

COMMISSION CONSULTATIVE DES BARREAUX DE LA COMMUNAUTÉ EUROPÉENNE

THE PROFESSIONAL SECRET, CONFIDENTIALITY AND LEGAL
PROFESSIONAL PRIVILEGE IN THE NINE MEMBER STATES OF
THE EUROPEAN COMMUNITY.

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"On ne peut douter en général que la foi religieuse du secret ne soit essentielle à la profession du barreau... L'avocat, le juriste est nécessaire aux citoyens pour la conservation et la défense de leurs biens, de leur honneur et de leur vie. Il est établi par la loi et autorisé par l'ordre public dans des fonctions si importantes. La confiance de son client lui est surtout nécessaire pour s'en acquitter et où le secret n'est point assuré, la confiance ne peut être. Ce sont donc les lois elles-mêmes qui en instituant l'avocat lui imposent la loi du secret sans laquelle son ministère ne peut subsister et ses fonctions sont impossibles" - M. l'avocat général Gilbert Desvoisins (Nouveau Denizart, v° Avocat, §6 n° 10).

"The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection It is out of regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings... Deprived of all professional assistance, a man would not venture to consult any skilful person or would only dare to tell his counsellor half his case" - Lord Chancellor Brougham in Greenough –v- Gaskell, 1833, 1 My & K. 98.

A. INTRODUCTION

In all the member states of the European Community, the law protects from disclosure information communicated in confidence to a lawyer by his client¹. The member states differ in the methods by which this protection is achieved. In some states legal duties are expressly imposed upon the lawyer and corresponding rights are expressly conferred. In other states, protection is achieved by the creation of "privileges" or exemptions from the ordinary rules of law.² The nature and extent of these rights, duties, privileges and exemptions, vary from state to state. By whatever means protection is achieved, and whatever its nature and extent, its purpose is the same in all states.

The purpose of the law is not to protect the individual lawyer or his individual client. The purpose is, first, to protect every person who requires the advice and assistance of a lawyer in order to vindicate his rights and liberty and, second, to ensure the fair and proper administration of justice. This cannot be achieved unless the relationship between the lawyer and his client is a relationship of confidence³. The rights, duties and privileges given to lawyers are therefore an essential element in the protection of individual liberty in a free society. They exist for the public interest; they have not been created by lawyers for their private benefit.

In most of the member states, the law also protects from disclosure information communicated to other persons, such as doctors. But lawyers are the only category of private professional persons upon whom such rights, duties and privileges are conferred without exception in all the member states. These rights, duties and privileges are therefore, not only an essential feature of a free society, but also an essential mark of distinction between those who are properly qualified lawyers and those who are not.⁴

In all the member states, it is also recognised that written correspondence and oral communications between lawyers acting for different parties must in certain circumstances be protected from disclosure. The purpose of this protection is, again, the same in all the member states - namely, to ensure that lawyers, as part of their professional duty, can achieve the settlement of disputes without resort to litigation. (Interest reipublicae componere lites). In the majority of member states, the protection of correspondence between lawyers is achieved by rules of professional conduct and not by rules of law. But in two member states (the UK and Ireland) the protection is achieved by the same rules of law which protect communications between the client and the lawyer.

The main purpose of this Report is to describe the methods by which the general principles mentioned above are applied in the member states of the Community, and to consider some of the

¹ In this Report, unless otherwise stated, the word "lawyer" means an Avocat (Belgium, France and Luxembourg), Advocaat (Netherlands), Advokat (Denmark), Avvocato (Italy), Rechtsanwalt (Germany), Barrister (England, Wales and Ireland), Advocate (Scotland) or Solicitor (UK and Ireland), as the case may be. Notaries are treated in the same way as Rechtsanwälte by the law of Germany, but their rights and obligations are different from those of Avocats under French law - see Dalloz, Répertoire de Droit Pénal, 1969, III, v° Secret Professionnel, §§21, 47 and 81. The 'conseil juridique' is also bound by the professional secret in France (Decret No. 72-670, Art. 58), but, again, his rights and obligations are different from those of the Avocat.

² The English expression "legal professional privilege" expresses an idea which is common to all the member states - namely, that the rules are an exception to the ordinary rules of law. Privilege = Privi-legium = Vor-recht = Voor-recht.

³ See quotations on first page.

⁴ The Swiss Federal Court has recently held that the obligation of professional secrecy is an essential feature of those professions which enjoy a monopoly of 'consultation juridique' in the Canton of St. Gall, and therefore justifies that monopoly - Arrêt du 27 février 1974. French law equally distinguishes between the obligations of the 'professions réglementées' and others - Dalloz, Répertoire, loc. cit., §21.

problems raised by the differences in application. The Report was presented, in draft form, to the Commission Consultative des Barreaux at a meeting in Dublin in November 1975, and has been revised in the light of discussion at that meeting and of comments made subsequently by delegates and others. In the light of this discussion and comment it has become clear that the law governing the rights, duties and privileges of lawyers cannot be fully studied in isolation. This aspect of the law is, in most member states, only a part of a more general legal and constitutional framework by which the state guarantees to its citizens such fundamental rights as the right to a fair trial, the inviolability of the home, of letters and of telecommunications, and the right to individual privacy. This Report does not attempt to study every aspect of this vast subject, but it may help to show that any threat to the confidential relationship between lawyer and client is, truly, a threat to the liberty of the individual in a free society governed by the rule of law.

For the sake of brevity, the member states of the original Six are referred to as "the Six" or "the continental countries". Where appropriate, their systems of law are referred to as "the continental systems". Similarly, except where otherwise stated, "the UK" includes Ireland and references to "the UK systems" or the "common law systems" include the Scottish and Irish systems. Denmark is considered separately.

B. DESCRIPTION AND ANALYSIS - GENERAL -

1. For purposes of description and analysis, the member states can initially be divided into two main groups:
 - the Six, where the central legal concept is "the professional secret";⁵ and
 - the UK, where the central legal concept is "legal professional privilege".⁶

THE SIX

2. In the Six, the primary source of law is an Article of the Penal Code, which provides that it is an offence (punishable by imprisonment or a fine or both) to reveal another person's "secret". This provision of the Penal Code is the source of the lawyer's duty and, since breach of that duty is a criminal offence, the duty is not simply a professional or contractual duty, but a matter of public order.⁷
3. The duty of the lawyer carries with it corresponding rights, - in particular (i) the right to refuse to give evidence on matters covered by the professional secret, and (ii) the right to withhold from seizure by the police and judicial authorities any document which contains information covered by the professional secret. These rights are in some cases expressly conferred by the Codes of Criminal and/or Civil Procedure.

⁵ Le secret professionnel/Schweigepflicht/ geheimhoudingsplicht/segreto professionale.

⁶ "Legal professional privilege" is, strictly speaking, only a term of Anglo-Irish law. Scots law refers to "confidentiality".

⁷ "Dans les premières années du XIX^e siècle, certains auteurs estimaient que l'article 378 avait pour but de sanctionner la violation, analogue à l'abus de confiance, d'un contrat formé entre le praticien et son client ... Une telle conception est aujourd'hui périmée. On s'accorde à reconnaître que l'intervention de la loi pénale répond ici à l'intérêt social. Sans doute, a-t-elle pour résultat de sanctionner le tort causé à celui dont le détenteur du secret aurait trahi la confiance. Mais là n'est pas exclusivement, ni avant tout, l'objet de l'incrimination. Le devoir de silence a une portée plus large. Il a été imposé encore en faveur de tous les particuliers qui pourraient un jour avoir affaire, volontairement ou non, aux membres d'une profession appelés à connaître des secrets d'autrui" - Dalloz, Répertoire de Droit Pénal, 1969, III, v^o Secret professionnel, §5-6.

4. The secret thus enjoys both positive and negative protection: positive protection, in that the lawyer is bound to keep the secret and not to divulge it; negative protection, in that the courts and other authorities cannot force him to divulge it.
5. The law of the professional secret only protects information communicated to the lawyer. It does not protect advice or information communicated by the lawyer to his client, since the law of the professional secret is only concerned with the duties and corresponding rights of the person to whom a secret has been communicated. Freedom of communication between accused persons and their defence lawyers is protected in other ways.⁸ In no state does the professional secret protect the confidentiality of correspondence between lawyers except (in some states) insofar as such correspondence contains information which is itself protected by the professional secret.
6. In none of the Six is the obligation of professional secrecy imposed only upon lawyers. The law of the professional secret makes no basic distinction between -
 - a secret entrusted to a person to whom the citizen turns for help in a particular situation affecting his physical or moral well-being - e.g., the lawyer, the doctor, or the priest; and
 - a secret which the citizen is required by law to communicate to persons in authority - e.g., the judge, the police or the tax inspector.

