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Attorney-Client Privilege in the Americas

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1. Concepts

1. People seeking legal advice should be assured, when discussing their rights or obligations with a lawyer, that the latter will not disclose to third parties the information provided. Only if this duty of confidentiality is respected will people feel free to consult lawyers and provide the information required for the lawyer to prepare the client's defense or ascertain the client's legal position. Regardless of the type of information disclosed, clients must be certain that it will not be used against them in a court of law, by the authorities or by any other party. It is generally considered to be a condition of the good functioning of the legal system and, thus, in the general interest. Legal professional privilege is much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.[1]

Lawyers, representing clients, are generally bound by a duty to treat any information received from the client or any advice given as confidential. This obligation not to reveal applies to all information relating to the representation of the client (American Bar Association [ABA] Model Rule 1.6(a)). In this

[1] *Regina v. Derby Magistrates Court ex parte B*, House of Lords UK, Oct. 19, 1995.

respect, a lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client (ABA Model Rule 1.6(c)). Clients should be entitled to hold the lawyer liable in the event of breach of this duty.

In common law jurisdictions, this secrecy is part of the attorney-client privilege. It generally implies that the communications between lawyers and their clients are confidential and that no authority should be empowered to order disclosure of such information. *Professional secrecy* is the term generally used in continental legal (i.e., civil law) systems to refer to the common law concept of legal professional privilege or the attorney-client privilege – that is, the lawyer's duty to refuse to disclose, and the client's right to prevent the lawyer from disclosing, any information received from the client to prepare the latter's defense. In any case, regardless of the term used, the underlying goal is the same, namely to protect information exchanged between the client and the lawyer with respect to the client's legal position in relation to a specific matter.

2. Privileged information cannot be used against the client, and the lawyer cannot be forced to disclose it. To qualify as such, however, the information must have been provided to the lawyer or by the lawyer to the client for the purpose of legal advice or general assistance in defining the client's legal position toward authorities or other parties. It covers all information that is relevant to the legal representation.

   If privileged information is nonetheless disclosed in violation of the applicable rules, it may not be used in court or otherwise against the client. However, if the information is disclosed pursuant to a derogation provided for by law (see "Limitations and Derogations," later in this chapter), it can be used in court.

3. In several jurisdictions, litigation privilege is distinguished from attorney-client privilege. Litigation privilege applies to matters in litigation and the information exchanged between the lawyer and the client in relation to this litigation. The distinction has a historic explanation, as the English House of Lords first recognized in 1577 privilege of communication to clients in anticipation of or pending litigation[2] and extended it later (in 1833) to advice outside court litigation.[3] The distinction is made in Anguilla, Bahamas, Barbados, Bermuda, British Virgin Islands, Canada, Jamaica, and Trinidad and Tobago, even though litigation privilege is part of the broader attorney-client privilege. Nevertheless, litigation privilege may apply to communications between a lawyer and third parties if it is for the purpose of obtaining advice in connection with the litigation, such as gathering evidence.[4]

[2] *Berd v. Lovelace, EngR* 10, (1957–77) *Cary 61*, 1576 21 ER 33(E).
[3] *Greenough v. Gaskell* (1833) *EngR* 333.
[4] *See* Chapter 2, no. 10 (Anguilla); Chapter 5, no. 3 (Bahamas); Chapter 6, no. 4 (Barbados); Chapter 8, no. 4 (Bermuda); Chapter 11, no. 10 (British Virgin Islands).

Litigation privilege may, in certain U.S. states such as California, refer to a type of immunity for things said in court when defending one's position and presenting legal arguments. In the heat of debate and to defend themselves, parties are entitled to speak more freely and to openly attack the other party without fear of a defamation suit.

2. Basis

4. Typically in common law jurisdictions, the attorney-client privilege has been developed by case law originating in the United Kingdom (see no. 3 in the preceding section). The legal basis for the privilege in those countries is still the case law and part of the common law. This is the case in Anguilla, Bermuda, British Virgin Islands and the United States. In several countries in which common law or case law provides for the basis of the privilege, specific statutes, such as a criminal code, may define the secrecy duty of lawyers. This is the case in Bahamas, Belize, Canada and Jamaica. Also, in several civil law countries, case law is the basis of the attorney-client privilege, even though confirmed by several statutes and more particularly in the criminal code. This is the case in Argentina, Brazil, Chile, Curaçao, Dominican Republic, El Salvador, Mexico, Paraguay and Uruguay. In certain countries, the privilege is found in professional codes and not in the law, such as in Costa Rica, Cuba and Puerto Rico (but additionally in the judicial code).

In other countries, the attorney-client privilege and the duty of professional secrecy have been enshrined in statutes specifically applicable to the attorney-client privilege. In several countries, this is the legislation applicable to lawyers. This is the case in Antigua and Barbuda, Barbados, Bolivia, Guatemala, Honduras, Panama, Trinidad and Tobago, U.S. Virgin Islands and Venezuela. In other countries, it is laid down in the constitution or other legislation on rights and freedoms, such as in Québec (Canada), Colombia, Ecuador and Peru.

