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On the Scope of Professional Secret and Confidentiality: The International Criminal Court Code of Professional Conduct for Counsel and the Lawyer's Dilemma

ABDELRAHMAN AFIFI*

Abstract

In late 2005 the Assembly of States Parties adopted the Code of Professional Conduct for Counsel of the International Criminal Court. Article 22 of the Code contains a provision on fee splitting which does not go as far as to place a positive duty on counsel to report such practices to the Registrar. This essay revisits this approach in the light of the practice of the ad hoc tribunals, the jurisprudence of the European Court of Human Rights, and existing norms in domestic legislation. It argues that the lawyer–client privilege is not absolute. Accordingly, the ICC should make it obligatory – through specific empowering clauses – for lawyers to advise their clients about the prohibition of the practice of fee splitting and to report the incident to the Registrar forthwith, notwithstanding any claim of privilege.

Key words

code of conduct; defence counsel; fee splitting; International Criminal Court; professional secret

1. Introduction

The indigent accused in the International Criminal Tribunal for Rwanda (ICTR),[1] the International Criminal Tribunal for the former Yugoslavia (ICTY),[2] and the

* Ph.D. in Public Law from the University Aix-Marseille III (France), Diplôme d'études approfondis (DEA) in Public International Law from the Univesity of Aix-Marseille III; currently at the International Criminal Court. I would like to thank Esteban Peralta-Losilla, Officer in Charge, Defence Support Section, and Sam Shoamanesh, Assistant Legal Officer, for their advice in the development process of this article and for their insight into the issues of the argument. This article is dedicated to my mother. Special thanks to my wife for her encouragement. The views expressed in this article are the personal views of the author and do not reflect the views of the International Criminal Court on the issues discussed.

1. Art. 20(4) of the ICTR Statute stipulates:

> In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

2. Art. 21(4) of the ICTY Statute stipulates:

> In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he

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International Criminal Court[3] (ICC) are entitled to have counsel assigned to them by the respective registrars, with the legal fees and costs borne by the tribunals. A defence team is normally composed of a lead counsel, a co-counsel, investigators, and legal assistants. During its first investigation into fee-splitting matters, the Office of Internal Oversight Services (OIOS)[4] found evidence that the legal aid systems of the ad hoc tribunals had been abused and that some former or current defence counsel had either been solicited and/or had accepted requests for fee splitting made to them by their respective clients.[5] The recommendations made by the OIOS to the UN General Assembly regarding the practice of fee splitting of ad hoc tribunals illustrate the sound basis of our concern, which could not be perceived as a mere theoretical question:

> In an effort to further curb fee splitting arrangements, both Tribunals should consider revising their statutory texts so that reports of solicitations by defence team members to the Registrars are not viewed or considered as a breach of the duty of confidentiality owed to their respective clients.[6]

> does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

3. Art. 67(1) of the ICC Statute stipulates:

> In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.

4. The Investigations Division of the OIOS has conducted a follow-up investigation into possible fee-splitting arrangements between defence counsel and indigent detainees at the ICTR and the ICTY. The first report on this matter was transmitted to the UN General Assembly on 1 February 2001 (A/55/759), available at http://www.un.org/Depts/oios/reports/a56_836.pdf.
5. Documents examined and interviews conducted by OIOS investigators revealed that:
   (a) One former defence counsel at the ICTR had received but rejected a detainee's request for fee splitting and resigned as counsel.
   (b) One current defence counsel at the IIOTR informed the Registrar in April 2001 that five months earlier his client had requested from him a monthly sum of $2,500. Although he had agreed to the solicitation at the time it was made, the defence counsel claims that the arrangement was never implemented. The detainee denied the allegation and filed a motion for withdrawal of counsel, which was denied by a trial chamber of the Tribunal. The detainee appealed against the decision, but the ICTR Appeals Chamber dismissed his appeal on technical grounds. While the matter was under judicial review, the OIOS investigators provided the Registry with new evidence which clearly showed that the counsel had, in fact, engaged in misconduct by inflating his billings to the Tribunal. Based on his examination of this and other evidence, the Registrar was able to determine that the counsel had violated the Code of Conduct for Defence Counsel. As a result of the evidence adduced, the Registry decided to discharge the counsel from the case.
   (c) Another current counsel at the ICTR informed the Registrar in January 2002 that in July 2001 he had declined a solicitation from his client who had asked him to provide $5,000 monthly as part of a fee-splitting arrangement. The counsel requested to be withdrawn from the case. The OIOS noted that the counsel reported the alleged solicitation only after his client had filed a request for his withdrawal. The Registry is currently investigating the matter in consultation with OIOS.
   (d) One staff member of the ICTR, whose responsibilities included the review of the financial statements submitted by defence team members, repeatedly requested and received kickbacks (in the form of cash payments and cheques) from several defence team members in return for processing their claims expeditiously. The staff member admitted these corrupt actions.

6. Rec. No. IV01/290/01.

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> Both Tribunals should prepare and request all defence team members and detainees to sign a special form clearly indicating that fee splitting is prohibited and making it obligatory on their part to inform the Registrars promptly of any breach of the matter by any member of their respective defence teams. The form should also provide specific sanctions for breaches of the above.[7]

For the implementation of these recommendations both ad hoc tribunals have revised their Codes of Professional Conduct for Defence Counsel and have entrenched the prohibition of fee-splitting arrangements between counsel and their clients.[8] In addition, the International Criminal Tribunal for Rwanda has amended its Rules of Procedure and Evidence, adding a new sub-rule (B) to Rule 97. This sub-rule reads as follows:

> Nothing in this rule shall be interpreted as permitting the use of confidentiality between Counsel and Client to conceal the participation of Counsel in illegal practices such as fee-splitting with client.

For some organizations such as the Association of Defence Counsel practising before the ICTY, or the International Criminal Bar, which advocate the interests of counsel, this positive duty to inform the Registrar is considered a breach of confidentiality, and it creates a general obligation for counsel to act as informers for the Registrar with regard to fee-splitting initiatives. Many lawyers will feel morally incapable of complying with such a requirement for reasons of principle. In practice, such an obligation will only serve to create a difficult ethical dilemma for honest counsel.[9]

The ICC has followed the step taken by both ad hoc tribunals in order to prohibit fee-splitting arrangements as set out in Article 22 of the Code of Professional Conduct for Counsel[10] (Code). Yet Article 22 of the Code does not go as far as placing a positive

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7. Rec. No. IV01/290/02.
8. Art. 18(B) of the ICTY Code of Conduct established that 'Where assigned counsel are being requested, induced or encouraged by their clients to enter into fee-splitting arrangements, they shall advise their clients on the prohibition of such practice and shall report the incident to the Registrar forthwith.' Art. 5 *bis*(2) of the ICTR Code of Conduct established that 'Where Counsel are being requested, induced or encouraged by their clients to enter into fee-splitting arrangements, they shall advise their clients on the unlawfulness of such practice and shall report the incident to the Registrar forthwith.'
9. General Observations by the Committee on Ethics of the International Criminal Bar on the Draft Code of Conduct for Counsel before the ICC prepared by the Registrar of the ICC. See http://www.bpi-icb.org/EN/doc/analysisofthedraftcodeproposal090204.doc.
10. Resolution ICC-ASP/4/Res.1 adopted at the 3rd plenary meeting on 2 December 2005, by consensus.

