

Trends & Policies in Criminal Justice

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Attorney-Client Privilege

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Necessity and Purpose

- An attorney's duty of confidentiality or attorney-client privilege is the right to refuse the court's request to submit materials or disclose facts that are related to communications between the attorney and a client. In Anglo-American law, this concept is referred to as attorney-client privilege (ACP) or legal professional privilege (LPP). The US Supreme Court holds that ACP is the oldest privilege known to common law that ensures communications between an attorney and a client is conducted with mutual trust, (*Upjohn Co. v. United States*, 449 U.S. 383, 389) and that ACP maintains its validity even after the legal relationship ends or when a client dies (*Swidler & Berlin v. United States*, 524 U.S. 399).
- Korean Law has no provision specifically delineating ACP or a legal equivalent, and the Supreme Court rejected the plausibility of deriving ACP from current legislation in 2012. (Supreme Court's plenary decision on Case No. 2009Do6788 dated May 17, 2012). Serious discussions on ACP began in 2016 when the prosecution raided a law firm in charge of tax management of a family of a conglomerate owner on the grounds of suspected tax evasion. Although the Korean Bar Association and legal community strongly criticized the request and issuance of a warrant against attorneys-at-law in cases such as these, the prosecution nevertheless still conducts search and seizure on law firms and lawyer's offices, as can be observed in the following cases: Abuse of authority of the National Court Administration of the Supreme Court in 2018, the humidifier disinfectant case in 2019, and the case of alleged illegal Propofol use in 2020. Consequently, controversy over instances of alleged violations of ACP continues to be discussed in legal discourse.
- In the current situation, the need to systematically guarantee ACP can be justified by (1) the argument that ACP offers considerable value as a social utility, and (2) that it serves as a measure of protecting a client's right of defense. In regards clients' right of

Keywords

※ Duty of confidentiality, right to confidentiality, attorney-client privilege (ACP) or legal professional privilege (LPP)

defense, ACP maximizes clients' capacities to legal defense by granting attorneys the right to assist in protecting the legitimate rights and interests of their clients. As for ACP's value as a social utility, ACP provides clients means to obtain appropriate assistance from an attorney, thereby increasing their knowledge capacity regarding methods of appropriate compliance with laws and societal procedures. Based on these justifications, it can be argued that ACP provides potential substantive value in its ability to provide clients with sufficient needed assistance from an attorney.

- Many legislative bills have been submitted to the National Assembly with the intention of incorporating ACP into the law as a recognized legal provision. These legislative bills all proposed to insert new provisions concerning ACP into the Attorney-at-Law Act by amending the provisions concerning an attorney's duty of confidentiality in Article 26 and the proposed conditions of ACP generally drew from descriptions of ACP from Anglo-American law. This study contends that a prior comparative legal review should be conducted to promote effective legislation and establish a stable system. Moreover, the review should consider the characteristics of Korea's practices and legal system so that the necessity and feasibility of enacting legislation can be properly assessed.
- This study first examines whether or not the current legal system provides sufficient conditions from which ACP can be either derived and/or recognized, as well as evaluating the likelihood of its potential for violation. It furthermore evaluates the potential implications of ACP on the current legal system by reviewing actual scenarios of ACP violations in Anglo-American and continental law. The study concludes by contending that appropriate measures must be established to allow for appropriate legislation of ACP and the development of practical, effective legal systems in the Republic of Korea.

Research Methods

Review and Prior Studies on the Current System of Confidentiality between an Attorney and a Client

- The system for Attorney's duty of confidentiality under the current legal system has been reviewed to establish the significance and concept of confidentiality in the attorney-client relationship. Relevant statutes and regulations reviewed include,—the Constitution, the Criminal Procedure Act, the Civil Procedure Act, the Attorney-at-Law Act, the Code of Ethics for Attorneys, court decisions, and the internal regulations of criminal justice agencies and related institutions. In particular, this study presents the concepts of "attorney" and "client," the relationship between an attorney and a client, the meaning of confidential information and maintenance of confidentiality, the scope of application of confidentiality under current statutes, limitations thereon, etc.