5. In a large number of countries, the duty of professional secrecy or attorney-client privilege is enshrined in the bar association's code of ethics. Violations will result in disciplinary sanctions, in accordance with local procedures.

In addition, it appears that the duty of professional secrecy is generally considered to result from or at least to be part of the contract between the lawyer and the client, as part of the representation of the client by the lawyer. Consequently, any violation of the privilege constitutes a breach of contract, allowing the injured party to claim the appropriate remedies and damages. This is explicitly accepted in Anguilla, Argentina, Bahamas, Barbados, Bermuda, Bolivia, Brazil, British Virgin Islands, Colombia, Costa Rica, Curaçao, Ecuador, El Salvador, Guatemala, Mexico, Peru, Puerto Rico, Trinidad and Tobago, and Uruguay.

3. Scope

A. Information Protected by Attorney-Client Privilege and Professional Secrecy

6. In general, professional secrecy protects all information a lawyer receives or obtains in the context of assisting a client. Under European law, this encompasses all information received in relation to legal proceedings or any conflict in general, or to determine whether the rights and obligations of the client benefit from the attorney-client privilege.[5] Similarly, attorney-client privilege protects any information the client gives to the lawyer to get legal advice, and the lawyer gives to the client as part of the legal advice. This includes any exchange to facilitate the advice[6] and assistance in determining a legal position whether in or pending litigation or outside litigation. Indeed, effective representation of a client's interests requires that clients be able to speak freely to their lawyers and that the information exchanged be kept confidential. The protected information cannot be disclosed and, if so, cannot be used as evidence in litigation.

The advice is generally protected if it is given by the lawyer as part of a professional relation, even if the lawyer is not paid for it. This is generally referred to as information communicated to the lawyer or by the lawyer in his or her capacity as an attorney. Consequently, when a personal opinion is given outside any legal advice, the information is not protected.[7] In general, any information exchanged outside the professional relation of the lawyer is not protected. Also, information given to third parties (who are not employees or agents of the lawyer) will not be protected unless, in certain countries, by the litigation privilege (see no. 7). The privilege generally applies to any documents and notes prepared by the lawyer and any communications, in particular correspondence, between the lawyer and the client. Communications may be in writing or oral, including electronically exchanged information.

7. The litigation privilege applies to all information exchanged by a lawyer with third parties – that is, parties who are not clients of such lawyer – with the dominant purpose of providing or receiving legal services in actual, anticipated or pending proceedings in which the client is or may be a party. It relates to all confidential communications and documents where "the dominant purpose in creating the document (or making the communication) is to use it or its contents to obtain legal advice or help in the conduct of litigation which at that time was at least reasonably in prospect."[8]

[5] European Court of Justice, June 26, 2007, case C-305/05 (Belgian Bar Associations). *See* Dirk Van Gerven, "Professional Secrecy in Europe," in *Professional Secrecy of Lawyers in Europe*, Bar of Brussels (ed.), Cambridge University Press, Cambridge, 2013, 11–12.

[6] *See* Chapter 30, no. 3 (United States).

[7] *See* Chapter 2, no. 8 (Anguilla); Chapter 28, no. 6 (Puerto Rico).

[8] Virginia Dunn, *Be Civil! A Guide to Learning Civil Litigation and Evidence*, Worth Publishing Ltd, 2014, 219; *see* Chapter 6, no. 4 (Barbados).

B. The Advisers Subject to Professional Secrecy

8. When defending the interests of their clients, that is, advising on the client's rights and obligations or representing the client in legal proceedings challenging such rights and obligations, lawyers are subject to a duty of professional secrecy. This is the case regardless of where the lawyer or the client is situated. In general, foreign lawyers working in the country benefit from attorney-client privilege only if duly registered to practice in such country.

The duty of professional secrecy and the attorney-client privilege apply in most countries to the lawyer's associates, staff and employees working within the law firm or working for the lawyer representing a client. The information made available to these persons, or gleaned by them in the course of assisting the client, is subject to the attorney-client privilege. Exceptionally, this is not the case in countries such as Antigua and Barbuda. Further, it is advisable to provide for an obligation to keep all information confidential in the employment contract. It is useful to include clear provisions in the employment agreements with staff informing them of the duty of professional secrecy applicable to the law firm.

In most countries, external service providers who perform services on behalf of the lawyer in representation of a client also benefit from the attorney-client privilege. In some countries, such as Jamaica and Panama, this may be subject to certain doubt, or it may not be the case, such as in Antigua and Barbuda and the British Virgin Islands. In several countries, it is generally recommended to sign confidentiality agreements with independent service providers when disclosing confidential information to them. Finally, in countries that distinguish attorney-client privilege from litigation privilege, the latter will apply to information shared with external service providers in relation to preparing litigation (see no. 7 in the preceding section).

