A Comparative Study of Lawyers’ Ethics in the US and PRC: Attorney-Client Privilege and Duty of Confidentiality

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A Comparative Study of Lawyers’ Ethics in the US and PRC: Attorney-Client Privilege and Duty of Confidentiality

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In the United States, the attorney-client privilege doctrine is considered to be a fundamental aspect of the attorney-client relationship. In contrast to a lawyer’s ethical duty of confidentiality, the attorney-client privilege is an evidentiary rule, which prevents disclosing privileged information to any fact finder. Accordingly, although the attorney-client privilege has a more narrow scope than a lawyer’s duty of confidentiality, it provides broader protection for the relevant communications. With the growth and development of China’s legal profession, Chinese laws and regulations have imposed a greater duty of confidentiality upon Chinese lawyers, most recently through the revisions to the Law of the People’s Republic of China on Lawyers in 2008. However, China still lacks any doctrine comparable to the American attorney-client privilege, and many lawyers in China are very unfamiliar with the “attorney-client privilege” concept. By examining the scope of Chinese lawyers’ obligation of confidentiality, this paper examines how the absence of an attorney-client privilege doctrine in China affects Chinese lawyers, in-house lawyers, and foreign lawyers who work in China. This paper argues that the absence of an attorney-client privilege doctrine negatively impacts the attorney-client relationship in China by discouraging open and honest communication between lawyers and their clients. Moreover, the absence of the attorney-client privilege in China can create unique ethical dilemmas for foreign attorneys who work in China.
I. ATTORNEY-CLIENT PRIVILEGE AND DUTY OF CONFIDENTIALITY IN THE U.S.

Legal scholars in the United States have noted that “[t]he attorney-client privilege and the ethical obligation of confidentiality are the most basic building blocks of a successful attorney-client relationship.”¹ Both the attorney-client privilege doctrine and the duty of confidentiality are intended to encourage a client to speak frankly to his lawyer about his case so that the lawyer can provide the client with zealous representation. The attorney-client privilege doctrine protects communication between a client and his attorney that is provided in confidence for the purpose of seeking legal advice and prevents others, even the court, from compelling the attorney or the client to reveal their communications.² A lawyer’s ethical duty of confidentiality requires lawyers to keep information relating to the representation of a client strictly confidential and prevents lawyers from voluntarily revealing the information to outsiders without the clients’ consent.³

The attorney-client privilege and a lawyer’s duty of confidentiality are distinct in many ways. The attorney-client privilege, which only covers communications between the attorney and the client, and not the underlining fact or information, has a narrower scope than the duty of confidentiality.⁴ Compared with the duty of confidentiality, which does not restrict a lawyer from disclosing the facts and information if so required by law, the attorney-client privilege can provide stronger protection to both the client and the lawyer because it fully protects the privileged communication irrespective of the circumstances, even against court discoveries. From a client’s perspective, both the attorney-client privilege and a lawyer’s duty of confidentiality give the client the com-

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³ See Simon supra at 25.
⁴ See id.
fort to truthfully and completely disclose the facts of a case to his lawyer without worrying that the lawyer would “betray” him by divulging the information to others.

American lawyers are very familiar with the attorney-client privilege doctrine and a lawyer’s duty of confidentiality. As a lawyer who is licensed in China and the United States, I note, however, that many lawyers in China are unfamiliar with the attorney-client privilege doctrine: some have never heard of the concept, though many lawyers do realize (or agree) that they owe a confidentiality obligation to their clients to a certain extent. Hence, it is worthwhile to analyze the legal ethics issues in China. For example, important issues include: what is covered under the PRC legal system with respect to a lawyer’s confidentiality obligation, whether the PRC legal system provides attorney-client privilege, and how PRC lawyers and foreign lawyers working in China may be impacted by the current rules in place.

II. ATTORNEY-CLIENT PRIVILEGE AND DUTY OF CONFIDENTIALITY IN CHINA

Because China is a civil law country that does not rely on judicial precedent, China’s laws and regulations are the most important sources of law with respect to a lawyer’s duty of confidentiality and the attorney-client privilege.

