

**LAWYER'S OBLIGATION:
CONFIDENTIALITY OF CLIENT INFORMATION
IN THAILAND**

By

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OVERVIEW

The most direct guidance Thai legal authority provides lawyers with respect to client confidentiality can be found in Chapter 3, Clause 11, of the Lawyers Council Regulations on Lawyer Conduct B.E. 2529 (A.D. 1986), which provides that “a lawyer shall not disclose confidential information of the client that comes into his knowledge on the course of performing his duties as a lawyer, except where the client’s consent has been obtained or it is made under the Court’s order.”

This begs the question, what is a lawyer? The answer can be found in Section 4 of the Lawyers Act B.E. 2528 (A.D. 1985), which defines a “lawyer” as “a person who has been registered as a lawyer and a license therefore has been issued to him by the Lawyers Council of Thailand.”

There are two fundamental distinctions in Thailand dealing with legal practice: (1) only those who are of Thai nationality and who have graduated from an accredited Thai university law school and who are members of the Thai Bar Association and who are registered with the Lawyers’ Council of Thailand (sometimes called the Law Society of Thailand) after a series of examinations and an internship may appear in court to represent clients and prepare court pleadings and motions (i.e., act as a barrister) and be entitled to be identified as a “lawyer”; and (2) one does not have to be a registered lawyer, or even trained in the law, to give legal advice in Thailand (i.e., acting as a solicitor). This second distinction causes a series of problems, misconceptions, and ambiguities.

There are also several titles in the Thai language to describe and distinguish those trained in the law. Bear in mind that Thailand is a civil law jurisdiction. There is a general term which encompasses all those who have legal degrees—whether or not registered as lawyers—and covers practicing attorneys and in-house counsel, judges, prosecutors, government lawyers, and academics: *Nak Khot Mai*. Then there are those who are registered with the Lawyers Council of Thailand as “lawyers” and who appear in court: *Tha Nai Kwam*. Next there are those who have university degrees in law (LLB or a Bachelor of Law—as in many civil law jurisdictions, the basic legal degree in Thailand is an undergraduate degree) who serve as government lawyers, in-house counsel, and some academics but who do not appear in court and who are not necessarily registered with the Lawyers Council of Thailand: *Ni Ti Korn*. Advanced degrees in law are available from universities in the country, while for those who wish to act as judges or public prosecutors, there is an additional one year of study under the auspices of the Thai Bar Association, which is a different organization from the Lawyers Council of Thailand (an accident of Thai legal history). And finally there are those who may have legal training but who are not registered lawyers and who do not fall into any other category mentioned above, such as “legal consultants”: *Tee Pruk Sa Khot Mai*.

The term “legal advisor” in English can be assumed to meet the narrow definition of “lawyer,” but it can, in a wider sense, also describe a person who has not been registered as a lawyer or has not received a license. Care must be exercised by non-licensed legally trained persons as the provision of inaccurate legal advice by such an advisor or consultant can expose such an individual to potential criminal liability. In contrast, a member of the Lawyers Council of Thailand faces stricter limitations, as he can appear in court on behalf of a client.

It is a rule in Thailand that the practice of law presumes the confidentiality of lawyer-client communications, which means that every single word that both client and lawyer have in their

conversation is considered “confidential information.” This rule is enshrined in the code of ethics of the Lawyers Council of Thailand and in several provisions of the Penal Code and the Civil and Commercial Code as enumerated in this paper.

1. Are only legal advisors who are able to go into court in your jurisdiction entitled to maintain the confidentiality of information that they receive from a client?

In England, Australia, Canada, India, Malaysia, Singapore, and some other Common Law jurisdictions, there are two types of lawyers—barristers and solicitors—each of which plays different roles. The same is still true in some civil law jurisdictions which have not yet merged or blended both practices into a single profession. Solicitors will contact the client, prepare case documents, and arrange witnesses and evidence. Barristers represent clients in court proceedings. In Thailand, however, a lawyer plays both roles in the blended Bar, representing clients both inside and outside of the courtroom.

