

# Back to Fundamentals: A Closer Look at a Seoul High Court's Unsuccessful Attempt to Introduce Attorney-Client Privilege in Korea

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## Abstract

*In light of certain recent events, such as a search and seizure conducted at one of the major law firms by the Prosecutor's Office, vigorous discussion has surfaced in South Korea concerning the absence of and need for the so-called "legal professional privilege" or "attorney-client privilege." In fact, back in 2009, "attorney-client privilege" almost found its way into Korean jurisprudence, when the Seoul High Court affirmed a lower court's finding that US-style attorney-client privilege can be derived from the Korean constitution's "right to counsel," existing laws, and the fact that attorney-client privilege exists in many other jurisdictions. This case, however, was later reversed by the Supreme Court. A careful examination of each of these grounds for attorney-client privilege, with the analytical tools provided by the body of case law and scholarship concerning attorney-client privilege in the US, makes clear why these alleged grounds for finding such a privilege in Korea fell short of expectations. Amidst recent discussions, which often revive these same grounds that previously failed, a straightforward approach reviewing the fundamentals of attorney-client privilege appears to be all the more necessary.*

KEY WORDS: Attorney-client privilege, legal professional privilege, US law

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“[L]egal professional privilege is . . . without a doubt one of the fundamental principles on which the administration of justice in a democratic society is based.”<sup>1)</sup>

Imagine a government prosecutor’s visit to a judge to obtain a warrant. The warrant did not concern the suspect directly. The prosecutor had already searched the business and residential premises of the suspect. The warrant that the prosecutor requested and received on this occasion was actually for the law firm that had represented the suspect on a variety of matters over a long period of time. The warrant allowed the prosecutor to raid the law firm in order to search for relevant information concerning the case at hand. There was nothing in the warrant, however, that prevented the prosecutor from reviewing documents that include highly confidential information of not only the suspect but other clients of that law firm, materials that no one expected to be disclosed outside of the relationships between each client and the attorney(s) representing that client. Among other documents, the prosecutor finds and reviews a memorandum internal to the law firm, written by a junior associate summarizing all of the facts relevant to the case, a copy of an email sent by the law firm to the suspect-client that provides detailed advice as to how to respond to questions from the prosecutor on this specific case, and most importantly, a memorandum that provides a thorough roadmap of the defense strategy devised for this specific case. The government prosecutor reviews and becomes aware of all of this information and may use the information to the prosecution’s advantage during the trial that follows.

This scenario, which would be deeply troubling to anyone who believed in the rule of law and modern democratic values, could technically happen in South Korea. In fact, in August 2016, the South Korean Prosecutor’s Office obtained a warrant from a judge to conduct a “search and seizure” of a major Korean law firm to obtain evidence for an ongoing tax evasion investigation. The investigation did not concern any potential wrongdoing by the law firm or any attorney or employee of the firm. Rather, the Prosecutor’s Office could not obtain the evidence it wanted from the

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1) *Michaud v. France*, Eur. Ct. H.R. (2012), available at <http://hudoc.echr.coe.int/eng?i=001-115377>.

suspected tax evader. The Office believed, however, that the materials and the information that it sought would be in the possession of the lawyers who had previously provided legal advice to the client-suspect, and thus requested a warrant so that they could search for that kind of evidence at the law firm offices. As the news of this event spread, it provoked considerable outrage among legal practitioners in Korea, with the key issue becoming the absence of attorney-client privilege in Korea. Various bar associations in Korea have initiated or renewed existing efforts for the legislature to adopt some type of legal professional privilege in Korea.<sup>2)</sup>

The vigorous discussions surrounding this event revealed the following two facts: first, while in this specific incident, the actual events did not entail a firm-wide search but only the submission of specific documents requested by the prosecutor (and thus was more like a subpoena than a true “search and seizure”),<sup>3)</sup> law practitioners in Korea actually fear the scenario described above because there appears to be no legal mechanism to protect confidential materials from these types of warrants. Second, against this perceived need for some protection, the most popular solution suggested by many practitioners is the introduction of “attorney-client privilege” to provide some level of protection for client information and data.<sup>4)</sup>

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2) E.g., Attorney Client Privilege, Not a Special Right but a Fundamental Right, Korean Bar News (October 4, 2016), <http://news.koreanbar.or.kr/news/articleView.html?idxno=15293> (summarizing a conference held to discuss the introduction of attorney-client privilege in Korea by the Korean Bar Association and a recent failure of an effort to introduce a bill on attorney-client privilege in the Korean parliament).

3) The Prosecutor’s Office clarified that the warrant was necessary given that the law firm could not voluntarily turn over the documents without running into privacy law concerns. See *‘Shock’ from Prosecutors’ Office Search and Seizure Warrant for Law Firm*, Law Times, Aug. 8, 2016, <https://www.lawtimes.co.kr/legal-news/Legal-News-View?serial=102337&kind=AE>

4) In fact, without any protection, law firms could become the treasure trove of all sorts of incriminating evidence for the Korean Prosecutors and would be the first stop for a large number of investigations, as a client would ideally seek legal advice by confiding relevant information to her attorney, and any good attorney would be keeping diligent records of the communications and relevant materials. This risk exists in other types of governmental investigations, such as the investigations conducted by the Korea Fair Trade Commission. The Korea Fair Trade Commission routinely conducts investigation of US and foreign businesses operating in Korea for potential competition and fair trade law violations, and as is the case with the Prosecutor’s Office, the Commission also regularly requests and seizes would-be privileged information and materials in other jurisdictions.

How did South Korea come so far in operating under the law without this privilege or any commensurate doctrine protecting Korean defendants and their attorneys from the scenario described above? In fact, attorney-client privilege almost found a home in Korean jurisprudence when the Seoul High Court – later overturned by the Supreme Court – affirmed a lower court’s finding that US-style attorney-client privilege can be derived from the Korean constitution’s “right to counsel,” existing laws and, essentially, the fact that many other jurisdictions have such privilege. A careful examination of each of these grounds, in light of *what* attorney-client privilege is and *why* it is necessary, shows that each of the grounds asserted by the Seoul High Court was ill-fated. These alleged grounds for privilege – a constitutional right to counsel, existing laws, and the fact that many other jurisdictions have the privilege – fail to address the unique purposes and the scope of attorney-client privilege. Unfortunately, the Supreme Court did not elaborate on its reasoning when overturning the Seoul High Court, and little has been said of why the grounds alleged by the Seoul High Court were insufficient. Perhaps for this reason, recent discussions concerning attorney-client privilege too often repeat similar arguments made by the Seoul High Court and fail to engage in a discussion of the fundamentals: the *what* and the *why*. This article thus first analyzes the unique characteristics and the purposes of attorney-client privilege in the context of US law as a reference and a starting point for discussion. Then, it uses analytical tools provided by the American example to examine each of the Seoul High Court’s failed grounds.

