JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION´S SECTIONS OF INTERNATIONAL LAW AND ANTITRUST LAW ON ATTORNEY-CLIENT PRIVILEGE IN RESPONSE TO THE PUBLIC CONSULTATION ISSUED BY THE CABINET OFFICE OF THE GOVERNMENT OF JAPAN

July 10, 2014

The views stated in this submission are presented only on behalf of the Sections of International Law and Antitrust Law of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors, and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of International Law and Antitrust Law (the "Sections") of the American Bar Association ("ABA") welcome the opportunity to provide comments to the Office of Examination of Anti-Monopoly Act Investigations Procedures, Cabinet Office of the Government of Japan (the "Cabinet Office"), regarding issues relating to the attorney-client privilege raised by the Japan Fair Trade Commission ("JFTC") on pages 15 and 16 of the Summary of Issues of Administrative Investigation Procedures under the Anti-Monopoly Act ("Summary of Issues") issued by the Cabinet Office.[1] The Sections appreciate the Cabinet Office´s and the JFTC's substantial thought and effort reflected in the Summary of Issues.

The Sections are available to provide additional comments or to participate in any further consultations with the Cabinet Office or the JFTC, as they deem appropriate. In particular, the Sections would welcome the opportunity to provide comments regarding the issues raised on pages 12-15 and 17-25, concerning the presence of an attorney during on-the-spot inspections and depositions, copying of materials obtained during on-the-spot inspections, securing verifiability of the process of deposition (including access to records of depositions and ability to take notes during depositions by parties), information disclosure for appropriate claims, and sharing knowledge of rules and practices on administrative investigations, which in the limited time available the Sections do not address in these comments. The Sections' over 30,000 members include attorneys from all over the world and their comments reflect the members´ expertise and experience with issues of attorney-client privilege and investigative procedures in the United States and in other jurisdictions worldwide.

[1] The Sections' comments are based on a tentative translation of the Summary of Issues posted by the Cabinet Office at http://www8.cao.go.jp/chosei/dokkin/pubcomm/m-03.pdf. The drafting group includes Javier Canosa, Wayne J. Carroll, Jennifer M. Driscoll-Chippendale, Michael Inouye, and Fabian Martens, led by Javier Canosa. The views stated in these comments do not necessarily reflect the views or opinions of the professional organizations with which the members of this drafting group are affiliated.

GENERAL COMMENTS

The attorney-client privilege is one of the oldest evidentiary privileges recognized in Anglo-American jurisprudence. Reference to the principles underlying the privilege can be traced as far back as the Roman Republic and 16th century English common law.[2] The earliest express recognition of the attorney-client privilege found in U.S. federal law is in 1888.[3] Since then, the concept of confidentiality in attorney-client communications has evolved as an ethical requirement in the rules of professional responsibility for every state of the United States. In Asia, the privilege was most recently found by the High Court of the Hong Kong Special Administrative Region, Court of First Instance, to be a human right that may be waived only in very limited circumstances.[4]

Courts in the U.S. recognize the attorney-client privilege in the following circumstances: (1) where legal advice is sought; (2) from a legal professional adviser in that capacity; (3) the communications relating to that purpose; (4) that are made in confidence; (5) by the client; (6) are at the client's instance permanently protected; (7) from disclosure by the client or the legal adviser; (8) unless waived.[5] Any waiver of the privilege must be intentional and voluntary.[6] The attorney-client privilege is not absolute; there are limited exceptions, such as communicating an intention to commit future crimes or fraud.[7]

The ABA, the world's largest voluntary association of attorneys, with nearly 400,000 members from around the world, has adopted resolutions establishing ABA policy addressing the importance of the attorney-client privilege in the legal profession and the enhancement of the rule of law. In 1997, for example, the House of Delegates of the ABA expressly adopted the principle that the attorney-client privilege for communications between in-house counsel and their clients should have the same scope and effect as the attorney-client

---

2 *See* Edna Selan Epstein, The Attorney-Client Privilege and Work Product Doctrine 2 (4th Ed. 2001); Hon. Dick Thornburgh, Waiver of the Attorney-Client Privilege: A Balanced Approach, Washington Legal Foundation (Wash., D.C. 2006).

