

The inviolability of privilege

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Recent high-profile raids of law firms and in-house departments in Brazil contravene basic legal rights for lawyers and their clients, the public, argues Carlos Roberto Siqueira Castro, partner of Siqueira Castro - Advogados and chairman of the Brazilian Bar Association

The right of law firms and in-house departments at companies to be secure against unreasonable searches has drawn great concern lately in Brazil, since large-scale police search and seizure operations have taken place at major São Paulo and Rio de Janeiro law firms and in-house departments. All kinds of files and documents related to the practice of law have been seized, some of them ultimately leading to lawyers' arrests. Many of those operations took a "Hollywood-style" spin, with the employment of unreasonable resources such as an unnecessary amount of officers, heavy firepower (rifles and machineguns), illegal use of handcuffs, real-time recording by reporters and even live nationwide media broadcast. Those circumstances caused direct and immediate public loathing of the law firms and attorneys involved, with indirect but certainly prejudicial repercussions for the practice of law in general.

Nevertheless, it is imperative to note the difference between proper law enforcement and police abuse. The attorneys' legal privilege clause is enshrined in article 133 of the Brazilian Constitution. This privilege has deep roots in fundamental civil liberties such as the right to counsel, presumption of innocence, due process of law and so on. Moreover, Federal Statute 8,906/04 states that attorneys render relevant public services. In general, all legally civilised countries that cherish the due process of law clause grant legal privileges to lawyers.

Among those legal privileges are the fundamental rights to privacy and to be secure against unreasonable searches and seizures (article 5, X and XII of the Brazilian Constitution), also granted to law firms and house counsel departments in general by articles 150, section 4th, III of the Penal Code and 7th, II of Federal Statute 8,906/04. Those fundamental rights protect communication between lawyers and their clients and, ultimately, the right to effective counsel itself.

Article 243, section 2 of the Brazilian Criminal Procedure Code forbids the seizing of any document in the possession of a defendant's lawyer, unless it is considered *corpus delicti*. This legal term means the physical exteriorisation of felonies, such as the person or thing on which the action has taken place, the crime's weapon or tool, and any remains of the criminal action. Therefore, any other evidence falling outside the legal concept of *corpus delicti* (for example, computer data, documents, mail, briefs, files, contracts, etc), if in possession of the defendant's counsel, may not be legally seized by police authorities.

More recently, Federal Statute 11,767/08 increased legal protection of law firms and in-house departments, as a legislative response to reported police abuse in many search and seizure operations.

Of course, the state has legitimate powers to enforce criminal law by searching any locations, if there is probable cause showing reasonable likelihood of finding relevant evidence of a felony. On the other hand, constitutional protection against unreasonable searches and seizures and legal privilege do impose serious legal constraints on police search and seizure proceedings, according to the reasonableness principle that governs the clash of relevant public interests.

Such legal constraints include the need for a search and seizure warrant, based on consistent judicial showing of probable cause. This term means evidence proving a felony and reliable indications of evidence of such a felony being found inside the place to be searched. Article 248 of the Criminal Procedure Code also forbids a higher degree of harassment to the inhabitants than strictly necessary to carry out the search proceedings successfully. Lastly, the reasonableness principle also forbids search and seizure proceedings in law firms and in-house departments with the same police apparatus and firepower that would be needed for an armed criminal organisation's fortified bunker.

The violation of any of these legal constraints on police search and seizure proceedings make any evidence seized inadmissible in court, since Brazilian Constitution is clear on the inadmissibility of evidence obtained by illegal means (article 5, LVI).

The framework for the legal protection of lawyers, besides being essential for fundamental rights such as right to effective assistance of counsel and due process of law, has a very educational effect on citizenship and regarding democracy's constraints on the exercise of police authority. As Winston Churchill once said: "Democracy means that when there's a knock on the door at 3am, it's probably the milkman."