

# Legal Professional Privilege and Professional Secrecy in Brazil: Overview

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A Practice Note providing an overview of the laws in Brazil relating to the protection available to lawyer-client communications and the best practices for preserving the confidentiality, privilege, and secrecy in those communications in business and commercial situations. In the context of privilege and professional secrecy rules, this Note also considers the definition of lawyers and clients, the impact of a common interest or joint representation on the applicability of privilege, and the application of privilege in an internal investigation or an M&A transaction.

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The concepts of legal privilege, legal confidentiality, and professional secrecy are rooted in the core principle that clients must be able to openly and honestly communicate with their lawyers, and therefore their communications must be protected from disclosure. Although these concepts are recognised by legal systems around the world (though not always by the same name), their nature, scope, and application vary.

In the globalised and interconnected world of today, the provision of legal services is no longer confined to a single jurisdiction, rather it is spread across multiple jurisdictions. Conflicting rules and expectations on privilege and confidentiality can therefore pose great challenges for practitioners involved in cross-border matters, particularly since the protections available to lawyer-client communications may often lack consistency and predictability. As a result, it is important to understand the scope of protection offered by the applicable laws and to exercise restraint and caution in communicating with clients and counterparties.

This Note provides an overview of the law related to:

- Parties' disclosure obligations.
- The rules related to legal professional privilege and professional secrecy.
- Who are considered to be lawyers and clients for the purposes of legal professional privilege and professional secrecy.
- How local courts consider privilege and professional secrecy issues when clients share counsel or a common interest with a third party.
- How a party can protect privileged documents during an internal investigation or in an M&A transaction.

For information on the different approaches to legal professional privilege, and professional secrecy in common law and civil law jurisdictions, see [Practice Notes, Legal professional privilege, legal confidentiality and professional secrecy: Cross-border](#) and [A world tour of the rules of privilege](#) (Law stated date 20-Jul-2021).

## General Disclosure Rules

## Rules of Disclosure in Civil Litigation

There are a number of rights and duties regarding the disclosure of documents (*Articles 396 and 397, Civil Procedure Code (Código de Processo Civil) (Law No. 13.105/2015) (CPC)*). The courts can request, for example, documents from a party or a third party by means such as:

- The use of police authority and force.
- Prosecution of the party.
- Imposition of fines.
- Other legal coercive measures.

(*Article 400, CPC.*)

The rules of disclosure of the CPC specify that the court will not allow a party to refuse to disclose documents if:

- The defendant has a legal obligation to disclose the information/document.
- The defendant has mentioned the document or item during the proceedings, with the aim of proving a certain fact.
- The document, by virtue of its content, belongs to, or relates to both parties.

As a general rule, a party may be excused from disclosing documents when such disclosure:

- Endangers their family business.
- Dishonors the party or anyone related to them.
- Breaches any professional confidentiality rule.
- May result in criminal prosecutions for the party's family.
- In the court's opinion, is unsuitable for that specific situation or there are legal provisions concerning secrecy in that case.

(*Article 404, CPC.*)

## Rules of Specific Disclosure

Brazilian law does not allow general or unqualified requests for disclosure of documents. Any disclosure request must include:

- A characterisation, as complete as possible, of the document or item.
- The purpose of the evidence intended to be produced, pointing out the facts that are related to the document or item.

- The circumstances on which the applicant bases their affirmation that the document or item exists and is in the possession of the adversary party.

*(Article 397, CPC.)*

## **Legal Professional Privilege and Professional Secrecy Rules**

The Brazilian Constitution provides for the fundamental rule regarding professional privilege in Brazil, which is that the lawyer is indispensable to the administration of justice and that their acts in the exercise of their profession are inviolable, within the limits of the law (*Article 133*).

The Code of Ethics and Discipline of the Brazilian Bar Association (Bar Association Code) regulates professional privilege, confidentiality, or professional secrecy.

Legal professional privilege only applies to documents in the hands of a lawyer.

Non-parties are obliged to disclose privileged materials to the court in response to a court order.

### **Nature of Protection**

Whether in non-contentious matters, civil litigation, criminal litigations, proceedings before regulatory authorities, arbitration tribunal proceedings, or employment tribunal proceedings, the same obligations (and exceptions to those obligations) apply.

A lawyer is ethically obliged to maintain full secrecy regarding the client's personal information, unless to do so would severely risk someone's or their own life or honor, or in cases in which confidentiality entails a conflict of interest between the lawyer and the client.

### **Purpose**

#### **Legal Proceedings**

Client-attorney privilege covers any document and/or communication that is related to the practice of advocacy, regardless of whether it is produced for the purpose of legal proceedings or for obtaining legal advice.