In general, the obligation of secrecy is imposed upon any person who, by reason of his office, status or profession, may become the recipient of another person's secret. So too, the right to refuse to give evidence is generally conferred upon those who are bound by an obligation of secrecy.

THE U. K.

7. In the UK, a basic distinction is made between -
 - "the official secret" - i.e., information entrusted to persons in authority; and
 - "legal professional privilege", which protects communications to and by lawyers.

The law of official secrets is not unlike that of the professional secret on the continent.⁹ The law of legal professional privilege, on the other hand, is derived from "case law" (i.e. law declared by judges rather than law enacted by statute) and is part of the law of evidence.

8. In the U K., the rules of evidence protect all aspects of the relationship between the lawyer and his client. That is to say, they protect advice given by the lawyer to his client as well as information communicated by the client to the lawyer. Application of the same set of rules protects the confidentiality (in certain cases) of correspondence between lawyers.
9. In general, the U.K. rules of evidence involve asking three distinct questions: -
 - (a) (i) May this witness be required to give evidence? or
 - (ii) May this document be produced in court?
 - (b) (i) May this question be addressed to this witness and, if so, may his answer be used as evidence? or

⁸ See below, para.C5.

⁹ Compare, for example, the terms of Section 2(1) of the Official Secrets Act, 1911, with those of the relevant Articles of the continental Penal Codes.

- (ii) May the contents of this document be used as evidence? and
 - (c) (i) What is the value as evidence of the witness's answer to the question? or
 - (ii) What is the value as evidence of the contents of the document?
10. The rules relating to "legal professional privilege" are essentially rules relating to question (b). In other words, the rules presuppose that the witness is already in the witness-box, or that the document has already been produced in court. Question (b) is therefore a question which the judge, rather than the advocate or the witness, must answer. The rules also presuppose that there is a basic distinction between what is said by a witness or what is contained in a document, on the one hand, and what is "evidence", on the other hand. Judges in the UK are trained to make this distinction. Cases are decided only on the basis of what has competently been made "evidence". In the case of a document, positive steps must be taken to "place it in evidence"; unless and until a document has been placed in evidence, no steps need be taken to exclude it from consideration by the court.
11. Although the primary source of law in the UK consists in rules of evidence, it is possible to derive from those rules, and from the principles upon which they are based, a framework of rights and duties giving positive and negative protection, analogous to those which exist on the continent. In the UK, however, these rights and duties belong only to the lawyer. With very few exceptions, no other person may refuse to give evidence or refuse to produce a document when required to do so by the courts. It is ultimately the judge who must protect the citizen against disclosure of his "secrets".
12. The lawyer's duty is a professional and contractual duty to his client. Breach of duty may give rise to disciplinary sanctions or to an action of damages, but not to a criminal prosecution. If the client authorises the lawyer to give evidence or to produce a document, the lawyer's rights and duties cease to exist. The privilege, it is said, is the "privilege of the client". Moreover, the client may lose that privilege against his will - for example, where he has communicated information to a lawyer for the purpose of committing a fraud or crime. (*Privilegium contra rempublicam non valet*).

COMMENT

13. Before turning to a more detailed examination of the law of the member states, the following points should be noted at this stage: -
- (1) Although the juridical source of the lawyer's rights and duties is totally different, there exists in all the member states a similar framework (express or implied) of rights and duties.
 - (2) Lawyers from each group of member states will find something of value in the approach of the other group. The continental rules can be studied by UK lawyers, not simply as rules relating to lawyers, but as an aspect of the "law of privacy" and as a possible

method of solving the problems created by the Official Secrets Acts.¹⁰ The UK rules can be studied by continental lawyers as an illustration of the role of the judge in the UK system, of the importance of "evidence" in the decision of cases, and of the relationship of confidence which must exist between the lawyer and the judge in that system.

- (3) The differences between the two main groups show that practical difficulties may be created for the lawyer engaged in cross-frontier practice. For example, the UK lawyer must remember that advice given by him to his client is not absolutely protected in the other member states. Equally, the continental lawyer must remember that, in the UK, it is ultimately the judge and not the lawyer who will decide whether evidence must be given or a document produced.

C. DESCRIPTION AND ANALYSIS - DETAIL-

THE SIX

(i) Who is bound to preserve the professional secret?

1. In FRANCE the duty to preserve the professional secret is imposed upon doctors, surgeons and other medical practitioners, pharmacists, midwives "and all other persons who, by reason of their status or profession or of any office temporary or permanent, are 'dépositaires' of secrets which are entrusted to them."¹¹ In the Codes of BELGIUM and LUXEMBOURG, the relevant words are the same.¹² In ITALY, no profession is specifically mentioned and the duty is imposed generally upon "whoever has knowledge of a secret by reason of his particular status or office, or of his particular profession or skill".¹³ In these four states the words of the Code are wide enough to include lawyers from any state, their 'stagiaires' and other employees. The words are also wide enough to impose the duty of secrecy even if the secret has been

¹⁰ Parmi les prérogatives essentielles de la personne humaine qui appellent une protection juridique, figure le droit pour l'individu d'être préservé de toute intrusion abusive dans l'intimité de sa vie privée. C'est à ce titre que chacun doit se sentir à l'abri de la révélation par autrui des faits de nature confidentielle qui relèveraient de ce domaine réservé... L'intervention de la sanction pénale dans cette matière suppose une faute particulièrement caractérisée et grave. Tel est le cas pour la violation d'un secret commise dans l'exercice d'une activité professionnelle". - Dalloz, Répertoire de Droit Pénal, 1969, III, v° Secret professionnel, § 1-2.

Il nostro legislatore ha guardato al segreto cosiddetto privato come ad una delle più significative estrinsecazioni della libertà individuale" - Novissimo Digesto Italiano, 1969, XVI, v. Segreti (Delitti contro l'inviolabilità dei), §2, p.955.

There is no general law of privacy in the UK. The Younger Committee on Privacy recommended against the introduction of such a law. (Report Cmnd 5012). The law on official secrets was considered by the Franks Committee on Sec. 2 of the Official Secrets Act 1911. (Report Cmnd. 5104). Both Reports are still the subject of debate and no action has been taken on either of them.

¹¹ Code Pénal, Art. 378: Les médecins ... et toutes autres personnes dépositaires par état ou profession ou par fonctions temporaires ou permanentes, des secrets qu'on leur confie, qui hors le cas où la loi les oblige ou les autorise à se porter dénonciateurs, auront révélé ces secrets, seront punis ...

¹² Code Pénal, Art. 458: Les médecins ... et toutes autres personnes dépositaires, par état ou par profession, des secrets qu'on leur confie, qui, hors le cas où ils sont appelés à rendre témoignage en justice et celui où la loi les oblige à faire connaître ces secrets, les auront révélés, seront punis ...

¹³ Codice Penale, Art. 622: Chiunque, avendo notizia, per ragione del proprio stato o ufficio, o della propria professione o arte, di un segreto, lo rivela, senza giusta causa, ovvero lo impiega a proprio o altrui profitto, è punito, se dal fatto può derivare nocumento...

communicated before the professional relationship of lawyer and client has been formally created, and to preserve the duty after that relationship has ended.

2. In the NETHERLANDS the Code is worded slightly differently: "He who deliberately violates a secret of which he knows or has reason to suspect, which he is obliged to preserve by reason of his office or profession or a legal regulation, as well as of his former office or profession, shall be punished ..." ¹⁴ The words "secret ... which he is obliged to preserve" imply that the source of the duty lies' outside the provisions of the Penal Code. But for all practical purposes, the effect is the same as in France, Belgium, Luxembourg and Italy.
3. By contrast, in GERMANY, the terms of the Code are specific rather than general. The duty is imposed upon a list of persons, who include the Rechtsanwalt, Patentanwalt, Notary and defence advocate in a trial governed by statute (Verteidiger in einem gesetzlich geordneten Verfahren). ¹⁵ By a separate provision of the same Article, the duty is imposed upon their professional assistants and persons working with them in preparation for a professional career and, after the death of the person obliged to keep the secret, upon any person who heard of it from him or through succession to his estate. ¹⁶ There is no express reference to lawyers from other states or their 'stagiaires' or employees but a leading commentator has expressed the opinion that they are bound by the same obligation as German lawyers. ¹⁷ This would certainly be so if they were acting as 'defence advocate in a trial governed by statute'. ¹⁸
4. The German Code, like the other five Codes, refers to secrets confided to a person "in his capacity as" Rechtsanwalt, Patentanwalt, etc. It is not a secret confided to a person who happens to be a lawyer which is protected, but a secret confided to a lawyer in his professional capacity.