According to the Regulation of the Lawyers Council on Conduct of Lawyers B.E. 2529 (A.D. 1986), Conduct Towards Clients, lawyers (remember that means only those registered with the Lawyers Council of Thailand) shall not reveal the client’s secrets which have been obtained from acting as a lawyer, unless permission is received from the client or an order is issued by the court. This rule is an ethical mandate preventing lawyers from revealing clients’ confidential information. Whether a Thai lawyer does or does not appear in court does not impact their duty to keep their client’s information confidential. A lawyer who is in breach of such duty, at the very least, shall be subject to professional sanctions, such as reprimand and parole, suspension of practice for a period of not exceeding three years, or deletion of name from the register (Section 52 of the Lawyers Act B.E. 2528 [A.D. 1985]).

Although lawyers in Thailand act as both barristers and solicitors, a separate and distinct group of legally trained persons acts as “legal consultants.” For an advisor or consultant who has not obtained a lawyer’s license, violation of client confidentiality may lead to civil and/or criminal charges, which is a wrongful act (tort) charge.

According to the Thai Civil and Commercial Code, Section 420, “A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property, or any right of another person is said to commit a wrongful act [tort] and is bound to make compensation therefor, and/or face a defamation charge.”

Section 323 of the Thai Penal Code concerning Disclosures of Private Secrets states, “Whoever knows or acquires a private secret of another person by reason of his functions as a competent official or his profession as a medical practitioner, pharmacist, druggist, midwife, nursing attendant, priest, advocate, lawyer or auditor, or by reason of being an assistant in such profession, and then discloses such private secret in a manner likely to cause injury to any person, shall be punished with imprisonment not exceeding six months or a fine not exceeding 1,000 baht, or both.

“A person undergoing training and instruction in the profession mentioned in the first paragraph who has known or acquired the private secret of another person in the training and instruction in such profession, and discloses such private secret in a manner likely to cause injury to any person shall be liable to the same punishment.”

According to the Penal Code of Thailand, Section 326 on Defamation, “Whoever imputes anything to another person before a third person in a manner likely to impair the reputation of such other person or to expose the other person to hatred or contempt is said to commit defamation, and shall be punished with imprisonment not exceeding one year or a fine not exceeding 20,000 baht, or both.”

It is important to note that in Thailand the offenses mentioned above are “compoundable.” What this means is that if the injured person and the offender come to an accommodation or private settlement, then no offense is deemed to have ever been committed and hence no punishment applies.

a. Is it necessary that information is received for the purpose of the court proceedings the legal advisors are handling?

There are no express laws or regulations concerning the distinction between information received by a lawyer for the purpose of court proceedings and information received for some other purpose. It is not necessary that a lawyer receive information from their client for the purpose of court proceedings; any information concerning a client’s case is always considered confidential, including any information from sources other than from the client himself. Such information may have been obtained from a relevant source, such as client relatives or friends, and it is the lawyer’s duty not to disclose such information before, during, or even at the final judgment of the court.

b. Are only legal advisors who are admitted in your jurisdiction considered attorneys for client confidentiality purposes?

As mentioned earlier, the term “legal advisor” may apply to a lawyer or consultant (who may or may not have a Thai lawyer’s license), but if such legal advisor has never been admitted to the Lawyers Council of Thailand, then such legal advisor shall not be recognized as a “lawyer” according to Section 4 of the Lawyers Act B.E. 2528 (A.D. 1985). The Rules on Lawyers Ethics B.E. 2529 (A.D. 1986) and the Penal Code of Thailand, Offenses of Disclosure of Private Secrets, Section 323, shall apply to a lawyer for the purpose of lawyer-client confidentiality. It is still an open question whether a legal advisor who has never been admitted in Thailand may be charged with malpractice since they are not technically a lawyer and, therefore, cannot be considered an attorney for client confidentiality purposes. However, such advisor can be charged with the offense of defamation under the Penal Code of Thailand, Section 326 (as mentioned above), and possibly under Section 323 of the Penal Code as well.

c. Are foreign legal advisors considered attorneys in your jurisdiction for client confidentiality purposes?

