GIR PRIVILEGE KNOW-HOW 2018

Switzerland

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GIR INSIGHT

Scope of the privilege

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

They are. As a matter of principle, attorney–client privilege protects all communication between attorney and client provided that the former is acting in his capacity of legal counsel or legal representative in justice (ie, activities that are labelled "typical attorney activities") for the latter. This means a contrario that there is no privilege in relation to what are considered as "non-typical attorney activities", such as, for example, member of the board of directors in a company, asset manager, trustee, broker and the like.

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

The privilege does not protect legal advice only. It also covers all information given by the client to the attorney in confidence, whatever the character of the information provided that: (i) the attorney is carrying out legal counselling or judicial representation activities; and (ii) the information has some connection with these activities.

Is the attorney carrying out typical as well as non-typical activities for the same client, the privilege applies regarding the first activities but not regarding the second ones. As a consequence, when documents are seized in the hands of an attorney by a public authority for the sake of an investigation targeting one of the attorney's clients, they must be sorted out based on the nature of the activities (typical, respectively non-typical) they concern.

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

No distinction is drawn between these two (typical attorney) activities. The same principles apply to both. As to litigation, it must be noted that information disclosed at a public hearing are not covered by attorney–client privilege, irrespective of whether some public did actually attend the hearing or not. However, such information may well become secret again if, as time goes by, most people have forgotten about it. This is the case, for example, when a conviction handed down at a public hearing in the past, as well as the name of the convicted person, are nowadays known by a few people only.

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

The privilege protects documents (paper as well as electronic documents) that have been established by the attorney or by the client in relation to the attorney–client mandate (to the extent that the subject matter of the mandate is typical attorney activities, see question 1). This means that other documents are not protected, even if transmitted to the attorney. As to documents that were prepared in anticipation of an attorney–client communication, they are protected provided that they have been transmitted to the attorney.

Regarding documentation prepared during an attorney-led investigation, the Swiss Supreme Court (SSC) considered in recent decisions, in relation with anti-money laundering duties, that a law firm that undertakes a compliance,controlling or auditing tasks that the client (in casu, a bank) is obliged by law to carry out by his own cannot invoke privilege (SSC, decisions No. 1B_85/2016, 20 September 2016 and No 1B_433/2017, 21 March 2018). This is because these tasks are not to be held as ones of the attorney typical activities. On the contrary, if the activity carried out by the law firm in connection to compliance, controlling or auditing (or anti-money laundering) is legal counselling or legal representation in justice, then the privilege fully applies. Albeit clear from a theoretical point of view, the distinction to draw between typical v non-typical attorney activities may prove to be very difficult in such a case. This is especially true when the law contains broad obligations for the client to obtain, analyse and keep record of information, as well as to take internal organisational measures to respect these obligations, such as those provided in the anti-money laundering legislation. A careful analysis is then always required.

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

The rule is that an attorney is prohibited from disclosing any information given to him or her (by the client or any other source) in his or her capacity of legal counsel or legal representative. Even the client's identity is covered. Of course, the attorney is allowed to use the confidential information before the authorities to the extent necessary to carry out the mission entrusted to him by the client. In case of doubt, he or she has to refer to the client for advice.

As to attorneys' assistants (auxiliaires), they can be privy to the communication without breaking privilege (they are under duty to keep the secret). To be considered as an assistant within this meaning, a person (i) must be qualified for fulfilling the task entrusted to him or her, and (ii) is willing to fulfil the task. This is typically the case for an associate, a trainee or a secretary, but also for an expert a private detective or a translator hired by the attorney. Regarding other people who may come in contact with privileged communication owing to their function, such as cleaning staff, attorneys must take all the reasonable measures to protect privacy.

The client's family (spouse, parents and children) is not privy to the communication. This means that the attorney must seek the client's prior consent before sending mail to his home address or leaving voicemail messages on his home phone. As a matter of principle, the heirs of a deceased client are not privy. The communication can nevertheless be disclosed to them in the case it could be presumed that the client tacitly consented to the disclosure, for example, to enable his or her heirs to continue the proceedings after his or her death.