## I. Attorney-Client Privilege under US Law

Given the absence of attorney-client privilege in Korea, discussions on this topic must make references to privilege as it exists elsewhere. While there are many jurisdictions with “attorney-client” or “legal professional” privilege, such as other common law jurisdictions (Great Britain,<sup>5)</sup> Canada,<sup>6)</sup>

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5) *E.g.*, *Three Rivers District Council v The Governor and Company of the Bank of England* (No 5) [2003] EWCA Civ 474 and No 10 [2004] UKHL 48.

6) *E.g.*, *R. v. McClure*, [2001] 1 S.C.R. 445

Australia<sup>7)</sup>, and the European Union,<sup>8)</sup> this article examines US attorney-client privilege as a representative example, given that most discussions of attorney-client privilege in South Korea make references to the US and that case law and scholarship concerning US attorney-client privilege provide solid analytical tools.

### 1. Defining Characteristics of US Attorney-Client Privilege

US attorney-client privilege originated from English common law and was later introduced in federal and state statutes.<sup>9)</sup> Attorney-client privilege is one of the oldest privileges in common law, dating back to at least 1654 in English case law.<sup>10)</sup> It is a rule of evidence that concerns whether a piece of evidence, even if it would be reliable and non-prejudicial, should be excluded for reasons entirely unrelated to the truth-promoting principle. In other words, even if a piece of evidence would have great probative value and thus would be instrumental in getting to the “truth” in a case, the attorney-client privilege allows exclusion of such evidence as long as it meets the conditions outlined above.<sup>11)</sup>

While there are slight variations among federal and state courts,

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7) E.g., *Daniels Corp. Int'l Pty Ltd. v. ACCC*, 213 CLR 543 (2002).

8) E.g., *Akzo Nobel Chemicals, Ltd. v. Comm'n*, Case C-550/07, Sept. 14, 2010, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=82839&pageIndex=0&dclang=EN&mode=req&dir=&occ=first&part=1&cid=1397857> (decision of the European Court of Justice).

9) For instance, Rule 501 of United States Federal Rules of Evidence codifies common law privilege and states “[c]ommon law shall – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege... But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” Fed. R. Evid. 501. Federal Rules of Evidence became law in 1975.

10) See Avidan Y. Cover, *A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment*, 87 Cornell L. Rev. 1233, 1237 (2002)

11) In the US, the privilege is subject to an exception – also dating back to English common law cases – which is the “crime-fraud exception.” This exception applies when the client has sought legal assistance for the purpose of committing an on-going future crime or fraud. Legal communications undertaken for such purpose would not be subject to the privilege. Under certain state law, such exception also extends when there is an intention to commit a “tort.” The scope of this exception has not remained static in the development of the related case law. See generally David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. Rev. 443, 490-492 (1986).

Wigmore's widely cited treatise for evidence summarizes the attorney-client privilege in the US as:

(1) Where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communication related to that purpose, (4) made in confidence, (5) by the client, (6) is at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except where the protection is waived.<sup>12)</sup>

Of these conditions, the following characteristics are of particular interest for this article's analysis of developments in South Korea:

- a. The privilege is applicable to *any client seeking advice*, not only to those who are in an active legal proceeding or under an investigation.

This means that the communications between an attorney and a client who consults an attorney simply to assess the legal risks associated with a planned activity would be protected under the privilege, if for some reason, such communication might be requested as evidence in a later proceeding. For instance, client A, a manufacturer of a leading brand of baby power, intends to terminate a supply contract with an existing business partner; client A may consult attorney B as to the legal risks associated with such termination, including consequences under the contract itself as well as applicable laws like antitrust laws. The communication between client A and her attorney concerning a potential termination would be protected under the privilege even if Client A is not in any ongoing legal dispute concerning the contract or under investigation of any kind. As is discussed further below, while the Korean Supreme Court held that attorney-client privilege does not exist in Korea for those who are not facing actual proceedings or under investigation, the attorney-client privilege in the US does not make a distinction based on whether a client is facing an actual court proceeding or an investigation.

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12) 8 John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW §2292 (McNaughton rev. 1961).

- b. The privilege applies to *any type of legal advice sought and provided*, and is not restricted to the legal advice given for a particular case where the production of document is at issue.

Thus, evidence completely unrelated to the case at issue could be excluded based on the privilege. For instance, client A in the above example may be engaged in a court proceeding involving a similar supply contract with a different business partner. In this proceeding, client A can assert privilege against a broad discovery order for materials relating to “all supply contracts for baby powders.” The communications between client A and attorney B on the other contract would be protected from a discovery request in the ongoing case.

- c. The privilege is permanently protected *by the client, and not by the attorney*.

The attorney-client privilege stands independently of a lawyer’s duty of confidentiality.<sup>13)</sup> This means that even if for some reason, an attorney intended to violate her duty of confidentiality and disclose a client’s confidential information, the privilege holder – who is the client – would be able to assert the privilege against the attorney to prevent the privileged materials from disclosure by that attorney. In other words, the ultimate control over a privileged communication rests with the client. In jurisdictions that have only a lawyer’s duty of confidentiality but not attorney-client privilege, such as South Korea, the ultimate control over any putatively privileged material would rest with the attorney. While attorneys, among others, may benefit from the introduction of attorney-client privilege by being able to provide assurances to their clients and to provide better legal services, US-style attorney-client privilege is ultimately a privilege that rests with the client rather than the attorney.

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13) In the US, a lawyer’s duty of confidentiality is spelled out in the legal ethics rules of each jurisdiction and a violation may lead to disciplinary sanctions for the lawyer. Model Rule 1.6 of American Bar Association’s Model Rules of Professional Conduct 1.6 states, “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”

d. *Only the communications undertaken for the purpose of seeking and providing legal advice* is subject to the privilege.

In practice, whether a certain communication is privileged or whether the entirety or a part of a document is privileged often requires a careful review of the contents. A single document like an email may contain both privileged and non-privileged parts; a precise determination of the privileged portions of the material is necessary before any privilege could be successfully asserted.

