C. Confidentiality

Confidentiality is of the essence of the lawyer’s mission, the lawyer must respect the confidentiality of all information told to him in confidence by his client.\(^{15}\)

Lawyer’s confidentiality is necessary in order to defend the rights of citizens.

It has two objectives: to protect every individual who requires the help of a lawyer to defend his rights and liberties and to ensure the adequate administration of justice.\(^{16}\)

"It is of the essence of a lawyer’s function that he should be told by his client things which the client would not tell to others. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. A lawyer shall accordingly respect the confidentiality of all information given to him by his client, or received by him about his client or others in the course of rendering services to his client" (Arts. 2.3.1 and 2.3.2 of the CCBE Code).

However, the approach to confidentiality differs from country to country often depending on whether they have a civil based or common law legal system.

For example in France, the duty of confidentiality of the lawyer is absolute and of public interest.\(^{20}\) The breach of this duty results in an immediate offence regardless of the final outcome.\(^{21}\)

Professional confidentiality was established neither for the benefit of the lawyer who listens in confidence nor in the interest of those who disclose their secrets; it is a matter of public interest.\(^{22}\) A lawyer can thus never be exempted from the duty of confidentiality, and this duty is unlimited in time.

On the other hand, in Anglo-Saxon countries, the duty of confidentiality is considered as the lawyer’s obligation to the client and endures until the client releases him from this obligation.\(^{23}\)

In Great Britain, the lawyer’s confidentiality is a contractual obligation towards his client only, and in the case of divulging the secret there are not any criminal proceedings but only a disciplinary hearing.

In the U.S.A\(^{24}\) a distinction is made between the “attorney-client privilege” and the “professional duty of confidentiality”.

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\(^{16}\) Ibid.

\(^{20}\) Ibid.

\(^{21}\) Ibid.

\(^{22}\) Ibid.

\(^{23}\) Ibid.

\(^{24}\) Ibid.
The Code of Professional Responsibility, Canon 4, differentiates between "confidences" and "secrets:"

"(a) Lawyers should preserve the confidences and secrets of a client:"

The differences are as follows:

a. "Attorney client privilege" is a procedural rule of evidence which protects against the disclosure of certain information ("confidences") by the lawyer, even in judicial proceedings ("evidentiary privilege"). It applies to information disclosed by the client to the lawyer in confidence. "Attorney-client privilege" therefore constitutes an exception to the general rule according to which the community has the right to the testimony of anyone.

b. The "professional duty of confidentiality" is an ethical rule which forbids the lawyer from disclosing a larger group of information ("secrets"), an exception to this being if the court permits such a disclosure ("ethical privilege"). This applies not only to information given by the client but also to all other information received by the lawyer concerning his mission irrespective of its source.

Appendix II of the ICC Internal Rules of the International Court of Arbitration establishes that the work of the International Court of Arbitration is of a confidential character which must be respected by everyone who participates in that work in whatever capacity.

If professional confidentiality is still regarded as being essential to the lawyer, perhaps it is even more essential when the lawyer acts in arbitral proceedings where the parties often elect this procedure for its more confidential characteristic in comparison with judicial proceedings.

17 Art. 2.3.1 of the CCBE Code.
18 Art. 2.3.1 of the CCBE Code, La Cour Fédérale Suisse (Judgment of 27th February 1974). It was held that the necessity for professional secrecy is an essential characteristic of professions which have a "monopoly" over legal advice. Quoted by David A. O. Edward, op. cit., p. 7; Novissimo Digesto Italiano, 1969, XVI, v. Segret, p. 955: "Il nostro legislatore ha guadato al segreto cosiddetto privato come al una delle più significative estrinsecazioni della libertà individuale."
20 Article 5.7.1 of Règlement intérieur de l'Ordre des Avocats à la Cour de Paris "...Confidentiality is general absolute and unlimited in time. It is of public interest. The lawyer cannot be released from this duty neither by his client nor by an authority," Jacques Hamelin and André Damien, Les règles de la profession d'avocat, édition 1992, p. 403: "The role of a lawyer depends upon keeping everything that he learns under this title secret. This obligation is absolute." Regarding the heroes of a lawyer's professional secrecy in particular Me. Python, who was deported and died during deportation as a result of having adhered to confidentiality, c.f. A. Toulemon Gazette Palais, 26th January 1865 and the Tribunal Administratif de Paris, 8th July 1864, Gazette Paris, 17th January 1865 quoted by Hamelin and Damien, op. cit., p. 403. The authors of the same book 1995 edition, explain the situation concerning jurisprudence which accepts confidentiality for judicial matters but not for the matters of legal advice.
23 See for example, the jurisprudence quoted by Henry S. Drinker, Legal Ethics 1953. p. 133.
25 Wigmore, Evidence, para. 2285. The conditions for the existence of any privileged communication are as follows: (i)
The communications must originate in a confidence that it will not be disclosed. (ii) This element of confidentiality must be essential in order to maintain the relationship between parties. (iii) The relation must be one which in the opinion of the community ought to be sedulously protected, (iv) Consequences that would result from disclosure must be more serious than the benefit obtained in the case of disclosure.

26ABA, Model Rules, Comment to Rule 1.6(5): "The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the "work product doctrine ") and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness...The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source..." The Code of Professional Responsibility of the ABA, 4.101 (A) defines a "confidence" as: "information protected by the attorney-client privilege under applicable law" and a "secret" as: "other information gained in the professional relationship that the client has requested to hold inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

27The distinction made between an "official secret" and "legal professional privilege" in the U.K. does not coincide with the United States binomial "secret confidence;" see David O. A Edward, op. cit., p. 11.

Referring Principles:

XII.5 - Settlement privilege