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Fundamental Criminal Procedural Obligation of the Lawyer: Attorney-Client Privilege (Confidentiality)

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Abstract: *The spectacular development of the market of legal services determined the development of some rules for the protection of the professional body of lawyers, but also of their clientele, starting from the definition, redefinition and updating of some fundamental principles regarding the way of conducting the lawyer's activity, among the most important being the obligation to preserve professional confidentiality. In the criminal process, this is the fundamental institution for guaranteeing the right of defense and the right to a fair trial of the accused. This article aims to analyze the dual nature of this principle that governs the activity of lawyers: that of protecting the attorney as a professional and that of guaranteeing the procedural rights of the client.*

Keywords: *professional confidentiality; attorney-client privilege; lawyer's obligations.*

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1. Introduction

The institution of professional confidentiality is not specific to the profession of a lawyer (Apostu, 2018). Professional confidentiality was born in the field of medical practice (Terec-Vlad & Terec-Vlad, 2013), Hippocrates being the one who defined the foundation of medical confidentiality as the things that the doctor finds out about the existence of to pacient and which must not be disclosed, therefore the doctor will not mention to others. The confidentiality of the religious confession – religious confidentiality – is another form of professional confidentiality that, in form, is very close to the lawyer's professional confidentiality (Fischel, 1998).

Historically speaking, however, the lawyer's professional confidentiality had a different evolution, as the thesis of the protection of the person's dignity or the protection of social interests was embraced, each of them representing distinct imperatives (Simon, 2006). The lawyer's professional confidentiality does not have a legal contractual nature, but a legal one, it originates from the law and is part of the lawyer's professional status (National Union of Romanian Bar Associations, 2019), as it appears from Law no. 51/1995 (Romanian Parliament, 2018).

The lawyer's profession assumes that the defender comes into contact with a wide area of the individual's intimate problems in his confrontation with life, with society, with the regulations imposed by law in general. Preserving professional confidentiality is a form of guaranteeing the dignity of the person and the confidentiality of non-public information, on the one hand, and guaranteeing the collective interests of society, on the other hand, achieving a balance between the different factors of power that are in charge for law enforcement.

What the client expects from his lawyer is primarily counseling (Sandu & Nistor, 2020), the advice given on the basis of a support of understanding and rapprochement that can only be achieved under conditions of maximum security and openness on the part of both parties. In essence, the lawyer and the client are, in the early phase of their relationship, two strangers discussing aspects of the client's privacy, without a previous relationship that would have created the necessary climate of openness and trust (Clark, 2007). However, the circumstances being such that they force the client to contact the lawyer, the operating principles of the lawyer profession must support the creation of an optimal framework for discussions.

When the client transfers the responsibility of his problems and the care of legal proceedings to the lawyer, he expects from him, as a professional, to keep the secret of what was said and to discern the information necessary for its formulation in a legal manner. The collaboration between client and lawyer creates, regularizes and finalizes the case. The choice of the lawyer, regardless of the type of legal activity performed by him under the law, is free (Zacharias, 1988). No one can impose a defense attorney on a person, except for the cases provided by the law regarding mandatory ex officio legal assistance or free legal assistance.

In the exercise of his profession, the lawyer has, however, regardless of the form in which he exercises his duties, the obligation to preserve professional confidentiality. Keeping the professional secret implies, on the one hand, the obligation of the lawyer to keep the secret, not to divulge the content of the information received from his client, and, on the other hand, the obligation of the others not to do anything likely to affect the professional secret.

2. Preservation of professional confidentiality – an absolute obligation of the lawyer

The preservation of professional confidentiality implies all the activities of the lawyer, his associates and collaborators, including relations with other lawyers (Bok, 1983). Based on the Statute of the lawyer profession, the lawyer is obliged to inform them of this obligation. The lawyer's obligation to maintain professional confidentiality extends to all matters brought to his attention by his client and is objectionable erga omnes. No pressure from any public authority can compel the lawyer to divulge professional confidentiality, except in the cases expressly provided by the law.