(ii) **In what circumstances is a lawyer permitted or obliged to reveal a secret?**

5. In all the states of the Six, it is a basic principle of criminal law and procedure that communications between an accused person and his defence lawyer are confidential and immune from disclosure. This principle protects, not only communications by the accused to his lawyer, but also communications by the lawyer to the accused. Thus (as in the UK) both aspects of the relationship are protected. Juridically speaking, however, this protection is part of the law relating to "the rights of the defence" (i.e. the guarantee of a fair trial) rather than the law of the professional secret. The protection is "negative protection" (cf. para. B.4 above) in the sense that the law prevents the use of such communications by the courts and other authorities against the accused. The law of the professional secret continues to provide both positive and negative protection insofar as the communication in question consists of the communication of a "secret"

¹⁴ Wetboek van Strafrecht, Art.272(1): Hij die enig geheim, waarvan hij weet of redelijkerwijs moet vermoeden, dat hij uit hoofde van ambt, beroep of wettelijk voorschrift, dan wel van vroeger ambt of beroep verplicht is het te bewaren, opzettelijk schendt, wordt gestraft...

¹⁵ §203 I Ziff. 3 Strafgesetzbuch. (University professors may act as defence advocates). Other persons included in the list are members of the medical, pharmaceutical and other health professions, auditors, accountants and tax consultants.

¹⁶ §203 III StGB.

¹⁷ Dreher, Strafgesetzbuch 35, Aufl. 1975 Anm.4 zu §203. The absence of any reference to foreign lawyers is explained by the Rechtsberatungsgesetz (13 December 1935, last amended 2 March 1974) which restricts the management of legal affairs, including legal advice, to persons authorised by the competent authorities.

¹⁸ See Schönke – Schröder, Strafgesetzbuch 18. Aufl. 1976 Anm. 37 zu §203.

by the client to the lawyer. It is this aspect of the law (the protection of secrets communicated to the lawyer) which is under consideration here.

6. In FRANCE, the duty to preserve the professional secret is general and absolute even where the facts are capable of being known.¹⁹ A violation of the professional secret is an instantaneous criminal offence (un délit instantané) irrespective of the permanence of its results.²⁰ No offence is committed where the law (la loi) requires or authorises disclosure.²¹ This applies, for example, to a doctor who reports an illegal abortion.²² But, in the case of a lawyer, there is no law which requires or permits disclosure of a professional secret, even where the lawyer is called upon to give evidence in legal proceedings.²³ The lawyer is absolutely "maître du secret" and must determine according to his own conscience whether, and if so to what extent, it is his duty to speak.²⁴ Even if his client consents to disclosure of the secret, the lawyer cannot be forced to disclose it.²⁵
7. There are two exceptions to these rules. First, the court may require a witness to answer a question, even where he has claimed the protection of the professional secret, if the question is precise and relates to information which could not in any circumstances be considered as covered by the professional secret.²⁶ Second, a secret may be revealed where this is necessary to protect the 'dépositaire du secret' against an unjustified accusation.²⁷ On the other hand, there is no exception in the case of secrets affecting the security of the state.²⁸
8. In BELGIUM, the provisions of the Code Pénal are general and absolute in their character.²⁹ Persons to whom professional secrets have been entrusted commit a criminal offence if they reveal them "except where they are called to give evidence in legal proceedings or the law requires them to disclose the secrets in question."³⁰ The person to whom a secret has been

¹⁹ Req. 17 juin 1927 D.H. 1927. 423
Crim. 24 jan. 1957. D.1957. 298

²⁰ Crim. 30 avril 1968. Bull. Crim. No. 135, p.318.

²¹ CP 378: see text in footnote to para. C.1 above.

²² CP 378 alinéa 2.

²³ Code de Procédure Pénale, Art. 109, alinéa 1: Toute personne citée pour être entendue comme témoin est tenue de comparaître, de prêter serment et de déposer, sous réserve des dispositions de l'article 378 du Code pénal. (A lawyer duly cited as a witness must therefore appear, take the oath and answer all questions which can be answered without violating the professional secret).

²⁴ "Les tribunaux s'en remettent entièrement sur ce point à la conscience du praticien" -Dalloz, Répertoire de Droit Pénal, 1969, III, v° Secret prof., §86.

²⁵ "[L'obligation] est absolue et ... il n'appartient à personne de les en affranchir" - Crim. 11 mai 1844. S.44.1.527; cf. Dalloz, loc. cit., §99.

²⁶ Crim. 15 fév. 1901 S.1904.I.201. note
Esmein; 6 déc. 1956. Bull. Crim. no. 820.

²⁷ Dalloz, Répertoire de Droit Pénal, 1969, III, v° Sec. prof., § 105-110.

²⁸ This used not to be so. Under the 'ancien régime', an avocat was obliged by his oath of office to reveal anything which he might learn 'de menaçant pour le roi'. See also, Dalloz, loc. cit. §73.

²⁹ Cass. 2 fév. 1905.

³⁰ CP 458. For text, see footnote to para. C.1.

entrusted cannot be compelled to speak if he believes it to be his duty to preserve the secret.³¹ Nevertheless, if he is called upon to give evidence about a fact covered by the professional secret, he may reveal it if he believes it to be his duty to do so.³² Otherwise, a violation of the professional secret occurs whenever the disclosure of facts covered by the professional secret is voluntary and spontaneous (*volontaire et spontanée*) even when it is made in the course of legal proceedings: no criminal intent is required.³³

The following advice is given to *avocats* of the Bar of Brussels:

"No law obliges the *avocat* to give evidence about the facts covered by the secret.

"Should he speak in order to protect his client? In that situation he should remember that, if he adopts the principle of speaking when his evidence is favourable, his silence will be interpreted in other cases as adverse to the accused.

"He should not allow himself to be guided by the authority of his client which cannot be freely given. As master of the secret, he should be prudent and should only speak in the most exceptional cases in accordance with the dictates of his own conscience; neither the *Bâtonnier*, nor the Council of his Order, have any authority to dictate the attitude which he must adopt."³⁴

A Lawyer may reveal a secret in order to defend himself against an unjustified accusation.

9. The law of LUXEMBOURG is substantially the same as the law of Belgium, since the terms of their respective Penal Codes are identical.
10. In ITALY, the Penal Code provides that it is an offence to reveal a professional secret "without justifiable cause" (*senza giusta causa*) and imposes a penalty only "if damage may result" (*se dal fatto può derivare nocumento*).³⁵ "Damage" in this context means "any prejudice which is juridically significant, whether it is prejudice of a patrimonial nature or simply moral".³⁶ The words "without justifiable cause" have given rise to much discussion and have been described as a 'fountain of uncertainties'.³⁷ It has been suggested that "justifiable cause" exists where disclosure is "effectively inevitable".³⁸ The lawyer is protected against being required to give evidence, in criminal cases, by the Code of Criminal Procedure and, in civil cases, by a law of 1933.³⁹ The Code of Criminal Procedure provides that the following cannot be obliged to give

³¹ Cass. 22 mars 1926.

³² Cass. 15 mars 1948.

³³ Cass. 26 Sept. 1966.

³⁴ Nyssens, *Introduction à la Vie du Barreau*, 2nd edition (1974), published by L'Ordre des Avocats à la Cour d'Appel de Bruxelles, §63.

³⁵ CP622. For text, see footnote to para. C.1.

³⁶ *Novissimo Digesto Italiano*, 1969, XVI, V. *Segreti* (*Delitti contro l'inviolabilità dei*), §6, p.958.

³⁷ *Ibid.* §9, p.962.

³⁸ *Ibid.* §9, p.963. "Justifiable cause" would certainly cover the situation where a lawyer had to defend himself against an unjustified accusation.

³⁹ *Codice di Procedura Penale*, Art. 351. R.D.L. 27 November 1933, N. 1578, Art. 13.

evidence "on what was confided to them or came to their knowledge by reason of their ministry, office or profession":- (1) ministers of religion, (2) 'avvocati', 'procuratori', 'consulenti tecnici' and notaries, and (3) doctors and other members of the medical profession. The Code goes on to provide that, where the prosecuting authority has reason to doubt whether the refusal to give evidence is justified, the grounds for refusal may be investigated and, if they are found to be unjustified, the witness will be required to give evidence.⁴⁰ The Code refers only to 'avvocati', 'procuratori', 'consulenti tecnici' and notaries. Thus, unless foreign lawyers would qualify as 'consulenti tecnici', they are not protected by the Code of Criminal Procedure; nor are their 'stagiaires' or employees. The Law of 1933 extends the same protection to 'avvocati' and 'procuratori' before tribunals of any kind, but again the protection is given to them specifically, so that foreign lawyers would not be protected.

