

**CHINA**

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## **1. DEFINITION – PRESENTATION**

The legal principle of attorney-client privilege is well-founded and well-developed in many jurisdictions throughout the world. It has not been officially recognized under the laws of the People's Republic of China although there is extensive academic debate over the issue.

While attorney-client privilege does not officially exist in China, a similar protection for both attorneys and clients does exist in the form of an obligation of professional secrecy, under which attorneys are required by laws and regulations to keep secret client confidential commercial information and client private information of which they become aware during an engagement.

It is clear that such protection is limited to clients' 'confidential commercial information' and 'private information' only. However, this protection could arguably be a partial substitute for attorney-client privilege in practice, while such 'privilege' is not officially recognized by the law.

## **2. SOURCES**

As mentioned above, the principle of attorney-client privilege does not exist in China. There are no sources of the principle under Chinese law. Instead, we provide a detailed analysis of the rules which apply to the confidentiality obligation that attorneys owe to clients in order to provide a better understanding of the practice in relation to the area of attorney-client communication in China.

### **2.1 Relevant statutes**

#### **2.1.1 S.38 of the Law of Lawyers<sup>1</sup> Ss.8 and 39 of the Code on Professional Ethics and Practice Discipline of Lawyers<sup>2</sup>**

The Law of Lawyers and the Code on Professional Ethics and Practice Discipline of Lawyers provide that attorneys must keep confidential the confidential information of the State, client confidential commercial information, and client private information of which they become aware during their engagement. The latter also provides that attorneys must continue to observe this confidentiality obligation after the end of the engagement.

It is clear that the type of information that attorneys are required to keep confidential is the confidential information of the State as well as client confidential commercial information and client private information only.

The law and code do not define confidential commercial information and client private information, however, the newly amended Law of Lawyers excludes 'criminal facts and information doing harm to State security, public security and the safety of the person and property of others, which the client or other persons are preparing to perpetrate or are perpetrating from protection as client 'confidential commercial' information or client 'private information'.

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1 as amended in 2007

2 as amended by the All China Lawyers Association in 2001

**2.1.2 S.15 of the Rules on Lawyers' Participation in Criminal Litigation during Investigation Stage<sup>3</sup>**  
**S.6 of the Code on Lawyers' Practice on Criminal Cases<sup>4</sup>**

While information other than State secrets, client confidential commercial information and client private information does not receive attorney confidentiality protection under the above law and code, the Code on Lawyers' Participation in Criminal Litigation, during Investigation Stage, requires attorneys to keep confidential information about the case which they become aware of during meetings with a criminal suspect.

This rule raises the question whether the attorneys' confidentiality obligation applies to information obtained by the attorney in criminal practice work, in addition to client 'commercial information' and client 'private information'. However, a close look at section 6 of Code on Lawyers' Practice on Criminal Cases may help to clarify the scope of the attorney's confidentiality obligation. It provides that, "Attorneys must keep confidential the confidential information of the State, the confidential commercial information of the client as well as the client's private information during practice in criminal cases."

Suffice it to say that information which falls within the three special categories: State secrets, client confidential commercial information, and client private information remain the only protected classes of information under Chinese law.

**2.1.3 S.17 of the Measures on Archive Management for Lawyers' Practice**<sup>5</sup>  
**S.56 of the Rules on Practice Conducts of Lawyers (Provisional Rules)**<sup>6</sup>

Section 17 of the Measures on Archive Management for Lawyers' Practice provides that State secrets and those of clients must be kept confidential by attorneys (without expressly mentioning client commercial or private information). Section 56 of the Rules on Practice Conducts of Lawyers (Provisional Rules) provides that State secrets and client confidential commercial information must be kept confidential by attorneys (without expressly mentioning client private information).

This may seem to give room for wider protection for clients' information where the words 'commercial' and 'private' are not expressly mentioned. Nevertheless,

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3 issued by the Ministry of Public Security on December 20, 1996

4 issued by the All China Lawyers Association on February 21, 2000

5 issued by the Ministry of Justice on September 11, 1991

6 issued by the All China Lawyers Association on March 20, 2004

considering the much lower ranking of these authorities<sup>7</sup> compared with the law, code, and rules referred to above, it is difficult to say that any information beyond that within the scope of the three special categories is in any way covered by the protection derived from the statutory obligation of confidentiality which attorneys owe to clients under Chinese law.

