A cityscape at sunset with modern skyscrapers and a river. The sky is a mix of orange, pink, and blue. In the foreground, there's a river with a walkway and trees. The text is overlaid on an orange circular shape on the left side.

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The rules and
exceptions of the
'Without Prejudice'
Principle

The Italian perspective

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The Italian legal framework

The reference standard is Article 48 of the Italian Code of professional conduct:

"The lawyer must not file, mention in Court documents or mention in Court the correspondence exchanged between colleagues qualified as confidential, as well as that containing settlement proposals and their replies. The lawyer may file the correspondence exchanged between colleagues when it: a) constitutes execution and proof of a settlement; b) ensures the performance of the relevant obligations.. The lawyer shall not hand over confidential correspondence between colleagues to the client and the assisted party; he may, if the professional mandate is terminated, hand it over to the colleague who succeeds him, who is in turn bound to observe the same duty of confidentiality. Abuse of the confidentiality clause constitutes an independent disciplinary offence. Violation of the prohibitions set forth in the preceding paragraphs entails the application of the disciplinary sanction of censure".



The nature of the rule as 'jus cogens'

The rule is issued by the Italian Law Society and is contained in the Code of Professional Conduct ('CoPC').

The CoPC is not a Law of the State but, on the assumption that the rules constitute an integration of the same (Cass. Civ. no. 26810/2007), it is an unquestionable that their violation entails the infringement of a legal precept and also a civil offence.

"The infringement of the law also includes the violation of the rules of the deontological code, since they are mandatory for members of the bar that integrate the objective law for the purposes of the configuration of the disciplinary offence" (Cass. Civ. no. 5776/2004).



The nature of the rule as 'jus cogens' (2)

The breach of the CoPC determines on the one hand a violation of procedural rules and on the other hand can be both a source of tort liability towards the other party and the lawyer representing it (with the consequent obligation to pay compensation to both) and a source of contractual liability of the lawyer towards the client, in the light of the good faith principle pursuant to Art. 1375 of the Civil Code.

Even the Italian case-law has affirmed that "*an unlawful conduct from a deontological point of view that results in damage to a competing professional is sanctioned in civil law according to the general principles of the tort law, given that the violation of the internal rules of the professional category is sufficient to qualify the act performed as unjust*".



The purposes of the Italian WP

The Italian Law Society (January 2017) has specified that *'the deontological rule in Article 48 was dictated to safeguard the proper conduct of professional activity, with the aim of not allowing that fair relations between colleagues may give rise to negative consequences in the performance of the function of defence, especially when the communications or letters contain admissions or awareness of wrongs or settlement proposals. This in order to avoid the mortification of the principles of cooperation that, on the other hand, are at the basis of the legal activity'*.



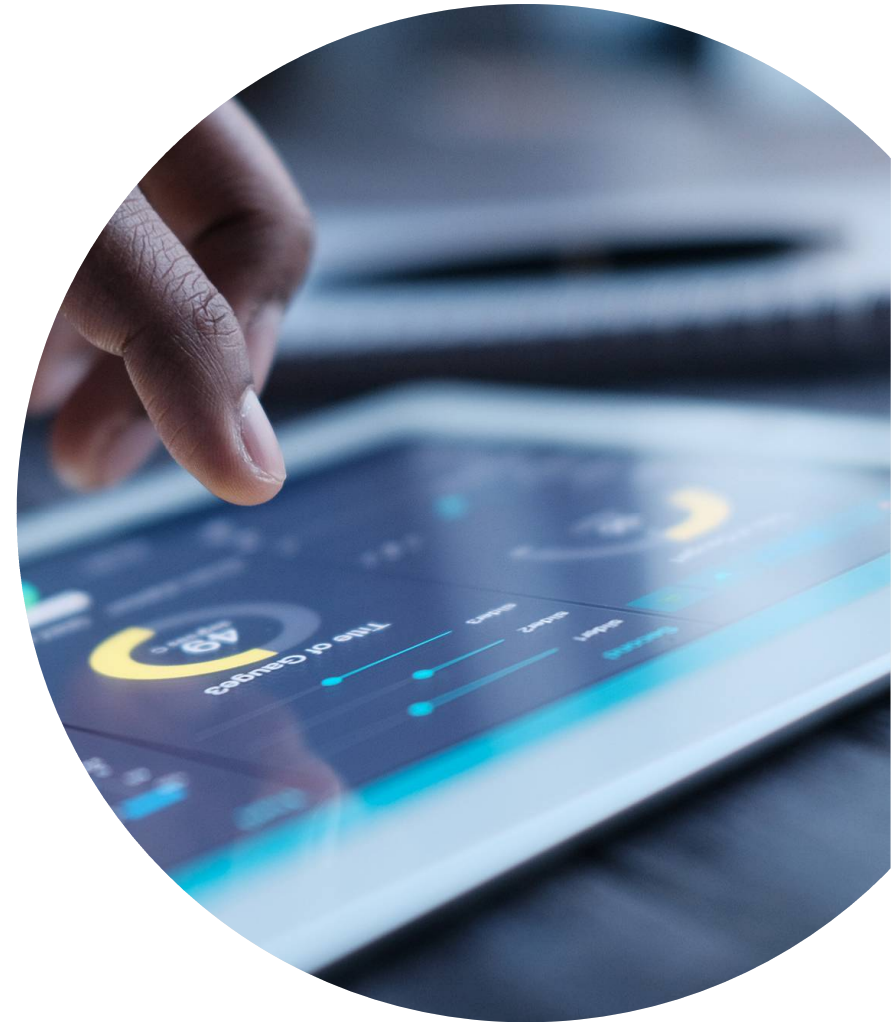
The purposes of the Italian WP (2)