While some commentators in Korea propose legislation establishing “attorney-client privilege” – in the form of a statute defining the privilege<sup>14)</sup> – as a response to broad law firm warrants and the threat to confidentiality, the mere existence of a statutory definition of attorney-client privilege itself without the accompanying body of case law drawing the precise scope of the privilege and establishing procedural safeguards would not afford much protection for confidential communications. Because attorney-client privilege is essentially a rule of evidence that relates to whether a piece of evidence should be disclosed in court, in the US, it has been the judiciary who has exercised ultimate authority to determine the precise scope of when the privilege applies, whether an exception applies, and whether there has been a waiver of the privilege, over a long series of cases.<sup>15)</sup>

For instance, even in the US, the government is able to receive and actually has received warrants to search lawyers’ offices.<sup>16)</sup> Privilege *per se* does not stop such searches. As long as there is probable cause that evidence of crime will be found in a law office, judges in the US have consistently ruled that searches of law offices are not *per se* unreasonable.<sup>17)</sup> At the same time, as there are inherent risks in such searches – given the expected amounts of privileged materials in the law offices – US courts in these cases have put in place procedural mechanisms to review, select, and

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14) E.g., SEOUL DISTRICT BAR ASSOCIATION, POLICY STUDY FOR PROTECTION OF CONFIDENTIALITY BETWEEN ATTORNEY AND CLIENT 16, Law Times, 2013.

15) See Cover, *supra* note 11 at 1236.

16) Eric McArthur, *The Search and Seizure of Privileged Attorney-Client Communications*, 72 U. CHI. L. R. 729, 742-43 (2005).

17) *Id.*

protect privileged materials, such as the appointment of a special master to accompany the government agent or the sealing of all documents obtained from a law firm until a court clears any privileged materials or portions. These procedural safeguards have been developed through a long history of case law to provide the court with an opportunity to determine what confidential communications should be protected under the privilege; the safeguards are not automatic elements of or responses to the existence or assertion of attorney-client privilege.<sup>18)</sup> The statutory introduction of a definition of attorney-client privilege is hence not a one-stop solution.

## 2. *Justifications for Attorney-Client Privilege in Common Law*

Historically, there have been multiple justifications articulated for attorney-client privilege in common law, broken down into i) instrumental, ii) utilitarian, and iii) humanistic justifications.<sup>19)</sup> These rationales are intimately linked to the development and evolution of the law on attorney-client privilege and the defining characteristics of the privilege that were outlined in the previous section. The conceptualization of these rationales also provides the necessary tools to facilitate the discussion of *why* such a privilege is called for.

### 1) *Instrumentalist Rationale*

The most widely recognized and articulated rationale for attorney-client privilege in the common law tradition is the rationale that the privilege is instrumental in encouraging frank and candid communication by a client to her attorney, and that full disclosure is necessary for effective legal representation. Attorney-client privilege encourages clients to disclose even

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18) In fact, some commentators in the US allege that these procedural safeguards reflect US constitution's Fourth Amendment against unreasonable search and seizure and are not necessarily a part of the attorney-client privilege. *Id.* at 744 (“[I]nsofar as the privileged documents do fall within the scope of the warrant-and would therefore be subject to search and seizure but for their privileged status-the courts plainly assume that something immunizes them from search and seizure. Again, it is not implausible to conclude that this ‘something’ is the Fourth Amendment.”).

19) See David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 490-492 (1986).

the most damaging information to their attorneys, which they would not do if such a privilege did not exist. Underlying this idea is the assumption that without full disclosure, attorneys would not be able to provide effective representation and that without effective representation and a fair chance at trial, the legal system would not function properly.

Another articulation of the instrumentalist view is the argument that attorneys are often successful in dissuading their clients from illegal and unethical courses of action and that such dissuasion cannot occur if clients are reluctant to disclose their plans for fear of betrayal.<sup>20)</sup> In the corporate context, this communication can take the form of internal investigations whose purpose is to discover potentially risky or unlawful activities before law enforcement intervenes and to administer self-correction measures.

Under the instrumental rationale, attorney-client privilege, despite its potential costs to truth-seeking, should be available to protect the effectiveness of the legal system. The instrumentalist reasons for the privilege – the promotion of an effective legal system through frank communications between clients and their attorneys – do not depend on whether the client is currently in a proceeding or not, or whether the communication relates to a particular issue or a case.

## 2) *Utilitarian Rationale*

The utilitarian rationale recognizes the instrumentalist reasons for attorney-client privilege and is similar to that rationale. The only difference is that as opposed to an instrumentalist, who categorically calls for the privilege, a utilitarian would argue that the privilege should be afforded in so far as its benefits outweigh its costs in truth-seeking and correct disposal of cases. Wigmore's treatise articulates the utilitarian view and states that a type of evidentiary privilege (including attorney-client privilege) can be justified if "the injury that would inure to the relation by disclosure of communications [is] greater than the benefit thereby gained for the correct disposal of litigation."<sup>21)</sup> This utilitarian view would narrowly construe the privilege only to the extent that the benefits of the privilege outweigh the costs to the truth-seeking process. It is reflected in the delicate exercise of

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20) *Id.* at 492.

21) Wigmore, *supra* note 13, §2285.

trying to define the precise boundary of what is privileged or not privileged, as it has developed in US case law.

### 3) *Humanistic Rationale*

Although not discussed as often, the humanistic rationale places emphasis on the autonomy, dignity, and privacy of the client as an individual and the lawyer as an extension of the client. Under this rationale, the attorney-client relationship is an intimate relationship that needs to be protected from forced betrayal and any communications shared with an attorney are an extension of the private sphere of the client.

As Professor Charles Fried has articulated the basic rationale:

[I]t is not only consonant with, but also required by, an ethics for human beings that one be entitled first of all to reserve an area of concern for oneself and then to move out freely from that area if one wishes to lavish that concern on others to whom one stands in concrete, personal relations. Similarly, a person is entitled to enjoy this extra measure of care from those who choose to bestow it upon him without having to justify this grace as either just or efficient. We may choose the individuals to whom we will stand in this special relation.<sup>22)</sup>

In other words, under the humanistic rationale, a client is entitled, as a person, to reserve a private space for herself and invite a person of her choosing with whom she is in a special relationship (her attorney), to share this private space. Under this rationale, therefore, clients must have control over their private spaces, the protection of which does not depend on instrumental or utilitarian reasons.<sup>23)</sup> Under this rationale, the privilege

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22) Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1070-71 (1976).

23) This rationale seems particularly pronounced in Europe. For instance, European Court of Human Rights adopted such humanistic rationale in finding that attorney-client privilege is “one of the fundamental principles on which the administration of justice in a democratic society is based.” The Court derived attorney-client privilege from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is the article that protects individual privacy. Article 8 of the Convention reads,

holder must be the client, who is the creator of the private space and the special relationship, rather than the attorney.

