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THE SOUND OF SILENCE AND THE ADVOCACY'S FORGOTTEN ROLE

Massimiliano Bina
Professore a contratto di Deontologia e Ordinamento Forense
Università dell'Insubria

ABSTRACT: This article discusses the old dictum *nemo tenetur edere contra se* from the point of view of lawyers, identifying ethical profiles in the presentation of evidence in relation to the professional secret and discussing the rationale of the lawyer's role who is entrusted with the task of selecting evidence, both in civil and common law systems.

KEYWORDS: Law of layering, The right to remain silent, Lawyer's professional secret, The duty of confidentiality.

SUMMARY: 1. THE RIGHT TO REMAIN SILENT AND THE ADVOCACY.— 2. PROFESSIONAL SECRET AND CONFIDENTIALITY.— 3. RELATIONSHIP BETWEEN THE PROFESSIONAL SECRET AND THE RIGHT OF DEFENCE.— 4. MATTERS COVERED BY THE PROFESSIONAL SECRET.— 5. THE PROFESSIONAL SECRET'S RATIONALE.— 6. THE HOLDER OF THE PROFESSIONAL SECRET.— 7. THE LAWYER AS A GATEKEEPER OF THE CLIENT'S INFORMATION.

1. THE RIGHT TO REMAIN SILENT AND THE ADVOCACY

The longstanding dictum *nemo tenetur edere contra se* serves as a fundamental tenet underpinning the right of defense within legal proceedings. Specifically, it safeguards the right of individuals to refrain from actions that may incriminate themselves[1]. While not explicitly enshrined in the Italian Constitution, the Italian Constitutional Court maintains that the right to silence is

[1] Cfr. ECtHR, 25.2.1993, *Funk v. France*, §44; *ex multis*, ECtHR, 5.4.2012, *Chambaz v. Switzerland*, §52, which stated that this principle lies in the notion of *fair trial*, according to Article 6, §1, ECHR.

an inherent aspect of Article 24[2], which guarantees the right to defense and aligns with the principles of a democratic rule of law[3].

Debates persist regarding the scope of application of this principle, whether confined solely to criminal proceedings or extending to civil proceedings[4]. Nevertheless, it is unequivocal that the right to remain silent does not equate to forfeiting one's entitlement to defend oneself in court. Moreover, non-exercise of the right to silence does not mandate comprehensive disclosure of information to the court or opposing party. This concept is underscored by the inherent constraints on the court's authority to gather evidence. The court's discretion in utilizing this power is circumscribed, contingent upon the necessity to rectify information asymmetries[5]. In the realm of legal proceedings, it is evident that wide-ranging discovery processes inherently lack efficacy in establishing factual truths during trials. Consequently, any rigorous framework within this domain must prioritize the formulation of precise discovery methods, thereby restricting their admissibility solely to cases demonstrating prima facie validity[6].

Given that individuals lacking legal expertise must depend on legal representation to secure a fair hearing and uphold their rights before the judiciary, the pivotal role of advocacy emerges. This is underscored by the fundamental entitlement to competent legal counsel, ensuring the realization of the right to effective assistance in legal matters[7].

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[2] Corte cost. 10.05.2019, n. 117, Corte cost., ord., 28.6.2004 n. 202, Corte Cost., ord., 26.11.2002, n. 485, Corte Cost., ord., 26.06.2002, n. 291.

[3] Corte cost. 22.10.2014, n. 238, Corte cost. 11.02.1999, n.26, Corte Cost. 6.6.1989, n.323, Corte cost. 2.2.1982, n.18.

[4] Calamandrei (1927), p.131 ss.; see also Calamandrei (1939), c. 237 ss.; Calamandrei (1950), *Il processo come giuoco*, p. 31; Calamandrei (1950), *Processo e giustizia*, p. 289 ss., believes the principle applies to both civil and criminal proceedings. Similarly, Consolo (2007), p. 45, argues that privilege against self-incrimination is only one aspect of a much more general guarantee typical for every proceedings; Scarselli (2010), §3 thinks that no one, not even the Court, can demand that the parties behave against their own interest; Reali (2009), p. 196 s.; Liebman (2012), p. 117. *Contra*, Bertolino, p. 146 ss., spec. p. 156 ss., according to whom, the rationale for the privilege against self-incrimination is typical to criminal proceedings only and it balances State's power; Gradi (2018), p. 632 believes that an extension from criminal to civil proceedings is the result of an arbitrary logical leap.

