

Гарантия конфиденциальности и право адвоката не разглашать информацию клиента

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Abstract: *anyone knows the information of a case has the obligation to testify in the court, and considering the importance of the communication right secretly between the client and the lawyer, china establishes limited lawyer's confidentiality obligation in the legislation, which are the compromises production of public interests and personal interests. Lawyer's confidentiality obligation and attorney-client privilege are two related systems, and the lawyer's confidentiality obligation belongs to the client, while the privilege is the right to confront the third party. The nature of the lawyer's confidentiality obligation and the attorney-client privilege are different at all. The attorney-client privilege is the further extension of confidentiality obligation, and the lawyer not only has the right to communication with the clients secretly, but also has the right to refuse to testify in the court. In Chinese legislation, attorney-client privilege has not been established completely yet, and there is still a long way to go on protecting the right of the lawyer.*

Аннотация: *все, кто владеет информацией, относящейся к делу, обязаны давать показания в суде, но принимая во внимание важность тайного общения между клиентом и адвокатом, Китайское законодательство устанавливает адвокату ограниченные обязательства конфиденциальности в законодательстве, что является компромиссом общественных и личных интересов. Гарантия конфиденциальности и право адвоката не разглашать информацию клиента – это две похожие системы в законодательстве. Гарантия конфиденциальности адвоката относится больше к правам клиента, в то время как неразглашение информации клиента - это право противостоять третьей стороне. С другой стороны, сам характер обязательств по обеспечению конфиденциальности и привилегии адвокат - клиент очень отличаются. Привилегия адвокат - клиент является продолжением обязательств по соблюдению конфиденциальности т.к. адвокат не только имеет право на общение с клиентами тайно, но также имеет право отказаться от дачи показаний в суде. В китайском законодательстве, привилегия адвокат - клиент еще не была установлена полностью, ей еще предстоит пройти долгий путь по защите прав адвоката.*

Keywords: *attorney-client privilege, confidentiality obligation, obligation of truthfulness.*

Ключевые слова: *привилегия адвокат-клиент, обязательств по соблюдению конфиденциальности, обязанность правдивости.*

Legal profession has different property with other social careers, compared with general occupation, the main features of professional are: profession, publicity and autonomy [1]. As a large part of the legal profession community, the nature of the lawyer's profession combines with social (public) and private (professional) nature. Public character demands the lawyer to undertake the task of providing legal service for the society, and private character requires the lawyers to use their professional knowledge to maximize the clients benefit. In socialist countries, social interests and personal interests are conformity in most the cases, but conflict is inevitable in some circumstances.

1. The lawyer's confidentiality obligation

The American Lake Pleasant Bodies Case (1973) also be known as Buried Bodies Case, has caused the social discussion about whether the lawyer's obligation system is right or obligation [2]. Lawyer's confidentiality

obligation refers to that the secrets which the lawyer knows form the practice process may not disclose, or without the consent of the parties, the lawyer shall take this obligation of not disclosure [3]. Chinese legislation has established the lawyer's confidentiality obligation in principle, such as "A lawyer shall keep confidential secrets of the state and commercial secrets and privacy of the parties" [4]. A lawyer shall keep confidential secrets of the State and commercial secrets of the parties concerned that he comes to know during his practice activities and shall not divulge the private affairs of the parties concerned. A lawyer shall keep confidential secrets that he comes to know during his practice activities and shall not divulge the private affairs of the parties concerned [5]. The defense lawyer shall have the right to keep secret of the privileged information and relevant situations of his client obtained in the practice of being a lawyer [6]. But when carefully analyzed, scholar will find that the specific stipulation is not consistent with each other. First of all, the interpretation of article 38 of *The Law on Lawyers of PRC* (2012 version) can be divided in two aspects:

1.1 The stipulation of the confidentiality obligation

Lawyer (the subject) has a confidentiality obligation of the knowledge known in the process of practice about state secrets, commercial secrets, and personal privacy. Si Li (Chinese scholar) thinks that it has a certain ambiguity about the subject, scope, exceptions to the rules of lawyer's confidentiality obligation, such as only the lawyer can be the subject, which exclude the paralegal, auxiliary personnel, legal interns, etc. No provision stipulates these people but in fact they should also be the subject of confidentiality obligation category. She considers that other than "state secrets, commercial secrets, and personal privacy" there are still some other kinds of information that the parties are not willing to let others to know [7]. The lawyer still needs to keep secret of this part of information for the client. For the exception of the confidentiality obligation, the law is too broad and not specific, and in practice, exception situations are difficult to define, which lead to the less protection about lawyer's right. Other scholars believe that the vague stipulations confuse the boundary of lawyer's general obligation and confidential obligation [8]. The information of "state secrets, commercial secrets, and personal privacy" is general obligation for every citizen which must be conservative to keep secret, and the general obligation does not have professional features. In addition, the legislation lack of the specific definition of "secret", such as whether the "criminal files material" is secret, and when it belongs to the secret, the law is unclear until now.

