

Model Article on Confidentiality¹

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1. Confidentiality serves the rule of law. It forms the basis of the relationship of trust between a lawyer and his or her client.

Confidentiality is a fundamental principle of justice. In EU law, the protection of confidentiality has the status of a general legal principle in the nature of a fundamental right. Confidentiality is currently recognised in all Member States of the European Union. The protection of confidentiality also derives from Article 8(1) of the European Convention on Human Rights (ECHR) (protection of correspondence) in conjunction with Article 6(1) and (3)(c) of the ECHR (right to a fair trial) as well as from Article 7 of the Charter of Fundamental Rights of the European Union (respect for communications) in conjunction with Article 47(1), the second sentence of Article 47(2) and Article 48(2) of that Charter (right to be advised, defended and represented, respect for rights of defence) (cp. CJEU, C-155/79 (AM&S); Opinion of the Advocate General Kokott, C-550/07 (Akzo Nobel)).

If a client cannot be certain that the facts and thoughts he or she entrusts to a lawyer will be kept strictly confidential, trust between the client and his or her lawyer will be compromised.

Without such trust lawyers cannot properly discharge their duty to provide legal assistance which is essential for the safeguard of the rule of law.

Both aspects are underlined in paragraph 1.

In some countries, the concept of confidentiality is also considered to serve the proper administration of justice. However, since this view is not shared by all Member Countries, paragraph 1 refers to the “rule of law”: and the term “rule of law” is intended to cover where appropriate the proper administration of justice as well as the client’s interest, his/her right to legal assistance and his or her right to a fair trial.

2. The lawyer is bound by confidentiality. It is a duty of the lawyer, and may also be a right of the lawyer.

Legal professional privilege/Confidentiality serves to protect communications between a client and a lawyer. On the one hand, it is the indispensable precondition for the client’s right to legal assistance and, on the other hand, it is based on the specific role of the lawyer as being required to provide, in full independence, and in the overriding interests of justice, such legal assistance as

1 The Article is not intended to govern disciplinary proceedings where different rules may apply.

the client needs (cp. CJEU, C-155/79 (AM&S); Opinion of the Advocate General Kokott, C-550/07 (Akzo Nobel).

Given/considering that different terms - Confidentiality/Professional Secrecy/Legal Privilege - are used in different jurisdictions to express a similar concept, the CCBE Code of Conduct uses the more general term confidentiality without defining it; its content can be derived/deduced from the various sections of this article.

Not to disclose confidential information is a duty of the lawyer.

It may also be a right of the lawyer in the sense that no one can force a lawyer to disclose confidential information.

Such duty and any such right shall be respected by the legislator and public authorities.

3. Confidentiality is unlimited in time; it survives the termination of the retainer with the client.

4. Confidentiality applies to any and all information about a client or a client matter which is given to the lawyer by his or her client or which is received by the lawyer in the course of the lawyer's exercise of his or her profession, irrespective of the source of such information.

Primarily, duties of confidentiality cover all information relating to the client and the client's matter that are entrusted to the lawyer. It is irrelevant from what source a lawyer obtains that information. It is not only the information given to the lawyer directly by the client that is protected but also any and all information which the lawyer obtains from other sources in dealing with that client, be it relatives, business partners or third parties unrelated to the client and/or the client's matter.

Bearing in mind the broad scope of the concept of confidentiality, it follows that any and all information, relating to the client and the client's matter entrusted to the lawyer, will be confidential irrespective of the means of transmission of that information to the lawyer and will, without limitation, encompass verbal, digital and written information.

5. Confidentiality also applies to any and all documents prepared by the lawyer, to all those delivered by the lawyer to his or her client and to all communications between them.

As follows from paragraph 4, all communications between a lawyer and his or her client are confidential in both directions. Not only the information received by the lawyer, but also any document or communication from the lawyer addressed to the client in the exercise of his or her profession.

6. Confidentiality as defined in paragraphs 4 and 5 applies both in litigation or advice.

7. Paragraphs 4 and 5 above do not prevent a lawyer from disclosing confidential information to third parties and in particular to public authorities and courts, provided the lawyer has ascertained that:

(a) such disclosure is in the best interests of the client; and

(b) the client agrees with such disclosure; and

(c) no applicable provisions forbid such disclosure.

Paragraph 4 gives a broad definition of the scope of confidentiality. However, in the exercise of his or her profession, lawyers need to be able to disclose information. Without such disclosure he or

she would not be able to act as a lawyer. It is the lawyer (under the supervision of his or her professional authorities) who has to judge what information he or she will disclose in what circumstances. As a general rule, the lawyer can never disclose information without the permission of the client (b). Even with the agreement of the client, it is the lawyer's duty to consider whether or not a disclosure is in the best interest of his or her client (a). If not, he or she cannot disclose.

As a result of different concepts of Confidentiality/Professional Secrecy/Legal Privilege, there are various approaches as to the circumstances in which a lawyer is entitled or even obliged to disclose information. In some Member States, the lawyer may be obliged to disclose information if the client agrees to the disclosure or instructs the lawyer to do so. In other Member States, the client's consent is a necessary condition for the lawyer to disclose confidential information, but the lawyer is still entitled not to disclose if he or she considers that disclosure would not be in the best interest of the client. Subject to those differences, the lawyer should always act in the best interest of the client.

All conditions mentioned under this paragraph must be met in order to entitle the lawyer to disclose confidential information. It thus follows that the consent of the client is a necessary but not sufficient condition to allow the lawyer to disclose confidential information.

Point c) refers to applicable national rules since in some Member States the disclosure can be forbidden even if conditions in points a) and b) are met. The term "provisions" includes general statutory provisions as well as deontological rules irrespective of their nature, including case law, because the nature of deontological rules differs from Member State to Member State.

- 8. The lawyer is entitled to disclose confidential information in proceedings between the lawyer and his or her client or in proceedings against the lawyer provided such disclosure is necessary for such proceedings and there is a direct relation between such proceedings and the lawyer's mandate from this client. Proceedings include court, administrative, professional and alternative dispute resolution proceedings.**

Under certain circumstances a lawyer may be entitled to disclose confidential information when involved in proceedings as a party. This is not a general rule and is subject to certain restrictions.

A lawyer may be entitled to use confidential information:

- 1. In proceedings between the lawyer and a client and*
- 2. In proceedings against the lawyer for the purpose of his or her defence.*

In all such proceedings the lawyer is entitled to disclose confidential information only to the extent that it is necessary to secure his or her interests in such proceedings as long as there is a direct relation between such proceedings and the lawyer's mandate from this client.

- 9. The lawyer shall ensure that his or her employees and any other person with whom he or she collaborates in the course of the exercise of his or her profession, comply with confidentiality as set out in this Article.**

This provision stipulates that the lawyer may collaborate with non-lawyers provided he or she takes all reasonable measures to safeguard that these persons comply with the confidentiality obligations of the lawyer.