

# THE LAWYER'S DUTY OF CONFIDENTIALITY IN VIETNAM - A STUDY OF COMPARATIVE LAW IN THE ASIA PACIFIC COUNTRIES

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## Abstract

*Around the world and in Vietnam, lawyers have to comply with codes of ethics and professional conduct. This article examines the rules and regulations on the Vietnamese lawyer's duty of confidentiality as stipulated in the 2019 Lawyers' Code of Ethics and Conduct and the 2006 Law on Lawyers. Although this obligation has been one of the important ethical and legal obligations that create the foundation of the client-lawyer relationship, the lack of clarity and implementation guides has created many shortcomings. The authors applied legal analysis to highlight the unclear scope, scale, and requirements of such duty in the current legal and ethical regulations. By comparing the Vietnamese approach with those of South Korea, Japan, Singapore, Australia, Germany, and the United States, the authors highlight best practices and offer recommendations on how to resolve and improve the rules and regulations on lawyers' duty of confidentiality. Exploring other countries' approach towards attorney-client privilege, the paper suggests that the conflict between the confidentiality obligations and the current civil procedural laws in Vietnam should be resolved.*

**Keywords:** code of conduct, legal profession, confidentiality, law on lawyers, legal ethics

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Lawyer's duty of confidentiality is said to be the cornerstone of the lawyer-client relationship.<sup>1</sup> Such confidentiality is the foundation for the clients' trust towards their lawyers so that they can provide full and frank information to the lawyers and receive the best legal assistance. Lawyer-client confidentiality is the established consensus among many jurisdictions. At the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, participating countries issued a Declaration of Basic Principles on the Role of Lawyers, stating: "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."<sup>2</sup> Regardless of such

1 Lerner, J. I., Frank, M., Lee, M., & Wade, D. (2014). The duty of confidentiality in the surveillance age. *Journal of Internet Law*, 17(10), 7-22. <https://papers.ssrn.com/abstract=2585643>

2 United Nations Secretariat. (1991). *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*. Havana, 27 August - 7 September 1990. <https://digitallibrary.un.org/record/142947>

acknowledgment, each country has its own approach to this principle depending on its legal system, tradition, and other underlying legal principles. Within the Asia Pacific region, countries following common law systems such as the United States, Australia, and Singapore not only stipulate confidentiality as the lawyers' obligation but also provide the clients with attorney-client privilege to avoid unauthorized disclosure and use of their confidential information, especially during litigation. Meanwhile, countries with civil law systems like Japan and South Korea heavily rely on the lawyer's professional standards and ethics to uphold lawyer-client confidentiality. A lawyer who discloses a client's secrets may face criminal charges.<sup>3</sup> While these countries do not officially adopt attorney-client privilege, lawyers have the right to refuse to testify in court as a way to comply with their duty of confidentiality. However, the duty of confidentiality is entirely a statutory and ethical obligation of lawyers, and attorney-client privilege and other relevant doctrines are not legally recognized or applied in Vietnam and China.<sup>4</sup>

The differences between the countries' interpretation and realization of lawyer-client confidentiality can create a big gap in the lawyers' practice standards. In the context of globalization where cross-border transactions are increasing in number, foreign clients may expect to enjoy the same level of confidentiality protection as their home country. Clarity and stability of a country's legal system and strong trust in legal assistance provided by the lawyers can affect the decision to invest by foreign investors. By comparing Vietnam with other countries in the Asia-Pacific region, as well as Germany, a representative of European countries' approach, this article provides a comprehensive analysis of the current duty of confidentiality applied to Vietnamese lawyers, thus pointing out the incompatibility between such duty and lawyers' obligations in procedural proceedings. The article also aims to provide a different perspective on how Vietnam should approach lawyer's duty of confidentiality to improve, thus promoting harmony in the region's legal practice standard.

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3 Article 317 of the Criminal Act No.19582, dated 8 August 2023, of South Korea; Article 135 of the Penal Code Act No. 45, dated 24 April 1907, of Japan.

4 Xu, X. (2009). A comparative study of lawyers' ethics in the US and PRC: Attorney-client privilege and duty of confidentiality. *Tsinghua China Law Review*, 1(1). <https://ssrn.com/abstract=2677196>

## 1. An overview of Vietnam's approach towards lawyer's duty of confidentiality

It has been observed that bureaucratic government and market exchange aided the development of legal expertise, and the society's preference toward nonlegal means for social order control could limit the role of the legal profession.<sup>5</sup> In Vietnam, due to the long history of war, the legal profession has been developed intermittently and without sufficient support of concrete theoretical frameworks.