    Article 22: Remuneration of counsel in the framework of legal assistance
    1. The fees of counsel where his or her client benefits from legal assistance shall be paid exclusively by the Registry of the Court. Counsel shall not accept remuneration in cash or in kind from any other source.
    2. Counsel shall neither transfer nor lend all or part of the fees received for representation of a client or any other assets or monies to a client, his or her relatives, acquaintances, or any other third person or organization in relation to which the client has a personal interest.
    3. Counsel shall sign an undertaking to respect the obligations under this article when accepting the appointment to provide legal assistance. The signed undertaking shall be sent to the Registry.
    4. Where counsel is requested, induced or encouraged to violate the obligations under this article, counsel shall advise the client of the prohibition of such conduct.
    5. Breach of any obligations under this article by Counsel shall amount to misconduct and shall be subject to a disciplinary procedure pursuant to this Code. This may lead to a permanent ban on practising before the Court and being struck off the list of counsel, with transmission to the respective national authority.

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duty on counsel to report on an attempt at fee splitting by their respective clients. This very issue was intensely deliberated at the latest plenary meeting of the Assembly of States Parties, where it was decided that the Court cannot compel counsel to report on such conduct due to the sanctity of solicitor–client privilege and confidentiality. The question remains whether the Court should follow the same approach as those adopted by the ad hoc tribunals in this respect, by obligating the lawyer to report this kind of arrangement to the Registrar.

Our view is that the ICC ought to have followed the same rationale and approach as those espoused by both the ICTY and ICTR. This article thus focuses on the justified causes for disclosing information given by clients in order for the Registry to have in due time the necessary factual elements to counter a fraudulent request for change of counsel, presented by an indigent accused, when the actual reason for such request is the prior refusal by the lawyer to enter a fee-splitting agreement. The purpose of this disclosure is, therefore, to preserve the good use of public legal aid funds.

The definition of 'confidentiality' is, in general terms, keeping information secure and controlling its disclosure.[11] It can be defined as an obligation to protect information that is not generally known, and to use or disclose it only to approved persons, for agreed purposes. It involves a right and a correlative duty.[12] In our research, we find many exponents of the view that confidentiality is one of the greatest problems in combating crime.[13] Given that very often this confidentiality results from statutory rules, we have a situation where a conflict appears between the duty to protect confidential information and the need to combat fraud or corruption. In the case of the ICC, measures are needed to prevent fraud or corruption that will have a direct impact on the all-too-important legal aid resources of the Court, but also to guard against unnecessary disruptions to the proceedings, which may arise if the accused requests that his or her counsel be changed because his existing counsel refuses to enter into a fee-splitting agreement.

There is no question that the lawyer must maintain professional confidentiality, since it constitutes a right and a duty. This is inherent in the profession and in the rights of the defence, because the lawyer is the custodian of the client's secret or confidential communication. If there is no privacy of communication, a fiduciary relationship cannot be constituted. The right and duty of confidentiality survive even after legal services have ended. In the light of the fundamental principles of the legal profession as set forth in the by-laws and Codes of the Union internationale

11. See http://www.wordreference.com/definition/confidentiality.
12. R. Pattenden, *The Law of Professional–Client Confidentiality* (2003), 12.
13. H. Weinstein, 'Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion', (1994) 35 *South Texas Law Review* 727; L. Zer-Gutman, 'Revising the Ethical Rules of Attorney–Client Confidentiality: Towards a New Discretionary Rule', (1999) 45 *Loyola Law Review* 669; R. P. Lawry, 'The Central Moral Tradition of Lawyering', (1990) 19 *Hofstra Law Review* 311; M. Ganado and S. Frendo, 'The Impact of the Laws of Confidentiality in Combating Commercial and Financial Fraud – the Maltese Perspective', available at http://www.isrcl.org/Conference_Papers.htm, 2/02/2005.

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des avocats (UIA)[14] and in the basic principles governing the role of bars and law societies enshrined in Basic Principles on the Role of Lawyers adopted by the UN General Assembly in 1990,[15] lawyers play a critical role in society with respect to the rule of law and administration of justice.

The lawyer may be faced with the conflict of having on the one hand to fulfil his duty of confidentiality and on the other hand to cope with the need to disclose private information when forced by the law, by public considerations, or by a greater ethical moral duty.[16]

2. Limitation of the professional secret in the jurisprudence of the European Court of Human Rights

The professional secret is a means by which the law protects the client's right to privacy, but privacy itself is simply one interest that is to be balanced against many others. The client is entitled to demand confidentiality only as long as this does not conflict with some greater interest of another person, or of society itself. For this reason the client cannot always be allowed to dictate when, and under what conditions, this information is disseminated; a balance must be struck between the competing public (and private) interests that pull away from and towards privacy and confidentiality.[17]

The jurisprudence of the European Court of Human Rights (ECtHR) backs up these claims. For instance, it has been rendered that neither the right to respect for private life (Article 8(1))[18] nor the right to freedom of expression (Article 10(1))[19] is absolute. 'In a democratic society there are many circumstances in which freedom of expression must, of necessity, be restricted. In particular, untrammelled exercise of freedom of expression will often infringe the rights of others, both under the Convention and outside it.'[20] Similarly, qualification of the privacy rights protected by Article 8 is necessary. Interference by a public authority, including a court, with rights protected under Articles 8 and 10 of the Convention is permitted as long as the interference, in the particular case, meets the following criteria.

14. The UIA approved in 2002 Standards for Lawyers Establishing a Legal Practice outside their Home Country, available at http://www.uianet.org/english/e_turin2000_standards.pdf.
15. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at http://www.unhcr.ch/html/menu3/b/h_comp44.htm.
16. See Lawry, *supra* note 13, at 30.
17. See Pattenden, *supra* note 12, at 30.
18. Art. 8(1): 'Everyone has the right to respect for his private and family life, his home and his correspondence.'
19. Art. 10(1): 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.'
20. *Ashdown v. Telegraph Group*, (2001) 4 All ER 666, at para. 25 (*per* Lord Phillips).

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2.1. Interference is 'in accordance with law'

This condition, established in Article 8(2),[21] is close to the condition of 'prescribed by law' included in Article 10(2).[22] The rule of law requires that any interference with the rights of a citizen have a legal foundation. The ECtHR examined in *Sunday Times* v. *UK* what 'prescribed by law' entails.[23] The first principle that emerges from this judgment is that the interference must have a basis in domestic law, be it legislation or common law. A second principle is publication: 'the law must be adequately accessible: the citizen must be able to have an indication that is adequate, in the circumstance, of the legal rules applicable to a given case'.[24]

2.2. Interference serves a specific legitimate aim

Section 2 of Article 8 permits infractions of section 1 by a public authority for the following purposes: in the interests of national security, public safety, the economic well-being of the country, the protection of health or morals, the prevention of disorder or crime, or the protection of the rights of others. Prevention of disorder or crime has been held to include disclosure for the purpose of investigating and prosecuting crime;[25] the economic well-being of the country includes the tax and revenue system.