Trends and Cases of Violation of the Attorney-Client Privilege

- The Korean Bar Association conducted a fact-finding survey concerning ACP in 2019 in order to obtain and examine data regarding the current status of the practical operation of ACP. This study analyzed the violation of the right to confidentiality in detail, focusing on the violating entities and the methods of violation. Common themes emerged in lawyers' responses to short-answer questions about potential methods to resolve these violations, and can be classified into the following categories: the necessity for just and fair judgment in the court system, improvement of the awareness of investigative agencies, legislative measures, system improvements, and the need for Bar Association to actively respond to cases of violation.
- Data from policy forums concerning the right to confidentiality for which the Korean Bar Association was as a host or participant reveals that during the forums, written opinions were submitted in the period from the 19th through 21st terms of the National Assembly concerning the "legislative bills for a partial amendment to the Attorney-at-Law Act," indicating that certain parties had interest in introducing the right of confidentiality. Moreover, inquiries and replies were communicated during the policy forums regarding the Attorney-at-Law Act with the Bar Association concerning cases of violation of the right to confidentiality.

In addition, attorneys, legal experts, researchers, and other individuals connected with these forums have voiced their opinions regarding the issue through other mediums.

Analysis of Legislative Cases of Different Countries on ACP and Extension to Korea's Legal System

- The current study reviews legislative cases from the United States, the European Union, the United Kingdom, Germany, France, the Netherlands, Belgium, Sweden, Spain, Canada, and Japan, as well as court decisions rendered by the European Court of Human Rights and the European Court of Justice in terms of analyzing ACP from the Anglo-American perspective, focusing on the requirements and consequences of granting one the privilege to refuse to testify, and from this review infers potential comparative legal implications of creating such a system in Korea. In particular, the study also discusses the issue in relation to specific cases such as the search and seizure process, cases involving digital evidence, which have been controversial in Korea's legal system.

The Necessity of Introducing ACP and Review on Legislative Bills Submitted to the National Assembly

- The current study discusses the possible unconstitutionality and illegality of the current system in relation to violation of ACP, as well as the need to guarantee ACP in the criminal procedure as well as in civil and administrative procedures. In addition, the validity of "legislative bills for a partial amendment to the Attorney-at-Law Act" submitted during the 19th through 21st terms of the National Assembly was examined by dividing the proposals into categories including parties of interest, subject, scope of application, exceptions, etc. From this examination, the current study proposes a legislative bill for introducing ACP as a method of improving the current legal system and practices.

Highlights of the Study

Significance and Limitations of the Current System of the ACP

- The concepts of "attorney" and "client," relationship between an attorney and a client, the meaning of confidential information or confidentiality, the scope and limitations of application of confidentiality, etc. are generally understood under the framework of an attorney's duty of confidentiality as already stipulated in current Korean law. However, the result of the review on whether ACP can be inferred from, or recognized under, the current legal system clearly shows that ACP cannot be inferred or recognized by interpreting relevant statutes and regulations, such as the Criminal Procedure Act, the Civil Procedure Act, the Attorney-at-Law Act, and the Code of Ethics for Attorneys. Moreover, the Supreme Court denied the existence of the ACP (the Supreme Court's plenary decision on Case No. 2009Do6788 dated May 17, 2012).
- Potential violations to the right to confidentiality were reviewed not only in the criminal procedure, but also in the civil and administrative procedures under the premise that ACP cannot be inferred from, or recognized under, the current legal system. The seemingly most controversial issues are as follows:
 - (1) Potential violations to the right to confidentiality in the criminal procedure: An attorney or an ex-attorney can exercise the right to resist seizure or the right to refuse to testify in the criminal procedure (Articles 112 and 149 of the Criminal Procedure Act) However, the sole party who can exercise the right is an attorney. Therefore, if an attorney intentionally or accidentally does not exercise the right to resist seizure or the right to refuse to testify, the client does not have a legal means to prevent or interrupt this process in advance. The only option for such cases is to examine retroactively whether the attorney's action or inaction constitutes as the unlawful act of disclosure of a secret under the Criminal Act (Article 317).

