CONFIDENTIALITY OF CORRESPONDENCE WITH COUNSEL AS A REQUIREMENT OF A FAIR TRIAL

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Note: please make sure to deal with all of the areas mentioned in this outline. You do not need to reproduce the questions in your text, but please organize your country report more or less in the order of the questions in this questionnaire.
The best contributions will be published, likely by Springer Press. If you would like to have a chance to have your contribution published, please submit a copy in good English (Springer does not, we believe, publish dual-language books). Also, your report should be written like a scholarly chapter, not just with answers, such as “yes” or “no” to the questions if you would like it to be published.
Please do not write more than 20 pages, single-spaced, 12-point, Times New Roman font.
We will provide you later with the citation format for publication, but do include date of publication, city and publishing house for books, or chapters of books which you cite.

OUTLINE

Note: in answering the following questions, point out whether the practice is regulated by separate statute, by the code of criminal procedure (CCP), or by national or supranational (i.e. European Court of Human Rights) case law.

1. PRELIMINARY INFORMATION ABOUT THE RIGHT TO COUNSEL

1.1 When does the right to counsel apply in your country? At time of arrest? Before the first interrogation?
1.2 If an arrested person is indigent (without funds) what system is used to provide counsel to these persons? City, State or National Public Defender System? Lawyers provided by the state or local bar association? Lists of lawyers practicing criminal law?
1.2.1 How is the lawyer appointed during the pretrial investigation stage? Does your country have duty lawyers posted at the jails? Are investigative officials responsible for calling a lawyer for the indigent or is this done by the Bar, or the Court? Are there reports in your country of lawyers summoned by law enforcement officials who collaborate with police or investigators or encourage their clients to confess, even if it might not be in their best interests (“pocket” lawyers in Russia).
1.3 In which kinds of cases is a defendant required to have counsel (mandatory counsel provisions)? Cases punishable by a certain minimum punishment? Juveniles? Mentally Ill? If the suspect-accused is in police custody or pretrial detention? Complexity of the case? Language issues?

2 ATTORNEY-CLIENT PRIVILEGE

2.1 Attorney-Client Privilege, Loyalty and Legal Duties of Defense Counsel. Please describe the general legal requirements imposed on a criminal defense lawyer by the Law on the Bar, other legislation, or court decision especially in relationship to the confidentiality of attorney-client communications (the “attorney-client-privilege”).

2.2 Does the lawyer have a duty to aid (or not impede) the ascertainment of the truth, along with the duty to defend his or her client? May the lawyer express his or her own opinion at trial even if it differs from the position of the client-defendant? (In the Soviet Union lawyers had a “civic duty” to help solve crimes which could go against the interests of the client). If the defendant proposes to give admittedly perjurious (false) testimony, what duty does the lawyer have in such a case? If the defendant turns the murder weapon or other relevant, material physical evidence over to the lawyer, what are the lawyer’s duties in such a situation? If the defendant tells the lawyer where the victim’s body is buried, what duties does the lawyer have?

2.3 Attorney-Client Privilege. Does the attorney have a right not to testify as to any conversations he or she has had with the client or any information obtained from his client? What, if any, exceptions apply here? Are there exceptions where the confidentiality duty does not apply and the lawyer would be obliged to report about a crime committed or in order to prevent its commission (e.g. child abuses, terrorism)? Are there special rules in case of corporate criminal liability? Do different rules apply when the defence lawyer is the same corporate in-house lawyer?

2.4 Do special rules restrict the defendant’s choice of lawyer in terrorism cases or other cases which might involve state secrets? If so, please explain how these special regimes work.

2.5 Are there special rules regarding confidentiality if the lawyer is suspected himself of being involved in the criminal action or is part of the criminal organization?

2.6 What would be the consequences if the lawyer breaches the duty of confidentiality to his client? Civil liability? Criminal Liability? Disciplinary liability? Exclusion of such statements/materials as evidence?

3 THE PRETRIAL RIGHT TO COUNSEL DURING THE PRELIMINARY INVESTIGATION

3.1 Conditions for Counsel Meeting with Incarcerated Clients

3.1.1 Does counsel have a right to meet with an in-custody arrestee before any interrogation is attempted by police, investigator, or prosecutor?

