

International Corporate Counsel College

Mastering New Challenges in a Globalized Economy

October 7 – 8, 2010
Paris, France

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Is the Attorney-Client Privilege and the Work Product Doctrine Relevant? - Pitfalls and Best Practices

October 7, 2010

101905/vo/20/ic/02/00669386.doc/JWI/dah

Legal Professional Privilege in Switzerland*

I. INTRODUCTION

1. The legal professional privilege is an important pillar of Swiss law and the strict observance of privilege is considered as key for the due exercise of the profession of a lawyer.
2. Under Swiss law, the protection of the legal professional privilege is part of the procedural law. Swiss state courts will, therefore, invariably apply their procedural codes as *lex fori* when determining who may avail himself of a legal professional privilege.¹
3. The legal professional privilege is mirrored by the lawyer's duty of confidentiality which is governed by several sources of Swiss law.

* I sincerely thank my junior associate Daniel Huser for his great assistance in preparing this overview.

¹ PETER BURCKHARDT, Legal Privilege and Confidentiality in Switzerland, in: Privilege and Confidentiality: An International Handbook, London 2006, p. 311.

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4. While it was historically strictly tied to the person of the lawyer, the protection of privilege will be extended to cover also work product which is no longer in the immediate control of the lawyer as of January 1, 2011.

II. OBLIGATION FOR SECRECY ACCORDING TO SWISS LAW

A. Swiss Federal Lawyer's Act²

5. The Swiss Federal Act on the freedom of Movement for Lawyers (Lawyer's Act, LA) regulates the freedom of legal services within Switzerland and implements at the same time the European freedom of legal services between the European Community and its member states on the one hand and the Swiss Confederation on the other (see sec. 47 below).³
6. In addition, the Lawyer's Act defines the rules of professional conduct and disciplinary supervision on a national level.
7. With respect to the observance of the professional secrecy, the LA provides as a basic rule as follows (art. 13 para. 1 LA):⁴

*Unlimited in time and applicable to anyone, lawyers must observe professional secrecy for all information that has been confided to them by their clients as a result of their professional activity. Release from professional secrecy does not obligate the lawyer to divulge confidential information.*⁵

8. In the event of an intentional or negligent violation of the Lawyer's Act, including the professional secrecy imposed by art. 13 LA, the supervisory authority can impose disciplinary sanctions, reprimands, a fine as well as a temporary or permanent interdiction to practice (art. 17 LA).

² http://www.admin.ch/ch/d/sr/c935_61.html.

³ LUCIEN W. VALLONI / MARCEL C. STEINEGGER, Bundesgesetz über die Freizügigkeit der Anwältinnen und Anwälte, Zurich 2002, p. 117.

⁴ Art. 13 LA: "*L'avocat est soumis au secret professionnel pour toutes les affaires qui lui sont confiées par ses clients dans l'exercice de sa profession; cette obligation n'est pas limitée dans le temps et est applicable à l'égard des tiers. Le fait d'être délié du secret professionnel n'oblige pas l'avocat à divulguer des faits qui lui ont été confiés.*"

"Anwältinnen und Anwälte unterstehen zeitlich unbegrenzt und gegenüber jedermann dem Berufsgeheimnis über alles, was ihnen infolge ihres Berufes von ihrer Klientschaft anvertraut worden ist. Die Entbindung verpflichtet sie nicht zur Preisgabe von Anvertrautem."

⁵ Translation by LUCIEN W. VALLONI / MARCEL C. STEINEGGER, loc.cit., p. 138.

B. Swiss Penal Code⁶

9. Due to its fundamental importance, legal professional secrecy is protected by the Swiss Penal Code (PC). Art. 321 sec. 1 para. 1 PC provides as follows:⁷

*Lawyers, ... and their auxiliaries, who divulge a secret which was entrusted to them due to their profession, or which they have learnt within the execution of their profession, are punished, upon request, by imprisonment of up to three years or by a monetary punishment.*⁸

10. The monetary punishment may amount up to a maximum of CHF 1,080,000.
11. As may be seen, the protection provided by the PC is wider than the one by the Lawyer's Act as it covers also perceptions made by the lawyer in practising his profession. In contrast to the Lawyer's Act, only intentional violation of the secrecy shall be punished. After having obtained a release from professional secrecy by the client or based on a written authorisation by the competent supervisory authority, the divulging of a secret cannot be punished (art. 321 sec. 2 PC).