- (2) Potential violations to the right to confidentiality in the civil procedure: A person who is or was an attorney may refuse to testify when he/she is examined concerning a matter that can be classified as a secret related to his/her official function (Article 3151 of the Civil Procedure Act). On the other hand, parties who do not fall under the above-mentioned exceptions are required to testify and answer questions he/she is asked during the examination. However, this requirement is contradictory with the attorney/prior attorney's right to refuse testimony, as the party's testimony is directly related to communications with the attorney themselves (Article 369 and 370 of the Civil Procedure Act).
- (3) Potential violations to the right to confidentiality in an administrative procedure: The National Tax Service, the Financial Supervisory Service, the Fair Trade Commission, etc. have special acts that permit them to conduct investigations of illegal conduct on individuals subject to general administrative investigations relating to collecting information and data. Of particular interest to this issue is the system of the National Tax Service which gives tax officers the authority for search and seizure against persons suspected of violation of tax law. The National Tax Service may request an investigating agency conduct investigations,

or in other cases such actions may indirectly lead to actual investigations. However, concerns have been continuously raised about this process, including the ambiguity of criteria for recognizing the admissibility of the evidence collected through administrative investigations and the failure to guarantee fundamental procedural right such as the principle of requiring a warrant in administrative investigations the right to refuse to testify, the Miranda Doctrine, and the right to appoint an attorney.

Trends and Cases of Violations to the ACP

- The results of the national fact-finding survey conducted by the Korean Bar Association in 2019 revealed that concerns regarding potential violations to the right of confidentiality as detailed above were indeed valid. More specifically, it was found in some cases that not only the prosecution and the police but also the National Tax Service, the Financial Supervisory Service, and the Fair Trade Commission—which had the authority for examinations and investigations—searched and seized law firms, in-house legal counsel teams of companies and institutions, law offices, offices of suspects, etc. They also searched and seized computers or mobile phones to verify contents therein or collected written opinions, memoranda, etc. produced by attorneys as evidence.

<Table 1> Category of violation by each violating agency (unit: person)

Category of violation Violating agency	Search and seizure or custody of an attorney's office, computers, and mobile phones	Searching and seizing or taking custody of a suspect's office, computers, and mobile phones to collect conversations with an attorney as evidence	Others
Prosecution	13	3	6
Police	2	2	6
Fair Trade Commission	4	3	3
National Tax Service	1	1	3
Military Prosecution	0	1	0
Financial Supervisory Service	1	2	1
Investigators of the Seoul Metropolitan Government	0	1	0
Ministry of Food and Drug Safety	0	1	0
Total	21	14	19

<Table 2> Other cases of violation

No.	Other cases
1	Verbal inquiry
2	Summoning persons related to a client and questioning them with the intent of obtaining information regarding client-attorney relations, including whether the client met the attorney, the contents and length of client-attorney discussions advice the attorney offered, and information about what the attorney requested the client prepare for testimony
3	Preventing an attorney from taking notes at the scene or forcing an attorney to submit something while searching and seizing a law firm
4	Calling an attorney to obtain information about interviews conducted in a detention facility
5	Depriving a judge of the ability to delete mobile phone records by recording mobile phones as "mobile telecommunication device" when applying for a search and seizure warrant
6	Asking a question on what the story is
7	Forcing an attorney to respond to questioning
8	Arbitrary search of attorney's computer
9	Investigating the office of the in-house legal counsel team of a company, and using information about discussions between the in-house legal counsel and a law firm collected during the investigation as evidence
10	Taking custody of a computer that an attorney used when he/she worked for a company
11	Taking custody of an email that an attorney wrote when he/she worked for a company for tax investigation and then requesting the attorney make an appearance and testify; sending an official letter warning that an administrative fine will be imposed if he/she does not make an appearance
12	Requesting to submit a bill issued by a law firm (with timesheets)