After Vietnam declared its independence from France, the legal profession was not eradicated from the law, but in practice, most law firms ended up ceasing their operation.<sup>6</sup> In the North, the role of lawyers was replaced by the system of "people's advocate" starting from the end of 1949.<sup>7</sup> The same system was extended to the South after the country's reunification, replacing the previous lawyer system there.<sup>8</sup> It was not until 1984 that the Hanoi Bar was established as a pilot program<sup>9</sup> for the re-introduction of the legal profession. Following the "Doi Moi" (Renovation) movement in Vietnam in 1986, the legal profession system was officially reinstated under the socialist-oriented market economy. At the end of 1987, the Ho Chi Minh City Bar was established, and until the end

- 5 Rueschemeyer, D. (1977). The legal profession in comparative perspective. *Sociological Inquiry*, 47, 97-127. <https://doi.org/10.1111/j.1475-682X.1977.tb00795.x>; Phan, T. H. (2003). *Cơ sở lý luận của việc hoàn thiện pháp luật về luật sư ở Việt Nam hiện nay* [Theoretical basis for perfecting the law on lawyers in Vietnam today] (Publication No. LA03.0177.3) [Dissertation, Ho Chi Minh National Academy of Politics], National library of Viet Nam, p. 12. <http://luanan.nlv.gov.vn/luanan?a=d&d=TTbFqWqvOKTO2003>
- 6 Vietnam Lawyer Journal. (2014, October 10). Lịch sử hình thành và phát triển thiết chế của Luật sư tại Việt Nam [History of formation and development of the institution of Lawyers in Vietnam]. *Vietnam Bar Federation*. <https://backup.liendoanluatsu.org.vn/web/Lich-su-hinh-thanh-va-phat-trien-thiet-che-luat-su-tai-Viet-Nam-434.html>; Ngo, T. N. V., & Nguyen, T. T. M. (2021). Lịch sử phát triển nghề Luật sư ở Việt Nam [Historical development of the legal profession in Vietnam]. *Journal of Legal Profession*, (3), 72-77. <http://thuvienso.quochoi.vn/handle/11742/84174>
- 7 Presidential Order No. 69/SL dated 18 June 1949 by the President of the Democratic Republic of Vietnam.
- 8 Vietnam Lawyer Journal. (2015, November 10). Nghề Luật sư ở Việt Nam đã ra đời và hoạt động như thế nào? [How was the legal profession founded and operated in Vietnam?]. *Vietnam Bar Federation*. <https://backup.liendoanluatsu.org.vn/web/Nghe-luat-su-o-Viet-Nam-da-ra-doi-va-hoat-dong-nhu-the-nao-205.html>; Lieu, C. T. (2023). Luật sư trong các chế độ cũ ở Việt Nam [Lawyers under old regime in Vietnam]. *Vietnam Lawyer Journal*, (8), p. 7.
- 9 Chu, H. T. (2022). Tổ chức và hoạt động của Luật sư ở Việt Nam - Hiện tại và hướng tương lai [Organization and operation of lawyers in Vietnam - Present and future direction]. *Journal of Legal Profession*, (7), p. 4.

of 1989, there were 186 lawyers in Vietnam.<sup>10</sup> Such change can also be seen in the legal history of the Russian Soviet Federative Socialist Republic from 1917 to 1922.<sup>11</sup> Since Doi Moi, Vietnam's legal reform efforts followed an eclecticism approach where it borrowed a wide range of legal approaches from other countries and modified it to match the country's needs.<sup>12</sup> This did not mean that Vietnam adopted every underlying legal theory that accompanied such approaches. In addition, the first generation of lawyers after the Doi Moi movement was a mix of domestic lawyers and those formerly trained by France, Western nations, and socialist Russia, East Germany.<sup>13</sup> Such diversity in educational background among legal practitioners added to the inconsistency in Vietnam's approach towards the legal framework for the legal profession and lawyers' ethical standards, including confidentiality.

The duty of lawyers to keep clients' information confidential was first legally stipulated in Article 18.3 of Ordinance No. 2A-LCT/HĐNN on Lawyer Organization dated 18 December 1987. After that, Article 16.3 of Ordinance No. 37/2001/PL-UBTVQH10 dated 25 July 2001 of the Standing Committee of the National Assembly prohibited lawyers from disclosing information about cases and clients that they know from their course of practice. Following the footsteps of this regulation, the 2006 Law on Lawyers, supplemented in 2012 (the 2006 Law on Lawyers), continues to detail such an obligation in Article 9.1c and Article 25.<sup>14</sup> In addition, such a duty

10 Nguyen, V. T. (2010), Tổ chức hoạt động luật sư ở Việt Nam quá trình hình thành và phát triển [The organizational operation of lawyers in Vietnam: Formation and development process]. *Democracy and Law Journal, Special Issue of 60th Anniversary of the Judiciary*. <https://moj.gov.vn/qt/cacchuyenmuc/70TuPhapVietNam/Pages/tu-lieu-nganh.aspx?ItemID=27>

11 Razi, G. M. (1960). Legal education and the role of the lawyer in the Soviet Union and the countries of Eastern Europe. *California Law Review*, 48(5), 776–804. <https://doi.org/10.2307/3478352>

12 Rose, C. V. (1998). The “new” law and development movement in the post-cold war era: A Vietnam case study. *Law & Society Review*, 32(1), 93–140. <https://doi.org/10.2307/827750>

13 *Ibid.*

14 “Article 9 of the 2006 Law on Lawyers: Prohibited practices

1. Lawyers are strictly prohibited from conducting the following practices:

[...]

