

WIPO/AIPPI Conference on Client Privilege in Intellectual Property Professional Advice

Thursday 22 May 2008 – GENEVA

**Scope of privilege (or its equivalent) and issues in some Latin American
countries, namely Chile, Argentina, Brazil, Colombia, Peru.**

Speaker: CRISTOBAL PORZIO (Chile) .

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I would like to thank Mr. Michael Dowling, chairman of our Q 199 Committee for his kind invitation to attend this meeting in representation of Chile. I would also like to thank WIPO for hosting and organizing this meeting and for giving us the opportunity to address the problem of privilege.

In view of the fact that the topic of this meeting concerns every possible country, I took the liberty to prepare an overview of the situation in my country, Chile, but also of the situation in Argentina, Brazil, Colombia and Peru. This should allow us to have a general impression of what is happening in our subject in the main countries of the Latin American continent.

Before entering into the matter, I would like to give my special thanks to the following colleagues and friends who were kind enough to give me very useful and complete information regarding the present situation in their countries:

Mr. Juan Carlos Ojam partner of "Mitrani, Caballero y Ojam" from Argentina;

Mr. Gustavo Leonardos partner of "Momsen y Leonardos" from Brazil;

Mr. Jorge Chávarro partner of Cavelier Abogados from Colombia;

Mr. Gustavo Heraud partner of "Fernández, Heraud y Sánchez Abogados "from Peru".

From overseas, all Latin American countries tend to be seen as countries with the same situation. However, even if most of them obey to a civil law system, they all have each particularity and not necessarily a same solution for solving the matter we are dealing with today. But it is to be said that the systems ruling the countries indicated above do not provide for a "pre-trial discovery" as the one established by the Law and practice of the United States. Therefore the issue of the "attorney client privilege" will have an impact mainly in negotiations, in trials once legal procedures have started, in the issue regarding use of privileged information, in the establishing possible conflicts of interests in patent matters, etc. I have prepared a questionnaire which I will respond on a country by country basis.

The countries included in this document are in alphabetical order: Argentina, Brazil, Chile, Colombia and Peru. Before entering into the details of the situation in each of them, it is to be said that probably due to the Roman origin of their legislations they may not all have specific regulations regarding privilege in IP matters, but all have a protection for the secrets given in the frame of a mandate of the ones for which the secret and confidentiality is of the essence, or in the frame of a power, and especially of a power of attorney. For an easier treatment of the data and in order to be able to establish parallels between the different countries's situations, we will address the legal treatment of the following issues:

- 1.- What IP advisers are there in South American countries? Are they always lawyers?
- 2.- Does privilege apply for client's communications with IP advisers?
- 3.- What is the scope of such a privilege? Is it applicable to non-lawyers?
- 4.- Is there any difference is a national adviser or an overseas adviser?
- 5.- Should amendments be incorporated to the national laws or are the said laws sufficient as they are?

Entering now in the analysis country by country, we can answer the questions raised here above in the following manner:

CHILE

(1) What IP advisers are there in Chile and what are their qualifications? Does privilege (or something equivalent to it) now apply to clients' communications with IP advisers?

a.- In Chile the "IP adviser profession" does not exist as such in the sense that the Law does not provide for Chilean Law for IP professionals as it does for doctors, lawyers, engineers. Practice indicates that most of the IP Practitioners are lawyers, few are engineers and other are paralegals.

b.- Practitioners are not the subject of a specific exam nor qualifications for practicing, but have learnt their job in private practice and/or working at the Patent and Trademark Office and/or assisting to specific courses given by Chilean and/or foreign Universities.

c.- The Law provides for specific situations or procedures that are considered as contentious and for which only lawyers can appear before the Patent and Trademark Office and or Court, in representation of a person.

d.- ACHIPI (Chilean Association of Industrial Property), to which membership is voluntary, concentrates an important number of practitioners or at least the main firms of Chile, devoted to IP.

e.- Lawyers are bound by "secreto profesional" or "profesional secret". In consequence the communications they have with clients and vice versa are protected by "secreto profesional" which can be somehow assimilated to "attorney client privilege". In addition the scope of this obligation is enlarged to cover also communications received from third parties and/from other attorneys. Third parties cannot force disclosure of such communications.