As for Article 10, freedom of expression, as recognized in section 1, may be subject to restrictions, according to section 2, for the following purposes: in the interests of national security, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, to maintain the authority or rights of others, and to prevent the disclosure of information received in confidence.

2.3. Interference is not discriminatory

Discriminatory interference with Convention rights is forbidden by Article 14.[26] This article is not autonomous but has effect in relation to other Convention rights.[27] A distinction is discriminatory if it 'has no objective and reasonable justification' – that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aims sought to be realized'.[28]

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21. Art. 8(2): 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.
22. Art. 10(2): 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'.
23. 26 April 1979 (Series A No 30), 2 EHRR 245.
24. Ibid., at para. 49.
25. *Murray v. UK*, (1994), 19 EHRR 193; *Z v. Finland*, (1997) 25 EHRR 371.
26. Art. 14: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'
27. *Van Raalte v. Netherlands*, (1997) 24 EHRR 503, at para. 33.
28. *Marckx v. Belgium*, (1979–80) 2 EHRR 330, at para. 33.

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2.4. Interference is 'necessary in a democratic society'[29]

In *Sunday Times* v. *UK*, *supra*, the ECtHR said that for an infringement of Article 10 to be justified it is not sufficient that the interference involved belongs to the aforementioned exceptions listed in section 2; neither is it sufficient that the interference was imposed because its subject matter fell within a particular category. The court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.[30] An interference will be 'necessary' in a democratic society if

> it meets 'a pressing social need'[31] – that a measure that interferes with a Convention right is useful, desirable, logical or reasonable, or has been done in good faith is not enough;[32] and the reasons adduced for encroaching on the Convention right are 'relevant and sufficient'.[33]

3. Limitation of the protection of the professional secret in national systems

3.1. Unlimited protection of the professional secret in states

It should be mentioned that a few states, such as Austria,[34] Iceland,[35] Liechtenstein,[36] and Spain,[37] have stated that the protection of the professional secret is unlimited.[38]

3.2. Limited protection of the professional secret in states

In most of the states parties to the Rome Statute, however, the protection of the professional secret is limited.

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29. Arts. 8(2) and 10(2) ECHR.
30. 26 April 1979, (Series A No 30), 2 EHRR 245 at para 65.
31. *Handyside v. UK*, (1976) 1 EHRR 737, para. 48, *Vogt v. Germany*, (1996) 21 EHRR 205.
32. 26 April 1979 (Series A No 30), 2 EHRR 245, para. 59.
33. *Goodwin v. UK*, (1996) 22 EHRR 123, at para. 45.
34. Pursuant to Section 9 of the Lawyer's Code (*Rechtsanwaltsordnung*), a *Rechtsanwalt* is bound by professional secret in matters which have been confided to him and which have otherwise become known to him in his professional capacity, such confidentiality being in the interest of the client. A *Rechtsanwalt* is entitled to claim professional secret in court and any other proceedings according to the relevant procedural provisions. This right of the lawyer may in principle not be circumvented by any legal or other official measures, in particular by questioning the lawyer's staff or by imposing requirements relating to the delivery of documents, pictures, recorded speech or data carriers or their confiscation. The protection of the professional secret is basically unlimited in Austria. There are, however, minor limitations established by court practice. For a lawyer who is accused of a crime, professional secret can be disclosed within very strict limits while he is defending himself at court (OBDK 24.1.2000, 11 Bkd 4/99). Furthermore, the protection of the professional secret can be limited where a lawyer is accused of a financial crime. (VwGH [*Verwaltungsgerichtshof*] 25.6.1997, 96/15/0225). See for details D. A. O. Edward, QC, 'The Professional Secret, Confidentiality and Legal Professional Privilege in Europe', Council of Bars and Law Societies of Europe (CCBE), 2003.
35. Section 17 of the Icelandic Bar Association's Code of Conduct imposes a legally enforceable obligation of professional secrecy on an Advokat based upon Section 22-1 of the Law on Lawyers. See J. Fish, 'Regulated Legal Professionals and Professional Privilege within the European Union, the European Economic Area and Switzerland, and Certain Other European Jurisdictions', Dublin, 2004. This report was prepared in conjunction with, and based on information supplied by, the bars and law societies of the CCBE, available at http://www.ccbe.org/doc/En/fish_report_en.pdf.
36. The duty to observe the professional secret is further provided under Section 26 of the Code of Conduct of 5th May 1994 (as amended) and Art. 15 of the Lawyer's Act dated December 9th, 1992 as amended.) See Fish report, *supra* note 35.
37. Under the provisions of the Estatuto General de la Abogacía Española (Real Decreto 658/2001), both regulated legal professionals and regulated salaried legal professionals are bound by professional secret. An extension of the protection of professional secret has occurred as a consequence of the consolidation of the State of Law and its development.
38. Discussed in depth in the Fish report, *supra* note 35.

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Ireland. The protection of the professional secret in Ireland is subject to more detailed definition in the context of Court challenges, as well as by statute developments.[39]

Belgium. Persons who have been entrusted with professional secrets 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. The impossibility for the client to waive professional secret has been consecrated by the case law, with the only exception being that professional secret may be overridden in certain cases in favour of the right of defence of the lawyer,[40] applying the theory of the conflict of values (e.g. danger to life or health).

Germany. The production of documents and written materials in civil proceedings is subject to the obligation of professional secret when in the possession of a *Rechtsanwalt* (lawyer).[41] Article 97 of the Code of Criminal Procedure (which also applies in anti-trust investigations and proceedings) provides protection against seizure of specific types of documents, namely (i) written communications between the accused and persons who are entitled to refuse to give evidence; (ii) 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; and (iii) other objects which are covered by the right to refuse to give evidence. These limitations of seizure only apply if the objects are in the actual possession of the person who has the right to refuse to give evidence. The limitations do not apply if those entitled to refuse to give evidence are suspected of involvement in or encouragement of 'crime or of receiving stolen property'.

Italy. Although protection is essentially unlimited, and Italian lawyers must observe professional rules, an exception exists where there is a statutory duty to give information.[42]

Netherlands. Protection is not unlimited. The Dutch Supreme Court ruled on 1 March 1985 that 'privilege must be based on a principle of law generally applicable in the Netherlands, which means that in the case of confidants, society's interest in

39. *Smurfit Paribas v. AAB Export Finance Limited*, (1990) ILRM 588; *Miley v. Flood*, [2001] 2 IR 50; Criminal Justice Act, 1994; S.I. No. 324 of 1994 Criminal Justice Act, 1994 (Commencement) Order, 1994; S.I. No. 55 of 1995, Criminal Justice Act, 1994 (Commencement) Order, 1995; S.I. No. 105 of 1995, Criminal Justice Act, 1994 (Section 32) (10b) Regulations, 1995; EU Directive on Money laundering 2001/97/EC (Amends 91/308/EEC); 'Collection and enforcement of Stamp Duty' – Revenue Commissioners Statement of Practice SP – SD 1/91.