## II. Failed Grounds for Attorney-Client Privilege in Korea

The various rationales and justifications in common law examined in the previous section reflect the unique purposes of the attorney-client privilege as an evidentiary privilege that stand independently of any related constitutional principles or other laws. These rationales also are intimately linked to why attorney-client privilege in the US has gained its particular characteristics. With these analytical tools, this section examines the failed attempt by the Seoul High Court to introduce attorney-client privilege in Korea and recent discussions concerning the introduction of that privilege in Korea.

### *1. The Failed Attempt to Derive Attorney-Client Privilege from Right to Counsel*

In 2009, the Seoul High Court attempted to introduce a US-style attorney-client privilege in Korea, a decision that was eventually overturned by the Supreme Court of Korea.<sup>24)</sup> The case concerned a legal memorandum of a well-respected law firm in Korea that was discovered and confiscated during a “search and seizure” by the Prosecutor’s Office of one of the defendants’ business premises. The law firm represented the defendant company and wrote a legal memorandum that started, as is the

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1. “Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

See *Michaud v. France*, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-1153777>.

24) Seoul High Court, 2008No2778, June 26, 2009.

case with most legal memoranda, with a “facts” section that summarized the key details of the issue in this case. This case (the Legal Memo Case below) concerned whether the defendant violated the Framework Act on Construction Industry (*Keonsulsanupgibonbeop*), more precisely by providing unlawful financial and economic benefits, such as election campaign funds, to exercise undue influence on a procurement process. The memorandum apparently included a summary of facts and statements such as, “your company provided funds for the election... If such indirect and round-about way of providing the funds were to be discovered...”<sup>25)</sup>

The Seoul High Court denied the Prosecutor’s Office’s request to introduce the legal memorandum as evidence to prove defendants’ wrongdoing, based on Korea’s own “attorney-client privilege,” as derived from Article 12, Paragraph 4 of the Constitution concerning the right to counsel. The Seoul High Court affirmed the lower court’s reasoning, stating:

[E]ven if there is no explicit recognition, a client’s privilege to refuse to disclose confidential communication between attorney and client made for the purposes of seeking or providing legal advice should be recognized, considering the background of the decisions of our Constitutional Courts, and the background and the limits of the existing provisions relating to confidentiality between attorney and client, and the fact that the precedents in the U.S., in Great Britain and in other common law countries recognize [such a privilege.]<sup>26)</sup>

The Seoul High Court, in essence, relies on (i) existing laws and cases relating to confidentiality between attorney and client (unfortunately without discussing these laws and cases in detail) as well as (ii) the fact that the attorney-client privilege is found in various other jurisdictions, including common law jurisdictions, to hold that attorney-client privilege may be derived from the Constitutional provision concerning the right to counsel. This conflation of various rationales – which are unfortunately barely articulated – begs the following questions:

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25) See Seoul District Bar Association, *supra* note 15 at 54.

26) See *supra* note 25.

- How can attorney-client privilege be inferred from a constitutional right to counsel? How can the constitutional right to counsel that applies to a narrow set of beneficiaries support a broad evidentiary privilege? How did other jurisdictions like the US with both a constitutional right to counsel and attorney-client privilege understand the relationship between the two?
- How do existing laws and cases in Korea provide grounds for inferring attorney-client privilege? Does this mean that the existing laws and cases together already provide equivalent protection?
- How could the existence of attorney-client privilege in other jurisdictions itself justify the adoption of such privilege in Korea?

Each of these questions is examined below.

## *2. The Relationship between Right to Counsel and Attorney-Client Privilege under Common Law*

In the Legal Memo Case, the Seoul High Court refers to the existence of attorney-client privilege in common law jurisdictions, including the US, as one of the many bases for its holding. However, in the US, the relationship between the constitutional right to counsel and the attorney-client privilege is not in any way consistent with the Court's reasoning that the privilege can be derived from the constitutional principle.

In fact, at the time the first English cases began asserting and developing attorney-client privilege, there was no such thing as a right to counsel in England. Far from guaranteeing access to counsel, English common law actually prohibited the use of lawyers for those charged with serious crime until the mid-eighteenth century.<sup>27)</sup> Hence, at least in the US, the development of attorney-client privilege as a common law rule of evidence predates the introduction of the right to counsel as a constitutional principle, and cannot thus be said to have derived from the constitution. In fact, it was only in 1791 that the Sixth Amendment of the United States Constitution, stating that "[i]n all criminal prosecutions, the accused shall enjoy the right

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<sup>27)</sup> See John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 7 (2013).

to have ... the assistance of counsel for his defense," was ratified and thus included in the Bill of Rights.<sup>28)</sup> This was long after the English courts recognized the necessity of attorney-client privilege based on the rationales examined in the previous section.

Another obvious challenge in the Seoul High Court's approach is that attorney-client privilege is in at least a few aspects much broader in scope than the Sixth Amendment's right to counsel. The Sixth Amendment's right to counsel only applies to criminal defendants, while attorney-client privilege applies regardless of the type of claim in question: criminal, civil, or administrative. Additionally, the Sixth Amendment's right to counsel attaches to criminal suspects or defendants who are facing charges, while attorney-client privilege applies to any client who seeks legal advice from an attorney, even clients who are not facing any ongoing proceeding or investigation.

This does not mean, however, that the attorney-client privilege and the Sixth Amendment are not intimately linked. The U.S. Supreme Court noted that "the Sixth Amendment's assistance of counsel can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations are secure against intrusion by the government, his adversary in the criminal proceeding."<sup>29)</sup> This statement, however, simply reflects the fact that both the Sixth Amendment's right to counsel and the attorney-client privilege both advance an individual's privacy interests. The standard for the privacy interest of a criminal defendant under the Sixth Amendment is likely higher than, or at least commensurate with, the privacy interest protected under the humanistic rationale by the attorney-client privilege. Thus, one cannot satisfy the Sixth Amendment's right to counsel, if the lesser of the

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28) In the U.S., the Sixth Amendment's Right to Counsel was included in the Bill of Rights in 1791 while the first English cases on attorney-client privilege, as mentioned above, dates back to late 17<sup>th</sup> century.

29) *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4. See also, Joshua T. Friedman, *The Sixth Amendment, Attorney-Client Relationship and Government Intrusions: Who Bears the Unbearable Burden of Proving Prejudice?*, 40 WASH. U. J. URB. & CONTEMP. L. 109, 123 (1991) ("It is difficult to imagine how the sixth amendment right to counsel could effectively exist in the absence of protections afforded to the attorney-client relationship by the privilege of non-disclosure.")

standards – the attorney-client privilege – is not met.<sup>30)</sup> In other words, under US jurisprudence, the relationship between the Sixth Amendment right to counsel and attorney-client privilege is not one where the latter can be derived from the former. Even if they share certain objectives, neither is entirely inclusive of the other.