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

Yes. A fact can be attorney-privileged even though it is known by people in addition to the client. Indeed, it is very common that the attorney–client communication relates to information that is well known by the client's friends or colleagues, or by other people. Such information is not necessarily notorious and remains covered provided that the client wants it to be kept secret and has an interest in it being kept secret. Only publicly known, notorious information is not subject to privilege.

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

Generally speaking, abuse of right is prohibited and this is also true in attorney–client privilege matters. For example, an attorney is not allowed to invoke the privilege (typically, to resist the disclosure of documents by the criminal prosecution authorities) in criminal proceedings in which he or she is personally targeted. That being said, all necessary measures (eg, redacting) are still to be taken in such a case by the state authorities to protect the clients' confidentiality. In the same way, the privilege does not apply where the client's real purpose is to hide and secure goods that are the result of an offence. Also, there is no protection if the documents transmitted to the attorney are actually intended for another person (who is not subject to privilege).

As explained above (see questions 1, 2 and 4), the privilege does not apply regarding non-typical attorney activities. In particular, an attorney acting as financial intermediary (eg, asset manager) is subject to the Swiss Anti-Money Laundering Act (AMLA). Article 9 AMLA refers to different situations in which there are reasonable grounds for the financial intermediary to suspect that the assets involved are connected to a money laundering operation. In such situations, the financial intermediary – also if he or she is an attorney – has a duty (among other things) to file a report with the Money Laundering Reporting Office. It is worth noting that since 1 January 2016 tax evasion offences may in specific (and rather limited) circumstances give rise to money laundering.

A draft legislation proposes to impose, through AMLA, various obligations to people who provide advice (named counsellors) in relation to the creation or management of offshore companies, domicile companies in Switzerland and trusts, including attorneys when they, for example, counsel their clients in relation with tax or asset management matters. These counselors should not be subject to the duty to report like the financial intermediaries, but are "only" to refuse the opening of a business relationship, respectively to terminate an existing one. However, they will have to appoint an audit company to verify that they respect their AMLA obligations. Should this audit company find or assume that the audited counsellor did open or did not terminate the business relationship, the first has a duty to report it to the Money Laundering Reporting Office.

See also the decision of the SSC regarding attorney-led investigations (see question 4).

In criminal as well as in civil proceedings, an attorney released from secrecy by the competent authority is free to disclose information, even against the will of the client as the case may be, but is not obliged to.

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

Yes. Switzerland is a party to the International United Nations Covenant on Civil and Political Rights, which prohibits arbitrary or unlawful interference with privacy (article 17 al. 1). It is also a party to the European Convention on Human Rights, which provides that everyone has the right to have his or her correspondence respected (article 8 al. 1). As to domestic laws, various articles of the Swiss Federal Constitution (SFC) are relevant. The SFC affirms the right to privacy in particular regarding to mail and telecommunications (article 13 al. 1). In addition, the confidentiality of communications is protected by the Swiss Telecommunications Act (article 43 ss).

Protected parties

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

According to the majority view, the privilege does not extend to communications between in-house counsel and the employees or clients of the corporation (as opposed to communications between in-house counsel and external attorneys). The reasons for this are twofold. First, in-house counsel do not work as independent attorneys but as employees of a corporation (insurance, bank, etc) – other than a law firm. Second, they do not carry out one of the two typical attorney activities (ie, legal counselling or legal representation in justice), or at least the typical attorney activities element is not predominant. In a 2008 decision, the Swiss Federal Criminal Court (SFCC) adopted this majority view (SFCC, decision No. BE.2007.10-13, 14 March 2008). An appeal against this decision was lodged with the Swiss Supreme Court, which decided as follows: the in-house counsel might exceptionally invoke privilege if he is the sole recipient of the information and documents given to him or her by the corporation as well as the sole to be entitled to transfer them (SSC, decision No. 1B_101/2008, 28 October 2008). The point was then debated by the legal scholars. At the same time, a draft bill on in-house counsel including the applicability of privilege was discussed by the Swiss parliament. However, the bill was finally rejected.