40. Cass. 5 fév. 1985, Pas., I, 670; Cass. 23 décembre 1998, JLMB, 1999, at 61.

41. The duty to preserve the professional secret is provided under Art. 203 of the Criminal Code and Art. 43A of the German Lawyers Act (*Bundesrechtsanwaltsordnung*).

42. The last paragraph of Art. 9 of the Italian Code of Conduct for lawyers from 1999 provides: 'There are exceptions from this general rule in those cases where the disclosure of information concerning lawyer's client becomes necessary: a) for effectively carrying out his representation of his client; b) for preventing his client from committing any particularly serious crime [reato di particolare gravità]; c) for providing facts in a controversy between a lawyer and his client; d) in proceedings concerning the way in which the client's interests have been represented. In any case such disclosure must be limited to those facts strictly necessary to achieve the limited purpose set out above' (as translated in Fish, *supra* note 35).

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the truth coming to light must make way for society's interest in everyone being able to turn to confidants freely for help and advice and without fear of disclosure'.[43] However, legislation and case law provide further precision as to the scope of the duty and privilege of professional secret. For instance, the Disclosure of Unusual Financial Services Transactions Act of 1 February 1994, amended in December 2001 in line with EU Directive 2001/97/EU of 4 December 2001, states that unusual transactions must be reported to the judicial bodies.

Greece. The protection of the professional secret is almost unlimited. In some exceptional cases, and for certain very serious reasons, the Council of the Athens Bar Association can permit a lawyer to be examined as a witness in Court. All those exceptions are mentioned in Article 32.2 of the Code of Conduct and Article 49.2 of the Lawyer's Code.[44]

Sweden. Lawyers are obliged to observe confidentiality unless there is statutory duty to give information. A Swedish lawyer may not be questioned as a witness in a court procedure regarding anything he has learned in the exercise of his profession; there are exceptions to this rule regarding certain particularly serious crimes, but they do not apply if the lawyer is acting as a defence attorney.[45]

Finland. The protection here is also limited, since the fiscal authority may, while examining the grounds for an advocate's personal taxation or that of a law firm, inspect the professional diary of the lawyer or law firm and all documents relevant to the bookkeeping.[46] In addition, according to the EU Directive on money laundering already introduced in Finland, there are some statutory limitations to the protection. The Finnish Code of Conduct provides that an advocate shall preserve confidentiality with respect to his client's affairs and may not reveal anything which has been confided to him in his professional capacity or which he has learned in connection therewith, without permission, unless there is a statutory duty to give information.

Poland. In accordance with the relevant articles of the laws for advocates and for legal advisers, the protection of professional secret is unlimited, and it is explicitly stated that advocates and legal advisers cannot be relieved of their duty to keep everything secret.[47] However, Article 180(2) of the Code of Criminal Procedure, in

43. Dutch Supreme Court 01–04-1985, NJ 1985, 173.
44. Art. 49 of the Code for Lawyers (LD3026/1954), which has the force of law, provides that a *dikigóros* is obliged to keep inviolable the required secrecy in favour of his principal client. It is left to him to decide whether or to what extent he should depose anything else which may come to his knowledge as a consequence of the practice of his legal function, in good conscience, if he is called as a witness. Furthermore, in any event, a *dikigóros* cannot be examined, without the prior permission of the executive council of his Bar or, in case of extreme urgency, of the president of the Bar, as a witness in respect of a case in which he was involved in that capacity. This prohibition applies also to a *dikigóros* who renders his services on a fixed periodical retainer (i.e. as defined above in paragraph (2) in respect of all the cases of the party to whom he renders his services).
45. Ch. 36, S. 5(2) of the Code of Judicial Procedure.
46. Supreme Court of Administration, 1995.
47. Polish legal advisers are subject to obligations of professional secret under the provisions of the Legal Advisers Act of 6 July 1982 and Lines of Ethics (Code of Ethics) of 6 November 1999 (as amended). Under Art. 3(2)–(5) of the Legal Adviser's Act, a legal adviser engages in the profession with diligence stemming from legal knowledge on the rules of the ethics of legal advisers, as well as being obliged not to reveal any information which he or she acquired in the process of providing legal advice.

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force since 1 September 1998, provides that persons obliged to preserve secrets, such as legal advisers, advocates, physicians, or journalists, may be examined as to the facts covered by these secrets only when it is necessary for the benefit of the administration of justice and the facts cannot be established on the basis of other evidence. The court shall decide on examination or permission for examination. This order of the court shall be subjected to interlocutory appeal.

Malta. The Professional Secrecy Act[48] modified Section 257 of the Criminal Code, which was further amended by Act II of 1998.[49] The Act provides for exceptions to the secrecy rule (i) when the depository is authorized to disclose by the depositor of the secret; this authorization is deemed to have been given in the case of necessary disclosure to the employees of the depository of a secret; when the disclosure is compelled by law; (ii) when, in certain circumstances, a Court orders disclosure in which case disclosure is to take place in camera and such information shall be available to the Court and to the parties; (iii) when the information is in the public domain; (iv) when a person employed by the state communicates secret information to another person employed by the same entity or to the government minister responsible for that entity; and (v) where such communication is directly necessary for the carrying out of their respective functions.[50]

Canada.[51] The question of the professional secret is treated under Articles 23 and 25 of the Access to Information Act (Loi sur l'accès à l'information), 1980–81-82–82, ch. 111, ann. 1 '2' under the title 'Professional secret of lawyer'.[52]

Rule 2.02(5) (Dishonesty, Fraud etc. by Client) of the Rules of Professional Conduct of the Law Society of Upper Canada stipulates that 'When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.' This means that a lawyer should avoid becoming unknowingly involved with a client engaged in criminal activity such as finance fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers commonly provide services, such as establishing, purchasing, or selling business entities; arranging financing for the purchase; and

48. The Professional Secrecy Act, 1994 (PSA) rewrote s. 257 of the Criminal Code, which now reads as follows: 'If any person who, by reason of his calling, profession or office, becomes the depository of any secret confided in him, shall, except when compelled by law to give information to a public authority, disclose such secret, he shall on conviction be liable to a fine (multa) not exceeding 20,000 Maltese liri or to imprisonment for a term not exceeding two years or to both such fine and imprisonment.'

49. The Professional Secrecy Act has also listed the persons 'who by reason of their calling, profession or office, fall within the scope of section 257', including a number of professions, among which advocates are included.

50. Ganado and Frendo, *supra* note 13.

51. G. Guénette, 'Le privilege avocat–client', CAPA Conférence, Ottawa, 3 October 2002.

52. In effect since 1 November 2000, adopted by Convocation on 22 June 2000, available at http://www.lsuc.on.ca/services/frenchrule2.jsp. See Art. 23: 'Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements protégés par le secret professionnel qui lie un avocat à son client.' See also Art. 25: 'Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.' See http://www.infocom.gc.ca/acts/view_article-f.asp?intArticleId=36#23.

