

Confidentiality of communication with patent advisors – Background

Mechanisms to preserve confidentiality of communication with certain professions

In general, when a client seeks an opinion from a qualified lawyer, communications between the lawyer and his client are kept confidential. The purpose of establishing and preserving such confidentiality is to encourage those who seek advice and those who provide advice to be fully transparent and honest in their communications. Those who seek advice should provide the advisor with all the information that could be relevant to obtain the best advice, including aspects which may run counter to his position. On the other hand, the advisor should be able to be completely frank. Therefore, in order to ensure a high quality of legal advice, the exchange of instructions and advice should not be restricted due to the fear of disclosure of their communications.

There is both a public and a private interest underpinning the regulation of the confidentiality of professional advice. On the side of the public interest, encouraging a client to frankly and fully communicate with his lawyer assists the administration of justice, and maintaining such communication confidential ensures the human right to privacy. However, another public interest aspect exists, which is to investigate the truth for the sake of justice, and for that reason, all relevant information needs to be laid down before the court. Consequently, there is a need to balance these competing interests, and the answer of many countries is to provide a mechanism to preserve confidential professional communications only to the extent that it would not compromise the exercise of justice.

The legal mechanism to preserve confidential professional communications in each jurisdiction, therefore, is closely linked to the legal framework and procedures for the investigation of the truth in court, such as submission of evidence. Generally speaking, a distinctive framework that governs the legal fact finding process has been developed in the respective legal tradition, notably common law and civil law. At the same time, even within the same legal tradition, various ways to investigate the truth without compromising the confidentiality of communication with certain professions have been developed at the national level.

Discovery proceedings in common law countries in general

One general characteristic of civil procedure in common law countries is “discovery” (or disclosure) in a pre-trial phase. There, each party to litigation may be required to provide disclosure of relevant documents and other evidence in the possession of other parties. The discovery system was developed with a view to bringing all evidence to the attention of the court so that the truth can be ascertained. On the other hand, as seen above, there is also a competing public need to keep certain information confidential from public inspection. For example, information received by certain professions, such as lawyers, doctors or priests, in their professional capacity should remain confidential. Considering the overall public interest, common law jurisdictions developed a notion of “privilege” under which a client is given the right to prohibit certain confidential communications or documents from forced disclosure. In parallel with the professional duty of confidentiality, the client-attorney privilege is intended to promote the broader public interest in the observance of law and the administration of justice by creating a specific exception to the discovery of information in litigation.

No discovery proceedings in civil law countries in general

Unlike common law countries, civil law countries do not have a discovery or disclosure process that obliges the parties to disclose all relevant information in their possession during court proceedings. Therefore, the inter-related concepts of discovery and the privilege granted to clients as an exception to it are not common in civil law countries.

However, civil law countries also recognize that confidentiality of communications between certain professionals and their clients' needs to be protected in order to ensure frank and open communications necessary to the accomplishment of their professional tasks. They have developed the notion of "professional secrecy obligation", according to which certain professionals, such as lawyers, doctors and priests, are obliged to keep information that they have received through their professional activities secret. This would, in turn, guarantee the clients that the information communicated to those professionals could not be ultimately be disclosed to third parties. Breach of the secrecy obligation is generally a criminal offence.

In order to fulfill such legal obligation, those professionals, for example, lawyers, are entitled to refuse to cooperate in court proceedings to the extent that it leads to breach of their professional secrecy obligation. This may include refuse to testify in courts regarding any such confidential information provided to them in their professional capacity. Similarly, in countries where a limited scope of document submission order or seizure of documents is allowed in the court proceedings, provision of documents that cover such confidential information under the professional secrecy obligation can be refused or such documents cannot be seized.