

# Switzerland

## National aspects

### *Introduction*

The professional secrecy obligation of the legal profession in Switzerland relates to the confidentiality between client-lawyer communications which covers all information that an attorney receives from his or her client or of which he or she learns in the course of his or her activity as an attorney. Swiss law provides for a strong protection of confidentiality, in part because of the very high value placed on the constitutional right to privacy (Federal Constitution of the Swiss Confederation of 18 April 1999, RS 101, art 13). Switzerland's highest court has emphasized that the legal professional secrecy assists the administration of justice by allowing clients to confide frankly in their lawyers: if the client does not unreservedly trust him or her, and if he or she is not aware of all the material circumstances, then it is difficult, even impossible, for the lawyer properly to represent the client in either advisory work or in a lawsuit (BGE 112 Ib 606, 606–7). In *S v. Switzerland* ((1992) 14 E.H.R.R 6770), the European Court of Human Rights held that: “[A]n accused’s right to communicate with his advocate out of the hearing of a third person is one of the basic requirements of a fair trial in a democratic society. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness”.

### *Professionals bound by secrecy obligation*

The professional secrecy includes, among others, attorneys, medical doctors, notaries, dentists and bankers. Pursuant to the article 321 of Swiss Criminal Code (RS 311), cited professionals who divulge secrets entrusted to them or which they come to know in their professional capacity may be punished by imprisonment or a fine. Banking secrecy falls under Article 47 of the Swiss Federal Law on Banks and Savings Banks (RS 952). Corporate in-house counsels are not protected by confidentiality because of their perceived lack of independence.

### *Patent Attorneys and Patent Attorneys Associations in Switzerland*

The Swiss Parliament adopted the Patent Attorney Act (RS 935.62) in March 2009. Pursuant to Art. 2, Swiss patent attorneys must possess a recognized higher education qualification in natural sciences or engineering; have passed the Swiss Federal Patent Attorney Examination or a recognized foreign patent attorney examination; have completed practical training; possess an address for service in Switzerland and be registered in the Patent Attorney Register.

In Article 10 of the Patent Attorney Act, the Swiss legislator introduced professional secrecy obligations for patent attorneys (see Art. 10 in the appendices). In addition, the professional secrecy guaranteed by the Swiss Criminal Code was also extended to patent attorneys. According to the Federal Act on the Federal Patent Court (Art. 29, RS 173.41,

see appendices), a registered patent attorney can represent a party before the Federal Patent Court provided that they engage in independent practice. As a procedural counterpart, the Code of Civil Procedure (Art. 160 par. 1 lit. b, RS 272) provides that patent attorneys may refuse the production of evidence that is subject to professional secrecy.

In Switzerland, there are three patent attorney associations, namely the Association of Swiss Patent and Trademark Attorneys ([ASPTA](#)), the Association of Swiss and European Patent Attorneys in the Private Practice ([VESPA](#)) and the Association of Patent Attorneys in Swiss Industry ([VIPS](#)). The members of all those associations are bound by the Code of Conduct of the Institute of Professional Representatives before the European Patent Office (epi Code of Conduct), as well by the Regulation on discipline for professional representatives (epi Disciplinary Regulation), which obliges its members to keep the information received from their clients undisclosed (See Article 2 of epi Disciplinary Regulation ). In addition, ASPTA represents the national association of the *Fédération Internationale des Conseils en Propriété Industrielle* ([FICPI](#)) in Switzerland. Therefore the patent attorneys of ASPTA are also bound by [FICPI](#) rules and more particularly the Lugano Code of Conduct ([See Rule 5 of the Lugano Code of Conduct](#)).

#### *Scope of secrecy obligation*

##### *- Secrecy confined in the course of the profession*

Under Article 321 of the Swiss Criminal Code, the secrecy obligation covers all information that an attorney at law has received from his or her client, or of which he or she has learned in the course of professional activity as an attorney at law. However, the professional secrecy is only limited to such material which is confided for the purpose of the mandate and the exercise of the lawyer's profession (BGE 112 Ib 606). In addition, professional secrecy extends only to facts which the client entrusts to his or her lawyer in order to carry out the mandate, or which the lawyer notices in the practice of his or her profession (BGE 112 Ib 606 at 607).