It is to be said that there are two exceptions to this principle: i.- a lawyer accused by his client or by another lawyer will be entitled to reveal a secret received from the accuser or from a third party, provided such a disclosure is made in benefit of his own defense; ii.- the intention of committing a crime entrusted by a client to his lawyer, will not fall within the privilege of secret and in addition, the lawyer will have to reveal such intentions in order to avoid the crime.

f.- The Civil Code rules the "Mandate contract" and makes a special reference to "professional services".

g.- In addition, it is to be said that several laws, especially in the tax field, give strong powers to the Chilean Internal Revenue Service (Servicio de Impuestos Internos) to somehow have access to information that could even be protected by the attorney-client privilege. This is not an IP issue. However, it is to be said that in case IP rights are part of contracts that may be affected

by an investigation of the SII in search of fraud or crime, the powers of the SII will be rather broad and attorney-client privilege "may not be sufficient to keep a secret".

(2) What is the scope of privilege in Chile? What advantages does that bring?

The sole privilege ruled as such by the law is the one existing for attorneys. The non-lawyers practitioners will be ruled by the Civil mandate and eventually by the clauses of a contract they may have with client, and / or with their employer.

In addition to this, practice indicates that the privilege gives confidence to a client to speak openly with his lawyers and reveal his secrets with the intention to find with his lawyer the best possible manner to protect such secrets, before entering the market.

Practice has also shown that this openness or candidness is very clear when there is a lawyer among the IP practitioners assisting a client. In other words, it appears that the professional secret and/or client-attorney privilege to which the lawyer is bound tends to cover the rest of the team working under the lawyers' roof, independently of the background of each of the members of the team. However the enforcement of a breach of secret made by a non-lawyer who is employed by a lawyer or lawyer's firm, will be complicated and probably very time consuming, especially if there are no specific provisions in the labour contract regarding confidentiality and punishment in case of breach.

(3) What practical complications are there for clients in maintaining privilege in communications with IP advisers? Any difference if IP adviser is based in Chile or overseas?

There seem not to be any particular complication. Practice has shown that a client faced to a problem consisting in having his IP attorney, lawyer or non-lawyer, revealing a secret he should not reveal, will normally not sue his attorney but will prefer to find very quickly better hands where to put his future secrets.

There are no differences, nor different treatments for national advisers or overseas advisers. However, there is a point developed under next point (4).

(4) What recognition of client privilege is there in Chile in the communications between clients in your country with overseas IP advisers and in particular –

No difference with national (Chilean advisers) in the sense that information entrusted under a veil of confidence will force the parties to such a secret. However, this situation has a material problem or point of discussion, consisting in the fact that the sole lawyers admitted to practice law in Chile are the Chilean lawyers, and the Code of Ethics is applicable to Chilean lawyers only. Therefore if a foreign lawyer travels to Chile to give advice to a Chilean company (Chilean

or Chilean branch of a foreign company), legally speaking, he will not be allowed to give lawyer's advice in Chile. The latter, even if de facto he will, after entering in Chile probably as "tourist" and spending two or three days in the Chilean territory. On the other hand, in case the advice were to be given to the Chilean company, by the foreign lawyer by mail or letter, no sanctions would apply if the Chilean company were to reveal such advice received, unless a contract between the Chilean company and the foreign adviser were to rule such a situation.

(5) Describe the effect of any leading published court decisions about the limits of the application of privilege (or its equivalent) for clients of IP advisers in Chile and overseas, including any that deal with whether privilege applies or not, to IP non-lawyers.

There do not seem to be decisions on the IP front. There are decisions issued by the Chilean Bar against lawyers who have infringed their obligation to keep secret, in fields other than IP.

(6) Is there a need for a change in the law relating to privilege (or its equivalent) in Chile?

