

Attorney-Client Privilege – The Limits of Protection in Bankruptcy Proceedings

Definition and Legal Basis

The attorney-client privilege is governed by the provisions of the Law on Legal Practice of the Republic of Serbia, the Statute of the Bar Association of Serbia, and the Code of Professional Ethics for Attorneys.

An attorney is obliged to preserve as a **professional secret**, and to ensure that **all persons employed in their law office also preserve as confidential, everything that the client or their authorized representative has entrusted to them, or that the attorney has otherwise learned or obtained in a matter in which they provide legal assistance, during the preparation, throughout the representation, and after its termination.**

The obligation to maintain attorney-client confidentiality is not limited in time.

The privilege of confidentiality in the attorney-client relationship constitutes a guaranteed human right of the client, an essential precondition for competent and conscientious representation, and an indispensable element of the independence and autonomy of the legal profession.

The rules on attorney-client confidentiality serve, among other purposes, to uphold one of the fundamental principles of the professional ethics of attorneys – the **principle of confidentiality**. Trust in the confidentiality of information shared with an attorney is of fundamental importance for the provision of legal assistance, legal certainty, and the administration of justice.

Scope of Attorney-Client Privilege and Subjects Bound by the Obligation of Non-Disclosure

When it comes to the scope of protection, the definition is sufficiently broad to encompass **everything that a client, or a person authorized by the client, has entrusted to the attorney, or that the attorney, in the matter in which he represents the client, has otherwise learned or obtained, during the preparation, throughout, and after the representation**, including information not formally designated as “confidential.”

Accordingly, the obligation to preserve attorney-client confidentiality equally applies to:

- **data, documents** (files, objects, papers, electronic, audio or video recordings), **and deposits related to the representation, communicated, presented, or delivered to the attorney**, regardless of whether such documents and deposits are held in the attorney’s office or temporarily stored elsewhere under the attorney’s direction or supervision;
- **confidential information obtained from a person whose representation the attorney did not accept** (a prospective client), **or from the opposing party** who, prior to initiating proceedings

before the competent authority, approached the attorney for the purpose of settlement or mediation.

Furthermore, the attorney is obliged to **keep as confidential even generally known, publicly disclosed, or publicly registered facts, if the client specifically requests so, or if disclosure of such facts could harm the reputation, honor, privacy, or other interests of the client, their relatives, or heirs.**

It is evident that the concept of attorney-client privilege is significantly broader than that of a trade secret under the Law on the Protection of Trade Secrets. Under that law, a trade secret is deemed to exist where the following conditions are met:

- constitute a secret, as they are **not, in their entirety or with respect to the structure and combination of their constituent elements, generally known or easily accessible** to persons who, within the scope of their activities, customarily meet that type of information;
- has **commercial value** because it is secret;
- the person who lawfully controls trade secrets **has undertaken reasonable measures**, under the given circumstances, **to preserve its secrecy.**

Regarding the subjects bound by the obligation, the **obligation of confidentiality applies both to the attorney and to all employees or associates in the attorney's office.** The attorney has to warn and personally bind their associates, staff, trainees, and any persons engaged during representation, to keep attorney-client privilege and to inform them of the consequences of breaching this obligation.

Exceptions to the Obligation of Attorney-Client Privilege

Disclosure of information or making available documents entrusted to the attorney by the client, or a person authorized by the client, to the extent necessary for the purpose of representation, shall not be deemed a breach of attorney-client confidentiality.

In addition to keep confidentiality, the attorney is required to respect other principles of professional ethics and to strike an appropriate balance between confidentiality and other principles. Refusal to disclose information not covered by confidentiality, under the pretext of protecting attorney-client privilege, shall be deemed a violation of the principle of honesty.

The Code of Professional Ethics for Attorneys recognizes specific circumstances under which an attorney may disclose confidential information, prescribing such cases as exceptions. Thus, the attorney may reveal information covered by attorney-client privilege in the following situations:

- when the client, or a person whose representation the attorney declined, or the opposing party who approached the attorney before the initiation of proceedings for the purpose of settlement or mediation, gives **clear and unequivocal consent;**

- when disclosure is **necessary to prevent the commission of an announced criminal offense** of significant social danger;
- when disclosure is **necessary for the defense of the attorney** in proceedings initiated against them by the client, the person who entrusted the information or documents, or by a person whose representation was declined, or by the opposing party who approached the attorney before proceedings for settlement or mediation;
- when disclosure is **necessary to protect the rights and interests of the attorney or their close relatives and associates**, provided that such interests and rights are objectively more significant than the content of the confidential information.