It is possible, however, that this will change in the future. In March 2015, a Swiss member of the parliament has submitted to the National Council an initiative that would imply a modification of the Swiss Civil Procedure Code. The proposed modification would allow the in-house lawyer to refuse to collaborate in respect with the in-house activity of a company, provided that the activity at stake is considered as typical if it had been done by an external lawyer and that the legal department of the company is managed by a lawyer who is holder of a cantonal "brevet" (admission to a cantonal bar) or who would fulfil the requirements to practise at the bar in his former state. In September 2016, the National Council agreed on this initiative, which now requires to be accepted by the States Council, whose judicial commission already agreed on 25 October 2016. In parallel, the judicial commission of the States Council also submitted a "postulat" in March 2016 requesting the Federal Council to elaborate a report on the issue of the privilege for in-house lawyers and to come up with solutions, for instance, in the framework of the future revision of the Swiss Civil Procedure Code or the Swiss Criminal Procedure Code. The National Council decided in September 2018 to postpone the deadline to process this initiative to autumn 2020.

10 Does the privilege protect communications between an attorney and a corporate client's employees? Under what circumstances?

As seen in question 9, the privilege does in principle not extend to communications between in-house counsel and the clients or employees of the corporation, as opposed to communications between in-house counsel and external attorneys.

In a client-attorney relation between an external attorney and a corporation, it is up to the latter to decide which of its organ(s) or employee(s) are entitled to communicate with the attorney. The attorney must follow the client's instruction in that respect. However, if he or she considers for any reason that some information must be transmitted to another person within the corporation, as, for example, the CEO, then he or she is allowed to communicate to that person instead. Such communication does not amount to a breach of privilege.

If an external attorney delivers a legal opinion to a corporation and subsequently one of the corporation's organs or employees become an accused in criminal proceedings, then the criminal prosecution authorities are prohibited (by privilege) from seizing the legal opinion. This is also true when the legal opinion was not transmitted to the employee or the organ involved.

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

In principle the privilege applies only to communications between external attorneys and employees of the corporation that is the client. However, documents prepared by the client at the direction of the external attorney, provided that they relate to the attorney's typical activity, will be protected.

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

Foreign attorneys also are entitled to invoke privilege as well as obliged to comply with its requirements. However, a distinction is to be made in that respect between attorneys who are European Union (EU) or European Free Trade Association (EFTA) member state citizens, on one hand, and attorneys who are not, on the other hand. As to UE or EFTA citizens, they are subject to both criminal rules (article 321 of the Swiss Penal Code, see questions 20 and 25) and professional rules (article 13 of the

Attorneys Free Movement Act, see question 20). As to other citizens, they are subject to criminal rules (article 321 of the Swiss Penal Code, see question 20 and 25) only. Another difference is that some protections provided by the Swiss Code of Criminal Procedure in favour of the attorney privilege apply to EU or EFTA attorneys and not to others.

13 Does the privilege extend to non-lawyer third parties? In which circumstances does the privilege protect communications with third parties if they are providing advice related to a legal matter?

The privilege does not extend to non-lawyer third parties except when they can be considered as auxiliary (see question 5) of the external lawyer and help him or her in the context of a typical activity as defined above (see question 1).

For the sake of completeness, some non-lawyers third parties also benefit of some kind of professional secrecy, though not analogous to the privilege.

In criminal proceedings, clergymen, notaries public, some members of the medical profession as well as their assistants (non-exhaustive list) are entitled to refuse to testify. However, these people – as opposed to attorneys – must testify (i) if they have a legal duty to denounce, or (ii) in the case they are released from secrecy by the beneficiary of the secret or by the competent authority. In the (ii) scenario, they nevertheless have a right to refuse to testify if they make plausible that the interest in keeping the secret outweighs the interest in finding the truth.

The Swiss Criminal Procedure Code allows journalists to refuse to testify as to the identity of the author or as to the content and sources of their information. They, however, have to testify if their testimony is required to save a person from immediate danger or if without their testimony serious offences specifically listed would not be solved. The Swiss Criminal Procedure Code further provides for a person who is required to preserve professional confidentiality in accordance with specific provisions (such as, for instance, based on the Assistance to Victims Act) to testify only if the interest in establishing the truth outweighs the interest in preserving confidentiality.

