

# Disclosure of Attorney-Client Privilege with the Crime Prevention Purpose: Legal Regulation Gaps

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## ABSTRACT

Attorney-client privilege is the ethical basis for an attorney's professional activities. The principal's confidence in the observance by attorney of the privilege regime regarding the information provided by him is important for the provision of high-quality legal assistance. The study's purpose is to analyze the legal regulation of issues related to the preservation of attorney-client privilege, as well as cases where disclosure of information constituting an attorney-client privilege in the Russian Federation is permissible. To achieve this goal, the analysis was made of the sources of legal regulation of these issues in the Russian Federation, the viewpoints of scientific community representatives on the issue under study were presented, as well as examples from disciplinary practice regarding an attorney's violation of attorney-client privilege were examined.

**Keywords:** *attorney, attorney-client privilege, advocacy in the Russian Federation*

## 1. INTRODUCTION

The study methodological basis is a general scientific dialectic method of socio-legal and moral-ethical phenomena cognition, as well as the intersystem approach to the study of legal phenomena.

In accordance with the provisions of Article 48 of the Constitution of the Russian Federation, everyone is guaranteed the right to receive qualified legal assistance. In cases provided for in a law, legal assistance is provided free of payment.

Each detainee, misdemeanor prisoner, accused of committing a crime has the right to use the attorney's (defense lawyer's) assistance from the moment of detainment, confinement under guard, or filing accusation, respectively.

It is attorney activity that, in accordance with the Federal Law dated May 31, 2002, No. 63-FZ "On Advocacy and the Bar in the Russian Federation", is qualified legal assistance provided on a professional basis by persons who have received the status of an attorney, in the manner prescribed by law.

The existence of advocacy is inconceivable without statutory guarantees of non-disclosure of information constituting the subject of attorney-client privilege. In the Russian Federation, the concept of attorney-client privilege is entrenched in Article 8 of the Federal Law dated May 31, 2002, No. 63-FZ "On Advocacy and the Bar in the Russian Federation". In accordance with this rule, the attorney-client privilege is any information related to the provision by an attorney of legal assistance to his client. In addition, in Article 8, the provision that the attorney cannot be called and questioned as a witness about the circumstances that became known to him in

connection with applying to him for legal assistance or in connection with its provision, and conducting operational-search measures and investigative actions in relation to the attorney is allowed only on the basis of a court decision.

## 2. MATERIALS AND METHODS

In accordance with Clause 5 of Article 6 of the Code of Legal Ethics, the rules for the protection of privileged information apply to:

- fact of contacting an attorney, including names and title of principals;
- all evidence and documents collected by the attorney in preparation for the case;
- information received by the attorney from principals;
- information about the principal, which became known to the attorney in legal assistance;
- content of legal advice given directly to the principal or intended for him;
- all legal proceedings in the case;
- terms of the legal assistance agreement, including cash payments between attorney and principal;
- any other information related to the legal assistance provision by the attorney;

Thus, the information list that may be classified as attorney-client privilege is not exhaustive.

Violation of attorney-client privilege is largely carried out by the intervention of law enforcement officials who seek

to gain access to the attorney's information, which neutralizes his capabilities, in particular, in the criminal process. For example, according to statistics for 2017, the number of unlawful calls by attorneys for interrogation increased and amounted to 168 cases per year, which is an increase of 71.4% compared to 2016. The number of illegal searches in the office (residential) premises of attorneys has also increased – 34 cases, which is 126.7% more than this index in 2016.

In addition to the external offense to the professional attorney-client privilege, there are cases when the attorney violates the information confidentiality provided to him by the principal. Thus, in the Review of Disciplinary Practice of the Legal Association of St. Petersburg for July-December 2018, an example related to attorney's disclosure of information constituting an attorney-client privilege by participating in the examination as a witness about circumstances that became known to him when providing legal assistance to a citizen in prior years. Such examples also take place in social interaction, from advertising consideration.

Clause 4 of Article 6 of the Code of Legal Ethics contains three cases, where an attorney has a right to disclose information related to attorney-client privilege without the principal's consent. Among these are:

- presence of civil dispute between attorney and principal;
- own attorney defense in a criminal case brought against him;
- own attorney defense in disciplinary proceedings brought against him;

### **3. RESULTS AND DISCUSSION**

To date, neither the Code of Legal Ethics nor the Federal Law contains such a basis for disclosing attorney-client privilege as preventing an imminent crime. It is referred to as a situation where the principal informs the attorney about the crime (or by other persons directly connected with the principal) he is preparing. Moreover, the Recommendations on securing attorney-client privilege and guarantees of the attorney independence when practicing attorney' professional activities (approved by the decision of the Russian Federal Bar Association dated November 30, 2009, as amended on October 5, 2017) indicate that the privilege regime termination by the principal acknowledged in writing should not offer opportunities for the former principal to inflict any harm associated with the use of information previously comprising its subject.

