

How far lawyer's documents are protected by law

Frans H. Winarta

JAKARTA

Recently there has been news about a lawyer's office being searched by the anti-graft body. This incident has happened in the past and made the client concerned because it raises the question of how documents kept at a lawyer's office — which are given and entrusted to the lawyer — can be kept safely and their confidentiality can be maintained.

As a matter of fact, when a client appoints a lawyer as his legal counsel to handle his case, the client entrusts all documents in the hands of the lawyer and therefore their confidentiality must be maintained.

In lawyer-client privilege, a client's trust in a lawyer, including documents and secrets, must be maintained in such a way and must not be disclosed except with the client's approval and instruction. Thus, a lawyer-client relation is based on "trust" and must be maintained in

such a way that it must not be disclosed to other parties.

In the search and seizure of documents at a law office in Jakarta recently, the question is how far the lawyer's immunity in maintaining his client's confidentiality and documents can be protected by the law.

The Civil Code Procedures and the Criminal Code Procedures — with regard to search on houses and so forth, and seizure of property that can be used as evidence — do not limit the authority of the police or prosecutor to search and seize property related to professional secrets, and in fact, seizure of criminal property by the investigator can be publicized.

If the documents belonging to a client that has nothing to do with the case being investigated, then such client's confidentiality is disclosed as a result of the search by the investigator. How far can the law protect the confidentiality of a client? Article 19 of Law No. 18/2003 on Advocate ("Advocate Law") only

stipulates client's confidentiality but does not stipulate the possibility of a search at a law office.

Thus, we should see the comparison in other countries with regard to protection of a law office in connection with a search by the investigator.

In England and Wales, the police can seize evidence or documents in the possession of a lawyer for his client and search his office if they have a permit from the court or judge, where the alleged crime occurs (*locus delicti*) within the jurisdiction of the court that gives the permit.

In Austria, the police can seize evidence or documents and search a lawyer's office if they have previously informed the bar association and the search and seizure at the lawyer's office are observed by a representative of the bar association.

In the United States, a lawyer is not above the law and can be treated as a regular citizen to be investigated and searched, except in the state of Minnesota. Meanwhile, in Norway, the condition for the search of the

lawyer's office is that such search must concern a criminal offense that could lead to imprisonment.

As a lawyer, I have repeatedly raised an objection to the lawyer's status as a law enforcer because he does not have the right to arrest and right to detain, in accordance with Article 1 of the United Nations Code of Conduct for Law Enforcement Officials, Adopted by the General Assembly Resolution 34/169 of Dec. 17, 1979 which states:

"(a) The term 'law enforcement officials', includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention."

However, Article 5 paragraph (1) of the Advocate Law becomes the reason that the Corruption Eradication Commission (KPK) is able to search a lawyer's office recently. Article 5 paragraph (1) of the Advocate Law states:

"Advocates who bear the status as a free and independent law enforcer

shall be guaranteed by the laws."

But in reality, a lawyer is never equipped with the right to arrest and right to detain. This mistake clearly should not occur in the new Advocate Bill.

Indonesia through the Indonesian Advocates Association (IKADIN) in 1991 became a member of the IBA (International Bar Association) in London, and is bound by the IBA Standards for the Independence of the Legal Profession, which in point 13 states that:

"Lawyers shall have all such other facilities and privileges as are necessary to fulfill their professional responsibilities effectively, including: Confidentiality of the lawyer-client relationship, including protection of the lawyer's files and documents from seizure or inspection and protection from interception of the lawyer's electronic communications."

Thus, the new Advocate Law must regulate and protect the confidentiality of the client from the

search and seizure of documents by the investigator because the obligation to maintain and keep the client's confidentiality has been stipulated in Article 19 paragraph (1) of the Advocate Law which states:

"(1) Advocates must keep confidential anything known or acquired from their clients as a result of professional relationships, unless it is stipulated otherwise in the laws."

From the search and seizure of documents at a law office in Jakarta, it is time for the new Advocate Law to protect the confidentiality of documents of the client that are kept at the office of the lawyer who is entrusted to handle his case, in order to create good law enforcement and guarantee legal certainty in Indonesia.

The author is chairman of the Indonesian Advocates Association (PERADIN) and member of the Governing Board of the National Law Commission (KHN)