GIR PRIVILEGE KNOW-HOW 2020

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 an attorney and its client provided that the former is acting in his or her capacity of legal counsel or legal representative (ie, activities that are considered "typical attorney activities") for the latter. This means, however, that there is no privilege in relation to what are considered to be "non-typical attorney activities" (ie, commercial activities) such as, corporate administration, brokerage, asset management, trustee and the like.

The Swiss Supreme Court has recently confirmed that legal advice pertaining to offshore companies and estate planning are also to be considered as typical attorney activities and thus, are protected by privilege. However, the documents relating to the incorporation of the company itself as well as to the establishment of the structures holding estate assets (eg, trusts, domiciliary companies, foundations, etc) are not protected by privilege as they are considered to be commercial activities.

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 only protect legal advice. It covers all information disclosed by the client to the attorney in confidence, regardless of the nature of such information and provided that: (i) the attorney is carrying out legal counselling or judicial representation activities; and (ii) the information has some connection with these activities. The very existence of a mandate is a fact covered by privilege. However, 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.

If an attorney carries out both typical and non-typical activities for the same client, the privilege will only apply regarding the first activities but not regarding the second ones. As a consequence, documents seized by Swiss criminal authorities at an attorney's office following an investigation of the attorney's client must be sorted out based on the nature of the activities they concern (typical, respectively non-typical attorney activities).

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 third parties actually attended the hearing or not. However, such information may be covered by privilege again if, as time goes by, most people have forgotten about it. This is the case, for example, if a conviction rendered 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. The transmission to an attorney – by mail or email – of the copy of a correspondence between the client and a third party is not protected by privilege. 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 compliance,controlling or auditing tasks that the client (in casu, a bank) is obliged by law to carry out on his or her own cannot invoke privilege (SSC, decisions No. 1B_85/2016, 20 September 2016 and No. 1B_433/2017, 21 March 2018). This is explained by the fact that these tasks are not to be considered as typical attorney 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 be drawn between typical versus 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. In such case, a careful analysis is 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 by privilege. The attorney is, of course, allowed to use the confidential information before the authorities to the extent that is 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.

The attorneys' assistants (auxiliaries) can be privy to the communication without breaking privilege (they are bound by professional secrecy). 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) must be 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.

When it comes to other people who may have access to privileged communication due to their function, such as such cleaning staff, attorneys must take all necessary measures to protect privacy. Attorneys are responsible for the organisation of their law firms, which must be such as to ensure that confidentiality is preserved.

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 or her home phone. As a matter of principle, the heirs of a deceased client are not privy to the communication either. The communication can nevertheless be disclosed to them in cases where it could be presumed that the client tacitly consented to the disclosure, for example, to enable the heirs to continue 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–client 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, 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 in criminal proceedings in which he or she is personally targeted. In such a case, the proper administration of justice and the interest in finding the truth outweighs the interest in protecting the privilege. Consequently, the attorney will no longer be able to resist the disclosure of documents by Swiss criminal authorities. That being said, the proportionality principle requires that searches be limited to what is useful for the purpose of uncovering the truth. Fishing expeditions are prohibited. Moreover, all necessary measures (eg, redaction of information) must also be taken by the Swiss criminal authorities to protect the clients' confidentiality.

For the same reason, the privilege does not apply either when it is invoked for illegitimate purposes, such as to hide goods that are the proceeds of an offence or evidence. Moreover, there is no protection if the documents transmitted to the attorney are actually intended for another person, who is not subject to privilege. The attorney must therefore always ensure that the items handed over to him or her by his or her client are in relation with the mandate entrusted to him or her, otherwise he or she will not be able to oppose the seizure of documents and assets by the Swiss criminal authorities.

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 a 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 – who can be an attorney – has, in particular, a duty to file a report with the Money Laundering Reporting Office (MROS). It is worth noting that since 1 January 2016 tax evasion offences may in specific (and rather limited) circumstances give rise to money laundering.

Draft legislation suggests imposing, through AMLA, various obligations to people who act as "counsellors" and provide advice in relation to the creation or management of offshore companies, domicile companies in Switzerland and trusts – such as attorneys who give advice to their clients in relation with tax or asset management matters. These counsellors will be under the obligation to report to MROS in case they suspect that assets are connected to a money-laundering operation, the same way as financial intermediaries. Counsellors will also be required to inform MROS if they terminate an existing business relationship on the grounds of such suspicions. Moreover, counsellors will have to appoint an audit company to verify that they respect their AMLA obligations. Should this audit company find that the audited counsellor did not fulfil his or her duty to report to MROS, it must immediately file such report with the MROS.

