyer-client confidentiality has two explicit purposes:

i. It is essential for fair trials, the administration of justice and the rule of law

Fair trials are a cornerstone of the rule of law. Such trials (particularly for a defendant in criminal cases) and the proper administration of justice would be impossible without lawyer-client confidentiality.

A lawyer's role is to provide *fully independent legal assistance* to his or her client. Such assistance is impossible to give if, as mentioned above, lawyers are permitted to divulge the secrets of their clients, which are given in confidence.[2]

If such revelations occur, by whatever means (including through state action), then lawyers and the advice they give to their clients can no longer be considered 'independent' in the eyes of the law. As the United Nations Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán states: 'The independence of judges, prosecutors, and members of the legal profession is indispensable for ensuring the rule of law, separation of power, and the protection of human rights'.[3]

This is why lawyer-client confidentiality is given special protection by law and is supported so strongly by the judiciary. It is an essential element in the protection of individual freedoms in a free, fair and democratic society, and is not, in any sense, about lawyers' 'self-interest'. Far from being the obstacle claimed in Annex A of this document, lawyer-client confidentiality in fact plays a crucial role in supporting the public interest, and the interests of justice. As the eminent English judge Lord Bingham said: 'The doctrine […] is rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged, and civil disputes so far as possible settled without resort to

2 The importance of lawyer-client confidentiality in enabling clients to access independent legal advice was emphasised by Lord Hoffman in the leading English case R *(Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, where he described it as 'a necessary corollary of the right of any person to obtain skilled advice about the law'.

3 Special Rapporteur of the United Nations on the Independence of Magistrates and Lawyers, 'Report on the Independence of Judges and Lawyers' (16 October 2019) 74th Session of the United Nations General Assembly https://independence-judges-lawyers.org/supplementing-the-un-basic-principles-on-the-independence-of-the-judiciary accessed 16 August 2021.

judicial decision. To that end it is necessary that actual and potential litigants should be free to unburden themselves, without reserve, to their legal advisers'.[4]

ii. It allows lawyers to perform their professional duties

The relationship between lawyer and client must be one based on complete confidence.

In order to represent their clients, it is essential that lawyers are informed of all matters relevant to the representation, including things their clients would not willingly tell others, including, for example, intimate personal details and valuable commercial secrets.

Clients would likely withhold information if they knew that:

- their lawyers were free to disclose it to third parties without consequences; or
- their lawyers may be required to disclose it to third parties other than in the most exceptional circumstances (and usually with their knowledge and consent).

In this way, lawyer-client confidentiality provides the trust at the heart of the lawyer-client relationship and advances the rule of law by providing lawyers with the opportunity to fully and completely counsel their clients.

3. How does lawyer-client confidentiality work?

Lawyer-client confidentiality has three main features:

- the client's interests;
- the lawyer's obligation; and
- exceptions to those interests and obligations (as described in Section 5).

The client's interests

As stated above, the relationship between lawyer and client must be one based on complete confidence. Any risk that a lawyer might be required to produce information relating to the representation of his or her client as part of an investigation would preclude a meaningful and effective dialogue between lawyer and client.

Such dialogue is essential if lawyers are to provide proper advice or representation to their clients. Lawyers' ability to uphold the interests of their clients, of justice

4 *Ventouris v Mountain* [1991] 1 WLR 607.

and, thereby, the best interests of society, would be fatally compromised if this trust and transfer of confidential information were to be undermined.

If, as a result of this confidential dialogue, a lawyer becomes aware that he or she may in fact be assisting his or her client in the commission of fraud or a criminal offence (eg, money laundering), and that lawyer continues to act for his or her client, then the lawyer may also be committing a criminal offence. Lawyers who commit criminal offences can, and should, be prosecuted accordingly, and should also be subject to professional discipline.

As also mentioned above, law enforcement agencies can challenge the client's evidentiary privileges by seeking a court order in specific cases. Yet it is worth noting that even in these circumstances, the broader duty of confidentiality cannot simply be 'given away' by the lawyer.

In circumstances where law enforcement agencies reasonably believe that a lawyer is actively assisting a client in the commission of an offence, then that lawyer should be prosecuted under existing legislation. This is not the same as authorities undertaking wide-ranging requests for documentation from lawyers in an attempt to uncover potential wrongdoing (a so-called 'fishing expedition').