C. Swiss Code of Obligations⁹

12. On the level of contractual law, the relationship between the lawyer and the client is subject to the provisions of the Swiss Code of Obligations (CO) on mandate. The lawyer is, in particular, liable towards his client for the faithful and careful performance of the mandate (art. 398 para. 2 CO¹⁰). This duty of loyalty provides implicitly also for the duty of confidentiality, prohibiting any disclosures of secrets with which client entrusted to the lawyer or of which the

⁶ http://www.admin.ch/ch/d/sr/c311_0.html.

⁷ Art. 321 sec. 1 para. 1 PC: "*Les ..., avocats, ..., ainsi que leur 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 d'une peine privative de liberté de trois ans au plus ou d'une peine pécuniaire.*" "*Rechtsanwälte, ..., sowie ihre Hilfspersonen, die ein Geheimnis offenbaren, das ihnen infolge ihres Berufes anvertraut worden ist, oder das sie in dessen Ausübung wahrgenommen haben, werden, auf Antrag, mit Freiheitsstrafe bis zu drei Jahren oder Geldstrafe bestraft.*"

⁸ Translation by the author.

⁹ <http://www.admin.ch/ch/d/sr/c220.html>.

¹⁰ Art. 398 para. 2 CO: "*Le mandataire est responsable envers le mandant de la bonne et fidèle exécution du mandat.*" "*Er haftet dem Auftraggeber für getreue und sorgfältige Ausführung des ihm übertragenen Geschäftes.*"

lawyer became aware in the course of the mandate.¹¹ Intentional or negligent disregard of that confidentiality obligation is a breach of contract which may result in the lawyer's liability for damages.

D. Secrecy Obligation Mirrored by Procedural Rights

1. Preliminary Remarks

13. The applicable procedural codes provide for the rules guaranteeing the legal professional privilege in the context of court proceedings.
14. The organization of the court system and, accordingly, also the codes on civil and criminal procedure was historically a competence of the 26 Swiss Cantons. Accordingly, Switzerland had 26 different codes of civil procedure and 26 different codes of criminal procedure, in addition to the codes of civil procedure and of criminal procedure which governed the procedure before the Swiss Federal Supreme Court.
15. This situation became increasingly impracticable and finally resulted in the enactment of a single Federal Code of Criminal Procedure (**CCrP**) and a single Federal Code of Civil Procedure (**CCiP**) which will come into effect on January 1, 2011. The organization of the court system will remain in the competence of the individual Cantons, however, with the exception of the Federal Courts.¹²

2. Federal Code of Criminal Procedure¹³

16. Art. 171 para. 1 CCrP provides lawyers with a right to refuse testimony as follows:¹⁴

¹¹ WALTER FELLMANN, Berner Kommentar Band VI, 2. Abt., 4. Teilband, Der einfache Auftrag, Bern 1992, n. 43 et seq. of art. 398 CO.

¹² Swiss Federal Supreme Court; Swiss Federal Court of Administration; Swiss Federal Criminal Court.

¹³ <http://www.admin.ch/ch/d/as/2010/1881.pdf>.

¹⁴ Art. 171 para. 1 CCrP: "*Les ..., avocats, ..., ainsi que les auxiliaires peuvent refuser de témoigner sur les secrets qui leur ont été confiés en vertu de leur profession ou dont ils ont eu connaissance dans l'exercice de celle-ci.*"

"..., Rechtsanwältinnen und Rechtsanwälte, ...sowie ihre Hilfspersonen können das Zeugnis über Geheimnisse verweigern, die ihnen aufgrund ihres Berufes anvertraut worden sind oder die sie in dessen Ausübung wahrgenommen haben."