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

It must also be noted that an attorney released from secrecy by the competent authority is free to disclose information, even against the will of the client, 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, paragraph 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, paragraph 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 mail and telecommunications (article 13, paragraph 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, either 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 2008, the Swiss Federal Criminal Court (SFCC) adopted this majority view in its judgment (SFCC, decision No. BE.2007.10-13, 14 March 2008). An appeal against this judgment was lodged with the Swiss Supreme Court, which decided as follows: the in-house counsel might exceptionally invoke privilege if he or she is the sole recipient of the information and documents given to him or her by the corporation as well as the sole person entitled to transfer them (SSC, decision No. 1B_101/2008, 28 October 2008). This issue 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 submitted to the National Council an initiative that would imply an amendment to the Swiss Civil Procedure Code. The proposed amendment 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? And who possesses the privilege - the corporate client, the employee or both?

As seen in question 9, the privilege does in principle 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.

In an attorney–client relationship 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, the attorney is allowed to communicate information to the governing bodies of the corporation if he or she deems it necessary, such as to the CEO. Such communication will not amount to a breach of privilege.

If an external attorney delivers a legal opinion to a corporation and subsequently one of the organ or employees of the corporation becomes accused in a criminal proceeding, the Swiss criminal authorities will be prohibited from seizing the legal opinion because it is protected by privilege. This is also true if the legal opinion was not transmitted to the employee or the organ involved.

The privilege is held by the corporate client, not its employees who may only indirectly benefit from the attorney–client privilege.

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 only applies to communications between the external attorney and the employees of his or her corporate client. However, documents prepared by the client following the external attorney's instructions will be protected provided that they relate to the attorney's typical activity.

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

Foreign attorneys acting in Switzerland are both entitled to invoke privilege and obliged to comply with its requirements. However, a distinction is to be made in that respect between attorneys who are citizens of the European Union (EU) or European Free Trade Association (EFTA) member states and attorneys who are not.

EU or EFTA citizens are subject to both criminal rules (article 321 of the Swiss Criminal Code, see questions 20 and 25) and professional rules (article 13 of the Attorneys Free Movement Act, see question 20). This is, however, not the case of other citizens, who are merely subject to criminal rules (article 321 of the Swiss Criminal Code, see questions 20 and 25). Moreover, some provisions of the Swiss Code of Criminal Procedure in favour of the attorney–client privilege only apply to attorneys who are citizens of EU or EFTA member states 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? What measures in such circumstances should an attorney take to protect those communications?

The privilege does not extend to non-lawyer third parties except when they can be considered as the external lawyer's auxiliaries (see question 5) and help him or her in the context of a typical attorney activity as defined above (see question 1). To protect the privileged information shared with third parties, attorneys may, for example, enter into a confidentiality agreement with such third parties, which however is not equivalent to the professional secrecy/privilege.

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

In criminal proceedings, clergymen, public notaries, 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) if they are released from secrecy by the beneficiary of the secret or by the competent authority. In scenario (ii), 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 are however required to testify if their testimony is required to save a person from immediate danger or if without their testimony serious offences (specifically listed in the relevant provision) would not be resolved. The Swiss Criminal Procedure Code also provides that 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) will only be required to testify 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 a 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 Criminal 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 one exception to this: clergymen are, like attorneys, entitled in all cases to refuse to collaborate in the taking of evidence.

The Swiss Civil Procedure Code also 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 in exceptional circumstances by the competent local authority (the "Commission du barreau" in Geneva) against the client's will. However, even in case of relief from secrecy by the client or by the authority, the attorney remains absolutely free to decide whether to disclose the secret information or not, as mentioned above (see question 7).

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 opinion considers that third parties are not protected by privilege. The Swiss Supreme Court (SSC) has ruled that a party to a proceeding is not entitled to claim breach of secrecy by the opposing 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 the case of doubt, he or she has a duty to ensure that the envisaged disclosure is in line with the client's wish. 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. If the client refuses to waive such privilege or is unable to because he is diseased, the attorney can request a waiver from the competent authority.