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so on. If a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime, or illegal conduct, he or she should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer.[53]

The professional secret in Quebec is protected under Section 9 of the Quebec Charter of Human Rights and Freedoms, Article 2858 of the Civil Code, Article 60(4) of the Professional Code, Article 131 of the Law of the Bar (Loi sur le Barreau) and Article 7(10)(b) and (11)(d) of the Charter of Rights.[54] One of the limitations of the professional secret is the crime exception which entails all communications between lawyer and client which are in nature criminal or tend to be criminal activities.[55] Article 131 of the Law of the Bar reaffirms the right to professional secrecy while setting out its limits, as does the corresponding provision in the Professional Code. Article 131 reads as follows:

> (1) An advocate must keep absolutely secret the confidences made to him by reason of his profession.
>
> ...
>
> (3) An advocate may, in addition, communicate information that is protected by professional secret; in order to prevent an act of violence. The advocate may only communicate such information as is necessary to achieve the purposes for which the information is communicated.

This kind of exception has been developed by Canadian jurisprudence. For example, the Supreme Court of Canada in the case of *Descôteau* v. *Mierzwinski* has confirmed the decisions of the Appeals Court of Quebec which established that there is no professional secret in the case of criminal communications between lawyer and client or in the case of legal counselling through which the client seeks to facilitate the commission of a crime.[56] This shows that the professional secret is limited in Canada and Quebec and also confirms that the highest court in Canada also applied the balancing approach which involves weighing the public interest in disclosure against the public interest in maintaining the professional secret.[57] The Supreme Court of Canada has confirmed in the case of *Foster Wheeler Power Co.* v. *Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.* that

> As important as professional secrecy may be, it does have its limits. Not every aspect of relations between a lawyer and a client is necessarily confidential. The exigencies

53. Commentary to New Rule on Cash Transactions and Record Keeping Requirements, available at http://www.lawsociety.nf.ca/part1.asp?partid=18.
54. 'Le fait que le législateur québécois ait érige de façon spécifique le secret professionnel au rang d'un droit fondamental indique l'importance que la société québécois lui accorde. Dans cet esprit, on ne peut donc pas l'invoquer comme une simple exception à l'obligation générale de témoigner ou de produire une preuve. Il ne peut donc s'analyser comme une simple règle de preuve ou de procédure.' *Poulin c. Prat*, (1994) RDJ 301. See L. Comeau, L. Belleau, J. P. Dumais, and R. Langlois, 'Le Secret professionnel de l'avocat est-il mis en péril par les pouvoirs dont dispose l'Etat en matière de perquisition, d'écoute, de fouilles et de saisies?', Congrès du Barreau du Québec, 2000, at 519.
55. Comeau et al., *supra* note 54, at 525.
56. *R. c. Cox and Railton*, (1884) 14 QBD 153; *Descoteaux c. Mierzwinski*, (1982) 1 RCS 860; *R. c. Casey* (1995) OJ No. 2788; Comeau et al., *supra* note 54, at 526.
57. P. G. Guimont, 'Le Conflit d'intérêts – plus qu'une simple notion légale', Congrès annuel du Barreau du Québec, 1990, Montréal, Service de la formation permanente, Barreau du Quebec, 1990, at 599.

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> of other values and concern for competing interests may sometimes necessitate the disclosure of confidential information, as provided for under s. 9 of the Quebec Charter[58] (para. 37). Despite the intense nature of the obligation of confidentiality and the importance of professional secrecy, not all facts and events that lawyers deal with in the execution of their mandates are covered by professional secrecy (para. 39).[59]

It seems generally admitted, in most of the jurisdictions consulted, that over the last 25 years there has been a trend towards greater limitations in the protection of professional secrecy. This trend is mainly caused by tougher statutory developments in order to overcome corruption, drug crimes, and terrorism. This statutory intrusion is motivated by the search for a total transparency in economic and financial transactions and the suspicion that lawyers may be involved in illegal matters or permit themselves to be used for illegal purposes.[60]

4. Directives adopted as references to the limitation of the professional secret (European Union), rules of professional conduct (American Bar Association) and others

We can make reference to several directives issued by the European Union and also mention some examples from the American Bar Association which show the limitations of the principle of the professional secret.

4.1. Directive 91/308/EEC ('Principal Directive')

One of the main instruments used by the European Union to prevent laundered money entering the international capital market obliged credit institutions to denounce all suspected money laundering. In November 2001 the European Parliament and the Council of Ministers agreed on a text for amending the Principal Directive, in the form of Directive 2001/97/EC ('Amending Directive'), which must be incorporated into national legislation. According to this amending Directive,

> It is to the discretion of Member States to decide whether to keep or not the principles of professional secret in application of the amending Directive.
>
> If a Member State decides that the principle of professional secret does not apply to the application of the Amending Directive, according to Article 6.1, the lawyer must inform the authorities on his own initiative of any fact which may be an indication of money laundering activities and furnish them, at their request, with all necessary information.
>
> If a Member State decides that the principle of professional secret does apply, then a lawyer is under no obligation to report the suspicion of money laundering unless:
>
> > the lawyer is taking part in money laundering activities; or

58. See *Smith v. Jones*, (1999) 1 SCR 455, at para. 51; *R. v. McClure*, (2001) 1 SCR 445, 2001 SCC 14, at para. 34 (*per* Major J).
59. *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, (2004) 1 SCR 456, 2004 SCC 18.
60. D. A. O. Edward, QC, 'The Professional Secret, Confidentiality and Legal Professional Privilege in Europe', 2003, update on his report.

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> the legal advice is provided for money laundering purposes; or
>
> the lawyer knows that the client is seeking legal advice for money laundering purposes.

This kind of regulation can prove useful because it shows that the professional secret is limited and that lawyers cannot use professional secrets as a shield to engage in wrongdoings such as fee splitting with his client.

4.2. The American Bar Association's Model Rules of Professional Conduct

The Model Rules of Professional Conduct of the American Bar Association (ABA) limit the scope of the professional secret. Rule 1(6) stipulates that

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; or
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[61]

We can see in this kind of regulation that paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services.

However, some states go beyond the regulation provided by the ABA model regarding this issue. The following two examples illustrate how the practice is not at all protective.

> (c) (1) a lawyer shall promptly reveal:
>
> the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime . . .
>
> information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3 . . .[62]
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

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61. See R. C. Cramton and L. P. Knowles, 'Professional Secrecy and Its Exceptions: *Spaulding v. Zimmerman* Revisited', (1998) 83 *Minnesota Law Review* 63.
62. Virginia Rules of Professional Conduct, Rule 1.6.

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(1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another . . .[63]

These rules show that the principle of professional secret is subject to limited exceptions; in particular, when a lawyer learns that a client intends to engage in criminal conduct, he or she is obliged to reveal such information.