A. Legislation Overview

The earliest law regulating lawyers in the PRC was the Interim Regulations of the People’s Republic of China on Lawyers (“Interim Lawyers Regulations”), which was promulgated by the National People’s Congress (the “NPC”) in 1980 and became effective on January 1, 1982. The Interim Lawyers Regulations only had 21 ar-

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5 In fact, there is no equivalent legal term of “attorney-client privilege” in Chinese. Some academic articles describing the U.S. legal concept have used the term “律师-当事人特权” [Attorney-Client Special Rights].

6 In civil law jurisdictions, courts try cases strictly based on promulgated laws and regulations, but court cases themselves do not have precedential value.

articles, one of which stipulated that lawyers must keep “State secrets” and “private matters” confidential. However, the Interim Lawyers Regulations were silent on the attorney-client privilege.

Due in part to the rapid development of private practice, in 1996, the NPC enacted the Law of the People’s Republic of China on Lawyers (the “1996 Lawyers Law”), which replaced the Interim Lawyers Regulations. The 1996 Lawyers Law regulated not only lawyers, but also law firms and lawyers’ associations. It expressly protected “state secrets” and “clients’ trade secrets” that a lawyer learns during his practice and prohibits disclosure of a “client’s private information.” Although under the 1996 Lawyers Law the scope of a lawyer’s duty of confidentiality was more specific and broader than the duty described in the Interim Lawyers Regulations, the 1996 Lawyers Law still did not cover the attorney-client privilege.

In 2001, the Law of the People’s Republic of China on Lawyers was amended (the “2001 Lawyers Law”). The 2001 Lawyers Law established the National Judicial Examination system and raised the requirement of the applicants’ educational background for taking the bar examination, while other rules remained unchanged.

In October 2007, the NPC amended the Law of the People’s Republic of China on Lawyers (the “2008 Lawyers Law”) for the third time. The amendments came into effect on June 1, 2008. The 2008 Lawyers Law is quite different from and more developed than the

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8 See id. at art. 7 (“律师对于业务活动中接触的国家机密和个人阴私，有保守秘密的责任。”) [A lawyer has a duty to maintain the confidentiality of state secrets and private matters of a client.]


10 The 1996 Lawyers Law required at least a college degree in law or a bachelor degree in other majors for taking the bar examination purpose. The 2001 Lawyers Law generally required a bachelor degree, in law or other majors, unless in certain geographic areas. The 2008 Lawyers Law no longer mentioned the requirement about applicants’ educational background, but the requirement of a bachelor degree is still maintained through the lawyer执业管理办法, Lü shi zhi ye guan li ban fa [The Administrative Regulations on Lawyers Practice], promulgated by the Ministry of Justice, July 18, 2008.
2001 Lawyers Law in many aspects, including with respect to a lawyer’s duty of confidentiality.

The PRC Ministry of Justice (the “China MOJ”), which is the agency responsible for regulating the legal profession, also enacted some regulations to regulate lawyers and address ethical issues. On October 22, 1992, the China MOJ enacted the *Lawyers Reprimand Rules*, effective March 1, 1993, which set forth rules for sanctioning unethical lawyers.\(^{11}\) On December 27, 1993, the China MOJ enacted the first version of the *Lawyers Professional Ethics and Code of Conduct in Practice* (“1993 Code of Conduct”).\(^{12}\) Article 14 of the 1993 Code of Conduct sets forth eight principles that govern the relationship between attorneys and their clients, one of which provides that an attorney cannot divulge a client’s private information, “secrets or other facts and materials that the client does not wish to divulge to the public.”\(^{13}\) The China MOJ amended the *Administrative Regulations on Lawyers Practice* in 2008. With respect to a lawyer’s duty of confidentiality, the 2008 amendments adopt the same language as Article 38 of the 2008 Lawyers Law.

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\(^{11}\) **律师惩戒规则** Lü shì chéng jiè guī ze [The Lawyers Reprimand Rules], promulgated by the Ministry of Justice, October 22, 1992 (repealed 2000) was superseded by the **律师违法行为处罚办法** Lü shì wéi fà xíng wéi chu fā bān fā [Sanction Measures Against Lawyers’ Illegal Activities], promulgated by the Ministry of Justice, January 31, 1997. The latter regulation was further superseded by the **律师和律师事务所违法行为处罚办法** Lü shì hé lü shì shì wù suǒ wéi fà xíng wéi chu fā bān fā [The Sanction Measures Against Lawyers’ and Law Firms’ Illegal Activities], promulgated by the Ministry of Justice, January 4, 2004.