[5] Gradi (2018), p. 632 ss.

[6] Dondi (2012), p. 233.

[7] Corte Cost. 18.03.1957, n.46 states that the right of defence must be understood as the effective power of the technical and professional assistance in the conduct of any trial, so that the bilaterality of the hearing is ensured and any obstacle to asserting the reasons of the parties is removed; ECtHR 27.11.2008, *Salduz c. Turchia*, §51, according to Article 6 ECHR: «although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial»; *Powell v. Alabama*, 287 U.S. 45, 68-69, 77 L. Ed. 158, 170, 53 S. Ct. 55, 64 (1932): «The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law». On the legal grounds of the mandatory nature of advocacy, cfr. Punzi (2009), p.589 ss., spec. p.596.

2. PROFESSIONAL SECRET AND CONFIDENTIALITY

To safeguard the right to defense of a party, legal practitioners are mandated to maintain confidentiality concerning specific information or documentation[8]. Similarly, in their capacity as representatives of clients, attorneys possess the prerogative to decline testimony[9] and contest efforts by either the State or opposing parties to procure such information during trial proceedings[10].

In civil law countries, this matter is regulated by the concept of professional secrecy, while common law systems uphold it through the attorney-client privilege. Both doctrines encompass several facets, including: (i) privileged communication originating from the client within legal proceedings or acquired for the purpose of legal advice[11]; (ii) information provided by *ex parte* experts or other attorneys appointed to assist the party in proceedings[12]; (iii) documents stemming from preliminary legal work or investigative endeavors undertaken for the case[13]. Consequently, legal professionals are bound by professional secrecy to refrain from divulging such information and documents, with legal provisions prohibiting lawyers from testifying about facts protected by professional secrecy or from disclosing confidential materials.

It is imperative to differentiate professional secrecy from the broader duty of confidentiality recognized by professional codes of ethics[14]. These codes not only extend the scope of protection[15] but they also delineate the conduct

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[8] For an overview, see Allen *et al.* (1990), pp. 359-397. For a historical background, see Hazard (1978), pp.1061-1091.

[9] Article 6, §3 l. 31.12.2012, n. 247, implemented by Article 200, §1, lett. b) and Article 249 Civil Procedure Code («CPC»), and Article 195, §6 Criminal Procedure Code («CPP») prohibits the indirect testimony of a person who has learned information covered by the attorney-client privilege, unless the lawyer has decided not to avail himself of the right to abstain or the facts themselves have not been previously disclosed. This rule is not mentioned in the Civil Procedure Code, but indirect testimony aimed at proving facts covered by attorney-client privilege would be inadmissible in civil proceedings since it is aimed at circumventing an evidentiary rule.

[10] Article 6, §1 l. 247/2012 states that lawyers are obliged, in the interest of their client, to keep absolute professional secrecy and full confidentiality with reference to the facts and circumstances learned in the advocacy, legal counseling and out-of-court assistance.

[11] Andrews (1994), 12-009, «modern society accepts that there is an important constitutional value in obtaining "free, confident, and candid" legal consultation».

[12] See Rule 26 (b) (3) *Federal Rules of Civil Procedure* which implements Work-product doctrine («*Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative*») specifying that are included «*the other party's attorney, consultant…or agent*)».

[13] Since *Hickman vs. Taylor,* in *U.S.* 1947, vol.329, p. 495 ss. documents, drawings, charts, photographs, computer data that constitute the work product of the lawyer are excluded by the duty of disclosure.

[14] Article 13 and Article 28 Codice Deontologico Forense («CDF») for Italian lawyers; Article 2, Règlement Intérieur National (RIN) de la profession d'avocat for French lawyers Article 5 Código Deontológico de la abogacía Española («CDAE»); §2 Berufsordnung für Rechtsanwälte (BORA), for German lawyer; §2.3 Code of conduct for European lawyers adopted by Council of Bars and Law Societies of Europe («CCBE Code»).

[15] Principle (b) of the *Charter of Core Principles of the European Legal Profession* adopted by CCBE states «the right and duty of the lawyer to keep clients' matters confidential and to respect professional

expected of lawyers toward their clients. They mandate the preservation of all information obtained in the course of professional engagements as confidential and prescribe penalties for any breaches thereof.

