PROFESSIONAL SECRECY AND DUTY TO COMMUNICATE AS THE MAIN OBLIGATION OF LAWYERS IN THE PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCE

Spanish law defines the Lawyer as the Graduate who is professionally dedicated to the defence of the interests of others and to provide legal advice or counselling.

These two functions, defence, on the one hand and legal advice or counselling, on the other hand, are the ones that frame the duty of professional secrecy that imposes the Lawyer to keep reserve on all the facts or news that come to his knowledge in his practice. This seems to be unequivocally deduced from the coordinated interpretation of the first and third paragraphs of Article 542 of the Organic Law of the Judiciary.

1. *The name and function of lawyer corresponds exclusively to the graduate in Law who professionally exercises the direction and defence of the parties in all types of proceedings, or legal advice and counselling.*
2. *...*
3. *Lawyers shall keep secret all the facts or news that they know of by reason of any of the modalities of their professional activity, and they may not be obliged to testify about them*'.

Apart from those functions, the lawyer can carry out other activities, as many as he wants or can, always

within the legality, but in them the obligation of secrecy does not reach him.

Failure to comply with the obligations of keeping professional secret could result in deontological and even criminal sanctions - article 197 of the Criminal Code -, civil liabilities for breach of obligations to the client for whose interests he had to watch over with the utmost diligence, keeping professional secrecy.

The preventive law of money laundering and fince of terrorism, Act 10/2010 of 28th of April determines that the lawyer is obliged to collaborate in the prevention of money laundering when he participates in the advice of certain financial, real estate or commercial operations - cfr art.2 letter ñ) of the law - and, consequently, he or she is obliged to communicate to the financial unit the indications or certainty of money laundering and to collaborate with the Executive Service, SEPBLAC is the anagram in Spain. This without advising the client of this communication: there is no tipping off.

Infringement of his duty to communicate the operation that offered him indications or certainty of money laundering would entail heavy fines.

The Spanish Act use of the term ‘advice’ asesoramiento - which the Directive did not use – creates concern because the same term is found in the Organic Law 6/1985, of the Judiciary

Thus, at first sight, the lawyer was subject to two kinds of opposite obligations when advising.

On the one hand, to keep confidential all the facts or news that he/she may have known in the exercise of any of the functions that he/she carries out and, on the other hand, to inform the Financial Unit of the indications or certainty of money laundering that he/she may know or conceive in the development of the activities that made him/her an obliged subject, among others, to participate in the advising of real estate, financial or mercantile operations or to act in the name and on behalf of the client in any of them..

These obligations: to maintain confidentiality and to report (also to cooperate) appear to be incompatible and this apparent conflict must be resolved.

In matters of the activity of defence, there should not be a problem as the lawyer is not an obliged entity when he acts in the interest or on behalf of a client in that mission either before the courts or before any administrative body. He only has such a character in the cases foreseen in the aforementioned letter ñ.

The preventive law itself reaffirms the non-obligation in its article 22, a provision that, in my opinion, is superfluous. It recites, "*Without prejudice of its provisions, the lawyer shall keep professional secret according to the law.*"

The problem is the provision of the law.

The third and fourth successive directives only refer to advice in order to exclude it from the entity's own obligations, partially when it refers to prior, contemporaneous or subsequent to legal procedures.

We already know that any situation with legal consequences may be the subject of a legal dispute in the future.

As provided, then pure advice, the determination of the client's legal position, what the French define as ‘the personalised intellectual service aimed at providing an answer on the application of a legal rule with the possible aim of taking a decision’ is outside the scope of the obligations imposed on the legal profession.

But nowadays, the advice is not exhausted in itself and requires the lawyer, because the client and the market demand it, to carry out complementary actions after, by advising the one who demands his services, he determines that what he proposes is lawful and feasible. And, then, he enters into what we may call the ‘legal management’, the set of activities that are necessary to successfully complete the pretensions of those who wish to acquire a property, found a company or carry out any other financial operation. And that legal management, born from the advice and that runs parallel to it is not included nowadays within the Lawyer's own functions that, according to the aforementioned article 542, are limited to two: defence and advice. Amongst other things, because it can be carried out by a non-lawyer.

There is a formula to determine up to where the advice reaches and where the management begins: the irrevocability. While, in general, the advice can be reproduced - it can be requested to a professional and

then to another or others - and it can be corrected as long as it is not followed, it can be amended, the management produces effects that are difficult to repeat.

There could be a solution based on the time factor in which the advice is given. In terms, it could be said that if it was prior to the operation, the duty to communicate prevailed. If it was subsequent to the transaction, the duty of secrecy would prevail because then, in terms of the Community directives, the ‘legal position’ would be determined.

Even this interpretation is not beneficial to the profession, we may sustain that there is no incompatibility between the professional rule and the preventive rule. The client who just seeks advice is protected by the lawyer's obligation to keep secret everything he entrusts to him. The client who wants something more: to be accompanied by the lawyer in all his activity, is no longer protected. He must know that through the professional he cannot develop criminal purposes because he exposes himself, with all certainty, to his actions being communicated to the body in charge of the prevention and the Lawyer cannot take refuge in his right to keep confidentiality because when managing, he participates in and takes away his condition as a Lawyer, at least in the narrow limits as it is legally conceived.

Lawyers can do many things and, of course, we do: we act as arbitrators, as mediators, as agents, as executors, as managers, as proxies, but in none of

these activities is our client protected by professional secrecy, without prejudice to our obligation of fidelity towards them, which implies not revealing their confidences or misusing them, unless a law - as is the case of the preventive law - obliges us to carry out certain actions.

Conclusions.

1.- when acting as a defence lawyer, the lawyer is not obliged to comply with the rules on the prevention of money laundering.

2.- when he limits himself to advising, to determine the legal position of the client and to advise him on the path to follow, neither is he obliged to do so.

3.- when he is involved in the matter he is consulted on, when he participates in the operation, even if he is advising on its success, he is not obliged to keep the professional secrecy and subject to the obligation of reporting and collaborating with the Financial Unit.

Nielson Sanchez Stewart
Advocate
Vice President of the
Deontology Committe
Consejo General de la Abogacía Española