\(^{12}\) **律师职业道德和执业纪律规范** Lü shì zhí ye dao de he zhi ye ji lü gui fan [The Lawyers Professional Ethics and Code of Conduct in Practice], promulgated by the Ministry of Justice, December 27, 1993 (repealed 2000) was superseded by **关于反对律师行业不正当竞争行为的若干规定** Guān yú fǎn dào lü shì háng yè bù zhèng dāng jìng zhěng xìng wéi de ruò guān dìng [Several Regulations Against Unfair Competition Activities in the Lawyer Profession], promulgated by the Ministry of Justice, January 13, 1995. The latter regulation is still effective today, however, it is purely from the competition perspective and actually does not address lawyers’ confidentiality or the attorney-client privilege.

\(^{13}\) See **律师职业道德和执业纪律规范** Lü shì zhí ye dao de he zhi ye ji lü gui fan [The Lawyers Professional Ethics and Code of Conduct in Practice], promulgated by the Ministry of Justice, December 27, 1993 (repealed 2008) art. 14(4) (“不得泄露在执行职务中得悉的委托人的隐私、秘密和委托人不愿公开的其他事实和材料.”) [A lawyer may not divulge information entrusted to a lawyer by a client in which the lawyer should know the information is private, secretive, or is information that the client does not want the facts or materials to become public.].
The All-China Lawyers’ Association, which was established in 1986 pursuant the Interim Lawyers Regulations, also enacted its own version of the Code of Conducts for Lawyers’ Practice (for Trial Implementation) (the “Trial Code of Conduct”) on March 20, 2004. Although the Trial Code of Conduct has 190 articles, only Article 56 governs a lawyer’s duty of confidentiality. Notably, the language of Article 56 is very similar to that of the 2008 Lawyers Law. Similarly, the Trial Code of Conduct does not provide for the attorney-client privilege.

B. Current Ethical Rules

A lawyer’s duty of confidentiality is addressed in Article 38 of the 2008 Lawyers Law, which reads:

A lawyer shall keep the state secrets and trade secrets he/she learns in the course of his/her practice activities confidential and may not divulge the private matters of concerned parties.

A lawyer shall keep confidential the matters and information that the client or others do not wish to be divulged and that he/she learns in the course of his/her practice activities. However, facts and information pertaining to a criminal offence that jeopardizes state security, public safety or seriously jeopardizes the safety of others or others’ property that the

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14 See 律师执业行为规范(试行) Lü shi zhi ye xing wei gui fan (shi xing) [ Code of Conduct for Lawyers (Trial Implementation)], promulgated by the All-China Lawyers’ Association, March 20, 2004 art. 56 (“律师事务所、律师及其辅助人员不得泄露委托人的商业秘密、隐私，以及通过办理委托人的法律事务所了解的委托的其他信息。但是律师认为保密可能会导致无法及时阻止发生人身伤亡等严重犯罪及可能导致国家利益受到严重损害的除外。”) [Law firms, lawyers, and legal staff shall not divulge business secrets, private information, or other information that clients may provide them for the purpose of resolving the client’s legal affairs. However, a lawyer may divulge if they believe maintaining confidentiality will render them incapable of preventing serious bodily injury, the commission of a serious crime, or an act endangering national interest.]
client or another is preparing to commit or currently committing shall be excepted.¹⁵

Compared to the previous versions of the Lawyers Law, the 2008 Lawyers Law provides for better protection of confidential information. First, the 2008 Lawyers Law substantially expands the scope of coverage of a lawyer’s duty of confidentiality. Previously, only two types of information about a client were protected: trade secrets and private information. Although the Lawyers Law does not define the terms “trade secrets” or “private information,” the Law of the People’s Republic of China Against Unfair Competition (the “Anti-Unfair Competition Law”) defines a trade secret as “technical information and business information which is non-public, can bring economic benefits to the party that has rights therein and is practical, and for which the party that has rights therein has adopted measures to maintain its confidentiality.”¹⁶ While the term “private information” is not defined in PRC laws, it is generally accepted that the term refers to a client’s personal, non-public information. The 2008 Lawyers Law expands the scope to any matter and information that a client tells their lawyer but does not wish the lawyer to divulge to others.