*Lawyers, ... and their auxiliaries may refuse testimony on secrets which were entrusted to them due to their profession or which they have learnt within the execution of their profession.*¹⁵

17. However, lawyers are not only authorised, but obliged to refuse testimony about their professional secrets.¹⁶ Moreover, as provided for by art. 13 LA, even the release from professional secrecy by the client or by the competent supervisory authority does not obligate the lawyer to divulge confidential information in a criminal proceeding (art. 171 para. 4 CCrP).
18. Under the rules of the old cantonal codes on criminal procedure, the legal professional privilege was exclusively tied to the lawyer. If work products produced by the lawyer within the execution of his profession were found with the client or a third person, the legal professional privilege did not protect them against seizure by the authorities. This dissatisfactory situation was changed by art. 264 para. 1 letter c CCrP which provides that items, notably records and correspondence, stemming from communication between the accused and those who are entitled to refuse testimony in accordance with art. 170-173 CCrP, especially the lawyer, may not be seized irrespective of their location or the point in time when they were produced.¹⁷
19. However, lawyers and the owner of such documents have the duty to raise this objection immediately in order that records and items, which may not be searched or seized as a result of their right to refuse to give evidence, are to be sealed and are to be neither accessed nor used by the criminal justice authorities. Unless the concerned criminal justice authority does not file an application within 20 days for the seal to be lifted with the competent court, the sealed records and items shall be returned to the person to whom they belong (art. 248 CCrP).

¹⁵ Translation by the author.

¹⁶ ANDREAS DONATSCH, Kommentar zur Schweizerischen Strafprozessordnung (StPO), Zurich 2010, n. 4 of art. 171 CCrP.

¹⁷ Art. 264 para. 1 letter c CCrP: "*Quels que soient l'endroit où il se trouvent e le moment où ils ont été conçus, ne peuvent être séquestrés: ... c. les objets, notamment les documents et la correspondance, qui proviennent de relations établies entre le prévenu et une personne ayant le droit de refuser de témoigner en vertu des art. 170 à 173 et qui n'a pas le statut de prévenu dans la même affaire.*"
"*Nicht beschlagnahmt werden dürfen, ungeachtet des Ortes, wo sie sich befinden, und des Zeitpunktes, in welchem sie geschaffen worden sind: ... c. Gegenstände, namentlich Aufzeichnungen und Korrespondenzen, die aus dem Verkehr zwischen der beschuldigten Person und Personen stammen, die nach den Artikeln 170–173 das Zeugnis verweigern können und die im gleichen Sachzusammenhang nicht selber beschuldigt sind.*"

3. Federal Code of Civil Procedure¹⁸

20. Irrespective of the parties' or any third person's duty of cooperation (e.g. as a witness), lawyers may refuse testimony within civil proceedings, insofar as they would be liable to prosecution due to violation of their professional secrecy according to art. 321 sec. 1 para. 1 PC (art. 166 para. 1 letter b CCiP¹⁹). In line with art. 13 LA and art. 171 CCrP, release from the legal professional secrecy does not obligate the lawyer to divulge confidential information.
21. Furthermore, neither the parties themselves nor any third persons (including lawyers) are obliged to disclose to legal correspondence relating to the legal professional representation of the party or a third person (art. 160 para. 1 letter b CCiP²⁰).
22. As with respect to CCrP, the legal professional privilege which was historically understood in Switzerland to bind the lawyer was now extended to cover also a lawyers' work product relating to the professional representation of parties before court.

4. Federal Act on Administrative Procedure²¹

23. The Federal Act on Administrative Procedure (**FAP**) governs the procedure in administrative matters that are to be dealt with by federal administrative authorities as first instance or on appeal. For instance, the FAP applies to procedures by the Swiss Competition Commission under the Cartel Act, unless the Cartel Act provides otherwise.²²

¹⁸ <http://www.admin.ch/ch/d/ff/2009/21.pdf>.

¹⁹ Art. 166 para. 1 letter b CCiP: "*Tout tier peut refuser de collaborer: ... b. dans la mesure où, de ce fait, la révélation d'un secret serait punissable en vertu de l'art 321 CP;*"

"Eine dritte Person kann die Mitwirkung verweigern: ... b. soweit sie sich wegen Verletzung eines Geheimnisses nach Artikel 321 StGB strafbar machen würde;".

²⁰ Art. 160 para. 1 letter b CCiP: "*Les parties et les tiers sont tenus de collaborer à l'administration des preuves. Ils ont en particulier l'obligation: ... b. de produire les documents requis, à l'exception de la correspondance d'avocat, dans la mesure où elle concerne la représentation à titre professionnel d'une partie ou d'un tiers;*"

"Die Parteien und Dritte sind zur Mitwirkung bei der Beweiserhebung verpflichtet: ... b. Urkunden herauszugeben; ausgenommen ist die anwaltliche Korrespondenz, soweit sie die berufsmässige Vertretung einer Partei oder einer Drittperson betrifft;".

