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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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THE RIGHT OF PRIVACY IN CONTRACTING ATTORNEYS' FEES

by **Angélica ARRUDA ALVIM**, Professor of Civil Law at the Pontifical Catholic University of São Paulo – PUC/SP.

The purpose of this brief study is to examine the contracting of attorneys' fees for and the right of privacy in the related contracting agreements.

To investigate this judicial mechanism in greater depth, we will begin with a brief overview of the person of the attorney, as defined in Law No. 8,906/94, in addition to the Brazilian Code of Civil Procedure. Subsequently, we will examine the various existing modalities of attorneys' fees, pursuant to the classification prescribed in article 22, heading, of Law No. 8,906/94.

§ 1 – PRELIMINARY CONSIDERATIONS ON THE PERSON OF THE ATTORNEY

A) General Information On The Required Qualification of Attorneys

The attorney is addressed in article 133 of the 1988 Brazilian Federal Constitution, which declares legal representation essential for the proper administration of justice. The attorney must hold a Bachelor's Degree in Law and be registered with the Brazilian Bar Association. The attorney may represent a client in judicial or extrajudicial proceedings. Moreover, the attorney may represent the client before the Courts or the Public Administration.¹ The activities of attorneys are governed, in part, by private law (with respect to the power of attorney agreement signed between the client and the attorney),² and by public law, specifically in regard to the attorney's activities before the Courts.

In virtually all cases, claimants may only petition the Courts through their legal counsel (article 103 of the Brazilian Code of Civil Procedure). This is referred to as the power to litigate. The provision of article 103 applies, in addition to defendants, who may only present defense pleadings

¹ In this light, with regard to the imperative of legal representation by the attorney before the Public Administration, Binding Judgment No. 5 of the Brazilian Federal Supreme Court – STF is applicable, specifically: "The absence of a technical defense by an attorney in disciplinary administrative proceedings does not violate the Constitution."

² In the Brazilian Civil Code, the power of attorney agreement is governed by article 653 and following.

through an attorney, while subject, nonetheless, the effects of the valid summons clause (article 312). There are a few exceptions, such as *habeas corpus*, pursuant to article. 1, § 1, of Law No. 8,906/94 (Bylaws of the Brazilian Bar Association). Law No. 8,906/94 required the presence of an attorney before special courts (former small claims courts), as well. The Brazilian Federal Supreme Court then suspended the requirement,³ which was reinstated by Law No. 9,099/95 (article 9) for claims in an amount greater than 20 monthly minimum salaries. For purposes of appeals before the Special State Courts, the Law requires that the party be represented, in such cases, by an attorney (article 41, § 2, Law No. 9,099/95).

Law No. 10,259/2001, which instituted the Special Civil and Criminal Courts at the federal level, and Law No. 12,153/2009, governing the Special Courts of the Public Treasury in the States, Federal District, Territories, and Municipalities, do not include a similar provision to that prescribed in Law No. 9,099/95, in respect of the waiver of legal representation in specific cases. Despite the absence of a provision on this matter, article 1 of Law No. 10,259/2001, governing the subsidiary application of Law No. 9,099/95, provides for waiver of legal representation within the limits established in Law No. 9,099/95, namely 20 monthly minimum salaries. The same holds for the Special Courts of the Public Treasury, as per the provision of article 27 of Law No. 12,153/2009 on subsidiary application in Law No. 9,099/95.

B) Activities of Attorneys Under Brazilian Law

With regard to their activities, in exceptional cases attorneys may appear before the Courts without a power of attorney, but are required to attach one to the case record within the period prescribed in article 104, § 1, of the Brazilian Code of Civil Procedure: 15 days, which may be extended an additional 15 days; In the same sense, Law No. 8,906/94, article 5, § 1, includes a similar provision. The judge may not dismiss the case without a decision on the merits due, simply, to the absence of a power of attorney, without first providing a reasonable time for the respective corrective action (article 76), subject to denial of due process, a violation prohibited under the Federal Constitutional (article 5, LV, of the Federal Constitution).

The respective powers may be conferred on the attorney

³ Direct Action of Unconstitutionality – ADIn 1,127-8/DF, decision published in the Judicial Register – DJU of October 14, 1994.

through a public or private power of attorney. *Ad judicia* powers of attorney (for purposes of granting general powers of attorney before the Courts) authorize the attorney to undertake all procedural acts, with the exception of those specified in article 105, final part, of the Brazilian Code of Civil Procedure, which, due to their importance, require the grant of specific powers.