11. In the NETHERLANDS the provisions of Penal Code are limited in that an offence is only committed if a professional secret is revealed "deliberately" (opzettelijk). The Dutch Code also provides that "where this offence is committed against an identified person, it may only be prosecuted on the complaint of that person".⁴¹ The Dutch Code of Criminal Procedure provides that "those who, by virtue of their status, profession or office have an obligation to maintain secrecy, may excuse themselves from giving evidence or from answering specific questions, but only about that of which the knowledge was entrusted to them in that capacity".⁴² The Dutch Civil Code contains an almost identical provision in relation to civil cases.⁴³ A lawyer may reveal a secret in order to protect himself against an unjustified accusation.
12. In GERMANY, there is a major difference in the provisions of the Penal Code. An offence is only committed by a person who reveals a professional secret "without authorisation to do so" (unbefugt). The author of the secret, rather than its recipient, is to that extent "maître du secret". The obligation of secrecy continues after the author's death,⁴⁴ but a prosecution may only proceed on the application of the person injured or his next of kin.⁴⁵ The right to refuse to give evidence (Zeugnisverweigerungsrecht) is (like the duty imposed by the Penal Code) conferred on a specific list of persons who "may not refuse to give evidence if relieved from their obligation of confidentiality".⁴⁶ The list of persons entitled to refuse to give evidence includes (i) "defence advocates of the accused (Verteidiger des Beschuldigten) on matters which were confided or became known to them in that capacity; (ii) "Rechtsanwälte, Patentanwälte, [and] notaries on matters which were confided or became known to them in that capacity"; (iii) "their assistants and persons who participate in the practice of the profession in preparation for a professional career".⁴⁷ In the case of those last mentioned, the question of whether the right to refuse to give evidence shall be exercised is decided by their principals, unless this decision

⁴⁰ CPP. Art. 351.

⁴¹ Wetboek van Strafrecht, Art. 272(2).

⁴² Wetboek van Strafvordering, Art. 218.

⁴³ Burgerlijk Wetboek, Art. 1946. This exemption also applies to relatives and relatives by marriage.

⁴⁴ §203 IV St. GB.

⁴⁵ §205 St. GB.

⁴⁶ §53 II Strafprozeßordnung (St. PO).

⁴⁷ §53 I & 53a I. St. PO. The list also includes ministers of religion, accountants and auditors, members of the medical, pharmaceutical and health professions, members of federal or state legislatures, editors, publishers, printers, and radio and television producers. The limits of the right to refuse to give evidence are defined in each case.

cannot be obtained within a reasonable time.⁴⁸ Again, there is no reference whatever to lawyers from other countries or their assistants although, if they were to appear as 'defence advocates', they would be protected. It is thought, however, that they would be protected in the same way as German lawyers.⁴⁹

Protection of documents from search and seizure:

13. The importance of this aspect of continental law will not be understood by lawyers trained in the UK system unless it is remembered that, on the continent, the police have independent powers of search and seizure and that the prosecuting authorities are, like the judges, members of the magistrature. In general, once a document is seized and reaches the 'dossier', it may be used as evidence against an accused person unless positive steps are taken to have it excluded from consideration. It is therefore important, in order to ensure protection of the professional secret, to prevent a document from being seized and thus reaching the dossier. The distinction is made between search (perquisition, perquisizione, huiszoeking, Haussuchung) and seizure (saisie, sequestro, beslag, Beschlagnahme).⁵⁰
14. Documents in the hands of lawyers are protected against search and seizure in all the Six. Before considering the methods by which this protection is achieved, it is important to remember that in all the Six there are wider legal and constitutional guarantees against unauthorised invasion of a citizen's private and family life, his home and his correspondence. Apart from Article 8 of the European Convention on Human Rights, which is self-executing in Belgium, Germany and the Netherlands, the laws of all the Six expressly protect the privacy of the home and of correspondence.⁵¹ Further, as mentioned above (para. C5), communications between an accused person and his defence lawyer are protected in all the Six.
15. In FRANCE, BELGIUM, and LUXEMBOURG, the procedure for search of the office of an Avocat is regulated by agreement between the Bar and the Procureur-Général. The search must be carried out by the 'juge d'instruction' (rather than the police) and in the presence of the Bâtonnier or his delegate. The Bâtonnier or his delegate determines what documents are protected by the professional secret. In France only, the Code of Criminal Procedure expressly requires the police and the 'juge d'instruction', before instituting a search, "to take all appropriate steps beforehand to ensure that the professional secret and the rights of the defence are

⁴⁸ §53 a. I. St PO.

⁴⁹ The German commentaries do not deal with this problem (see Kleinknecht St PO 32. Aufl. 1975 Anm. Zu §53; Lowe-Rosenberg St PO 22. Aufl. 1971 Anm. Zu §53). No reported court decision has been found. See also footnote 3 to para. C3 supra.

⁵⁰ On peut définir la perquisition comme la recherche par les juges d'instruction et les officiers de police judiciaire, en des lieux normalement clos, et particulièrement au domicile des citoyens, des objets et documents susceptibles de constituer le corps du délit ou d'apporter la preuve d'une culpabilité. La saisie est la mise de ces objets sous main de justice" - Dalloz, Répertoire de Droit Pénal 1969, III, v^o Perquisition, §1.

⁵¹ See, for example:

Belgium: Constitution Arts. 10 (home) and 22 (letters); CP Arts. 439-442 (home) and 460 (letters).

France: CP 184 and CPP 98 (home); CP 187 (letters), CP 368 (communications).

Germany: Basic Law Arts. 13 (home) and 10 (posts and telecommunications).

Italy: Constitution Art. 14 (home) and 15 ("correspondence and every form of communication"); CP 616, 617, 618 (communications).

Luxembourg: Constitution Art 15 (home) and 28 (letters); CP 439-442 (home) and 460 (letters).

Netherlands: Constitution Arts. 172 (home) and 173 (letters).

protected".⁵² The only documents which may be seized by the juge d'instruction are documents which constitute the "corps du délit". It has, however, recently been held in France that there is no violation of the professional secret in the case of seizure, after search of the home of an avocat, of documents relating to company administration which is not confidential in character.⁵³

16. In ITALY, the Code of Criminal Procedure provides that "seizure may not take place in the premises of defence advocates ('difensori') or 'consulenti tecnici', of papers or documents which they have received into their keeping in the performance of their function, except where such papers or documents constitute part of the corpus delicti (corpo del reato)".⁵⁴ Thus, the position in Italy is the same as in France, Belgium and Luxembourg, except that there is no provision for intervention by a person such as the Bâtonnier. The lawyer himself must protect documents from seizure.
17. In the NETHERLANDS, the Code of Criminal Procedure distinguishes between seizure (beslag) and search (huiszoeking):- "Where letters or other documents to which the obligation of maintaining secrecy extends are in the possession of persons entitled to excuse themselves from giving evidence as provided by Article 218, such letters or documents may not be seized without their consent. Search may only take place in the premises of such persons without their consent insofar as it can proceed without breaching the secrets of their status, profession or office; and such search may not extend to letters or documents other than those which constitute the corpus delicti or which have served towards the commission of the crime".⁵⁵ The result is therefore the same as in France, Belgium and Luxembourg but the intervention of the Bâtonnier is not required. The Dutch lawyer is specifically protected against search, which the Italian lawyer is not.
18. In GERMANY, protection against seizure (Beschlagnahme) is provided by Article 97 of the Code of Criminal Procedure: - "The following are not subject to seizure: (1) written communications between the accused and persons who are entitled to refuse to give evidence; (2) notes which [such persons] have made about matters confided to them by the accused or about matters which are covered by the right to refuse to give evidence; (3) other objects which are covered by the right to refuse to give evidence. These limitations only apply if the objects are in the actual possession of the person who has the right to refuse to give evidence. These limitations do not apply if those entitled to refuse to give evidence are suspected of complicity in, or encouragement of, crime or of receiving stolen property".⁵⁶ Thus, the limitation upon seizure is restricted to specific types of documents (whereas in the other states only documents which themselves constitute the corpus delicti may be seized); and there is no protection where the lawyer is suspected of complicity in crime. Apart from the general protection provided by Art. 13 of the Basic Law, the limitation upon seizure acts as a further protection against search (Hausdurchsuchung). No search can be ordered or made for the sole purpose of looking for, or seizing documents which are protected by Article 97.⁵⁷ A document which has been seized in violation

⁵² CPP 56, 57 and 96.

⁵³ Trib. corr. Paris, 11^e ch., 19 mars 1974, Gaz. Pal. 1974.1.376.

⁵⁴ CPP 341.