- Fundamental principle of reliability and loyalty in inter-professional relations.
- The lawyer, in addition to performing his function of representing lawyer, is also an arbiter in the conduct of the litigation, assessing the usefulness and possibility of the settlement thereof.
- The lawyer must always have a position of third party and extraneousness in the dispute and can never identify himself, or be identified, with his litigating client.



Correspondence subject to WP

- The lawyer must not file the correspondence exchanged between colleagues,
 - a) which is expressly qualified as confidential; or
 - b) which contains settlement proposals/negotiations (even if it is not expressly qualified as confidential).
- According to the Italian Law Society, the prohibition relates to correspondence exchanged before and during the proceedings and is irrespective of whether the confidentiality has ceased to exist (CNF 5.10.2006, no. 66).
- Moreover, it is of no relevance whether the lawyer-client was represented in Court (CNF 27.06.2003, No. 189).



Correspondence subject to WP (2)

- The prohibition does not apply where the correspondence was sent by the sender for information to third parties not bound by the prohibition in question. In this case, irrespective also of the affixing of the wording “*without prejudice*” the content must in fact be considered public.
- The Italian Law Society clarified that the prohibition against the filing in court of “*WP correspondence*” must also include the letters of which the person who intends to produce them in Court was the author. Since the interest protected is that of fairness in relations between colleagues, it is considered that the prohibition set out in Art. 48 CoPC refers to confidential correspondence as a whole regardless of the authors of the messages.



Exceptions

The filing of correspondence is expressly permitted by the CoPC even irrespective of the qualification given to the communication, in the following circumstances:

- when it constitutes execution and proof of a settlement (once a settlement agreement has been reached, also the preceding confidential letters are producible as confirmation and proof of the agreement reached and its content);
- when it ensures the performance of the obligations (here the rule essentially has the purpose of transparency in the sense of not being able to hide behind the confidentiality clause where the performance of a payment was assured).



Exceptions (2)

- The lawyer shall not deliver to the client and the assisted party confidential correspondence between colleagues; he may, if the professional mandate is terminated, deliver it to the colleague who succeeds him, who in turn is bound to observe the same duty of confidentiality.