Enforcement agencies should also consider reporting a lawyer they reasonably believe is engaging in inappropriate behaviour to the relevant regulator in that jurisdiction. This would allow the regulator to address that lawyer's potential breach of their professional obligations. In the IBA's experience, few enforcement agencies seem willing to engage with regulators in this way, something that is also given insufficient weight in the comments found in Annex A.

The lawyer's obligation

There is a general obligation placed on lawyers to keep information relating to the representation of their clients confidential, unless clearly mandated by exception, including a court order, law or the express and informed consent of the client to do otherwise. Depending on the jurisdiction, this may be a contractual, ethical and/or statutory obligation.

Most jurisdictions respect and protect such confidentiality obligations. For example, some exempt lawyers from the requirement to testify before the courts and other public authorities regarding the information they have gathered over the course of their relationship with their clients. Others afford lawyer-client communications special protection, for example, through the evidentiary privilege procedures described above.

The elements of a lawyer's obligation to maintain client confidentiality can be broken down as follows:

Duration

Generally speaking, the obligation of lawyer-client confidentiality begins when a prospective or ongoing client communicates with a lawyer for the purposes of legal advice. The lawyer must be acting in a professional capacity, and the client must intend for the information to remain private and act accordingly. This means, for instance, a casual conversation in a crowded setting between an individual and an acquaintance who happened to be a lawyer would probably not be covered. Once established though, confidentiality extends beyond the termination of this formal lawyer-client relationship and does not tend to expire.

Persons covered

The obligation of lawyer-client confidentiality extends beyond those lawyers handling the client's case directly. It typically applies to all lawyers and employees of that lawyer/law firm, including assistants, paralegals and interns. In some circumstances, it may also apply to assistants from outside the firm, such as experts, and third-party technology providers and so on. Lawyers are under an obligation to ensure that those who work in the same law firm, in whatever capacity, uphold the obligation of confidentiality and professional secrecy. Relevant communications made between in-house lawyers and other employees of an organisation are also protected in most jurisdictions.[5]

Extent of information

Lawyer-client confidentiality often applies to information related to representing or advising a client, regardless of whether the information came from the client or another source. It also applies in all situations where there is a lawyer-client relationship, not just in situations whereby the lawyer provides specific legal advice or conducts litigation (see LPP, below).

LPP

As identified earlier in this document, LPP (a common law jurisdiction principle belonging to the client) protects written (including electronic) or oral lawyer-client communications, or, in certain instances, the lawyer's communication with third parties, from disclosure in a dispute through 'legal advice privilege' or 'litigation privilege'.

5 In the US, lawyers are also obligated to ensure that those they contract or associate with outside the firm comport with their professional responsibilities: see, eg, the American Bar Association's Model Rule of Professional Conduct 5.3 and its state versions. However, in England and Wales, such communications are only covered if they take place within a relevant legal context.

Legal advice privilege protects communications, documents and information between a lawyer and client made for the sole or dominant purposes (depending on the jurisdiction) of giving or receiving legal advice.

Litigation privilege protects:

- communications between a lawyer/client and a third party; and
- documents created by, or on behalf of, the lawyer/client, when litigation is contemplated or commenced, and the dominant purpose of the communication or document is for that litigation.

In some jurisdictions, the client may claim that legal advice or litigation privilege would apply to certain communications sought by another party to a dispute, although privilege would not apply if the client is unable to justify his or her claim, typically following an application to the court.

4. Differences between common law and civil law jurisdictions

Scope

In civil law jurisdictions, the facts on which legal conclusions are based may be covered by professional secrecy, and consequently, may not be disclosed. Additionally, in some civil and common law countries (including Canada and the US), the name of the client and the fact of legal representation of that client are also protected by confidentiality and cannot be disclosed. For examples of how this works in practice, please see Annex B.

However, these limitations on disclosing the name of a client or the fact of legal representation may not apply in all common law jurisdictions, and disclosure of such information would therefore be required (unless such disclosure could of itself imply the existence of other information that would be subject to confidentiality). In some common law countries, lawyer-client confidentiality and LPP can apply to facts discussed in a 'continuum of communication' between the client and lawyer not relating to a specific legal dispute at that time.