The attorney is tasked with representing the party in Court and, consequently, must be registered with the Brazilian Bar Association, as per article 3 of Law No. 8,906/94. All acts restricted to practicing attorneys adopted by any person not registered with the Brazilian Bar Association are deemed null, pursuant to article 4, heading, of Law No. 8,906/94.

The attorney may resign the power of attorney, but will remain responsible for a period of ten days following notification of revocation of the power of attorney, as necessary to prevent losses or harm to the party. This provision is prescribed in article 112 and sole paragraph of the Brazilian Code of Civil Procedure.

The power of attorney may also be revoked by the grantor, pursuant to article 111 of the Brazilian Code of Civil Procedure. The grantor must then constitute an attorney-in-fact through execution of a new power of attorney for purposes of ensuring continued running of the respective proceeding. In these cases, revocation may be express or implicit in nature, when, for example the grantor confers a new power of attorney on another legal representative in which an explicit reservation of powers is not provided. However, tacit revocation will only enter into force as of notification of the former sponsor.

§ 2 – ATTORNEYS' FEES

A) Modalities of Attorneys' Fees

One of the key rights conferred on the attorney by the Brazilian Code of Civil Procedure and the Bylaws of the Brazilian Bar Association (Law No. 8,906/94) consists in the right to attorneys' fees.

Pursuant to article 22 of Law No. 8,906/94 (Bylaws of the Brazilian Bar Association), “The delivery of professional services entitles professionals registered with the Brazilian Bar Association to fees negotiated with the client, established in judgment awards, and stemming from loss-of-suit charges.” According to the legal provision in question, there are three modalities of attorneys' fees, namely: a)

negotiated attorneys' fees; b) loss-of-suit fees; c) fees set by judicial judgment awards.

The first modality of fees we want to look at are negotiated attorneys' fees, also called contractual fees. These are fees established in an agreement executed between the attorney and the client.

Ethical duties require that the fees be established in a written agreement, pursuant to article 48 of the Brazilian Bar Association Code of Ethics, compliance with which is mandatory under article 33, heading, of Law No. 8,906/94 (Bylaws of the Brazilian Bar Association). According to Paulo Luiz Netto Lôbo, the written fee agreement renders the respective fees "indisputable and authorizes, in extreme cases, judicial enforcement."⁴ However, fees may be negotiated verbally, preferably in the presence of witnesses, in which case they are also deemed enforceable contractual fees.

Fees are set on the basis of a number of parameters prescribed in article 49 of the Brazilian Bar Association Code of Ethics, namely: a) relevance, importance, complexity, and difficulty of the matter in question; b) the work and time required; c) the potential for the attorney to be precluded from working other cases or required to turn away clients or third parties; d) the claim amount, the financial means of the client, and the advantage thereto from the professional service; e) the nature of the assistance, based on whether the service involves a one-time, regular, or permanent client; f) the venue of service delivery, whether in or out of the attorney's domicile; g) the professional's competence; h) the customary practice in similar cases within the pertinent jurisdiction.

In addition to negotiated fees, there are also loss-of-suit fees, which are set by the Courts in their final decisions. Loss-of-suit fees do not preclude negotiated fees. For while negotiated fees are those agreed to by the attorney and the client, loss-of-suit fees are awarded, in general, at the end of a lawsuit and due and payable by the losing party to the winning party's attorney.

The judgment requires the losing party to pay the winning party's attorneys' fees (article 85 of the Brazilian Code of Civil Procedure). However, the obligation is suspended during such time as the losing party does not have the means to meet the respective obligation, pursuant to article 98, § 3, of the Brazilian Code of Civil Procedure.

⁴ See Paulo Luiz Netto Lôbo, *Comentários ao Estatuto da Advocacia e da OAB*, 3.^a ed. São Paulo: Saraiva, 2002, p. 133.

By losing party, we mean the party (or third party) subject to the effects of the judgment, in its capacity as defendant, or which, as plaintiff, is not successful in its claim, either in whole or in part.

Specifically, the Brazilian Code of Civil Procedure adopted the principle of loss-of-suit based on the idea that the proceeding should not result in losses to the party found to have the Law on its side. The financial responsibility arising from loss-of-suit is objective and unrelated to the assignment of guilt to the losing party in the proceeding.