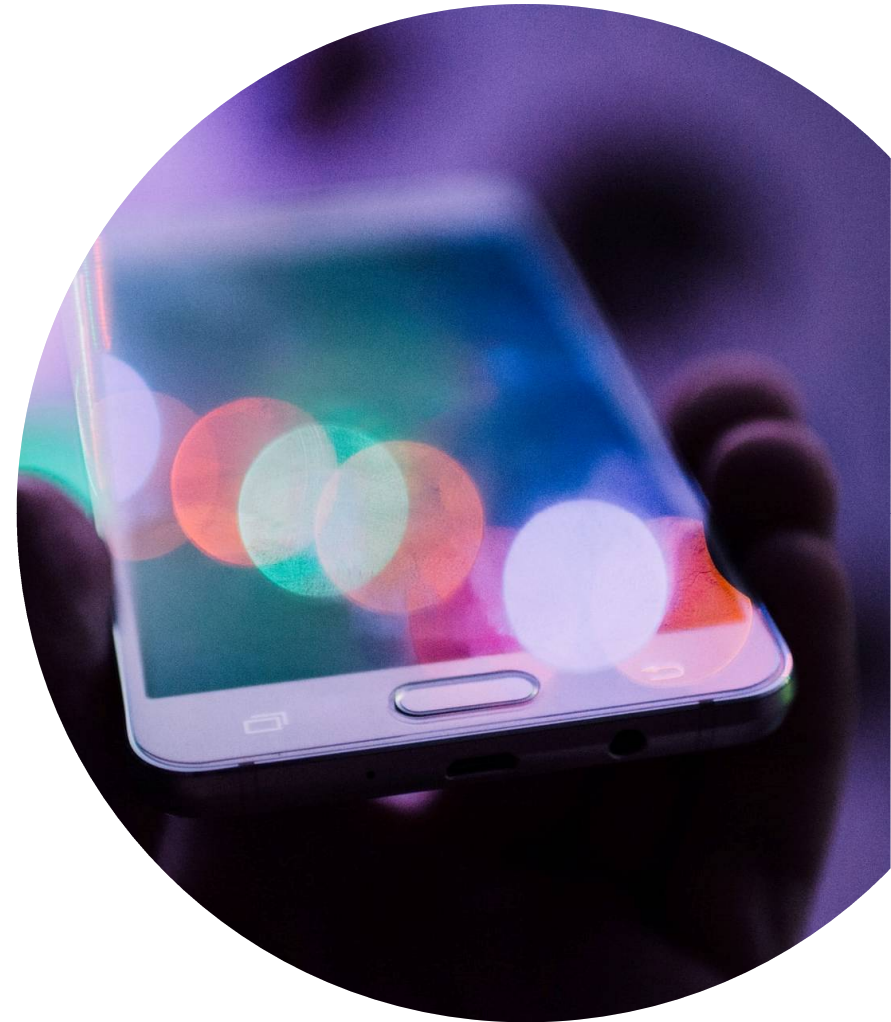


WP between foreign lawyers

- There is not a specific discipline applicable to foreign lawyers in their exchange of WP correspondence.
- Art. 5.3 of the Code of Conduct for European Lawyers recites:

“If a lawyer intends to send communications to a lawyer in another Member State, which the sender wishes to remain confidential or without prejudice, he or she should clearly express this intention prior to communicating the first of the documents.

If the prospective recipient of the communications is unable to ensure their status as confidential or without prejudice he or she should inform the sender accordingly without delay”.



WP between foreign lawyers (2)

In certain Member States communications between lawyers are normally regarded as to be kept confidential as between the lawyers. The content of these communications cannot be disclosed, nor be passed to the lawyers' clients, and at any event cannot be produced in Court. In other Member States, such consequences will not follow unless the correspondence is marked as "confidential". In yet other Member States, the lawyer has to keep the client fully informed of all relevant communications from a professional colleague acting for another party, and marking a letter as "confidential" only means that it is a legal matter intended for the recipient lawyer and his or her client, and not to be misused by third parties. In some states, if a lawyer wishes to indicate that a letter is sent in an attempt to settle a dispute, and is not to be produced in a Court, the lawyer should mark the letter as "without prejudice".



WP between foreign lawyers (3)

These important national differences give rise to many misunderstandings. Whenever a lawyer wants to send a letter to a professional colleague in another Member State on the basis that it is to be kept confidential as between the lawyers, or that it is “without prejudice”, the lawyer should ask in advance whether the letter can be accepted on that basis. A lawyer wishing that a communication should be accepted on such a basis must express that clearly in the communication or in a covering letter. A lawyer who is the intended recipient of such a communication, but who is not in a position to respect, or to ensure respect for, the basis on which it is to be sent, must inform the sender immediately so that the communication is not sent. If the communication has already been received, the recipient must return it to the sender without revealing its contents.



WP between foreign lawyers (4)

In the event that a foreign lawyer does not comply with the WP principle set out at Art. 5.3 of the Code of Conduct for European Lawyers, it is unclear what sanction should be applicable and what kind of deterrent could represent in order to avoid the breach of the rule in foreign jurisdictions.

Correspondence exchanges between foreign lawyers could happen where an arbitration case is ongoing. In that case, it is highly recommended to make a separate agreement on the exchange of the WP correspondence (clarifying what WP is meant to be) from the very initial exchange.



Thank you

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