In civil proceedings, the same professionals and some others (the list is very similar to the above-mentioned) have a right to refuse to collaborate in the taking of evidence – be it as party in the proceedings or as a third party – to the extent that by the disclosure they would breach the professional privilege as described in article 321 of the Swiss Penal Code (see questions 20 and 25). However, these people – as opposed to attorneys – have no other option but to collaborate if the conditions above-mentioned under either (i) or (ii) are met, unless they make plausible that the interest in keeping the secret outweighs the interest in finding the truth. There is an exception: clergymen, like attorneys, are entitled in all cases to refuse to collaborate in the taking of evidence.

The Swiss Civil Procedure Code allows for a third party to refuse to collaborate when asked in his or her capacity as professional or auxiliary person engaged in the publication of information in the editorial part of a periodical to reveal the identity of the author of the content or source of his or her information.

14 Does the privilege apply to communications with potential clients?

Yes. All information that the attorney gathers in the exercise of his professional (typical attorney) activities falls under the scope of the attorney–client privilege. This means that the privilege applies even if there is no mandate (yet) between the attorney and the potential client. It is sufficient that the information was given to him or her in his or her capacity of attorney. The privilege continues to apply even if the attorney finally refuses the mandate or if the client eventually does not entrust the attorney with the mandate.

Ownership of the privilege

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

The privilege is held by the client as it is intended to protect the client's interests. The attorney can be released from secrecy by the client. This relief does not need to be in writing or to meet any formal requirements; the consent may be an implied one. Furthermore, the attorney can be released from secrecy by the competent local authority (for example, in Geneva, the Commission du barreau) against the will of the client in exceptional circumstances. However, as mentioned above (see question 7) even in case of relief by the client or by the authority the attorney remains absolutely free on whether to disclose the secret information or not.

Both the client and the attorney have rights under the privilege.

The question whether third parties may also be protected by privilege is debated. The majority view is that the answer is negative. In the same way, the Swiss Supreme Court (SSC) has decided that a party in the proceedings cannot complain about a purported breach of secrecy by the adverse party's attorney (SSC, decision No. 2C_900/2010, 17 June 2011).

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

As beneficiary of the privilege, the client is free to waive it. The principle is that all information gathered by the attorney (be it from the client or from any other source) in relation to the client is privileged and can be used by the attorney for the sole purpose of fulfilling the mission entrusted to him or her by the client. Therefore, the attorney is allowed to disclose only pieces of information that the client agrees to disclose. In case of doubt he or she has a duty to ensure that the envisaged disclosure does really meet the client's willingness. As the case may be, he or she also has a (contractual) duty to inform the client about the potential legal consequences of the disclosure.

The obligation to request a waiver of privilege from the client, and in case of refusal from the competent authority, also applies when the attorney wants to initiate legal proceedings against his client in relation with outstanding fees. The fact that the attorney was able to request a retainer from the client will influence the balance of interests when the competent authority decides to waive the privilege or not.

As already stated (see question 15) the privilege can be waived by the competent authority under exceptional circumstances.

Since t1 January 2019, an attorney will have the right to inform directly the child protection authorities in case a threat to the physical, psychological or sexual integrity of a child justifies it. He will also have the right, but no duty, to collaborate to the official inquiry without requesting from its competent authority the waiving of his or her privilege. Only the attorney himself will benefit of these rights, to the exclusion of his or her auxiliaries.

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

The waiver has not to be all or nothing. It can be partial only. It is up to the beneficiary of the privilege (ie, the client) to determine the extent of the waiver, as well as the other conditions (eg, the scope of addressees of the secret information to be disclosed, the form of the disclosure, etc). The same is true when the attorney is released from secrecy by the competent authority. According to some authorities, in case of a complete release (by the client or by the competent authority) the attorney who chooses to disclose information as a witness in proceedings cannot do it only partially. That is because answering some questions and not the others would create the risk of distorting reality.

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

As explained above (see question 15), the client holds the privilege. Therefore, when two defendants intend to mount a joint defence each one must authorise his attorney to share the privilege information with the other's attorney. If that is done the defendants and their attorneys become privy to the information shared; they do not waive the attorney–client privilege. These rules also apply when each of two parties with a common interest decide to enable his attorney to share privilege information with the other's attorney. Even if the client's consent to the sharing of information may be implied depending the circumstances, the best practice is to provide for the sharing in the engagement letter.