The Council of the National Union of Romanian Bar Associations adopted, in the meeting of 02.03.2006, decision no. 116/2006, which aims, mainly, to protect the obligation to respect professional confidentiality in relations between lawyers and tax authorities. In accordance with art. 1 paragraph 1 of the aforementioned decision, professional confidentiality covers the confidentiality of telephone conversations carried out in the professional interest of a lawyer, including the identity of the correspondent and the identity of the holder of the corresponding telephone station, the date and duration of the telephone conversation, as well as the content of the telephone conversation, regardless of whether these telephone conversations were made from a telephone belonging to the lawyer (as his

personal estate) or of his law firm (as part of the professional estate), from a telephone (landline, mobile or public) that uses cards or from another telephone belonging to a third party.

Further, in the same article it is stipulated that in the relations with the fiscal bodies, the lawyer has the obligation to preserve the confidentiality of telephone conversations carried out in professional interest. In the relations with the tax authorities and for establishing the deductibility of expenses regarding telephone calls, it is assumed that all telephone calls made from a telephone belonging to the law firm or through the use of a telephone card purchased by the the law firm are made in the interest of the profession. If not all telephone calls made from a phone belonging to the law firm or by using a card purchased by the law firm were made in the interest of the profession, the lawyer or the law firm determines, on their own responsibility, the value of the telephone calls that were made in professional interest, in order to determine the deductible expenses.

Professional confidentiality also covers, in accordance with art. 2 of Decision no. 116/2006 of the NURBA Council (National Union of Romanian Bar Associations, 2006), the lawyer's trips in professional interest, of whatever nature they may be, carried out with the vehicle belonging to the lawyer or the law firm. In the relations with the fiscal bodies, the lawyer or the law firm have the obligation to preserve the confidentiality of the trips made in professional interest.

In relations with fiscal bodies and for establishing the deductibility of expenses (depreciation, leasing rate, mandatory and optional insurance, property tax, registration fees, repairs, equipment, gasoline and other consumables, parking space etc.) regarding the vehicle, it is assumed that all journeys made with a car belonging to the law firm are made in the interest of the profession.

In the relations with a lawyer registered in a bar outside the European Union, the lawyer must make sure, before exchanging confidential information that, in the country where the foreign colleague practices, there are rules that allow ensuring the confidentiality of correspondence (Huidu, 2019) and, otherwise, to conclude a confidentiality agreement with the fellow lawyer or to ask his client if he accepts, in writing, the risk of an exchange of information whose confidentiality may not be guaranteed (according to the Statute of the profession of lawyer).

The ethical code of lawyers in the European Union, adopted in the Plenary Session of the Council of Bars and Law Societies of Europe, on October 28th, 1998, and amended in the Plenary Sessions of November 28th, 1998 and December 6th, 2002, establishes, in chapter 2, entitled

General principles, art. 2.3. - professional confidentiality, the fact that by the very nature of his mission, the lawyer is the depository of his client's secrets and the recipient of confidential communications (National Union of Romanian Bar Associations, 2018).

Next, it is shown that without a guarantee of confidentiality, trust cannot exist. Therefore, professional confidentiality is recognized as both a right and a fundamental and primary duty of the lawyer. The lawyer's obligation regarding professional confidentiality serves both the interests of the judicial administration and the interests of the client. Consequently, it must benefit from protection from the state. It is stated that the lawyer must respect the confidentiality of any confidential information he becomes aware of in the course of his professional activity. This obligation is not limited in time. The lawyer requires his employees and any person who collaborates with him in his professional activity to respect professional confidentiality (Bok, 1983).

3. Preservation of professional confidentiality - an obligation not limited in time

Considering the idea that the obligation to respect professional confidentiality is not limited in time, the employment of a new client cannot be done if by doing so secrets from another client are revealed, with harmful effects for the latter (Fischel, 1998). For the same reason of guaranteeing the preservation of professional confidentiality, the lawyer cannot assist or represent parties with opposing interests in the same case or in related cases and cannot plead against the party who previously consulted him regarding concrete litigious aspects of the case (Law no. 51/1995). This reveals the connection between the obligation to preserve professional confidentiality and the obligation to avoid conflicts of interest, the situation presented above being part of the wider area of situations in which the lawyer could be in a conflict of interests.

The lawyer must not be the adviser, nor the representative or defender of more than one client in one and the same case, when the interests of the clients are in conflict or when there is, in reality, the risk that such a conflict of interests might appear (Simon, 2006). The lawyer must refrain from dealing with the cases of all involved clients, when there is a conflict between their interests, when professional confidentiality risks are violated or when confidentiality is being undermined (according to the Statute of the lawyer profession).

