

Basic Recommendation for Establishment of Principles of
Protection of Confidentiality of Communications between Attorney and Client

February 19, 2016
Japan Federation of Bar Associations

1. Purport of the Recommendation

In order to promote legal compliance and have the rule of law penetrate every facet of society, confidentiality of consultation between attorneys and their clients should be protected as a right of any client to engage/consult with an attorney at law. More specifically, a system should be developed as follows:

- (1) In cases where disclosure of information is compelled either in civil/criminal proceedings or in administrative procedures, etc., both the client and the attorney shall be granted the legal right to refuse disclosure.
- (2) In addition, an appropriate mechanism shall be established to judge whether it is legitimate to exert such right to refuse disclosure.
- (3) It shall be guaranteed by legislation that any person who is under physical custody and is subject to restrictions of visits by and correspondence with others may receive visits of attorney without attendance of enforcement officials to obtain legal advice or their correspondence shall not be subject to examinations.

2. Background and Reasons for the Recommendations

(1) Background

The right of clients to keep consultation with their attorneys confidential is established as a basic principle of justice system in most Western countries. However, in Japan, there are occasions where such consultations with attorneys are not protected as confidential. There has been concerns about negative effects such as clients not being able to fully exert their rights appropriately or defend themselves properly in the proceedings, or client hesitation to consult with attorneys for legal compliance. In order to deal with such concerns, the Japan Federation of Bar Associations (“JFBA”) established the “Working Group on Principles of Protection of Confidentiality of Communications between Attorney and Client (“PPCC”)” in January 2014, and commenced a research/study project on the necessity for such

principles, legal problems, circumstances surrounding other countries, and other issues relating to implementations of such principles in Japan.

The Working Group spent about two years researching and studying the issues inside and outside Japan with the cooperation of outside experts, etc., and released a final report (see the attachment) in February 2016. Based on this report, the JFBA has issued the foregoing Recommendations.

(2) Reasons for the Recommendation

The PPCC, which is known as attorney-client privilege or legal professional privilege are principles that safeguard “the right of clients to refuse disclosure of consultation with their attorneys in civil/criminal proceedings, alternative dispute resolution procedures such as arbitration, etc., and further in investigative proceedings, etc., by administrative agencies.” Confidentiality of consultation with attorneys is protected to a certain extent under current laws in Japan. For instance, attorneys are obligated to keep communication with their clients confidential (Article 23 of the Attorney Act; Article 134 of the Penal Code; Article 23 of the Basic Rules on the Duties of Practicing Attorneys, etc.), and under the Codes of Civil/Criminal Procedure, attorneys have the right to refuse to testify (Article 197 (1)-(ii) and Article 220 (iv)-(c) of the Code of Civil Procedure; Articles 105 and 149 of the Code of Criminal Procedure), and further, in the field of criminal defense, the right to meet and communicate with attorneys without attendance of any other person is guaranteed under Article 39-(1) of the Code of Criminal Procedure.

However, in administrative investigations, for example, clients may not necessarily refuse to disclose communication with their attorneys if such disclosure is required by a third party such as the regulatory authorities. Moreover, within penal detention facilities, the communication with the attorneys may be subject to censorship in some cases, and therefore, it is difficult to say that the confidentiality of communication between attorney and client is protected as it now stands.

Thus, in order to safeguard client rights and promote legal compliance and have the rule of law penetrate every facet of society, the right to refuse disclosure of communication between attorney and client should be clearly provided for by law so that the right of clients to engage/consult with attorneys will be institutionally established.

This recommendation is made based on the reasoning the attorneys’ confidentiality

obligation under the current law, and does not intend to alter the nature and scope of the attorneys' obligation. In relation to the Code of Civil Procedure, it is an issue to be addressed together with expansion of obligations to produce documents and enhancement of the party inquiry system. Further, in relation to criminal procedures, we also consider that these principles, to be established on the premise of the current systems such as the defense rights of suspects/accused under the Constitution and the right to meet and communicate with attorneys without attendance of any other person (particularly its aspect as the attorneys' inherent right) under Article 39-(1) of the Code of Criminal Procedure, etc., will serve to supplement these current systems.

(3) Efforts by the JFBA towards Establishment of Principles

Establishment of principles which enable clients to consult with their attorneys with a sense of confidence and reassurance is a common issue in the fields of civil/criminal proceedings, etc., and administrative procedures, etc., where the JFBA has been addressing various issues such as enhancement of civil actions, etc., establishment of the right to meet and communicate with attorneys without attendance of any other person in criminal procedures, procedural security for investigative procedures under the Antimonopoly Act, and so on. The JFBA will continue to initiate and implement various activities to realize the contents of this Recommendation in the future, further deepening the cooperation among the relevant organizations of different fields.

Moreover, the JFBA is committed to initiating and implementing activities to gain greater understanding not only among legal professionals including the Supreme Court, the Ministry of Justice and legal academics, etc., but also among policy makers such as Diet members, the mass media, and also the public at large, so that our society should appreciate the necessity to realize this Recommendation as a principle of the justice system.