Expenses and fees are not always related to loss-of-suit. In fact, the rule that the losing party should bear the costs of the proceeding stems simply from application of the principle of causality, by which the party liable for giving rise to the proceeding should cover the related costs. In the large majority of cases, after all, it is the losing party, whether plaintiff (in the case of claims without merit) or defendant (in the case of relief granted to the petitioner), that renders the proceeding necessary.

Even in his or her capacity as legal counsel in the proceeding, the winning attorney is entitled to compensation for the respective fees. In addition to the Bylaws of the Brazilian Bar Association, article 23 of Law No. 8,906/94, confers on the attorney the right to the loss-of-suit award, with sole authority to enforce the judgment at this stage and in the appellate stage.

A judgment award ordering payment of attorneys' fees is not contingent on which party is ultimately benefited, as payment of the fees is prescribed in the Code as an objective outcome of defeat (article 322, § 1, of the Brazilian Code of Civil Procedure and Judgment No. 256 of the Federal Supreme Court). Similarly, in the case of the denial of a claim, irrespective whether a motion is entered or not, in the rebuttal argument, seeking payment of loss-of-suit fees by the claimant, the judge may issue a judgment against the claimant through application of the article above.

Note, however, that where express mention is not made in the decision to the loss-of-suit judgment award, the attorney may enter motions to clarify, with a view to correcting the omission in connection with loss-of-suit. In cases in which the motion to clarify is not entered through issuance of the *res judicata* decision, the Superior Court of Justice had previously held the position that if the Courts could not revisit the issue and order the losing party to pay the respective loss-of-suit fees, subject to breach of *res judicata*. Consider, on this point, Judgment 453 of the Superior Court of Justice: "Loss-of-suit fees, where omitted from the *res*

judicata decision, cannot be collected through enforcement measures or a separate proceeding.” However, following enactment of the 2015 the Brazilian Code of Civil Procedure and article 85, §18, where the omission persists a separate proceeding is allowed for purposes of determining the assessment of loss-of-suit fees.

In this light, it is worth addressing loss-of-suit fees in the case of reciprocal loss-of-suit. Reciprocal loss-of-suit occurs when each litigant is partially successful and partially unsuccessful. In these cases, the respective legal costs are distributed proportionally between the litigants, as both are, in part, the winning party and the losing party. The pertinent legal costs are not assessed to the party to which the minimum portion of the claim falls. Compensation claims for losses and damages in which the decision is favorable to the claimant, but by which an amount less than the claim amount is awarded, will not result in reciprocal loss-of-suit (Judgment No. 326 of the Superior Court of Justice): “In compensation claims for moral damages, judgment awards for amounts less than the claim amount will not result in reciprocal loss-of-suit”).

Pursuant to article 23 of Law No. 8,906/94 (Bylaws of the Brazilian Bar Association), loss-of-suit fees belong to the attorney, who, in addition, is entitled to enforce the judgment in respect of the party subject to the loss-of-suit fees, as well as issue a judicial bond in name thereof. On the other hand, the consolidated interpretation of the Superior Court of Justice is that loss-of-suit fees belong to the attorney and the party each,⁵ both of whom, therefore, are

⁵ On this point: “CIVIL PROCEDURE. ENFORCEMENT OF LOSS-OF-SUIT FEES. COMPETING STANDING PARTY AND LEGAL COUNSEL. ART. 24, § 1, OF LAW No. 8,906/94. PRECEDENT. ENFORCEMENT IN PROCEEDING OTHER THAN PRINCIPAL. WITHOUT MERIT. VIOLATION OF ART. 589 OF BRAZILIAN CODE OF CIVIL PROCEDURE (TEXT IN FORCE PRIOR TO LAW No. 11,232/05). INVERSION OF LOSS-OF-SUIT ONUS. 1. The case law of this Court has found that, pursuant to article 24, § 1, of Law No. 8,906/94, the case attorney has the independent right to enforce loss-of-suit fees, having competing standing with the party. 2. Following enactment of Law No. 11,232/05, execution of the judicial enforcement instrument, current fulfillment of the judgment is carried out in the same case record, resulting, as such, in a syncretic proceeding, as it is known. However, enforcement must first comply with article 589 of the Brazilian Code of Civil Procedure. 3. Both current fulfillment of the judgment and the previous definitive enforcement procedure occur in the principal proceeding, so as to prevent the double charging, above all in the case at hand, which involves the enforcement of loss-of-suit fees, in which the party and the legal counsel each have standing to initiate enforcement, pursuant to the reasons cited above. It is important to note that the possibility of enforcement through a separate motion within the same proceeding should not be confused with the impossibility of enforcement through a separate proceeding. The matter does not involve contractual fees, as the contracted amount may be enforced by legal counsel in a separate proceeding, given the validity of the contractual covenant as an extrajudicial enforcement instrument. 4. The ruling under appeal is hereby overturned and the present enforcement dismissed, based on violation of article 589 of the Brazilian Code of Civil Procedure, specifically the text in force prior to enactment of Law No. 11,232/05, which provision must be interpreted in