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

As long as the mandate between the client and the Swiss attorney is governed by Swiss law, the confidentiality duty results from contractual obligations and an attorney breaching confidentiality may therefore be held contractually liable for the damage caused through the breach. Furthermore, article 321 of the Swiss Penal Code (see questions 20 and 25) punishes the violation of the confidentiality by the attorney (among other professionals) even if the attorney is a foreign one acting in Switzerland. That being said, more and more foreign clients ask for confidentiality guarantee in the engagement letter since they are not familiar with Swiss rules relating to privilege and want to be in a position to rely on terms they are used to.

Enforcement considerations

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

The most important rules pertaining to privilege are to be found in statutes. First, article 321 of the Swiss Penal Code punishes the violation of professional secrecy by, among others professionals, attorneys (see question 25). Further, the Swiss Criminal Procedure Code, the Federal Act on Criminal Administrative Law and the Swiss Civil Procedure Code contain provisions that describe the content and delineate the limits of the privilege. The Federal Act on Administrative Procedure and the Federal Act on Federal Civil Procedure also contain provisions relating to the privilege. Finally, article 13 of the Attorneys Free Movement Act states that attorneys are subject to professional confidentiality regarding all matters entrusted to them by clients (this article apply only to Swiss, European Union as well as European Free Trade Association member state citizens; see question 12).

In addition, some legal basis relating to attorney–client privilege, albeit indirectly only, can be found in the Swiss Federal Constitution (SFC). This is in particular the case of article 13(1) SFC, which affirms the right to privacy in particular regarding to mail and telecommunications.

The above-mentioned provisions and their scope have further been developed and specified by case law.

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

As attorney–client privilege is provided for by statutes and governs the core relationship between client and attorney, it is better defined as a substantive right with (major) procedural implications.

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

The principles ruling the privilege and their application are the same in the criminal, civil, regulatory, or investigatory context.

In the regulatory and investigatory context (administrative type of proceedings) however, specificities may exist in the particular area considered (eg, competition law). Given the Financial Action Task Force (FATF) new anti-money laundering standards and the implementation of the USA-Switzerland Foreign Account Tax Compliance Act (FATCA), the protection of privilege may become a very thorny issue in the future.

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

Since the entry into force of the Swiss Civil Procedure Code and of the Swiss Criminal Procedure Code, which replaced the local codes, as well as of the Attorneys Free Movement Act, the rules relating to privilege are uniform nationwide.

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

The Attorneys Free Movement Act provides that every local public body (canton) must designate a public authority whose function is to supervise all the attorneys practicing at the (local) bar. This authority is competent to take disciplinary actions against attorneys who breach professional rules (eg, regarding privilege).

The sanction may be: (1) an admonition; (2) a blame; (3) a fine up to 20,000 Swiss francs; (4) a prohibition from practising for a two-year duration maximum; (5) a definitive prohibition to practice. The fine and the prohibition to practice may be cumulated.

If the attorney is a member of a professional association (eg, the Geneva Bar Association), he or she may have to face further sanctions.

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

According to article 321 of the Swiss Penal Code, the violation of privilege is sanctioned by imprisonment for a three years duration maximum or by a pecuniary penalty. In such a case, the enforcing authority (ie, the General Attorney Office) does not act ex officio. Therefore, the offence is prosecuted only if a criminal complaint is lodged against the attorney. In addition, the

attorney would be contractually liable for any damages or moral harm caused to the client (either intentionally or through negligence).

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

There are no specific requirements as to how the privilege must be invoked by the parties. However, the parties must do it at the first occasion to avoid being considered as having waived it. The privilege can be invoked on the witness stand.

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

The burden of proof rests with the party who invokes the existence, respectively the violation of the privilege.

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

In case of criminal search warrants, the holder of the targeted documents is entitled to oppose the search provided that he has a right to refuse to testify or to collaborate to the taking of evidence. Such a right exists in particular when the documents are subject to attorney–client privilege. The right must be invoked immediately (ie,at the time of the execution of the search warrant). There is no distinction between documents held by the client and documents held by the attorney.

