

Strengthening Attorney-Client Confidentiality and Privilege in the People's Republic of China

By Laura Stanton, Research Editor Volume 39



China should make its attorney-client confidentiality protections stronger and promulgate a new law on attorney-client privilege in order to better protect client and lawyers' interests and encourage trust in the legal system and rule of law. The American Bar Association Model Rules of Professional Conduct provide a template that China could modify to meet its unique needs and Chinese realities.

Legal reforms in China from 1928–1949 were based on the European continental model (Germany, Japan, and Switzerland) and the Anglo-American model, mixed with existing traditions of the late Chinese Qing Dynasty and Warlord periods. A reform on confidentiality and privilege laws based on American model rules is therefore not a far-fetched proposal. Strengthening confidentiality rules in China for clients and lawyers must be done carefully so as not to disrupt socialist ideals and the powers of the National People's Congress and its Standing Committee, and of course China's laws will not exactly mirror that of the U.S. due to differences in historical development of law and culture.

Confidentiality and privilege protections are important because clients should be able to be open and candid with their lawyers, so that lawyers can best represent them. To encourage clients to use the legal system as a remedy for disputes, it is necessary to protect clients' dignity and personhood. A client must be able to trust that their lawyer will defend them fully, as well as trust that the legal system will deliver justice and fairness. China's current confidentiality laws do not rise to this threshold. Below are the current Chinese Laws on Confidentiality.

The Law of the People's Republic of China on Lawyers.

The Law of the People's Republic of China on Lawyers holds that a lawyer shall protect the lawful rights and interests of the parties, ensure the correct implementation of the law, and safeguard fairness and justice of society. Chinese lawyers cannot effectively do this without stronger confidential and privilege protections.

Under Article 38 of the Law of the People's Republic of China on Lawyers, a lawyer shall keep confidential the secrets of the State and commercial secrets that he comes to know during his legal practice and shall not divulge the private affairs of the parties concerned. A lawyer shall also keep confidential the things and information that he comes to know during his legal practice which his client or another person does not want other people to know, with the exception of the facts and information about a crime which his client or another person prepares to commit or is committing to endanger State or public security or seriously endanger another person's personal safety or safety of property. This exception is similar to the U.S.'s crime-fraud exception, which permits waiver of the attorney-client privilege if the client uses the attorney's assistance to commit or further a crime or fraud.

In comparison to the United States, the duty of confidentiality imposed by this law is somewhat limited since lawyers only have to maintain secrets of current clients and those of the State. The law does not address former clients or prospective clients.

While Article 38 of China's Law on Lawyers lays out some restrictions on attorney-client confidentiality, in practice there are several additional constraints that may undermine the protection. Chinese lawyers, as Chinese citizens, may be compelled to testify about their clients and their clients' situations under the legal obligation imposed by the Criminal Procedure Law, the Civil Procedure Law, and the Administrative Procedure Law to provide testimony to courts, procuratorates, and public security bureaus.¹ Although the Law of the People's Republic of China on Lawyers was passed later in time and therefore should trump those procedural laws, in reality there is not a [built-in protection](#) for confidentiality.² Current confidentiality laws only require a lawyer "not to voluntarily divulge clients' information"—this duty does not override the obligation to comply with a court order.³

The Constitution. Chinese lawyers must also uphold the Constitution of the People's Republic of China. Article 40 of the Constitution ensures that the freedom and confidentiality of correspondence of citizens of the People's Republic of China is protected by law. There are several exceptions: cases necessary for national security, criminal investigation, or when public security organs or procuratorial organs examine correspondence in accordance with procedures prescribed by law. Note that these exceptions are all

¹ Misha Yang, *Confidentiality in the United States and China: An Ethical Conundrum and A Proposed Solution*, 29 GEO. J. LEGAL ETHICS 1443, 1447 (2016). Interestingly, this author completed a degree at both ECUPL and Georgetown Law.

² *Id.*

³ *Id.*

focused on permitting state intervention and preserving state power; on the other hand, the article bars organizations or individuals from infringing upon a citizen's freedom and confidentiality of correspondence *for any reason*. These state exceptions are not the problem – the United States also maintains a state secrets doctrine, for example, and makes many privacy exceptions for national security (see, for example, the reauthorization debate on the Foreign Intelligence Surveillance Act, Section 702). Transparency on when and how these exceptions are being exercised, as well as adherence to these three exceptions, would go a long way in protecting individuals' rights to confidentiality and enforcing the rule of law.

China's Criminal Procedure Law. Under Article 30 of China's civil procedure law, a lawyer shall, within the limits of authorization, protect the lawful rights and interests of the client. Under Article 48, a lawyer cannot divulge commercial secrets or private affairs, at the risk of receiving a disciplinary warning and a fine of up to 10,000 yuan (about \$1,375 USD). Under Article 49, a lawyer will have their legal practice suspended for between 6 months and 1 year if they present views that endanger state security, maliciously slander another person, seriously disrupt court order, or divulge secrets of the state. Article 33 of China's criminal procedure law holds that a lawyer shall meet with the criminal suspect or defendant and inquire about the case, and that the meeting between a lawyer and a criminal suspect or defendant shall not be monitored.

There are several other laws that supersede attorney-client confidentiality in favor of other Chinese values. Under Article 45 of China's Criminal Procedure Law, the People's Courts, the People's Procuratorates and the public security organs have the authority to collect or obtain evidence from units and individuals concerned in the matter at hand. The units and individuals concerned shall provide truthful evidence. Evidence involving State secrets shall be kept confidential. Article 48 provides that all those who have information about a case have a duty to testify. Under Article 67 of China's civil procedure law, the people's court shall have the right to investigate and take evidence from the relevant units or individuals, and such units or individuals shall not refuse to cooperate. Under Article 68, evidence involving State secrets, trade secrets or private matters of individuals shall be kept confidential. If such evidence needs to be presented in court, it shall not be presented in a public court session.

In conclusion, if the Chinese legal system is going to continue to grow and become more important for resolving disputes, Chinese citizens must be able to trust lawyers and the legal system as a whole. Stronger confidentiality and privilege laws that protect client and lawyer relationships are crucial to this development. Several of the protections that already apply to state information could be reimagined to strike a better balance between individual rights and state rights, while still permitting government exceptions as needed. If China truly wants to establish a robust legal system with a strong rule of law, they

should look to U.S. model rules on protection mechanisms and enforce them strongly.