

Brussels Bar Association issues rules on legal privilege during *saisie contrefaçon*

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The Brussels Bar Association (Dutch speaking section, hereafter BBA) recently issues the third guideline since it was created in 1994. In this Guideline the BBA instructs its members how they should safeguard the attorney-client privilege in the event of a *saisie contrefaçon* at the client. Since the Brussels courts have exclusive competence for patent litigation in Belgium and since most Belgian patent litigators are a member of the BBA, the Guideline essentially covers any patent-related *saisie contrefaçon* in Belgium.

The Guideline was issued because shortly before a court appointed expert leading a *saisie contrefaçon* had among others seized the strategic memorandum drafted by specialised intellectual property lawyers retained by the party that was subject to the *saisie*. Notwithstanding explicit protest by that party as well as by its lawyers, the expert studied and even used the legally privileged content of the document. The lawyers informed the Dean of the BBA of the violation of their legal privilege, as required by their professional ethics rules. The Dean consequently instructed the lawyers of the seizing party to order the expert to stop using and return any legally privileged information. Notwithstanding repeated demands from the lawyers of both sides, the expert refused to comply with these. He stated that he could only be instructed by the judge that had appointed him. This left the lawyers of the party that was subject to the *saisie* no other choice but to initiate court proceedings against the expert. In parallel the Guideline was adopted by the BBA.

The Guideline recalls that correspondence between an attorney at law and his client benefits from a far-reaching confidentiality that extends to third parties. Letters from an attorney at law may not be used as evidence in court against his client, even if this would prevent the third party from submitting evidence. The Guideline then states that during criminal, antitrust and other types of *ex parte* evidence seizures the duty of professional secrecy and the confidentiality of correspondence with the lawyer are at least guaranteed by the presence of a representative of the Dean of the Bar Association. Such a guarantee is not provided for in the framework of a *saisie contrefaçon* nor does the typical sanction of invalidity of the obtained evidence apply.

Legal privilege is a cornerstone of the rule of law and the rights of the defence. With the Guideline, the BBA requires the lawyers, acting for the seizing party as well as those acting on behalf of the party subject to the *saisie*, who are confronted with the seizure of legally privileged information "to *take immediate action to call the appointed expert to order and have him return the seized correspondence to the client. If necessary, the expert may even be sued in order to oblige him to return legally privileged correspondence.*"

The Guideline concludes that "*in exceptional cases, the President of the Bar, as guardian of professional secrecy, may intervene in the proceedings in order to ensure that the professional secrecy and confidentiality of this correspondence are respected.*"

Several other Belgian bar associations are reported to be discussing similar rules. A ruling in the proceedings against the expert is not to be expected before mid-2020.

Note: Crowell is assisting the party that was subjected to the *saisie contrefaçon*.