Just as in the case of doctors who cannot divulge professional confidentiality even after the death of their patients, the lawyer's obligation to maintain professional confidentiality over time is unlimited. The lawyer is the client's confidant in relation to the entrusted file. Confidentiality and professional attorney-client privilege guarantee trust in the lawyer and constitute fundamental obligations of the lawyer, as stipulated by the Statute of the lawyer profession.

4. Professional confidentiality – an aspect of public order

Professional confidentiality is neither a prerogative of the profession nor the sole right of the client, but is also an aspect of general interest, and thus a problem of public interest (Zacharias, 1988). Therefore, the question arises whether professional confidentiality is an obligation imposed by the legal assistance contract, by the law firm or by the state. Keeping professional confidentiality is not and cannot be an obligation of a contractual nature, because it would mean that the very essential element that creates the relationship of trust between the defender and the party is left to the random regulation of some institutions such as that of the termination of the contract - but the obligation has an unlimited character in time - with the restoration of the parties to the previous situation - but the information, once granted, cannot be withdrawn, otherwise, once the contract is terminated, the obligation of confidentiality could disappear -, as well as the possibility of invoking the exception of non-execution of the contract - in which case, for example, the lawyer would consider himself free to divulge confidential information until the outstanding client's fee is paid, which would affect the prestige of the profession.

Keeping professional confidentiality is not an obligation imposed by the profession, because the essence of the profession is not the creation of a caste of professionals, but it is represented by the legitimacy of the lawyer (Zacharias, 1993) as an instrument that meets the need for defense and specialized legal assistance of non-lawyers, parties in cases. The obligation of non-disclosure of professional confidentiality is established by law, so it is determined by an act of public authority, of the Parliament's legislation, as a representative of the State (Chavkin, 2012). The lawyer is obliged to maintain professional confidentiality regarding any aspect of the case entrusted to him. The lawyer cannot be forced under any circumstances and by any person to divulge the professional secret. The lawyer cannot be released from professional confidentiality by any person or authority, other than the client. However, the cases in which the lawyer is prosecuted

criminally, disciplinarily or when there is an appeal against the agreed fees, exclusively for the strict needs of his defense, confidentiality is excluded.

The obligation of professional confidentiality does not prevent the lawyer from using information about a former client, if it has become public (according to the Statute of the lawyer profession). We are in the presence of an obligation of public order because the preservation of professional confidentiality was not guaranteed in the interest of the client, nor in the interest of the lawyer, but in the public interest. The maintenance of professional confidentiality is based on a social interest (Dănilă, 2017, p. 67; Hamelin & Damien, 1989, p. 283), a principle of public order, namely that of guaranteeing the right to defense. It applies exclusively to the information and documents that come from the client and that the client provides to the lawyer in order for him to provide qualified legal assistance.

5. The secret of professional correspondence

Respecting professional confidentiality is, at the same time, a right and an obligation. The obligation also extends to communications and professional correspondence. Professional confidentiality covers all information and data of any type, in any form and stored on any medium, provided to the lawyer by the client for the purpose of providing legal assistance and in connection with which the client has requested confidentiality (Zacharias, 2004), as well as any documents drafted by the lawyer, which contain or are based on data provided by the client. Therefore, the correspondence between the lawyer and his client is protected to the extent that it is a correspondence carried out in connection with the mandate entrusted by the client to his lawyer (Zacharias, 2000).

If the document is, however, requested as a means of proof, the lawyer has the obligation to indicate the necessary elements to prove that it is a document protected by the incidence of professional confidentiality. Naturally, to the extent that the client believes that the information contained in the respective document can be used in his defense, he can exempt his lawyer from the obligation to maintain professional confidentiality. In order to fully guarantee the confidentiality of the correspondence, it is customary for the envelopes addressed to the client or by the client to the lawyer to include, in the mandatory mentions of the correspondence, the title of the addressee, respectively of the sender.

