

KOREA

Tony DONGWOOK KANG

Bae, Kim & Lee
3th-12th Floors, Hankook Tire Bldg,
647-15, Yoksam-dong, Gangnam-gu Seoul, 135-723
KOREA

Phone: (82-2) 3404-0000
Fax: (82-2) 3404-0001

Email: dwk@BKL.co.kr

1. DEFINITION - PRESENTATION

DEFINITION / SIGNIFICANCE

In Korea, the attorney-client privilege derives from the attorney's "duty to maintain confidentiality" pursuant to Article 26 of the Attorney-at-Law Act, which prescribes that "any attorney-at-law or any former attorney-at-law shall not disclose any confidential matters that the attorney has learned in the course of performing his/her duties." The purpose of the privilege is to help attorneys fulfill their mission to "defend fundamental human rights and realize social justice" (Article 1 of the Attorney-at-Law Act) by facilitating the public trust that can be gained when the communications between attorneys and their clients are protected and kept confidential. The attorney-client privilege ultimately safeguards the attorney-client relationship that is essential to the legal system.

2. SOURCES

2.1 Relevant statutes

2.1.1 Article 26 of the Attorney-at-Law Act

As mentioned above, this provision sets forth the duty of attorneys and former attorneys to not disclose any confidential information that the attorneys have learned in the course of performing their duties.

2.1 .2 Article 23 of the Ethics Rules for Attorneys

The Ethics Rules for Attorneys include the duty of confidentiality to make it clear that fulfilling such duty is a part of the professional code of conduct for attorneys, and any attorney breaching that duty may be subject to professional discipline.

2.1.3 Article 315(1)-1 of the Civil Procedure Act

Article 149 of the Criminal Procedure Act

Article 190 of the Military Court Act

The privilege is specifically recognized in the right to refuse to testify as set forth under the various procedure acts.

2.1.4 Articles 344(1)-3-(c) and (2)-1 of the Civil Procedure Act

The holder of a document may refuse to disclose the document if it contains information that can be deemed to be the work product of an attorney, and if there are no exemptions to the duty of confidentiality applicable to such document.

In general, the holder of a document may not refuse to disclose it unless such document contains any information that is subject to the duty of confidentiality and the confidentiality privilege for such document has not been waived.

2.1.5 Article 112 of the Criminal Procedure Act

Article 115 of the Military Court Act

Criminal law enforcement authorities may, in principle, search residences and offices to seize evidence. However, seizures may be opposed for certain objects if they are related to the secrets of others and are in the possession or custody of an attorney or a former attorney in the course of performing his/her duty. The protection from seizure does not apply to any document prepared by an attorney.

2.2 Relevant cases

There have not been any cases in Korea involving the attorney-client privilege except for a case decided by the Constitutional Court in which they stated, “An essential part of the right to receive assistance from an attorney is the right of a person under physical constraint to discuss and communicate with his/her attorney. To sufficiently guarantee such right to discussion and communication, any conversation between the person under restraint and his/her attorney must be kept completely confidential.” (Ruling 91HunMa111 by the Constitutional Court on January 28, 1992.)

3. SCOPE/LIMITS

Attorneys who disclose confidential information learned in the course of their legal practice may be subject to criminal punishment for the offense of secret divulgence in the conduct of business (Article 317 of the Criminal Act) or to disciplinary measure for violation of the Ethics Rules for Lawyers.

The client may waive the attorney’s confidentiality obligation (Article 149 of the Criminal Procedure Act). Such waiver does not need to be made explicitly. Once waived, an attorney who is a witness no longer has the option to refuse, but rather must testify.

There are cases in which an attorney needs to disclose confidential information even without the client’s consent or against the client’s will. A good example of such case is “for important interests of the State” as stipulated in Article 149 of the Criminal Procedural Act. Furthermore, Article 23 of the Ethics Rules for Lawyers provides that “attorneys may disclose confidential information if such disclosure is deemed necessary to protect their own rights,” including circumstances where the attorneys need to secure their claim accrued in the relationship with the client, or to defend themselves against any claim made by the client or cases in which they are involved. On the other hand, attorneys have, in principle, the obligation to maintain confidentiality in the case of any claim, lawsuit, or accusation filed by a third party. Attorneys are allowed to resort to the disclosure of confidential information as the last means, only if such information can be objectively deemed to be of minor importance to the client.

4. IN-HOUSE ATTORNEYS

The attorney-client privilege may extend to in-house attorneys to the extent that they may not disclose any confidential information obtained from the employees, officers, or directors of the company during the course of rendering legal service. However, in the absence of any express provisions under Korean law, whether or not, or to what extent, the privilege will be recognized with respect to in-house attorneys remains unclear.

Searches and seizures may be opposed for certain objects if they are related to the secrets of employees, officers, or directors of the company and are in the possession or custody of in-house attorneys in the course of performing their duties.

5. PROSPECTIVE

The Attorney-at-Law Act as amended by Act No. 8271 on January 26, 2007, has new provisions requiring attorneys who have retired from a public office or handled more than a certain number of cases to submit their case information to the Legal Ethics Council (Articles 89-4 and 89-5 of the Attorney-at-Law Act). To protect the client's secrets, the act also has a new provision prohibiting any former or current member, advisor, and, staff member of the Legal Ethics Council from disclosing any confidential information that they may have obtained during the course of performing their duties (Article 89-7 of the Attorney-at-Law Act). Nevertheless, it is true that the client's secrets are at a greater risk of being disclosed as the provision requires attorneys to submit their case information in certain cases.

Since there are arguments over the conflict between (i) the attorney-client privilege and (ii) an attorney's obligation to pursue the truth, and also since there actually are some advocates who strongly dissent that the privilege cannot override public welfare, there should be some serious debate or discussion of the merits and necessities of ensuring the privilege as a thorough protection of basic human rights.

Additionally, it is advisable to clearly deal with, through the law, the relationship between in-house attorneys and their companies.