Such waiver of privilege will also have to be requested by the attorney when he or she intends to initiate legal proceedings against his or her (former) client to recover outstanding fees. As already stated (see question 15) the competent authority can waive the privilege under exceptional circumstances only. 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.

Since 1 January 2019, attorneys have the right to directly inform the child protection authorities of a threat to the physical, psychological or sexual integrity of a child. Attorneys also have the right, but not the duty, to collaborate to official inquiries without being required to request the waiver of privilege from the competent authority.

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

Waiver is not all or nothing and can be partial. 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, such as 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, attorneys who choose to disclose information, as a witness in proceedings, following a complete waiver of privilege cannot do it partially. That is because answering some questions and not 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 (see question 15), the client holds the privilege. Therefore, when two defendants intend to mount a joint defence each one of them must authorise their attorneys to share the privileged information with the other attorney. If that is done, the defendants and their attorneys become privy to the information shared; this does, however, not amount to the waiver of

attorney–client privilege towards third parties. The same rules apply when two parties to a proceeding have a common interest and decide to enable their attorney to share privileged information with the other attorney. In this case, the best practice is to provide for the sharing of information in an engagement letter, even if, in certain circumstances, the client's consent may be implied.

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

As long as Swiss law governs the mandate between the Swiss attorney and the client, the confidentiality duty results from the Swiss Code of Obligations. The attorney breaching confidentiality may therefore be held contractually liable for the damage resulting from such breach. Furthermore, the breach of confidentiality by an attorney (among other professionals) is also punished by article 321 of the Swiss Criminal Code (see questions 20 and 25). This provision also applies to foreign lawyers as long as the breach occurs on Swiss territory. That being said, more and more foreign clients ask for confidentiality guarantees 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 accustomed 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 Criminal Code punishes the violation of professional secrecy by, among other 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 on the content and 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 only applies to Swiss citizens as well as citizens from the EU and EFTA member states; 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 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 an attorney and its client, 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 governing 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?

The rules relating to privilege are uniform nationwide 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.

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 Swiss "canton" must designate a public authority whose function is to supervise the attorneys practising at the (local) bar. This supervisory authority is competent to take disciplinary actions against attorneys who breach the professional rules (eg, regarding privilege).

The sanction may be: (i) an admonition; (ii) a blame; (iii) a fine up to 20,000 francs; (iv) a temporary prohibition on practising for a maximum period of two years; (v) a definitive prohibition to practise. The fine and the prohibition to practise 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 additional sanctions.

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

According to article 321 of the Swiss Criminal Code, the violation of privilege can be punished by imprisonment for up to three years or by a pecuniary penalty. Such offence is not prosecuted ex officio by the Swiss criminal authorities (ie, the General Attorney Office). A criminal complaint must be lodged against an attorney for a criminal investigation to be opened and a sanction imposed.

In addition to a criminal sentence, the attorney will also 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 invoke this privilege 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 the 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 of the targeted documents, the Swiss criminal 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 for the ongoing criminal investigation, 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 such transmission, the court must take all necessary measures to ensure the protection of the attorney–client privilege, typically by redacting the confidential information. It must be noted that it is the holder's obligation to designate at the time of the search the files that are irrelevant for the ongoing criminal investigation and/or covered by the privilege.

The principle under the Swiss Criminal Procedure Code is that documents used in communications between a person (ie, the charged person, a victim or a witness) and its attorney cannot be seized, regardless of where these documents are located. This protection does not, however, apply if the attorney is accused of an offence in the proceeding (see question 7). When the person targeted by the seizure challenges it, the procedure to be followed is the one described above regarding the sealing.

In civil proceedings, both the clients and their attorneys are entitled to invoke privilege to refuse to collaborate with 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 relationship between the attorney and the client is a mandate. 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 regardless of the foreign law elected by the parties.

Article 321 of the Swiss Criminal Code (see questions 20 and 25) as well as article 13 of the Attorneys Free Movement Act (see question 20) are public law provisions and thus apply in all circumstances, provided that the relevant conditions to their application are met. This explains why, in practice, Swiss attorneys rarely (if ever) accept that the mandate be governed by foreign law.