Privilege of lawyers is rather strong. The privilege for the rest of the professionals commonly involved in IP practice appears to be rather vague from what has been said in the answers to the former questions. However, it is also to be said that legally speaking the "IP Practitioner profession" is not established by Law but practice. In addition, as indicated above the pre-trial discovery does not exist in the manner conceived in the United States. Therefore a yes or a no cannot be given to this answer before a prior discussion that we hope to have during our meeting in Geneva. However at this stage, it appears that the concept of Chilean IP advice being compared in another country with local advice given in the other country and not being

treated by the courts of that place as not subject to disclosure in the proceedings there, is a matter of concern in Chile. Therefore there would be a need of harmonisation of IP adviser privilege internationally.

(7) If so, do you consider that Chile needs a treaty in accordance with the AIPPI CIPPPA proposal (assuming its satisfactory refinement)?.

This question is to be answered together with question No. 6. In any case and as indicated under point (6) a treaty on the matter would be useful for Chile and would be a good tool for harmonization.

¹. Art. 10 del Código de Etica Profesional. "Guardar el secreto profesional constituye un deber y un derecho del abogado. Es hacia los clientes un deber que perdura en lo absoluto, aún después que les haya dejado de prestar sus servicios; y es un derecho del abogado ante los jueces, pues no podría aceptar que se le hagan confidencias, si supiese que podría ser obligado a revelarlas. Llamado a declarar como testigo, debe el letrado concurrir a la citación y con toda independencia de criterio, negarse a contestar las preguntas que lo lleven a violar el secreto profesional o lo expongan a ello.

² Art. 11 del Código de Etica Profesional. "La obligación de guardar el secreto profesional abarca las confidencias hechas por terceros al abogado, en razón de su ministerio, y las que sean consecuencias de pláticas para realizar una transacción que fracasó. El secreto cubre también las confidencias de los colegas. El abogado, sin consentimiento previo del confidente, no puede aceptar ningún asunto relativo a un secreto que se le confió por motivo de su profesión, ni utilizarlo en su propio beneficio.

³. Art. 2116 del C.C. "El mandato es un contrato en que una persona confía la gestión de uno o más negocios a otra, que se hace cargo de ellos por cuenta y riesgo de la primera. [...].

⁴ Art. 2118 del C.C. "Los servicios de las profesiones y carreras que suponen largos estudios, o a que esa unida la faculta de representar y obligar a otra persona respecto de terceros, se sujetan a las reglas del mandato.

Art. 2125 del C.C. "Las personas que por su profesión u oficio se encargan de negocios ajenos, están obligadas a declarar lo más pronto posible si aceptan o no el encargo que una persona ausente les hace; y transcurrido un término razonable, su silencio se mirará como aceptación."

ARGENTINA

(1) What IP advisers are there in Argentina and what are their qualifications? Does privilege (or something equivalent to it) now apply to clients' communications with IP advisers?

IP advisers can be divided in two types, namely IP lawyers and IP agents.

a.- IP Lawyers

Person with the same qualifications than the ones of a "normal non-specialized lawyer".

The lawyer-client privilege is expressly protected by the rules that govern the Law practice in the country. In the Argentine legal system, these rules are established by the Provinces; more specifically, by the Provincial Congresses and the local *Colegios Públicos de Abogados*, or Bar Associations. Despite so, these rules are generally homogeneous in all jurisdictions.

As an example, we will cite the rules regulating the Law practice in the City of Buenos Aires. Law 23.187 establishes that the lawyer-client privilege is both a duty and a right for a lawyer. Moreover, the Ethics Code of the City of Buenos Aires Bar Association rules that the lawyer-client privilege is an inherent duty of the practice of Law, and that a lawyer must keep it except in two situations: a) when the client authorizes him to reveal the information, b) when revealing information for the lawyer's own defense.

Violation of client privilege can result in professional disciplinary sanctions, such as the suspension of the professional license or even the disqualification for the lawyer license in the respective jurisdiction.

b.- IP Agents

IP agents are individuals that have passed an IP agent examination prepared by the INPI (*Instituto Nacional de la Propiedad Industrial*, or Patents and Trademarks Office) and who are in possession of IP agent license.

By INPI regulations, an IP agent is enabled to perform a number of tasks that only a lawyer would be able to perform in other areas of the Law (such as filing writs, filing administrative appeals and representing the client before the INPI on general matters).