The lawyer is not bound by secrecy concerning such facts which he noticed as a private person, or which are generally known (BGE 112 Ib 606 at 607).

##### *- Release of the professional secrecy*

Pursuant Art. 321 par. 2 of the Swiss Criminal Code no offence is committed if the attorney at law discloses the information with the consent of its client. However, even in such case the attorney has no obligation to release the secrecy (see Art. 13 of the Federal Law on the Free Circulation of Lawyers of 23 June 2000, RS 935.61; Art. 166 par. 1 lit. b of the Swiss Civil Procedure Code of the 19 December 2008, RS 272; Art. 171 par. 4 of the Swiss Penal Procedure Code of the 5 October 2007, RS 312). Furthermore, an attorney at law can disclose information if he or she is authorized (but in no way obliged) by a supervisory authority (e.g. the Cantonal authority in charge of supervising attorneys at law). An attorney at law may request the authorization to disclose privileged information if his or her professional honor is at stake; or if he or she can only defend

himself by disclosing such information (e.g. in a malpractice case); or if it is in the public interest to do so, e.g. in the event of a crime or fraud (Canton of Zurich, Anwaltsgesetz vom 17 November 2003 (OS Zürich Bd 59 S 144) arts 33–5; Canton of Geneva, Loi sur la profession d'avocat du 26 avril 2002 (RSG E 6 10) art 12).

Patent attorneys who are bound by the epi Code of Conduct are obliged to keep information received in the course of the exercise of their duties undisclosed, unless they are released from this obligation (Article 1b of the epi Code of Conduct in relation to Article 2 of the epi Disciplinary Regulation). Moreover, patent attorneys are automatically released from their secrecy obligation if the secret information is published (Rule 4(g) of epi Code of Conduct).

### *Consequences of unauthorized disclosure*

The violation of the professional confidentiality obligation is a criminal offense that can lead to a custodial sentence or to a monetary penalty (Art. 321 Swiss Criminal Code). An attorney at law, including a patent attorney, can be held liable for any damages caused by the violation. He or she can be subject to administrative sanctions, warned, fined, suspended or disbarred in the event he or she violated the privilege.

Article 9 par. 1 lit. a of the FICPI statutes provides that an individual member may face expulsion from the Organization if he or she has been deficient in their professional conduct. It is assumed that deficiency in professional conduct includes breach of professional client confidentiality. In addition, a professional representative who fails to comply with the epi Disciplinary Regulation may face disciplinary measures, such as a warning, reprimand, a fine, removal from the list of professional representatives for not more than six months and deletion from the list of professional representatives for an indefinite period of time (Art. 4 par. 1 of epi Disciplinary Regulation).

## **Cross-border aspects**

### *Treatment of foreign patent advisors*

The question whether the relevant provisions and practices in Switzerland related to professional confidentiality could be invoked by foreign patent attorneys (not registered in Switzerland) is not yet resolved by the Swiss legislation and jurisprudence.

## **Summary**

Patent attorneys are bound by professional secrecy. In general, they cannot be compelled to testify on confidential matters arising out of their profession, nor can documents covered by privilege be seized. Members of Patent Attorney Associations, such as ASPTA, VESPA and VIPS are required to observe the rules and the code of conduct of those associations which oblige members to keep the information received from their clients undisclosed. Whether patent attorneys registered in foreign countries are also entitled to enjoy such privilege is not regulated or decided by court.

## Appendices

Section 3, **Article 10 of the Patent Attorney Act** (RS 935.62) states:

“Section 3: Professional Confidentiality

Article 10

- (1) Patent attorneys are obliged to maintain confidentiality concerning all secrets that are entrusted to them in their professional capacity or which come to their knowledge in the course of their professional activities, this obligation being unlimited in time.
- (2) They must ensure that persons assisting them maintain professional confidentiality.”

The Federal Act on the Federal Patent Court (RS 173.41) states:

“Section 3: Representation of Parties

Article 29

- (1) In proceedings concerning the validity of a patent, patent attorneys may also represent parties before the Federal Patent Court as provided for in Article 2 of the Patent Attorney Act of 20 March 2009, provided that they engage in independent practice.
- (2) Proof of independent practice as a patent attorney shall be furnished by way of suitable documentation at the request of the Federal Patent Court.”

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