(c) Disclosing information about a case, matter or client which information the lawyer obtained during the course of practice, unless the client agrees in writing or the law stipulates otherwise;

[...]

Article 25 Confidentiality of information

is also an ethical obligation for lawyers according to Rule No. 7 of the Code of Ethics and Conduct for Vietnamese Lawyers, which was promulgated under Decision No.201/QĐ-HDLSTQ dated 13 December 2019 (the 2019 Lawyers' Ethics Code).<sup>15</sup> Other laws which cover information confidentiality obligations also apply to lawyers in each specific aspect of their practice. These include regulations on the protection of privacy and contract confidentiality in the 2015 Civil Code; consumer confidentiality under the 2023 Law on the Protection of Consumer Rights; protection of personal data in the online environment under the 2006 Law on Information Technology, 2015 Law on Cyber Information Security, and Decree No. 13/2023/ND-CP dated 17 April 2023.

Nonetheless, among these regulations, the provisions in the 2006 Law on Lawyers and the 2019 Lawyers' Ethics Code can be seen as the legal and ethical basis of the lawyer's duty of confidentiality, respectively. It is established that a lawyer's duty of confidentiality only ends when either the client gives their consent or the laws allow it. However, other elements of the duty, as analyzed in Section 2 below, can be understood and applied inconsistently in practice due to the lack of clear interpretation. The Vietnam Bar Federation and the Bureau of Justice Assistance, two authorities that manage the Vietnamese lawyers, have not provided any further explanation or guideline. The principle and intention of the lawmakers regarding the lawyer's duty of confidentiality could not be found in any of the documents and reports on the promulgation of the 2006 Law on Lawyers and the Code of Ethics in the past. There have been no public

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1. Lawyers must not disclose information about cases, matters, or about clients which they learn during the course of practice, unless a client provides written agreement or the law stipulates otherwise.
  2. Lawyers must not use information about cases, matters, or about clients which they learn in the course of practice for the purpose of infringing the interests of the State, the public interest, or the lawful rights and interests of bodies, organizations and individuals.
  3. Legal practicing organizations shall be responsible to ensure that their staff do not disclose information about cases, matters, or about clients of the legal practicing organization."
- 15 "Rule 7 of the 2019 Lawyers' Ethics Code: Maintaining information confidentiality
- 7.1. Lawyers are obliged to keep information of clients confidential while performing legal services and after completing such services unless the clients agree or the laws prescribe otherwise.
  - 7.2. Lawyers are responsible for requesting the relevant colleagues and staff in their legal practicing organization to commit not to disclose any confidential information that they know, and lawyers are responsible for explaining clearly if a person discloses confidential information, that person has to bear the responsibilities in accordance with the law."

cases or precedents addressing such obligations either. Recently, an amended version of the 2006 Law on Lawyers is suggested to be included in the law-making program of the 15th National Assembly of Vietnam, but no assessment regarding the duty of confidentiality has been presented yet.

## **2. Varying interpretations in the rules and regulations on lawyer's duty of confidentiality**

### **2.1. Regarding specific required acts**

Not disclosing clients' confidential information to other people is the fundamental element of the duty of confidentiality and can be found in the regulations of many countries, such as Japan,<sup>16</sup> South Korea<sup>17</sup> and Singapore.<sup>18</sup> Vietnam also treats it as a statutory obligation for lawyers in Article 25 of the 2006 Law on Lawyers by requiring lawyers to “not disclose information”. However, unlike South Korea, where both regulations in the Attorney-at-law Act and the Attorney Ethics Code<sup>19</sup> have the same request of non-disclosure, Rule 7 of Vietnam's 2019 Lawyers' Ethics Code states that lawyers must “keep information confidential”. This discrepancy between the wording of the law and the ethical standard has led to varying interpretations in practice.