- Answers to the short-answer questions on potential solutions for violations indicated the necessity of the court's right judgment, enhancement of the consciousness of investigating agencies, improvement of the current process of search and seizure by investigating agencies, and preparation of manuals. Solutions also include legislative measures for denying the admissibility of the evidence involved in the violation of the right to confidentiality, the preparation of regulations on the prohibition of violations to the right to confidentiality, and the preparation of a strict procedure for the examination of a warrant, forced investigations, and search and seizure. Furthermore, discussions on, and attention to, the improvement of systems and institutionalization related to search and seizure, the Bar Association's stern response, the collection of violation cases, and the Bar Association's official response are also necessary. Other opinions highlighted the expansion of recognition of the current right to reject seizures, the right to refuse to testify, and the attorneys' self-purification efforts.
- United States: The privilege of refusing to testify about communications between an attorney and a client has been applied for a long time through the accumulation of cases in the country and its Supreme Court, and it has been more firmly enforced through its codification on the Federal Rules of Evidence. Discussions continue to be held on more detailed issues, such as the principle of work products, theory of agreement on common interests, conflict between the opinions of experts (like medical doctors, appraisers, scientists), and privileges to refuse to testify.
- United Kingdom: In Europe, the European Court of Human Rights and the European Court of Justice recognize the right to confidentiality, much like the privilege under the Anglo-American legal system. The United Kingdom adopted the privilege to refuse to testify communications between an attorney and a client as part of the right of privacy guaranteed under the European Convention on Human Rights and established it as a fundamental right and a right under a substantive law. In the United Kingdom, the privilege to refuse to testify is divided into the privilege for legal advice and that for litigation. The privilege off litigation is more extensively protected.

Legislative Cases of Major Countries on the Right to Confidentiality, Focusing on the Privilege to Refuse to Testify

- Germany: Like most European countries, Germany independently regulates the privilege to refuse to testify communications between an attorney and a client. In Germany, an attorney must keep confidential the secrets known to him/her in connection with his/her service and is not obliged to testify in civil and criminal proceedings about information provided by a client. Furthermore, all information, such as documents and text messages communicated between an attorney and a client or deposited with an attorney, are not subject to seizure. In particular, Germany has detailed regulations on the right to reject seizure in connection with the right to refuse to testify, and the privilege of a law firm or an in-house attorney, like that of the United States, is discussed as an issue.
- France: The protection of confidential business conversations between an attorney registered with a regional bar association and a client is codified in the Penal Code. Individual statutes and regulations also provide that all communications between an attorney and a client are entitled to protection as business secrets, regardless of whether the conversations are for simple legal advice or for preparing for defense in litigation. Therefore, the advice requests from a client to an attorney and advice thereon, communications between a client and an attorney, communications between attorneys, meeting minutes, other documents, etc. are all eligible for protection as business secrets, irrespective of whether those are for advice or defense. In addition, the national regulations on the professional conduct of attorneys in France stipulate the requirements for the recognition of the right to confidentiality and the scope of the right in connection with communications between an attorney and a client.
- In Japan, there are no codified regulations on the privilege to refuse to testify communications between an attorney and a client, but Article 134 of the Criminal Law, Article 23 of the Practicing Attorney Law, Article 23 of the Basic Code of Professional Conduct of Attorneys, etc. provide an attorney's duty to keep confidential communications with a client. Furthermore, the Civil Procedure Law and the Criminal Procedure Law provide an attorney's duty to refuse to testify, the right to reject seizure, etc. and limit the extent of secrets in conversations with an attorney for protection.

Furthermore, it is the general view of academic circles and practitioners that the secrets in conversations between an attorney and a client must be protected not only in civil and criminal proceedings but also in extrajudicial procedures for the settlement of disputes, such as arbitration, administrative procedures, etc.

Necessity of Introducing ACP

- Protection of rights oriented on clients and citizens: Introducing ACP to the legal system of the Republic of Korea is necessary mainly because the right to confidentiality can be recognized as the right to have assistance from an attorney under the Constitution (Article 12). The Constitution must be interpreted and applied in the current legal system in a manner which recognizes the right to confidentiality for both attorneys and clients. Furthermore, if the right to confidentiality is violated because of the failure to codify the right, legislators should be compelled to pass specific legislation that establishes and guarantees this right. To this end, the recent legislative trend of strengthening and expanding the scope of attorneys' guaranteed rights to participation and representation in the investigation process can be considered as a potential method of integrating ACP (the Rules on the Practice of the Prosecution, as partially amended and effective on January 31, 2020, by the Ordinance of the Ministry of Justice No. 966; the Operating Guidelines for Attorneys' Participation in Interrogations and Examinations, as established and effective on November 12, 2019, by the Established Rules of the Supreme Prosecutors' Office No. 1028; the Rules on Consultation, Participation, Etc. of Attorneys, as partially amended and effective on August 13, 2018, by the Directive of the National Police Agency No. 882). In short, the legislation of the ACP is essential for substantively guaranteeing the fundamental rights of clients and people.
- Substantializing and expanding the principle of due process: The basis for introducing the ACP into the legal system of the Republic of Korea can also be found in the principle of due process in addition to the right to have assistance from an attorney under the Constitution (Article 12(1) and (3)). Currently, the principle of due process is not solely applied in criminal proceedings, namely because its significance lies in guaranteeing fundamental human rights and advocating individuals' human rights to state agencies.