#### **Legal Advice**

Client-attorney privilege covers any kind of document and/or communication between the client and their attorney.

## **Scope of Legal Privilege and Professional Secrecy Rules**

### **Communications**

Any document or communication exchanged between an attorney and their client, in the context of legal advice, is protected from disclosure. Federal Law No. 8.906/1994 provides for lawyers' rights to inviolability of their office

or place of work, instruments of work, and written, electronic, telephone and written correspondence, provided it relates to the practice of advocacy.

Evidence of confidential communication is also confidential (*Federal Law No. 8.906/1994*).

Attorney-client privilege protects any document/communication concerning the client and the practice of advocacy, regardless of what is actually exchanged. The lawyer's notes, drafts, and other documents in the context of a legal representation are all subject to legal privilege.

Legal professional confidentiality is inherent to professional practice, and is a lawyer's inalienable duty when receiving powers to advocate. Lawyers should not disclose any confidential act or fact regarding their clients even when giving deposition in a court (*Article 26, Bar Association Code*).

The privilege must not represent a severe risk to the lawyer's or someone's life, nor compromise the lawyer's or a third party's honor, and is not applicable in cases in which confidentiality will entail a conflict of interest between the lawyer and the client.

## **Third Parties**

Whether privilege can apply to communications between a lawyer and a third party depends on the specific circumstances of the case. For example, if a law firm is providing legal advice to a client in the context of an internal investigation and a forensic company has been copied in on such messages, these communications will be subject to attorney-client privilege and should not be disclosed (*Article 3, Federal Law No. 8.906/94*).

Whether privilege can attach to documents that have been created by a third party also depends on the specifics of the case. For example, if a law firm is co-ordinating an internal investigation and supervises all the work performed by a forensic company in the context of such investigation, the work product will be subject to attorney-client privilege (*Article 3, Federal Law No. 8.906/94*).

## **Confidentiality**

Any communication between a lawyer and their client is privileged.

A breach of confidentiality is considered a disciplinary infraction and will be heard at the Court of Ethics of the Brazilian Bar Association (*Article 34, VII, Federal Law No. 8.906/94*). A breach of confidentiality that causes any harm or damage to a party/client can also give rise to a claim for damages.

In addition, in the context of a criminal investigation, communications subject to attorney-client privilege cannot be used against the defendant.

## **Adverse Inferences**

The fact that privilege is claimed cannot be used as evidence or as a source for further allegations.

## **Exceptions**

There are no exceptions to the application of attorney-client privilege, except where non-disclosure of privileged documents would entail severe risks to a person's or the lawyer's life or honor and where confidentiality leads to

a conflict of interest between the lawyer and the client (see *Legal Professional Privilege and Professional Secrecy Rules*).

## Defining the Client

The client is the legal or natural person that gives power of representation to an attorney, creating with them a relationship of rights and duties, including the right of privilege.

The client is the person legally represented by the attorney, meaning that the power of the attorney is restricted to those who have contracted such bond.

Any legal entity can be represented by a lawyer. Only the statutory directors/partners are considered to be the client, as they represent the interests of the legal person. Client-attorney privilege does not cover other employees.

There are no additional practical considerations that corporate clients must keep in mind before engaging in protected communications with their lawyer.

## Defining the Lawyer

Only persons enrolled with the Brazilian Bar Association can practise advocacy in Brazil (*Article 3, Federal Law No. 8.906/1994*).

## Lawyers' Employees

Legal privilege only applies to lawyers enrolled with the Brazilian Bar Association. Trainees, legal clerks, and paralegals are not able to receive powers to practise advocacy.

## Foreign Lawyers

The Brazilian Bar Association allows the enrolment of foreign lawyers (*Article 8, Federal Law No. 8.906/94*). Once a foreign lawyer is enrolled with the Brazilian Bar Association, they have the same rights and duties as a Brazilian lawyer. Therefore, a foreign attorney must comply with the Bar Association Code and will be subject to attorney-client privilege. Foreign lawyers that are not enrolled in the Brazilian Bar Association are not allowed to practise advocacy, and are therefore not subject to attorney-client privilege.

## In-House Lawyers

In-house lawyers and consultants enrolled with the Brazilian Bar Association are covered by attorney-client privilege.

Legal advice given by an in-house lawyer of a parent company to a subsidiary company in the same group is protected by attorney-client privilege.