## **2.2 Relevant Case Law**

Not applicable

## **3. SCOPE/LIMITS**

### **3.1 General observations**

As mentioned above, the three categories: State secrets, client confidential commercial information, and client private information are the only categories of information clearly stated in Chinese laws and rules, which are protected by the confidentiality obligation which Chinese attorneys owe to their clients. It is generally understood that the client may waive such obligation in terms of confidential commercial information and client private information. However, it is unclear who, if anybody, has the power to waive the attorney's obligation to keep state secrets confidential.

### **3.2. Ss.38, 45, 84 and 109 of the Law of Criminal Procedure<sup>8</sup> S.35 of the Law of Lawyers**

The Law of Criminal Procedure states that "defense attorneys shall not assist suspects or defendants to conceal, destroy, forge...any evidence nor commit any conduct that may disrupt litigation activities of Justice authorities...the court, the public prosecutor, and the public security authority are entitled to collect and obtain any evidence from any relevant entities or individuals; such entities and individuals shall provide evidence that is true and accurate...any entity or individual is entitled to, and shall disclose or report information to the public security authority, the public prosecutor or the court upon discovery of any criminal activities or suspects...for the purpose of discovery, investigators may search any places and objects where the suspect or criminal evidence may hide."

A similar requirement for attorneys is also set out in the Law of Lawyers.

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<sup>7</sup> such ranking is measured by the level of authority of the issuing body as well as the date of issuing, the higher the level is and the later the date is, the higher the rank is.

<sup>8</sup> as amended in 1996

Arguably, this is to say that attorneys are under an obligation to disclose any evidence which they know of that may lead to a criminal charge against a suspect or the defendant that they represent. The reason is that, on the one hand, Chinese law does not differentiate between evidence which attorneys become aware of during the attorney-client engagement and that which they know in their position as an ordinary person notwithstanding the engagement. On the other hand, it is unclear whether the court would order evidence that the client and attorney wish to keep confidential to be disclosed in a criminal proceeding if the court were satisfied that such evidence falls within either of the special categories of client confidential commercial information or client private information.

### **3.3. S.56 of the Rules on Practice Conducts of Lawyers (Provisional Rules)**

Section 56 of the Rules on Practice Conducts of Lawyers (Provisional Rules) provides that “law firms, attorneys and their assistants shall not disclose any confidential commercial information and private information of their clients, nor any other information they become aware of in the course of dealing with their clients’ legal matters, save where an attorney is satisfied that to keep such information confidential may result in circumstances in which the personal injury, death or other severe crime cannot be duly prevented or circumstances in which the interest of the State may be jeopardized.

The limit of the attorney confidentiality obligation here is in line with that set out above under item 3.1: In the event of a conflict between the clients’ interest and that of the State or of the administration of criminal justice, the former may give way to the latter.

### **3.4. Ss.2 and 3 of the Provisional Rules of the Ministry of Justice on Administrative Archive of Justice<sup>9</sup> Ss.12-14 and 26 of the Measures on Archive Management for Lawyers’ Practice**

It is also important to note that it was once asserted by the Ministry of Justice in its early practical rules that a client’s document archive that is produced in the course of an attorneys’ legal practice is an asset of the communist party and the State; that law firms shall maintain the archive in accordance with the rules; that the Ministry has the power to determine whether any documents in such archive can be withdrawn and reviewed by any party; and that upon the end of the operation of a law firm, the client document archive held by the law firm shall be transferred to the competent Archive Center of the State.

In the absence of any further rules defining the scope and limit of the power of the Ministry of Justice in this regard, it is reasonable to interpret that such rules grant unlimited power and discretion to the Ministry in terms of the disclosure of the ‘client’s’ information, whether commercially confidential, private or not.

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<sup>9</sup> issued by the Ministry of Justice on April 16, 1993

Nonetheless, it should be noted that such rules were issued during the period of time in China's contemporary history when law firms remained state-owned or state-sponsored. Contemporary Chinese law firms are largely privately owned entities.

### **3.5 Between lawyers**

No applicable rules.

### **3.6 Third parties**

No applicable rules.

## **4. IN-HOUSE LAWYERS**

The Measures on Archive Management for Lawyers Practice, which was issued by the Ministry of Justice, provide that in-house lawyers are responsible for maintaining documents which come into their possession as a result of the engagement with their clients, and that the obligation to keep confidential State secrets, client confidential commercial information, and client private information applies equally to in-house lawyers.

## **5. PROSPECTIVE**

There is no indication that attorney-client privilege will be officially recognized in China in the near future. Of course, academic debate by legal practitioners and scholars over the issue is expected to serve as a driving force for such recognition.<sup>10</sup>

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<sup>10</sup> Drafting note: This version revised 31 May 2011