⁵⁵ Wetboek van Strafvordering, Art. 98.

⁵⁶ §97 St PO.

⁵⁷ Bundesgerichtshof vom 13.8.1973 in NJW 1973, 2035; Kleinknecht StPO 32. Aufl. 1975 Anm. 2 zu §103 und Anm. 1 zu §97; Waldowski AnwBl. 1975, 106; Haffke NJW 1974, 1984.

of Article 97 cannot be used by the judge as evidence against the accused.⁵⁸ It is generally acknowledged that communications from a defence lawyer which are in the possession of a client under criminal charges (Verteidigerpost) are also protected from seizure,⁵⁹ but such communications are not protected by Article 97. The Rechtsanwalt is not protected by any person such as the Bâtonnier.

19. So far as lawyers from other member states are concerned, documents in their possession would only be protected by the express terms of the Codes of France and the Netherlands. In Italy and Germany, they would be expressly protected only if the lawyer concerned were acting as "defence advocate" or (in Italy) 'consulente tecnico'. It appears that in Germany lawyers from other member states would be given the same protection as German lawyers⁶⁰ and, insofar as they are given the same rights as local lawyers by Community Directives, they will be protected in all six states. The co-operation of the local Bâtonnier might, however, be necessary to ensure effective protection in Belgium and Luxembourg and possibly also in France.

Protection of correspondence between lawyers:

20. The procedure for search and seizure does not apply in civil litigation. In civil litigation, the extent to which one party can force another party to disclose documents is more limited than in the UK. For this reason, the confidentiality of correspondence between lawyers is treated on the continent as a matter of professional rather than legal obligation.

21. In GERMANY, correspondence between lawyers is not treated as confidential unless it is expressly marked "Confidential" or "Without Prejudice", which is very rarely the case. In the OTHER FIVE states, correspondence between lawyers is treated as an extension of the confidential oral discussions which take place between lawyers in the law courts ("les confidences du palais") and is therefore treated as being confidential in principle.⁶¹ This principle does not apply where (a) the correspondence is expressly stated not to be confidential or cannot by its nature be confidential, (e.g. where an avocat writes as 'mandataire' of his client) or (b) the correspondence, although initially confidential, discloses a concluded agreement between the parties. Otherwise, correspondence between lawyers may only be produced in court by agreement between the lawyers concerned or, if they cannot agree, with the authorisation of the Bâtonnier in France, Belgium and Luxembourg, the Deken in the Netherlands, or the Consiglio dell' Ordine in Italy. For the same reasons, correspondence which is in principle confidential should not be shown by the lawyer to his client.

What is protected by the professional secret?

⁵⁸ Bundesgerichtshof vom 23.1.1963 in BGH St 18,227; Kleinknecht StPO 32. Aufl. Anm. 9 zu §97.

⁵⁹ Bundesgerichtshof v. 13.8.1973 in NJW 1973, 2035; Kleinknecht StPO 32, Aufl. 1975 Anm. 3A zu §97.

⁶⁰ See above para. C3 footnote.

⁶¹ This is an example of something which appears to be generally true - namely, that the rules governing the professional conduct of lawyers in these five countries are primarily related to their activity as court lawyers. This explains many of the differences in the professional rules governing the conduct of lawyers in these five states as well as barristers and advocates in the UK and Ireland, on the one hand, and those which govern the conduct of German and Danish lawyers and of solicitors in the UK and Ireland, on the other hand.

22. It is necessary to distinguish between the rules of law and the rules of professional conduct. It is a general rule of professional conduct in all the states of the Six that a lawyer should not reveal anything which has come to his knowledge in his professional capacity. But the law cannot be stated so generally or so simply.
23. In FRANCE, BELGIUM AND LUXEMBOURG, the terms of the Penal Code are such that any "secret" communicated in confidence to a lawyer in his professional capacity by any person is covered by the obligation of professional secrecy. The obligation (and the corresponding rights) therefore extend, not only to information communicated to a lawyer by his client, but also to information communicated by the opposing party, by his lawyer or by a third party, provided that the information constitutes a "secret" and has been communicated in confidence. And, since correspondence between lawyers is in principle confidential, the obligation covers information contained in such correspondence. It follows also that a lawyer is not completely free to disclose information derived from others to his own client. A "secret" has been defined as "tout ce qui a un caractère intime que le client a un intérêt moral et matériel à ne pas révéler", but the question of whether an item of information is a "secret" is a pure question of fact in each case.⁶² The obligation of professional secrecy applies even where the facts are susceptible of being known by others.⁶³
24. In ITALY, the essential elements are (i) that the fact should not be generally known (la non-notorietà del dato) and (ii) the existence of a juridically appreciable interest in its concealment (la sussistenza di un interesse giuridicamente apprezzabile al suo occultamento).⁶⁴ As already explained, the possibility of damage (nocumento) resulting from disclosure is an essential element in the criminal offence.⁶⁵
25. In the NETHERLANDS, the law is substantially the same as in France, Belgium and Luxembourg except that the relationship between a lawyer and the opposing party or a third party is not treated as being per se a relationship of confidence. Information communicated to a lawyer by an opposing party or a third party is therefore not, in principle, protected. But this does not apply to information communicated by another lawyer acting for an opposing party or a third party.
26. In GERMANY, what is protected is a 'secret' (Geheimnis), which has been confided to a lawyer or "which has otherwise become known to him" (oder sonst bekanntgeworden ist).⁶⁶ It is therefore immaterial who is the author of the secret, provided that it is a "secret" which has come to his knowledge in his professional capacity. The Principles of Professional Conduct (Grundsätze des anwaltlichen Standesrechts) promulgated by the Bundesrechtsanwaltskammer in 1973 provide: "The obligation of confidentiality goes beyond the statutory obligation of secrecy and covers everything which is confided to the lawyer in the exercise of his profession or which becomes known to him in the course of the exercise of his profession, unless otherwise determined by statute or by principles of jurisprudence."⁶⁷ The principal difference between

⁶² Cass. crim. 24 mai 1862, D.P., 1862.1.545.

⁶³ Crim. 24 jan. 1957. D. 1957. 298.

⁶⁴ Novissimo Digesto Italiano, 1969 XVI, v° Segreti (delitti contro l'inviolabilità dei) §5. p.958.

⁶⁵ See above, para. C.10.

⁶⁶ §203 I StGB.

⁶⁷ Art. 42.

Germany and the other five states arises from the fact that correspondence between lawyers is not in principle confidential (see above, para. C.21). It follows that information communicated by the opposing lawyer will not normally be a 'secret' and may therefore be communicated to the client and to the court.

Interception of letters and wire-tapping:

27. Apart from the general protection of the "rights of the defence" mentioned above (para. C5), there appears to be no express protection in any of the Six against duly authorised interception of letters and wire-tapping related specifically to the protection of the professional secret as such. Unauthorised interception of letters, wire-tapping and other interference with communications is the subject of extensive legislative protection in all six states. The circumstances in which, the extent to which and the methods by which, interception of letters and wire-tapping may be authorised varies from state to state.

Conclusion

28. The fore-going analysis shows that, although "the professional secret" is recognised as a specific legal concept in all the states of the Six, there are major differences and less important nuances in the law and procedure. Quite apart from the differences between the Six and the UK, it is apparent that no "approximation of laws" within the EEC could take place without a radical alteration of the law in one or more of the Six states. To take only one example, the single word 'unbefugt' (without authorisation) which appears in the German Penal Code creates a major difference between the laws of Germany and France as to who is "maître du secret". This point must be emphasised in the context of the Nine because there is a tendency to emphasise the similarities within the Six and the differences between the Six and the UK. The differences between the Six and the UK are differences of approach or method (made necessary by their fundamentally different legal systems) rather than differences of result. In terms of result, the law of Germany is at least as close to the law of the UK as it is to the law of France.

THE UK

29. In the UK, as on the continent, there is a distinction between the rules of law and the rules of professional conduct. All the Bars and Law Societies of the UK and Ireland recognise the basic principle of professional conduct that a lawyer should not disclose information which has become known to him in his professional capacity. In this respect, therefore, there is no difference between the professional rules which apply to lawyers on the continent and those which apply in the UK and Ireland. But the law or circumstances may require the UK lawyer to disclose information either because the communication in question is not "privileged" in the legal sense, or because a statute imposes a positive duty of disclosure.