In accordance with the provisions of Clause 1 of Article 9 of the Code of Legal Ethics, the attorney is not entitled to disclose without principal's consent the information provided to the attorney in connection with the provision of legal assistance to him, and use them in their own interests or in the interests of third parties. Based on the foregoing, an inference should be drawn that it is

impossible for the attorney in the Russian Federation to disclose information constituting an attorney-client privilege when receiving information on an imminent crime in order to prevent such crime. In our opinion, a gap in the legal regulation of such situations is obvious. So, Article 10 of the Code of Legal Ethics establishes that law and morality in the profession of an attorney are beyond the principal's will. This rule could be the basis for allowing the disclosure of attorney-client privilege in the event of receiving information on a crime being prepared by the principal. However, the subsequent disclosure of this provision in this article obviously narrows its meaning, namely: no principal's wishes, requests or requirements, aimed at non-compliance with the law or violation of the rules provided for by this Code, can be fulfilled by an attorney.

Advocates of the attorney-client privilege absolutization, that is, those representatives of the attorney's community who believe that under no circumstances other than those listed in the law today, an advocate has the right to disclose information constituting an advocate secret, reinforce their position by arguing that the advocate should not act on the side of law enforcement and facilitate the crime detection. In addition, the relationship between attorney and client has certain specifics, in particular, any attorney who has a certain experience in business management will confirm that the quality of legal assistance and effective work in the case of the client directly depends on the level of trust in the attorney. The fact of the concealment by the principal of information from the attorney, in consequence, will certainly be clarified and will have a negative effect on the result of a dispute or criminal case consideration.

As Yu. Pilipenko correctly notes, most of the participants in the discussion about the possibility or impossibility of revealing an attorney-client privilege when receiving information on an imminent crime believe that an attorney has the right to disclose this information if the imminent crime is classified as serious or extremely serious. It is important to note that this approach does not take into account the provision of Part 6 of Article 15 of the Criminal Code of the Russian Federation, namely, that, taking into account the actual circumstances of the crime and the degree of its public danger, the court has the right, in the presence of mitigating circumstances and in the absence of aggravating circumstances the category of crime is less serious, but not more than one category of crime. Accordingly, it can be assumed that an attorney who discloses information constituting an attorney's secret and assumes that an impending crime belongs to the category of serious or extremely serious crimes after the court makes a decision, will not have grounds for disclosing the relevant information.

We believe that in this matter the legislation of the Russian Federation should be supplemented by a norm that would provide for the right of an attorney to report the imminent crime. At the same time, we consider it necessary to highlight several important conditions that must be observed in this case.

First, the attorney must assess the reality of the threat of committing a crime, which is expressed by the principal. If it is obvious from the actual circumstances that the principal is unable to fulfill the threat made or commit a crime, the attorney must not disclose attorney-client privilege. Secondly, the imminent crime should be associated with a threat to the life or health of people, as well as with the state security. It is important to emphasize here that the identification of crimes for which professional secrets can be disclosed should not be based on the classification in accordance with the category of offense severity. Thirdly, the right to disclose information constituting the attorney-client privilege should apply only to the imminent crimes, but not to those already committed by the principal (even if such crimes did not constitute grounds for instituting criminal proceedings against the principal). Otherwise, the attorney's role will really be indistinguishable from the activities of law enforcement agencies. Fourthly, it is necessary to give the attorney the right to unilateral refusal of defense if, as a result of the information about the imminent crime that has become known to him, the attorney has decided to disclose the lawyer's secret. This proposal seems logical, because it is difficult to imagine the possibility of continuing the relationship between attorney and principal under the relevant circumstances. Fifthly, the attorney is obliged to notify the principal of his right to disclose information constituting an attorney-client privilege, if such information relates to the imminent crime, before receiving information on the matter from the principal. This condition is necessary in order to maintain a balance between the legal and moral component of the relationship between attorney and principal. It seems reasonable to include this provision in the legal assistance agreement by analogy with how the provision on the lack of attorney's liability for a court decision on a specific case is included in the agreement.