Some may argue that “keep[ing] information confidential” and “not disclos[ing] information” are essentially the same. As long as the lawyers follow Article 25 of the 2006 Law on Lawyers, they comply with their ethical duty of confidentiality in the 2019 Lawyers' Ethics Code. This interpretation significantly reduces the scope of lawyer's ethical duty of confidentiality. Another point of view is that “keep[ing] the information confidential” can be interpreted as maintaining the confidential status of the information and preventing others from discovering it. Thus, lawyers may be required to apply certain protection measures against unauthorized access to clients' confidential information. Consequently, failing to do so can lead to a violation of a lawyer's ethical duty of confidentiality.<sup>20</sup> While

16 Article 23 of the 1949 Attorneys Act of Japan.

17 Article 26 of the 2007 Attorney-at-law Act of South Korea.

18 Rule 6 under the 2015 Legal Profession (Professional Conduct) Rules of Singapore.

19 Article 18 of the Code of Ethics for Attorneys of South Korea.

20 Bach, T. N. N. (2021). Rủi ro bảo mật thông tin khách hàng ở Việt Nam trong hành nghề Luật sư [Risk of client's information confidentiality in the practice of Lawyers in Vietnam]. *Vietnam Lawyer Journal*. <https://lsvn.vn/rui-ro-bao-mat-thong-tin-khach-hang-o-viet-nam-trong-hanh-nghe-luat-su1628826482.html>

Japan has similar wording discrepancy between its Attorney Act<sup>21</sup> and Basic Rules on the Duties of Practicing Attorneys,<sup>22</sup> Article 18 of its Basic Rules on the Duties of Practicing Attorneys requests Japanese lawyers to guard against confidential information leakage when storing case records. However, such a rule does not exist in the 2019 Lawyers' Ethics Code of Vietnam.<sup>23</sup> If lawyers do not safeguard a client's confidential information, leading to it being inadvertently disclosed, it will not only damage the lawyers' reputation but also be detrimental to the client's legal cases and private matters. In the current digital age where cyberattack is a high and serious risk, it is both necessary and reasonable for the information entrusted by clients to their lawyers to be protected under some level of security measures. Rule 1.6 of the Model Rules of the United States requires lawyers to make reasonable efforts to prevent confidential information from being inadvertently disclosed or disclosed without authorization.<sup>24</sup> In practice, since 1 July 2023, in the state of New York, lawyers will have to complete one hour of mandatory training on cybersecurity to be able to renew their practice certificates. In Germany, Article 2 of the Rules of Professional Practice (BORA) stipulates the lawyers' duty to take organizational and technical measures that are necessary to protect confidentiality.<sup>25</sup>

From the above analysis, the acts required for Vietnamese lawyers to fulfil their duty of confidentiality should be extensive in terms of ethical duty and narrow in terms of legal obligation. Specifically, a lawyer will only be held legally liable for violating Article 25 of the 2006 Law on Lawyers if they disclose or expose clients' confidential information to others; but in addition, a lawyer must also apply security measures for clients' information to comply with Rule 7 of "keep[ing] information confidential" in 2019 Lawyers' Ethics Code. In case of the absence of confidentiality measures leading to the theft of client information, the lawyer may be subjected to only disciplinary actions for ethical violation (unless they also violate other laws). Nonetheless, it is recommended to clarify the requirements for confidentiality measures either via the regulations

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21 *Supra* note 16.

22 Articles 18 and 23 of the 2004 Basic Rules on the Duties of Practicing Attorneys of Japan.

23 Rule 12.2 of the 2019 Lawyers' Ethics Code only requests lawyers to preserve the documents and records received from clients without mentioning the prevention of information leakage.

24 American Bar Association. (2025). Model Rules of Professional Conduct. *American Bar Association*.

25 Article 2 of the 2022 Rules of Professional Practice of Germany.

in the 2019 Lawyers' Ethics Code or guidelines and training from the Vietnam Bar Federation to reach a unified understanding and practice among lawyers.

## ***2.2. Regarding confidentiality for prospective clients***

Rule 7 of the 2019 Lawyers' Ethics Code states that a lawyer shall maintain the confidentiality of information "when performing legal services and after the completion of such services." Considering that a lawyer shall only provide legal services to a client after entering a legal service agreement,<sup>26</sup> the lawyer's ethical duty of confidentiality shall be applied from the effective date of the legal service contract, and last indefinitely, even after the legal service contract has been completed. With this wording, Rule 7 overlooks a ubiquitous situation: individuals, agencies, and organizations seeking out a lawyer for a specific case (i.e., prospective clients of the lawyer) but ultimately do not hire the lawyer, or the lawyer declines the case. In this instance, without a legal service agreement, the case information previously exchanged between the lawyer and the prospective client will not be subject to the lawyer's ethical duty of confidentiality under the 2019 Lawyers' Ethics Code.

Meanwhile, Article 25 of the 2006 Law on Lawyers states that lawyers are not allowed to disclose the information that lawyers "know during the course of legal practice." However, the current 2006 Law on Lawyers only regulates the scope<sup>27</sup> and form<sup>28</sup> of a lawyer's legal practice without defining the start time of legal practice, hence no respective start time for confidentiality obligation. In a narrow sense, "the course of legal practice" can be understood as when the lawyer is performing professional activities within the scope of practice in Article 22 of the 2006 Law on Lawyers, including litigation and consultation. A legal service contract is required to commence such professional activities, meaning the start time of a lawyer's legal duty of confidentiality is the effective date of such legal service contracts, the same as the start time of the ethical confidentiality obligation in the 2019 Lawyers' Ethics Code. This interpretation bears the same problem of prospective clients as analyzed above. However, the lawyer's legal practice can also be understood in a broader sense, i.e. lawyer's legal practice shall commence from the date lawyers

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26 Clause 1, Article 26 of the 2006 Law on Lawyers of Vietnam.

