

## **LAWYER CONFIDENTIALITY**

**ABSTRACT:** The role of the lawyer is characterized by a focus on counseling, advocacy and conciliation. A lawyer advises a client on legal issues, considers the possibilities of resolving the dispute amicably and certainly advocates in a legal proceedings if this occurs. In order the previously mentioned activities between the client and lawyer to be achieved, it is necessary to establish a mutual connection. Talking about a lawyer's capability of fulfilling the role of a counsel and client's representative, he/she must be independent in his/her work, especially having professional independence in relation to courts, state bodies, but also in relation to his/her own interests. It is this independence that represents a significant foundation in gaining trust in the client-lawyer relationship. Achieving trust is not easy, although it is a priori expected. In order to gain trust and to be able to access an adequate representation in a legal proceedings, the lawyer's obligation is to keep the lawyer's secret and not to disclose confidential information. A lawyer's secret can be considered from several aspects, from the moral, contractual, ethical... In this research, certain important theoretical frameworks will be considered, with the focus on presenting and reviewing the international, primarily European legislative regulation of the issue of legal secrecy. This paper will certainly include the aspect of domestic legislation too. In addition to the above, some important positions of the European Court of Human Rights will be pointed out. Before presenting the conclusions emerged from this research, a special attention will be paid to the circumstances when a lawyer can reveal a secret.

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\* LLD., Associate Professor, The Faculty of Law for Commerce and Judiciary in Novi Sad, The University of Business Academy in Novi Sad, Serbia, e-mail: nbingulac@pravni-fakultet.info

\*\* LLB., Lawyer and doctoral student, The Faculty of Law for Commerce and Judiciary in Novi Sad, The University of Business Academy in Novi Sad, Serbia, e-mail: miljenovicdragan@gmail.com

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## 1. Introduction

Trust!? You killed, you stole, you just defended yourself, you thought it was your right, you did something for which you are convicted and threatened with imprisonment or a high fine. A person assigned to you on duty, or found online on the first page of a search engine or possibly on a recommendation, called a lawyer, you have to trust... to give him your trust. To tell him the truth that will incriminate you morally or legally. Is it a straw of salvation or is it some form of dogma?

Trust is a two-way relationship that is gained over time, essentially with close people or people from a relatively wider circle of friends, business associates, neighbors... With greater social distance, honesty and transparency play a dominant role in building trust that is probably easier to collapse than to build.

Is it possible to establish trust in the client-lawyer relationship on the basis of "one" call to the law office or on the basis of "one" meeting with an "instant" lawyer?

Based on the experiences from the penalty practice, we can note various problems. Thus, it is not uncommon for a convict to be on the execution of a security measure of obligatory treatment of drug addicts, and to deny any history of drug abuse to educators after entering the execution of a prison sentence. Although this seems illogical or untrue, it is not uncommon, nor uncommon, for convicts to report that their lawyers teach them to emphasize drug addiction in court. Only such a statement, according to the statements of the convicts, usually carries a more favorable attitude of the court and a milder punishment (Dragojlović & Bingulac, 2019, p. 298). Is this a modality of defense with a certain degree of damage towards the perpetrator of the crime, or does it enter the zone of abuse of trust, or is it just pure Machiavellianism.

If an example is also given from the practice in which the lawyer is accused of keeping for himself the amount of close to 1.4 million dinars, which was paid to him by the insurance company for the parties whose interests he represented before the court. More precisely, there is a suspicion that the lawyer abused the authority given to him by three women and misappropriated the money, claiming that it was not paid (Radio televizija Vojvodine, 2015).

In order for a lawyer to be able to fulfill the role of counsel and client's representative, he must be independent in his work, especially he must have

professional independence in relation to courts, state bodies, but also in relation to his own interests. It is this independence that represents a significant foundation in gaining trust in the client-lawyer relationship.