entitled to enforce the corresponding amounts (“competing legitimacy”), as well as enter appeals aimed at increasing the judgment amount awarded by the Court.

Note that while the Bylaws of the Brazilian Bar Association (Law No. 8,906/94) provide that the fees belong to the attorney, the Court adopts, let us say, a “mixed” interpretation. Specifically, it recognizes the standing of the attorney to personally enter appeals with a view to securing a higher judgment award, as a corollary to the idea that the corresponding fees belong, in fact, to the attorney.⁶ At the

harmony with article 24, § 1, of Law No. 8,906/94. (...). Special appeal granted” (Special Appeal – REsp 1138111/RS, Rapporteur Minister Mauro Campbell Marques, 2nd Panel, decision of 03/02/2010, Judicial Register – DJe of 03/18/2010); “REGULATORY APPEAL. CIVIL PROCEDURE. ATTORNEYS’ FEES. ARTICLES 22 AND 23 OF THE LAW No. 8,906/94. COMPETING STANDING PARTY. PRECEDENT. 1. The Superior Court has ruled that the enforcement of the judgment, with respect to fees arising from loss-of-suit, may be claimed by the party or the attorney, by virtue of their competing equal standing. Precedent. 2. Regulatory appeal denied” (Regulatory Appeal 941.206/RS, Rapporteur Minister Maria Thereza de Assis Moura, 6th Panel, decision of 11/24/2009, Judicial Register of 12/14/2009).

Note the decision of the Federal Supreme Court in Direct Action of Unconstitutionality – ADIn 1194/DF: “BYLAWS OF THE BRAZILIAN BAR ASSOCIATION - OAB. ARTICLES 1, § 2; 21, SOLE PARAGRAPH; 22; 23; 24, § 3; AND 78 OF LAW No. 8,906/1994. (...). ARTICLE 21 AND SOLE PARAGRAPH: INTERPRETATION PURSUANT TO CONSTITUTION. ARTICLE 24, § 3º: VIOLATION OF FREEDOM TO CONTRACT. DIRECT ACT OF UNCONSTITUTIONALITY PARTIALLY GRANTED. (...). Article 21 and sole paragraph of Law No. 8,906/1994 must be interpreted to ensure the freedom to contract with respect to court awarded loss-of-suit fees is safeguarded. 5. Pursuant to the interpretation given to article 21 and sole paragraph, § 3 of article 24 of Law No. 8,906/1994, namely that ‘any provision, clause, regulation, or individual or collective agreement that withdraws the attorney’s right to receive loss-of-suit fees.’ 6. Direct action of unconstitutionality with merit, in part and, in respect of that portion, partially granted for purposes of applying the interpretation, pursuant to article 21 and sole paragraph and declaring the unconstitutionality of § 3 of article 24 of Law No. 8,906/1994” (Direct Action of Unconstitutionality – ADI 1194/DF, Rapporteur Minister Maurício Corrêa, Rapporteur for Judgment: Minster Cármen Lúcia, Full Chamber, decision of 05/20/2009, Electronic Judicial Register – DJe of 09/10/2009, Judicial Register – DJ of 09/11/2009).