3 Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

4 Chinachem Financial Services Limited v. Century Venture Holdings Limited, [2014] 2 HKLRD 557 at ¶¶ 132-135 (Court of First Instance, March 25, 2014).

5 *See*, *e.g.*, 8 John Henry Wigmore, Evidence in Trials at Common Law § 2292, at 554 (McNaughton 1961 & Supp. 1991).

6 Federal Rules of Evidence 502(a)(1), (c).

7 *See U.S. v. Zolin*, 491 U.S. 554, 562-63 (1989).

privilege for communications between outside counsel and their clients.[8] With regard to the privilege in connection with foreign lawyers, the ABA recommended as early as 1983 (and again in 2008) that the European Commission ("EC") extend the same level of protection granted to communications between a client and its lawyer practicing in a member state of the European Union ("EU") to communications with a U.S. lawyer.[9] In both 1983 and 2008, the ABA also urged the EC to extend the privilege to in-house counsel.[10]

In 2005 the ABA Task Force on the Attorney-Client Privilege ("Attorney-Client Task Force") reported that:

> "Lawyers have always been understood to play a critical role in preserving legal rights, compliance with the law, and ultimately, the rule of law. As the law becomes increasingly complex, the need for lawyers has become increasingly essential. Further, the confidentiality of the attorney-client relationship has historically been considered an essential aspect of legal representation, and one that is necessary to ensure the ability of lawyers to carry out their assigned role in the legal system. The confidential relationship is recognized and preserved not only in the common law regulating the lawyer-client relationship and in the rules of professional conduct, but in the attorney-client privilege…"[11]

The Attorney-Client Task Force highlighted some of the important attributes of the attorney-client privilege, noting that the privilege: (i) fosters the attorney-client relationship; (ii) encourages client candor; (iii) fosters voluntary legal compliance; (iv) promotes efficiency in the legal system; and (v) enhances the constitutional right to effective assistance of counsel.[12]

In 2005, the House of Delegates of the ABA adopted resolutions reiterating its long-standing support of the attorney-client privilege and work

---

[8] ABA, 1997 Report with Recommendation #120 (Policy adopted Aug. 1997), 1997_AM_120 *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1997_am_120.authcheckdam.pdf.

[9] ABA, 1983_Report with Recommendation # 301 at 1 (Policy adopted Feb. 1983, Re-activated Feb. 2008), 2008_MY_301 *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2008_my_301.authcheckdam.pdf.

[10] *Id*.

[11] ABA, 2005_ Report with Recommendation #111 at 3-4 (Policy adopted Aug. 2005), 2005_AM_111 *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf.

[12] *Id*. at 8-12.

product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice. The ABA specifically opposed policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and supported policies, practices and procedures that recognize the value of those protections.[13]

Finally, as the Summary of Issues reported, a Japanese court has found that, at least in criminal cases, "[f]or defendants to receive effective and appropriate assistance from lawyers, it is essential for defendants and lawyers to communicate freely without [an] investigation agency knowing, so that defendants can provide lawyers with necessary and sufficient information and lawyers can offer appropriate advice to defendants."[14] The ABA believes that this need extends to all proceedings.

CONCERN THAT THE ATTORNEY-CLIENT PRIVILEGE MAY HINDER FACT-FINDING.

