

# ECUADOR

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## 1. DEFINITION - PRESENTATION

### **What attorney/client privilege is and what it is not?**

*Professional Secret* is defined as reserved or confidential information disclosed in the exercise of a certain profession or activity, such as attorneys or defenders, by the parties they defend.

*Attorney/client privilege* is the result of the existence of a professional relationship and is therefore a duty and right between attorney and client.

When consulted by the client, the attorney contracts the moral duty to not reveal any *Professional Secret* disclosed to them and also contracts the legal commitment to keep such secret confidential even when a Legal Services contract has not been established until then.

Therefore, the legal obligation to keep a Professional Secret and the moral duty to not disclose such secret is borne from professional dependency, which may or may not become a Legal Services contract in the future. If an attorney accepts to defend a case, he/she will become the client's defender and consultant. Otherwise, there is no legal connection between the attorney and the client, although the attorney will always have the commitment and moral obligation to keep the subject-matter of the consultation a secret.

Consequently, *attorney/client privilege* stems from a relationship whereby one person discloses a fact and/or a document and a confidant receives it with the obligation to keep it a secret and therefore not disclose it to anyone not involved in the situation. Obviously, this means that legal privilege is the result of a relationship of trust. The profession of attorney is therefore characterized as being one where trust is evidently the foundation of the relationship with the client.

## 2. SOURCES

The sources of attorney/client privilege in Ecuador are: Constitutional Law and the Organic Code of the Judicial Branch.

Details of Legal privilege are regulated in Administrative Law: the Laws of the Federation of Attorneys of Ecuador, and the Rules of the Court of Honor of each of the local Bar Associations.

## **2.1 Relevant Statutes**

**The ORGANIC CODE OF THE JUDICIAL BRANCH provides the following:**

**ART. 335.** PROHIBITIONS PLACED ON ATTORNEYS WHEN REPRESENTING CLIENTS IN A CASE: When representing a client in a case, the attorney shall not:

1. Disclose the secrets, documents or instructions of the parties they defend.

**The PENAL CODE establishes:**

**Art. 279:** Attorneys, defenders or representatives in cases informed of the secrets of the parties they defend from the opposing party; or who after becoming in charge of defending a party and becoming aware of their pretensions and means of defense, abandon such party and defend the other party; or who however willfully inflict harm to the party they defend to the benefit of the other party, or obtain a certain personal benefit, shall be punished with prison from one to five years.

**The LAW OF THE FEDERATION OF ATTORNEYS OF ECUADOR prescribes the following:**

Art. 23: The Court of Honor shall hear and resolve on the following matters involving the members of the Bar Association: .....

- f) Breach of legal privilege

**and the RULES OF THE COURT OF HONOR OF THE BAR ASSOCIATION OF PICHINCHA establishes that:**

### **Chapter II – fundamental duties inherent to the practice of the law profession**

Art. 4. The duties inherent to the practice of the law profession are:

- a) To rigorously keep professional secrets and oppose before the courts or other authority any rule that might breach such legal privilege, by refusing to respond to questions posed to the attorney that could violate such privilege, except (I) when the client so authorizes (II) when dealing with the client's own defense; and, (III) with respect to the attorney's defense in any action initiated against them by the client.

### **3. SCOPE OF APPLICATION**

#### **Can legal privilege be waived?**

Pursuant to the Rules of the Court of Honor of the Bar Association of Pichincha (District of the Capital of the Republic), any agreement or covenant between attorney and client altering or rendering without effect or excusing compliance with the professional duties or obligations established in this internal regulation or containing a waiver of the enforcement thereof, shall be devoid of validity and efficacy.

#### **Is legal privilege subject to limitations?**

Pursuant to Art. 49 of the Rules of the Court of Honor of the Bar Association of Pichincha (District of the Capital of the Republic), they shall apply generally to all members of the Pichincha bar association. When an attorney who is a member of another bar association infrequently practices in Pichincha, these rules shall apply solely to the specific case handled by the attorney in this province.

Similar rules are contained in By-laws of other Bar Associations.

#### **3.1 Among Attorneys**

Is the correspondence between lawyers protected?

Yes, if related to the case

Again, the Rules of the Court of Honor of the Bar Association of Pichincha (District of the Capital of the Republic), contain a section that contains the duty of loyalty. Part of the duty of loyalty is to accept the client's proposal to consult professional specialists in complex situations, without this being taken as a lack of trust. A professional's founded refusal to make such a consultation shall not constitute, however, a lack of ethics. The professional may suggest the convenience of advice, although the ultimate decision will rest with the client. In order to make a report public or include it in the case file, the author of the opinion must give his or her consent.

#### **3.2. 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.

#### **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. In addition, certain rules pertaining to the labour relationship, as provided by the Labour Code, must be observed.

#### **5. PROSPECTIVE**

It is important to note that the norms quoted from the Rules of the Court of Honor of the Bar Association regulate a private association. These rules had greater weight before the legislative reforms that established that, in order to practice a profession, membership with a professional association is not required (previously, such membership was mandatory). Under the prior legislation, an attorney could lose their license if the rules of the association were broken. Now, in practice, the attorney could be disaffiliated or penalized by the association without this necessarily implying a suspension of their professional license. This, however, does not mean that a violation of the professional secrecy would not be subject to penalties.