## Other Professionals

A professional who is not enrolled with the Brazilian Bar Association or is not providing legal advice will not be subject to attorney-client privilege. The situation is different when that professional is working under the supervision of a lawyer (for example, performing transactional tests in the context of a risk assessment or internal investigation).

## Duration of Privilege

Documents or communications deemed privileged continue to be privileged in subsequent matters. However, legal exceptions may apply, see [Exceptions](#).

## Loss and Waiver of Privilege

### Scope of Waiver

Attorney-client privilege is a client's constitutional right, deriving from the client's right of defence, and a lawyer's duty. The attorney cannot waive the privilege, except in cases in which there is:

- A serious threat to life.
- A serious threat to the honor of the attorney.
- A conflict of interest between the lawyer and the client.

Privilege will be lost if the communication poses a serious threat to a person's or the attorney's life or honor, and if the communication sets a conflict of interest between the attorney and the client (see [Exceptions](#)).

If privileged information is disclosed by mistake, the Court of Ethics of the Brazilian Bar Association will determine whether and how the lawyer may be sanctioned for their infraction. However, if the breach results in any harm or damage to a party or client, it can also lead to a claim for damages. In the context of a criminal or civil lawsuit, information subject to attorney-client privilege cannot be used as legal evidence in court. If a summary of the document or communication is sent to the other party by accident, the other party cannot presume that the document or communication is bound by attorney-client privilege. Therefore, the interested party will have to claim for privilege to prevent use of the material.

What happens where a document subject to privilege has been disclosed to a limited number of people but has not been made available to the general public depends on the client's interests and previous authorisation. In the event of authorised disclosure to a specified number of people for the purpose of assisting the client's interests, there is no breach or loss of client-attorney privilege.

Disclosure for the sake of compliance does not lead to breach or loss of client-attorney privilege.

The client can waive privilege in part of a document or in a document that forms part of a series of interconnected documents, if this does not affect another person's rights.

See also [Partially Privileged Documents](#).

## Disclosure to Entities with a Common Interest

Legal professional confidentiality is inherent to professional practice and is a lawyer's inalienable duty. Lawyers must not disclose any confidential act or fact regarding their clients even when giving deposition in a court or when the client authorises disclosure (*Article 26, Bar Association Code*). Therefore, privilege will be preserved even if a confidential communication is voluntarily disclosed to a third party by the client.

All written communications between lawyer and client are presumed to be confidential and cannot be revealed to third parties by the lawyer (*Article 27, Bar Association Code*).

However, if the parties do not sign a confidentiality agreement, privilege will be presumed waived by the sharing party in relation to the receiving third party. Privilege will also be waived if the party chooses to use the privileged document in the legal proceedings for which the document has been created, if the proceedings are not conducted in private.

Brazilian law does not recognise common interest privilege. Therefore, common interest cannot be inferred from conduct. If the parties want to preserve any confidential information shared between them, they must enter into an agreement in writing that sets out their specific obligations.

## **Disclosure to Entities Represented by the Same Counsel**

### **Joint Retainer**

All information shared by a client with their lawyer in Brazil is considered privileged. The lawyer cannot disclose any piece of information. However, parties that retain the same lawyer to advise them on a legal matter can share privileged communication between them without waiving privilege because a lawyer's duty of confidentiality is absolute. Additionally, the case law of the Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Econômica*) (CADE) indicates that parties cannot share privileged information that may be in breach of antitrust legislation, that is, competitively sensitive information.

### **Joint Interest**

Parties can share privileged communication between them without waiving privilege if they share a joint interest in the subject matter of the privileged communication. However, CADE case law indicates that parties cannot share privileged information that may be in breach of antitrust legislation, that is, competitively sensitive information.

## **Partially Privileged Documents**

Where a document contains some privileged and some non-privileged information, the whole document is protected from disclosure (*Article 27, Bar Association Code*).

## **Privilege in Unique Contexts**

Privilege against self-incrimination and spousal privilege in the Brazilian courts are recognised by the CPC and the Brazilian Federal Constitution.

A party in a lawsuit is not obliged to testify on:

- Criminal or vile facts that are attributed against the party.

- Facts in respect of which, by status or profession, the party must maintain secrecy.
- Facts about which the party cannot respond without harming the honor of their spouse, companion, or a relative in successive degree.
- Facts that endanger the life of a deponent or of the persons referred to in the bullet point above.

*(Article 388, CPC.)*

A witness who is not a party is not required to testify on facts:

- That may cause them serious harm, as well as their spouse or companion and their consanguineous or related relatives, in a straight line or collateral, up to the third degree.
- In relation to which, because of the witness' status or profession, the witness should maintain confidentiality.