### *3. Right to Counsel under Korean Law*

The circumstances are not different in Korea. There appear to be no material differences between Korea's constitutional right to counsel and its US counterpart in view of their relationship with a potential attorney-client privilege in Korea.

The Korean constitutional provision at issue is Article 12, Paragraph 4 of the Korean Constitution, which reads, "anyone who is arrested or detained has immediate right to counsel." This right to counsel has been extended by the Korean Constitutional Court to all criminal defendants or suspects in that even those who are not arrested or detained would have this right.<sup>31)</sup> As is the case in the US, this right to counsel, however, does not apply to any defendants in civil or administrative proceedings, nor does it apply to those who are not actually defendants or suspects in a proceeding or an investigation. In other words, the scope of the beneficiary of the constitutional right to counsel under Korean constitution is fundamentally narrower than the potential beneficiary of attorney-client privilege or legal privilege in two important respects: first, the right to counsel applies to criminal defendants or suspects only, whereas the potential privilege should arguably apply to all types of proceedings; second, the right to counsel applies only to those facing court proceedings or investigations and not to those merely seeking legal advice for a potential future proceeding or investigation, while the potential privilege should arguably apply to any

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30) Additionally, some commentators writing on US privilege have set forth that forcing attorneys to produce incriminating evidence against her client would also be in violation of the client's Fifth Amendment right against self-incrimination. See e.g., Cover, *supra* n. 7 at 1238. This, however, follows the same logic and does not necessarily suggest that Fifth Amendment is the origin of the attorney-client privilege. Rather, it suggests that the privilege shares the humanistic or instrumentalist interests with certain constitutional rights.

31) Constitutional Court of Korea, 2000HunMa138, Sept. 23, 2004.

client. Hence, if an attorney-client privilege in Korea were to be derived from right to counsel – as suggested by the Seoul High Court in the Legal Memo Case – the beneficiary group of the privilege would have to be much narrower than how attorney-client privilege is understood in the US and other common law jurisdictions. In fact, if certain privileges were derived from the right to counsel with such narrow scope, calling them attorney-client privilege would be a misnomer or at least confusing, given how the privilege is understood in other jurisdictions. Any such derived privilege would be a beast of a significantly different nature.

Instead, the case law concerning the Korean constitutional right to counsel suggests that one of the fundamental pillars of such right is privacy, and that while this pillar links this constitutional right to a potential attorney-client privilege, the former cannot be the grounds for the latter. In a case where a government investigator listened in and took notes about a detainee's communications with his counsel despite the lawyer's repeated requests for a private consultation, the Constitutional Court of Korea held that an indispensable element of the constitutional right to counsel is the right to "consult and communicate" *in private* with counsel. According to the Court, "the confidentiality of the communication between the client and the counsel should be completely guaranteed and the meeting between the client and the counsel must be unconstrained and free from any restriction, influence or pressure whatsoever." The Court clarified that attorney-client meetings should be free from interference by an officer, an investigator, or any other related public official, also holding that the old Article 18, Paragraph 3 of the Act on Criminal Punishment, which required a guard to be present for any detainee consulting with counsel, to be unconstitutional.<sup>32)</sup> In a subsequent case, the Constitutional Court extended the application of this precept to written communication between a detainee and counsel, as long as there is no reasonable suspicion that such communications involve destruction of evidence.<sup>33)</sup> However, the widening of the scope stops there; beyond actual defendants and suspects in a criminal proceeding or investigation and their communications with attorneys, the constitutional right does not guarantee privacy for the rest. Additionally, none of these

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32) Constitutional Court of Korea, 91HunMa111, Jan. 28, 1992.

33) Constitutional Court of Korea, 92HeonMa144, Jul. 21, 1995.

cases articulates instrumentalist, utilitarian, or humanistic rationales (or anything similar) that would suggest that the right to counsel is somehow based on broader theoretical grounds that would support the finding of an attorney-client privilege that is derived from the right to counsel.

Instead, in the same way the relationship is understood in the US context, these cases at best suggest that as far as attorney-client privilege protects the privacy interest of any and all clients and their legal communications with attorneys, the satisfaction of attorney-client privilege would be necessary to the fulfillment of the right to counsel under Korean law. This, however, does not suggest that such a privilege can be derived from the constitutional right to counsel. The very concept of deriving the attorney-client privilege is thus at best a challenging and at worst a flatly impossible task and a holding that would require considerable logical leaps.

#### *4. Existing Laws on the Confidentiality between Attorneys and Clients*

Although not very clearly articulated, the Seoul High Court suggested in its decision that existing Korean laws also may serve as the basis for the finding of attorney-client privilege as derived from the constitutional right to counsel, even if there is no explicit statement establishing such a privilege in any law. In the decision, the Seoul High Court makes extremely brief references to certain statutes concerning professional responsibility, and certain evidentiary statutes that relate to the protection of information exchanged between a client and her attorney. These statutes, however, largely fall short of the protection of confidential information exchanged between a client and its counsel as provided under US-style attorney-client privilege; instead, they promote different objectives and interests.

##### *1) Provisions concerning Professional Responsibility*

In the Legal Memo Case, the court briefly mentions Article 26 of the *Byeonhosabeop* [Attorney-in-Law Act] as relevant law. Article 26 of the Attorney-in-Law Act states that “a person who is or was an attorney shall not disclose confidential information obtained in the course of providing its services, unless there are specific laws stating otherwise” (emphasis added). This provision in the Attorney-in-Law Act, however, is not an evidentiary rule.

Rather, it concerns attorneys' professional responsibility to maintain confidentiality of client information in general, akin to the general duty of confidentiality imposed on US attorneys through professional ethics rules of each state. In fact, this provision is silent on whether lawful discovery requests would relieve attorneys of this duty of confidentiality, that is, whether lawful discovery requests would qualify as "specific laws stating otherwise" and would allow attorneys to disclose client's confidential information in response to such requests. This provision thus has little relevance to the discussion other than perhaps that such provision may also reflect the legislative intent to promote frank communication between attorneys and clients. In addition to the Attorney-in-Law Act, the court also briefly mentions Article 317, Paragraph 1 of the Criminal Code as relevant law,<sup>34)</sup> which provides that disclosing confidential information obtained through the course of providing professional services may be subject to criminal punishment. However, similarly, this provision simply concerns a general duty of confidentiality imposed on attorneys as well as other professionals such as doctors, midwives and accountants, and is similarly silent on whether such duty may be relieved if information that would otherwise be subject to this duty of confidentiality is called for in a court proceeding. These provisions thus bear little relevance to the discussion of attorney-client privilege, as an evidentiary rule.