The 2008 Lawyers Law also sets forth an important exception to a lawyer’s general duty of confidentiality. According to the law, a lawyer’s confidential obligation is excepted in the following circumstances: (a) if the facts and information are pertaining to a crimi-

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¹⁵ 中华人民共和国律师法 Zhonghua Renmin Gongheguo Lü shi fa [The People’s Republic of China Law on Lawyers] promulgated by the 10th Natl. People’s Cong., 30th Sess., October 28, 2007 art. 38 ( “律师应当保守在执业活动中知悉的国家秘密、商业秘密，不得泄露当事人的隐私。律师对在执业活动中知悉的委托人和其他人不愿泄露的情况和信息，应当予以保密。但是，委托人或者其他人准备或者正在实施的危害国家安全、公共安全以及其他严重危害他人人身、财产安全的犯罪事实和信息除外。”) [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 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.].

nal offense that jeopardizes state security, public safety or seriously jeopardizes the safety of others or others’ property; and (b) if the client or another is preparing to commit or is currently committing a criminal offence.

It is clear under Article 38 of the 2008 Lawyers Law that a client’s past crime is not subject to the exception. A reasonable inference is that, if, for the purpose of legal representation, a client tells her lawyer that she committed a criminal offence and seeks the lawyer’s representation, no matter how fierce and abominable the offence was, the lawyer shall keep the facts and information confidential and is not supposed to report the information to any governmental authorities. However, it is unclear whether a lawyer has an affirmative duty to report a client and his future or current crime if the above conditions are met, or whether the exceptions to a lawyer’s duty of confidentiality only mean that the client or others cannot sue the lawyer for breach of confidentiality if the lawyer discloses confidential information that falls within one of the exceptions.

Although Article 38 of the 2008 Lawyers Law is a big development with respect to a Chinese lawyer’s duty of confidentiality, the 2008 Lawyers Law and related ethical rules fail to provide rules regarding the attorney-client privilege. Accordingly, PRC lawyers and their clients do not enjoy attorney-client privilege with respect to their communications under the 2008 Lawyers’ Law.

Not only has the 2008 Lawyers Law not established the attorney-client privilege doctrine, the evidence laws of China have not supported this doctrine either. Under the relevant procedural laws of the PRC, an individual’s obligation to disclose information and provide evidence is almost absolute. Please refer to the discussions below.

In the U.S., the ABA Model Rules of Professional Conduct (“ABA Model Rules”) has similar rules regarding a lawyer’s duty of confidentiality; however, the ABA Model Rules provide a broader scope of exceptions to the general duty of confidentiality than Article 38 of the 2008 Lawyers Law.\(^\text{17}\) For example, the ABA Model Rules

\(^{17}\) See MODEL RULES OF PROF’L CONDUCT R.16 (2008) (“a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). (b) A lawyer may reveal information relating to the rep-
grant lawyers the right to reveal clients’ information in a self-defense case. More importantly, the U.S. evidence rules acknowledge the attorney-client privilege. Therefore, both a lawyer’s duty of confidentiality and the attorney-client privilege are covered under the U.S. laws.

III. DISCUSSION

A. Impact on PRC Lawyers

As mentioned above, a lawyer’s duty of confidentiality only prevents the lawyer from voluntarily divulging a client’s confidential information to an outsider, but does not prohibit the lawyer from disclosing the information if so required by law or a court order.

Based on Article 45 and Article 48 of the Criminal Procedure Law of the People’s Republic of China (1996 version) (the “PRC Criminal Procedure Law”)

representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.”).