⁶ With respect to the precedent finding that both the client and attorney may appeal the portion of the judgment relating to attorneys’ fees: “CIVIL PROCEDURE. ATTORNEYS’ FEES. STANDING TO ENTER APPEALS. 1. The case law of the Superior Court of Justice has reached a consensus opinion that both the party and the attorney have standing to appeal the judgment with respect to determination of attorneys’ fees. 2. Regulatory Appeal granted” (Regulatory Appeal – AgRg in Special Appeal – REsp 532.173/SP, Rapporteur Minister Herman Benjamin, 2nd Panel, decision of 04/14/2009, Electronic Judicial Register – DJe 05/06/2009); “CIVIL PROCEDURE. ATTORNEYS’ FEES. STANDING TO ENTER APPEALS. 1. Both the party and the attorney, acting on their own behalf, have standing to enter appeals in respect of decisions relating to attorneys’ fees. Precedent” (Superior Court of Justice, Special Appeal – REsp 614.218/PR, Rapporteur Minister João Otávio de Noronha, 2nd Panel, decision of 10/19/2006, Judicial Register – DJ of 12/07/2006); “CIVIL PROCEDURE. ATTORNEYS’ FEES. STANDING OF THE PARTY AND THE ATTORNEY TO ENTER APPEALS AGAINST JUDGMENT IN RESPECT OF DETERMINATION OF THE RESPECTIVE AMOUNT. APPLICATION OF THE CASE LAW TO THE MATTER. ARTICLE 515, § 3, OF THE BRAZILIAN CODE OF CIVIL PROCEDURE. ABSENCE OF SUPPRESSION OF EXORBITANCE OF JURISDICTION. EFFECTIVENESS. AWARD OF NEGLIGIBLE AMOUNT. APPLICABLE MINIMUM. ARTICLE 20, §§ 3 AND 4, OF THE BRAZILIAN CODE OF CIVIL PROCEDURE. PRECEDENT 1. Special appeal against judgment ruling that the attorney held standing to seek higher attorneys’ fees through an appeal filed in name thereof and not through the winning party to the proceeding, as loss-of-

same time, compensation for the fees was recognized, as, in fact, the fees do not belong to the claimant, but to his or her respective sponsors. Judgment 306 of the Superior Court of Justice lays this position out: “Attorneys’ fees must be compensated in the cases of reciprocal loss-of-suit, ensuring the attorney the individual right to enforce the pertinent balance, without excluding the standing of the party itself.”⁷

suit did not occur in the dispute. 2. The Superior Court of Justice has extensive case law stating that: ‘It is true that article 23 of Law No. 8,906/94, which governs the “Bylaws of the Legal Profession,” confers on the attorney the sole right to enforce the judgment with respect to loss-of-suit fees. However, this does not preclude the party’s standing to enforce attorneys’ fees, especially as there is no conflict between them of any nature (Interlocutory Appeal in Special Appeal – EREsp 134778/MG, 2nd Section, Judicial Register – DJ of 04/28/2003); ‘As per the consensus position of this Court, both the party and the attorney have standing to enter appeals against the decision, with respect to legal fees’ (Regulatory Appeal – AgRg in Special Appeal – REsp 432222/ES, 3rd Panel, Judicial Register – DJ of 04/25/2005); ‘The attorney, as an interested third party, has standing to enter appeals against the portion of the judgment regarding the determination of legal fees’ (Special Appeal – REsp 724867/MA, 4th Panel, DJ de 04/11/2005); ‘the party and the attorney alike have standing to appeal the decision determining the respective attorneys’ fees’ (Special Appeal – REsp 648328/MS, 5th Panel, Judicial Register – DJ of 11/29/2004); ‘The Second Section ruled that the attorney, as an interested third party, has standing to enter appeals against the portion of the judgment regarding determination of the legal fees’ (Special Appeal – REsp 586337/RS, 3rd Panel, Judicial Register – DJ of 10/11/2004); ‘Both the party and the attorney have standing to appeal judgment in regard to attorneys’ fees’ (Special Appeal – REsp 361713/RJ, 4th Panel, Judicial Register – DJ of 05/10/2004); ‘The Second Section consolidated the Court’s position recognizing the right of the party to appeal the judicial decision in regard to attorneys’ fees’ (Special Appeal – REsp 533419/RJ, 3rd Panel, Judicial Register – DJ of 03/15/2004); ‘Both the attorney and the party have standing to enter motions in connection with the respective attorneys’ fees’ (Special Appeal – REsp 457753/PR, 3rd Panel, Judicial Register – DJ of 03/24/2003). 3. The need to ensure a speedy resolution to the proceeding fully justifies judgment on the merits. Article 515, § 3, of the Brazilian Code of Civil Procedure allows for examination of the underlying matter, as the issue under discussion is exclusively legal in nature and there is no formal prohibition or procedural conflict to prevent analysis of the petition on the merits. There is no logical or legal basis for denying this Superior Court the prerogative under the legal provision in question. Therefore, such provision is applied. Absence of exorbitance of jurisdiction. (...). Article 20, § 3, of the Brazilian Code of Civil Procedures provides that fees will correspond to at least 10% and at most to 20% of the judgment award based on: a) the dedication of the professional; b) the venue of service delivery; c) the nature and value of the claim, the work performed by the attorney, and the time required for the attorney’s services. For its part, § 4 states that for purposes of claims involving small amounts or inestimable values or in which a judgment is not awarded or in which the ruling is issued against the Public Treasury, and in cases of enforcement, whether appealed or not, the fees will be set in accordance through an equitable review by the judge, as per the rules in ‘a,’ ‘b,’ and ‘c’ of paragraph 6 above. Pursuant to the final part of § 4 (‘the fees will be set in accordance with an equitable review by the judge, as per the rules in ‘a,’ ‘b,’ and ‘c’ of the paragraph above’), it is perfectly reasonable to set the fees between a minimum of 10% and a maximum of 20%, even with application of article 20, § 4, based on an equitable review by the judge. 7. Award of attorneys’ fees at a negligible level is demeaning and an assault on exercise of the profession. In view of the principles above requiring that attorneys’ fees be set at a minimum of 10% and a maximum of 20%, in the specific case in question, if such fees were increased by 20% and given that the debt amount is R\$71.95, the attorney would receive only R\$14.38. 8. Attorneys’ fees are hereby set at R\$100.00, due to the simplicity of the matter. Precedent of all Panels of the Superior Court. 9. Precedent of this Superior Court. 10. Appeal granted” (Special Appeal – REsp 761379/PR, Rapporteur Minister José Delgado, 1st Panel, decision of 08/16/2005, Judicial Register – DJ of 09/12/2005).