The underlying objective of the duty of confidentiality is to foster trust between clients and their legal representatives while upholding the core tenet of loyalty in the professional relationship[16]. Furthermore, it is noted that the lawyer's duty of confidentiality encompasses not only the obligation to maintain professional secrecy but also the duty to uphold the confidentiality of all information garnered during the professional association. The former represents an integrity-based obligation, paralleled by the client's corresponding right; the latter is a correlative duty, meaning that the client has a substantive right to keep the personal information obtained by his or her lawyer during the professional relationship confidential [17]. This correlative duty primarily pertains to information within the realm of privacy protected by law, encompassing details shared by the clients to avail themselves of legal services[18].

The provision of a duty of confidentiality, in fact, is intended to induce laymen to consult lawyers in order to find legal advice, or as the professionals who have special skills or knowledge, not only limited to the legal sphere, that he or she habitually uses for his or her profession. Frequently, laymen hire a lawyer because they need a professional who knows negotiation techniques, which might help the conclusion of a business deal; story telling skills, which might help the client in a shareholders' meeting; or even just because they want certain jobs to be performed by a professional who discharges its tasks with independence, loyalty, probity, dignity, decorum, diligence, and competence.

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secrecy». Among the scholars, *Vlies (2014)*, p.231 s., distinguishes between professional secrecy (which he brings back to public policy) and confidentiality (for which he admits exceptions), echoing Cruyplants *et al.* (2005), p. 574. Borghesi (2008), p. 671, states that secrecy exists as a function of the process and it is related to the lawyer's role within the system, whereas confidentiality concerns the information itself. The 1969 Model Code of professional responsibility (DR 4-101(A), which was the model before adopting the 1983 Model Rules of professional conduct, uses the terms «confidences» and «secrets». Confidences are «information protected by the attorney-client privilege» and secrets are «other information ... the disclosure of which would be embarrassing or would be likely to be detrimental to the client».

[16] Patterson (1987), p. 43 ss., at p. 73, notes that lawyers characterize the duty of confidentiality as an independent duty necessary to fulfill the duty of loyalty to the client; Bianchi Riva (2012), p.198 ss. reconstructs medieval confidentiality doctrine as an implementation of loyalty to the client.

[17] Patterson (1987), p. 72 ss.; Patterson (1981), p. 717 ss., p. 720 ss. who resumes, developing them, the ideas of O'Brien (1842), p.108, 115.

[18] About privacy as the rationale for duty of confidentiality, see Scalfati (2004), p.1240 ss., who believes there exists a claim not to be subjected to indiscriminate disclosure of what has been confided by reason of a relationship necessitated by the indispensability of technical service; Patterson (1987), p.73 thinks that «the client's right of privacy creates the lawyer's duty to protect client information which no one else has a right to know»; Wendel (2016), p. 205 ss.

3. RELATIONSHIP BETWEEN THE PROFESSIONAL SECRET AND THE RIGHT OF DEFENCE

The professional secret is therefore an expression of party's right to silence and can be justified to the extent that it serves to guarantee its right of defence[19]. Other scholars [20] assert that the lawyer, as an officer of the Court, is entitled to a sphere of inviolability of communications with her client and a duty to keep such information confidential. On this ground, §2.3.1 CCBE Code states that «It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State». However, in a democratic society this argument, which assigns a special role to the lawyer, whenever allowed, represents a last chance to be used with caution, only when there are no other ways to achieve results that are deemed essential.

So, assuming that there is a close connection between professional secret and the right of defence, it could be alleged, according to Taruffo[21], that there is a general moral and political, as well as legal, obligation of truth from which procedural law may derogate. In this framework the professional secret constitutes the exception to the general rule. But it can also be reasonably argued that all the interests and rights involved in the issue must be balanced and, in so doing, the right of defence is bound to overrule the others. If that is the case, then the professional secret is the rule, not the exception.

This is the *rationale* of the discipline allowing the party to remain silent, therefore preventing certain information and documents from reaching the Court. This explains the lawyer's role as a 'gatekeeper' who, within the range of information in the client's possession, selects those that are appropriate to present.