In criminal proceedings, when the right is invoked by the holder, the prosecuting authority is obliged to seal the documents that, according to the holder, are privileged. It is then up to the court to sort out the sealed documents or information and to decide (i) which ones are relevant, and (ii) among the relevant documents or information, which ones are not privileged (if any) and can therefore be transmitted to the prosecutor without seal. Before the transmission the court must thus take all necessary measures to ensure the protection of the attorney–client privilege, typically by redacting the confidential information. Importantly, it is the obligation of the holder of the documents to designate at the time of the search the files that are irrelevant for the ongoing enquiries and/or covered by the privilege.

According to the Swiss Criminal Procedure Code, the principle is that documents concerning contacts between a person and its attorney cannot be sequestrated, wherever located. This is true when the person is the accused but also when she is, for example, the victim or a witness. In both cases, however, this protection does not apply if the attorney him or herself is the (or one of the) accused in the proceeding (see question 7). When the person targeted by the sequestration oppose to it, the procedure to follow is the one described above regarding the sealing.

In civil proceedings, the client as well as the attorney are entitled to invoke privilege to refuse to collaborate to the discovery request in relation to the privileged documents they hold.

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

There are no Swiss choice-of-law rules specifically governing privilege. The legal relation between the attorney and the client is a mandate agreement. Under the Swiss Private International Law Act, the parties are free to choose the law applicable to their contract. However, application of foreign law is precluded if it leads to a result that is inconsistent with the Swiss public order or if is it contrary to certain mandatory Swiss law provisions that apply whatever the foreign law may be.

Article 321 of the Swiss Penal Code (see questions 20 and 25) as well as article 13 of the Attorneys Free Movement Act (see question 20) are public law, and therefore apply in all cases (provided that the relevant conditions are met). For that reason, it is likely that in practice Swiss attorneys will rarely (if ever) accept that the mandate agreement be governed by foreign rules.

Termination of the privilege

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

No. In case of death of the attorney, the new attorney is under the same duty and enjoys the same right regarding the privilege. When the client dies, the privilege is opposable to the client's heirs. This means that the heirs are not allowed to obtain information about the legal counselling or representation in justice activities carried out by the attorney for the deceased.

However, there is an exception when it is to be presumed that the disclosure corresponds to the implied intent of the deceased. Furthermore, the attorney is entitled to ask the competent authority to be released from secrecy. To that end he or she has to demonstrate that the heirs' interest outweighs the interest in keeping the secret. This is typically the case where the release is necessary to ensure a fair sharing or the inheritance estate. The heirs also are entitled to ask for release.

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

No, the privilege survives the end of the attorney–client relationship.

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

As explained above (see question 7), abuse of right is prohibited by law generally and this is also true in attorney–client privilege matters, especially when the client tries to make the attorney an accessory to a crime or a fraud. However, in the framework of attorney typical activities, the principle is that any information given by the client is protected by privilege. The issue whether privilege covers a positive indication that the client intends to perpetrate an offence or a crime is not clear. In such a case, the best practice would therefore be for the attorney to ask the competent authority to release him or her from secrecy (see question 15).

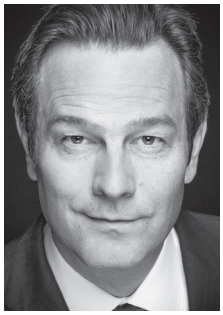
The situation is different when it comes to attorney non-typical activities. In particular, the attorney acting as financial intermediary has a duty to file a report with the Money Laundering Reporting Office when he or she has serious reasons to suspect that the assets involved are connected to a crime (see question 7).

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

As the holder of the secret is the client and not the attorney, a disclosure by the attorney (whether inadvertent or intentional) should in principle not terminate the privilege, unless the disclosure makes the information publically known (see question 6). In a case where a document under privilege had been stolen at the attorney's office, the court decided that the privilege nevertheless remained in force and consequently that the prosecution authority was not allowed to use the document. In this decision, the court considered that the opposite solution would be unsatisfactory because it would make the client bear the negative consequences of the unintended disclosure.