9. In the Americas, legal advice of in-house counsel benefits from attorney-client privilege. When practicing law in their work, in-house counsel are considered lawyers and therefore also subject to a duty of professional secrecy. Lord Denning said in this respect that the only difference between in-house counsel and a lawyer in private practice is that in-house counsel act for one client, not for several clients.[9] The privilege applies only with respect to queries for legal advice and thus information provided as part of this legal advice. Furthermore, in some countries, the in-house counsel must be guaranteed an independent position in the company to qualify for the privilege.

In Europe, the matter of whether in-house counsel benefit from attorney-client privilege is challenged. The European Court of Justice is of the opinion that exchanges within a company with in-house lawyers are not covered by professional secrecy in European legal proceedings governed by European law,

[9] *See* Chapter 6, no. 13 (Barbados).

such as antitrust proceedings against the European Commission. This court based its decision on the fact that in-house counsel are, further to their employment, not sufficiently independent from their employer.[10] In this respect, held the court, independent lawyers are bound by professional rules that ensure their independence, while lawyers employed by companies are not. However, as the European Court of Justice recognized, this is for national proceedings a matter of state law, and state law may provide otherwise.

C. Limitations and Derogations

10. The attorney-client privilege is linked to the lawyer's duty to defend a client's interests in law. Consequently, it does not apply when the lawyer acts outside this context – for example, when the lawyer acts as a company director or a court-appointed representative, such as a trustee in bankruptcy. In such cases, the information gathered by lawyers in the exercise of their functions is not protected by the duty of professional secrecy (unless the lawyer in question consults a lawyer to assist him or her with respect to the exercise of such functions).

11. Furthermore, a number of limitations and derogations apply, which refer in general to cases in which the lawyer cannot rely on the attorney-client privilege or is even forced to disclose certain information. In some of these cases, the authorities are entitled to break through the attorney-client privilege; in others, it is up to the lawyer to decide whether to disclose the confidential information without the authorities being entitled to force the lawyer.

Rule 1.6(b) of the Model Rules of the American Bar Association list the following cases in which a lawyer is entitled to reveal confidential information, but only to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the

[10] ECJ May 18, 1982, case 155/79 *AM&S Europe v. Commission, Eur. Court Reports* 1982, 1575; Sept. 14, 2010, case C-550/07, *Akzo and Ackros, Eur. Court Reports* 2010, I-8301.

client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; and

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

12. The prevention of bodily harm or, in a number of countries, a greater damage is generally recognized as an exception authorizing the lawyer to contact authorities to prevent the harm. In such cases, the information to be communicated should be limited to what is required to prevent such harm (or damage). The lawyer will have to assess the information when deciding to step forward and disclose information. Also, specific matters of public interest, such as money laundering, terrorism or abuse of children, can be reasons provided by the law to refuse to invoke professional secrecy and force lawyers to disclose confidential information.

Furthermore, it is generally accepted that attorney-client privilege cannot be used to commit a crime. Communications made for the purpose of getting advice for the commission of fraud or other crime are not protected.[11] In some countries, this is also the case if the information is used to commit a wrongful act in general. This is the case in Anguilla, Bahamas, Belize and possibly in the British Virgin Islands.

Lawyers should be able to defend themselves against claims based on negligence or malpractice and may, to the extent required to argue their defense, disclose confidential information. The same applies generally to a lawyer's claim to obtain payment of fees.

D. Waiver by the Client

13. The attorney-client privilege is intended to protect the client's interests.[12] In general, it is accepted in the Americas that a client can waive the attorney-client privilege. Only in Guatemala is the attorney-client privilege a matter of public law and cannot be waived, not even by the client.

The client's consent to waive must be informed, that is, the client must be aware of the consequences of the consent. Also, the initiation of civil or disciplinary proceedings against a lawyer because of negligence or malpractice is in some countries construed as an implicit waiver, permitting the lawyer to defend himself by disclosing confidential information. However, in Curaçao, only the lawyer can waive the attorney-client privilege (with consent of the client).

[11] *See* Chapter 30, no. 5 (United States).
[12] Lord Denning, *The Due Process of Law*, Butterworths, London, 1980, 29.

4. No International Supervision

14. Contrary to the situation in Europe,[13] many countries in the Americas are not a party to an international convention that institutes an international court ensuring the application of human rights and freedoms, such as a right to a fair trial, and legal assistance and professional secrecy of any information exchanged between lawyer and client. While the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have certain responsibilities in this area, they are not typically cited as controlling on issues of attorney-client privilege. Furthermore, contrary to the European Court of Human Rights, citizens do not have access to the Inter-American Court on Human Rights.

[13] The European Court of Human Rights has confirmed in several decisions that the attorney-client privilege is part of the rights of defense and the right to a fair trial. *See* Dirk Van Gerven, "Professional Secrecy in Europe," in *Professional Secrecy of Lawyers in Europe*, Bar of Brussels (ed.), Cambridge University Press, Cambridge, 2013, 6 *et seq.*