

**BRAZIL**

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## **1. DEFINITION – PRESENTATION**

### **What attorney-client privilege is and what it is not.**

The attorney-client relationship is fiduciary. The lawyer becomes a particular kind of agent of the client with special responsibilities. Confidentiality duty is part of the legal profession. The ethical obligation applies not only to matters communicated by the client in confidence, but also to all information, documents and materials related to the representation itself.

Confidentiality permeates all stages of the attorney-client relationship. The lawyer is bound by confidentiality duties not only to his present clients, but also to prospective clients, and even former clients. The purpose of the broad protection is to encourage the client to speak freely with the lawyer and to encourage the lawyer to obtain information beyond that offered by the client. Needless to say, this obligation is not furthered if the confidential information becomes a matter of general knowledge.

## **2. SOURCES**

### **From which sources is the legal privilege derived?**

The legal privilege derives from both legal statutes and jurisprudence.

### **2.1 Relevant statutes**

The attorney's obligation to protect client's confidential and secret information and client's right to freely consult with his attorney derive from a combination of multiple rules, among them the following:

- Article 133 of the Federal Constitution;
- Articles 25 to 27 and 34 of the Code of Ethics and Discipline of the Brazilian Bar Association;
- Articles 7 (II) and 34 (VII) of the Statute of Advocacy (Law 8906/94).

### **2.2 Relevant Case Law**

Brazilian courts have to decide in accordance with law, and in the absence of a relevant statute or rule, in accordance with the Federal Constitution and the general legal principles. Jurisprudence plays an important role when it comes to interpretation of legal texts and principles.

The Superior Court of Justice and the Supreme Federal Court, the highest courts in hierarchy, dealing first with federal law and second with constitutional matters, have provided a relevant number of decisions in various cases related to the attorney-client privilege issues. The decisions acknowledge the privilege as essential to advocacy, however tend to derogate the privilege when it comes to situations where the lawyer acted divested of this condition or acted against law.

The importance of and the unequivocal reliance on the privilege was largely discussed in 2005, when few of the largest law firms in Brazil had their files arrested by the Federal Police as a result of searches related to money laundry and tax evasion. The action was highly contested by the legal community, namely by the Brazilian Bar. As a consequence of the abusive intrusion various lawsuits took course, and Federal Police agents moved backwards in their attempts to collect crime evidence.

### **3. SCOPE/LIMITS**

#### **3.1 General observations**

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

**Is the privilege limited? Which documents/information are involved?**

Information gained in the professional relationship shall be treated as privileged and in no event may be disclosed, even if the lawyer is called as a witness. The lawyer shall refuse to witness in cases under his supervision or related to current or former clients, even if an authorization from that client is given. The information disclosed by the client may be brought to court within the limits of defense provided an authorization is given by the client. Attorney-client correspondence is presumed confidential and may not be disclosed to third parties.

The extent of the confidentiality duties goes far beyond the attorney-client relationship. The prospective client may extend confidential information to the lawyer who he seeks to retain. Irrespective of a further relationship, the lawyer has the ethical duty of confidentiality. As a consequence, the lawyer may not take as a client a party opposing to whom he has rendered a legal opinion or from whom he has obtained confidential information. The lawyer shall not take under his advocacy causes that he oriented or knew in consultation. Violation of confidentiality may further consequences beyond the ethical obligation and meet criminal rules.

The duty of confidentiality usually survives not only the termination of the attorney-client relationship but also the death of the client. The lawyer is not authorized to disclose or benefit from information obtained from his former client, be he alive or dead. The lawyer may defend third parties against his former client, but shall refrain from the use of the information obtained in the course of the former relationship, which shall be kept confidential under all circumstances.

There are not specific rules dealing with the duties to prospective clients but general rules do impose obligations on the attorney for the information thus obtained. As a consequence, the lawyer may not take as a client a party opposing to whom he has rendered a legal opinion or from whom he has obtained confidential information.

Along with the confidentiality duties goes the client's implied waiver according to which the client impliedly authorizes the lawyer to engage in the disclosure in order to carry out the representation. An important exception to this rule exists whenever it is necessary for the lawyer to establish a claim or defense in a controversy with the client, or necessary to defend any civil or criminal charge or even necessary to secure the lawyer's fee. The purpose of this exception is to prevent the client, who is the beneficiary of a fiduciary relationship, from exploiting that relationship to the detriment of the lawyer-fiduciary. But, the right to use confidences does not create a right to blackmail the client. The lawyer may only exercise the right to reveal client information to the extent that it is reasonably necessary to establish his right. Extortion or unnecessary disclosure is not allowed.

The client should be able to rely on the lawyer. Thus, assuming a situation where concurrent representation is authorized by the clients, the pursuit of the representation shall occur if the lawyer reasonably believes that he can represent each client competently and diligently.

Joint representation is another situation that often appears in the advocacy arena. It is often in the best interest of such parties that their interests are defended by the same lawyer in an attempt to save money and time. Such cases may represent a potential for conflict, and it is on the lawyer to carefully analyze the situation and decide whether his loyalty will be impaired or divided before accepting the representation.

The discretion to reveal meets the liability for disclosure. Unauthorized disclosure entails civil and criminal liability. Although difficult to access, the extent of the damage is relevant to the establishment of the penalty, which may consist of an indemnity, a punishment, or in certain circumstances, a combination of the two. Lawyers shall be held responsible to the client for the decision to disclose the information entrusted. The balance between discretion and liability is the core of the lawyer's conduct.

### **3.2 Between lawyers**

#### **Is the correspondence between lawyers protected?**

The correspondence between lawyers follows the same rules and principles, and as a consequence, is protected as legal privilege.

### **3.3 Third parties**

Third parties are not bound by the privilege. Information and materials disclosed to them should be subject to confidentiality agreements carefully drafted. In the event such

information and materials come to their knowledge through disclosure either from the attorney or the client, the liability is on the disclosing party.

#### **4. IN-HOUSE LAWYERS**

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

A conflict may develop because the lawyer may know information about one client that may be relevant to another client. The opposition of interests will demand from the lawyer opposed actions what may cause the breach of the fiduciary duties to the clients. If he does not disclose the information to the interested party, on one hand, he may be failing to his commitment to defend that client, and on the other hand, may be violating his fiduciary obligation to the other.

If such a situation occurs, the lawyer is obliged to inform both clients of the conflict. Failing to obtain the consent of both to pursue the defense of both simultaneously, the lawyer shall then renounce to one of the clients and keep confidential the information obtained as a result of the discontinued representation. As a consequence, the lawyer is prohibited to represent a client whose interests are directly adverse to another client or present significant risk to the responsibilities already existing towards another client, be he a current, a former client, or even a third person to whom the lawyer has personal responsibility.

Because of such limitations, lawyers of the same law firm are not authorized to represent clients with opposing interests. One of them must resign under such circumstances. It is interesting, however, to point out the fact that representation powers are granted on an individual basis. It is the lawyer who is personally empowered, not the law firm as an entity.

#### **5. PROSPECTIVE**

##### **Does professional secrecy tends to be more or less protected?**

Historically, professional secrecy has been seen not only as an ethical obligation, but also as a legal obligation, as those infringing the privilege are subject to penalty and fines. Given the serious repercussion of the acts perpetrated by the Federal Police against law firms in the recent past, the attorney-client relationship pursues as privilege.