On this basis, the scope of professional secrecy in civil law countries can appear to be more extensive than that of lawyer-client privilege and LPP in common law countries. However, this does not mean that clients in civil law countries have *greater rights* than those in common law countries. What it does mean is that the disclosure obligations placed on lawyers by the law differ between jurisdictions, and that this reality needs to be borne in mind by the authorities when engaging with these issues.

Waiver

In common law jurisdictions, the client can consent to the disclosure of information subject to confidentiality or waive LPP. In the case of the former, some jurisdictions require the lawyer to obtain informed consent from the client.

However, professional secrecy cannot always be waived by the client in civil law countries. In some civil law jurisdictions, such as France, a lawyer is unable to disclose information and documents provided directly or indirectly by the client, even if the client requests the lawyer to do so. In other civil law jurisdictions, even if the client chooses to waive professional secrecy, the lawyer ultimately decides whether or not to disclose such information, taking into account the client's best interests. The client, however, can disclose his or her information and documents if the client so chooses.

5. Exceptions

There are a number of exceptions to the client's right to, and the general obligation of lawyers to uphold, lawyer-client confidentiality. Some are full exceptions, while others are only partial. These exceptions – some permissive, some mandatory – apply on a jurisdiction-by-jurisdiction basis, and are not universal. They include the following:

Unlawful conduct

The protection provided by lawyer-client confidentiality does not apply when a lawyer is knowingly assisting, aiding or abetting the unlawful conduct of his or her clients. In such circumstances, the lawyer would be committing a criminal offence in most jurisdictions. The law should seek to hold individual lawyers who have become criminals to account without compromising the broader principle of confidentiality: prosecution authorities should take action accordingly, under existing legislation, and should also report the lawyer to the relevant regulator. The regulator can then consider appropriate action against the lawyer for breach of his or her professional obligations.

Resulting crimes

Some jurisdictions also permit or require a lawyer to reveal information relating to the representation of his or her client (that would otherwise be subject to lawyer-client confidentiality) to the extent that the lawyer reasonably believes it necessary, to prevent:

- death or substantial bodily harm; or
- the client from committing a crime, or fraud (including, in the US, one that is reasonably certain to result in substantial injury to the financial or property interests of another), in furtherance of which the client has used, or is using, the lawyer's services, whether or not the lawyer is aware of the client's criminal intentions.

Self-defence

Some jurisdictions allow the lawyer's obligation of lawyer-client confidentiality to be waived for self-defence purposes in judicial proceedings, such as when a lawyer needs to defend him or herself in civil or criminal proceedings relating to the lawyer's representation of a client.

Terrorism, money laundering and organised crime

While lawyers cannot assist in unlawful conduct, in some jurisdictions, legislation and/or rules of professional conduct have imposed special obligations upon lawyers to assist in the prevention of specific crimes. In these countries, lawyers are now required to report suspicious transactions to the relevant authorities (eg, law enforcement or the bar association).

In France, for example, as a consequence of the Prevention of Money Laundering and Terrorism Act No 2004-130 of 11 February 2004, adopted further to Directive 2001/97/EC, lawyers, as well as notaries and other independent legal professionals, have an obligation to report suspicious transactions. This obligation was incorporated into the Monetary and Financial Code (see Articles L561-15 and L561-17), according to which lawyers must report sums entered in their books or transactions involving sums they know, suspect or have good reason to suspect derive from an offence punishable by a penalty involving the deprivation of liberty of more than one year or are related to the financing of terrorism.[6] It is also worth noting that under European money laundering legislation, the law specifically forbids lawyers from telling or tipping off their clients about the breach of confidence to the relevant authorities.

6 The relevant procedure requires the lawyer to report the identity of the client and the transaction in question to the President of the Bar Association (the 'Bâtonnier'), who decides whether or not it is necessary to inform the public authorities, ie, Traitement du renseignement et action contre les circuits financiers clandestins ('TRACFIN'), a specialised department of the French Ministry of the Economy and Finance. This procedure is set to change in 2021 to meet heightened anti-money laundering standards, such that the verification of the origin of funds, as well as the legality of the purpose, will be carried out by Caisse des Règlements Pécuniaires des Avocats ('CARPA'), an intra-professional organisation. Unlike in other countries, lawyers in France are not permitted to hold funds on behalf of third parties, with some exceptions. Such funds are deposited into a bank account opened in the name of CARPA, which acts as an escrow account. The books of CARPA are kept by the Bar.