4.3. The Declaration of Perugia on the Principles of Professional Conduct of the Bars and Law Societies of the European Community (16. IX. 1977)

This Declaration considers the maintenance of professional secret as a fundamental right and a duty of the profession (Declaration, IV/1). The Consultative Committee observes the existence of a very important divergence among member states concerning the limit of rights and duties of lawyers. This divergence has a fine distinctive character especially relating to the right and duty of lawyers towards clients and the tribunals (IV/2).[64]

5. Justified causes for lawyers to disclose confidential information

For the disclosure, or even communication, of confidential information not to become an offence, there must be a justified cause. In our research into national and jurisdiction systems, we can find three kinds of restrictions to the professional secret principle.

5.1. Public interest

We find the exception of public interest[65] in the common-law system, especially in the United Kingdom; we also find this in Switzerland.[66] The notion of public interest is a reincarnation of the older common-law principle of public policy, as

63. Tennessee Rules of Professional Conduct, Rule 1.6.
64. See http://www.ccbe.org/doc/En/perugia_en.pdf.
65. J. N. Sands and R. Conn III, 'Comment, Confidentiality and the Lawyer's Conflicting Duty', (1984) 27 *Howard Law Journal* 329.
66. Art. 321 of the Swiss Penal Code:

1. Les ecclésiastiques, avocats, défenseurs en justice, notaires, contrôleurs astreints au secret professionnel en vertu du code des obligations, médecins, dentistes, pharmaciens, sages-femmes, ainsi que leurs auxiliaires, qui auront révélé un secret à eux confié en vertu de leur profession ou dont ils avaient eu connaissance dans l'exercice de celle-ci, seront, sur plainte, punis de l'emprisonnement ou de l'amende.

   Seront punis de la même peine les étudiants qui auront révélé un secret dont ils avaient eu connaissance à l'occasion de leurs études.

   La révélation demeure punissable alors même que le détenteur du secret n'exerce plus sa profession ou qu'il a achevé ses études.

2. La révélation ne sera pas punissable si elle a été faite avec le consentement de l'intéressé ou si, sur la proposition du détenteur du secret, l'autorité supérieure ou l'autorité de surveillance l'a autorisée par écrit.

3. Demeurent réservées les dispositions de la législation fédérale et cantonale statuant une obligation de renseigner une autorité ou de témoigner en justice.

See M. A. Schaffner, 'L'autorisation de révéler un secret professionnel', thesis, University of Lausanne, 1952, at 43.

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a principle of judicial legislation or interpretation founded on the current needs of the community. Its functions in the enforcement of confidences are the same as the role played by public policy in the formulation of contract law. It provides a starting point for the intervention of the courts and circumscribes the scope of that intervention.[67]

There are passages in recent judgments that treat the public interest as a rule that determines whether an obligation of confidentiality exists at all.[68] There are many cases, however, that say that it is unlawful to disclose confidential information unless disclosure can be shown to be in the public interest.[69] According to this approach the public interest is a defence that overrides the obligation of confidentiality.[70] No person is permitted to divulge to the world information that he has received in confidence, unless he has just cause or excuse for doing so.[71]

The lawyer is the defender of the rights and liberties of the citizen, with duties towards clients, the court, and society ('in the spirit of public service'). These duties fall into two groups of allegiances: private (client) and public (society). Many authors maintain that lawyers best serve the public interest when they completely represent the private interests of their clients to the limit of the law.[72] The reality is that sometimes conflicts arise between the duties that a lawyer owes to his client and the duties he owes to the public interest, such as the protection of public funds in the system of legal aid.

This concept of 'common good' or 'public order' may be applied in order to lend justification to the lawyer's duty of confidentiality, where the clash between different obligations is translated into an ethical conflict that seeks to embrace essential values (life, physical and mental integrity, dignity, and protection of public funds) as supreme values. It is this last that wipes away any trace of unlawfulness in violating the principle of confidentiality.

Protecting public funds is at the same time a duty and a right of citizens, and the rule of law has to guarantee this, in conformity with the international covenants on

67. G. Francis, *Breach of Confidence* (1984), 5.
68. *Initial Services Ltd v. Putterill*, (1967) 3 All ER 145, 149, 151; *Malone v. Commissioner of Police of the Metropolis* (No 2), (1979) 2 All ER 620, 646; *Re a Company's Application*, (1989) 2 All ER 248, 251. Cf. *Re C*, (1991) 2 FLR 478. In *R v. Harrison*, for example, a remand prisoner facing a murder charge blurted out to a prison chaplain that he had got such a buzz out of killing that he wanted to kill someone else. Delivering the judgment in which his appeal against conviction was dismissed, Rougier LJ said 'We doubt whether there exists any confidentiality or any right to privacy for someone who announces that he intends to continue a career of murder (CA, 10 July 2000). Cf. R. Toulson and C. Phipps, *Confidentiality* (1996), 87. In *R. v. Department of Health, ex p. Source Informatics Ltd*, the Court of Appeal said that where a duty of confidentiality arises, the scope of the duty of confidentiality is circumscribed to accommodate the public interest. (2000) 1 All ER 786, at 800–1. This approach was said to be preferable to a public interest defence. See also *Tournier v. National Provincial and Union Bank of England*, (1924) 1 KB 461, 473. See for more details R. Pattenden, *The Law of Professional–Client Confidentiality* (2003), 34.
69. *Hellewell v. Chief Constable of Derbyshire*, (1995) 4 All ER 473, 479. Cf. *London Transport Ltd v. Mayor of London*. (2001) EWCA Civ. 1491, at para. 36.
70. See Pattenden, s*upra* note 12, at 338.
71. *Fraser v. Evans* (1969) 1 QB 349, at 361 (*per* Lord Denning).
72. E. G. Cárrega, 'Confidentiality in Mediation: Its Limits and Exceptions: Analysis of Practical Cases', III World Mediation Forum Conference, 'World Expansion of Mediation Culture and Practice', available at http://www.carrega.com.ar/Ponencia_en.doc.

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human rights, which stress the rights of citizens to information and to participation in the management and control of public life, and to ask for accounts.[73]

5.2. The prevention of iniquity: crime and fraud

'The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law.'[74]

Iniquity was at first understood to mean crime and fraud, then certain civil wrongs, and finally anything antisocial.[75]

The concept of fraud, otherwise known as dishonesty, is encountered in numerous contexts in the criminal law. The word 'dishonesty', rather than 'fraud', tends to be used in more modern legislation. To act fraudulently, or dishonestly, involves, broadly speaking, the doing of an act which prejudices another's rights. The notion of fraud, at least for the purposes of this paper, relates to the infliction of economic loss. The cases on fraud recognize two distinct types of act: (i) acts to the prejudice of the victim's economic interests; and (ii) acts to the prejudice of the due performance of duties as a public official.[76] Several national or regional legal orders include references to these acts.