Any communication and professional correspondence between lawyers, between lawyers and clients, between lawyers and the bodies of the profession, regardless of the form in which they are made, is confidential, as

stipulated by the Statute of the lawyer profession. Correspondence and information transmitted between lawyers or between lawyer and client, regardless of the type of storage, cannot in any case be brought as evidence in court, nor can they be deprived of their confidential nature (Sandu & Damian, 2012). The institution of professional confidentiality entails the obligation not to speak and the right not to answer (Cremieu, 1954; Dănilă, 2007, p. 66). The right to professional confidentiality consists in the right not to answer the questions formulated by other persons, regardless of the quality and position from which they formulate the questions, and this right exists as long as the lawyer does not receive permission from the client to speak about the information he obtained in his capacity (Tuoni, 2012).

The relationship between the lawyer and his clients is based on honesty, probity, fairness, sincerity and confidentiality (Necula et al., 2018), but these basic principles and rules of the relationship between the lawyer and the client exceed the scope of this topic, being the subject of a separate section from the Statute of the lawyer profession. However, it is necessary to specify that in the absence of the guarantee of professional confidentiality, this whole climate of good faith would be seriously and irremediably affected (Aviel, 2012).

6. Professional confidentiality and professional headquarters

The professional headquarters and the other premises where the lawyer carries out his professional activity must ensure the preservation of professional confidentiality, as provided by the Statute of the lawyer profession. It can be appreciated, therefore, that the professional offices of lawyers are inviolable, as is their correspondence (Dănilă, 2007, p. 69; Giudicelli-Delage, 1987). In order to ensure professional confidentiality, the lawyer keeps the files only at the professional headquarters or in the premises approved in this sense by the bar council. Documents and works of a professional nature are inviolable.

In order to ensure professional confidentiality, the lawyer has the obligation to object to the search of his main headquarters, his secondary professional headquarters and the work office, as well as to the physical search, regarding the documents or works of a professional nature located in the above-mentioned places or on his own person (Vasishtha, 2020). The lawyer has the right to object to the collection of documents or assets consisting of documents and works of a professional nature, if the conditions of Law no. 51/1995.

7. Professional confidentiality and the lawyer as witness

The lawyer may not be heard as a witness for the information he has become aware of on the basis of the legal assistance contract and may not provide information to any authority or person regarding the case entrusted to him, unless he has the prior, express and written permission from all his clients (Law no. 51/1995). However, the capacity of being a witness has priority over the capacity of being a lawyer with regard to the facts and circumstances of which the lawyer became aware before becoming the defender of any party in the case (art. 114 of the Criminal Procedure Code) (Romanian Parliament, 2014).

According to the provisions of the Criminal Procedure Code, the person obliged to keep professional confidentiality cannot be heard as a witness regarding the facts and circumstances he became aware of in the course of the profession, without the consent of the person or unit towards whom he is obliged to keep the secret. Also, based on art. 114 of the Criminal Procedure Code, the lawyer who was heard as a witness in a case can no longer act as a defender of any party in that litigation. The Congress of Romanian Lawyers, meeting on June 29, 2007, adopted, on June 30, 2007, a Resolution stating that in the practice of some criminal investigation bodies, the provisions of Article 114 of the Criminal Procedure Code (National Union of Romanian Bar Associations, 2007), there are practices that make the legal provisions that regulate the lawyer's right and obligation to preserve professional confidentiality become void.

In the interpretation of some of the criminal investigation bodies, the obligation to preserve professional confidentiality refers only to legal services based on the legal assistance contract concluded in connection with a criminal trial, independent of the existence of other legal assistance contracts, prior to the services caused by the criminal trial, under which the lawyer learned about facts and circumstances that fall under the power of professional confidentiality and in connection with which the lawyer cannot be heard as a witness. Imperative legal provisions are ignored, including Law no. 51/1995 for the organization and exercise of the lawyer profession, which stipulates that the lawyer is obliged to maintain professional confidentiality in any aspect of the case entrusted to him, except for the cases expressly provided by law (Romanian Parliament, 2018).

In the same sense are the provisions of the Statute of the lawyer profession, which establish and explain the lawyer's obligation to maintain professional confidentiality regarding any aspect of the professional services

requested to him. The lawyer cannot be released from this obligation neither by his client nor by any other authority or person, except under the law if, in the exercise of the profession, he became aware of the facts and circumstances, as a lawyer. The special legislation respects the right of the person to preserve confidentiality, as a component element of the right to a fair trial, as they are regulated in the Constitution and by art. 6 of the European Convention on Human Rights.

