Global Attorney-Client Privilege Guide - Philippines

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# 01 - Discovery

## What disclosure/discovery is required in litigation?

Under the Philippine Rules of Civil Procedure, where a party has not been served with interrogatories, they generally cannot be compelled by the other party to give testimony in court or a deposition pending appeal. The exception to this is where a court allows the testimony or deposition for good cause and to prevent a failure of justice.

The Philippine Supreme Court has issued guidelines requiring litigants to make use of interrogatories to parties, requests for admission by adverse parties, and depositions. In civil cases, within one day from receipt of the complaint, the court should issue an order requiring the parties to avail themselves of: (i) interrogatories to parties; and (ii) requests for admission by the adverse party of the genuineness of any material and relevant document and the truth of any material and relevant matter of fact; or (iii) at their discretion, make use of depositions or other measures. Such other measures may include the production or inspection of documents or things upon the motion of any party showing good cause, or the examination of the physical or mental condition of a party where this is an issue in controversy.

In practice, however, these rules are not strictly enforced by Philippine courts.

# 02 - Type of privilege

## Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Attorney-client privilege is embodied in the Philippine Rules of Court ("**Rules**") and the Code of Professional Responsibility for lawyers ("**Code**").

Under the Rules, attorneys or persons reasonably believed by the client to be licensed to engage in the practice of law cannot, without clients' consent, testify or be examined as to any communication made by the client to them or as to their advice given on such a communication in the course of, or with a view to, professional employment; nor can an attorney's secretary, stenographer or clerk or other persons assisting the attorney testify or be examined, without the consent of the client and the attorney, concerning any fact the knowledge of which has been acquired in such capacity. The Code requires a lawyer to preserve the confidence and secrets of their client even after the attorney-client relationship is terminated. It further provides that a lawyer shall not reveal a client's confidences or secrets except:

If the services or advice of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud

As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate or by inter vivos transaction

As to a communication relevant to an issue of breach of duty by the lawyer to their client or by the client to their lawyer

As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness

As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients, unless they have expressly agreed otherwise

In order for a communication or information to fall under the coverage of attorney-client privilege, the following requisites must be present:

**There must be an attorney-client relationship**

The relationship of attorney and client must exist at the time the communication is made. This relationship exists when a client employs an attorney for the purpose of obtaining legal services, advice or opinion concerning the client's rights or obligations relative to the subject matter of the communication. The test is whether the communications are made to an attorney with a view to obtaining professional assistance or advice.

**There must be communication between the client and the attorney**

The privilege is not confined to verbal or written communications made by the client to the attorney. It also includes information communicated by the attorney to the client by actions, signs, or other means.

The communication must be made in confidence for the purposes of the attorney-client relationship. Confidentiality must be contemplated. Thus, communications made by the client to the lawyer in the presence of third parties who are not agents of either the client or the attorney are not covered by the privilege.

The work product of a lawyer, including effort, research and thought, contained in the lawyer's files, is privileged.

**Communication must have been made in the course of or with a view to professional employment**

A communication to an attorney is said to be in the attorney's professional capacity when the client makes the communication with the purpose of obtaining legal services, advice or opinion concerning the client's legal rights, obligations or duties relative to the subject matter of the communication. The communication must be connected with the matter for which the attorney has been employed. It is not necessary that the communication be made in connection with pending or current litigation.

In the absence of any of the requisites detailed above, the communication or information ceases to be covered by the attorney-client privilege rule.

# 03 - Scope of privilege

## Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

The law protects clients from the effect of disclosures made by them to their attorneys in the confidence of the legal relationship.

However, a distinction should be made between a copy held by a client and a copy that lands in the possession of third parties. There is jurisprudence in the Philippines to the effect that a copy of such communication that falls into the hands of third parties, whether legally or illegally obtained, is not covered by privilege.

## Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Philippine law does not distinguish between external or internal counsel in the application of privilege.

However, with respect to internal counsel, since they frequently perform both a business and a legal function for their employer, only internal counsel's communications in their legal role may be subject to the protection of attorney-client privilege. In one case, the Philippine Supreme Court held that attorney-client privilege cannot be extended to communications made to a corporate secretary and general counsel in the absence of evidence as to which "hat" they are wearing at the time the communications are received. The privilege also does not apply where legal services are so intertwined with business activities that a clearer distinction between the two is impossible to discern.

## Does privilege extend to internal communications between in-house lawyers?

Philippine law does not distinguish between external or internal counsel in the application of the privilege. Thus, privilege would also extend to internal communications between in-house lawyers, provided each lawyer has an attorney-client relationship with the employer client and the communication is made for the purpose of providing legal advice to that client or clients. There is no difference between in-house lawyers and external lawyers in this regard.

## Are foreign lawyers recognized for the purposes of privilege?

The client may invoke the attorney-client privilege rule when their foreign lawyer is asked to testify on matters covered by privilege. This is consistent with the purpose of the rule of encouraging clients to make full disclosure to their attorneys, and to place unrestricted confidence in them in matters affecting their rights and obligations.

## Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The Philippine Rules of Court are specific as to who may be covered by privilege, making particular reference to attorneys. As such, nonlawyers such as accountants and tax consultants providing legal advice are not covered. Indeed, in the case of accountants, there is legislation to the effect that accountants may be compelled to disclose confidential information when legally required to do so.

# 04 - Sharing documents with third parties

## In what circumstances (if any) can a document be given to a third party without losing protection?

A document may be given by an attorney to a third party without waiving privilege or losing confidentiality when such is either:

Required by law

Necessary to collect legal fees or to defend the lawyer, the lawyer's employees or associates, or by judicial action

Attorney-client privilege may be waived either expressly or impliedly. Implied waiver may result from either:

The client's failure to object to the attorney's testimony regarding a privileged matter

The client giving evidence on the privileged communication

The privileged communication falling into the hands of the adverse party

The client cross-examining the attorney in relation to the privileged communication

When privilege has been waived, the attorney may give evidence in relation to matters confidentially communicated by the client, or the attorney may be compelled to testify as to the statements and admissions of their client.

# 05 - Investigations

## Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

Generally, none. Attorney-client privilege is set out in the Philippine Rules of Court, which apply to civil and criminal cases. The privilege extends to regulatory inspections or administrative investigations, as it is common for government agencies to adopt these Rules as a supplement to their own procedural regulations.

## Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Notes of interviews with employees and other documents produced during investigations should be covered by privilege if the employees act in their capacity as such and on behalf of the client.

# 06 - Regulatory investigations

## Can governmental regulators require a privileged document to be provided to them?

A regulator generally does not have the power to require privileged documents to be provided.

# 07 - Recent issues

## What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

There have been no recent issues concerning privilege in the Philippines.

# 08 - Authors

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