5.2.1. England and Wales, and Scotland

Professional secret does not exist in a communication tainted by iniquity.[77] This refers to a communication that of itself constitutes misconduct for one of the following purposes:[78] (i) to enable the client to better commit a crime[79] or fraud;

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73. Art. 25 of the International Covenant on Civil and Political Rights stipulates that 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives'.
74. M. H. Bainor and N. Batterman, 'Report on the Debate over Whether There Should Be an Exception to Confidentiality for Rectifying a Crime or Fraud', (1993) 20 *Fordham Urban Law Journal* 857. See also D. J. Fried, 'Too High a Price for truth: The Exception to the Attorney–Client Privilege for Contemplated Crimes and Frauds, (1986) 64 *North Carolina Law Review* 443; H. I. Subin, 'The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm', (1985) 70 *Iowa Law Review* 1091; K. F. Krach, 'Comment, the Client–Fraud Dilemma: A Need for Consensus', (1987) 46 *Maryland Law Review* 436; T. J. Miller, Note, 'The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct', (1984) *Duke Law Journal* 582; R. N. Treiman, Comment, 'Inter-lawyer Communication and the Prevention of Client Fraud: A Look Back at the O.P.M.', (1987) 34 *UCLA Law Review* 925; C. Geoffrey and J. R. Hazard, 'Rectification of Client Fraud: Death and Revival of a Professional Norm', (1984) 33 *Emory Law Journal* 271; J. Hoffman, 'On Learning of a Corporate Client's Crime or Fraud – the Lawyer's Dilemma', (1978) 33 *Business Lawyer* 1389; M. H. Freedman, 'Symposium on Professional Ethics: Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions', (1966) 64 *Michigan Law Review* 1469.
75. See Pattenden, *supra* note 12, at 342.
76. P. Gillies, *Criminal Law* (1990), 724.
77. *Ventouris v. Mountain*, (1991) 1 WLR 607, 611; *Nationwide Building Society v. Various Solicitors* (1998) 148 NLJ 241; *Barclays Bank v. Eustice*, (1995) 4 All ER 511, 524. See Pattenden, *supra* note 12, at 558.
78. Pattenden, *supra* note 12, at 558.
79. *R v. Cox*, (1884) 14 QBD 153; *R v. Special Commissioner, ex p. Morgan Grenfell Co. Ltd.*, (2002) UKHL 21; (2002) 2 WLR 1299, at para. 38. If the client gratuitously announces that he intends to commit or is committing some crime, or that someone else is or is intending to do so, the communication might not be privileged but this would be because it was not related to the giving of legal advice rather than because it was made in furtherance of crime. The *Law Gazette* reported on 13 February 2002 the conclusion of the office for the Supervision of Solicitors that when a solicitor received a letter from a client saying that he would not be answering his bail and had decided to abscond, the solicitor was not being used to facilitate a crime or fraud. See Pattenden, *supra* note 12, at 558.

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(ii) in aid of a third party's crime or fraud; (iii) to enable the client to take advantage of a third party's fraud;[80] (iv) to protect the proceeds of crime or fraud;[81] or (v) to cheat in litigation by developing a bogus defence or by obtaining evidence by fraud or unlawful means.[82] The traditional explanation for the iniquity exception is that a client who uses a lawyer to further iniquity is not consulting the lawyer in his professional capacity and the communication is therefore outside the ambit of the privilege. An alternative explanation is that a communication made in bad faith is not deserving of protection.

The Law Society of England and Wales has established that a solicitor may reveal confidential information to the extent necessary to prevent the client or a third party committing a criminal act that is reasonably believed to be likely to result in serious bodily harm.[83] The Law Society, however, treats any communication by a client to a solicitor made with the intention of obtaining legal assistance to further a crime or fraud as outside the bounds of confidentiality.[84]

Law Society guidelines do not permit a solicitor to disclose financial wrongdoing by a client except where a solicitor's advice is sought to further a financial crime or civil fraud. There is no difference between a situation in which a client actively seeks assistance to carry out a fraud or crime (where there is certainly no privilege or confidentiality) and one in which the client simply reveals to a lawyer his involvement in an ongoing fraud or his intention to commit some crime.[85]

On the particular issue of legal-aid clients, Rule 5.04 (Legal aid: Confidentiality criminal) of the *Guide to Professional Conduct of Solicitors* stipulates that

> Where the client is legally aided in a criminal matter the duty to disclose all relevant information remains with the client. However, if the solicitor becomes aware of information which indicates that the client's circumstances have changed, or that the client did not disclose relevant information at the outset, the solicitor must advise the client that unless the client informs or permits the solicitor to inform the clerk to the justices, or the appropriate officer in the Crown court, the solicitor will have to cease acting and may have to report the matter.

In a letter addressed to a solicitor dated 27 April 2001 the director of the Law Society of Scotland explained that 'solicitors in Scotland are not allowed to accept instruction tainted with an inducement. Solicitors require to remain independent from their client and must remain at arm's length from the client'. The director confirms also that in the case of fee splitting 'the request for payment is not a matter which you require to keep confidential and that you should certainly feel free to inform the registrar of the approach'.[86]

80. *Conoco (UK) Ltd v. Commercial Law Practice*, (1997) SLT 373, 379; see Pattenden, *supra* note 12, at 559.
81. Cf. *Francis & Francis (A Firm) v. Central Criminal Court*, (1988) 3 All ER 775; see Pattenden, *supra* note 12, at 559.
82. *Dubai Aluminium Co Ltd v. Al Alwai*, (1999) 1 WLR 1964, 1970. C. Tapper, *Cross & Tapper on Evidence* (1999), 458, see Pattenden, *supra* note 12, at 559.
83. Law Society, *The Guide to the Professional Conduct of Solicitors* (1999), 16.02, at para. 3.
84. Ibid., at para. 1.
85. See Pattenden, *supra* note 12, at 352.
86. LS.100/14/BAR/LAA, AJM/CT/27 April 2001, The Law Society of Scotland, available at http://www.dial-a-law.uk/www.lawscot.org.uk.

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5.2.2. France

The French courts have confirmed the existing case law about this kind of exception. In a case before the Appeals Court (12 March 1992), the seizure of correspondence exchanged between an *avocat* and his client can in exceptional circumstances be ordered or maintained only if the seized documents are likely to establish the proof of the participation of the *avocat* in the relevant infringement. In another case before the Appeals Court, decided on 30 June 1999, it was deemed that professional secret does not apply in matters of legal counselling (since in-house counsels are not registered within the Bar in France), considering that professional secret must be reserved in relation to the exercise of defence rights.[87] Furthermore, an order issued by the president of the Tribunal de Grande Instance of Paris on 7 July 2000[88] applied the new provisions of the law of 15 June 2000[89] and set up the position of the case law. This order showed that professional secret of an *avocat*, as set up in the Article 66-5 of the law of 31 December 1971, does not have an absolute character that would make the provisions of the law of 15 June 2000 ineffective.[90] It was noted that professional secret of the *avocat* is a European concept that must not be considered as being restrictive.