⁷ It is worth noting the possibility of compensating attorneys’ fees, even in cases in which one of the parties receives free legal representation: “REGULATORY APPEAL. SPECIAL APPEAL. RECIRPOCAL LOSS-OF-SUIT. COMPENSATION OF THE

However, in this regard, the provision of article 85, § 14, of the CPC indicates that compensation of fees is prohibited.

When the attorneys' fees are not previously negotiated between the attorney and the client, whether in writing or verbally, these will be awarded by the Court. In addition, fees will be set by the Court where a dispute arises between the attorney and the client in respect of the amount owed for legal services.

The most appropriate judicial mechanism for a Court decision on this matter is through filing of a "legal fee arbitration action."

B) The Right to Privacy in Respect of Attorneys' Fees

The Courts cannot deny fundamental rights guaranteed to the individual professionals engaged in judicial proceedings. This assertion includes, by definition, the attorney. On this point, note that if attorneys' fees constitute a type of right assured thereto, that right, in our view, must encompass the right of privacy. In other words, the attorney has the right to charge the client for contractual fees without the obligation to disclose the respective amounts to third parties, precisely by virtue of the attorney's inherent right to fees, pursuant to the respective right of privacy.

BENEFICIARY OF FREE LEGAL REPRESENTATION. I. In the event of reciprocal loss-of-suit, the attorneys' fees will be compensated. II. Compensation of the fees also extends to the beneficiary of free legal representation. Appeal denied" (Regulatory Appeal – AgRg in Special Appeal – REsp 923.385/RS, Rapporteur Minister Sidnei Beneti, 3rd Panel, decision of 10/16/2008, Electronic Judicial Register – DJe of 11/03/2008); "CIVIL PROCEDURE. (...). ATTORNEYS' FEES. FREE LEGAL REPRESENTATION. SUSPENSION. RECIPROCAL LOSS-OF-SUIT. COMPENSATION. MERIT. (...). 'Compensation of attorneys' fees is possible in cases of reciprocal loss-of-suit, even where one of the parties receives free legal representation' (Special Appeal – REsp 791.909/RS, 1st Panel, Minister Teori Albino Zavascki, Judicial Register – DJ of 12/19/2005). 3. Motion to clarify receive with regulatory appeal, which is denied" (Motion to Clarify – EDcl in Appeal – Ag 962.948/RS, Rapporteur Minister Carlos Fernando Mathias (Federal judge convened from Federal Regional Court of Labor of the 1st Region), 4th Panel, decision of 09/23/2008, Electronic Judicial Register – DJe of 10/06/2008); "ADMINISTRATIVE. CIVIL PROCEDURE. FEES. RECIPROCAL LOSS-OF-SUIT. COMPENSATION. MERIT. (...). The compensation arising from recognition of reciprocal loss-of-suit is applied even where one of the parties receives free legal representation. 4. Regulatory appeal is hereby denied" (Regulatory Appeal – AgRg in Special Appeal – REsp 1000796/BA, Rapporteur Minister Paulo Gallotti, 6th Panel, decision of 08/19/2008, Electronic Judicial Review – DJe of 10/13/2008); "ADMINISTRATIVE LAW. CIVIL PROCEDURE. SPECIAL APPEAL. STATE CIVIL SERVANT. ATTORNEYS' FEES. COMPENSATION. MERIT. PRECEDENT OF THE SUPERIOR COURT OF JUSTICE. SPECIAL APPEAL HEARD AND GRANTED. (...). 2. Reciprocal loss-of-suit is hereby recognized, rendering moot the fact that one of the litigants received free legal assistance, as this does not prevent compensation of attorneys' fees. Precedent of the Superior Court of Justice. 3. Special appeal heard and granted" (Special Appeal – REsp 916.447/RS, Rapporteur Minister Arnaldo Esteves Lima, 5th Panel, decision of 08/12/2008, Electronic Judicial Register – DJe 09/29/2008).