The Financial Action Task Force (FATF), the global watchdog for combatting money laundering and terrorism financing, has published recommendations containing a framework to assist countries in drafting legislation to combat such crimes. However, the scope of national legislation based on the FATF recommendations, and application of this exemption to lawyer-client confidentiality, is inconsistent. Although FATF explicitly recognises that the requirement for lawyers to report their clients' suspicious transactions does not apply where the information is subject to 'privilege', this type of legislation has led to further troubling exceptions to the broader protection given by lawyer-client confidentiality.

In some cases, this type of legislation can endanger a lawyer's independence and role in upholding the rule of law by, in effect, making him or her an arm of the state. As a result, while law societies and bar associations obviously support efforts to tackle terrorism, money laundering and organised crime, many are opposed to the overly extensive scope of this type of legislation.

As outlined above, exceptions to the LPP principle apply in cases of wrongdoing, including the furtherance of terrorism and money laundering. Fundamentally, lawyers may not use privilege to facilitate the commission of an offence, or to shield themselves from accountability.

6. How we strike a balance[7]

Dishonest lawyers or clients may intentionally misuse the confidentiality provided to communications between clients and lawyers to further their criminal goals. In other situations, some lawyers may be willing to turn a 'blind eye' to their clients' suspicious activities, allowing clients to take advantage of the protection provided by lawyer-client confidentiality.

IBA Principle 4, and the description of specific exemptions in Section 5 above, show how the balance should be struck – by *disapplying* the concept of lawyer-client confidentiality in appropriate, but narrow circumstances. This balance, which is enshrined in legislation and/or the professional conduct rules of different jurisdictions, protects society, while maintaining the critical principle of lawyer-client confidentiality.

Criminal and civil legislative frameworks (including those of the relevant court system and the relevant legal profession regulatory bodies) exist to address and take action against intentional violations by lawyers of the principles of

7 That lawyer-client confidentiality currently exists as a balanced principle incorporating appropriate safeguards was stated in a leading English case, *R v Derby Magistrates Court*, ex p B [1995] 4 All ER 526, where the House of Lords said that 'if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits'.

professional secrecy, lawyer-client privilege and LPP. The IBA fully supports the investigation and prosecution of those lawyers who intentionally or knowingly misuse or abuse privilege for their clients' (or their own) benefit. It also supports action directed towards lawyers who turn a 'blind eye' towards clients' misdeeds.

It is possible that lawyers may unintentionally misuse confidentiality. For example, a criminal client may dupe his or her lawyer by developing a persuasive 'cover story' that a reasonable lawyer, doing appropriate 'due diligence', would not discover. A junior lawyer, tasked with analysing potentially thousands of emails, may inadvertently file materials as 'privileged', when in fact the communications do not qualify under that exemption. In these situations, criminal prosecution is unlikely to be appropriate, but the prosecution authorities have the right (in the majority of jurisdictions) to apply to the court for the matter to be considered. This 'safety valve' already exists in most countries.

Although safety valves and procedural mechanisms exist, the IBA believes that these current mechanisms are frequently ignored, and the need for proportionality in any further action to tackle cases of abuse of lawyer-client confidentiality is neither being properly recognised nor properly targeted. Equally, the significant dangers involved in permitting incursions into the principle of confidentiality are being overlooked.

There is a serious risk to lawyer-client confidentiality if law enforcement or government agencies disregard the protection granted by law covering lawyer-client confidentiality, and there is no viable recourse to justice to prevent this abuse. For example, in some countries, despite the protection of lawyer-client confidentiality on paper, there may be searches by investigation authorities of lawyers' premises, followed by the seizure of all documents, regardless of those legal protections. The penalties for such breaches of confidentiality are often so insubstantial that there is no incentive for the investigation authorities to discontinue such practices. There is similarly pressure on clients to disclose the secrets of their cases in order to gain access to state-funded legal aid.

The IBA recognises the importance of enforcing criminal provisions and believes that lawyers who violate criminal laws should be held responsible, even if the violations occur in the course of a lawyer-client relationship. However, the IBA also believes that international bodies focusing on lawyer-client confidentiality must also consider the instances where state prosecution authorities, in inappropriate circumstances, have overridden the lawyer-client confidentiality principle (often in a manner contrary to the law in that state) to the prejudice of the rule of law.