This paper agrees with the definition of the subject of lawyer's confidentiality obligation by Si Li, holds the opinion that the subject of lawyer's confidentiality obligation should not be limited to lawyers only, though some other subjects are not with qualification as lawyers, and awareness of relevant information based on auxiliary work or work convenience, also should be kept confidential obligation, such as, paralegals, interns, administrators of law firms, and auxiliary personnel, etc. The scope of the confidential information subject of *Law on Lawyers of PRC* is too narrow. The source of confidential information should not be limited to client, because the term "client" refers to that the lawyer has set up an agency contract with the client about the entrusted matters, which automatically exclude the information known by the lawyer in the process of legal consulting and communication with the parties, which finally doesn't establish the agency appointment contract between the lawyer and the client. This kind of circumstance belongs to the pre-contract obligation in *Civil Law of PRC*, and the lawyer still has to undertake confidentiality obligation.

Code of Practice of Beijing Lawyers stipulated by Beijing Lawyer Association, article 26 is that the lawyer has the duty to give guidance and supervision of practice lawyers, paralegals, legal intern, administrative personnel and other auxiliary personnel. This article requests auxiliary personnel to undertake confidentiality obligation, which has been clearly definite the scope of the subject of the confidentiality obligation and responsibilities [9]. *Lawyers' Professional Ethics and Disciplinary Norms of PRC* legislated by China Lawyers Association, the article 39 stipulate, after the principal-agent relations the lawyer still has the obligation to keep confidential obligation about the related information about the entrusted matter. But what people should know is

that the *Lawyers' Professional Ethics and Disciplinary Norms of PRC* is a regulation of legal profession, the scope of validity is limited. The period of confidential obligation isn't stipulated in the *Criminal Procedure Law of PRC* and the *Law on Lawyers of PRC*.

2.1 The exception of the lawyer's confidential obligation

Article 38 (b) of *Law on Lawyers of PRC* is the exception clause of the confidentiality obligation provision, that is, the criminal facts and information of clients or other persons that are preparing or implementing the behavior which make national security, public safety endangered and other serious behavior that seriously endanger the personal and property safety are excluded. But this exclusion needs to meet three conditions:

a) The subject is the clients or others. It is worth to noting that *Law on Lawyers of PRC* broad the subject of exceptions, not only the clients but also extended to persons. It is significant progress than other laws and regulations.

b) The content of the exception of confidentiality obligation must be the crimes endanger national security, public safety, and other crimes that seriously endanger the personal and property safety, and for these types of crimes, the lawyer cannot comply with confidentiality obligation. In legislation, there are difference between the serious crime and the general crime, and the difference is the damage degree of the crime to society or common people, such as the crime which has light endangerment of the personal safety or property cannot be exposed to the police, and the lawyer have to bear confidentiality obligation.

c) To prepare or be implementing is the time limitation. In accordance with *The Criminal Law of PRC*, to prepare, at least is the state of beginning a crime but not implement yet, which excludes the state of thought crimes without commission the actual behavior. Being implementing refers to the state that the criminal offense has taken place, but has an end yet; and the crime has been implemented is not the case. From the exceptions of confidentiality obligation in Chinese legislation, the American Lake Pleasant Bodies Case, two controversial lawyers are no accountable of their behaviors, because the crime had have occurred, the lawyers have the right to keep the confidentiality obligation for their clients. Refusing to disclose client information and fulfill the obligation of defense lawyer. But the fact, one of the defense lawyers was verdict in the end because the appellate court deemed that this behavior violated the basic nature of human.