27 Article 22 of the 2006 Law on Lawyers of Vietnam.

28 Article 23 of the 2006 Law on Lawyers of Vietnam.

start to work under one of the forms of legal practice in Article 23 of the 2006 Law on Lawyers, which is either in a law firm or registered to work individually. If so, any information that a lawyer receives from prospective clients while working professionally can qualify as information lawyers “know during the course of legal practice” and a non-disclosure obligation applies. The latter interpretation is more reasonable and addresses the matter of confidentiality for prospective clients’ information.<sup>29</sup> In South Korea, where similar wordings regarding the duration of the confidentiality obligation can be found,<sup>30</sup> academic discussions,<sup>31</sup> and the official stance of the Korean Bar Association,<sup>32</sup> all agree that the obligation extends to prospective clients. In other words, “during the course of legal practice” is understood in the broader sense.

If prospective clients cannot enjoy the lawyer’s duty of confidentiality, they could become hesitant to provide sufficient information about their case to the lawyer in the beginning, which may lead the lawyer to wrongly assess the nature of the case or whether a conflict of interest against current or former clients exists. The risk of malpractice will become higher if the lawyer accepts the case without sufficient information and later finds a conflict of interest. There are different ways to cover prospective clients under the lawyer’s duty of confidentiality. In Singapore, prospective clients are included in the definition of the term “client”.<sup>33</sup> In the United States, Model Rules

29 This interpretation would also address the question of whether a lawyer can act on behalf of the opposing party in the same case of the prospective client. Rule 15 of the 2019 Lawyers’ Ethic Code stipulates that a conflict of interest is when a lawyer’s obligations to their current clients, former clients and third parties is likely to interfere with the lawyer’s best effort to protect the client’s legitimate rights and benefits. If the legal duty of confidentiality applies to prospective client’s information, the lawyer could not act for the opposing party as the lawyer’s obligation to a third party (in this case, the prospective client) would create a conflict of interest with the opposing party.

30 *Supra* note 17.

31 Kim, H. S. (2020). A study on lawyer’s duty and privilege of confidentiality. *저스티스 [The Justice]*, 177, 411–435. <https://doi.org/10.29305/tj.2020.04.177.411>; Kim, T. B. (2016). Lawyer’s duty of confidentiality. *Chonnam Law Review*, 36(4), 257–289.

32 The official response from the Korean Bar Association to a lawyer’s question regarding a case where the lawyer has provided preliminary consultation for a prospective client and later wants to act for the opposing party of the same case states that if the lawyer discloses the secrets obtained during the consultation with the prospective client, it can be considered as a violation of the confidentiality obligation. See Human Rights and Justice Data Room. (2010, February). *Questions and answers related to attorney law*. Korean Bar Association. <http://www.koreanbar.or.kr/pages/board/view.asp?teamcode=402&category=&page=1&seq=6507&types=11&searchtype=&searchstr=>

33 Article 2 of the 1966 Legal Profession Act of Singapore.

state the lawyers' confidentiality obligations toward clients (Rule 1.6) and prospective clients (Rule 1.18). Notably, US lawyers are not obliged to apply security measures for information about prospective clients. Vietnam can adopt a similar approach, where lawyers have a statutory obligation not to disclose confidential information of both contracting clients and prospective clients and an ethical obligation to apply security measures only for the information of contracting clients from the start of the legal services. To do this, the term "during the course of legal practice" should be interpreted in the broader sense as mentioned above. The analysis of the scope of information subject to confidentiality also supports such an interpretation.

### ***2.3. Regarding the information subject to confidentiality***

The 2019 Lawyers' Ethics Code stipulates that lawyers must keep confidential "information of clients when performing legal services and after the completion of such services." Accordingly, the information of a client is the information of the one who has signed a legal service contract with the lawyer and includes the client's personal details, facts, and information on the cases that the lawyer is contracted to handle. As aforementioned, the lawyer's ethical confidentiality obligation does not cover the information of prospective clients, only of those who have signed legal service contracts. However, it is unclear whether such an ethical duty would apply to information on cases outside the scope of the signed contracts. For instance, client A has signed a retainer agreement with a lawyer specializing in pharmaceutical law and then requests the lawyer to take on an intellectual property case, but the lawyer declines as it is not their area of expertise. Although the information of the intellectual property case is also information of client A, the lawyer does not work for client A in this case. The question is whether the lawyer must keep the information of client A's intellectual property case confidential. Meanwhile, the 2006 Law on Lawyers stipulates that "information about cases, matters, about clients" that lawyers "know during the course of legal practice" is prohibited from lawyers' disclosure. If "the course of legal practice" is broadly interpreted, meaning when the lawyers begin to work for a law firm or individually, the lawyers should not disclose any information about cases and matters that they learn during their daily work, even if it belongs to prospective clients. This would also cover the information of cases and matters that the lawyers do

not handle for a client who has signed a retainer agreement or legal service contracts for other cases, an instance that the 2019 Lawyers' Ethics Code does not address.