The seizure of correspondence between an *avocat* and his client is only authorized if it is clearly shown that an avocat committed or was party to an offence. Besides, in an order of 2 October 2000,[91] the president of the Tribunal de Grande Instance of Paris decided that 'only documents for which the content can show the existence of the offence of undue influence to which the *avocat* took part are likely to be kept by the judge'.[92] Therefore it is on the basis of the principles of necessity and proportionality that the judge will take a decision after examination of the disputed documents.

5.3. The concept of corruption and the practice of fee splitting

The two justified causes mentioned above which could allow a lawyer to be exempted from the principle of professional secret could possibly raise a controversial argument and therefore may not be applied to fee-splitting practices. Subsequently, the concept of corruption can be introduced as a justified cause for the breach of confidentiality between lawyer and client in the relevant case. The classic definition, followed by the World Bank[93] and Transparency International,[94] views corruption as the use of one's public position for illegitimate private gains.[95] Furthermore,

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87. Chambre criminelle de la Cour de cassation, 30 June 1999.
88. *Gaz. Pal.* 25 July–9 Aug. 2000, at 2; *Gaz. Pal.*, 29 Aug. 2000, at 18, note Damien; JCP 2001.I.284 no. 1 obs. R. Martin.
89. Loi No 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes.
90. P. A. Iweins, 'Perquisitions dans les cabinets d'avocats: le "juge du secret" existe', *Gaz. Pal.*, September–October 2000, at 1751.
91. *Gaz. Pal.*, October 2000, 13–14, at 7.
92. Iweins, *supra* note 90, at 1751.
93. See http://www.worldbank.org/.
94. See http://www.transparency.org/.
95. On the basis of the report of the Italian minister of justice at the 19th Conference of European Ministers of the Multidisciplinary Group on Corruption (GMC, the French acronym), the Council of Europe

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Article 17 of the United Nations Convention against Corruption[96] empowers states parties to that instrument to engage in adopting

> such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

According to Article 2(a) of the same text, a 'public official' is, among others,

> (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.

Thus, taking these two together, there is a clear link between corruption and the case in which a defence counsel is solicited and/or has accepted requests for fee splitting made to them by their respective clients, given the fact that legal fees and costs are borne by the ICC, the ICTY, and the ICTR and paid in accordance with their respective legal aid regimes.

> It is then evident that fee splitting is a kind of corruption committed by a lawyer in his professional capacity – because the legal profession fulfils a special role or function in democratic societies, facilitating the administration of and guaranteeing access to justice and upholding the rule of law. Lawyers are at the same time officers of the courts and the guardians of the rights of citizens – public responsibilities that call for the utmost integrity and the strictest compliance with rules of ethics and professional conduct if effective operation of and public confidence in the system of justice are to be maintained. Accordingly, it is essential that standards and criteria for recognition of qualifications for the practice of law include not only the requisite elements of intellectual qualification, such as competence and ability to supply the service, but also those elements of ethical and moral qualification that are essential to the preservation of the integrity of the profession and, indeed of the legal system itself.[97]

6. Conclusion

When a client informs his lawyer of his intention of carrying out an offence or fraud, such a confidential communication is not subject to secret nor is it protected by such duty; therefore, once the lawyer has tried to discourage his client by all means, the

established the following provisional working definition of corruption. Corruption as dealt with by the Council of Europe's GMC is bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector which violate their duties that follow from their status as public officials, private employees, independent agents or other relationships of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others. According to this definition, the commitment by a private employee should be included in the concept of corruption. See http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019156.pdf.

96. Adopted by the General Assembly in Resolution 58/4 of 31 October 2003. See the text in http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.

97. Exhibit b: Explanatory memorandum accompanying the IBA's suggested changes to the WTO accountancy disciplines before they can be applied to the legal profession, available at http://www.wto.org/english/tratop_e/serv_e/workshop_march04_e/sess3_exhibit_b_terry_e.dc. 5.

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lawyer may make any disclosure that may be necessary to prevent the dishonest act or to protect any persons and (private or public) property that may be at risk.

Why do lawyers and judges 'lose their voice' when it comes to speaking about moral conduct and exceptions to confidentiality? Why does professional silence greet the moral argument that a good person, including a lawyer,[98] should take reasonable steps to prevent any kind of fraud or corruption, especially when it concerns public funds, as is the case with the ICC?

In accordance with the national legal systems and case law studied, the principle of the professional secret/lawyer–client privilege is accompanied by various limitations in order to protect other legal values. More precisely, the sources analysed reasonably justify the extension of the limitation of professional secret/privilege to fee-splitting arrangements.

Given the fact that the legal aid programme of the ICC is financed through public funds, and considering that fee-splitting practices are fraudulent acts and therefore prohibited, counsel acting before the Court should be under a positive duty to disclose to the Registrar information relating to the financial arrangement with clients, and this should not be considered as a breach of the duty of confidentiality. More importantly, this approach will enable the ICC to secure the public interest and equitable practices of counsel towards the client.

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights. The lawyer is an officer of the court, participating in the search for truth. No lawyer would consider that he had acted unethically in pleading the statute of fraud or the statute of limitation as a bar to a just claim.[99]

The act by which the lawyer reports to the Registrar any kind of fee-splitting arrangement is in conformity with Article 67(1)(b) of the Rome Statute, which guarantees the accused's right to 'have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence', because, if the lawyer is consulted for an illegal purpose, the absence of a professional relationship leads to a denial of privilege for all communications by the client. On the other hand, where an underlying professional relationship exists in which the lawyer performs normal legal services for his client, an exception to the principle of confidentiality might only extend to an illegal request or hidden illicit purpose expressed by the client.

At the end, the ICC has partially adopted the approach of the ICTY and ICTR by stipulating in Article 22(4) of the Code of Professional Conduct for Counsel that '[w]here counsel is requested, induced or encouraged to violate the obligations under this article, counsel shall advise the client of the prohibition of such conduct.'

The lawyer–client privilege is not absolute. An exception applies when a limitation on the privilege is specifically sanctioned by law for a legitimate purpose.

98. See Cramton and Knowles, *supra* note 61, at 63.

99. K. Raes and B. Claessens (eds.), *Towards a New Ethical Framework for a Legal Profession in Transition?*, Proceedings of the European Conference on Ethics and the Legal Profession, held at the Ghent University (Belgium) on 25 and 26 October 2001 (2002); W. H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (1998).

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Ensuring that the ICC's limited, yet highly important, legal aid resources are managed responsibly and judiciously is unquestionably a 'legitimate purpose'. It is the view of the author that the ICC ought to adopt the same approach taken by both the ICTY and ICTR, which make it obligatory – through specific empowering clauses – for lawyers who receive payment from their respective legal aid systems to advise their clients about the prohibition of the practice of fee splitting and to report the incident to the Registrar forthwith, notwithstanding any claim of privilege. Moreover, in order to protect counsel who may perceive this as being in breach of their domestic code of conduct, a clause can be added to the Code, explicitly stating that this requisite disclosure will not constitute a violation of the counsel's obligations under the Code, or their domestic rules of professional conduct.

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