2. The system of attorney-client privilege

British Lord Denning had said before, "as far as I know, there is only a lawyer has the privilege of refusing to provide the sources to the court. But this is not the privilege of a lawyer; it belongs to his client [10]. "Attorney-client privilege refers to that, in the proceeding, even if the lawyer has the ability to be witness, and still have the privilege to reject to give testimony who knows the information from the client by providing legal service for the client [11]." "The early 'honorary theory' believes that the generation of attorney-client privilege, derived from the lawyer's honor [12]", and later developed into the right of confidential communication between lawyer and client, which is an extension of the relationship of trust. Taking into account that the legal professional services relate to personal and property rights of the clients, if the law does not stipulate the right of confidential communication between lawyer and client, the client will fear the lawyer so that he maybe leak some important information when he is in urgent need of providing legal service. On the one hand, the client would rather refuse the lawyers to provide legal services, do not want the lawyers to be the witness for the prosecutor in court afterwards; on the other hand, for the information that known from providing legal services about the client, the lawyers don't hope that they have to betrayed their client by disclosing clients' interests, which will lead to lose lawyer's reputation. Considering the core of the attorney- client relationship is how to maximize interests of the client; and the lawyer should be given convenient condition for the client wholeheartedly, rather than acting as the prosecutor's witnesses in the practice [13]. Attorney-client privilege rule together with doctors-patients privilege, the privilege of relatives, religious exchange privilege constitute

privilege rule in common law system. Considering that the value of destroying the special relationship to ascertain the truth is inferior to sacrifice finding out the truth to maintain the value of those relationships [14]. In order to make the client can obtain legal service when he needs without fearing that the lawyer will be the potential witness, set up this privilege system in the law.

Anyone who knows the information of the criminal case has the obligation to testify [15]; this is an obligation for common citizen. In order to punish crimes and maintain social order, *The Criminal Procedure Law of PRC* stipulates an obligation of truthfulness of the witness to give statement when needed by the court. On the choice of public interests and personal interests, the attorney-client privileges choose to protect the interests of the client and sacrifice the targets of a society to strike crime to maintain the trust relationship between lawyer and client.

3. The conflict in China legislation

Article 60 of *The Criminal Procedural Law of PRC* (2012) stipulates anyone who knows the information of the criminal case has the obligation to testify. The clause is obligation of truthfulness of the witness. Scholars Li Zheng thinks that confidentiality obligation for the clients of lawyers are a kind of obligation in contract and private law; while the obligation of the witnesses is a kind of legal obligation, which belongs to a public law duty [16]. Knowing case has the testimony obligation, the so-called obligation is the boundary of certain behavior that one should do and shall not do [17]. The witness has the compulsive testimony obligation according to the law, and law encourages citizens to disclose crime actively and fight against crime behavior, the minimum requirement is that people cannot help the criminal suspect to conceal relevant criminal facts. While article 3 of *The Law on Lawyers of PRC* stipulates, the lawyers' lawful practice shall be protected by law, and no organization or individual allowed infringing upon the legitimate rights and interests of lawyers. Lawyers' lawful practice shall be protected by law, and the lawyer's confidentiality obligation belongs to part of a lawyer's practice activities, which shall also be protected by law.

Chinese laws and regulations about lawyer's confidentiality obligations are ambiguous which have identify difficulties in practice and make the establishment of attorney-client privilege rule become necessary. Attorney-client privilege rule stipulates lawyers have the right to communicate with client in a secret way, namely communicating without public the client's information about crime, and this rule is an extension of the lawyer's confidential obligation. Not only does the lawyer has an obligation to keep a secret about the client's information learned by professional practice, but also not disclosed to the third person. Attorney-client privilege rule stipulates the lawyer has the right to refuse testimony, as "the prosecutors' witness". In the legislation, on the one hand, it demands lawyer as an ordinary citizen of not concealing important criminal facts; on the other hand, it requires a lawyer abides by the professional ethics, conservative secrets between the client, and which make the legal professional group stuck in a dilemma.