3.1.1.1 Where do these meetings take place?
3.1.1.2 Are any time-limits placed on these meetings?
3.1.1.3 Are lawyer and client alone during these meetings? Are there videocameras or tape-recordings operating in the places where these interviews take place?
3.1.2 Do special laws prevent lawyers from meeting immediately with their clients in certain kinds of cases, such as terrorism, or organized crime cases? Or prevent confidential meetings?

3.2 Right to Counsel During Investigative Acts Carried on With the Participation of the Defendant Such as Interrogations, Confrontations, Re-enactments of Crimes, Identification Procedures
3.2.1 Does counsel have a right to be present during interrogations and the other aforementioned investigative measures? Does he have a right to ask questions? Does he have a right to consult alone with the defendant during the interrogation? In the absence of the investigative officials?

4. STATE INTRUSION INTO THE CONFIDENTIALITY OF ATTORNEY-CLIENT COMMUNICATIONS

4.1 The Attorney as a Witness Against His/Her Client
4.1.1 May a lawyer be compelled by subpoena or otherwise to reveal any information conveyed to her by the client during the pretrial investigation or at trial? May she be subpoenaed before a grand jury or other body to be questioned? In a trial against a third party?
4.1.2 May a lawyer be arrested by police and interrogated about what he knows about his client’s case? If so, are their special rules for such arrests, i.e., approval by the local bar or the Supreme Court?

4.2 Searches of Lawyers’ Offices
4.2.1 May the police or prosecutor request and a judge issue a search warrant for a lawyer’s office? Are there special rules which must be followed in order to get approval of such a search warrant? May the warrant be to search and seize papers relating to a client whom the lawyer is representing at the pretrial or trial stage?
4.2.2 What must be alleged in the search warrant affidavit (sworn statement) for a judge to lawfully issue a warrant to search a lawyer’s office?
4.2.3 Are there special conditions for the search to be carried out? Presence of a member of the Bar, approval of the local bar association? Are there mechanisms in place to prevent a “rummaging” search of all of the files in the office in order to find the sought-after material? Must the investigating magistrate, or judge of the investigation be present to preliminarily search through the files?

4.3 Interception of Confidential Communications Between Lawyer and Client
4.3.1 May a judge issue an order to wiretap private conversations between attorney and client, or to bug the lawyer’s office or other place where lawyer and defendant meet? May the e-mail servers used by lawyers be searched pursuant to a search warrant, or stored e-mail, stored phone messages, etc.?
4.3.2 Are their special procedures required before such conversations may be intercepted, or stored conversations accessed?

5. **EXCLUSIONARY RULES AND NULLITIES**

5.1 Would your country’s statutory law, constitution or case law require the exclusion of any evidence or information unlawfully seized during a search of a lawyer’s office? Would the exclusion reach indirect evidence (fruits of the poisonous tree)?

5.2 Would your country’s statutory law, constitution or case law require the exclusion of any privileged communications which were unlawfully intercepted in violation of the law? Would the exclusion reach indirect evidence (fruits of the poisonous tree)?

5.3 Would a serious violation of the right to counsel in the form of illegal search or interception of conversations, or coercive interrogation of a lawyer constitute a nullity, or serious violation which could lead to a dismissal of the case? Would this dismissal be with prejudice? (I.e. the case could not be re-charged).

6. **ATTORNEY-CLIENT COMMUNICATIONS AT TRIAL**

Are attorneys and clients able to freely and confidentially communicate with each other at trial? Does the defendant sit next to the lawyer, or separately in a cage or dock? May the lawyer freely speak confidentially with the defendant during recesses, or between court days after the trial has begun?

7. **CRITICISM & REFORM**

Have there been any new laws or draft laws seeking to more narrowly regulate this area? Are their opponents of the current regulations (the Bar, for instance) who criticize the current state of affairs and are seeking to strengthen the protection of attorney-client communications? Are there those who are trying to change the law in the other direction, by introducing further exceptions to the attorney-client privilege?