²¹ http://www.admin.ch/ch/e/rs/c172_021.html.

²² <http://www.admin.ch/ch/e/rs/c251.html>.

24. With respect to the right to refuse testimony, the FAP refers to the Federal Act on Federal Civil Procedure (**FCP**) which governs the procedure before the Swiss Federal Supreme Court as a single instance (e.g. in conflicts of jurisdiction between cantonal and federal authorities). Art. 42 para. 1 letter b FCP provides lawyers with a right to refuse testimony as follows:²³

*Persons named in art. 321 sec. 1 PC may refuse to testify concerning facts which are subject to the professional secrecy according to that provision, unless the authorised person agreed to the disclosure of the secrecy.*²⁴

25. Furthermore, the duty of cooperation of third parties in administrative procedure is tied to the (lack of a) right to refuse testimony: Anyone who may be examined as a witness must also cooperate in the gathering of other evidence and must, in particular, hand over documents that are in his possession (art. 17 FAP).²⁵

III. HOLDER OF LEGAL PROFESSIONAL PRIVILEGE

A. Independence of Lawyers

26. Swiss law accords legal professional privilege only to a lawyer who is independent. The independence is required in order to assure that the mandate is conducted by the lawyer in the exclusive interest of his client. The principle of the lawyer's independency has fundamental importance and is recognised as constituting a prerequisite for the reliance in lawyers and the judiciary.²⁶
27. According to the Lawyer's Act, Swiss lawyers are usually only authorized to represent parties before judicial authorities in Switzerland if they are entered in a cantonal lawyers' registry. For that purpose, they must fulfil certain professional requirements and personal qualifications, including, *inter alia*, the capability of practising law independently. Lawyers may, therefore, be employed only by per-

²³ Art. 42 para. 1 letter b FCP: "*Peuvent refuser de déposer ... b. les personnes visées par l'art. 321, ch. 1, du code pénal suisse, lorsqu'elles sont interrogées sur des faits qui, d'après cette disposition, rentrent dans le secret professionnel, à moins que l'intéressé n'ait consenti à la révélation du secret.*"

"*Das Zeugnis kann verweigert werden: ... b. von den in Artikel 321 Ziffer 1 des Strafgesetzbuches genannten Personen über Tatsachen, die nach dieser Vorschrift unter das Berufsgeheimnis fallen, sofern der Berechtigte nicht in die Offenbarung des Geheimnisses eingewilligt hat.*"

²⁴ Translation by the author.

²⁵ Art. 17 FAP: "*Celui qui peut être entendu comme témoin est aussi tenu de collaborer à l'administration d'autres preuves: il doit notamment produire les documents qu'il détient.*"

"*Wer als Zeuge einvernommen werden kann, hat auch an der Erhebung anderer Beweise mitzuwirken; er hat insbesondere die in seinen Händen befindlichen Urkunden vorzulegen.*"

²⁶ Decision by the Swiss Federal Supreme Court (**BGE**) 130 II 93.

sons who themselves are entered in one of the cantonal lawyers' registries. Only lawyers entered in a cantonal lawyers' registry are subject to the legal professional secrecy according to art. 13 LA.

B. Law Firm Corporations

28. Due to the prerequisite of independence of lawyers, the question of whether lawyers are authorized to organize themselves in a corporation was contentious in Switzerland for a long time. As this decision lies in the competence of the Cantons, in the Canton of Zurich the competent supervisory authority decided in 2006 that the constitution of a law firm as a corporation is admissible provided that the statutory main purpose is the execution of the lawyer's profession and that it is statutorily guaranteed that decisions on all levels are only valid if the majority of inscribed lawyers have consented.²⁷ Nevertheless, the lawyers employed by such a corporation are obliged to comply with the professional rules of conduct. Thus, law firm corporations must ensure the independence of their employed lawyers in the execution of their profession. Therefore, both law firm corporations and their employed lawyers have to observe the legal professional privilege. However, law firm corporations are not yet admissible in every of the 26 Cantons.