Pursuant to the Foreign Business Act B.E. 2542 (A.D. 1999), foreign legal “advisors” are prohibited from owning a legal practice in Thailand. Most law firms in Thailand are now formed as limited liability companies and foreigners can own a minority of the shares of capital stock therein. By virtue of a 1966 Treaty of Amity and Economic Relations between Thailand and the United States, Americans are allowed to own up to 100% of a Thailand-incorporated law firm.

However, it is also prohibited by the Royal Decree Naming Occupations and Professions Prohibited to Aliens (foreigners), Clause 39 (issued under the Alien Employment Act B.E. 2521 [A.D. 1978], the Work Permit statute), for any foreigners (including Americans) to render any “legal services” in Thailand. Fortunately or unfortunately, that term is not defined by law or regulation. Nevertheless, foreigners are allowed to act as arbitrators in Thailand if Thai law is not the applicable law of the case or enforcement and the award will not take place within Thailand. Thus, Section 4 of the Lawyers Act B.E. 2528 (A.D. 1985), the Rules on Lawyers Ethics B.E. 2529 (A.D. 1986), and the Penal Code of Thailand shall not apply to foreign legal advisors.

It could be interpreted that, since such foreigner is not a “lawyer,” they are not obliged under Thai law to maintain lawyer-client confidentiality. Yet Penal Code Sections 323 and 326 still apply to inhibit straying from the prohibition. Also, foreign legal advisors, if registered to practice law in their home jurisdictions, may still be bound by the legal ethics of their own bar association or law society, including the lawyer-client privilege, even though practicing in Thailand. In such case they may be answerable in their own jurisdiction for ethical violations committed abroad.

Generally accepted professional ethics, regardless of nationality, deem that even though they are not properly considered a “lawyer” in Thailand, subject to their peril they may or may not consider themselves subject to lawyer-client confidentiality obligations.

d. If a non-qualified legal advisor receives client confidential information, does this destroy the protection available in your jurisdiction for that information?

The issue of non-qualified legal advisors is of concern in the legal profession. First, we may need an explanation of what is a non-qualified legal advisor. Is it an advisor who has not obtained a lawyer’s license? Is it a foreign consultant who cannot obtain a lawyer’s license in Thailand because, according to the work permit law, they are prohibited from practicing law in Thailand? Or, have they never practiced law before despite having obtained a lawyer’s license? It is important to understand which situation is at issue, because it could lead to a different conclusion. A non-licensed legal advisor and foreign legal advisor (or consultant) under Thai law have no obligation of lawyer-client confidentiality according to the Lawyers Act B.E. 2528 (A.D. 1985) and the Rules on Lawyers Ethics B.E. 2529 (A.D. 1986). However, they may face a criminal charge for disclosing such information as it is considered confidential. And they may still have to look over their shoulders to sanctions in their home jurisdictions. However, even an inexperienced Thai registered lawyer is required to follow the rules according to the Lawyers Act B.E. 2528 (A.D. 1985) and the Rules on Lawyers Ethics B.E. 2529 (A.D. 1986) by virtue of the fact that they are a lawyer.

2. Are in-house legal advisors – i.e., attorneys who are employed by a corporation or another entity that consumes legal advisors – considered attorneys for confidential client information purposes?

In Thailand, there is no difference between an in-house lawyer and a private practice firm lawyer in terms of keeping client information confidential. As long as the lawyer is licensed, each has the

same obligations towards their client according to the Lawyers Act B.E. 2528 (A.D. 1985) and the Rules on Lawyers Ethics B.E. 2529 (A.D. 1986).

Both an in-house lawyer and a lawyer practicing in a private law firm are considered “employees” of the corporation or firm (the “employer”) at which they work and by which they are paid. If an employee commits a wrongful act (tort) in violation of the lawyer-client privilege or confidentiality, the employer shall be jointly liable with its employee for the consequences of the wrongful act committed by such employee in the course and scope of his employment, see Section 425 of the Thai Civil and Commercial Code. In such case, if the employer has made compensation to the injured party for the wrongful act committed by its employee, then the employer is entitled to reimbursement (indemnity) from such employee in accordance with Section 426 of the Thai Civil and Commercial Code.

