COMMENTS OF THE AMERICAN BAR ASSOCIATION´S SECTION OF ANTITRUST LAW ON ATTORNEY-CLIENT PRIVILEGE IN RESPONSE TO THE CONSULTATION ON AMENDMENT TO COMPETITION LAW REGULATIONS ISSUED BY THE FEDERAL ECONOMIC COMPETITION COMMISSION

November 8, 2017

The views expressed herein are presented only on behalf of the Section of Antitrust Law. 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.

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The Section of Antitrust Law (the "Section") of the American Bar Association ("ABA") is pleased to provide comments on the Federal Economic Competition Commission's ("COFECE") proposed amendment to the Federal Law of Economic Competition (the "Competition Law"), Article 103 BIS, pertaining to the attorney-client privilege.[1] The Section appreciates the time and attention that COFECE has devoted to this important subject.

Article 103 BIS would recognize the attorney-client privilege when an infringing party self-reports pursuant to Chapter IV "Exemption and Fine Reduction Procedures," Article 103 of the Competition Law. The Section believes that Article 103 BIS would facilitate self-reporting and cooperation from infringing parties, and commends COFECE for recognizing the potential benefits that the attorney-client privilege confers to both an infringing party and its own investigative processes.

The Section respectfully suggests that the proposed amendment could better delineate the bounds of the privilege so that a party understands what communications and materials are protected, and how to avoid an inadvertent waiver of the privilege. In that regard, the Section recommends that COFECE explain the distinction between non-privileged and privileged documents, and allow the latter to be withheld from production.[2]

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[1] The Section's comments are based on a preliminary translation of the Consultation on Amendment to Competition Law at:
https://www.cofece.mx/cofece/images/Consulta/Anteproyecto_acdo_modf_Dispo_Reg_LFCE.pdf
Although these comments solely address the important issue of attorney-client privilege (given the tight deadline for a written response to COFECE), the Sections would be pleased to consult with COFECE on other matters dealt with by the proposed amendment, such as the new exemption to premerger notification (see Article 15 BIS) and the clarification of COFECE's competition concerns in communications with parties (see Article 21).

[2] Such a clarification would help avoid controversies that might arise if a client inadvertently produced privileged documents, believing they were not privileged, and was then subjected to claims that it had waived privilege – both as to those documents and to other documents within its possession. These comments describe specific guidance followed by the U.S. Department of Justice for determining whether a document is privileged and may be properly withheld from production to avoid an inadvertent waiver. *See* text accompanying notes 17-21, *infra*.

The Section also recommends that COFECE explicitly state that producing privileged documents during an investigation will not result in a blanket waiver of the privilege.

The Section also believes that the most effective way of eliciting true and unvarnished communication is to eliminate any inhibition or apprehension in discussing a legal issue with a lawyer. Consistent with that belief, the Section recommends that COFECE clearly state that communications with counsel—particularly in-house attorneys—about misconduct are subject to the privilege. It is the collective experience of ABA members that the attorney-client privilege helps detect—rather than conceal—antitrust violations. A broad recognition of the privilege is critical to obtaining relevant facts during the early stages of an investigation. For employees who have knowledge or suspicions of misconduct, the logical course of action is to consult their in-house attorney. If an employee cannot speak openly with in-house counsel, early detection of misconduct and opportunities to self-report are greatly diminished.

Finally, the Section respectfully recommends that the proposed amendment delete exceptions III and IV to the extension of privilege found in Article 103 BIS. The Section believes that extending privilege to communications between the client and its attorney that suggest or imply infringements (exception III) encourages necessary candor and thereby enhances the attorney's ability to accurately assess the client's legal posture. Furthermore, in our view the fact that communications may assist a client's defense (exception IV) should not affect its privileged status. If the client wants to waive the privilege and provide specific documents, it may do so (as long as the disclosure is voluntary), but that should be for the client to decide, in consultation with its attorney. Such an approach furthers the attorney's ability to effectively represent its client and thereby promotes the interest of justice.

The Section is available to provide additional comments or participate in further discussions, if deemed helpful and appropriate by COFECE, as it continues to assess the proposed amendment to the Competition Law.