C. In-house Counsel

29. Under Swiss law, lawyers who are employed in a company's legal department cannot be entered in a cantonal lawyers' registry. Therefore, they are neither subject to the cantonal supervisory authorities, nor obliged to observe the rules of professional conduct according to the Lawyer's Act.
30. It is the prevailing position in Switzerland that in-house counsel are acting in the interest of their employer and are bound by latter's instructions. This cannot be reconciled with the independence requirement for lawyers.
31. As a result of their lack of independence, the professional secrecy according to art. 321 sec. 1 para. 1 PC does also not apply to in-house counsel. Therefore, in-house counsel are usually not entitled to refuse testimony or the production of documents in civil or criminal proceedings. Hence, in-house counsel do not benefit from legal professional privilege in Switzerland.

²⁷ Decision of October 5, 2006 by the supervisory authority of lawyers of the Canton of Zurich.

32. However, the Federal Supreme Court does not exclude that in-house counsel working part-time may, in addition to their employment, render legal services as external counsel in the framework of an independent legal professional activity.²⁸ In that case, a part-time lawyer has to ensure that the employer has no possibility to influence his providing of legal services as an external counsel. This requires, for instance, that the independent work is executed in another location so that the employer cannot have access to the records of the lawyer. Moreover, the lawyer needs to spend an appropriate amount of time in that independent office so that he may be reached by clients and court officials during office hours in his office.

IV. LAWYERS' ACTIVITIES SUBJECT TO THE PRIVILEGE

A. Lawyer's Core Business

33. Under Swiss law, the privilege is tightly bound to the activity as a lawyer. The confidential information must relate to the execution of the legal profession as such. In other words, the legal professional privilege in Switzerland is not comprehensive but guarantees protection only with respect to a lawyer's core business – e.g. the providing of legal advice and, within the scope of the lawyers' monopoly, the representation of parties before judicial authorities.
34. Not part of the lawyers' core business, and thus not protected by the legal professional privilege, are commercial activities in which the business element predominates, such as the administration of companies, asset management as made also by a trustee, banker or manager of an estate.²⁹ The distinction is made based on the capacity the lawyer had when the secrecy was confided to him.³⁰ According to practice of the Swiss Federal Supreme Court, knowledge obtained by a lawyer in the capacity as member of the board directors, asset manager or within the performance of a collection mandate is not protected by the privilege.³¹ Whether a specific activity is considered as being part of the lawyer's core business is assessed by the courts on a case-by-case basis.
35. The above gives no regard to whether the lawyer advises on the substantive laws of Switzerland, or on the substantive laws of another country. A lawyer entered

²⁸ BGE 130 II 87.

²⁹ BGE 126 II 495.

³⁰ BGE 115 Ia 199.

³¹ BGE 101 Ib 245; BGE 112 Ib 606; BGE 120 Ib 112.

in a Swiss cantonal lawyers' registry may thus well advise on the laws of a foreign state provided he is capable to perform his services faithfully and carefully according to art. 398 para. 2 CO.

36. In substantive respects (*ratione materiae*), every fact which is only known to a limited circle and of which the person, to whom confidentiality is owed, has an interest in non-disclosure, is considered as a secrecy.³²
37. Information perceived by the lawyer as a private person or in another, non-legal (political, social etc.) capacity is clearly not covered.³³ Professional secrecy includes everything that is confided to lawyer as a result of his professional activity. Lawyers must observe confidentiality for all information they have become aware of in the course of their work. However, the form, in which certain information is brought to the lawyer's attention (oral, written or non-verbal communication), does not matter.
38. Provided they are active within the core business of lawyers, also foreign lawyers are subject to the legal professional secrecy obligation of art. 321 sec. 1 para. 1 PC³⁴ and benefit of the legal professional privilege pursuant to the CCrP and CCiP.

B. Lawyer - Client Relationship

39. In the relationship between lawyer and client, the professional legal privilege is comprehensive. As already mentioned, in the past the secrecy protection covered only information and documents situated in lawyer's immediate control. If the document was found with the client or a third party, the document usually did not benefit of any privilege protection.³⁵
40. With the coming into force of the CCrP and the CCiP on January 1, 2011, this will change as a lawyer's communication with his client will be protected against seizure in criminal proceedings (art. 264 CCrP) and with respect to the duty of producing documents in civil proceedings (art. 160 CCiP), irrespective of the location or the point of time it was produced. Pursuant to parts of the doctrine, that extended legal professional privilege should not be limited to the lawyer's corre-

³² NIKLAUS OBERHOLZER, in: Basler Kommentar Strafrecht II, 2. ed. 2007, n. 10 of art. 321 PC.