3. Are there any efforts in your jurisdiction to force a waiver of client confidentiality? For example, do government regulators offer more lenient treatment if the person or entity being investigated waives client confidentiality protections?

In Thailand, the lawyer-client privilege is not absolute in that a court can order disclosure.

Under the Criminal Procedure Code of Thailand, Section 231, in cases “where any party or person is to give or produce ... any confidential document or fact which has been acquired or made known to him by virtue of his profession or duty,” but the party refuses to give or produce such evidence, the court has the power to “summon the authority or person concerned with such secret to appear and give explanation in order that the court may decide whether or not there is any ground to support such refusal.” The court may then, if it deems the refusal to be “groundless,” “order such party or person to give or produce such evidence.”

Under the Civil Procedure Code of Thailand, Section 92, “where any party or person is required to give testimony or produce any kind of evidence, and such testimony or evidence may entail the disclosure of ... any confidential document or fact which was entrusted or imparted by a party to him in his capacity as a lawyer ... said party or person is entitled to refuse to give such testimony or to produce such evidence unless he has obtained permission from the competent official or person concerned.” “Where a party or person refuses to give or produce such testimony or evidence,” the court has the power to “summon the competent official or person concerned” to appear in court and explain their reasons for refusal so that the court may consider the grounds. The court may then, if it deems the refusal to not be “well-grounded,” “issue an order so that such party or person cannot take advantage of this Section and give such testimony or produce such evidence.”

In direct response to the question, there is no extraordinary pressure on lawyers or their clients to waive the privilege.

4. Under what circumstances is an attorney who possesses client confidential information able, or even obligated, to disclose that information? A. Prevention of a serious crime? B. Prevention of serious injury to person or property?

There is no Thai law, regulation or case precedent on this question. In such a situation, the practice in Thailand is to look for publications of respected academics and judges for guidance. In certain circumstances, “a lawyer in Thailand may be able or obligated to disclose confidential information in his or her possession. Lawyers can reveal confidential information in order to prevent serious injuries to people or property or to prevent any criminal act, not just serious crimes, from being committed” (*Legal Profession*, Professor Jitti Tingsapat, Faculty of Law, Thammasart University, B.E. 2533 [A.D. 1990]).

5. What are the biggest threats in your jurisdiction to the protection of client confidentiality?

One of the biggest threats to the protection of client confidentiality in Thailand is the lack of any clear statutory or regulatory guidance especially applicable to those who are in the legal profession but who are not registered “lawyers.” Much of the practice of maintaining client confidentiality is governed by custom and tradition and, therefore, could easily be usurped by the promulgation of new customs or authority.

The issue that poses a threat to client confidentiality in Thailand is the ambiguity in the regulations with regard to non-licensed “legal advisors” also known as “business consultants” and “investment advisors.” Most often, such advisors are foreign lawyers who, unable to legally practice law in Thailand, take on the role of a legal or business consultant. The problem this practice presents is that there is little guaranteeing a non-licensed legal “consultant” will keep confidential information obtained from clients. In addition, there is no clear method of enforcing the disclosure of client confidences by a non-licensed legal advisor. Such a legal advisor could be held criminally liable for defamation according to the Penal Code of Thailand, Sections 323 and 326, but the disclosure of confidential information may not be deemed defamatory and the client could be left with little recourse without clearer legal guidance.

This problem is especially prevalent in today’s recessionary climate of limiting legal fee budgets for engaging practicing lawyers. Limiting their legal expenses means clients are typically more willing to assume the inherent risks of obtaining legal advice from non-licensed lawyers in exchange for paying lower fees. Non-licensed lawyers or consultants in Thailand have little at stake should they give false, inaccurate, or improper legal advice. Thus, clients could expose themselves to increased risk by soliciting advice from non-licensed lawyers and might suffer from the absence of a clear obligation of the person rendering the advice to uphold the attorney-client privilege of confidentiality.

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This paper has been prepared by the law firm of Tilleke & Gibbins of Bangkok, Thailand.