30. Since the law of "legal professional privilege" has been developed by the judges and is not dependent on the interpretation and application of statutes or codes, it cannot be stated with such precision as the law of the Six.⁶⁸ Each case has been decided on its own facts. The law is therefore neither static nor precise.⁶⁹ This has the advantage that the law is capable of development by the courts to meet new situations. On the other hand, since Parliament can override the courts, the scope of legal professional privilege is liable to be curtailed by statute at any time and in any way.
31. Although the "UK system" has hitherto been treated as a single system, the law of Scotland is not the same, either in origin or in detail, as the law of England.⁷⁰ The law of Ireland has more in common with the law of England but, again, is not the same in all respects.⁷¹ Nevertheless, the important basic principles are the same in all three countries.
32. 'Privilege' attaches to communications, rather than to the information communicated, the person to or by whom it was communicated, or the method (oral or documentary) of communication. In a disputed case, therefore, the law will look at the relationship which existed between the parties concerned at the time when the communication was made. For this reason, the same principles of law apply to solicitors, barristers and advocates in private practice, salaried lawyers employed by government departments, salaried lawyers employed by commercial companies ('juristes d'entreprise'), foreign lawyers and their assistants and 'stagiaires'.⁷² The question in each case is whether the communication was made to or by a lawyer in his professional capacity as a legal adviser or advocate.
33. For the same reason, it is not necessary that a formal legal relationship should have been created between lawyer and client in order that a communication should become privileged. If a man goes to a solicitor qua solicitor and tells him his story, that communication is privileged, even if the solicitor then refuses to act for him.⁷³ So too, the communication remains privileged after

⁶⁸ The volume of case-law is enormous. No attempt is made to provide detailed references here.

For England see Halsbury's Laws of England, 3rd Edition, vol. 12, paras. 56-70; Phipson on Evidence, 11th Edition, para. 585 ff.; A Guide to the Professional Conduct of Solicitors, published by the Law Society, 1974, Chapter 2.

For Scotland, see Green's Encyclopaedia of the Laws of Scotland, 2nd edition, Vol. 4, p.347 ff.; Walker on Evidence, p.413 ff.

⁶⁹ As an example of this lack of precision, it is not certain whether, in Scotland, communications to ministers of religion are protected by "privilege" or not. (See Green's Encyclopaedia, loc. cit., §799). They are not protected in England. (See 'for example, Wheeler -v- Le Marchant, 1881, 17 Ch.D.675, per Jessel, M.R., at p.681).

⁷⁰ Historically, the Scots law on this subject was closely akin to the continental law -see for example, Stair's Institutions of the Laws of Scotland (1681), IV 43.8: "Advocates ... are suspected witnesses for those who entrust them; but they are not obliged to depone as to any secret committed to them". This was a principle of Roman law, which was shared by the civil law systems of the continent long before revelation of a professional secret was made a criminal offence. (Cp. Nyssens, Introduction à la Vie du Barreau, Brussels, 2nd edition, 1974, §62). In 1760, the Court of Session held that "the secrets of the cause" extended to "everything he [the lawyer] was informed of" as lawyer in the case. (Leslie -v- Grant, 5 Brown's Supplement, p.874). Thereafter, Scots law developed in the same direction as English law, but "privilege" in this sense is not a term of art in Scots Law, which refers rather to "confidentiality".

⁷¹ Article 40(5) of the Irish Constitution provides: "The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law". The Republic of Ireland has a written constitution; the UK does not.

⁷² Salaried lawyers in the employment of government departments and commercial companies are barristers, advocates or solicitors. They remain members of the same profession as those in private practice, although they may not practise at the Bar. Scots law and Irish law have not yet gone as far as English law in protecting communications to and by salaried lawyers. For the law of England see A. Crompton Amusement Machines -v- Customs & Excise Commissioners, [1974] A.C. 405.

⁷³ Not so in Scotland, see Davie, 1881, 4 Coup.450.

the death of the client or of the lawyer, or after the formal relationship of lawyer and client has come to an end. Similarly, where a lawyer is preparing a client's case and communicates with third parties for that purpose, the communications between the lawyer and those third parties are privileged.⁷⁴ Again, the court will look at the de facto relationship which existed when the communication was made.

34. For the same reason also, the law protects communications by the lawyer to his clients and, in some cases, to other people. Thus, a UK lawyer can give written advice to his client in the knowledge that the document containing that advice cannot be used as evidence against his client. The document is equally protected whether it is in the hands of the lawyer, or in those of the client, or in those of a third party. Even if it is in the hands of the police or the prosecutor, it cannot become 'evidence' because the communication which it contains is privileged.
35. Similarly, communications between lawyers may be privileged. What matters is the relationship between the lawyers concerned. Communications between two lawyers acting for the same party (e.g. barrister and solicitor, or solicitor and French Avocat) are privileged because the relationship between those two lawyers is a confidential relationship for the benefit of their mutual client. Communications between two lawyers acting for different parties may, or may not, be privileged according to the circumstances of the case. Thus, a confidential discussion between two barristers or two solicitors who are seeking to settle a dispute between their clients would be privileged, provided that the discussion was intended to be a confidential one between lawyers for the mutual benefit of their clients and in order to assist the administration of justice. But the same discussion would not be privileged if it were not intended to be confidential for example, if one solicitor were making a formal proposal to the other with a view to settlement of a litigation. Special rules also apply where lawyers have been involved in the 'conciliation' of matrimonial disputes.
36. In the case of written communications between solicitors (barristers and advocates do not write letters to each other), the normal method of indicating that a letter is intended to be confidential is to mark it "Without Prejudice". But the words "Without Prejudice" are not magical and do not automatically confer privilege; and a letter may be privileged even if it is not marked "Without Prejudice". Some solicitors put the words "Without Prejudice" on almost every letter they write, but they cannot create privilege where the nature of the communication does not justify it. Similarly, if a letter is clearly intended to be confidential, the fact that it is not marked "Without Prejudice" is not fatal and the letter may be privileged. Letters marked "Without Prejudice" may be used as evidence of a concluded agreement, as on the continent.
37. Privilege is conferred solely for the benefit of the client concerned (although the rule exists to protect all clients). If the client makes an unfounded allegation against his lawyer, which the lawyer cannot answer without reference to privileged communications, then the client is held to have waived the privilege.
38. By similar reasoning, privilege does not protect communication made for a fraudulent or illegal purpose. Privilege exists to protect the confidential relationship between the client and his legal adviser in that capacity. A lawyer qua lawyer cannot assist a client to commit a fraud or crime.

⁷⁴ Scots law distinguishes more sharply than English law between communications ante litem motam and post litem motam.

39. Privilege may be overridden by statute, and this has happened, particularly in recent tax legislation.⁷⁵ The solicitor in the UK and Ireland acts, not only as legal adviser and advocate, but also in many matters as agent for his client. As a result, the solicitor may be the only person in possession of information relevant to his client's tax liability. Recent fiscal legislation therefore requires the solicitor to disclose such information. This legislation does not apply to barristers and advocates, since their function is solely that of adviser and/or advocate. It has been possible, so far, to preserve a fair distinction between information communicated to the solicitor qua legal adviser, and information communicated to him in another capacity. But Wealth Taxes (recently introduced in Ireland, and proposed in the UK) present serious problems since the solicitor may be in possession of information as to his clients wealth, not because he has acted as his agent, but because he has been consulted as legal adviser. The Incorporated Law Society of Ireland have taken a stand against the government of Ireland on this matter. The proposed legislation has not yet been published in the UK.
40. Interception of letters and wire-tapping in the UK (not Ireland) were considered by a Committee of Privy Councillors in 1957.⁷⁶ The Committee was set up because information, obtained through tapping the telephone of an English barrister who was suspected of criminal activities, was communicated by the Home Secretary to the Bar Council and the Benchers of the Inn of Court to which he belonged (i.e. to his professional disciplinary authorities). The decision to do so was criticised by the Committee, but the question of whether tapping a barrister's telephone was objectionable as an interference with legal professional privilege does not appear even to have been considered.

DENMARK

41. The law of Denmark is like UK law in that violation of professional secrecy is not a criminal offence. Danish law is like continental law in that the right to maintain secrecy ('hemmeligholdelse') and the obligation to maintain secrecy ('tavshedspligt') are specific legal concepts. Danish procedure, like UK procedure, is 'accusatorial' rather than 'inquisitorial'. But the lawyer's right to withhold evidence is regulated by the Code of Procedure, as in Germany, Italy and the Netherlands. Correspondence between lawyers is not in principle confidential. Its confidentiality depends on circumstances.
42. Article 170 of the Danish Code of Procedure provides: "(1) Clergymen, doctors, defence advocates and lawyers (forsvarere og advokater) may not be required to give evidence on matters which have come to their knowledge on the practice of their profession against the wish of the person who has the right to require that secrecy be maintained. (2) The court may order doctors or lawyers, other than defence advocates in criminal cases, to give evidence when the evidence is considered decisive for the outcome of the case, and when the nature of the case and its importance to the party concerned or to society is found to justify a requirement that evidence be given. In civil cases such an order cannot be extended to include what a lawyer may have learned from a lawsuit entrusted to his care or to the advice he may have given in such a lawsuit. (3) The courts may determine the extent to which evidence shall not be given, having regard to that which, by virtue of the law, the witness has the obligation to keep secret and about which the maintenance of secrecy has essential importance. (4) The rules in Arts. 1-3 apply also to the assistants of the persons concerned".