4. Attorney-client privilege rule and the lawyer's perjury

Article 306 of *The Criminal Law of PRC* known as lawyer's perjury, which has been criticized by the legal professional group more than once, specifically the lawyers. The purpose of the legislators to set up the crime is to prohibit that the lawyer helps the parties to destroy or forge evidence, and coerce or entice the witness to change his testimony in the process of providing legal service, which prohibit the judicial activities having on smoothly. But in actual implementation, this article is often improperly applied, which become the tool of the prosecutor (the public power) to revenge the lawyer. Especially the expansion interpretation of the word "entice" in the practice, had made a lot of lawyers prosecuted by procuratorial organization by article 306 [18]. After the lawyer meets the witness, then the witness changes his testimony, and the prosecutor will think that the witness changing his testimony is the result of enticing and coercing by the lawyer who should be pursued according the criminal law. The lawyer shall have the right to communicate with the client in a secret way, including the lawyer can give some suggestion about litigation skills in substantive and procedure law for clients which can

waive or a mitigate punishment. The establishment of article 306 of *The Criminal Law of PRC*, a lawyer can only lead the witness to state the criminal facts about the defendant and the defendant confess a crime, and such as the litigation skills, defense strategies, are easily considered to help the witness to commit perjury. Article 306 of *The Criminal Law of PRC* has been increased the risk of the lawyer's professional and lawyer's rights have no protection, which not only destroys the trust between the client and the lawyer, but also affects the effect of defense.

5. The improvement and suggestion

When construction lawyer's confidentiality obligation and attorney-client privilege rule, scholar should not only focus on the transplantation of a system, but also concern the assorted mechanism and pay much attention to comprehensive analysis of a country's litigation system, trial mode, value orientation and so on. Two systems all root from the common law system; the adversarial litigation trial is the presentation of cherishing the value of personal interests, which inevitably breeds, roots in the soil of western judicial system. When transplantation of the two rules, it should not be ignore adaptability of the domestic legal environment, and also can't ignore the short time of setting up the adversarial trial in Chinese, tendency of inquisitorial system are still thick; it need to attach importance to the value orientation of public interests and despise personal interests is still the same as before.

Considering the present Chinese judicial situation, although in 1996 the amendment of *The Criminal Procedure Law of PRC* established the adversarial trial system in a compulsory way, due to the imbalance power of the prosecutor and the defender in the lawsuit can't be armed equally. The procuratorial organization is on behalf of the state power, holds the most of judicial resources, and the defender as social legal service personnel, and holds of the limited resources in hands. The right to defend is often constrained by various reasons, and the result can be imagined when weak individual rights confronts with the strong state power. Based on the concept of heavy substantive light procedure in judicial practice in China has not been fundamentally changed, in legislation, it requires the judicial system to spare no effects in prosecuting crimes maximally to punish crime, which reflects on the choice of social value is to highlight the facts of the criminal case and ignore the protection of the confidentiality obligation. Witnesses rule is for maximum gain information about the truth of a case, and there is a fundamental conflict between lawyer's confidentiality obligation and the general obligation of the witness. On the one hand, law protects the secret communication right between the lawyer and the client, endows the lawyer privilege who shall not be investigated for declining to disclose the information of the clients when comply with legal requirements, in the other hand, and the lawyer's perjury has a compulsory stipulation which require the lawyer cannot act as the client assistant and provide legal services to help clients light legal liability and avoid legal risk. If the lawyers can't litigation skill to help clients, just do entity defense, and the defense effect will give a great discount, which lead to the legal profession group become the next "victim" just as the Li Zhuang case similarly.

Scholars generally call on to abolish lawyer's perjury and endow sufficient career development space to the lawyer. A series of corresponding systems should be attached great importance:

a) Substantial reform of the trial pattern. In legislation, the lawyer should have more right to confront the prosecutor, such as the immunity of speech in the court, and the right of investigation and collecting evidence during the investigation stage, and so on.

b) The equality armed of the prosecutor and the defender. More right should be endowed to the lawyer for the relief rights when the right is infringed by the prosecutor, such as the right of meeting the criminal suspect, right of reading case record.

c) Improving the technical level of the technical investigation. Only in this way can light the police's fear of lawyer in the investigation, and the criminal suspect statement and confession is not so important in the lawsuit. To realize the goal that the judicial justice pay equal attention to substantive law and procedural law in the

sometime.

d) To reinforce the self-discipline of All China Lawyers Association, and stretch its influence in protecting and punishing the practice lawyers. All China Lawyers Association as an institution of legal profession, it should do more to promote the development of lawyer's industry. Such as the lawyer's perjury, can be punished by the association instead of the criminal law.

e) To clarify the meaning of the article 306 of The Criminal Law of PRC. From the legal theory, the articles of the law must be specific, and the vagueness should be avoided. The aim of this principle is that common people have the ability to know what is lawful behavior or not, and the state power can not violate the private right in a random way. If a person crime, he should be punished by due article according to the law, not by the expansion interpretation of the prosecutor. This is very important in protecting human rights, but seemingly, in Chinese legislation, most articles are too broad.

f)The court should be given the right of judicial review. The court as a neutral judiciary authority has the right to give the final verdict of a case. But many illegal behaviors happen before the verdict, such as the illegal investigation, illegal custody, which should be supervised by the court before the damage has been expansion. The judicial review system should be introduced to Chinese judicial system to supervise the prosecutor and the scout.