³³ PETER BURCKHARDT, loc.cit., p. 305.

³⁴ STEFAN TRECHSEL / HANS VEST, in: Schweizerisches Strafgesetzbuch, Praxiskommentar, Zurich 2008, n.5 of art. 321 PC.

³⁵ BGE 1P.133/2004, August 13, 2004.

spondence with the client but should extend to all documents of the attorney-client relationship.³⁶

C. Third Party Communication

41. Third party communication, understood as communication from/to the lawyer made/received by a person other than the client, may attract legal professional privilege if a third party document was sent/received by the lawyer in the context and for the purposes of a mandate.³⁷ This court practice is now anchored in law with art. 160 para. 1 letter b CCiP.
42. Notwithstanding the above, for documents which were not designated for the lawyer but for a third person, the question of whether or not a seizure by the prosecuting authorities is valid must depend on whether the third person is entitled to refuse testimony. The lawyer may only refuse testimony on the limited issue of whether he actually has such documents in his custody. If the prosecuting authorities know of the lawyer's custody, they can request the production or order the seizure of any such documents which could otherwise be seized if they were in the third person's control.³⁸

V. LIMITS OF LEGAL PROFESSIONAL PRIVILEGE

A. Abuse of Legal Professional Privilege

43. Legal professional privilege is also subject to the limitations of, and shall not be guaranteed in the event of, an abusive conduct according to art. 2 para. 2 Civil Code (CC).³⁹
44. For instance the handing over of sensitive documents to an external counsel merely for "safekeeping" reasons would be disqualified as abusive.⁴⁰ Furthermore, such behaviour would represent a breach of the lawyer's professional code of conduct and could be sanctioned by the supervisory authority.

³⁶ ERNST F. SCHMID, in: Basler Kommentar Schweizerische Zivilprozessordnung, Basel 2010, n. 17 of art. 160 CCiP.

³⁷ BGE 102 IV 210.

³⁸ BGE 102 IV 210.

³⁹ Art. 2 para. 2 CC: "*The manifest abuse of a right shall not be protected by law.*"

⁴⁰ BGE 117 Ia 341.

B. Lawyer's Own Criminal Liability

45. According to predominant doctrine and practice, a person who has to observe a professional secrecy and thus is entitled to refuse testimony cannot prevent the seizure of documents in his possession if he is accused himself.⁴¹ Therefore, the provision of art. 264 para. 1 letter c CCrP does not protect lawyers against coercive measures if they are accused themselves in connection with the facts under investigation.⁴²

VI. INTERNATIONAL ASPECTS**A. Professional Privilege According to Public International Law**

46. On an international level, the protection of privacy is enshrined in art. 8 sec. 1 of the European Convention on Human Rights (ECHR)⁴³ and art. 17 of the International Covenant on Civil and Political Rights (ICCPR).⁴⁴ Moreover, art. 6 sec. 3 letter c ECHR and art. 14 sec. 3 letter d ICCPR guarantee persons charged with a criminal offence the right to obtain legal advice. The legal professional privilege is thus basically recognized as a part of the protection of privacy under public international law.⁴⁵

B. Practise of Law in Switzerland by Lawyers from Member States of the EU or EFTA

47. According to the Sectoral Agreements, Switzerland is obligated to implement European Directives 77/249EEC, 89/48EEC and 98/5 with reference to the legal profession. Therefore, the Lawyer's Act distinguishes between the exercise of the legal profession for single matters and the permanent exercise.

⁴¹ BGE 101 Ia 11; BGE 102 IV 210.

⁴² STEFAN HEIMGARTNER, in: Kommentar zur Schweizerischen Strafprozessordnung (StPO), Zurich 2010, n. 10 of art. 264 CCrP.

⁴³ Art. 8 sec. 1 ECHR: "*Everyone has the right to respect for his private and family life, his home and his correspondence.*"

⁴⁴ Art. 17 ICCPR: "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*"

⁴⁵ MICHAEL PFEIFER, in: Kommentar zum Anwaltsgesetz, Zurich 2005, n. 3 of art. 13 LA.