A broad scope of protected information is the approach of Singapore,<sup>34</sup> Australia,<sup>35</sup> and Germany.<sup>36</sup> Three countries, albeit with different legal systems, require lawyers to maintain the confidentiality of any information that a lawyer learns in the exercise of his or her profession. On the other hand, while “learned in the course of performing his or her duties” remains in Article 26 of the Attorney-at-law Act, South Korea has a more descriptive approach towards the protected information, in which any information that is deemed “secrets” would subject to lawyers' legal duty of confidentiality. Both the Attorney-at-law Act and the Attorney Ethic Code do not elaborate on the term “secrets”, leading to many debates, with the “positive compromise theory”<sup>37</sup> as the dominating theory.<sup>38</sup> The theory states that the information has to be considered to be secret by both the clients (subjective theory) and a layperson (objective theory) to be subject to the lawyer's duty of confidentiality. As lawyers in South Korea, a country following civil legal systems, also have a duty to protect society's interest,<sup>39</sup> the positive compromise theory is said to fulfill the purpose of the lawyers' confidentiality obligations, which is to protect clients' trust towards lawyers, without the unnecessary protection expansion to the point of going against the public interest.<sup>40</sup> Meanwhile, the United States separates the lawyers' confidentiality obligations into the non-disclosure and application of security for “information

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34 *Supra* note 18.

35 Law Council of Australia. (2024). *Australian Solicitors' Conduct Rules 2022* [Commentary]. <https://lawcouncil.au/publicassets/e219b6df-9ff7-ee11-9494-005056be13b5/ASCR%20Commentary.pdf>, pp. 33-34.

36 Section 43a of the 1994 Federal Code for Lawyers of Germany.

37 Other theories include (i) subjective theory in which only the information that is considered as secrets by the clients is protected, (ii) objective theory in which the information that a layperson considers to be worth keeping as secrets can be protected, and (iii) negative compromise theory in which both types of mentioned information are worth protecting.

38 Hah, J. C. (2014). Lawyer's duty of confidentiality: Focused on public interest exception. *Kyungpook National University Law Journal*, 47, 571-600. <https://doi.org/10.17248/knulaw..47.201408.571>

39 Kong, Y. H. (2017). A comparative study of the attorney ethics rules of Korea and the U.S. and the application of ethics rules in cross-border legal representations. *Hanyang Law Review*, 34(3), 297-323. <https://doi.org/10.18018/HYLR.2017.34.3.297>

40 Hah (2014), *supra* note 38.

relating to the representation of a client” regardless of the source, and non-disclosure for “information (learned) from a prospective client.”<sup>41</sup>

While broad coverage of confidentiality can secure the lawyer-client trusting relationship, it is necessary to strike a balance between the lawyers’ legal and ethical burden, as well as considering the lawyers’ role in promoting fairness and justice in the legal system. As such, the lawyer’s duty of confidentiality in Vietnam should be approached as follows: the ethical duty in the 2019 Lawyers’ Ethics Code shall be extensive in terms of required acts, including non-disclosure and application of certain security measures; but such acts will only apply for clients who have legal service contracts with lawyers, and for cases and matters that lawyers handle(d) for such clients. In contrast, the legal duty in the 2006 Law on Lawyers shall be on a narrower side for required acts, but for a wider scope of information. Specifically, the legal duty of confidentiality does not require a lawyer to take any confidentiality measures, but only to refrain from disclosing the information subject to confidentiality, which is information about any cases, matters, or clients as soon as this information becomes known to the lawyer during the course of their professional work in a law firm or as an individual lawyer. Regarding a case or matter that a lawyer has been contracted to handle, the information the lawyer receives is extensive and critical in determining the outcome of such a case or matter, thus stricter ethical requirements are needed for maintaining its confidentiality. On the other hand, the initial information of a case from a prospective client is typically general, basic information. Although such information deserves a certain level of confidentiality, the risk of unauthorized access and the negative consequences of its disclosure are not as high. As such, it is reasonable to require the lawyers not to disclose this information, but it will become an unnecessary burden to the lawyers if they must apply the same security measures to this information as those of contracting clients’ information.