Moreover, all proceedings where a state agency presides over or intervenes for the purpose of finding substantive truth are inevitably vulnerable to committing violations of human rights. Therefore, the principle of due process should be invoked to prevent abuses of the state agency's power of investigation or examination. Moreover, the principle of due process must be established and legislated as a means of regulating the legal process, promoting fair proceedings, and guaranteeing the right to confidentiality.

- Reflection of the global standard: With the exception of Japan, which bears much similarity to the Republic of Korea's legislation regarding confidentiality, the legislative cases of major countries show that the right to confidentiality is regularly legislated and enforced in international society, usually formally legislated as ACP or LPP. While some critics argue that ACP cannot be introduced into the legal system of the Republic

of Korea, or that even if introduced proper operation is impossible, basing their arguments on the presumption that ACP is a unique concept only operable under the Anglo-American legal system, such concerns are not substantiated. ACP is not merely a particular response to the unique characteristics of the Anglo-American legal system, but a concept based on fundamental values, such as the rule of law through the advocacy system, the principle of due process, and the right to receive assistance from an attorney. As such, the introduction of ACP should be understood as a method to more systematically guarantee the right to assistance from an attorney and the right to defense in accordance to the global standard.

Review on Legislative Bills Submitted during the 19th through 21st Terms of the National Assembly

	19th National Assembly	20th National Assembly		21st National Assembly
	Bill of Cheol-iae Noh, Assembly Member (Bill No. 8201)	Bill of Kyeong-won Nah, Assembly Member (Bill No. 9774)	Bill of Ki-jun Yu, Assembly Member (Bill No. 11628)	Eung-cheon Jo, Assembly Member (Bill Nos. 22526 and 697)
Persons obliged to keep confidential information	Any person			
Objects to be kept confidential	Communications between an attorney and a client and materials, etc. prepared by an attorney	Confidential communications between an attorney and a client and materials prepared by an attorney for legal advice, etc. to a client	Confidential communications between a person who is or was an attorney and a client for the purpose of legal advice	<ol style="list-style-type: none"> 1. Confidential communications between an attorney and a client in connection with the attorney's service. 2. Documents, data (including those prepared and managed in electronic form), or articles that an attorney received from a client in connection with his/her service. 3. Documents or materials prepared by an attorney in relation to a case represented by him/her.
Method of keeping confidential information	No one may request the release or disclosure of a secret against the client's intention.	No one may request the disclosure or use of a secret as evidence.	No one may request the disclosure of a secret.	No one may request the disclosure, submission, or inspection of a secret. The evidence collected in violation of this rule is inadmissible as evidence.
Scope of application	Includes other procedures in addition to criminal proceedings		Includes other procedures in addition to criminal proceedings (limited to the purpose of legal advice)	Includes trials, administrative procedures, and other similar procedures
Exceptions from application	In rare cases in which disclosure is deemed necessary for matters of serious public interest and/or in which a special provision in the law allows for the disclosure (consent for allowance of disclosure must be granted by the client)	In cases in which the client grants consent of disclosure and/or in which a special provision in the law allows for the disclosure		<ol style="list-style-type: none"> 1. In cases in which the client voluntarily consents to disclosure <ul style="list-style-type: none"> ✗ A person who forces the client to consent shall be criminally punished. 2. In cases in which disclosure is deemed necessary for matters of serious public interest, such as cases in which a client deliberately seeks legal advice with intent to commit a crime. 3. In cases in which disclosure is deemed necessary to protect an attorneys' rights in a client-attorney dispute.