Even in the aforementioned situations, the attorney have to, whenever the nature of the case and the circumstances allow and moral considerations recommend, **promptly notify the person to whom the confidentiality pertains of their intention to disclose, and make every reasonable effort to protect the personality and interests** of the client, a person whose representation was declined, or by the opposing party who approached the attorney before proceedings for settlement or mediation, and to avoid publicity. When disclosure is made to prevent the commission of a criminal act of significant social danger, the attorney must refrain from revealing personal data and disclose only the information necessary to prevent or interrupt the criminal act.

Attorney-Client Privilege in Bankruptcy Proceedings

The **Law on Bankruptcy** prescribes that the **legal representatives of the bankruptcy debtor are obliged to provide the bankruptcy judge and the bankruptcy administrator, upon their request and without delay, with all data and information.**

The question thus arises as to the rights and obligations of an attorney acting as the legal representative of a bankruptcy debtor concerning the duty of confidentiality in the attorney-client relationship during bankruptcy proceedings.

The **Law on Legal Practice** and the **Code of Professional Ethics for Attorneys** prescribe the circumstances and conditions under which an attorney may disclose confidential information.

On the other side, the **Law on Bankruptcy** imposes upon attorneys acting as legal representatives an obligation to provide the bankruptcy judge and bankruptcy administrator with all data and information without exception, including those protected by the attorney-client privilege.

Hence, there exists a **conflict** between the provisions of the **Law on Legal Practice and the Code of Professional Ethics for Attorneys**, which specify limited exceptions to attorney-client privilege, and the **Law on Bankruptcy**, which mandates the disclosure of all information without exception.

Under the Law on Bankruptcy, the bankruptcy judge may, by a non-appealable order, require the bankruptcy debtor's attorney to submit within a specified period all information and documentation deemed relevant to the course of the proceedings. Should the attorney fail to comply, the judge may impose and enforce coercive measures. Failure to provide such information and documentation as required by Law on Bankruptcy may also result in liability for damage caused by such omission.

Within this framework, it is necessary to strike a **balance between the duty to preserve confidentiality and the obligation to disclose information** in bankruptcy proceedings. One possible approach to achieving such balance is to inform the bankruptcy debtor of the intended disclosure and/or submission of documents and to obtain their explicit consent, or alternatively to apply one of the exceptions prescribed by the Code of Professional Ethics for Attorneys, depending on the specific circumstances of the case.

The **attorney-client privilege** in the relationship between the client and the attorney, as an inviolable human right and a precondition of a fair trial, cannot be derogated by the provisions of other laws, such as the Law on Bankruptcy, by prescribing the obligation of attorneys to submit information and documentation that constitute attorney-client privilege, in the absence of the express consent of the bankruptcy debtor for their submission.

Nevertheless, the justification of such a legal framework and practice must be considered in light of the statutory purpose of bankruptcy proceedings – the most favorable collective satisfaction of creditors by realizing the highest possible value of the debtor's assets – as well as the underlying principles of creditor protection, publicity, and transparency.

For instance, in cases where the bankruptcy debtor intentionally conceals information about the alienation of assets and refuses to cooperate with the bankruptcy administrator and the court, the attorney may be in possession of key information regarding transactions or legal acts undertaken prior to the initiation of bankruptcy proceedings that undermine equitable satisfaction of creditors or constitute preferential treatment of certain creditors, and that may be subject to avoidance. Refusal by the attorney to disclose such information, invoking attorney-client privilege, could result in significant or even irreparable harm to bankruptcy and other creditors.

Rather than a Conclusion

The attorney-client privilege represents **one of the highest standards of legal certainty**, not only as a professional duty of the attorney but also as a fundamental human right of the client. While the **Law on Bankruptcy** seeks to ensure complete transparency and cooperation among participants, these principles cannot override the essence of trust that lies at the foundation of the legal profession.

The conflict between the duty of confidentiality and the obligation to provide information in bankruptcy proceedings requires careful interpretation and application of the law – not only formally, but in the spirit of protecting rights, integrity, and fairness. The solution lies not in the absolute primacy of either principle,

but in the **balancing of the values** underpinning both. An attorney has to act conscientiously, assess in each case whether disclosure may endanger the client's rights, and whenever possible, obtain the client's explicit consent prior to disclosure.

Experience shows that only a clear balance between confidentiality and the public interest can preserve trust in the legal profession as an independent institution while ensuring that bankruptcy proceedings achieve their purpose – the fair and transparent satisfaction of all participants without infringing upon fundamental human rights.

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