18 中华人民共和国刑事诉讼法 Zhonghua Renmin Gongheguo Xing shi su song fa [The Criminal Procedure Law of the People’s Republic of China] promulgated by the 5th Natl. People’s Cong., 2nd Sess., July 7, 1979 art. 45 (“人民法院、人民检察院和公安机关有权向有关单位和个人收集、调取证据。有关单位和个人应当如实提供证据。”) [The People’s Courts, the People’s Procuratorates and the public security organs shall have the authority to collect or obtain evidence from the units and individuals concerned. The units and individuals concerned shall provide truthful evidence.]. Id. at art. ( “凡是知道案件情况的人，都有作证的义务.”) [All those who have information about a case shall have the duty to testify.]
(the “PRC Civil Procedure Law”)\(^\text{19}\) and Article 34 of the Administrative Procedure Law of the People’s Republic of China (the “PRC Administrative Procedure Law”\(^\text{20}\)) (collectively referred to hereinafter as the “PRC Procedure Laws”), a PRC lawyer, being a PRC citizen, is legally obligated to cooperate with PRC courts, procuratorates, and public security organs to provide truthful testimony about his client, regardless of whether the relevant facts and information were originally obtained from the client and requested to be kept confidential.

With respect to communications between a PRC lawyer and his client, it seems that a PRC lawyer must also disclose information in order to comply with the PRC Procedure Laws. If the attorney-client privilege were legally recognized, the lawyer could certainly claim the privilege and reject disclosure of client communications to the authorities.

Nonetheless, it is unclear as to whether Article 38 of the 2008 Lawyers Law will prevail over the relevant articles in the PRC Procedure Laws based on the legal principles set out in the Legislation Law of the People’s Republic of China (the “PRC Legislation Law”).\(^\text{21}\) Article 83 of the PRC Legislation Law the states that:

For the laws, administrative regulations, local regulations, autonomous regulations, special rules, administrative rules or local rules enacted by the same legislative body, if a special

\(^{19}\) 中华人民共和国民事诉讼法 Zhonghua Renmin Gongheguo Min shi su song fa [The Civil Procedure Law of the People’s Republic of China] promulgated by the 10th Natl. People’s Cong., 30th Sess., October 28, 2007 art. 65 (“人民法院有权向有关单位和个人调查取证，有关单位和个人不得拒绝.”) [A people's court shall have the right to investigate and take evidence from the relevant work units or individuals, and such work units or individuals may not refuse to cooperate.]. Id. at art. ("凡是知道案件情况的单位和个人，都有义务出庭作证.") [All work units and individuals that have knowledge of the circumstances of a case shall be obliged to give testimony in court.].

\(^{20}\) 中华人民共和国行政诉讼法 Zhonghua Renmin Gongheguo Xing zheng su song fa [The Administrative Procedure Law of the People’s Republic of China] promulgated by the 7th Natl. People’s Cong., 2nd Sess., April 4, 1989 art. 34 (“人民法院有权向有关行政机关以及其他组织、公民调取证据.”) [A people’s court shall have the power to conduct investigations with and to take evidence from the relevant administrative agency and other organizations and citizens.].

provision is different from a general provision, the special provision shall prevail; if a new provision differs from an old provision, the new provision shall prevail.

The 2008 Lawyers Law and the PRC Procedure Laws are all “laws” enacted by the National People’s Congress of China, and the 2008 Lawyers Law was enacted after the procedure laws. There is an argument alleging that lawyers are entitled to keep clients’ information confidential notwithstanding any judicial proceeding. However, it is doubtful whether the above argument is sustainable. Making such an argument does show a good intention to protect a clients’ confidential information and to give PRC lawyers the right to fight against PRC court discovery. However, such an argument has not been formally acknowledged by PRC laws. Further, a new provision shall prevail an old provision only if they are “different.” The 2008 Lawyers Law and the PRC Procedure Laws arguably do not have differences in terms of the confidentiality issue. As clarified in Rule 1.6(b)(6) of the ABA Model Rules, confidentiality only requires a lawyer not to voluntarily divulge clients’ information, which does not override his or her obligation to comply with a court order. Lastly, the lack of attorney-client privilege doctrine can imply that the protection to clients’ information is intended to be limited (to that is covered under legal confidentiality).