The Sections commend the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act (the "Advisory Panel") for weighing the proper balance between the JFTC's fact-finding ability against the right to a fair defense. The JFTC has expressed concern that recognizing the attorney-client privilege could impede fact-finding by enforcers. The JFTC apparently is unaware of any case in which a document that would be subject to attorney-client privilege has constituted conclusive or necessary evidence in JFTC cases, but is concerned that not having access to privileged communications between a defendant and its counsel could make it difficult to prove violations.[15] The JFTC has also asserted that the lack of an attorney-client privilege has apparently not inhibited in-house investigations in support of leniency applications, or prevented businesses from communicating with attorneys.[16]

The Sections believe that the attorney-client privilege in fact does not materially impede fact-finding by enforcers. As a threshold matter, the privilege is focused, shielding only the confidential communications between a client and counsel for the purpose of seeking legal advice. It does not protect the underlying facts (even if communicated to counsel) or other types of

---

13 *See id*. at 1.

14 Summary of Issues at 16 n. 5.

15 *Id.* at 15-16.

16 *Id.* at 16.

communications that would not be covered by the privilege from being discovered and used in prosecutions, such as communications that were not made for the purpose of obtaining legal advice, including communications made in furtherance of misconduct or of business objectives, or that were not made in confidence.[17]

In addition, recognizing the privilege actually promotes observance of the law and the administration of justice, by encouraging businesses to investigate and correct possible wrongdoing. The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients," which, in turn, has a profound and beneficial effect on the overall system of justice.[18] The most effective way of eliciting true and unvarnished communication is to do so in confidence so as to eliminate any inhibition or apprehension by a client in relaying his or her case to his or her lawyer. A client is unlikely to extend his or her complete trust to his or her lawyer if a confidence is not protected and must be shared with other parties, including the opposing party and the judicial body itself. Enabling a lawyer to hear all of the facts, encouraged under the protection of privilege, allows the attorney to formulate an effective legal strategy and offer sound legal advice based on actual facts and circumstances.

CONCERN THAT, WHILE OTHER JURISDICTIONS WITH AN EFFECTIVE ATTORNEY-CLIENT PRIVILEGE INCENTIVIZE VOLUNTARY COOPERATION, SUCH INCENTIVES ARE WEAK IN JAPAN

The Sections applaud the Advisory Panel's effort to consider how Japan's investigative procedures promote or diminish consistency across jurisdictions. The JFTC argues that in Japan, there are insufficient incentives for businesses to cooperate in investigations, identifying in particular the lack of a discretionary surcharge system and unavailability of tough sanctions against obstructing investigations.[19] Accessing a company's confidential communications with its counsel is apparently intended to counter-balance those deficiencies.

The Sections respectfully suggest that the better course is to address the issue of incentives for voluntary cooperation under Japanese law directly, through the adoption of a discretionary surcharge system and obstruction sanctions, rather than by banning the attorney-client privilege in

---

17 *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981).

18 *Id*. at 389.

19 The JFTC also expressed concern that an attorney-client privilege may be abused. The Sections believe that the legal profession in Japan is of high integrity and any abuses would be appropriately disciplined.

JFTC investigations. The very successful U.S. and EU leniency programs demonstrate the merits of this approach.

The JFTC also noted that attorney-client privilege issues are not unique to competition law and expressed concern about introducing recognition of the privilege for Anti-Monopoly Act procedures alone. The Sections agree that an attorney-client privilege should be universal, rather than limited to certain types of proceedings.

UNDERSTANDING THAT THERE IS A U.S. CASE HOLDING THAT ATTORNEY-CLIENT PRIVILEGE IS NOT WAIVED IF THE INFORMATION IS DIVULGED PURSUANT TO COMPETENT AUTHORITY, AND THAT, ACCORDINGLY, DISCLOSURE OF INFORMATION TO THE JFTC SHOULD NOT AFFECT ATTORNEY-CLIENT PRIVILEGE IN FOREIGN JURISDICTIONS.