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[19] Corte cost. 8.4.1997, n.87 in *Giur.it.* 1997, I, 425 ss. states that professional secret is intended to protect the activities inherent in the defence and not the subjective interest of the professional. In the United States A, *Upjohn Co. v. United States* 1981, in U.S. 449, p. 383 ss., spec. 389, states that «Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice». Buyle, Van Gerven (2012), p. 329, n° 8: «Même d'ordre public, (le secret professionnel) est limité au but dans lequel il a été institué à savoir l'intérêt du client. Le secret professionnel fait partie des droits de la défense et est donc lié à la défense des intérêts du client».

[20] Danovi (1993), p.121 ss.; Hazard (1982), c.215 ss., at §3, Lambert (1985), p. 193, note that the power to protect secrets constitutes one of the typical powers of the office of a lawyer, on the same level as the power to represent clients in court and to assist them in negotiations. This idea was already existing in Tommaso d'Aquino, *Summa theologia*, IIa IIae, q.70 art.1 and throughout medieval and modern scholarship, as notes Bianchi Riva (2012), p.198 ss.

[21] Taruffo (2009), p. 152 s.

The close connection between professional secret and the right of defence implies that: (§4) professional secret does not cover all information received by the lawyer in the exercise of his professional activity; (§5) information covered by professional secret is information that can be used by the lawyer to value alternative claims; (§6) the client is the holder of professional secret: the secret does not belong to the lawyer and the client may waive the privilege.

4. MATTERS COVERED BY THE PROFESSIONAL SECRET

As seen before, confidentiality must be distinguished from professional secret: the former covers personal information that no one else is entitled to know; the latter concerns professional information, whose disclosure would be of qualified interest for someone else, however protected by the law for policy reasons[22].

The professional secret is based on the client-lawyer relationship and on the right of defence: the client is entitled to keep confidential information that others have an interest in knowing but that the law allows him not to disclose. It follows that the lawyer[23] has a corresponding right to keep that information confidential and this way the client can implement his right in the context of the proceedings.

In this framework, professional secret does not cover all the confidential information received by the lawyer during his professional activity, but only the information, whatever support is used[24], (i) obtained in the context of proceedings, or (ii) aimed at providing a legal opinion or legal advice to the client, or (iii) acquired during a legal transaction[25]. It is not only the content of confidential information known to the lawyer, but also all information acquired by the lawyer from third parties, technical reports from other professionals relating to the subject matter of the dispute, correspondence with them[26], as well as the lawyer's notes and drafts of court documents[27].

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[22] Patterson (1987), p. 73.

[23] Legal trainees (Corte cost., 8.04.1997, n. 87, cit.), employees and even occasional associates of the lawyer have the same privilege (Article 6, §2, l.247/2012). In France, Article 2.3 RIN «*L'avocat doit faire respecter le secret par les membres du personnel de son cabinet et des structures au sein desquelles il exerce, et par toute personne qui coopère avec lui dans son activité professionnelle. Il répond des violations du secret qui seraient ainsi commises*». Similarly, §2.3.4 CCBE Code «A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality».

[24] In France, Article 2.2 RIN states «Le secret professionnel couvre en toute matière, dans le domaine du conseil ou celui de la défense, et quels qu'en soient les supports, matériels ou immatériels (papier, télécopie, voie électronique …); in Spain, Article 5, §5 CDAE states «El secreto profesional ampara las comunicaciones y negociaciones orales y escritas de todo tipo, con independencia del medio o soporte utilizado».

[25] See *Restatement 3rd of The Law Governing Lawyers*, §68 (now onwards «*Rest.*»).

[26] In the United States, attorney-client privilege covers confidential information relayed to individuals who cooperate with the attorney for a legal advice. See Allen *et al.* (2006), p.799 s.; *United States v. Kovel*, in 296 F.2d 918 (2nd Cir. 1961) stated that the confidence to an accountant employed by a

Footnote 27 in next page

In other words, it is necessary that the information is connected to a professional activity aimed at providing legal advice to the client, in the context of judicial activity or in the out-of-court practice. Thus, the other information is excluded from the procedural protection of professional secret and the lawyer may not refrain from testifying as a witness. It is the information that the lawyer should acquire in the business or financial activity, or in accounting matters, when he or she is asked to identify a public relation strategy: These scenarios involve legal services that do not require the assessment of alternative or competing legal claims[28].