In any event, a PRC lawyer who has been requested to testify against his or her client in court will most likely comply with the request given the fact that the *Criminal Law of the People’s Republic of China* (“PRC Criminal Law”) has particular provisions against lawyers and PRC courts and procuratorates have the tendency to arrest “obstructive” lawyers.\(^{22}\)

To a PRC client, it may be a surprise for him to realize that his lawyer may be forced to disclose (or may even voluntarily disclose) to the court whatever the client has told the lawyer. Therefore, the

\(^{22}\) See *中华人民共和国刑法* Zhonghua Renmin Gongheguo Xing fa [The Criminal Law of the People’s Republic of China] promulgated by the 5th Natl. People’s Cong., 2nd Sess., July 6, 1979 art. 306 (Providing that lawyers are prohibited from destroying or forging evidence, assisting clients to destroy or forging evidence, and forcing or inducing witness to change testimony or falsely testify.) There have been many cases in China reporting PRC lawyers being arrested for suspected conviction of the above crimes and later proved innocence and set free. It has been reported that such cases created shadows in PRC lawyers, especially criminal lawyers’ minds.
client will not be willing to candidly tell his lawyer about his wrongdoings or malicious thoughts once realizing that, especially if such wrongdoings or thoughts could bring him severe penalties if disclosed to the authorities. Nevertheless, it is hard to imagine that the lawyer can best represent the client without knowing all the facts.

Ideally, a PRC court would have determined a case involving a lawyer’s duty of confidentiality or the attorney-client privilege issue, even though cases do not have precedential effect in China. Unfortunately, due to the civil law nature of the Chinese legal system and the to-be-further-developed transparency of China’s case reporting system, no such case has been identified.

B. Impact on PRC In-House Counsels

Realizing that the communications between lawyers in China and their clients do not enjoy the attorney-client privilege, it is not surprising that the communication between an in-house counsel in China and the officers and employees of his corporate client are also not privileged.

In the U.S., the attorney-client privilege extends to communications between an in-house counsel in the U.S. and the officers of the company. In Upjohn Co. v. United States, the U.S. Supreme Court held that communications between an in-house counsel and any of the corporate employees are privileged so long as the communications concern the business. Although a handful of states do not favor such an expansive privilege for corporations, there is no doubt that the U.S. recognizes the attorney-client privilege for communications between in-house counsels and corporate employees.

In contrast to the U.S., in-house counsels in China are not subject to the same ethical rules that govern Chinese lawyers. In the U.S., in-house counsels are lawyers that have passed the bar examination of certain states and are subject to the ethical and privilege rules applicable to all U.S. lawyers. Although Chinese in-house counsels may provide legal services to their corporate employers, they are not required to have legal degrees or bar certificates; rather, Chinese in-

house counsels are subject to separate qualification, testing, and certification requirements.\textsuperscript{24}

According to the PRC regulations on in-house counsels, Chinese in-house counsels bear a legal obligation to keep state secrets and “corporate secrets” confidential.\textsuperscript{25} However, the law does not define “corporate secrets.” Moreover, similar to the other PRC laws and rules governing lawyers, the regulations on in-house counsels do not provide for an attorney-client privilege.

The ambiguity regarding an in-house counsel’s duty of confidentiality and the lack of privilege can put the in-house counsel in a very difficult position and can put the corporate client in a very disadvantaged position. For example, if a PRC in-house counsel who knows from interviews with the company’s workers that the company produced toxic products in the past is called by a PRC court to testify against the company, the in-house counsel will probably have to disclose the information to the court.

\textit{C. Impact on U.S. Lawyers}

Arguably, a U.S. lawyer is obligated to testify in a PRC court regarding his client if so requested by the court. For U.S. lawyers working in China, due to their physical presence in China, the chance of facing a PRC court order is obviously higher than for those working in the U.S. However, as a practical matter, the chance of a PRC court ordering a U.S. lawyer to testify in a PRC court, especially in civil cases, is very low.

For a matter that has the potential to be argued in a U.S. court, marking a document “privileged” and “confidential,” as U.S. lawyers commonly do, is still meaningful since the privilege between a U.S. lawyer and his client still applies in the U.S. Marking “privileged” on the relevant documents shows that the privilege has been asserted and maintained during the course of communications. Certainly, for

\textsuperscript{24} See 企业法律顾问执业资格制度暂行规定 Qi ye fa lü gu wen zhi ye zi ge zhi du zan xing gui ding [The Provisional Regulations on the practice Qualifications of Enterprise Counsels], jointly issued by the Ministry of Personnel, the Ministry of Foreign Trade and Cooperation, and the Ministry of Justice, March 12, 1997.