The Sections commend the Advisory Panel for examining the important issue of how the lack of an attorney-client privilege in administrative investigations conducted by the JFTC would impact requests in U.S. proceedings for evidence obtained during these investigations. The JFTC states that in the United States, some courts have concluded that attorney-client privilege is not waived in federal court proceedings when a company is ordered to disclose attorney-client communications by non-U.S. government authorities.[20]

However, there is actually a lack of binding judicial precedent in the U.S. on the applicability of the attorney-client privilege in such situations that provides little assurance on this issue. The U.S. rulings declining to require disclosure of materials provided to foreign governmental agencies are premised on principles of comity,[21] rather on any recognition of attorney-client communications or attorney work product. Additionally, U.S. federal courts have also addressed the adoption of foreign privilege laws through a choice of law analysis. The issue of foreign privileges tends to arise in U.S. courts if: (1) a foreign privilege is implicated in a claim involving a federal question;[22] or (2) an

---

[20] Summary of Issues at 16.

[21] The five factors relevant to a comity analysis are: (1) the importance to the litigation . . . of the documents or other information [requested]; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." *Société Industrielle Aérospatiale v. U.S. District Ct. for So. District of Iowa*, 482 U.S. 522, 544 n.28 (1987) (citation omitted). In comparison, disclosure compelled in state court does not result in waiver of the privilege in federal court. Fed. R. of Evidence 502(c).

[22] Under a claim involving a federal question, the federal common law would determine which privilege laws would apply. One choice of law analysis method used by U.S. courts in determining which privilege law should apply is the *touch base* test. Under the "touch base" test, if the communication has nothing to do with, or is only incidental to, the United States, the foreign rules of privilege would apply; however, if the communication has more than an

argument is made that a foreign privilege should attach to evidence in a state law claim being tried in a federal court.[23]

No U.S. appellate court—much less the U.S. Supreme Court—has ruled whether the attorney-client privilege or work product doctrine extends to evidence and communications submitted to foreign enforcers.[24] The several trial courts that have addressed the issue reached inconsistent results, precisely because they assessed the request based on the specific facts and circumstances often under a comity analysis instead of under the attorney-client privilege.[25]

In In re Vitamins Antitrust Litigation,[26] the defendants submitted documents that they believed to be protected by attorney-work product in their home jurisdiction at the request of foreign government agencies conducting an investigation. The defendants argued that any request by foreign government agencies should be deemed "compelled" because of the serious consequences of not complying, including relinquishing a claim for leniency. The U.S. District

---

incidental connection to the United States, the court will conduct a more traditional analysis and defer to the law of privilege of the country with the most direct and compelling interest in the communication. *See Golden Trade S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 520 (S.D.N.Y. 1992). There have been exceptions to the touch base test for policy reasons, including a ruling by a U.S. District Court which rejected applying a foreign privilege law because it was supported by a different system of discovery and, therefore, incongruent to American policy interests when applied partially in a U.S. court. *See Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y 2002).

[23] If a party contends that foreign privilege laws should apply to a state law claim tried in a U.S. federal court, the determination would rest with the choice of law rules of the state of the sitting court. A small minority of state courts rely upon a *territorial approach*, in which the local privilege laws apply without any external considerations. However, a majority of states use the *most significant relationship* principle in determining which forum's privilege law would apply. *See Wolpin v. Phillip Morris, Inc.*, 189 F.R.D. 418, 423-4 (C.D. Cal. 1999). In determining the location of the most significant relationship, courts have considered: (1) the number and nature of contacts in the forum state; (2) the relative materiality of the evidence sought to be excluded; (3) the kind of privilege involved; and (4) fairness to the parties. Restatement (Second) Conflict of Laws, section 139, cmt. d. "Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum." *Id*. at subsection 1.

[24] Defendants in U.S. private damage actions routinely furnish plaintiffs with documents subpoenaed by the Antitrust Division of the U.S. Department of Justice without any suggestion that the production vitiates attorney-client privilege in the civil litigation. *See*, *e.g.*, *In re Milk Prods. Antitrust Litig.*, 84 F. Supp. 2d 1016 (D. Minn. 1997) (documents provided to state and federal entities must be turned over to plaintiffs; privileged documents could be withheld with appropriate factual support).