## 2. International principles relating to lawyer confidentiality

Modern practice of law is based on confidentiality, non-existence of conflict of interest and independence. Council of Europe regarding the development of guidelines aimed at improving the efficiency and effectiveness of national legal aid schemes in the areas of civil and administrative law. For the 2021 edition of the EU Justice Scoreboard, the Committee collaborated with the European Commission by gathering data on the level of court fees, as well as on financial eligibility criteria for legal aid in civil and commercial law across EU Member States, based on the mentioned three principles (Cuomo, 2020, p. 25).

Most legal systems share the common understanding that if the right to protection of confidentiality is denied, a criminal or misdemeanor suspect may be denied access to legal advice and justice. This denial can also be disabling communication with a lawyer or disabling confidential communication with a lawyer or disclosing his communication with a lawyer (Council of Bars and Law Societies of Europe, 2020, p. 10).

Professional secrecy and legal professional privilege are thus seen as instruments by which access to justice and the maintenance of the rule of law can be achieved. Indeed, the ECtHR has repeatedly linked the respect for legal professional privilege and professional secrecy to the observance of Articles 6 and 8 of the ECHR. First, the Court considered that “an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6 para. 3 (c) of the Convention” (Council of Bars and Law Societies of Europe, 2020, p. 10). Cases are known in ECtHR practice are: *S. v. Switzerland* (12629/87), 1991, §48, also *Domenichini v. Italy* (15943/90), 1996, §39, also *Öcalan v. Turkey* (46221/99), 2005, §1333, also *Moiseyev v. Russia* (62936/00), 2008, §209 and *ECtHR, Campbell v. the United Kingdom* (13590/88), 1992, §§ 44-48. Furthermore, the ECtHR in case *Michaud v. France* (12323/11), 2012, §117-118 stated that “the right of everyone to a fair trial” is dependent upon the “relationship of trust between *the lawyer and the client*”.

The ECtHR has repeatedly emphasized that undermining professional secrecy or legal professional privilege may violate Article 8, which protects

the right to respect for private and family life, by indicating the need to “provide enhanced protection through exchanges between lawyers and their clients”(Guide on Article 8 of the European Convention on Human Rights, 2020, p. 117).

The necessity of having a confidential conversation between the client and the lawyer can be seen in “the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet they cannot carry out this essential task if they are unable to guarantee to those they are defending that their exchanges will remain confidential” (Council of Bars and Law Societies of Europe, 2020, p. 10).

In Article 4 of the Right of Access to a Lawyer Directive (Directive 2013/48/EU) provides: “Member States shall respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive. Such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law.”

It is important to mention the Council of Europe Recommendation (NoR200021) of 25 October 2000. concerning the freedom of exercise of the profession of lawyer in Europe which provides that “All measures should be taken to ensure the respect of confidentiality of the lawyer-client relationship. Exceptions to this principle should be allowed only if compatible with the Rule of Law.” (Principle I, paragraph 6) and that “Professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions” (Principle III, paragraph 2).

Having in mind everything that has been pointed out so far, the question arises here, in what way does a lawyer physically protect confidential data.

Legislation should not prevent lawyers from adequately protecting the confidentiality of their communications with clients and should not give state agencies or law enforcement authorities privileged access to encrypted data. Encryption method may be through some encryption software (Council of Bars and Law Societies of Europe, 2020, p. 20). Lawyers keep sensitive information (from business secrets to details of private life) that their clients have provided in confidence and may not disclose it. This makes lawyers particularly vulnerable to illegal attacks e.g. private hackers and requires appropriate cryptographic protection if the data is in electronic form. Decryption may be only permissible if it is legally defined and any decision allowing the decryption of protected lawyer-client communications must be granted by an independent judge, on a case-by-case basis, and following due process

(Coreprinciples of the legal profession, 2020, p. 20). As a reminder, the right to data protection is protected by Article 8 of the ECHR, Article 8 of the Charter of Fundamental Rights in the EU, as well as the 1981 Data Protection Convention and the current 2008 Framework Decision on Data Protection.