\textsuperscript{25} See 企业法律顾问管理办法 Qi ye fa lü gu wen guan li ban fa [The Administrative Measures of Corporate Counsels], promulgated by the Ministry on Foreign Trade and Cooperation, May 3, 1997 art. 11(4).
a pure Chinese matter that has no potential to go beyond the PRC territory, marking a document “privileged” will not be helpful for the lawyer or the client under the current legal scheme.

D. Complexity and Uncertainties

Nowadays, it is becoming more common to see a U.S. qualified lawyer working in China, a PRC lawyer who is also qualified in the U.S., or a U.S. lawyer and a PRC lawyer working together on a client matter. In light of the lack of protection of the attorney-client privilege in China, the ethical issues in these circumstances can be quite complicated and both the lawyers and the clients’ rights can be very uncertain.

A good example is a case where a U.S. company conducts an internal investigation on a Chinese subsidiary’s violation of the Foreign Corrupt Practices Act of the U.S. (“FCPA”). Different legal professionals in both the U.S. and China will be involved: the U.S. company’s in-house counsels in the U.S. will coordinate the work. The in-house counsels of the Chinese subsidiary will assist the investigation. A U.S. law firm may also be engaged to lead the investigation and the lawyers in the firm’s China office may conduct the China part of the investigation. PRC law firms may also be engaged to give PRC legal opinions since violation of the FCPA often implies violation of the anti-bribery laws in China by the Chinese subsidiary or officials as well.

Generally speaking, both the U.S. company and the Chinese subsidiary do not need to worry about being turned in by its lawyers or in-house counsels to a U.S. or PRC authority since the facts and information found by the lawyers and in-house counsels are supposed to be kept confidential (assuming all the lawyers and in-house counsels involved would strictly abide by their duty of confidentiality to their client).

Problems arise when a PRC procuratorate starts to investigate the Chinese subsidiary’s improper actions. Without the protection of legal privilege between lawyers or in-house counsels in China and their clients, a shortcut for the PRC procuratorate to investigate the case may be to call the in-house counsels of the Chinese subsidiary, the PRC lawyers who issued opinions on the case, or the U.S. law-
yers working on the internal investigation, to testify on their findings during the course of the internal investigation. As mentioned earlier, under PRC law, the lawyers are obligated to testify to the facts and information they learned from the internal investigation.

In the above scenario, the U.S. company has a significant dilemma. Not conducting the investigation would be a failure to meet the request of the U.S. government and may result in huge fines. On the other hand, conducting the investigation could cause the Chinese subsidiary (and potentially its officers) to be caught by the PRC authorities and to be criminally liable in China. The lawyers and in-house counsels involved in the internal investigation are in a dilemma too. Not testifying in the PRC court would violate PRC law, while testifying in a PRC court would force the attorney to divulge confidential information harmful to the client. For the U.S. lawyers involved, it is even more difficult. They may face the risk of being reported or sued by the U.S. company in the U.S. for legal malpractice if they, following a PRC court order, testify in the PRC court against that company.

The above scenario might not be common, but it illustrates the point that the rights of clients, lawyers, and in-house counsels are not offered sufficient protection due to the lack of the attorney-client privilege in China.

IV. Conclusion

Although the scope of a lawyer’s duty of confidentiality and the attorney-client privilege may differ among the various states of the U.S., the principles of protecting clients’ confidentiality and privilege are well established.

While the 2008 Lawyers Law has made significant developments on a lawyer’s duty of confidentiality, the applicable exceptions are still narrower those that in the U.S. Moreover, the PRC still does not recognize the attorney-client privilege in the Lawyers Law or the Procedure Laws. Hopefully, an official interpretation to the 2008 Lawyers Law or later amendments to the PRC Procedure Laws will clarify this issue, or, even better, the attorney-client privilege doctrine will be added into the later version of the Lawyers Law and recognized in the Procedure Laws of China.