1. Practise of Law According to the Freedom of Services

48. Nationals from member states of the EU or EFTA, who are entitled to practise the legal profession in their home member states under one of the professional titles listed in the appendix to the LA may represent parties before judicial authorities in Switzerland based on the freedom of services (art. 21 para. 1 LA).
49. Pursuant to art. 5 Agreement on the Free Movement of Persons between Switzerland and the EU/EFTA (**FMP**),⁴⁶ lawyers of member states of the EU and EFTA are allowed to provide legal services in Switzerland for a maximum of 90 calendar days each year. Therefore, these lawyers do not need to be entered in the cantonal lawyers' registries (art. 21 para. 2 LA). When appearing before judicial authorities, lawyers providing services must use their original professional title in the official language of their home member state including the name of the professional organisation or the court of law to which they have been admitted (art. 24 LA).⁴⁷
50. Furthermore, the federal and cantonal judicial authorities before whom the lawyers providing services appear, as well as the supervisory authority for lawyers, have the right to request evidence of the lawyer's qualification (art. 22 LA).

2. Permanent Exercise of the Legal Profession in Switzerland

51. Lawyers who are nationals of member states of the EU or EFTA must register with the cantonal supervisory authorities if they want to permanently represent parties before court (art. 27 para. 1 LA). The cantonal supervisory authorities maintain a separate list for that purpose. Lawyers are to use to the professional title in the official language of their home member state and shall provide evidence of their professional qualifications with an attestation issued by their home member state (art. 28 para. 2 LA).

3. Inscription of Lawyers in the Cantonal Registry of Lawyers

52. Lawyers from member states of the EU or EFTA may be entered in the cantonal lawyers' registries if they have passed an aptitude test or have been registered for at least three years as lawyers practising under their original professional title, and can prove that they were effectively and regularly active in the area of Swiss law during this period, or were active in the area of Swiss law for a shorter pe-

⁴⁶ http://www.admin.ch/ch/d/sr/0_142_112_681/index.html.

⁴⁷ LUCIEN W. VALLONI / MARCEL C. STEINEGGER, loc.cit., p. 121 et seq.

riod of time and that they have successfully evidenced their professional competence in a discussion (art. 30 LA).

4. Consequences Regarding Legal Professional Secrecy

53. According to art. 25 and art. 27 para. 2 LA, the rules of professional conduct according to art. 12 LA are, with some exceptions, applicable to the lawyers from a member state of the EU or EFTA exercising temporarily or permanently in Switzerland. However, only lawyers entered in the cantonal lawyers' registries pursuant to art. 30 LA are subject to the legal professional secrecy obligation provided for by art. 13 LA.⁴⁸
54. Irrespective of an entry in the lawyers' registry, the lawyers who are representing parties before court are active in the lawyer's core business and are, therefore, subject to the secrecy obligation for the legal profession according to art. 321 sec. 1 para. 1 PC.

C. Legal Professional Privilege as *lex fori*

55. In principle, foreign persons staying in Switzerland have to follow the summons of Swiss courts to give evidence as a witness or have to comply with a request for the production of documents.⁴⁹ Witnesses living abroad are not obliged to appear in front of a Swiss court and third persons living abroad cannot be compelled by a Swiss court to produce any documents.⁵⁰
56. The application of legal professional secrecy rules, and hence, the availability of legal professional privilege does not depend on the nationality of the lawyer or a domestic place of business, but *ratione personae* on whether an independent lawyer is working in a lawyer's core business.⁵¹
57. However, as already mentioned above, Swiss state courts will apply their procedural law as *lex fori* in order to determine who may avail himself of the legal professional privilege. This is of particular importance in relation to international disputes. When administering evidence in a proceeding pending before them, Swiss courts will normally not take into consideration whether or not certain in-

⁴⁸ ANDREAS KELLERHALS / TOBIAS BAUMGARTNER, in: Kommentar zum Anwaltsgesetz, Zurich 2005, n. 14 of art. 30 FAFML.

⁴⁹ GERHARD WALTER, Internationales Zivilprozessrecht der Schweiz, 4th ed. 2007, p. 319 et seq.

⁵⁰ ERNST F. SCHMID, loc.cit., n. 74 of art. 160 CCiP.