*(Article 448, CPC.)*

Every party also has the right not to self-incriminate *(Article 5, Section LXIII, Brazilian Federal Constitution)*.

## **Overriding Powers of the Court**

The protections of privilege against self-incrimination and spousal privilege do not apply to legal cases related to personal status and family *(Article 388, CPC)*. Therefore, in these cases, any court can override privilege and determine that the party should testify.

## **Internal Investigation**

Under the Bar Association Code, confidentiality is a public matter that must be respected by the state, the client, and the attorney, whether in-house or independent. All communications and acts of the attorney with, or in the interest of, the client are protected by attorney-client privilege, including interviews with employees and final reports to the client's board. Whether a decision to obtain legal advice or to pursue litigation has been taken is irrelevant, as the attorney's duty of confidentiality is absolute.

The lawyer can only waive privilege in cases of severe risk to a person's or their own life or honor, and in cases where the confidentiality entails a conflict of interest between the lawyer and the client.

While confidentiality is an absolute obligation of the attorney, client, and the state, there are some measures that can help to ensure that privilege associated with the documents and information of an internal investigation is preserved, such as marking materials as "privileged and confidential" and ensuring that the attorney is involved in the production and handling of the documents and information.

## **M&A Transactions**

Privileged information can be shared during the course of a transaction if the parties sign a contractual undertaking, such as a non-disclosure agreement or a confidentiality agreement. Parties must define what type of information will be treated as confidential and all privileged information will retain its status.



The most frequent steps taken by the seller management to protect its privileged documents from the buyer before closing are signing a non-disclosure agreement or a confidentiality agreement. The most common clauses are discussed below.

### **Definition of Confidential Information**

All the information, documents, and records relevant to the business and activities of the target company required for the evaluation to be conducted by the buyer and its advisers, including the business, contractual, legal, and financial information of the target company.

### **Authorised Persons**

The internal representatives of the buyer and seller responsible for the project (directors, managers, employees, and others), as well as all the consultants, lawyers, accountants, and auditors involved in the process. It is always important to consider the number of authorised persons, given that chances of leakage within companies tend to increase as more people are involved in the process. In addition, since the outcome of the statutory audit is always reflected in reports to be provided by the buyer's advisers, it is also important to define who can have access to the report; in cases of acquisitions involving buyers that are investment funds, some investors may be included.

### **Cases of Disclosure (Mandatory or Otherwise) of Confidential Information**

Case law establishes that information is normally not considered confidential when it is:

- Already public knowledge, or becomes public knowledge without participation of the receiving party.
- Known to the receiving party before it has been shared.
- Disclosed to the receiving party by third parties that have no relation with the disclosing party.
- Independently developed by the receiving party or any of its representatives without reference or use of any confidential information.

In addition, the receiving party is generally authorised to disclose confidential information if disclosure is required by administrative or judicial order (or rule), provided that the administrative or judicial order (or rule) is valid and has been issued by a competent authority. It is not possible to file appeals or to take judicial or administrative action against such determination or to preserve the right of the party not to disclose the information requested.

### **Devolution or Destruction of Confidential Information**

The confidentiality agreement may require the receiving party to destroy the information or return the documents provided by the disclosing party. The advisers will tend to resist this, as for internal compliance purposes they need to back up information as when reports to clients have already been issued. These advisers should retain this information for the duration of the limitation period of an eventual action (*Civil Code (Código Civil) (Law No. 10406/2002)*).

### **Indemnity and Other Contractual Remedies**

It is very common to provide that the party who breaches the confidentiality agreement will be obliged to reimburse and hold harmless the other party for any and all damages caused, and to include a penalty (generally non-compensatory) to ensure quicker resolution (without calculating the actual losses).

Generally, the parties also establish the right to specific enforcement and injunction measures as a remedy for breach, as monetary reparation may not be sufficient, depending on the importance of the confidential information involved.

### **Cross-Border Matters**

In investigations or disputes that stretch across multiple jurisdictions, the local courts usually apply Brazilian law to determine privilege associated with a document.

Where the parties chose to apply a foreign rule on privilege that conflicts with local laws, the court must apply the chosen rule. However, the court will not apply the chosen rule where to do so would breach national sovereignty, public order, or morality (*Article 17, Law of Introduction to the Civil Code and the Code of Civil Procedure*).

A document that is not privileged in the country in which it was created or is located may be considered privileged in Brazil under the Bar Association Code, depending on the circumstances of the case.

### **Recent Developments**

The most recent development on privilege in Brazil is the adoption of the new Bar Association Code, which was enacted in September 2016.

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