

THE PANAMA NATIONAL BAR ASSOCIATION

COMMUNIQUÉ

On the Professional Secrecy of Attorneys

THE BOARD OF DIRECTORS

Exercising its constitutional, legal and statutory powers:

WHEREAS:

FIRST: Following the leaks of the “Mossack Fonseca Papers” in national and international media, it is up to us as attorneys to reject such acts as being unlawful, both the theft of correspondence as well the non-authorized disclosure of attorney-client communications, and to demand increased compliance of the respect of professional secrecy as part of the right to and respect for the privacy of every human being.

SECOND: As to the juridical nature of company formation services and their connection with the legal profession, we would stress what is set forth in Law No.9 of 18th April 1984 whereby the practice of Law is regulated and modified by Law 8 of 16th April 1993 where it is set forth:

Article 4: The profession is practiced by means of a legally constituted power of attorney or by advising the interested party and, among other things, includes:

.....

4. The preparation of legal documentation relating to the formation, operation, dissolution and liquidation of companies.

THIRD: Both the Judicial Code and the Labour Code set forth the respect of attorneys’ Professional Secrecy, namely:

JUDICIAL CODE: Article 912: The following shall not be obliged to declare:

Any attorney or legal representative regarding confidential information received from their clients and any advice they have given them concerning the processes they are handling.

LABOUR CODE Article 803: The following are not obliged to declare regarding what has been confided to them or of which they have become aware by reason of their ministry, occupation or profession:

2. Attorneys, physicians, nurses, auditors or accountants with regard to

facts legally protected by professional secrecy.

FOURTH: The Code of Professional Ethics of every Panamanian attorney sets forth:

Article 13: It is every attorney's duty to keep the secrets and confidences of his client. This duty will endure even after termination of services and extends to the attorney's employees and neither the former nor the latter may be forced to disclose such confidences, save for whatever is authorized by the client. Any attorney that is accused by his client may disclose the professional secret that his accuser has confided to him if it is necessary for his defense.

FIFTH: Law 2 of 2011 on the subject of Know Your Client indicated the following in Article 14 with regard Professional Secret:

No attorney shall be obliged to submit any information or documents required by this Law regarding which he has a legitimate right of confidentiality of professional secrecy, save if such information is strictly limited to what is required by Know Your Client measures.

SIXTH: Professional secret is protected as a basic human right within the right to privacy and there is a series of international regulations that Panama has committed to complying, namely:

Article 12 of the Universal Declaration of Human Rights, which sets forth that "No one shall be the object of arbitrary interference in his private life, his family, his domicile or his correspondence, or of unlawful attacks against his honor and reputation".

Article 17, subparagraph 1 of the International Covenant on Civil and Political Rights provides that "No one shall be the object of arbitrary interference in his private life, his family, his residence or his correspondence, or of unlawful attacks against his honor and reputation".

Article 8, subparagraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950 sets forth that "every person has the right to respect of his private and family life, of his residence and of his correspondence.

Article 10 of the American Convention on Human Rights states that "every person has the right to the inviolability and circulation of his correspondence."

Article 11, subparagraph 2 of the Pact of San José de Costa Rica orders that “No one shall be the object of arbitrary or abusive interference in his private life, in that of his family, in his residence or his correspondence, or of unlawful attacks against his honor and reputation”. Subparagraph 3 of the same article provides that “Every person has the right to protection of the Law against such interference or those attacks.”

SEVENTH: There are past experiences in the international arena where it was clearly shown that the Republic of Panama did not fulfill its duty of care, with the consequent juridical and binding consequences for the Panamanian State, as was evident in the SANTANDER TRISTAN DONOSO VS THE REPUBLIC OF PANAMA sentence handed down by the Inter-American Court of Human Rights:

75. The Court considers that the telephone conversation between a client and an attorney was of a private nature and neither of the two persons consented to it being made known to third parties. Moreover, such conversation, because it took place between the alleged victim and one of his clients, should **even have a greater degree of protection because of professional secret.**

EIGHTH: Facts such as those that have taken place infringe the constitutional right set down in **Article 29 of the Panamanian Magna Carta, which literally reads as follows:**

Correspondence and other private documents are inviolable and may not be examined or retained except through an order from a competent authority and for specific purposes, in accordance with legal formalities. In any case, absolute confidentiality shall be kept regarding the matters unrelated to the object of the examination or retention.