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.[3] The earliest express recognition of the attorney-client privilege found in U.S. federal law is in 1888.[4] Since then, the concept of confidentiality in attorney-client communications has

[3] *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).

[4] 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.").

evolved as an ethical requirement in the rules of professional responsibility for every state of the United States. In Asia, the existence and scope of the attorney-client privilege has received renewed consideration. The privilege was 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.[5] In Japan, a court declared 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."[6] After this ruling, the Cabinet Office of the Government of Japan and the Japan Federation of Bar Associations are contemplating whether and to what extent the Japan Fair Trade Commission, which enforces the country's Anti-Monopoly Act, should accord deference to attorney-client communications.

Courts in the United States recognize the attorney-client privilege in the following circumstances: (1) where legal advice is sought; (2) from a legal professional advisor 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.[7] Any waiver of the privilege must be intentional and voluntary.[8] The attorney-client privilege is not absolute; there are limited exceptions, such as communicating an intention to commit future crimes or fraud.[9] We discuss below the potential interplay between the privilege and investigative processes in the context of proposed Article 103 BIS.

THE SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE IN ARTICLE 103 BIS

As set forth in *Upjohn Company v. United States*,[10] the leading U.S. Supreme Court case on attorney-client privilege, "the protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing." Documents created in the ordinary course of business before an investigation begins—such as corporate statements, telephone records, and business correspondence—do not involve "the compulsion of incriminatory evidence of a testimonial nature" and are not protected.[11] Accordingly, the production of these documents should not waive a party's attorney-client privilege.

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

6 Kagoshima District Court Judgment, Mar. 24, 2008, at 27 of Law Cases Reports No. 2008.

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

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

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

10 449 U.S. 383 (1981).

11 United States v. Osborn, 561 F.2d 1334, 1338 (9th Cir. 1977).

Even when non-privileged facts are conveyed orally or in writing to an attorney, the communication itself, rather than the underlying facts, is shielded from disclosure.[12] Otherwise, "a party could shield quantities of highly relevant and fully discoverable evidence through the simple expedient of conveying copies to his attorney."[13] Consistent with this reasoning, a U.S. district court ordered the production of a report on loan irregularities prepared by accountants (with limited assistance from counsel) where the report was "not a confidential communication [to] counsel for the purpose of securing legal advice, nor does it . . . contain any legal advice from the counsel . . . . It is a report of a factual investigation."[14]

However, facts ascertained *during* the course of an investigation and communicated to an attorney may be entitled to protection. For example, a federal district court ruled that an audit prepared by company personnel to assist attorneys in evaluating the company's compliance with environmental laws was protected.[15] Similarly, a federal court of appeals held that documents prepared by attorneys investigating an insurance claim were covered by the privilege because the attorneys were retained to evaluate the insurance company's legal obligations, and the investigative tasks and documents prepared as a result related to the provision of those services.[16]

The Section recommends that COFECE offer specific guidance for determining whether a document is privileged and may be properly withheld from production to avoid an inadvertent waiver. The U.S. Department of Justice, Antitrust Division (the "Division") follows a two-prong test established by U.S courts: (1) the document must have been privileged when in possession of the party; and (2) the document must have been transmitted to the attorney for the purpose of obtaining legal advice.[17] To establish the validity of the asserted privilege during an investigation, documents at issue are described in a privilege log, which identifies for each document, *inter alia*, (1) the type of document; (2) the date of the document; (3) the identity of the person(s) who prepared the documents as well as its recipient(s); (4) the party's basis for withholding the document; and (5) any other information necessary to establish the elements of the asserted privilege(s).[18]

In the event of a dispute, the Division and opposing counsel are generally able to resolve questions surrounding an asserted privilege without resort to judicial processes. If

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[12] *See id.* With mixed-purpose communications, where underlying facts are interspersed with legal advice or attorney-client communications, the court may order production of the document, but with the redaction of privileged material. *See* Giardina v. Ruth U. Fertel, Inc., 2001 U.S. Dist. LEXIS 21827 (E.D. La. Dec. 21, 2002) (ordering production of redacted board minutes).