Conclusion

It should be noted that, at present stage, the absolute confidentiality obligation rule cannot bear by the Chinese national judicial system and the common citizen, because the strict implementation of lawyer's confidentiality obligation can lead to many question in the practice, such as it will add the difficulty for the scout to investigate crime, and the same time common people cannot bear this situation that the lawyer keeps the secret for the criminals instead of disclosing crime. In traditional Chinese mind, to peruse crime is for the state interests while to keep the criminals' secret is the personal interests, and the lawyer is the criminal assistant other than the legal services provider. It must be point out that the space is still very broad for promoting the citizens legal consciousness, and changing the concept of lawyer in the future.

Chinese legislation about lawyer's confidentiality obligation and the exception are reasonable. But further improvement of the lawyer's confidentiality obligation should begin from the subject, scope, object, content, duration to avoid fuzzy legislative loopholes in the judicial practice. All of the laws have a process to be perfect, there are many efforts should be done by the Chinese scholar and the legal profession community. To promote the development of the legal industry, only setting up the lawyer's confidentiality obligation is not enough, the attorney-client privilege rule should be written in the law, which can be confront the obligation of truthiness for every person. When the time is right, it should endow the right of resisting in the court to improve the lawyers' confidentiality obligation and promote the development of the rule of law.

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2. *Yue Lu*. Moral Dilemmas and Solving Way of the Lawyer Confidentiality Obligation. PHD Candidate Dissertation in Shan Xi University, 2013. Pp.12.
3. The Buried Bodies Case was a New York court case in which lawyers Frank Armani and Francis Belge who in the mid-1970s, citing attorney-client privilege, refused to disclose the location of the bodies of two people murdered by their client, Robert Garrow. Armani and Belge did not disclose the identity of the bodies but it was assumed they were two girls missing from the area at that time. The case is discussed frequently in legal ethics classes, and has been dramatized in *Sworn to Silence*, a 1987 film, and "Bodies", a 2003 episode of the television series *Law & Order*. Armani and Belge had represented Garrow in his trial for murdering an

eighteen-year-old boy; during the trial, Garrow confidentially told the lawyers where he had hidden the bodies of the two girls. In discussions with the attorney prosecuting Garrow, the lawyers proposed a plea bargain where they would reveal the location of the bodies in return for Garrow being sentenced to life in a mental hospital, but the prosecutor refused. While testifying in his own defense during the case, Garrow admitted to four murders, including those of the girls, and was convicted. Belge was indicted for refusing to disclose the locations of the bodies, and Armani's bar association began a disbarment proceeding against him. Both were ultimately exonerated. Four years after his conviction, Garrow escaped from prison, leaving behind a hit list including Armani's name. After Armani disclosed to the police information from his conversations with Garrow that suggested where he was hiding, Garrow was shot and killed by the police.

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8. *Fang Tang*. Theory of Defense Lawyer Confidentiality Privilege System and Perfecting. *Journal of R & D Management*, 2008. Pp. 79-83.
9. The article 26 of Code of Practice of Beijing Lawyers stipulates: Partnership lawyers, lawyers are obliged to provide guidance and supervision in business and professional ethics to practice lawyers, paralegals, legal intern, administrative staff and other auxiliary personnel, particularly in supporting the client's information in secret. Lawyer not only should take action to stop or remedial measures but also should take responsibility when assigned auxiliary personnel occurs error in work.
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18. Currently, an open statistics show that after establishing this crime for eight years, there has more than 200 practicing lawyers be prosecuted by the crime of lawyer's perjury. The Chinese Lawyers Association had a statistical analysis about 23 lawyer's perjury cases; the results showed that the rate of wrong case is more than 50%. Some scholars made statistics, from 1997, the number of the lawyers who were prosecuted by article 306 of The Criminal Law of PRC, and finally more than 80% were acquitted by the court.
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