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Attorney-client privilege is a regime developed, and continually evolving, in the US legal culture. Initially, it was to protect the communication from the client to his attorney, by which the client will be encouraged, and assured, to disclose the true and full information to the attorney without incurring any adverse legal impact, by which the attorney may render an informed advice. Nowadays, the coverage of this protection has been expanded to the communication between the client and the attorney<sup>2</sup>. The term of “attorney-client privilege” is alien in Taiwan, where the fundamental legal system was brought from China in 1940 and basically belongs to the so-called German legal family. However, there is similar yet limited protection to the client.

### **Right to refuse to testify**

In Taiwan the protection of the communication between the client and the attorney is that the attorney may decline to testify before the court on the confidential matters that he becomes aware of owing to his legal service. Article 182 of the Criminal Procedure Law provides:

“A witness who is or has been a medical doctor, pharmacist, druggist, obstetrician, clergy, *lawyer, defense attorney*, notary public, accountant or one who is or has been an assistant to one of such persons, may refuse to testify when he is questioned on secret matters relating to others that he becomes aware of owing to his occupation, provided, however, that such person so agrees.” (*Italic added*)

Similar regulation can also be found in Article 307 of the Civil Procedure Law, by which a lawyer may refuse to testify on matters that he becomes aware of and shall keep in confidence. Hence, in general one may conclude that in Taiwan a lawyer is entitled to decline to testify before the criminal court or the civil court on confidential matters that may be detrimental or harmful to his client.

Under the Lawyer Act, the graduate of a law school has to pass a national exam and complete a 6-month training course before she can obtain a license from the Ministry of Justice to practice law in Taiwan. By interpretation, therefore, only an attorney-at-law with such a license may be the “lawyer” to assert and enjoy the privilege protection. After Taiwan’s accession to the WTO, a foreign lawyer who meets the legal requirements may file an application with the Ministry of Justice to obtain a license to be the “lawyer for foreign legal affairs” in order to provide legal service on the foreign law to clients in Taiwan. Since the specific license is also issued by the Ministry of Justice, the competent authority on lawyers, it seems that a licensed foreign lawyer in Taiwan should also have the right of privilege protection to refuse to testify. Yet this issue remains untested in practice.

The “matters” that fall within the scope of Article 182 are not defined under the law, and in practice they are not confined to any concrete event or any information. The attorney may refuse to testify on the content of the conversation or the information that his client conveys to him, as long as it is “confidential.” Such protection, however, may only

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<sup>2</sup> Cf. *Paul R. Rice: Attorney-Client Privilege*, 48 Am. U.L. Rev. 967 (1999).

guard the attorney against the court's request to disclose the verbal communication that he has with his client. It does not provide the shield or immunity for the attorney in the following situations:

1. When there is fact to prove that the suspect has been involved in serious criminal offences like kidnapping or blackmailing by using bombs or poisons, the defendant's communication by telephone or mobile phone, including his talk with the attorney, may be tape-recorded. Such taped verbal communication will be admissible to the court as evidence to convict the defendant<sup>3</sup>.
2. If the defendant is arrested and put into custody by the court in a detention center, his communication will be scrutinized by the officers of the center, which includes the letters exchanged between the defendant and his attorney. Further, the detained defendant is allowed to meet with visitors at the time specified and designated by the detention center, but all the verbal communication between the defendant and the visitor will be tape-recorded.<sup>4</sup> If the defendant is arrested and held *incommunicado*, then only his defence attorney will be allowed to see him in the detention center. According to the official Interpretation No. 654 issued by the Grand Justice in 2009, from May 1, 2009 the communication between the detained defendant and his defence attorney will not be taped and submitted to the Judge or the Prosecutor as evidence, unless the court has so approved in advance. In practice, in September 2010 the Taipei District Court denied the request raised by the Prosecutor for taping and recording the communication between the detained defendants and their defence lawyers when investigating a criminal offence where some High Court judges were accused of receiving bribes. Such development has been considered an endorsement of the "right to refuse to testify" of a lawyer and thus an improvement on human right protection.