In circumstances where it is necessary to issue an order to intercept the lawyer-client communication, supervision is required at all stages of the supervision procedure. Also, such a court decision must be made on a case-by-case basis. Any lawfully intercepted material should be used solely for the purpose for which the authorisation of the oversight body was granted.

Any intercepted material obtained without judicial authorisation should be ruled inadmissible in a court of law.

In order to avoid the risk that the state may make use of lawfully intercepted material in shaping and informing its tactics and approach to legal proceedings whilst keeping the defence in ignorance of that material (and, hence, unable to expose it to judicial scrutiny) material which has been lawfully obtained should both be disclosed to the lawyers acting for the party in respect of whose confidential or privileged data or communications surveillance has taken place and be admissible as evidence in court (Coreprinciples of the legal profession, 2020, p. 25).

Confidentiality rules enable clients to obtain the benefit of legal advice without having to bear the cost of disclosing information they would prefer to remain secret. The lawyers advice is only valuable if it remains secret, because public disclosure by the lawyers would increase, not decrease, the probability of an audit. And if an audit does occur, confidentiality is still valuable because it decreases the probability of a more severe sanction, which might be levied if the client's deliberate attempt to evade compliance were revealed. Confidentiality rules, therefore, increase the value of legal advice (Fischel, 1998, p. 5).

In Australia criminal law, lawyer confidentiality is called "client legal privilege" because the privilege belongs to the client, not the lawyer. A lawyer may only disclose privileged communications if clearly instructed to do so by their client. The proper administration of justice requires that clients are able to communicate freely and frankly with their lawyer, without fear of disclosing any information relevant to the legal advice they are seeking. It is well understood that, in the absence of the privilege, legal proceedings may be delayed or even miscarried as lawyers may not be able to properly represent their client, or bring relevant matters to the attention of the court (The Law Council of Australia, 2020).

### **3. Domestic principles relating to the confidentiality of lawyers**

Hvaing lawyer confidentiality in domestic legislation is one of the basic principles of advocacy. The lawyer keeps the its confidentiality until the person who entrusted him with the secret releases him from keeping it. A confidentiality is everything that a lawyer learns when performing legal aid, and that is entrusted to him as a client's lawyer. All deposits entrusted to a law firm have the same treatment.

In the domestic legal system, lawyer's confidentiality is primarily regulated in the Law on Advocacy, and then elaborated more broadly in the Code of Professional Ethics of Lawyers.

In the Law on Advocacy (2012) Article 20 stipulates that a lawyer is obliged, in accordance with the statute of the Bar Association and the Code, to keep it a professional secret and to ensure that the persons employed in his law office do so, everything that the client or his authorized representative has entrusted to him or what he learned or obtained in another case in which he provides legal assistance, in preparation, during and after the termination of representation. It is important to note that the obligation to maintain legal secrecy is not limited in time. The manner of keeping a lawyer's secret and acting in connection with a lawyer's secret are regulated by the statute of the Bar Association and the Code.

The Code of Professional Ethics for Lawyers (2020) defines legal secrecy in such a way that it represents everything that the client, or a person authorized by the client, has entrusted to a lawyer, or that the lawyer, in the case in which he represents, otherwise learned or obtained, in preparation, during and after the termination of representation. The obligation to maintain secrecy applies equally to: data, documents (files, objects, documents, electronic, audio or video, recordings and recordings) and deposits that are communicated, displayed or handed over to a lawyer in connection with representation, regardless of whether they are corrected and deposits are located in a law office, or are, by order or under the supervision of a lawyer, temporarily placed elsewhere; confidential information learned by the lawyer from the person whose representation he did not accept (the party), or from the opposing party, who, before initiating the procedure before the competent authority, addressed him for the purpose of settlement or mediation.