7. The way forward: more education and training on the misuse of professional secrecy, lawyer-client privilege or LPP, and a different approach by law enforcement

The IBA believes that current attempts by certain governments and international organisations to restrict lawyer-client confidentiality are misguided. This is why efforts to ensure the principle is properly applied and understood are critical, as is the legitimate and proportionate use of the existing exceptions to lawyer-client confidentiality, as encapsulated in IBA Principle 4. Access to confidential legal advice advances the administration of justice and the rule of law.

What can Bars do?

The issues associated with lawyer-client confidentiality, lawyer-client privilege and LPP are complex. There is bound to be a benefit to providing better and regular training on these issues, both during a lawyer's initial training, and while practising, in order to remind lawyers of the clear boundaries, and to reduce the risk of their carrying out unintentional acts.

Many bar associations and law societies have long provided, and continue to provide, such training for their members on lawyers' obligations under lawyer-client confidentiality as part of their ongoing professional ethics awareness courses, in addition to alerting lawyers to the risks of having their services used to facilitate money laundering and other illegal activity.

For those jurisdictions where continuing legal education or continuing professional development is a requirement, we recommend that regulators, bar associations and law societies devote enhanced attention to the responsibilities and rules associated with lawyers' obligations under lawyer-client confidentiality, expand training regimes for newly admitted lawyers and provide refresher training for existing lawyers.[8]

What should law enforcement do?

We do not believe that law enforcement or any other agencies should be focused on taking away or further diminishing the rights around lawyer-client confidentiality, particularly given the alternative actions law enforcement can take when they are investigating criminal activity, including:

8 See Annex B for an example of the type of training that could be provided.

- investigating and prosecuting on the basis of evidence that is not subject to lawyer-client confidentiality, for example, information obtained from banks or government registries about the ownership of companies;
- prosecuting lawyers whom they believe are clearly committing criminal offences, either directly or by aiding and abetting clients, and on the basis of evidence, not mere speculation;
- using the judicial system where they reasonably believe a lawyer is wrongly claiming information is protected by lawyer-client confidentiality, as has been explained earlier in this document;
- training law enforcement operatives on the content covered by this document, including the solutions that are currently available as listed here; and
- engaging in a dialogue with the IBA so that the contents of this document can be explained and discussed.

Insufficient use is made by law enforcement of the fact that the protection provided by lawyer-client confidentiality does not apply when lawyers are knowingly assisting, aiding or abetting unlawful conduct by their clients.

There have been several high-profile cases recently, such as *Versini-Campinchi and Crasnianski v France* (Application No 49176/11 of 16 June 2016) and *Lindstrand Partners Advokatbyrå AB v Sweden* (Application No 18700/09 of 20 December 2016) that have examined whether the right to lawyer-client confidentiality or privilege can be upheld.[9] With the rigour of the judicial system applied to such cases, this ought to provide law enforcement with access in appropriate circumstances, while at the same time protecting the rights of the individual.

Governments and other authorities need to recognise that civil society has multiple important interests that need to be balanced. These interests include a societal interest in having laws enforced, and a societal interest in having a robust rule of law system that includes the principle of lawyer-client confidentiality, but does not place the lawyer above the law. Society places trust in the law as a network of rules under which we operate, and which entail sanctions if breached. While greater enforcement of this balance on either side may, on occasion, be called for, it is not an appropriate resolution simply to call for the elimination or severe restriction of one of these important interests in an attempt to shore up the other.

Ultimately, law enforcement must investigate and engage in bringing criminals to justice and do so on the basis of evidence properly obtained and processed. This will include the prosecution of any lawyer who is reasonably believed to be involved in criminal activity, or inappropriately relying on privilege.

9 See Annex C for details of these two cases, as well as the FATF's 2013 report into the vulnerabilities of the legal profession with regards to money laundering and terrorist financing, which lists successful prosecutions of lawyers for knowing violations of the confidentiality principle.

