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Sealing procedure

Confirmation of case law on sealing and the activities of lawyers

Par Lionel Jeanneret le 18 March 2025

In judgment 7B_691/2024 and 7B_796/2024 of 7 February 2025, handed down by a panel of five judges but not intended for publication, the Federal Supreme Court ('**FSC**') confirms its recent case law on the application of seals under the new law (art. 264 para. 1 let. d) *cum* 248(1) 1st sentence CPP, cf. in particular Villard, cdbf.ch/1368).

The Office of the Attorney General of Switzerland (**OAG**) is conducting criminal proceedings against two defendants. In this context, the OAG is conducting a search of the office of the lawyer of a business partner of one of the defendants. After the search, the lawyer forwards a few additional documents. The lawyer and then his client request that all the seized documents be sealed.

The lawyer stated that the documents seized were, in particular, original investor contributor contracts that had been sent to him over time by his client for 'storage, for possible legal questions or disputes with either of the counterparties concerned'. The lawyer also states that he participated in the drafting of the relevant contract templates but not in each of them. However, the contracts indicate the lawyer's office as the address for service.

The OAG appeals to the FSC against the refusal of the Vaud Cantonal Court of Compulsory Measures ('**TMC**') to lift the seals. The lawyer and his client file requests for anonymisation.

In this ruling, the FSC :

- Judges that the handing over to a lawyer and the retention by the latter of a document does not in itself constitute a typical activity, as the lawyer is not the only one who can assume such a mission (c. 5.4.1).
- Confirms its case law according to which a document that exists prior to or independently of legal proceedings does not benefit from professional privilege simply because it was subsequently provided to a lawyer or discussed with a lawyer (c. 5.2.2).
- Recalls that when information covered by lawyer-client privilege is voluntarily communicated to a third party, the protection conferred no longer applies in principle, subject to the cases provided for in art. 171 and/or 264 of the Code of Criminal Procedure (c. 5.2.3).
- Considers that the evidence handed over to the lawyer may in certain circumstances be seized from the latter, particularly when the sole purpose of the handover was to

conceal the evidence, which then constitutes an abuse of law (c. 5.2.3).

- Considers that no typical activity of the lawyer had been demonstrated in connection with the contracts drawn up on the basis of his model (described as ‘derivatives’, c. 5.4.3). The lawyer had not participated in their negotiation, drafting or correction. Furthermore, the lawyer had stated that he had not been asked for any legal questions concerning the contracts. The Court of Appeal ruled out the possibility that a (hypothetical) future intervention by the lawyer who had justified the transmission of documents prior to any dispute would, on its own and without further explanation, allow them to be considered as subject to lawyer-client privilege.
- Considers that the retention of derivative contracts could not be linked to the previous mandate, i.e. that of drafting the source contract(s), because the client’s adoption of the content of the contracts was intended to build contractual relationships with third parties, and this, without the lawyer’s intervention (c. 5.4.3). Furthermore, lawyer-client privilege does not protect the client’s direct and voluntary exchanges with third parties. In the present case, the content was disclosed to third parties during the settlement discussions relating to the said contracts.

The FCC unequivocally reminds the CMP that the parties have the right to decide whether or not they wish to comment on any new position added to the file (c. 3.3.1). The TMC must notify the parties of these new positions, while ensuring that the sealed documents and the observations or annexes referring to them are not forwarded to the criminal prosecution authority.

On the other hand, the fact that the TMC refused the MPC’s request to hold (after two exchanges of pleadings) a hearing on the newly submitted documents does not violate the MPC’s right to be heard.

The Court of Cassation considers that the atypical nature of the activity carried out by the lawyer is established and that there is no interest in anonymising the decision (cf. c. 7.2.2), in the absence of a (sufficient) link between the persons concerned and the criminal proceedings conducted by the OAG.

However, this assessment seems harsh since the lawyer faced with a search seems to have no choice but to request that all the documents seized from him be sealed, as the line between typical and atypical activity is not an exact science. Only at a later stage and with his client’s consent will the lawyer be able to agree to a partial lifting of the seals in relation to the documents he considers not to be subject to confidentiality.

Furthermore, for legitimate reasons and in the public interest, the very existence of the relationship between lawyer and client is protected by professional privilege, which could justify anonymising the operative part of the Court of First Instance’s judgment. The grounds for the judgement do not specify how the publication of the non-anonymised decision meets an important, *a fortiori*, overriding public interest in this case. This is all the more true since several media outlets now tend to publish the names of the persons concerned without restriction.

Lawyers should therefore ensure that the documents received from the client are segregated from those produced by the lawyer in their files, as the mention of ‘subject to professional secrecy’ is no longer sufficient on its own.

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