Brazil

National aspects

Lawyers and registered Patents & Trademark Agent (API) are bound by professional secrecy obligation. Section 297 of the *Brazilian Criminal Procedural Code* exempts from the duty of giving testimony anyone who must keep privilege due to his profession. The *Brazilian Civil Procedural Code* has a similar provision in section 406, II. Criminal acts committed with the assistance of lawyers and APIs, however, are not covered by privilege and the privilege does not apply to documents evidencing such criminal acts.

Origin of the professional secrecy obligation and its coverage

The Brazilian Constitution recognizes the lawyer as an essential profession to the administration of justice. Professional acts and manifestations are protected by the Constitution, in the terms of a federal law. Federal Law n. 8.906/94, known as the Statute of Lawyers, provides for rules applicable to the legal profession. Besides, the Brazilian Bar Association (*Ordem dos Advogados do Brasil*) enacted a Code of Ethics and Discipline, which establishes the ethical principles of the legal profession. Those legislations impose high standards of professional conduct on Brazilian lawyers, particularly in relation to confidentiality and professional secrecy.

Professionals bound by the secrecy obligation

Many professionals are bound by secrecy obligations. They include practicing lawyers, medical doctors, dentists, and also patent agents and patent attorneys. The confidentiality and secrecy obligation applies to both lawyers and registered patent and trademark agents (*Agentes da Propriedade Industrial* (APIs)). Lawyers are bound by secrecy due to strict guidelines contained in the Statute of Lawyers. APIs are bound by professional secrecy obligations under the Code of Conduct of APIs enacted by the Brazilian Patent and Trademark Office (BPTO) through Normative Act 142, of August 25, 1998. 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 or her profession and the Brazilian Civil Procedure Code has a similar provision (Section 406, II).

The relationship between attorney and client is regulated in Brazil by the Statute of Lawyers and the Code of Ethics and Discipline referred to above. These provisions apply to all Brazilian lawyers, including in-house attorneys. There are express and specific provisions in the Statute and in its Regulations about privileged relationship between an attorney and his or her client, which guarantee the attorney the right to protect, and not to disclose, the information received from his or her clients.

Kind of information/communication covered by secrecy obligation

In Brazil, lawyers and APIs are required to respect the confidentiality of all information that becomes known to them in the course of their professional practice. Nevertheless, the scope of the confidentiality obligation is governed by different laws. Section 26 of the Code of Ethics and Discipline, in particular, states that Brazilian lawyers must maintain confidentiality and secrecy in court proceedings *vis-à-vis* what they have learned from their clients throughout their professional practice. Section 26 further states that lawyers should refuse to testify as witnesses about any facts related to a client, even if authorized or requested by the client. This obligation

remains regardless of whether the relationship between lawyer and client continues or has already been terminated by either party.

All the information supplied to the attorney by the client, including written communication, is confidential. As per this privilege, it can only be revealed, unless if used in the defense limits, when authorized by the client. The confidentiality privilege is extended to the attorney's office, files, data, mail and any kind of communication (including telecommunications), which are held inviolable.

Exceptions and limitations to the professional secrecy obligation/availability of forced disclosure

In a decision of December 5, 1995 (STJ, Resp No. 76.153, Relator: Min. Sálvio de Figueiredo Teixeira, 05.12.1995, D.J.U. 05.02.1996, p. 1,406), the Higher Court of Justice (*Superior Tribunal de Justiça)* held that a lawyer was allowed to give testimony in court proceedings about facts that the lawyer himself had witnessed, ignoring the language of both the Brazilian Statute of Lawyers (Section 7, XIX) and the Code of Ethics and Discipline (Section 26). In laying down his decision, Justice Teixeira stated that "the prohibition for a lawyer —who counsels or has counseled a party— to testify, under [Brazilian] procedural law, exists by the closeness of both vis-à-vis their contractual relationship, which would lead the testimony of the lawyer to be nothing more than a positive statement of the party with force of testimony. Nothing prevents, however, a lawyer, by himself and not because he has heard from his client, from testifying in court proceedings with respect to facts that he has witnessed". Justice Teixeira further stated that "the barring from a lawyer's testimony is restricted only to the lawsuit in which the lawyer represented or still represents a party."

On October 16, 2003, the Ethics Committee of the São Paulo branch of the Brazilian Bar Association issued an opinion, holding that a lawyer called to give testimony as a fact witness, in court proceedings involving former clients, is unconstrained to do so as long as the lawyer observes the strict interests of his former client.

Criminal acts committed with the assistance of lawyers and APIs are not covered by privilege and the privilege does not apply to documents evidencing such criminal acts. Attorneys and APIs have the right to refuse to make depositions as witnesses (i) in a question in relation to which the attorney has acted or may act, or (ii) about facts qualified as professional secrecy related to a person who is or has been his or her client, even if authorized by the last.

The Code of Ethics and Discipline, in Chapter III, also provides that the attorney–client relationship is protected by professional secrecy, which can only be violated in the cases of (i) severe threat to life or honor; or (ii) when the attorney is insulted by his or her own client; and (iii) in self-defense. Violation of professional secrecy must be restricted to the interests of the question under discussion.

Consequences of the loss of confidentiality and penalties for unauthorized disclosure

Any breach of a client's confidential information, under both statutes, can result in administrative, civil and criminal sanctions for the breaching lawyer. The disciplinary proceeding commences either with a petition by the interested party or *"ex officio"*. Once the petition is received, the President of the State Council must appoint a member of the Council to report the case and govern the collection of evidence. Penalties established in the Statute of the Lawyer are: admonition, suspension, disbarment and fines. If lawyers disregard the privilege,

without reasonable grounds, they are subject to: (a) professional sanctions imposed by the Bar Association (Law 8906/94, Section 34, paragraph VII); (b) criminal sanctions (Sections 153 and 154 of the Criminal Code), such as a fine or one to 12 months of imprisonment; (c) civil sanctions for damages (Section 159 of the 1916 Brazilian Civil Code).

Requirements/qualifications for patent advisors

In Brazil, API is recognized by law and is entitled to give advice on IP matters as well as to represent clients before the BPTO. Those who are willing to enroll in the BPTO Official Register of APIs need to be successful in an examination given before BPTO. However, lawyers admitted to the Brazilian Bar can be automatically enrolled as APIs, without any additional examination. Lawyers admitted to the Bar in Brazil are also fully qualified to give advice on IP matters as well as to represent clients before BPTO. APIs who are not lawyers have in many cases an engineering degree, although this is not a legal requirement.

Cross-border aspects

There is no evidence to show that the same treatment of confidentiality and privilege applies to foreign patent attorneys.

Summary

Brazilian law imposes confidentiality obligations on the patent attorneys and lawyers not to disclose confidential information obtained in the course of dealing with clients. However, this obligation is not absolute as there are several exceptions to the confidentiality obligation, such as in the case of crime and fraud or where the lawyer is required to testify as a witness in matters that he or she does not represent. Although the confidentiality requirement is applicable to both qualified lawyers and patent attorneys, it is not known whether the same obligation and right to keep information confidential applies to foreign patent advisors.

In Brazil, patent agents are bound by the secrecy obligation flowing from his or her profession. The Brazilian Criminal Procedure Code (Section 297) and the Brazilian Civil Procedure Code (Section 406) exempts anyone who is bound by the professional secrecy obligation from the duty of giving testimony. There is no evidence to show that a different treatment applies to foreign patent advisors.