Conclusion

Society wants and expects its laws to be enforced. But in doing so, it is important to remember the need to preserve the principle of lawyer-client confidentiality, which is necessary for lawyers to properly represent their clients, and for the proper administration of justice. Law enforcement should focus on solutions which involve:

- the responsible and proportionate use of *existing* exceptions to lawyer-client confidentiality; and
- collaborating with lawyers and bars to seek to prevent any *unlawful* activity by lawyers.

Diluting the lawyer-client confidentiality principle is disproportionate, misguided and damaging, given the interests that need to be balanced, and the other solutions that are available.

It is critical to remember that lawyer-client confidentiality *does not apply* when lawyers are intentionally or knowingly assisting, aiding or abetting unlawful conduct by their clients. Appropriate action should be taken by the authorities where such actions are reasonably suspected.

The global legal community cannot ignore recent attacks by several international organisations: there are serious risks involved if the state has too great a power to invade or erode the principle of lawyer-client confidentiality. There is nothing to stop a state that overrides confidentiality in the name of 'legitimate' concerns then going on to use those powers for oppressive or unconstitutional purposes. History warns us of the extreme damage inflicted on society when these protections and barriers to state power are removed.

Annex A

Comments adverse to the existence of lawyer-client confidentiality and/or legal privilege

Report of the UN High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda – Financial Integrity for Sustainable Development (2021)

'Very few types of illicit financial flows are conducted purely by criminals. Most of them are enabled by a variety of professionals, including lawyers, accountants and representatives of financial institutions. Such enablers are found in a broad swathe of jurisdictions, from small developing countries to countries hosting offshore financial centres.'

'Lawyers and law firms often abuse their legal professional privilege, asserting that routine tasks, such as creating a corporation, that may be performed by non-lawyers are protected from disclosure on grounds of privilege.'

'Self-regulation has proved to be insufficient and unreliable. This is a lesson that Governments learned about banks and financial institutions over the centuries, which they were forced to relearn recently, in the wake of the 2008 global financial crisis. Over the past few years, the inadequacies of self-regulation have also been laid bare by a number of high-profile leaks and investigations by the media and civil society. The world must demonstrate that it has heeded this lesson, by addressing gaps in coverage of enablers of illicit financial flows, as well as ineffective enforcement, and abuse of legal privilege.'

'In some jurisdictions, national bar associations have a history of developing their own standards of conduct, such as those created by the American Bar Association. Law associations, in particular, assert that they must have self-regulation rather than governmental regulation to safeguard the independence of the advice they provide to their clients. However, lawyers in multiple jurisdictions have used their legal privilege to assist criminals in money-laundering and other criminal conduct.'

'While many professions have codes of conduct and other standards for membership in professional bodies, these codes are divorced from the demands of sustainable finance and the public interest. Governments should not complain about the behaviour of these enablers if they have not taken responsibility for setting the standards for appropriate conduct. It is too easy for enablers, especially those in haven markets and countries, to ask too few questions about the origin of resources. Their activities become additionally worrisome when they help people engage in tax evasion and aggressive tax planning that blurs the line between the

legal and illegal, doing so often to garner their share of the proceeds through fees charged to their clients.'

'Many governments, particularly in haven countries, refrain from setting standards for appropriate conduct of enablers, despite the social costs.'

'Recommendation 6A: Governments should develop and agree global standards/ guidelines for financial, legal, accounting and other relevant professionals, with input of the international community.'

'Recommendation 6B: Governments should adapt global standards for professionals into appropriate national regulation and supervision frameworks.'

Part 3: The Way Forward: Building a Better Future Together: Enablers (pp 27–28), February 2021

OECD Global Anti-Corruption & Integrity Forum – Ending the Shell Game: Cracking Down On the Professionals Who Enable Tax and White Collar Crimes (2021)

'White collar crimes like tax evasion, bribery, and corruption are often concealed through complex legal structures and financial transactions facilitated by lawyers, accountants, financial institutions and other "professional enablers" of such crimes.'

'Over the last decades, the world has witnessed increasingly sophisticated financial crimes being perpetrated across borders – and the public interest in addressing such issues has also grown, as has been evidenced in the media through widely publicised leaks such as the Panama and Paradise Papers (ICIJ, 2020[1]). These crimes are often facilitated by lawyers, accountants, financial institutions and other professionals who help engineer the legal and financial structures seen in complex tax evasion and financial crimes.'