The search for letters and other documents or papers shall always be carried out in the presence of the interested party or of a member of his family or, lacking such persons, in that of two honorable residents of the same place. All private communications are inviolable and may not be intercepted or recorded except by order from a judicial authority.

Default in regard of this provision shall prevent the use of its results as evidence, without prejudice to the penal liabilities that the authors thereof shall incur.

NINTH: Recently, our Supreme Court of Justice stated, regarding the right to privacy, in Case 37-15:

Without any doubt, respect for a private life and privacy, both personal and of families, constitutes a basic value of human beings, for which reason the law has deemed it important to be its guardian and to order measures to avoid infringement thereof as well as to attempt to repair the damages caused. Thus arose what is called the right to privacy and to a private life, or simply the right to privacy, as a basic human right by virtue of which there exists the power to exclude or to refuse to other persons the knowledge of certain aspects of every person's life that only concern such person. This right, which seeks to protect the private life of human beings, is a complex right that includes and in turn is linked to several specific rights that seek to prevent foreign meddling or external interference in these areas reserved to human beings.

In this regard, it is important to agree with former Superior Court Justice of Bogotá, Abelardo Rivera Llano, as follows:

“private life should constitute a fortress where the four (4) states that are characteristic of privacy and liberty are protected and secure: a) solitude, when the person lives alone by self-determination; b) privacy, when the individual is in the company of others or of a small group (family, friends); c) anonymity, which consists of the interest in not being identified during the daily routine, and d) confidentiality, which is understood to be the will to not disclose certain things about oneself. “According to what is indicated by the author, the following may be found among the basic aspects making up the concept of privacy: tranquility, autonomy and control of information, the latter being more closely related to the facts described and being also the most important of the three elements making up the concept, as it addresses the possibility of maintaining certain aspects of the lives of persons hidden or confidential and of controlling the handling and circulation of information on himself which has been confided to a third party, and more so where it concerns that group of individuals that seeks to live in a democratic State with a rule of law that is regulated by a Constitution, which is the standard of standards or the superior standard, as its rules determine the acts of the State's public servants and institutions, as well as the work of branches and bodies, and establishes how differences arising between State bodies should be resolved by applying its principles as optimization orders that rule the lives of all the inhabitants of our Panamanian society.

TENTH: The Panamanian Penal Code sets forth the following in **Chapter III**, which addresses Crimes against the Inviolability of Secret and the Right to Privacy:

Article 164. Whoever **unduly takes hold of or discloses** the content of a letter, email message, document, cablegram or message of any other nature that has not been addressed to

him will be penalized with one to three years of imprisonment or its equivalent in fines or weekend arrests.

Where the person who has committed a crime obtains any benefit or discloses the information obtained and there is harm that arises from that, he shall be penalized with two to four years of imprisonment or the equivalent in fines, house arrest or community work. If the person obtained the information referred to in the above paragraph as a public servant or a worker in any telecommunications company and discloses it, the penalty shall be increased by one sixth to one half.

ELEVENTH: Our Supreme Court of Justice has already pronounced itself concerning what is known as the doctrine of the fruit of the poisoned tree. In this regard, it expressed in file 050-08:

The system of human rights and of basic guarantees and rights seeks to protect, in favor of all people and making no distinctions whatsoever, the acknowledgment and respect of such rights. This is why, even when in the case we are concerned with evidence has been found that links a certain person, such evidence having been found with **a prior infringement of a basic right having occurred**, such evidence cannot be lawful, as it arises, as expressed in the United States of America, from the fruit of the poisoned tree, which in the case being reviewed would be the violation of residence which took place as a search with infringement of Article 26 of the National Constitution.

TWELFTH: The Supreme Court of Justice has already pronounced itself on the scope of the searches and raids of law firm offices and professional secret in Case 634-11 where the following is indicated:

“This Highest Court of Justice deems that Article 29 of the Constitution has been infringed, as the Second Anti-Corruption Prosecutor was authorized to carry out a search and raid of the offices of a lawyer where they proceeded to take the documents of companies 1, 2 and 3 as well as those of other companies that were not mentioned in the warrant. **This fact caused serious damage, as it concerned strictly confidential information or data that are protected by the professional secret that is found in and protected by the basic right of inviolability of correspondence** and the right to professional secret by attorneys as set down in Law No.9 of 18th April 1984.”