## *2) Evidentiary Statutes that allow attorneys to refuse to testify*

The statutes that are more relevant are the evidentiary statutes that concern when information that would otherwise be confidential must be produced. The codes that lay out the procedural rules for civil and criminal cases each have provisions that allow attorneys to refuse testimony when they are asked to testify about certain confidential information related to their occupation or professional services. While the Seoul High Court mentions only the criminal statute – given that the Legal Memo Case was a

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34) Article 317, Paragraph 1 of the Criminal Code states that "those who are doctors, doctors of traditional medicine, dentists, pharmacists, apothecaries, midwives, attorneys, patent agents, certified accounts, notaries public, scribes, or those who assist the listed ... disclose others' confidential information obtained in the course of the professional services, may be subject to maximum 3 years of imprisonment, maximum 10 years of suspension of qualification or maximum KRW 7 million of fines."

criminal proceeding – for completeness, the analysis below also includes the corresponding civil statutes as well.

First, Article 315 of the *Minsasosongbeop* [Civil Procedure Act] reads (emphasis added):

- ① A witness may refuse testimony if it falls into one of the following categories:
1. When someone who was or is an attorney, patent agent, public notary, certified public accountant, tax accountant, medical professional, pharmacist or in other professional or religious position bound by law to protect confidential information is asked to testify on occupation-related confidential information.

Similarly, Article 149 of the *Hyungsasosongbeop* [Criminal Procedure Act] reads:

When someone who was or is an attorney, patent agent, public notary, certified public accountant, tax accountant, scrivener, doctor, doctor of traditional-medicine dentist, pharmacist, seller, midwives, nurses, or religious personnel, obtained confidential information concerning third-parties in the course of providing professional services may refuse to testify on such information. However, there could be an exception if such person agrees or there is a significant public interest.

In essence, both Acts provide that (i) it is the right of the attorney, (ii) to refuse to testify, (iii) “occupation-related confidential information” (Civil Procedure) or “confidential information obtained in the course of providing their professional services” (Criminal Procedure). However, the protections afforded by these statutes largely fall short of attorney-client privilege and promote different objectives and interests in the following respects:

- 1) *May v. Should*. Both statutes provide the option of refusing to testify, but neither imposes an obligation not to testify.
- 2) *No recourse for the client*. The most important limitation concerning these statutes is that they do not convey any rights or privileges to

the client; they merely provide attorneys with the right to refuse to testify. If an attorney decides to disclose a client's confidential information obtained while providing legal advice, there is no recourse that a client could take to exclude such information from disclosure. Admittedly, once disclosed, the client could, for example, sue for damages or refer an attorney who violated a confidentiality obligation to the Prosecutor's Office for violation of the Attorney-in-Law Act; however, this does not provide the same degree of protection that US-style attorney-client privilege, as an evidentiary rule, provides. As detailed above, under a US-style attorney-client privilege regime, it is the client who maintains control over confidential information shared with an attorney, which allows (i) the client to invoke the privilege to prevent an attorney from disclosing privileged materials before such disclosure (even against the attorney's preference), and (ii) even if such privileged information is accidentally disclosed by an attorney, there is a stronger justification for allowing the "claw back" of any information accidentally disclosed, as the attorney never had the authority to disclose such privileged information in the first place against the will of the client, who is the ultimate guardian of the privilege.<sup>35)</sup> By contrast, under these Korean statutes, control over the information shifts to the attorney, who now in her own right could disclose or refuse to disclose a client's confidential information obtained during the course of her professional services. This characteristic is fundamentally inconsistent with the instrumentalist or humanistic rationales articulated above in that a client's incentive to fully disclose even the most damaging information to their attorney is likely hindered by the possibility that the client has no legal recourse to stop her attorney from disclosing confidential communication and

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35) In US litigation, clawback agreements are frequent where parties enter into agreements to return any inadvertently produced privilege information without constituting voluntary waiver. *See e.g., Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (holding that parties may enter into "so-called 'claw-back' agreements in favor of an agreement to return inadvertently produced privilege documents").

that it ultimately places the attorney, rather than the client, in control of the information.

- 3) *What constitutes confidential information worth protecting?* Under the Civil Procedure Act, the information protected is “occupation-related confidential information.” The Supreme Court of Korea has recently attempted to clarify the meaning of “occupation-related confidential information” to signify “confidential information, if disclosed, that would have serious consequences on the occupation, and would make it difficult to continue to work after the disclosure.”<sup>36)</sup> The Court further stated that not all occupation-related confidential information should be protected but held that in determining which of the “occupation-related confidential information” is “worth protection,” courts should consider, among other factors, “the contents and the nature of the information, the harm that would be caused by the disclosure of such information, the nature of the case, [and the] availability of substitutable evidence.” With the dearth of case law defining the boundaries of “occupation-related confidential information” that is “worth protecting,” the Court’s general statements do not provide much guidance or predictability as to where such boundaries may lie.

Similarly, under the Criminal Procedure Act, the scope is broad and not clearly defined: the statute covers confidential information of any third party, and is not limited to the confidential information of clients. This means that client’s confidential information would be afforded the same protection as confidential information of unrelated third parties.

- 4) *One-Way Street.* Under the Criminal Procedure Act, the information that is protected is confidential information of third-

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36) Supreme Court, 2015Ma4174 Dec. 21, 2015. This case concerned a request to produce a company’s transaction documents (export-and-import credit), which, the document holder alleged, contained “occupation-related confidential information” and were thus subject to confidentiality obligations. Based on the fact that the transactions concerned were already completed and there was not any foreseeable harmful effect on the business by disclosing these documents, the court held that these documents did not fall under the scope of the protection provided by Article 344 of the Civil Procedure Act.

parties that the attorney obtained through the course of her services. Taken at face value, this is significantly narrower than the scope of protection provided under US-style privilege that also includes information flow from the attorney to the client. In other words, the statute only allows attorneys to refuse to testify concerning information that they obtained from clients; it does not necessarily follow that the legal advice provided by an attorney to a client based on such confidential information would fall under the scope of this protection.

5) *No special protection for the attorney-client relationship.* Both provisions apply to a number of professions, including accountants or notaries public, and do not specifically concern the attorney-client relationship, which is a special relationship that deserves special protection under the humanistic rationale. Under these statutes, the information exchanged in confidence between an attorney and a client is thus afforded the same level of protection as information exchanged between, for instance, a tax accountant and her client.