The client privilege is also expressly protected by the rules that govern the practice of IP Agents. INPI Resolution N° P-101, which establishes the "Rules for the Industrial Property Agent Practice", specifically includes the protection. Although this rule only has been in effect since

April 2006, it is possible to argue that it was an *implicit rule* or a general principle that governed the IP Agent practice before that date.

Violation of client privilege by IP agents can also result in professional disciplinary sanctions.

In addition to the specific legal frameworks described above, the client privilege is also protected by the Penal Code (Criminal Law) which states in its article 156, a fine in addition to the disqualification for the lawyer license, to violators of the duty of confidentiality. This rule is rather broad and applies to lawyers and physicians. However its broadness makes us reasonably consider that it could include IP agents.

Moreover, violation of the client privilege can bring monetary sanctions for both IP lawyers and agents, in view of the application of the general Argentinean Civil liability framework for harmful conduct.

(2) What is the scope of privilege in Argentina? What advantages does that bring?

The privilege is very broad in scope. There is a consensus on the fact that the privilege includes all information exchanged between the lawyer and the client and all communications between the lawyer and third parties that relate to the client's case. The privilege allows a lawyer to refrain from testifying in a criminal court, and has very few exceptions, such as those mentioned in the answer to former Question number 1.

Privilege for IP agents is brand new since it applies in Argentina since 2006. For this reason, one could reasonably maintain that the IP agent-client privilege should be interpreted under the light of the principles and jurisprudence that rule the lawyer-client privilege. As a consequence, it can be stated that the IP agent-client privilege is also very broad in scope.

The privilege is a good tool that allows clients to reveal all relevant information to their IP advisers, and in consequence it will permit IP advisers to perform a better task.

(3) What practical complications are there for clients in maintaining privilege in communications with IP advisers? Any difference if IP adviser is based in Argentina or overseas?

There are no special practical complications for maintaining the privilege.

(4) What recognition of client privilege is there in Argentina in the communications between clients in your country with overseas IP advisers and in particular –

There is no different recognition of client privilege in the communications between clients in our country with overseas IP advisers and local IP advisers.

(5) Describe the effect of any leading published court decisions about the limits of the application of privilege (or its equivalent) for clients of IP advisers in Argentina and overseas, including any that deal with whether privilege applies or not, to IP non-lawyers.

Unfortunately, there are no published court decisions that deal with the client privilege for IP lawyers or IP agents yet.

(6) Is there a need for a change in the law relating to privilege (or its equivalent) in Argentina?

Apparently NO.

⁵ It is interesting to mention the cases of the provinces of Santiago del Estero and Neuquén, which Provincial Constitutions include the privilege protection. See Constitution of Santiago del Estero, art. 52 and 53, and Constitution of Neuquén, art. 68.

⁶ **Ley 23.187. "Art. 6.–** Son deberes específicos de los abogados, sin perjuicio de otros que se señalen en leyes especiales, los siguientes: [...] f) Observar con fidelidad el secreto profesional, salvo autorización fehaciente del interesado. **Art. 7.–** Son derechos específicos de los abogados, sin perjuicio de los acordados por otras disposiciones legales, los siguientes: [...] c) Guardar el secreto profesional."

⁷ **Código de Ética del Colegio Público de Abogados de la Ciudad de Buenos Aires. "CAPÍTULO III. Deberes fundamentales inherentes al ejercicio de la abogacía. Art. 10.** Son deberes inherentes al ejercicio de la abogacía: [...] h) El abogado debe respetar rigurosamente todo secreto profesional y oponerse ante los jueces u otra autoridad al relevamiento del secreto profesional, negándose a responder las preguntas que lo expongan a violarlo. Sólo queda exceptuado: a) cuando el cliente así lo autorice; b) si se tratare de su propia defensa."

⁸ See, for example, Ley 23.187, art. 45.