5. THE PROFESSIONAL SECRET'S RATIONALE

Traditionally it is taught that professional secret encourages the client to provide the lawyer with true information because this allows the lawyer to work better[29]; but it has been said that this is only an empirical assumption yet to be demonstrated[30]. Recently, it has been argued that the professional secret is aimed at protecting privacy[31]; more refined is the idea of those who have argued that the benefits to the community from the rules on professional secret (equal to the sum of the benefits of the protection of privacy and the utilitarian ones) are greater than those that would derive from being able to decide the dispute with a complete picture of the information available[32]. However, none of these theories explain why the procedural rules frequently allow the violation of the parties' rights concerning privacy[33].

Some scholars, according to Bentham, have wondered about the opportunity to protect confidential information[34]. It has been said that the professional secret protects the offender who relies on the lawyer's confidentiality. However, this statement goes too far: from this perspective, the citizen should never be allowed to hire a lawyer. In this framework it is noted that professional secret operates as a one-way filter for the facts useful to the client[35].

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law firm that specialized in tax law are privileged; Murphy (2005), p. 545 ss. discusses the issue about spin-doctor.

[27] In France, Article 2.2 RIN «Le secret professionnel couvre …: les consultations adressées par un avocat à son client ou destinées à celui-ci; les correspondances échangées entre le client et son avocat, entre l'avocat et ses confrères, à l'exception pour ces dernières de celles portant la mention officielle; les notes d'entretien et plus généralement toutes les pièces du dossier, toutes les informations et confidences reçues par l'avocat dans l'exercice de la profession…».

For the United States, see Allen *et al.* (2006), p.836 ss.; Wendel (2016), p. 197 ss.; *Rest.*, §87.

[28] Allen *et al.* (2006), p.382.

[29] «The rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services». *Rest.*, § 68; Wigmore *et al.* (1961), §2285; Aa, Vv. (1985), 1481 ss.; Buyle, Van Gerven (2012) p. 329, n° 2.

[30] Krattenmaker (1963), pp. 85-94; Saltzburg (1984), p. 822.

[31] Krattenmaker (1963), pp. 61 ss.; Saltzburg (1984), p.817 ss.; Scalfati (2004), p. 1240 ss.

[32] Wright, Graham (1980), 23, §5422, p. 672; Shuman, Weiner (1982), p. 906 ss.

[33] Allen *et al.* (2006), p.373 ss.

[34] Bentham (1838-1843) vol.VII, libro IX, pt. IV, cap. V, p. 475.

[35] Kaplow, Shavell (1989), p.565.

Thus, the costs of the attorney-client privilege outweigh the benefits because the resulting rules stand in opposition to the principle that all relevant facts must be acquired[36] .

R.J. Allen's argument overcomes this criticism and appears persuasive. According to him, confidentiality is a cost to the other party and to the community and it is a benefit to the client because it makes more difficult for the opponent to acquire some information. This cost is justified to the extent that it becomes a benefit for the administration of Justice, and this occurs for several reasons[37].

First, a comprehensive and candid disclosure by the client enables the lawyer to assess the existence of contingent claims, i.e., the possibility of claims other than those abstractly assumed by the client[38]. Second, the professional secret increases the material for the trial, with reference to that information which is both favourable and unfavourable to the client. It is not reasonable to think that the client will voluntarily disclose such facts, but with the provision of the professional secret it is more likely that the lawyer will decide to use them for the client's defence[39]. Third, professional secret motivates the lawyer to carry out a preparatory work for the trial. Normally the lawyer's investigations are both helpful (a benefit) and harmful (a cost) to the client; thus, forcing lawyers to disclose all investigations, the lawyer's work product would have advantages for the administration of justice, but would constitute a disincentive for this type of activity[40].

The rationale thus identified explains the exceptions to the professional secret. When the client avails himself of the services of a lawyer in order to break the law or to commit a criminal offence, this hypothesis is outside the scope in which the lawyer is called upon to assess alternative claims and the cost of the professional secret would not be justified; indeed, the exception operates even when the lawyer is in good faith[41]. The same applies to information about the client's personal identity, since the client is not entitled to keep it confidential[42], and for which there is no room for the lawyer to develop an alternative claim.

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[36] Frankel (1982), p.51 ss.

[37] Allen *et al.* (2006), pp. 359-397.

[38] Allen *et al.* (2006), p. 371 ss.

[39] Allen *et al.* (2006), p.361.

[40] Allen *et al.* (2006), p.388.

[41] In this case, before ordering the lawyer to testify, the judge must summarily determine whether it is existing the client's intent to commit a crime. Cfr. Allen *et al.* (2006), p.823 s. and St.Peter-Griffith (1993), 259.