### 3) *Evidentiary Statutes that allow attorneys to refuse to produce documents or objects*

In addition to the statutes concerning testimony, the codes that lay out the procedural rules for civil and criminal cases also have provisions that permit refusal to produce documents or objects.

First, Article 344 of the Civil Procedure Act essentially reads that (i) anyone, (ii) holding a document that contains “occupation-related confidential information” as set out under “Article 315, ①” of the Civil Procedure Act (the provision on attorney’s refusal to testify examined above), and (iii) there is no special exemption, the document holder may refuse to produce such a document.<sup>37)</sup>

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<sup>37)</sup> More specifically, Article 344 ① 3. Da. And Article 344 ② 1. of the MINSASOSONGBEOP [Civil Procedure Act] reads,

#### Article 344 [Obligation to Produce Documents]

- ① A person that holds the following document cannot refuse production of document:

Article 112 of the Criminal Procedure Act allows attorneys to refuse to produce objects in their possession. It reads:

When someone who was or is an **attorney**, patent agent, public notary, certified public accountant, tax accountant, scrivener, doctor, doctor of traditional-medicine dentist, pharmacist, seller, midwives, nurses, or religious personnel, possesses or is keeping custody of objects containing confidential information concerning third-parties entrusted in the course of providing professional services can refuse production of such material. However, there could be an exception if the third-party agrees or there is a significant public interest. (Emphasis added)

The following observations, which are similar to the observations made on the provisions on testimony, can be made on these provisions. They show that these provisions concerning document or object production also fall short of the protection afforded under US-style attorney-client privilege and that the objectives behind these provisions are fundamentally different:

- 1) *May v. Should.* These provisions on document production give attorneys the option of not producing; they do not impose an obligation not to produce.
- 2) *No recourse for the client.* The same analysis as the provisions on testimony apply to document or object production. While the

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- ...
3. The document was drafted in the interest of the requesting party or the document concerns the legal relationship between the requesting party and the document-holder, and does not:

...

Da. Contain information falling under any of the paragraphs under Article 315 ① and is not exempt from confidentiality obligations.

- ② Even in cases other than ① [that provides circumstances where a document must be produced], if the document does not fall under the scope of any of the following, the document holder cannot refuse production:
  1. Documents falling under Article 315, ① Da...

language is somewhat unclear,<sup>38)</sup> the Civil Procedure Act affords attorneys, not clients, the right to be able refuse to produce documents. Under the Criminal Procedure Act, only attorneys – but not their clients – have the right to refuse production of objects that contain confidential information, and such objects must be in the attorney’s possession.

- 3) *Unclear scope.* As examined above for provisions concerning testimony, the boundaries of what qualifies as “occupation-related confidential information” under the Civil Procedure Act are unclear. Under the Criminal Procedure Act, it is similarly unclear what exactly is covered by the statute, that is, what constitutes objects that were *entrusted* to attorneys in the course of their professional services. At the same time, the scope is broader than what would be covered under an attorney-client privilege, as it includes confidential information of any third party, not just clients.
- 4) *One-Way Street: Only materials in possession of the attorney.* Under the Criminal Procedure Act, an attorney may refuse to produce objects in the possession of attorneys but not in the possession of clients. This limitation reveals that the focus of the provision is not on the protection of certain types of communications for whatever reason, but on protecting the personal space of the attorney. This reveals that the purpose of the provision is likely distinct from the purposes behind attorney-client privilege.
- 5) *No special protection for attorney-client relationship.* There is no special protection given to attorney-client relationship.

#### 4) *Insufficiency of Existing Laws*

Based on the examination of the existing rules on professional responsibility and evidentiary rules, it is challenging to infer a US-style attorney-client privilege. The rules, whether alone or together, do not fully

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38) There is certain room for interpretation that clients in possession of the documents containing “occupation-related” confidential information may refuse production given that the right to refuse production attaches to “anyone” and not just “attorneys,” but there appears to be no case law supporting such broad interpretation.

reflect or embody the instrumentalist, utilitarian, or humanistic rationales behind attorney-client privilege; nor do they share the defining characteristics of attorney-client privilege. Even combined with the constitutional right to counsel examined above, it is unclear how these statutes (or as the court stated, their “limits”) may be the basis for the finding of attorney-client privilege. As observed above, their purpose appears to be something other than to encourage frank communication between attorneys and clients, or guarantee the autonomy, dignity, and privacy of clients. Rather, they suggest the need for US-style attorney-client privilege to protect confidential communications between attorneys and their clients and achieve the goals underlying the instrumentalist, utilitarian, and humanistic rationales.

#### *5. Privilege as a Global Standard?*

Another strand of argument proposed by the Seoul High Court (and also suggested by many commentators in Korea) is the argument that attorney-client privilege – albeit in different forms – exists in many jurisdictions with advanced legal systems, including common law jurisdictions. This argument, which is unfortunately scarcely articulated and lacks elaboration, appears to suggest that the attorney-client privilege should be transplanted simply because it exists in other jurisdictions. Giving the court the benefit of the doubt, multiple rationales may underlie this argument:

##### *1) Agreement*

The court may agree with the instrumentalist, utilitarian, humanistic or other rationales based on which attorney-client privilege was developed and established in these other jurisdictions. It is thus advisable that South Korea also adopt the attorney-client privilege to meet one or more of these rationales. The court may agree with these other jurisdictions that such a privilege is necessary for the effective functioning of the legal system by promoting frank communications and early intervention, or that such privilege is necessary to protect humanistic interests.

##### *2) Practical Considerations*

Alternatively, this argument may reflect the court’s practical consider-

ations for individual and corporate clients that operate globally and are often subject to multi-jurisdictional investigations or proceedings. The lack of attorney-client privilege in South Korea would present the greatest challenges to these individuals and corporations. For instance, the production of privileged documents to a Korean investigative authority may constitute a voluntary waiver of privilege under American law. If a waiver is found, these privileged materials and any other materials relating to the same issues would be discoverable in any American court proceedings.<sup>39)</sup> The court may thus have wanted to promote a convergence of standards to facilitate the activities of individuals and corporations acting internationally. This justification based on practical considerations – which was not relevant in the development of the privilege in common law – may be another valid policy ground for attorney-client privilege, in addition to the instrumentalist, utilitarian, and humanistic rationales examined above. In assessing the need for attorney-client privilege in Korea, the importance of this rationale must be weighed against the others, and the exact formulation of the attorney-client privilege may depend on the priority given to a particular rationale.