⁹ There are further requirements to obtain the IP agent license, such as those established in **INPI Resolution P-101, Annex, art. 2:** "a) Ser mayor de edad o menor emancipado, con residencia en el territorio de la República Argentina, b) Poseer título secundario oficialmente reconocido, [...] d) Acreditar ausencia de antecedentes penales con relación a los delitos mencionados en los incisos b) y c) del art. 3°

del presente reglamento, mediante certificación emitida por el Registro Nacional de Reincidencia., e) Abonar el arancel de matriculación, f) Declarar bajo juramento no hallarse alcanzado por alguno de los impedimentos establecidos en el art. 3º, g) Denunciar su domicilio real y todo cambio del mismo y constituir el legal dentro del ámbito de la Ciudad Autónoma de Buenos Aires”.

¹⁰ See INPI Resolution P-101, Annex, art. 4.

¹¹ **Resolución INPI P-101, Anexo. “ARTICULO 5º:** Deberes: Los Agentes de la Propiedad Industrial deberán observar en todo momento un desempeño profesional acorde con la importancia de las tareas que les han sido confiadas, encontrándose especialmente obligados a: [...] b) Guardar confidencialidad respecto a toda la información reservada recibida en el ejercicio de su profesión, con motivo del asunto encomendado.”.

¹² See INPI Resolution N° P-101, Annex, art. 7.

¹³ **Código Penal. “ARTICULO 156.** - Será reprimido con multa de pesos mil quinientos a pesos noventa mil e inhabilitación especial, en su caso, por seis meses a tres años, el que teniendo noticia, por razón de su estado, oficio, empleo, profesión o arte, de un secreto cuya divulgación pueda causar daño, lo revelare sin justa causa.”

¹⁴ See art. 512, 902, 909 and 1109, Argentine Civil Code.

¹⁵ See, for example, Azerrad, M.E, *Ética y secreto profesional del abogado*, Buenos Aires, Ed. Cathedra Jurídica, 2007, pp. 45-48.

¹⁶ **Código Procesal Penal. “Deber de abstención. Art. 244.** - Deberán abstenerse de declarar sobre los hechos secretos que hubieren llegado a su conocimiento en razón del propio estado, oficio o profesión, bajo pena de nulidad: [...] los abogados, procuradores y escribanos [...] Sin embargo, estas personas no podrán negar su testimonio cuando sean liberadas del deber de guardar secreto por el interesado, salvo las mencionadas en primer término. Si el testigo invocare erróneamente ese deber con respecto a un hecho que no puede estar comprendido en él, el juez procederá, sin más, a interrogarlo.”

BRAZIL

(1) What IP advisers are there in Brazil and what are their qualifications? Does privilege (or something equivalent to it) now apply to clients' communications with IP advisers?

The profession of a "Patent & Trademark Agent" ("Agentes da Propriedade Industrial", hereinafter API) is recognized by law and APIs are entitled to give advice in IP matters as well as to represent clients before the BPTO – Brazilian Patent & Trademark Office. The ones who are willing to be enrolled at the BPTO Official Register of APIs need to be successful in an examination given before the BPTO. However, lawyers admitted to the Brazilian Bar, can be automatically enrolled as APIs, without any additional examination.

Lawyers admitted to Bar in Brazil are also fully qualified to give advice in IP matters as well as to represent clients before the BPTO. APIs that are not lawyers have in many cases an Engineering degree, although this is not a legal requirement.

Privilege applies to both lawyers and APIs.

It is to be noted that the Brazilian Criminal Procedure Code (Section 297) exempts from the duty of giving testimony anyone who must keep privilege due to his profession and the Brazilian Civil Procedure Code has a similar provision (Section 406, II).

Lawyers are bound to secrecy due to strict guidelines contained in the "Estatuto da Advocacia", the Federal law that rules the profession of lawyers. That APIs are also bound to secrecy is clear from the Code of Conduct of APIs enacted by the BPTO through Normative Act 142, of Aug. 25, 1998¹.

(2) What is the scope of privilege in Brazil? What advantages does that bring?

The broadest possible scope but criminal acts committed with the assistance of lawyers and APIs are not covered by privilege and documents evidencing such criminal acts are not covered by privilege.

It is not clear for us that these are "advantages" to anyone. Privilege is a matter of fact in a professional relationship.

(3) What practical complications are there for clients in maintaining privilege in communications with IP advisers? Any difference if IP adviser is based in Brazil or overseas?

None.