[42] See Article 651 Criminal Code («CP») which punishes refusal to give information about one's personal identity, status, or other personal qualities and Article 66 Code of Criminal Procedure («CPP»). which compels the defendant to answer.

6. THE HOLDER OF THE PROFESSIONAL SECRET

As it is typical in the civil law tradition[43], the professional secret must be protected regardless of the benefit to the client, as it is a fundamental element of the legal profession and closely linked to the subjective qualities of the lawyer[44]. This outlook is linked to the idea that the lawyer cannot be independent if he or she were forced to disclose client information. So, disclosure of information acquired by reason of agency would not in fact be permitted, as such conduct would not be considered professionally appropriate.

From the opposite view, the client is the holder of the professional secret, and it is the client who benefits from the confidentiality[45]; the advantage for the administration of justice is only a «collateral», not direct, consequence of the rules on secrecy[46].

This means that clients may waive the privilege[47]. Such a waiver does not need to be expressed in words but may legitimately be performed by voluntary disclosure of the information[48] or because of a legal claim is based on confidential information. Thus, the lawyer and the client must observe minimal precautions to ensure said confidentiality, in the absence of which it can be assumed that the information is not covered by secrecy[49]: what is relevant is «how» the client-lawyer communication takes place[50].

7. THE LAWYER AS A GATEKEEPER OF THE CLIENT'S INFORMATION

According to Patterson «the three core ethical duties of legal ethics all pertain to the communication of information: keeping confidences of the

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[43] Hazard (1978), p.1070 notes that originally the lawyer's was the holder of the privilege because «a gentlemen does not give away matters confided to him».

[44] See Hazard, Dondi (2005), p.210; Danovi (1993), p.121; Dondi (2009), p. 653 s.; Lambert (1985), p. 193; Cachard (2006).

[45] See Allen *et al.* (2006), p.798. Some openness in the civil law tradition is visible in Buyle, Van Gerven (2012), p. 329: «Même d'ordre public, (le secret professionnel) est limité au but dans lequel il a été institué à savoir l'intérêt du client. Le secret professionnel fait partie des droits de la défense et est donc lié à la défense des intérêts du client»; and, presumably, in the arguments that exclude that the rationale for attorney-client privilege can be traced to subjective characteristics of the witness, such as Dondi (1997), p.59; Taruffo (1988), p.751; Dittrich (2019), p. 2015; Corte cost. 8.4.1997, n.87, cit., stated that the exemption from the duty to testify is not aimed at securing a condition of personal privilege for those who practice a particular profession.

[46] Dondi (2009), p.655 states that U.S. rules on attorney-client privilege have shifted from a secrecy-protective to an information-selective device aimed at a more effective search for truth in litigation.

[47] *Contra*, Borghesi (2008), p.681 s., believes that the lawyer has a duty to refuse to testify even when the client has waived professional secret.

[48] Wendel (2016), p.188 ss.

[49] For an analysis of the impact of new technologies on the duty of confidentiality, see Baker (2018), p. 1 ss.; Guttenberg (2012), p. 415 ss.; Ho (2017), p. 853 ss.; Frostestad Kuehl (2019), p. 1 ss.; Preston (2018), p.879 ss.

[50] Dondi (2009), p.652.

client, displaying candor to the tribunal, and showing truthfulness to the adversary»[51].

This analysis shows that the lawyer has the control over client information and that the rule on professional secret is part of the legal regulation of this essential task of the lawyer.

These rules are procedural in nature, since they allow for the enforcement of substantive rights and duties, and they have an ethic nature too as they constitute the limit of the lawyer's power to control information[52]. In particular, the lawyer constitutes a filter to the information presented to the judge[53]. Such a filter is efficient when the reduced possibility of obtaining information, due to the lawyer's control over confidential information, is justified by the greater number of alternative claims on which the defence can be based[54]. Therefore, the rules on professional secret must be read through this interpretative criterion in order to balance the opposing party's right to evidence.

This function of selecting relevant information is inherent to the party's right of defence and to the role of the lawyer as a gatekeeper of the information provided by his or her client: at least in this context it is an expression of the dictum *nemo tenetur edere contra se*.

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[51] Patterson (1987), p. 66

[52] Patterson (1987), p. 66.

[53] Dondi (2009), p.655.

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