Policy Proposals

Legislative Form of the Right to Confidentiality: General Provisions of the Attorney-at-Law Act

- Legislating ACP through the Attorney-at-Law Act is necessary for the following reasons: The Attorney-at-Law Act is a framework act that stipulates the definitions of “attorney” and “client” and the relationship of an attorney and a client; the Attorney-at-Law Act establishes a legal base for the right to confidentiality from which ACP can be derived; stipulating ACP in general provisions in the Attorney-at-Law Act will expand the scope of application of ACP to encompass administrative investigations as well as general criminal investigations and trials and this legislation formally allows for prosecution of violations of confidentiality; For all reasons mentioned above, legislation of ACP through the Attorney-at-Law Act is expected to guarantee fundamental rights of clients and other involved parties in relation to ACP.
- Though it can be argued that issues relating to the right to refuse to testify can be resolved simply by invoking the right to confidentiality as stipulated by the general provisions of the Attorney-at-Law act, in many cases, this right may be overridden by the Criminal Procedure and Civil Procedure Act. For example, it is impossible in for the client themselves to exercise the right to refuse to testify because provisions in the Criminal Procedure Act and the Civil Procedure Act state that only attorneys maintain this right as a representative of their client. Furthermore, provisions which require an attorney to first obtain client consent in order to disclose private information should be established.

Article 26 of the Bill (Duty of Confidentiality and Right to Confidentiality)

(1) Any individual who is or has previously been an attorney shall not disclose confidential information shared through the client-attorney relationship.

- (2) No individual shall request the disclosure or submission of information, documents, etc. which fall under the following categories:
 1. Any information shared between the client and attorney in the client-attorney relationship
 2. Documents, data (including those prepared and managed in electronic form; hereinafter the same shall apply in this Article), or articles received by an attorney from a client.
 3. Any documents or data prepared by the attorney which would violate the stipulations of subparagraph 1 and/or subparagraph 2.
- (3) Exemptions from paragraph (1) or (2) may be allowed in the following cases, in which the scope of disclosure should be kept minimal:
 1. In cases where the client gives explicit consent for the exemption
 2. In cases where exemption is deemed necessary for the protection of serious matters of public interest
 3. In cases where exemption is deemed necessary for the protection of an attorneys’ rights

Individuals subject to and legally bound by the duty of confidentiality: all individuals

- The introduction and legislation of ACP maintains its legal objective in guaranteeing the right of the client, and as such legislation of ACP should prioritize protection of the client’s rights. The attorney’s legal duty to protect the rights of their client must also be strengthened. Hence, the current study proposes that the main text of Article 26 of the current Attorney-at-Law Act be replaced by Article 26 (1) of the Bill and that the provision stating “where any other Act specially provides otherwise” as an exemption from the duty of confidentiality be deleted. As it is already a given fact that such exemptions may be requested through the execution or amendment of another Act, explicitly stating such a provision is unnecessary. In such cases, the precedence between the Attorney-at-Law Act and other Acts may be determined by referencing the general principles of law.

Objects subject to and legally bound by the duty of confidentiality: Any communication records, documents, or materials provided by a client or prepared by an attorney based on those provided by the client

- Objects subject to and legally bound by the duty of confidentiality include all physical or digital information communicated through any form of media, such as phone calls, emails, and social media. However, some limitations may be imposed as follows to prevent the abuse of the right to confidentiality, irrespective of legal service:

(1) The objects eligible for protection shall be limited to communications with a client, the documents and materials provided by a client, and documents and materials prepared by the attorney based on those provided by the client. However, in cases in which ACP is only considered for documents and materials not necessarily communicated in the duration of the official legal communications between the client and attorney, a broader scope of application of ACP is advised.

(2) Communications referred to in this clause can be understood as those made confidentially. This clause derives from ACP established under Anglo-American law, which establishes that only communications made with the intent to keep such communications hidden from third parties are eligible for protection. This clause positions confidentiality as a legal tool that benefits the client, as it guarantees to clients that communications between the client and attorney are kept completely private to any third-party unless the client explicitly expresses his/her intent to disclose them to the public.

(3) In consideration of the fact that the reality of modern communication is that creation, storage, transmission, and receipt of electronic media is extremely common, it is reasonable to protect such documents under ACP and acknowledge these as documents submitted by the client.

(4) ACP should also be applied to articles that an attorney receives from a client. Under the current confidentiality system, an attorney has the right to reject the seizure of the attorney's articles. However, exertion of this right is difficult in practice, and in many cases attorneys are forced to submit such articles under the guise of requesting voluntary submission, or other methods are used to obtain the articles. Moreover, if a client possesses such articles, such articles easily become the target of a search and seizure.