(4) What recognition of client privilege is there in Brazil in the communications between clients in your country with overseas IP advisers?

There is no case law about this issue but it is widely understood that the same privileges apply to foreign IP advisers.

(5) Describe the effect of any leading published court decisions about the limits of the application of privilege (or its equivalent) for clients of IP advisers in Brazil and overseas, including any that deal with whether privilege applies or not, to IP non-lawyers.

We are not aware of any court decision dealing with this matter, something understandable because in Brazil there is no proceeding similar to the United States "discovery" phase of a lawsuit.

(6) Is there a need for a change in the law relating to privilege (or its equivalent) in Brazil?

No.

(7) If so, do you consider that Brazil needs a treaty in accordance with the AIPPI CIPPPA proposal (assuming its satisfactory refinement)?

Brazilians practitioners have not discussed at a national level nor felt the need for a treaty. However they are opened to discussion.

¹⁷ "DO SIGILO PROFISSIONAL

(12). O sigilo profissional é inerente à profissão, impondo-se o seu respeito, mesmo após a rescisão do mandato, salvo grave ameaça ao direito à vida, à honra, ou quando o Agente da Propriedade Industrial se veja afrontado pelo próprio cliente e, em defesa própria, tenha que revelar segredo, porém sempre restrito ao interesse da causa.

(13). O Agente da Propriedade Industrial deve guardar sigilo sobre o que saiba em razão de seu ofício, cabendo-lhe recusar-se a depor como testemunha em processo no qual funcionou ou deva funcionar, ou sobre fato relacionado com pessoa de quem seja ou tenha sido agente da propriedade industrial, mesmo que autorizado ou solicitado pelo constituinte.

(14). As informações confidenciais reveladas ao agente da propriedade industrial pelo cliente podem ser utilizadas nos limites da necessidade da defesa, desde que autorizado aquele pelo constituinte.

Parágrafo Único: Presumem-se confidenciais as comunicações epistolares entre agentes da propriedade industrial e seus clientes, as quais não podem ser reveladas a terceiros."

COLOMBIA

(1) What IP advisers are there in Colombia and what are their qualifications? Does privilege (or something equivalent to it) now apply to clients' communications with IP advisers?

The professional exercise of IP is not ruled in Colombia. However, in order to be entitled to give formal legal advice, including in the IP field, it is necessary to be a lawyer. Common practice indicates that lawyers and paralegals are the ones dealing with legal advice in IP in Colombia. In addition to that, at the time of entering into technical fields, especially in the case of patents, it is normal to find technical people such as engineers, chemists, etc. participating in the process of analyzing a case and giving professional advice together with the lawyer.

The "Estatuto de la Abogacía" (DECRETO 196 DE 1971) which is the Law applicable to the lawyer's profession provides for the obligation of keeping secrets. According to its text, a lawyer cannot communicate nor use the secret that has been entrusted to him. The latter is extensible to a possible requirement of the Authority in which case the lawyer will still be bound by the secret and prohibition to reveal the contents of the secret received, unless client has expressly authorized him to reveal the secret or unless the revealing of this secret is necessary to avoid a crime. The infringement of this provision can be punished with the suspension of the right to work as a lawyer.

(2) What is the scope of privilege in Colombia? What advantages does that bring?

The Constitutional Court of Colombia by means of judgement (Sentencia C-062 DE 1998, Magistrado Ponente Carlos GAVIRIA DÍAZ) has defined the professional secret:

"The idea of professional secret is linked to the exercise of certain activities in which there is a key feature consisting in the relation of trust which is due to certain persons linked to a determined area of knowledge and the persons who disclose or reveal before them data or facts of their private life. The duty to preserve the secret on the information which has been revealed to them is a consequence of the fact that the relationship existing between the two persons (the one who disclosed the secret and the one who received same) is *intuitu personae* and has for special scope the development of public trust and development of social activities."

(3) What practical complications are there for clients in maintaining privilege in communications with IP advisers? Any difference if IP adviser is based in Colombia or overseas?

