

SPAIN

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1. DEFINITION – PRESENTATION

What attorney-client privilege is and what it is not

In Spain, legal privilege is referred as “professional secrecy or confidentiality” (*secreto profesional* or *confidencialidad*). Legal privilege is part of substantive law and a procedural rule too.

Bases on legal privilege, a lawyer can resist the giving of information or the production of a document which would reveal communications with a client which may be used in Court (or before the Administrative Authorities) against said client.

Legal privilege covers the lawyer, or any other member of the office. Privilege covers, not only communications, but documents, and not only communication involving litigation, but also the provision of legal advice. It would cover any of the following documents and oral communications made by the client or lawyer:

- a) communication between a party and his lawyer if made by the professional adviser, or received from him;
- b) prepared to be used as a communication;
- c) between external legal advisers of the client;
- d) notes, memoranda, minutes, records, and other documents made by the lawyer, his client, or his officers of communications which are confidential;
- e) communication between the lawyers of both parties, if made or prepared when litigation is anticipated or commenced;
- f) communication of a third person if made in connection with legal advice given to client.
- g) knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or agent.

Furthermore, the lawyer of the other party cannot be referred to nor called as witness

2. SOURCES

From which sources is the legal privilege derived?

The sources of legal professional privilege in Spain are: Constitutional Law and Jurisprudence and Penal and Administrative Law and Jurisprudence.

The Jurisprudence of the Constitutional Law establishes the basic principles, of respect of the confidentiality as a Fundamental Right under our Constitution.

Details of Legal privilege are regulated in Administrative Law: the By-Laws of the Spanish Council of Bar Associations, and the By-Laws of each of the local Bar Associations.

According to the Spanish Supreme Court Case Law, said rules are obligatory. They are rules (i.e., internal laws), obligatory not only advise given to lawyers.

2.1 Relevant statutes

Penal Code considers a crime the violation of legal privilege.

Article 437 of the Organic Law on the Courts considers legal privilege an obligation to be respected; and they cannot be obliged to declare about the facts and information he knows, due to his professional activity.

The essence of legal privilege is covered by the Rules of the Council of Bar Associations (namely the General Statute of the Spanish Advocacy, Royal Decree 22 June 2001) and the Rulings local Bar Associations. This is considered Administrative Law.

2.2 Relevant Case Law

Case Law has recognized that confidentiality is a constitutional right, from the client's and the lawyer's point of view – and a legal obligation for the lawyer.

This jurisprudence has been ratified by the Spanish Constitutional Court.

3. SCOPE/LIMITS

3.1 General observations

Can the attorney-client privilege be waived? If Yes, how?

Privilege can be waived by client. Or by the Board of the Law Society, in the following cases: a) to avoid damages to a third party or to the client; b) when necessary, for the lawyer to defend himself in Court or before an administrative procedure in the Law Society.

Is the privilege limited?

No. It even covers employees of the lawyer's office.

Which documents/information are involved?

3.2 Between lawyers

Is the correspondence between lawyers protected?

Yes, if related to the case

3.3 Third parties

Is the correspondence with third parties protected?

No. It can be used in Court, unless the other party's lawyer has included confidential information in his communications or has made proposals or recognitions that may hamper his position in Court.

In these very specific cases, the lawyer who wants to use this documentation in Court must request permission from the Bar Association. It is customarily granted.

4. IN-HOUSE LAWYERS

Which regulations regarding legal privilege apply to in-house lawyers?

The same laws and principles regarding privilege apply to in-house lawyers, when they act as lawyer and the advice given is independent, notwithstanding the employment relationship.

But:

- (i) in-house lawyer must be qualified and entitled to practise law.
- (ii) the present EU regulations establish a very strict limit for legal privilege: it does not cover correspondence between in-house lawyers and the company, except when they are acting as lawyers.

5. PROSPECTIVE

Does professional secrecy tend to be more or less protected?

It is been weakened, by documents between lawyers being used in Court, and the linkage leakage to the press of confidential information.