The lawyer keeps the secret by not disclosing or transmitting confidential data, and makes confidential documents inaccessible to third parties. The lawyer keeps the secret without a special request from the client, based on a conscientious assessment of all the circumstances that may lead to the conclusion

of what the client wants or what is in his interest to remain confidential. Well-known, publicly published or recorded in public books, the lawyer keeps secret if the client specifically requested it, or if the presentation or transmission of these facts may harm the reputation, honor, privacy or other interests of the client, his relatives or heirs.

In order to maintain secrecy, a lawyer should: to warn and personally oblige his associates, officials, trainees and all persons he engages during the representation, to keep legal secrecy and to the consequences of violating this obligation; to act with reasonable caution in the transmission of confidential content by mail, telephone, fax, electronic means, or in any other indirect way, and to minimize the possibility of the secret being revealed, either accidentally or by misuse of means of communication; to warn the client of this danger and of the risk of disclosing confidential information under these conditions in circumstances where he knows or has reasonable grounds to suspect that his conversations with the client are being listened to or eavesdropped on, especially in the police, prison or detention; to personally, or through a trusted trustee, supervise the making of transcripts, copies or recordings of confidential documents; to take care of the documents in an appropriate manner; and finally to warn the confidentiality of the content to the person to whom he is authorized to transmit such content.

Then, the obligation to maintain secrecy must also state what the code stipulates that it is not considered a violation of legal secrecy when a lawyer discloses information or makes available documents entrusted to him by a client or a person authorized by the client, to the extent necessary for achieving the purpose of representation.

Then, when a lawyer's secret is invoked before a state body, the lawyer himself assesses whether and which data and documents are the subject of the secret, explaining only the basis from Rule 14 of this Code. It is envisaged that it will be considered a violation of the principle of honesty when a lawyer, under the pretext of maintaining secrecy, refuses to disclose information that is not the subject of secrecy.

Finally, a lawyer who sends a confidential notice to a colleague from another country should clearly state that the notice has such a character, and the recipient is obliged to return such notice without disclosing its content, if he assesses that he would not be able to do so for any reason. to preserve confidentiality.

The Code of Professional Ethics for Lawyers also provides for the disclosure of secrets. A lawyer has the right to reveal a lawyer's secret: when the client or a certain person unquestioningly allows him to do so; when it is

necessary to prevent the commission of an announced criminal offense with a significant social danger; when it is necessary for the defense of the lawyer himself in the proceedings against him upon the report or lawsuit of the client, the person who entrusted the data or documents to the lawyer on behalf of the client, or the person provided for that purpose; when it is necessary to defend the interests and rights of the lawyer himself or his close relatives and associates, if those interests and rights are objectively more important than the content of the secret.

The lawyer is obliged to inform the person to whom the secret refers without delay about the decision to use the right to reveal the secret, whenever the nature of the case and specific circumstances allow it, and moral considerations recommend it. Then, the lawyer is obliged to warn the client of his legal obligation to record and transfer some data to the competent authority in certain legal cases, before the client entrusts them to him. Finally, it should be noted that when revealing a secret, a lawyer should spare the client's personality and interests as much as possible, avoid publicity and not disclose personal data, but only circumstances that are sufficient to prevent or stop the criminal act.

It is necessary to point out the circumstance when the Law Office is searched for the needs of criminal proceedings. Of course, this action is not forbidden.

During the legal regulation of the search of a law office for the purposes of criminal proceedings, two, somewhat opposing interests must be reconciled and balanced: the interest in establishing facts in criminal proceedings, on the one hand, and the interest in protecting trust between a lawyer and a party, on the other. Therefore, the regulations of certain states that regulate criminal proceedings in some cases and / or under certain conditions exclude a lawyer from the duty to testify about what he is obliged to keep as a professional secret, ie prescribe the prohibition of temporary seizure of certain items related to by turning away from the duty to testify (Pisarić, 2019, p. 64).