[13] Renner v. Chase Manhattan Bank, 98 Civ. 925 (CSH), 2001 WL 3075, at *2 (S.D.N.Y. July 13, 2001).

[14] In re Kearney, 227 F. Supp. 174, 176-77 (S.D.N.Y. 1967).

[15] *See* Olen Props. Corp. v. Sheldahl, Inc., No. CV 91-6446-WDK(Mcx), 24 E.L.R. 20936 (C.D. Cal. Apr. 12, 1994).

[16] *See* Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 875 (5th Cir. 1991).

[17] *See* United States v. Fisher, 425 U.S. 391, 403-05 (1976).

[18] *See* In re Universal Serv. Fund Tele. Billing Practices Litig., 2005 WL 3725615, at *3 (D. Kan. July 26, 2005). *See also* Fed. R. Civ. P. 26(b)(5) (setting forth procedures for claiming privilege).

the parties cannot settle the issue, however, the document may be submitted to a district court for review by (1) the presiding judge *in camera*; [19] (2) a neutral third party known as a "special master;" or (3) a "filter team" or, in Division parlance a "taint team," of independent prosecutors and agents who conduct an initial review of the documents.[20] The party asserting privilege bears the burden of proof.[21]

IN-HOUSE COUNSEL AND THE ATTORNEY-CLIENT PRIVILEGE IN ARTICLE 103 BIS

The Section strongly advocates that communications with in-house attorneys receive the same protection accorded to those with outside counsel. As the world's largest voluntary association of attorneys, with nearly 400,000 members from around the world, the ABA has adopted resolutions 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 privilege for communications between outside counsel and their clients.[22] 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.[23] In both 1983 and 2008, the ABA also urged the EC to extend the privilege to in-house counsel.[24]

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

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[19] "In camera" is a Latin term meaning "in chambers." A judge may order *in camera* review of confidential or sensitive information to determine whether it should become part of the trial record.

[20] *See* U.S. Dep't of Justice, Computer Crime and Intellectual Prop. Section, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* at 110 (2009) *available at* http://www.justice.gov/criminal/cybercrime/documents.html.

[21] *See, e.g.*, Osborn, 561 F.2d at 1334; In re Bonanno, 344 F.2d 830, 833 (2d Cir. 1965).

[22] 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.authcheckda m.pdf.

[23] ABA, 1983_Report with Recommendation # 301 at 1 (Policy adopted Feb. 1983, Reactivated Feb. 2008), 2008_MY_301 *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2008_my_301.authcheckda m.pdf.

[24] *Id.*

> only in the common law regulating the lawyer-client relationship and in the rules of professional conduct, but in the attorney-client privilege….[25]

The Attorney-Client Task Force highlighted some of the important attributes of the attorney-client privilege, noting that the privilege: (1) fosters the attorney-client relationship; (2) encourages client candor; (3) fosters voluntary legal compliance; (4) promotes efficiency in the legal system; and (5) enhances the constitutional right to effective assistance of counsel.[26]

In 2005, the House of Delegates of the ABA adopted resolutions reiterating its long-standing support of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney and encouraging 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.[27] The Section believes that the disparate treatment of in-house attorneys dilutes the salutary effects of the privilege.

The Section believes that the attorney-client privilege—including communications with in-house counsel—does not impede fact-finding by enforcers. As a threshold matter, the privilege is focused, shielding only the confidential communications with counsel for the purpose of seeking legal advice. As stated above, it does not protect the underlying facts (even if communicated to counsel) or other types of 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.[28]

In addition, broad recognition of the privilege 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.[29] A client is unlikely to extend his or her

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[25] 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.authcheckda m.pdf.

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

[27] *See id.* at 1.

[28] *See* Upjohn Co., 449 U.S. at 395-96.

[29] *Id.* at 389.

complete trust to his or her lawyer if a confidence is not protected. 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. For these reasons, we respectfully ask COFECE to treat communications with in-house counsel as entitled to privilege protection if they meet the other criteria for attorney-client privilege to attach.

CONCLUSION

The Section appreciates the opportunity to comment on COFECE's proposed amendment to the Federal Law of Economic Competition. We would be pleased to respond to any questions COFECE may have regarding these comments or to provide additional assistance on these issues.