In this light, a Court decision ordering presentation of the legal services agreement and the amount paid to the attorney must be deemed to violate professional confidentiality and the independence of the legal profession.

There is, on this point, a highly interesting decision issued by the Minas Gerais State Court of Justice.⁸

As stated in the lead opinion to the decision, “The professional confidentiality of the attorney is essential to the administration of Justice. As such, the judge and law enforcement authorities are prohibited from seizing documents covered by confidentiality and all those that compromise the client or his or her defense, in accordance with the principle of due process.”

Based on the decision above,⁹ the attorneys filed an ex-parte motion injunction claiming that the lower-court decision requesting presentation of the legal services agreement and the amount paid for defense of the respondents was unlawful. According to the petitioners, the order violated the independence of the legal profession and the attorney’s free exercise of a full defense, in addition to the right of privacy. In addition, based on the information provided the Office of the Public Prosecutor entered a motion with the 1st Criminal and Enforcement Court of the Judicial District of Varginha (Minas Gerais) to compute the value of the legal fees agreement and ascertain the origin of such amounts. The objective, according to the Office, was to locate financial resources held by the defendants for purposes of a criminal case involving illegal gambling (*jogo do bicho*). With respect to the issue, the case rapporteur ruled that it was not possible to identify a direct relationship between payment of the attorneys’ fees and proof as to the commission of the alleged criminal offense by the respondents. To be sure, according to the Court’s decision, the defendants, in fact, had access to other sources of income, including companies in the civil construction segment, real-state and hotel projects through which their family members could obtain the sums necessary to pay the respective attorneys’ fees. The decision issued by the Minas Gerais State Court of Justice went on to state, “The lower-court decision failed to demonstrate the urgency of the document seizer request, nor did it sufficiently establish the need to adopt the measure as a means to prevent evidence tampering or destruction or demonstrate

⁸ Minas Gerais State Court of Justice, MS 1.0000.14.058119-0/000, 5th Criminal Chamber.

⁹ Livia Scocughia, *Advogado e réu não são obrigados a mostrar contrato de serviço em juízo*. Revista Conjur, dated February 5, 2015.

the alleged criminal offense. For this reason, the Panel granted the ex-parte injunction.”¹⁰

Notwithstanding the fact that, the Administration of Justice is, initially, public in nature, the role of the attorney is private. The attorney, preferably, should represent the citizen, although, as part of its legal relationship, a democratic State, in contrast to an authoritarian State, also, in the case of judicial disputes, interacts with the citizen through his or her attorney. It is clear, therefore, that the attorney should be paid by the claimant and that the respective right to attorneys' fees falls within the private sphere. As part of the attorney's private property, the information regarding legal services fee agreements is protected by the fundamental right of privacy. As such, there should not be any obligation to disclose the object, amounts, or timetables agreed to with the clients.

¹⁰Lívia Scocuglia, *Advogado e réu não são obrigados a mostrar contrato de serviço em juízo*. Revista Conjur, dated February 5, 2015.