This approach also corresponds with the respective consequences for violations against the ethical and legal duty of confidentiality. A lawyer who breaches the legal duty of confidentiality in the 2006 Law on Lawyers by disclosing information about a case that they have become aware of during their course of practice will have to face

41 American Bar Association (2025), *supra* note 24, Rule 1.6 and Rule 1.18.

both legal sanctions from the competent authorities and disciplinary actions from the Bar,<sup>42</sup> whereas a lawyer who arguably violates the ethical duty of confidentiality in the 2019 Lawyers' Ethics Code by not applying any security methods leading to the unauthorized disclosure of clients' information (thus failed to maintain the confidentiality of the information) will only suffer disciplinary actions without any legal sanctions (unless such act also violates other laws).<sup>43</sup> In other words, lawyers' ethics shall include compliance with legal regulation, plus higher practice standards. This would explain why ethical obligation on confidentiality should be stricter in terms of required acts, while lawyers' statutory confidentiality obligations are the basic obligations that every practicing lawyer must abide by to ensure a legally consistent professional practice among lawyers and their service.

### **3. Regulations in procedural laws not compatible with the lawyers' compliance with the duty of confidentiality**

Current procedural regulations do not support lawyers in fulfilling their duty of confidentiality. Under Vietnamese law, according to Article 78 of the 2015 Civil Procedure Code, witnesses are allowed to refuse to testify if their testimony is related to state secrets, professional secrets, trade secrets, personal secrets, or having a negative or detrimental effect on the litigant who is a relative of the witnesses. May a lawyer, summoned as a witness, refuse to testify if one of the litigants is, or used to be the lawyer's client? If the lawyer refuses to testify, claiming the information is a professional secret, is it satisfactory for the jury? In addition, the lawyer must file a motion, and the court will decide if the information can be considered a professional secret.<sup>44</sup> Until now, it is unfounded for a lawyer to claim to have provided legal services to a litigant as a basis to refuse to act as a witness. By doing so, the lawyer may face administrative penalties for obstructing legal proceedings.<sup>45</sup> In worse cases, the lawyer can be prosecuted for refusing to testify under Article 383 of the 2015 Penal Code. In short, such witness testimony obligation contradicts the lawyer's professional principle of keeping

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42 Article 85 of the 2006 Law on Lawyers of Vietnam.

43 Article 89 of the 2006 Law on Lawyers of Vietnam.

44 Clause 2, Article 78 of the 2015 Civil Procedure Code of Vietnam.

45 Article 18 of Ordinance No. 02/2022/UBTVQH15 on sanctioning administrative violations for obstructing procedural activities.

clients' information confidential and protecting the clients' best interests. The client would not dare to approach and hire a lawyer if the lawyer has a history of testifying against a former client using the information provided by that very client.

To solve this problem, crucial doctrines in the legal profession shall be considered: attorney-client privilege and work product doctrine. The attorney-client privilege protects communication between lawyers and clients during the process of the client using legal services. The work product doctrine protects documents prepared before litigation from disclosure to opposing counsels.<sup>46</sup> Such privilege and doctrine are important elements of the professional function of lawyers in the common law system. The attorney-client privilege was born and developed in the legal profession early in the 18<sup>th</sup> and 19<sup>th</sup> centuries, according to case laws on the lawyer's obligation not to disclose the secrets of clients in the Court of England.<sup>47</sup> Lawyers practicing their right to defend can only prepare their case adequately if their client is free to disclose everything, good and bad.<sup>48</sup> In common law countries, such as Australia,<sup>49</sup> Singapore,<sup>50</sup> and the United States,<sup>51</sup> attorney-client privilege is applied in the process of handling civil cases in federal court and the majority of state courts, with detailed regulations on the application of the privilege, exclusion circumstances, waiver of this privilege, and interpretation of important terms of the privilege. In general, this privilege provides the client with substantial protection against the lawyer testifying against the client.

Meanwhile, Japan and South Korea, as countries with civil law system, do not recognize the attorney-client privilege doctrine. Debates on the adoption of US-style attorney-client privilege are constant in South Korea, even though the Korean Supreme Court once refused to recognize such doctrine in a decision in

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46 Hickman v. Taylor, 329 U.S. 495 (1947). <https://supreme.justia.com/cases/federal/us/329/495/>

47 Hazard, G. C. Jr. (1978). An historical perspective on the attorney-client privilege. *California Law Review*, 66, 1061-1091. [https://scholarship.law.upenn.edu/faculty\\_scholarship/1068](https://scholarship.law.upenn.edu/faculty_scholarship/1068)

48 Nguyen, H. Y. (2020). Đặc quyền luật sư – khách hàng trong pháp luật một số quốc gia – Kinh nghiệm cho Việt Nam [Attorney-client privilege in the laws of some countries – Experience for Vietnam]. *Journal of State and Law*, (1), 78-84.