Law 78/2000 for the prevention, discovery and sanctioning of acts of corruption, provides that the professional confidentiality of the lawyer exercised under the law is opposable to the prosecutor after the start of the criminal investigation and the court, unlike bank confidentiality and other professional secrets than that of the lawyer, that do not have this regime after the start of the criminal prosecution before the prosecutor and before the courts (Romanian Parliament, 2000). Law no. 656/2002 for the prevention and sanctioning of money laundering, as well as for the establishment of measures to prevent and combat the financing of terrorist acts, excludes the obligation of lawyers to report to the National Office for the Prevention and Combating of Money Laundering the information obtained from clients in the course of determining the legal situation or defenses in legal proceedings, or in relation to them, including the provision of advice on the initiation of legal proceedings, according to the law, regardless of whether this information was received or obtained before, during or after the opening of the proceedings.

These legal provisions cannot become inapplicable through the interpretation made by some criminal investigation bodies, according to which the lawyer is obliged to disclose the professional secret regarding the circumstances of which he was aware under the effect of a legal assistance contract, if these circumstances are brought into question during a criminal trial. The restrictive interpretation of the provisions of art. 114 of the Criminal Procedure Code, in the sense that only the contract of legal assistance in criminal matters concluded for a specific case binds the lawyer in terms of professional confidentiality, is incorrect. Such an interpretation in reality denies the clients' right to benerfit from confidentiality, because the lawyer would never again be bound by the obligation to preserve professional confidentiality, because a contract for legal assistance in criminal matters cannot be concluded prior to the existence of a criminal trial.

It was found that, in practice (Dănilă, 2007), there were situations in which the lawyer who refused to give a statement as a witness, because he was bound by professional confidentiality in the sense of Law no. 51/1995

for the organization and exercise of the profession of lawyer, was subjected to criminal investigation under the aspect of committing the crime of perjury regulated by art. 273 of the Criminal Code, a situation that creates a real danger and constitutes an extremely dangerous precedent for the treatment of the legal regime of the confidentiality of the professional relationship between lawyer and client, causing defamation, which is contrary to the lawyer's professional oath and seriously violates the law.

These practices affect the principles that govern the legal profession and seek to obtain information through illegal means, having the effect of preventing the lawyer from exercising the acquired legal mandate and depriving the client of the opportunity to freely choose his lawyer, based on trust in professional confidentiality, guaranteed by law. The premises are created for the unlimited and arbitrary violation of the citizen's interests, and the rationale and essence of the lawyer profession is denied, which is inadmissible in a state of law.

The correct interpretation of the legal provisions and the principles that configure confidentiality and the lawyer's obligation to respect professional confidentiality is reaffirmed by the decision of the Court of Justice of the European Communities given in case no. C/305/5 on June 26, 2007 (European Communities, 2007), which interpreted Directive 91/308/CEE (European Communities, 1991) in the sense that the lawyer would not be able to fulfill the mission of providing advice, defense and representation of his client in an appropriate way, and he would, therefore, be deprived of the rights conferred to him by art. 6 of the European Convention on Human Rights, if the lawyer, in the framework of a judicial procedure, would be obliged to cooperate with the public authorities, transmitting to them information obtained during the legal consultations granted in the framework of such a procedure.

8. Conclusions

The competent authorities are obliged to apply the law in its letter and spirit and to fully respect the lawyer's obligation and right to keep professional confidentiality regarding the circumstances he became aware of in the execution of his legal mandate, without reducing the obligation exclusively to the legal assistance contract in criminal matters. The competent authorities are required to respect the fundamental principles that govern the exercise of the profession and not to allow the violation of the lawyer's right and obligation to preserve professional confidentiality, respectively the protection of the right of defense of any person.

The Council of the National Union of Romanian Bar Associations and the bar associations are tasked with taking organizational measures to inform public opinion and the competent authorities of the importance of the principles that govern the legal profession and to initiate the necessary measures to defend the legal profession and its fundamental principles. Non-compliance with the provisions of the Statute of the lawyer profession related to professional confidentiality constitutes serious disciplinary misconduct, as stipulated in the Statute of the lawyer profession.

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