⁷⁵ For example, in the UK - Taxes Management Act 1970, Sec.13; Finance Act 1972 (VAT), secs. 30-39; Finance Act 1975 (Capital Transfer Tax), Schedule 4.

⁷⁶ The Report is Cmnd.283.

43. The essential difference between Danish law and the law of the other eight states appears to be this: In all the other eight states the question of whether evidence must be given is answered by reference to a test which is essentially objective: in the UK and Ireland, the question is "Is the communication privileged?"; in the Six, the question is "Does the professional secret apply?". In Denmark, further subjective tests are applied: "(i) Is the evidence decisive for the outcome of the case? (ii) Is it important to the party concerned or to society? (iii) Does the maintenance of secrecy have essential importance?" The introduction of these subjective tests marks a major difference between Denmark and the other eight states.
44. Article 72 of the Danish Constitution provides that: "House searching, seizure, and examination of letters and other papers as well as any breach of the secrecy to be observed in postal, telegraph, and telephone matters shall take place only under a judicial order unless particular exception is warranted by Statute". The courts may permit the interception of letters and wire-tapping⁷⁷ but letters exchanged between an accused person and his defence advocate are, within limits, excepted from seizure.⁷⁸ Here again, the ultimate decision rests with the courts.

⁷⁷ Code of Procedure, Arts.750 (letters) and 750a and 750b (wire-tapping).

⁷⁸ Code of Procedure, Art.750(1).

D. PROBLEMS CONCERNING THE PROFESSIONAL SECRET, CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE IN THE EUROPEAN COMMUNITY

1. There appear to be two groups of problems:

(1) Problems of Community Law:

- (a) The "approximation of laws" under Article 3 of the Treaty of Rome;
- (b) Equality of treatment of lawyers from different member states;
- (c) The investigative powers of the European Commission.

(2) Problems affecting the Rights of the Lawyer and the Citizen:

- (a) Control of terrorism;
- (b) Control of monopolies;
- (c) Control of tax evasion.

(1) **Problems of Community Law:**

(a) **Approximation of Laws:**

- 2. Article 3 of the Treaty of Rome provides: "For the purposes set out in Article 2, the activities of the Community shall include ... (h) the approximation of the laws of Member States to the extent required for the proper functioning of the common market." Does the proper functioning of the common market require the approximation of the laws relating to secrecy, confidentiality and privilege as they affect lawyers?
- 3. It can be argued that the activities of lawyers are intimately connected with the legal systems of the different member states, and that the Treaty does not envisage approximation of legal systems. On the other hand, the activities of lawyers are also intimately connected with the economic activities of their clients; and the rights, duties and privileges of lawyers are important to their clients. It is therefore reasonable to expect that, in the long term, the proper functioning of the common market will require the approximation of laws relating to secrecy, confidentiality and privilege.
- 4. But this must surely be a long-term prospect. Laws as different in their spirit, their terms and their application could only be approximated by radical alteration of the law in several member states. Moreover, it would not only be necessary to alter details of the substantive and procedural law. The application of the law in each state depends upon the structure of the law and the approach of the courts to its interpretation and application. This approach is quite different, for example where the Constitution is written and the law is codified, and where it is not. But most importantly in the present context, the content and application of the law in this particular field depends upon the relationship which is resumed to exist between the lawyer, the prosecutor and the judge. This relationship is different, and the law must therefore be different (at least in detail), as between those states where the procedure is 'accusatorial' or 'combative', and those where it is 'inquisitorial' or 'investigative'; those where the prosecutor is a member of the magistrature and those where he is not; and those where the judges are drawn from the legal profession and those where the profession of judge is separate and distinct.
- 5. In the short term, the solution to the problem appears to lie in 'mutual recognition of principles' rather than in enforced 'approximation of laws'. The purpose of the law is the same in all the member states. It seems reasonable to ask that, in applying their own laws to lawyers from other

member states, the authorities of each member state should respect that purpose. The methods by which, and the extent to which, confidentiality is protected in his state of origin will affect the lawyer's attitude and conduct. For example, the UK lawyer is likely to assume that advice given by him to his client will be protected from disclosure; and the French lawyer will assume that he has an absolute right and duty to preserve secrecy. Provided that these assumptions are properly explained and understood, and provided that the lawyer's rights and privileges are not abused, it is probably only in the most extreme case that those rights and privileges will not receive protection in all the member states.

(b) Equality of treatment of lawyers from different member states

6. In 1965 Mr. J.A.H. de Brauw presented a Report to the Commission Consultative des Barreaux entitled "Le Secret Professionnel de l'Avocat à l'Etranger". This Report dealt with the law of the six original member states. Following upon that Report, the Commission Consultative adopted the following Resolution dated 5 February 1965:

LA COMMISSION CONSULTATIVE

.....

2° sur le secret professionnel de l'avocat appartenant à un barreau des pays de la C.E.E.,
- émet le vœu que cet avocat soit traité dans tout autre pays de la C.E.E., en ce qui concerne son secret professionnel, de la même manière que l'avocat national, sous réserve de ce que dans la pays où il invoque le secret professionnel, les modalités de l'exercice de sa profession ne soient pas incompatibles avec celles admises dans ce pays.

7. No action to achieve this aim has been taken by any of the member states since 1965. But it is also fair to say that no problems of a serious nature appear to have arisen since 1965 in relation to the rights of visiting lawyers. Since the enlargement of the Community, involving new systems of law and procedure in the UK, Ireland and Denmark, and with the growth of cross-frontier activity, the problem is likely to become more acute. UK lawyers, for example, are particularly worried by the fact that, except in Ireland, written advice to a client is not 'privileged' in the other member states as it is in the UK.⁷⁹ Further, in the context of the current proposed Directive on the Provision of Services⁸⁰ and any future Directive on Establishment, it is necessary to ensure that in those states where the Codes do not protect the lawyer from another state, equal protection is afforded to him. It seems probable that this will be achieved by the formula adopted in the current proposed Directive, which treats those persons listed in Article 1(2) as beneficiaries of the Directive and, as such, entitled to be treated as "lawyers" in the host member state. On the other hand, problems will remain, for the time being at least, in connection with those lawyers who have offices in other member states and in connection with employed lawyers.⁸¹

⁷⁹ See, for example, the article "Does Legal Professional Privilege Exist in the EEC?" by Stephen Stewart and David Vaughan, published in the Law Society's Gazette, 5 November 1975, pp. 1111-2. (It is only fair to point out, however, that this article treats the law of the professional secret as being the sole protection of communications between lawyer and client in the other member states).

⁸⁰ Com 75, 442 final, 25 July 1975.

⁸¹ cf. paras. C .19 and 32 above.

(c) The Investigative Powers of the European Commission:

8. The European Commission has very wide powers of investigation under Regulation 17,⁸² which contains no protection for the professional secret, confidentiality or legal professional privilege in the sense discussed in this Report.⁸³ The Report to the European Parliament preceding the making of Regulation 17 specifically recommended that the professional secret should be protected, but this recommendation was not adopted.⁸⁴ In at least one recent case, a document containing the advice of a lawyer to his client was used by the Commission as evidence of intentional infringement of Articles 85 and 86 of the Treaty of Rome.⁸⁵
9. It is no doubt necessary that the Commission should have wide powers of investigation in order to fulfil its functions under the Treaty, and the rights of the individual need not be the same as those of commercial undertakings. It is nevertheless objectionable that the Commission should have powers which are not restricted in any way by a principle which is recognised by the law of every member state namely, the principle that the confidentiality of the lawyer-client relationship is entitled to protection. It has been suggested that the necessary protection is to be found in Article 164 of the Treaty of Rome which requires that "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed".⁸⁶ In accordance with recent decisions of the Court, "the law" in this context includes general principles of law protecting fundamental rights which are recognised by the member states, or at least by a majority of them.⁸⁷ It may, however, be questioned how far the law of the UK and Ireland which protects all advice given by the lawyer to the client would be applied.

