

## Confidentiality of Communication between Clients and their Patent Advisors

### Colombia

Under Article 74 of the Colombian Constitution, “professional secrecy is inviolable.” This imposes the obligation of reserve on the professional to whom a professional secret is entrusted and the effectiveness of that obligation against individuals and authorities.

The Constitutional Court has defined professional secrecy as: “reserved or confidential information to which a person becomes privy by practicing a particular profession or engaging in an activity”. Thus, professional secrecy is both a right and an obligation of the professional, because “to be compelled to reveal what he knows will lose him the trust of his clients, his reputation and his income.”

Professional secrecy arises from a relationship of trust established between a professional and his client regarding the subject matter of their relationship. By virtue of professional secrecy, the user of a professional service transmits pieces of information that are covered by the right to privacy.

Professional secrecy is an autonomous and inviolable guarantee enshrined in Article 74 of the Constitution. It is based on respect for the right to privacy of the user of a professional service and on other guarantees that could be affected by the disclosure of the secret, such as the right to a defense or to a good name.

The Constitutional Court has established some features of professional secrecy. For example, it should be an essential aspect of professions linked to personal services. Another notable feature is that professional secrecy in Colombia is inviolable by express provision of Article 74 of the Constitution. Accordingly, the Constitutional Court has ruled as follows:

“As with the right to life, in the case of professional secrecy, the Constitution has allowed the legislature no leeway to indicate under what conditions an “inviolable” right might be legitimately violated. The inviolability attributed by the Constitution to professional secrecy means that it is not even optional for a professional bound by secrecy to reveal the secret or to refrain from doing so. He is obliged to keep it.”<sup>1</sup>

Another feature of professional secrecy established by the Constitutional Court is that although it arises from an interpersonal relationship of trust, it is effective against third parties:

“From the foregoing, it follows that professional secrecy has been codified in keeping with the relationship between the professional and the person requesting and obtaining his services, who must necessarily make him aware of material and information to which he would not otherwise be privy. That protection has effects on people other than the persons involved in the professional relationship, that is, it is something that can be effective against third parties.”<sup>2</sup>

Finally, the Constitutional Court has further established that professional secrecy varies in scope with the profession, depending on how it impacts the right to personal and family privacy and State control over them, for example, in legal matters:

“In legal matters, the Constitutional Court has held that professional secrecy has a special scope because it may also affect the right to defense, which is why the Court has

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<sup>1</sup> Constitutional Court Judgment No. C-264 of 1996, Presiding Judge: Eduardo Cifuentes Muñoz.

<sup>2</sup> Constitutional Court Judgment No. T-151 of 1996, Presiding Judge: José Gregorio Hernández Galindo.

stated that the inviolability of communications is markedly noticeable in client-lawyer communications,<sup>3</sup> so their illegal interception should be severely punished.”<sup>4,5</sup>

Furthermore, Law No. 1123/2007 establishing the Disciplinary Code for Attorneys provides:

“ARTICLE 34. It shall be a breach of loyalty to the client to:

[...]

(f) reveal or use secrets confided by the client, even at the behest of an authority, unless the attorney has received written authorization from the client or must make revelations to avoid the commission of a crime.”<sup>6</sup>

That said, professional secrecy is premised essentially on the protection of a person’s natural privacy and the preservation of the honor, good name and good reputation of the confider of the secret. Presiding Judge Vladimiro Naranjo Mesa accordingly ruled in Constitutional Court Judgment T-073A in 1996:

“It is reserved for privacy or exclusivity, for two reasons: firstly, to avoid leaving the person powerless, by depriving him/her of the introspection require to live in dignity with his/her natural privacy; and secondly, to leave the confider’s honor, good name and good reputation unblemished, as required. “Reserve” is used to indicate that knowledge is kept for something specific that must be used with the professionally required confidentiality and exclusivity. Confidentiality is breached when a secret is divulged, not necessarily when it is revealed before those who, legally speaking, are also bound by said reserve”.

For patent agents or consultants who are not attorneys, the confidentiality and handling of information between clients and such agents or consultants is governed by the establishment of contractual clauses that, pursuant to the principle of contractual freedom, may be agreed between the parties. On this basis, it is valid to establish such clauses, as well as penalties or fines agreed between the parties for non-compliance.

Finally, it should be noted that in the contract governing the professional relationship between a client and a patent attorney, special confidentiality clauses may also be agreed upon for the handling of privilege related to patent information entrusted to the attorney, as well as penalties for non-compliance, all subject to the principle of contractual freedom.

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<sup>3</sup> Constitutional Court Judgement No. T-708 of 2008, Presiding Judge: Clara Inés Vargas Hernández.

<sup>4</sup> Constitutional Court Judgement No. T-708 of 2008, Presiding Judge: Clara Inés Vargas Hernández.

<sup>5</sup> Information is taken from the submission made by Colombia to the twenty-sixth, thirtieth and thirty-fifth sessions of the SCP.

<sup>6</sup> The scope of this provision and the exception it refers to was established by the Honorable Constitutional Court in ruling No. C-301 of April 25 2012.