THIRTEENTH: Article 314 of the Penal Procedural Code sets forth the following regarding the seizure of data:

“Seizure of data. Where equipment or data stored in any support system is seized, **the same limitations referred to in professional secret** and the confidentiality of the content of the documents seized shall apply.

The examination of the content of the data shall be done under the responsibility of the Prosecutor carrying it out. The person charged and his attorney shall be summoned duly in advance to such procedure. However, their absence shall not prevent this act being carried out. Any equipment or information found to be not useful for the investigation or which is included as non-seizable objects shall be immediately returned and may not be used for the investigation.”

FOURTEENTH: Absolute knowledge of the gravity of what has occurred on the matter of infringement of professional secret is required of the three State branches and the existing regulations are those that must allow arguments in order to find solutions in accordance with our Rule of Law State.

FIFTEENTH: Among the aims to be achieved in the conclusions of the “State Commission for Justice”, these were set down:

“To reinforce professional secret, extending same to all of a Firm’s Attorneys and employees.

To establish the obligation of reasonably knowing the client, particularly in the handling of corporations.”

SIXTEENTH: National and international media are by means of this communiqué being made aware of the interdiction to use any information contained in Attorney-client correspondence.

SEVENTEENTH: The Panama National Bar Association is a member of different international law associations such as the Inter-American Federation of Attorneys (IFA), the International Union of Attorneys (IUA), the Latin American Union of Bars and Law Associations (LAUBLA) and maintains as well links with others such as the International Bar Association (IBA), the latter association being the one that has established the following hypotheses in defense of professional secret within the International Principles of Conduct for the Legal Profession of the IBA that were approved on 28th May 2011 by the International Bar Association:

4. Confidentiality/professional secret

4.1 General Principle

Every attorney shall at all times maintain and be granted the protection

of confidentiality with regard to the affairs of his current or past clients, save if otherwise allowed or required by law and/or the applicable rules of professional behaviour.

EIGHTEENTH: In Europe, the Charter of Core Principles of European Bars and Law Societies and the Code of Ethics of European Bars and Law Societies enshrined professional secret as follows:

“2.3. Professional secret

2.3.1. Part of the essence itself of any Attorney’s duties is that of being the depository of his client’s secrets and the receiver of information based on trust. Without the guarantee of confidentiality, there cannot be any trust. Therefore, professional secret is a right and a basic and primary obligation of every Attorney.

Every Attorney’s obligation relating to professional secret is in the interest of the Administration of Justice and of the client. This obligation must, therefore, have a special protection from the State.

2.3.2. Every Attorney must maintain the secrecy of any information that he becomes aware of within the framework of his professional activity.

2.3.3. The confidentiality obligation shall not be limited in time.

Every Attorney shall demand compliance with the same confidentiality obligation from his partners, employees and any person working with him in his professional activity”.

RESOLVES:

FIRST: TO CONDEMN any infringement of the Attorney-client Professional Secret.

SECOND: TO REQUEST of the Attorney General of the Nation full compliance of the procedures that can clarify any indication on the matter of criminal acts committed, avoiding infringement of the professional secret of Attorney-client communications in any modality.

THIRD: TO REGRET that local media have been surprised at the international media’s lack of knowledge of our Rule of Law State, which has clear rules on the subject of Attorney-client communications.

FOURTH: TO REQUEST that the Assembly of Deputies legislate on the increase of prison sentences in the matter of infringement of privacy and that same be adapted to the value of the respect of human dignity.

FIFTH: TO DEMAND the immediate ceasing of any publication that contains non-authorized Attorney-client communications.

SIXTH: TO CALL ON all the attorneys in the country to close ranks in the defense of professional secret in face of the most serious attack suffered in the last few decades.

SEVENTH: TO REQUEST that law professionals in the world pronounce themselves on the abhorrent attack against the Attorney-client professional secret.

Approved by the Board of Directors on Monday, the 18th day of April 2016.

(*sgd.*) J.A. Alvarez
José Alberto Álvarez
President

(*illegible signature*)
Delia Rodríguez Gutiérrez
Minutes Secretary