Methods for protecting confidentiality of information : prohibition of requests for or disclosure of private information

- When compared with the currently enforced Attorney-at-Law Act and the Code of Ethics for Attorneys that serve to regulate attorneys' duty of confidentiality and prohibit the disclosure or improper use of confidential information, the proposed bill would enable a more efficient and sensible guarantee of confidentiality, as unlike present legislation, it establishes prohibition of requests, submission, and disclosure of private information as implicitly guaranteed principles.
- The issue of whether it is reasonable to deny admissibility of evidence collected through actions which would constitute as violations of the Duty to Confidentiality and Right to Confidentiality should be examined. The Criminal Procedure Act of the Republic of Korea codified the principle of exclusion of illegally collected evidence in 2007 (Article 308-2 of that Act), with the principle of due process in this context having the same definition as due process as defined in the Constitution. Considering this fact, denial of admissibility of evidence collected through violations of ACP should not be evaluated any differently than other types of illegally collected evidence. Under the principle of exclusion of illegally collected evidence, the admissibility of all evidence collected by means which infringes any law relating to the right to receive assistance from an attorney, or any other procedure of the Criminal Procedure Act, is strictly illegal. Furthermore, the duty of confidentiality is closely tied to an attorney's professional ethics, and thus admissibility of evidence collected through violations of ACP should be strongly discouraged.

Scope of application of the right to confidentiality and the duty of confidentiality: all criminal, civil, and administrative procedures in which state agencies are involved in any extent

- As discussed above, introducing ACP is necessary as the principle is derived from the the right to receive assistance from an attorney as granted in the Constitution and the principle of due process (Article 12(1), (3), and (4). In protecting clients' rights to receive assistance from an attorney, it is necessary to implement measures to guarantee ACP for the client not only when he/she is in the role of a suspect or defendant, but also when he/she is in the role of an unofficial suspect, a person being subject to an unofficial investigation, a victim, or another person of interest. Furthermore, the scope of application of due process be expanded beyond only criminal procedures. The right to confidentiality and duty of confidentiality should be recognized not only in criminal procedures but also in civil and administrative procedures over which state agencies preside.
- Limitations on application of confidentiality: The grounds for exception can be stipulated as follows. However, while the grounds for exception are stipulated to waive ACP and the duty of confidentiality, granting such exceptions should be kept to the absolute minimum extent, only granted in very rare cases.
 - (1) In cases where a client grants their consent: The duty of confidentiality and the right to confidentiality are principles established for the benefit and protection of clients. Therefore, a client may consent to the disclosure of confidential information by communicating his/her intention to waive the right. However, even in cases in which the client grants their consent, the attorney may only use this confidential information in such a way that the client is benefitted.
 - (2) In cases in which disclosure of confidential information is deemed necessary for serious matters of public interest: The issue of defining the concept of public interest, as well as clearly delineating the scope of application of the concept as it relates to

types of crimes committed by clients is an important area of discussion. Clearly defining the concept and its scope of application is necessary in the interest of enhancing the capacity for proper adherence to attorneys' duty of confidentiality and state agencies' compliance with the right to confidentiality. To this end, it may seem of interest to cite specific examples and/or enumerate the exact details of what constitutes as a 'public interest.' In the long-term, these examples and specifications should be derived from typological analysis of discussions in academic circles, court decisions, cases, etc., but as a short-term solution, these specifications should be explicitly stipulated in the Code of Ethics for Attorneys.

- (3) In cases where disclosure is deemed necessary for an attorney to defend his/her rights: While the current Code of Ethics for Attorneys recognizes exemptions only in the case that disclosure is necessary for an attorney to defend his or her rights, the question of whether there is a need to add additional cases in which attorneys may utilize this exemption can arise. However, in light of the legislative purpose of ACP, level of ethics required by the nature of attorneys' profession, use of this exemption should only be deemed valid in cases where disclosure is necessary as a defense measure for the attorney, and more flexible interpretations of this exemptions are discouraged.

Expected Effects of Policies

- Strengthening clients' guarantee to the right to receive assistance from an attorney and the right to participate in the legislative process
- Protecting the human rights of clients and defendants in the criminal procedure
- Eliminating unconstitutional components of investigations and trial proceedings
- Regaining people's trust in the criminal justice system