Termination of the privilege

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

No. In the event of the attorney's death, the new attorney is under the same duties and enjoys the same rights regarding privilege. In the event of the client's death, the privilege is opposable to the heirs. This means that the heirs are not allowed to obtain information regarding the typical attorney activities (ie, legal counselling and/or representation in justice) carried out by the attorney for the deceased. Such information can nevertheless be disclosed to the heirs of a deceased client when it can be presumed that such disclosure corresponds to his or her implied intent. Furthermore, the attorney is entitled to ask the competent authority to be released from secrecy. To that end, the attorney must demonstrate that the heirs' interest outweighs the interest in keeping the secret. This is typically the case where the release from secrecy is necessary to ensure a fair sharing of the inheritance estate. The heirs are also entitled to ask the competent authority for the release of the attorney's secrecy.

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. Such abuse can take place in attorney–client privilege matters, especially when the client tries to use the attorney to perpetrate a crime or a fraud. However, in the framework of typical attorney activities, the principle is that any information given by the client is protected by privilege. The question as to whether privilege covers information that the client intends to perpetrate an offence or a crime is not clear. In such a case, the best practice for the attorney would therefore be to ask the competent authority to release him or her from secrecy (see question 15).

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

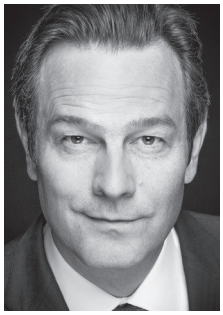
33 Is the privilege terminated if the attorney makes an inadvertent disclosure? If such a disclosure is made, can the attorney retrieve the privileged information or otherwise correct the error?

A disclosure by the attorney – whether inadvertent or intentional – does not, in principle, terminate the privilege, as the holder of the secret is the client and not the attorney. However, if information becomes available and known to the public following such disclosure, this information will no longer be subject to privilege (see question 6).

This being said, the Swiss Supreme Court decided that the privilege nevertheless remained in force in a case where a document under privilege had been stolen from the attorney's office. Consequently, the Swiss Supreme Court ruled that the prosecution authority was not allowed to use the stolen document and considered that any different 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 seizure of the attorney–client communication is in principle prohibited by law regardless of the place where the communication is located (see question 28). Legal scholars consider that privilege in not terminated when a client transfers such communication to a third party, even if the third party is not bound by privilege. The same rule should thus apply a fortiori when a third party is included in the communication.

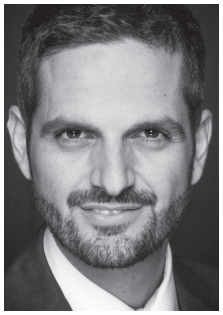


Christophe Emonet

Pestalozzi

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.

Christophe Emonet's expertise has been recognised for a decade by the leading legal directories, including *Chambers, The Legal 500, Who's Who Legal, Best Lawyers* and *IFLR*. A sample of recent quotes from clients and peers distinguish him as "standing out among Swiss lawyers. He always goes the extra mile." (*The Legal 500* 2020, Banking and Finance), being a "tough but sensible lawyer, who understands the client's needs" (*The Legal 500* 2020, Insolvency and Corporate Recovery), a "top practitioner, who deeply cares about his clients" (*The Legal 500* 2019, Litigation), and praise his "deep knowledge of the law, razor-sharp advice, and the fact that he helps you to put your best interest forward" (*Chambers* 2019, WCC). Other sources emphasise: "highly strategic, very bright and relentless in defence of his clients" (*Chambers* 2018, WCC; The Legal 500 2016/2015, Banking and Finance), "a great negotiator" (*The Legal 500* 2018, Litigation), who is "striking in the court room as well as in negotiations" (*Chambers* 2016, WCC; *The Legal 500* 2014, Banking and Finance) and 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 career, he also served for a 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 president of the AIJA Commercial Fraud Commission and member of the AIJA executive committee.

Pestalozzi is one of the leading and most respected law firms in Switzerland. It has offices in Zurich and Geneva and specialists with expertise in all areas of business law, enabling it to form customised teams to meet the needs of a vast range of international and domestic clients. Over the past decade, Pestalozzi established a strong track-record in white-collar crime, financial fraud and internal investigations. The firm regularly represents governmental bodies, states, banks, financial institutions and other corporations, as well as ultra-high net worth individuals. Banks in particular draw on Pestalozzi's expertise on a regular basis to solve complex matters stemming from internal or external financial fraud or involving regulatory (Swiss Financial Market Supervisory Authority) recovery and liability issues. Pestalozzi has made a name for itself handling complex cross-border cases combining expertise in the fields of governmental investigations, financial fraud, asset recovery and liability claims.

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