Opening Summary and Executive Summary (pp 2 and 7), February 2021

OECD Directorate for Financial and Enterprise Affairs – Competition Committee Working Party No 3 on Co-operation and Enforcement (2019)

'Effective enforcement requires that all relevant information be requested, seized and discovered, and that investigations are not held up by legal privilege claims that may be inaccurate or abusive. The discussion at the roundtable showed that the procedures to protect legal privilege can be burdensome and costly, and the assessment of legal privilege claims may delay enforcement. Further, this discussion pointed out the need of effective independent review of legal privilege claims to prevent abusive claims of such principle.'

Executive Summary of the roundtable on the treatment of legally privileged information in competition proceedings, October 2019

UNODC Global Expert Group meeting on Corruption Involving Vast Quantities of Assets (2019)

'RECOMMENDATION 15: International standard setters, law-makers and bar associations should remove existing uncertainties around the interpretation of legal privilege or professional secrecy by clarifying which activities are and which activities are not covered by these protections in their jurisdiction.

RECOMMENDATION 16: To prevent the facilitation of corrupt activities, legal privilege or professional secrecy should protect only activities that are specific to the legal profession, such as ascertaining the legal position of a client, providing legal advice, or representing a client in legal proceedings. These protections should not extend to activities performed by a legal professional that are purely financial or administrative in nature, such as handling client funds, acting as a nominee director or shareholder on behalf of a client, or acting as a formation agent of legal persons.

RECOMMENDATION 17: Legal professionals should be required to conduct thorough due diligence on their clients, especially high-risk clients, which should always include maintaining up-to-date beneficial ownership information on legal entities. In the context of investigations, legal professionals should cooperate with law enforcement, whenever a disclosure requirement for beneficial ownership information exists and make such information readily available to law enforcement. Reporting obligations should be considered when lawyers have reasonable grounds to believe that the conduct of their client is or may become illegal.'

Oslo Statement on Corruption involving Vast Quantities of Assets, June 2019

FATF Guidance: Guidance for a risk-based approach for legal professionals (2019)

'Criminals may misperceive that legal professional privilege and professional secrecy will delay, obstruct or prevent investigation or prosecution by authorities if they utilise the services of a legal professional. They may also seek out legal professionals (over other non-legal professions) to perform services with the specific criminal intent of concealing their activities and identity from authorities through professional privilege/secrecy protections.'

Guidance for a risk-based approach for legal professionals (p 23), June 2019

FATF Guidance: Transparency and beneficial ownership (2014)

'Investigators have found that a frequent obstacle in accessing information about corporate vehicles is the use of attorney-client privilege. The recent FATF study on Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals also

found that legal professional privilege and legal professional secrecy could impede and delay the criminal investigation'

Transparency and beneficial ownership (p 38), October 2014

World Bank Report: The Puppet Masters – How the corrupt use legal structures to hide stolen assets and what to do about it (2011)

'When investigators seek to access information held by attorneys regarding the establishment and operation of a corporate vehicle by one or more of their clients, the attorneys frequently seek to justify their refusal to divulge such information by invoking attorney-client privilege (or legal professional privilege). Investigators should guard against the unjustified use of this privilege.'

Attorneys and claims of attorney-client privilege (p 6)

'Invariably, almost all of the investigators interviewed for this study mentioned that one of the obstacles to obtaining information from TCSPs was attorney-client privilege (legal professional privilege). Other investigators reported that, in cases in which the privilege is invoked to frustrate law enforcement, the investigative trail often stops.'

Attorney-client privilege (p 94)

'Jurisdictions should clarify what is and what is not covered by attorney-client privilege. At least, the privilege should cover no more than the services provided as an advocate and not extend to financial services or fiduciary advice.'

Conclusions and recommendations (p 102)

'The use of attorney-client privilege and lack of reporting requirements on monies transferred through attorney-client trust accounts were frequently cited as roadblocks or even insurmountable walls in an investigation.'

Obstacles frequently encountered (p 154)

Annex B

France

Article 2.2 of the National Internal Regulations (Règlement Intérieur National de la profession or RIN), which sets out the ethical rules for all lawyers practicing in France, explicitly states that the names of clients are covered by professional secrecy.