In our opinion, an important result of the acceptance of all these conditions will be a reduction in the number of cases when the principal informs the attorney of the imminent crime. Thus, the attorney will be spared the need to make a choice between the absolute preservation of attorney-client privilege and moral requirements, and the work on crime prevention will be fully provided to law enforcement agencies.

It is also important to note that in practice there are situations when a person planning a crime commits an oral consultation with an attorney in order to provide all possible options to avoid responsibility. Thus, the attorney in some way becomes an accomplice to such crime. In such a situation, it is also necessary to secure the right for the attorney to disclose information communicated by the person who has applied for the consultation, subject to the conditions described above.

Given the nature of the current legal secrecy standards, this proposal may seem excessive and violate the idea of attorney-client privilege itself. However, it is necessary to refer to Article 7.1. of the Federal Law dated August 07, 2001, No. 115-FZ "On Counteracting the Legalization (Laundering) of Criminally Obtained Incomes and the

Financing of Terrorism" which provides for the obligation of an attorney to notify the authorized body if he has reason to believe that transactions or financial transactions (such as real estate transactions, management of bank accounts, management of cash, securities or other property of a client, raising funds to create organizations, support their activities or their management, as well as the creation of organizations, the provision of their activities or their management, as well as the purchase and sale of organizations) are carried out or can be carried out with the aim of legalizing (laundering) of proceeds from crime or terror financing. In this case, it is not the right, but the attorney's duty is to disclose certain information. It is important to note that in accordance with the aforementioned Federal Law, the attorney is not entitled to disclose the fact of transferring this information to an authorized body. It was separately noted that the attorney-client privilege does not apply to relevant information. Thus, the legislation of the Russian Federation provides a practical example of excluding information of a certain nature from the scope of the requirements for the observance of attorney-client privilege.

It is worth noting that the introduction of the duty, and not the right of the attorney, to disclose information constituting an attorney-client privilege when it becomes known about the imminent crimes is permissible, but only if the conditions are elaborated in detail under which such a duty occurs. Overly broad and lengthy wording of such a duty in the law will inevitably lead to the erosion of the very principle of preserving attorney-client privilege, the fall of the advocacy's authority and trust in attorneys. Such consequences are unacceptable for the lawyer community and the qualified legal aid system in general.

It should be noted that in July 2019, the State Duma introduced a draft on additional liability for failure to report crimes. It is proposed to introduce a new article – 316.1 "Non-reporting of crimes against life in aggravated circumstances". The explanatory memorandum to the bill draft states that the article will establish liability for failure to report on imminent extremely serious crimes. We believe that this rule should not apply to attorneys even if they are granted the right to disclose the attorney-client privilege, because in this case, reporting the imminent crime will be an attorney's right, not an obligation.

As the President of the Russian Federal Bar Association Yu. Pilipenko noted: "for non-observance of the attorney-client privilege, a Russian attorney can only be held disciplinary, according to which the most severe punishment is deprivation of status". Obviously, it is necessary to deduct liability when the attorney discloses information containing details about the imminent crime.

Matters related to advocacy secrecy have always been of great interest to the advocacy and academic community. In our opinion, this is due to the fact that relations developing in connection with the preservation of attorney-client privilege are at the junction of legal and ethic, moral regulation. Obviously, the current legal norms regarding the attorney-client privilege are not enough to ensure a balance between the observance of the attorney's ethics and moral requirements.

#### 4. CONCLUSION

Moreover, amendments to the rules relating to attorney-client privilege cannot be made separately from the revision of other rules that are logically related to attorney-client privilege. Regulation of advocacy, and especially issues related to the preservation of professional secrets, is possible only with a deep understanding of the advocacy specifics. The attorney's relationship with the principal is essentially different from other relations in the service industry. In addition to the principal's confidence in the quality of the service provided, a person who has entrusted the attorney with confidential information should be fully confident that such information will not be known to third parties. However, the requirements for the attorney to observe the attorney-client privilege regime should not contradict the provision according to which the law and morality in the attorney profession are beyond the principal's will. One cannot but agree with the assertion that the attorney should not participate in crime detection activities. However, the attorney is a representative of civil society. In addition, it is understood that an attorney is a person with high moral and ethical standards.

In conclusion, I would like to note that the situation of legal uncertainty, when there are gaps in legal regulation, creates significant difficulties in the attorneys' activities. Today, the only available option for resolving the issue of the possibility of disclosing information constituting a lawyer's secret when receiving information on the imminent crime is the attorney's appeal for clarification to the Board of the Bar Chamber.

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