49 Part 3.10 of the 1995 Evidence Act of Australia.

50 Articles 128, 128A, 129, 130, 131 of the 1893 Evidence Act of Singapore.

51 Article V: Privileges under the 1975 Federal Rules of Evidence of the United States.

2009.<sup>52</sup> Specifically, the Court reversed a lower court's decision to accept attorney-client privilege but avoided any fundamental discussions regarding the reason for not doing so.<sup>53</sup> Vietnam, a civil law country similar to Japan and South Korea, does not officially recognize the doctrine either.<sup>54</sup> A plausible explanation for the lack of attorney-client privilege in civil law countries lies in how the system perceives the role of lawyers and the court in litigation, compared with the common law system. In the adversarial system employed by common law countries, lawyers play a zealous role in litigation for the maximization of the client's interest,<sup>55</sup> and the judge is a passive moderator in the evidence discovery process. Therefore, the attorney-client privilege is mostly exercised among the litigating parties.<sup>56</sup> However, in civil law countries, the courts and judges play a more active role, as a party must file requests to collect evidence from the other party and receive approval from the judges. Therefore, the attorney-client privilege can go directly against the court, which is supposed to have the impartial role of discovering the truth and maintaining justice.<sup>57</sup> Nonetheless, Japan and South Korea still grant specifically to lawyers the right to refuse to testify and refuse to submit documents related to lawyer confidentiality obligations in the civil procedural code of each country.<sup>58</sup> There is still the burden of proof, and whether the refusal to testify is reasonable will be decided by the court. In the mentioned 2009 decision, the Korean Supreme Court also mentioned that the discovered memorandum was excluded from the evidence records lawfully, not based on so-called attorney-client privilege, but since lawyers had rightfully exercised their right to

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52 Korean Supreme Court case, 2009 Do 6788, decided on 17 May 2012. The ruling was on whether a legal memorandum prepared by a lawyer can be admitted as evidence in a criminal case.

53 Nam, S. (2016). Back to fundamentals: A closer look at a Seoul high court's unsuccessful attempt to introduce attorney-client privilege in Korea. *Journal of Korean Law*, 16(1), 230–261. <https://doi.org/10.23110/JKL.2016.16.1.008>

54 Truong, N. Q., & Le, H. N. (2017). Phạm vi cung cấp dịch vụ pháp lý của luật sư [Scope of legal services provided by lawyers]. Trong *Sổ tay Luật sư* (Vol. 1, pp. 69–101). National Political Publishing House, p. 79.

55 American Bar Association (2025), *supra* note 24, Preamble and Scope.

56 Nam, S. (2018). Structural issues to consider before adopting U.S.-style attorney-client privilege in Korea. *Seoul Law Review*, 26(2), 487–520. <https://doi.org/10.15821/slr.2018.26.2.013>

57 *Ibid.*

58 Articles 197 and 220 of the 1996 Code of Civil Procedure of Japan; Articles 315 and 344 of the 2023 Civil Procedure Act of South Korea.

refuse to give testimony authenticating the document. It shows that in an inquisitorial system, even with the lack of attorney-client privilege, the lawyers' statutory right to refuse to testify still exists as a correlative to their confidentiality obligation.

Thus, it is recommended that there be a specific provision in Vietnamese civil procedural law that allows lawyers to refuse to give testimony if it involves information subject to lawyers' confidentiality obligations. In other words, advocates are completely incompetent as witnesses in a case affecting their client.<sup>59</sup> Such a right to refuse would allow the duty of confidentiality to serve effectively as a fundamental principle in building a trusting client-lawyer relationship and promoting a fair justice system. While the lawyer's duty of confidentiality could be overridden in criminal cases, as these cases deal with a violation of public interests, confidentiality protection should strictly apply in civil and commercial disputes since they only involve opposing interests between individuals or entities. As the lawyer-client relationship once existed between the lawyer and the litigant, the lawyer should not harm or give information that could worsen the legal situation of their former client. The lawyer in this case should be considered to be on the same side as the litigant, even if the lawyer-client relationship no longer persists. In these situations, allowing lawyers to refuse to give testimony will help lawyers avoid having to go against their clients in civil and commercial cases. If this recommendation is applied in reality, the litigation process in Vietnam could be effectively improved.

## Conclusion

The article examines the current rules and regulations on Vietnamese lawyers' obligation to maintain the confidentiality of client information in the 2019 Lawyers' Ethics Code and the 2006 Law on Lawyers of Vietnam, comparing them with the approach of other jurisdictions within the scope of the authors' survey at the time of writing. The authors argue for and support (i) a proper, comprehensive interpretation of the lawyer's legal and ethical duty of confidentiality and (ii) lawyers' statutory right to refuse to testify against their clients in civil and commercial litigation, as a means for complying with their duty of confidentiality. ●

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<sup>59</sup> Radin, M. (1928). The privilege of confidential communication between lawyer and client. *California Law Review*, 16(6), 487-497. <https://doi.org/10.2307/3475332>

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### Author Contribution

All authors contributed to the study conception and design. All authors read and approved the final manuscript.

### Declarations

**Conflict of Interest:** The authors declare no competing interests.

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