In addition, the principle of professional secrecy is considered a rule of public policy: it is general, absolute and unlimited in time (National Internal Regulations, Article 2.1). The violation of professional secrecy is punishable by one year of imprisonment and a fine of €15,000 (Criminal code, Article 226-13).

Germany

Confidentiality is regulated in Section 43a (2) of the Federal Lawyers Act (Bundesrechtsanwaltsordnung or BRAO), which sets out that any and all information received by the lawyer in the course of his or her practice is subject to confidentiality. Exemptions are made for information: (1) publicly known; or (2) lacking of any importance. Consequently, the lawyer has the right to claim privilege in any kind of procedure, in particular in criminal proceedings (Section 53 (1) 2 and 3 of the Code of Criminal Procedure (Strafprozessordnung or StPO)).

Austria

Pursuant to section 9 paragraph 2 of the Lawyers' Act (Rechtsanwaltsordnung) a lawyer is bound by a statutory duty of confidentiality. This duty covers all matters entrusted to the lawyer and all facts that otherwise become known to him or her in the lawyer's professional capacity, the confidentiality of which is in the interest of the client. Therefore, the fact that a lawyer-client relationship exists or has been terminated is confidential. Under Austrian case law, this duty extends even to the fact that a prospective client has contacted the lawyer to seek representation.

Section 47 of the Guidelines for the Exercise of the Legal Profession (Richtlinien für die Ausübung des Rechtsanwaltsberufes or RL-BA) paragraph 3 No 5 declares advertising 'naming clients without their consent' to be prohibited.

Any violation of a lawyer's duty of confidentiality is subject to disciplinary sanctions, which include reprimand and monetary fines. In such circumstances, the damaged client could also pursue compensation in civil proceedings.

Annex C

Versini-Campinchi and Crasnianski v France (Application No 49176/11 of 16 June 2016)

Monitoring of a law firm's telephone lines.

Circumstances

The applicants were a lawyer and his junior colleague. At the time of the events, during the bovine spongiform encephalopathy (BSE or 'mad cow disease') crisis, they were representing the interests of the managing director of a company suspected of breaching the embargo on beef imports from the United Kingdom. The case concerned the use as evidence in disciplinary proceedings against the second applicant of the transcript of a telephone conversation she had with her client, which showed that the applicant had disclosed information covered by legal professional privilege.

Ruling

The court held that there had been no violation of Article 8 of the Convention in respect of the second applicant, finding that the interference in question had not been disproportionate to the legitimate aim pursued – namely the prevention of disorder – and could be regarded as necessary in a democratic society. It considered in particular that, as the transcription of the conversation between the applicant and her client had been based on the fact that the contents could give rise to the presumption that the applicant had herself committed an offence, and the domestic courts had satisfied themselves that the transcription did not infringe her client's rights of defence, the fact that the former was the latter's lawyer did not suffice to constitute a violation of Article 8 of the Convention in the applicant's regard.

Lindstrand Partners Advokatbyrå AB v Sweden (Application No 18700/09 of 20 December 2016)

Searches and seizures carried out at a lawyer's offices or home.

Circumstances

This case concerned a search undertaken on the premises of the applicant law firm by the Tax Agency in the course of audits that were being carried out on two other companies. The Tax Agency suspected that significant amounts of money had been shielded from Swedish taxation through irregular transactions between

a client company of the applicant and a Swiss company. The applicant complained in particular that the firm's privacy rights had been infringed by the fact that the Tax Agency had been given access to search its premises and to seize data drives allegedly belonging to the firm.

Ruling

The court held that there had been no violation of Article 8 of the Convention, finding that the search of the applicant's offices had not been disproportionate to the legitimate aim pursued, namely the economic wellbeing of the country. It noted in particular that none of the material seized or copied by the Tax Agency had been found to contain information subject to professional secrecy. The court held, however, that there had been a violation of Article 13 (right to an effective remedy) of the Convention in conjunction with Article 8, considering that the applicant had been denied legal standing in the proceedings concerning the authorisation to search its premises and thus had not had access to any remedy for the examination of its objections to the search.

FATF Report: Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals (2013)

See Annex 5 (pp 96–107) for details of successful prosecutions of lawyers:

www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf

FATF Training Guidance: A Risk-Based Approach: Legal Professionals (2019)

www.fatf-gafi.org/media/fatf/Risk-Based-Approach-Legal-Professionals.pdf

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