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

As seen above, the sequestration of the attorney–client communication is in principle prohibited by law whatever the place where the communication is located (see question 28). Legal scholars conclude that when the client transfers such a communication to a third party, this does not terminate privilege, even if the third party is not bound to observe privilege. The same rule should logically apply a fortiori if a third party is included in the communication.



Christophe Emonet

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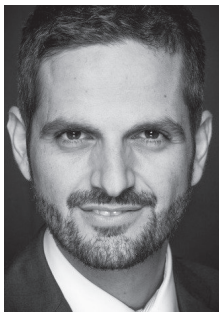
Christophe Emonet has been a partner since 2004 and heads the Litigation and Arbitration Group in Geneva and the White-Collar Crime Team. He specialises in complex national and international banking/commercial disputes and investigations, regulatory and white-collar crime matters (corporate/financial fraud and corruption). He also has broad experience of asset recovery and cross-border bankruptcies. Christophe Emonet represents primarily Swiss and foreign banks, corporations, foreign states and HNWIs, which request his assistance for strategic matters and complex negotiations.

Highlight cases led by Christophe Emonet include representing a foreign banker in the *Parmalat* investigations (Switzerland and Italy) and an HNWI in the Swiss and SFO investigations related to British Aerospace, both resulting in prosecuting authorities renouncing to bring charges. More recently, Christophe Emonet represented a Swiss listed bank in the largest ever criminal investigation (10 years of preliminary investigations followed by a five-month daily trial) and civil state court disputes, against former directors and auditors in relation to a 3 billion Swiss franc loss. He also represented Swiss banks in the DOJ Tax Programme for Swiss Banks. Current assignments include leading the defence of the former CEO of a foreign pension fund in large-scale Swiss and foreign investigations and representing a foreign state in major mutual assistance and national criminal proceedings, as well as worldwide recovery actions against a former public agent.

Christophe Emonet's expertise is recognised since a decade by the leading legal directories, including *Chambers, The Legal 500, Who's Who, Best Lawyers*, etc. A sample of recent quotes from clients and peers distinguish him as "highly strategic, very bright and relentless in defence of his clients" (*Chambers 2018*, WCC), "a great negotiator" (*The Legal 500* 2018, Litigation), "striking in the court room as well as in negotiations" (*Chambers* 2016, WCC; *The Legal 500* 2014, Banking and Finance), who "stands out for his determination and intense dedication to his clients in banking litigation and internal investigations" (*The Legal 500* 2016 and 2015, Banking & Finance), and is a "fierce advocate" (*Chambers* 2015, WCC).

Christophe Emonet graduated from the University of Geneva in 1996 (MLaw), was admitted to the Bar in 1998 and became a partner in 2004. Prior to joining Pestalozzi in 1999, Christophe Emonet worked with barristers and solicitors in London. As part of his cursus, he also served for one year as foreign associate in two major law firms in Madrid and Buenos Aires.



Nicolas Herren

Pestalozzi

Nicolas C Herren is a partner and a member of the litigation and arbitration group in Geneva. He specialises in national and cross-border banking/commercial disputes, in particular stemming out of contractual and regulatory issues. His activity also covers enforcement proceedings such as complex cross-border bankruptcies or recognition of foreign judgments. In addition, he has a broad experience in white-collar crime and international mutual assistance in criminal and administrative matters.

After graduating from the universities of Geneva and Bern (lic. iur. 2003), Nicolas C Herren worked at the University of Geneva as an assistant lecturer in the fields of white-collar crime and international mutual assistance in criminal matters from 2004 to 2008. He was also involved in the development of a training programme on the Swiss and cross-border anti-money laundering legislation, addressed to private banks' employees and directed by the Centre for Banking and Financial Law of the University of Geneva. After obtaining a DEA (LLM) at the University of Geneva in 2008, Nicolas C Herren joined Pestalozzi as a junior associate and, following his admission to the Geneva Bar in 2010, as an associate, before becoming partner in 2016. He is an active member of different law associations such as the International Association of Young Lawyers (AIJA) and the Geneva Association of Commercial Law (AGDA). He is vice-president of the AIJA Commercial Fraud Commission and member of the AIJA executive committee.

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