

The Restrictions on Coercive Measures Aiming at Obtaining Evidences Through the Right of Refusal to Testify: Take the Right of Refusal to Testify Based on Kindred and Professional Identity as an Example

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Abstract

According to the recent criminal procedure law, there is no special restriction on the coercive measures imposed upon people who have the right of refusal to testify during trials based on kindred and professional identity. Based on the recent criminal procedure law, even if attorneys have the rights of refusal to testify based on professional identity, and are allowed to refuse to testify about secrets which the defendant has told to the attorney during trials, the government still could achieve the same contents as the testimony by seizing documents, wiretapping and so forth. Those coercive measures, however, would hollow the attorneys' rights of refusal to testify. To avoid the government hollows the right of refusal to testify by means of other coercive measures, it has become a pending problem that whether we should restrict the coercive measures imposed on people who have the right of refusal to testify or not. If the answer is positive, on the next step, we should discuss the restrictive scope. First, in this article, I will point out that the purpose of kindred refusal to testify is to protect the witness, to avoid forcing the witness to criticize the defendant who is a relative of the witness. It shows that the purpose of the right is different from the kindred and professional identity, and the latter is to ensure the interest of defendants. To achieve the above-mentioned purposes, the coercive measures imposed on those who have the rights of refusal to testify should attach special restrictions. However, based on the

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different purposes of different kinds of the right of refusal to testify, the scope and measure of restriction attached to coercive measures will be different as well. To protect the independence of attorneys and communication privilege within attorneys and defendants, the coercive measures imposed on attorneys should append to stricter restrictions than other professional identities.

Keywords: the right of refusal to testify; coercive measures; seize; search; communication surveillance; nemo tenetur seipsum accusare; attorney; communication privilege; exclusion of evidence.