(2) Problems affecting the Rights of the Lawyer and the Citizen:

10. Quite apart from action by the organs of the Community, the traditional protection of the confidentiality of the lawyer-client relationship is threatened in the member states themselves. Terrorism, tax evasion and the abuse of monopoly power have added a new dimension to the age-old problem of preserving a proper balance between the interests of the state and the liberty of the individual. Moreover, the conduct of some lawyers has led (rightly or wrongly) to the suspicion that they are abusing their legal privileges and acting as accomplices, rather than advocates or advisers, of their clients.

⁸² Council Regulation No. 17/62 of 6 February 1962 (J.O.C.E. No. 13. 21 Feb. 1962).

⁸³ Article 20 relates only to the obligation of professional secrecy of the Community authorities and officials in relation to the information obtained.

⁸⁴ Report by Dr. Arved Deringer. Assemblée Parlementaire Européenne, Documents de Séance 1961-62, Doc.57, 7 Sept. 1961.

⁸⁵ See the Quinine case (69/240/EEC - J.O.L. 192/5, 5 Aug. 1969).

⁸⁶ See article by Stewart & Vaughan, cit. sup., para. D.7 footnote 1.

⁸⁷ See particularly Case 11/70 (Internationale Handelsgesellschaft), 17 December 1970, Rec. XVI, 1970, p.1125. In his Opinion, the Advocate-General said: "The fundamental principles of national legal systems contribute to forming that philosophical, political and legal substratum common to the member states from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure respect for the fundamental rights of the individual. In that sense, the fundamental principles of national legal systems contribute to enabling Community law to find in itself the resources necessary for ensuring, where needed, respect for the fundamental rights which form the common heritage of the member states."

11. The 'Lex Baader-Meinhof' in Germany⁸⁸ is an example of legislative action affecting the rights of the defence, although a proposal that written and oral communications between an accused in custody and his defence lawyer should be supervised was dropped. Recent fiscal legislation in the UK and Ireland⁸⁹ is an example of measures against tax evasion which expressly limit legal professional privilege.
12. Even the routine inspection of a lawyer's account books for tax purposes may lead to covert infringement of the lawyer-client relationship. In some member states lawyers not only advise their clients but manage their affairs, and lawyers throughout the Community hold money on behalf of clients. Only by exercising the greatest care can the lawyer ensure that his books do not disclose to the inquisitive official information confidential to the client.
13. There is equally very little express protection of communications between lawyer and client against secret supervision through interception of letters and wire-tapping – see above paras. C 27, 40 and 44.
14. It is to be expected that such threats to the confidential nature of the lawyer-client relationship will increase rather than diminish. Measures infringing that confidentiality may, indeed, be provoked and apparently justified by the unscrupulous abuse of privilege by lawyers themselves. But it is also to be expected that, as the law becomes more complex, so the individual will become increasingly dependent upon the advice and assistance of the lawyer. The words of Avocat-Général Desvoisins and Lord Chancellor Brougham quoted at the beginning of this Report are as true today as they were when they were written.
15. The Community and national authorities should recognise that the rights, duties and privileges of lawyers are not simply a peculiarity of the law relating to lawyers but are specifically designed to protect the liberty and privacy of the individual, the proper administration of justice and the right to a fair trial. The Bars of the member states have a right and duty to protest against any infringement or curtailment of that protection. They stand, in this respect, between the citizen and the state. Abuse of privilege by individual lawyers acting as accomplices of their clients should be punished by professional and, if appropriate, by penal sanctions directed against them as individuals, rather than by withdrawing protection from the innocent. If abuse cannot be proved against individuals, it is not to be presumed to exist.
16. Insofar as it is necessary to find new methods to preserve a proper balance between the interests of the state and the interests of the individual, a model is to be found in the practice of those states where the Bâtonnier intervenes to protect the professional secret.⁹⁰ The problems are not insoluble, given a proper working relationship between the authorities of the Community and member states on the one hand, and the Bars and other professional organisations on the other.

⁸⁸ § 138a StPO now provides for the expulsion of defence lawyers in circumstances where they are suspected of abusing their privileges.

⁸⁹ See above para. C.39.

⁹⁰ Cf. para. C 15 above.

E. RESOLUTION OF THE.COMMISSION CONSULTATIVE DES BARREAUX DE LA COMMUNAUTE EUROPEENNE

[The French text is the primary text but, as this Report is published in English, the English translation is printed first.]

THE CONSULTATIVE COMMITTEE OF THE BARS OF THE EUROPEAN COMMUNITY MEETING AT DUBLIN ON 21ST NOVEMBER 1975

- FINDS AS FOLLOWS: -

1. The rights and obligations of the lawyer in relation to professional confidentiality rest upon common principles but involve particular methods of application in each state related to its own legal system. They are, however, recognised in the law of every state as being an essential guarantee of the liberty of the individual and of the proper administration of justice and as constituting one of the basic attributes of the legal profession.
2. Elimination of all the differences which have been found to exist cannot be achieved without alteration of the legal systems themselves.
3. Nevertheless it appears that those difficulties which arise most frequently through the application in an international context of the rules of professional confidentiality can be resolved if account is taken of the underlying principles which justify those rules.
4. Lawyers should not suppose that they are entitled, under cover of professional confidentiality, to transgress their legal obligations or their moral duties, and they must not, in whatever capacity or whatever circumstances, be the accomplices of their clients.

THEREFORE ADOPTS THE FOLLOWING RESOLUTION

1. The high authorities of the Community and national governments should be reminded that any restriction upon the rights and legal privileges of the lawyer in relation to professional confidentiality (which are already recognised by all the member states) prejudices the liberty of the individual, the independent administration of justice and the proper defence of accused persons.
2. While lawyers may not lend aid and assistance to their clients in the commission of crimes or offences, they are nevertheless protected by the rules of professional confidentiality in the interests of their clients, it being the task of the professional disciplinary authorities to prevent and punish any abuse on the part of their members.
3. The high administrative and judicial authorities should be reminded that, when in another country, the lawyer must also obey the law and rules of professional conduct of his country of origin and the basis of that law and those rules should be explained to the authorities where necessary. The bars of the host country should assist the lawyer from another country in order to safeguard the principles of liberty and justice.
4. In those countries where the foreign lawyer is not a beneficiary of the rules which protect professional confidentiality for a lawyer of that country, all necessary steps must be taken to ensure that this disparity is removed.

LA COMMISSION CONSULTATIVE DES BARREAUX DE LA COMMUNAUTE

EUROPEENNE REUNIE A DUBLIN LE 21 NOVEMBRE 1975

CONSIDERANT

- 1° Que les droits et devoirs de l'avocat en ce qui concerne le secret professionnel reposent sur des principes communs mais comportent des modalités d'application particulières à chacun des Etats qui sont fonction de leurs systèmes juridiques. Mais ils sont considérés dans toutes les législations et les jurisprudences comme une garantie essentielle de la liberté de l'individu et du bon fonctionnement de la justice et comme constituant l'un des attributs primordiaux de la profession d'avocat.
- 2° Que la suppression de toutes les différences constatées ne pourrait être réalisée que par des novations apportées aux systèmes juridiques eux-mêmes.
- 3° Que néanmoins il appert que les difficultés le plus couramment suscitées par l'application internationale des règles du secret professionnel de l'avocat peuvent être résolues si l'on tient compte des principes qui causent et justifient ces règles.
- 4° Que l'avocat ne saurait, sous le couvert du secret professionnel, justifier la transgression à ses obligations juridiques et à ses devoirs moraux, alors qu'il ne doit, à quelque titre et dans quelque circonstance que ce soit, être le complice de son client.

ADOpte LA RESOLUTION SUIVANTE

- 1° Qu'il importe de rappeler aux hautes autorités communautaires et nationales que toute restriction aux droits et prérogatives de l'avocat en ce qui concerne le secret professionnel, lesquels sont d'ailleurs reconnus par tous les Etats membres, porte atteinte à la liberté de l'individu, à l'indépendance de la justice et à la défense du justiciable.
- 2° Qu'au demeurant, si les avocats ne peuvent prêter aide et assistance à leurs clients dans la commission des crimes et des délits, ils sont, dans l'intérêt de ceux-ci protégés par leur secret professionnel, les autorités disciplinaires professionnelles ayant mission de veiller et de prévenir tous abus de la part de leurs membres.
- 3° Qu'il importe de rappeler aux hautes autorités administratives et judiciaires que, dans un pays d'accueil, l'avocat doit aussi respecter le droit et la déontologie de son pays d'origine, en expliquant s'il y a lieu les fondements. Que les barreaux d'accueil doivent aider l'avocat étranger pour que les principes de la liberté et de la justice soient sauvegardés.
- 4° Qu'il est nécessaire que dans les pays où l'avocat étranger ne bénéficie pas encore des règles protégeant le secret professionnel de l'avocat national, toute mesure soit prise pour que cette disparité soit abolie.

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