Lawyers and paralegals have access to information which is disclosed to them by their clients in view of the need to have elements enough for giving a good professional advice. However, as ruled by the Constitutional Court not all professionals are bound to secret, but only the ones who have a very special *intuitu personae* relationship (such as a lawyer, a doctor, etc). Since in the IP

field other professionals are called to act, such as engineers, designers, chemists, etc, some like the ones cited are not legally bound by the secret.

Practice indicates that many firms devoted to IP include in their labour contracts and in the contracts they may have with their clients special clauses related to attorney-client privilege, making applicable to non-lawyers working within those firms the obligations to which lawyers are already bound.

(4) What recognition of client privilege is there in Colombia in the communications between clients in your country with overseas IP advisers and in particular –

The Laws of Colombia do not provide for any rule regarding the treatment of information and communications exchanged between clients and their overseas IP advisers.

(5) Describe the effect of any leading published court decisions about the limits of the application of privilege (or its equivalent) for clients of IP advisers in Colombia and overseas, including any that deal with whether privilege applies or not, to IP non-lawyers.

We are not aware of any decision in this field.

(6) Is there a need for a change in the law relating to privilege (or its equivalent) in Colombia?

In principle yes. In fact, in view of the amount of confidential information involved in the IP field it would be convenient to formalize the attorney-client relationship to non-lawyers.

PERU

(1) What IP advisers are there in Peru and what are their qualifications? Does privilege (or something equivalent to it) now apply to clients' communications with IP advisers?

In Peru there are no formal specialized IP advisers (i.e., persons who follow a specific training programme and/or are incorporated to a special registry), like for example Industrial Property Agents, Trademark Attorneys or Patent Attorneys. Most IP work is performed by general lawyers and, to a much lesser extent, by engineers. Both are assisted by paralegals and trained persons who have learnt their job in private practice or at the Indecopi (Peruvian Patent and Trademark Office)

(2) What is the scope of privilege in Peru? What advantages does that bring?

Lawyers in Peru are subject to the Code of Ethics of the Peruvian Bar which refers to this matter as the obligation and the right of a lawyer to keep the "professional secret". In general terms, a lawyer is not obliged to disclose professional secrets, not even when summoned as a witness. In the case of lawyers who appear at Court, the Peruvian General ("Organic") Law on the Judiciary expressly considers as an obligation of the lawyer to keep the "professional secret". Engineers are also subject to no disclosure obligations under the Code of Ethics of the Engineers' Association.

(3) What practical complications are there for clients in maintaining privilege in communications with IP advisers? Any difference if IP adviser is based in Peru or overseas?

Considering (1) above, we do not see practical complications for clients because both lawyers and engineers (both dealing with IP work) are subject to confidentiality obligations, even though on a general basis.

(4) What recognition of client privilege is there in Peru in the communications between clients in your country with overseas IP advisers.

The Laws of Peru do not provide for any rule regarding the treatment of information and communications exchanged between clients and their overseas IP advisers.

(5) Describe the effect of any leading published court decisions about the limits of the application of privilege (or its equivalent) for clients of IP advisers in Peru and overseas, including any that deal with whether privilege applies or not, to IP non-lawyers.

We are not aware of any decision in this field.

(6) Is there a need for a change in the law relating to privilege (or its equivalent) in Peru.

To the extent that IP clients are protected by the general obligations of confidentiality of lawyers and engineers there doesn't seem, in principle, to be a need to change local legislation. However, efforts in improving current legislation should not be left aside.

(7) If so, do you consider that Peru needs a treaty in accordance with the AIPPI CIPPPA proposal (assuming its satisfactory refinement)?

In general terms, and further to (6) above, such a treaty may be positive in the context of international transactions and increasing globalization.

CONCLUSIONS

The rules are not the same in the countries analyzed. All the countries have very clear ruling of lawyer's obligations and privilege for attorney-client's communications and secret. Regarding non-lawyers, some of the countries such as Brazil and Argentina have rather clera rules, while others like Chile have vaguer rules and therefore a need to combine several elements of law and fact for considering a conduct falling within the frame of privilege. As far as overseas in adviser's situation is concerned, the local laws do not provide for rules or no difference is made with local attorneys. However, the situation is not clear. Therefore there would be a need of harmonisation of IP adviser privilege internationally.