⁵¹ PETER BURCKHARDT, loc.cit., p. 308.

formation might be privileged under the foreign concept applicable in the country of origin of the opposing party or of the concerned lawyer,⁵² should that provide a protection going beyond that accorded by Swiss law.

58. For instance, the principle of *lex fori* applies to the right to refuse testimony according to art. 160 CCiP: If a witness is entitled to refuse testimony according to the *lex fori*, but not under the law of his foreign residence, he may rely on the right to refuse testimony. Whereas the witness who could refuse testimony under the law of his foreign residence, but not according to *lex fori*, will not be relieved of his duty of testify before a Swiss court.⁵³

D. Legal Professional Privilege in Legal Assistance Matters

1. International Criminal Assistance

59. Provided that international conventions do not provide otherwise, the Federal Act on International Criminal Assistance (IMAC)⁵⁴ governs procedures of international cooperation in criminal matters. Subsidiarily, the CCrP is applicable (art. 54 CCrP).
60. In the execution of requests for criminal cooperation, the protection of privacy is determined according to the provisions on the right of witnesses to refuse testimony. The principles of art. 246 – 248 CCrP will apply to the search and to the placing under seal of documents (art. 9 IMAC).⁵⁵
61. Consequently, the lawyer and his legal professional privilege enjoy the same protection both in domestic criminal procedures and international criminal assistance procedures.

⁵² PETER BURCKHARDT, loc.cit., p. 311.

⁵³ ERNST F. SCHMID, loc.cit., n. 77 of art. 160 CCiP.

⁵⁴ http://www.admin.ch/ch/d/sr/c351_1.html.

⁵⁵ Art. 9 IMAC: "*Lors de l'exécution de la demande, la protection du domaine secret est réglée conformément aux dispositions sur le droit de refuser de témoigner. Les art. 246 à 248, CPP s'appliquent par analogie à la perquisition de documents et à leur mise sous scellés.*"

"*Bei der Ausführung von Ersuchen richtet sich der Schutz des Geheimbereichs nach den Bestimmungen über das Zeugnisverweigerungsrecht. Für die Durchsuchung von Aufzeichnungen und die Siegelung gelten die Artikel 246–248 StPO sinngemäss.*"

2. International Administrative Assistance

62. Switzerland has no act on international administrative assistance. The administrative assistance provided by Switzerland is, rather, governed by bilateral agreements (e.g. double taxation agreements) or specific provisions in particular fields of administrative law.
63. With respect to the competition law, the planned revision of the Cartel Act (**revCA**)⁵⁶ provides the Competition Commission with the power to disclose confidential information to a foreign competition authority, provided that particular conditions are met (art. 41b para. 1 revCA).⁵⁷ So far, this is not admissible yet according to the current law.

3. International Civil Assistance

64. Where Swiss courts are charged with the execution of legal assistance proceedings in aid of civil proceedings pending before a foreign court under the Hague Evidence Convention of 1970 (**HEC**),⁵⁸ the - more favourable - set of rules provided for by the HEC will apply. According to art. 11 HEC, the witness is entitled to refuse testimony in witness hearings for judicial assistance if the privilege is provided for either under the law of the state of execution or under the law of the state requesting the judicial assistance.

To sum-up, the legal professional privilege of foreign lawyers staying in Switzerland is subject to the Swiss procedural law as *lex fori* due to the principle of territoriality. Only in case of the administration of evidence by a Swiss court in legal assistance proceedings in aid of a foreign civil proceeding under the HEC, foreign legal professional privilege rules going beyond those of Switzerland will be considered by Swiss courts in application of art. 11 HEC.

⁵⁶ <http://www.weko.admin.ch/aktuell/01024/index.html?lang=de>.

⁵⁷ Those are (i) dual illegality, (ii) confirmation of official secrecy by the receiving authority, (iii) principle of specialty, (iv) guarantee of similar standard of procedural and party rights, (v) reciprocity and (vi) compliance with conditions of international assistance in criminal matters if the information are to be used in a criminal procedure in the receiving country.

⁵⁸ Convention of the Hague of March 18, 1970 on the taking of evidence abroad in civil or commercial matters; http://www.admin.ch/ch/d/sr/c0_274_132.html; http://www.hcch.net/index_en.php?act=conventions.text&cid=82.