[25] For example, the U.S. District Court for the Northern District of California affirmed a Special Master's Report denying plaintiff's motion to compel the production of documents submitted to the European Commission because the information sought was deemed relatively unimportant and could be obtained through alternative channels. *See In re Methionine Antitrust Litig.*, M.D.L. No. 00-1311 CRB (N.D. Cal. June 17, 2002).

[26] Misc. No. 99-197 (TFH), MDL No. 1285, (2002) U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002); (2002) U.S. Dist. LEXIS 25815 (D.D.C. Dec. 18, 2002).

Court addressed the issue of waiver of the attorney-client privilege in a U.S. court if a privileged document is disclosed under *compulsion* in a foreign jurisdiction.[27] The court opined that "compulsion avoiding waiver requires that a disclosure be made in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for non-compliance, and that any applicable privilege be asserted."[28] In other words, normal acquiescence to the laws of disclosure in another country does not afford immunity from waiver in a U.S. court. In applying this standard, the court concluded that the defendants' compliance with foreign government agencies in specified countries, including Japan, was not compelled and not exempted from a waiver of privilege.[29] Ultimately, the court ordered defendants to produce corporate statements made to the European Commission after determining that "concerns raised by the EC . . . were outweighed by the United States' interest in open discovery and enforcement of its antitrust laws," given that some of the information originated in the United States and could not be obtained through other means.[30] Nonetheless, the court in the same opinion ruled that although voluntary submissions of attorney work product to a Canadian law enforcement agency resulted in a waiver of protection, those documents would be shielded from disclosure under principles of comity to avoid revealing Canada's enforcer's negotiating position out of respect for that country's investigative processes.[31]

This uncertainty pervades more recent opinions. Some courts have noted the chilling effect that ordering production of evidence gathered by foreign agencies would have on leniency programs and denied plaintiffs' motions to compel.[32] However, others accord greater deference to the principles of U.S. discovery.[33] Given the lack of higher court precedent and the discretionary nature of a comity analysis, the outcome of any given request for evidence remains uncertain. And as the U.S. Supreme Court stated: "If the purpose of the attorney-client privilege is to be served, the attorney and the client must be able

---

27 (2002) U.S. Dist. LEXIS 26490 at *105.

28 Id.

29 Id.

30 (2002) U.S. Dist. LEXIS 25815 at *22-23.

31 Id. at *27-28.

32 *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 05-MD-01720 (JG) (JO), Mem. & Order (E.D.N.Y. Aug. 27, 2010) (denying motion to compel production of documents submitted as part of the European Commission's investigation of interchange fees); *In re Static Random Access Memory ("SRAM") Antitrust Litig.*, 07-CV-01819CW, Mem. & Order (N.D. Cal. Jan. 5. 2009) (denying motion to compel); *In re Rubber Chems. Antitrust Litig.*,486 F. Supp. 2d 1078, 1083 (N.D. Cal. 2007) (denying motion to compel where the importance of relevant documents submitted to the European Commission was dubious given that the litigation focused on the U.S. market and plaintiff already had documents from the U.S. investigation).

33 *See*, *e.g.*, *In re Flat Glass Antitrust Litig.*, 08-MC-00180-DWA, Proposed Order (W.D. Pa. July 2, 2009) (ordering defendant to produce documents provided to or received from the European Commission).

to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."[34]

Consequently, a disclosure of privileged material to the JFTC may result in a waiver of the attorney-client privilege in a U.S. court.[35]

CONCLUSION

The Sections urge the adoption in Japan of the attorney-client privilege in all types of proceedings.

[34] *Upjohn Co. v. United States*, 449 U.S. at 393.

[35] Moreover, even if there is no waiver of the attorney-client privilege in the U.S., there may still be a waiver of the privilege in other jurisdictions.