## 6. *Supreme Court's Opinion*

As examined above, the grounds provided by the Seoul High Court fall far short of an implied attorney-client privilege in Korea, and the Supreme Court did in fact ultimately reverse the Seoul High Court's decision. Unfortunately, the Supreme Court also chose not to spare many words in its decision, packing its analysis of the proposed attorney-client privilege into essentially a mere paragraph. In the following way, the Supreme Court's paragraph, as parsed below, also lacks specific guidance that would have been helpful in shaping the subsequent discussions:

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39) *E.g.*, *In re Vitamin Antitrust Litigation*, MDL No. 1285, 2002 U.S. Dist. LEXIS 26490, at \*105 (D.D.C. Jan. 23, 2002) (holding that the submissions made by defendants in response to requests by foreign government agencies constituted waiver of attorney-client privilege). These risks may incentivize clients and attorneys to devise ways to avoid creating and storing sensitive documents and information, which likely would cause great nuisance and inconvenience.

- (i) *“Taking into account the [existing laws and cases]”*: The Supreme Court held that existing laws and cases do not support the finding of a general attorney-client privilege. As has been made clear above, this appears to be reasonable in light of the existing laws and cases.
- (ii) *“it cannot be accepted that a client’s privilege to refuse disclosure can be derived from [the Constitutional] right to counsel”*: The Supreme Court concluded that the reach of Constitution’s “right to counsel” does not include a general privilege for the client to refuse disclosure of confidential communication. This conclusion, as examined above, is reasonable in that the scope and the justifications for attorney-client privilege are such that the privilege cannot be derived from a constitutional right to counsel.
- (iii) *“for communications that occurred under ordinary circumstances between an attorney and someone who is not yet a defendant or a suspect because an investigation or a court proceeding or other criminal proceeding has not been initiated,”*: The Supreme Court explicitly denies protection for any communications that occurred before a criminal investigation or a court proceeding has started. In other words, any legal communications that occurred outside this scope – for instance, any ordinary course legal counseling for business or legal advice provided during an internal investigation – would not be afforded any attorney-client privilege. Nonetheless, the Court implies that such a privilege may exist for suspects or defendants where an investigation or a court proceeding has actually started. This analysis is consistent with the understanding laid out above that the constitutional right to counsel simply affords a higher standard of privacy than attorney-client privilege, and as such, attorney-client privilege as a lower standard may already be available whenever the right to counsel is available.
- (iv) *“or that without the consent of the client, seized materials cannot be introduced as evidence regardless of the legality of the seizure, in a criminal trial based on the existence of such privilege”*: The Supreme Court again denies that there is an independent attorney-client privilege as opposed to the protection afforded under the consti-

tutional right to counsel and emphasizes that what determines whether a seized material is to be excluded or may be introduced as evidence depends on whether such evidence was seized legally, rather than whether there was consent by the client.

- (v) “It is inappropriate for the [Seoul High Court] to justify the rejection of the legal memorandum based on the so-called “attorney-client privilege”:<sup>40)</sup> The Supreme Court later goes on to argue that, because in this specific case the attorney from the law firm that drafted the legal memorandum rightfully exercised his right to refuse to authenticate the memorandum, in the end, the exclusion of the legal memorandum was lawful.

As such, the Supreme Court reversed the lower courts and in so doing refused to recognize a so-called attorney-client privilege in South Korea. The implication of this decision is significant: many legal practitioners in Korea have relied on this decision to conclude that there is no attorney-client privilege in Korea.<sup>41)</sup> As a result, in addition to private parties, various government agencies with investigative authority – such as the Prosecutor’s Office or the Korea Fair Trade Commission – have often requested submission of would-be privilege materials in the course of their investigation.<sup>42)</sup> So far, the would-be privilege holders have not been able to refuse production based on an attorney-client privilege under Korean laws.

One must wonder if the holding would have been different if the lower court had successfully articulated a more fundamental justification for finding that privilege. One also wonders how, if the Supreme Court had engaged in a more in-depth analysis of the grounds presented by the Seoul

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40) Supreme Court, 2009 Do 6788, May 17, 2012.

41) E.g., Yoon-Jung Jang, *Legislative Efforts Necessary for Protection of Confidential Information between Attorneys and Clients*, the L Legal News (Sep 27, 2016) <http://thel.mt.co.kr/newsView.html?no=2016092715508224546> (Quoting attorneys at a bar association conference stating that the Supreme Court does not recognize attorney-client privilege in Korea).

42) E.g., Joo-Jin Yoon, *Industry: Attorney-Client Privilege Must be Introduced in KFTC Process*, NewsWorks (Dec 4, 2015) [http://www.newsworks.co.kr/news/articleView.html?idxno=15333&sc\\_word=jujin](http://www.newsworks.co.kr/news/articleView.html?idxno=15333&sc_word=jujin) (Reporting the argument by the Federation of Korean Industries that attorney-client privilege – which is lacking currently – should be introduced in the KFTC process).

High Court (rather like the exercise carried out in this paper), that analysis would have shaped and guided subsequent discussions on the introduction of attorney-client privilege.

### III. Conclusion

The examination of each of the grounds for privilege asserted by the Seoul High Court in the Legal Memo Case shows how challenging it would be to derive US-style attorney-client privilege from the constitutional right to counsel or existing evidentiary rules whose objectives and scope are fundamentally different. What the courts in that case could have done but failed to do is to examine and discuss in a thorough fashion the very fundamentals that, if they did not establish the privilege, at least laid the groundwork for further discussions. Lacking specific guidance from the courts, the Korean legal community is now left to its own devices. Although the details are beyond the scope of this paper, that community is now tasked with examining the various rationales behind attorney-client privilege as articulated in other jurisdictions to evaluate which of the original common law rationales or any other rationales, such as the relatively novel need for global convergence, would be applicable in Korea. For instance, to examine the applicability of the utilitarian rationale, the community should consider whether frank communication between attorneys and clients is an important and necessary element of an effective legal system in the Korean context. For this analysis, one may examine the attorney-client relationship in the Korean context, and whether the lack of privilege actually discourage frank communication. To examine the humanistic rationale, the community should consider what degree of protection is necessary to guarantee the autonomy and privacy of individuals through an attorney-client privilege, by, perhaps examining laws relating to Article 10, 17 or 18 of the Korean Constitution on individual autonomy and privacy.<sup>43)</sup> Examination of these types of questions would

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43) Article 10 of the Korean Constitution reads, "All citizens shall be assured of human worth and dignity and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." Article

help identify the most important and fitting justifications for the introduction of attorney-client privilege in Korea. The boundaries of the privilege, if ever established, would be designed to reflect those priorities.

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17 reads, "The privacy of no citizen shall be infringed." Article 18 reads, "The privacy of correspondence of no citizen shall be infringed."