### **Written communication**

The laws in Taiwan are silent on whether the written communication between a lawyer and his client may be kept in strict confidence and free from the criminal investigation or discovery in a civil lawsuit. While it is quite usual to encounter the call for such protection among lawyers<sup>5</sup>, the courts have so far not given any clear indication that the lawyer's written communication shall receive the privilege protection. On the other hand, there are specific situations worthy of note:

1. The written communication between the attorney and his client, even in digital form, will be subject to search and seizure by the court, if such correspondence may serve as evidence to prove the criminal offence under investigation<sup>6</sup>. Under Taiwan Criminal Procedure Law, the Prosecutor's investigation on criminal offence shall be kept in strict

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<sup>3</sup> Article 7 of the Law for Protection and Inspection of Communication.

<sup>4</sup> See the Guidelines in regulating inmates' communications of Taipei Detention Center.

<sup>5</sup> *Jien, Hsu-cheng*: "Right to refuse to testify for business relationship," pp. 88 - 90, *Taiwan Bar Journal*, vol. 6, No. 9, Taipei: September 2002.

<sup>6</sup> Paragraph 2 of Article 122 and Article 133 of the Criminal Procedure Law.

confidence until the defendant is indicted<sup>7</sup>. Neither the defendant nor his defense attorney may have access to the Prosecutor's files. In practice, there was an unreported case several years ago in which the Prosecutor applied for a search warrant to conduct a police raid on the law firm of a defense attorney in order to verify whether the defense attorney has "disclosed" to the witness the content of the investigation conducted by a Prosecutor<sup>8</sup>.

If the correspondence, e.g., letters or telegraphs exchanged between an attorney and his client, is held by a post office or a postman, the court may attach and seize them when and if: (1) the defendant has fled away; (2) such correspondence may be considered as evidence to prove the crime; or (3) there is reason to believe that the attorney advises the defendant to destroy or change the evidence, or to collaborate with accomplice<sup>9</sup>. Nevertheless, the application of said rule has been slightly changed in practice. According to the "official opinion" issued by the Ministry of Justice on April 27, 2004, the MOJ opined that the written communication issued by a defendant to his defense attorney shall be free from the court's search and seizure if such communication is made owing to the defendant's reliance on his legal counsel, otherwise the defendant's right to legal defense will be jeopardized. However, said protection against the search and seizure does not apply to the written communication if it is made with an aim at the destruction or forgery of evidence, or the collaboration with accomplice<sup>10</sup>.

## **IN-HOUSE LAWYER**

In Taiwan, it is not necessary for one to obtain the license and be admitted to bar association before he may be employed as the in-house lawyer of a company. Hence, while the in-house counsels who are licensed lawyers will have the privilege protection to refuse to testify, such protection will not be extended to the in-house counsels who are not licensed. It is interesting to note that recently the Taiwan government seem to have determined to truthfully implement the securities regulations by seriously prosecuting the legal liability against the criminal offence of insiders trading and manipulation. Such firm determination may be proved by the arrest of a Chief In-House Counsel of a famous listed company for being allegedly involved in insider trading.<sup>11</sup> The incident shows that the privilege protection to be granted by the court in Taiwan to an in-house lawyer does not deviate from, though seemingly narrower than, the general principle prevailing in other jurisdictions.

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<sup>7</sup> See Article 245 of the Criminal Procedure Law.

<sup>8</sup> *Wang Jaw-Perng*: "On the object to be searched and seized – Media and Law Firms?" Taiwanese Law Review No. 68, Taipei: January 2001 (in Chinese).

<sup>9</sup> Item 2, Paragraph 1, Article 133 of the Criminal Procedure Law.

<sup>10</sup> An official opinion issued by the Ministry of Justice, serial No. Fa-Jian-Tze 0930801416, dated April 27, 2004.

<sup>11</sup> He was released on bail of a huge bond on May 3, 2007. See news report on May 3, 2007 at the following website (in Chinese): [http://ms.www.gov.tw/newscenter/Pages/20070503cftp0319.aspx?CurrentNode=2&NextNode=0&QueryType=1&ShowOrgMenu=0&TranslateMenuName=31038\\_26371\\_26032\\_32862\\_](http://ms.www.gov.tw/newscenter/Pages/20070503cftp0319.aspx?CurrentNode=2&NextNode=0&QueryType=1&ShowOrgMenu=0&TranslateMenuName=31038_26371_26032_32862_).

## **PROSPECTIVE**

Compared to the Attorney-Client Privilege under the Anglo-American legal system, the protection of the defendant's communication with his attorney provided in Taiwan legal system appears to be insufficient to encourage the defendant to tell the true story in order to obtain an accurate and appropriate legal advice. Taiwan has been implementing a judicial system reform, and many believe that protecting the defendant's written communication to his attorney shall be included.