## **4. Conclusion**

Modern practice of law is based on confidentiality, non-existence of conflict of interest and independence. Most legal systems share the common understanding that if the right to protection of confidentiality is denied, a criminal or misdemeanor suspect may be denied access to legal advice and justice. In order for a lawyer to be able to fulfill the role of counsel and client's representative, he must be independent in his work, especially he must have



professional independence in relation to courts, state bodies, but also in relation to his own interests. It is this independence that represents a significant foundation in gaining trust in the client-lawyer relationship.

Lawyers keep sensitive information from business secrets to details of private life, that their clients have provided in confidence and may not disclose it. This makes lawyers particularly potential vulnerable to illegal attacks. In the paper itself, we pointed out several positions of the European Court of Human Rights, which relate to the topic of this research. The essentially observed research of the institute of legal secrecy has been considered from both the international and domestic legislative aspect.

The aim of this research is to consider certain theoretical frameworks, but also to point out international legislation, and certainly to show how lawyer confidentiality is envisaged in domestic legislation. The secondary goal of this paper is to create a basis for future research on this issue and to consider specific cases from domestic practice from which a more complete understanding of the issue of legal secrecy in real circumstances could be made.

It was concluded that in the legislative / theoretical sense, the legal secret as one of the most important democratic institutions is well enough regulated starting from the European legislation, but there is room for some additional clarifications. Finally, we reiterate that there is no fair trial without legal confidentiality.

### ***Bingulac Nenad***

Doktor pravnih nauka, vanredni profesor, Pravni fakultet za privredu i pravosuđe u Novom Sadu, Univerzitet Privredna akademija u Novom Sadu, Srbija

### ***Miljenović Dragan***

Diplomirani pravnik, advokat i doktorand, Pravni fakultet za privredu i pravosuđe u Novom Sadu, Univerzitet Privredna akademija u Novom Sadu, Srbija

## **ADVOKATSKA TAJNA**

**REZIME:** Uloga advokata je okarakterisana sa fokusom na savetovanje, zastupanje i mirenje. Advokat savetuje klijenta o pravnim pitanjima, razmatra mogućnosti rešavanja spora na miran način i svakako, zastupa ga u pravnom postupku ako do toga dođe. Da bi se postiglo pomenuto između klijenta i advokata neophodno je uspostaviti međusobno poverenje. Da bi

advokat mogao da ispuni ulogu savetnika i zastupnika klijenta, on mora biti nezavisan u svom radu, posebno mora da ima profesionalnu nezavisnost u odnosu na sudove, državne organe ali i u odnosu na sopstvene interese. Upravo ova nezavisnost predstavlja značajan temelj u sticanju poverenja na relaciji klijent – advokat. Postizanje poverenja nije jednostavno iako se to apriori očekuje. Sa ciljem ostvarivanja poverenja i da bi se moglo pristupiti adekvatnom zastupanju u pravnom postupku, obaveza advokata je da čuva advokatsku tajnu i da ne otkriva poverljive informacije. Advokatska tajna može se razmatrati sa više aspekata, sa moralnog, ugovornog, etičkog, i dr. U ovom istraživanju razmotriće se pojedini teorijski okviri koji su od značaja, s tim da će fokus biti na prikazu i sagledavanju međunarodnog, prvenstveno evropskog zakonodavnog uređenja pitanja advokatske tajne, a svakako razmotriće se tema ovog rada i sa aspekta domaćeg zakonodavstva. Pored pomenutog ukazaće se i na pojedine značajnije stavove Evropskog suda za ljudska prava. Pre iznošenja zaključaka koji su proistekli iz ovog istraživanja, posebna pažnja će biti ukazana okolnostima kada advokat može da otkrije tajnu.

**Ključne reči:** *advokatska tajna, poverenje klijenata, pravično suđenje, međunarodni principi, sudska praksa.*

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