

JAPAN

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1. DEFINITION - PRESENTATION

Concept of Legal Privilege under Japanese Law

1.1 Scope of lawyers in this memo

Since there is no discovery procedure in Japan, the “attorney-client privilege” issue has no magnitude like that of the US. In Japan, the client information issue has been discussed more as non-disclosure “obligation” by the lawyer, rather than as his “privilege”.

Before looking into this topic, I have to make it clear which legal profession is referred to in this memo.

There are three kinds of licensed legal advisors in Japan, namely bengoshi, shiho-shoshi, and gyosei-shoshi. Bengoshi is a lawyer with full qualification who is authorized to render unlimited legal advice on Japanese law, to file applications to the Legal Affairs Bureau (“LAB”), as well as to represent the client before all civil and criminal courts in Japan.

Shiho-shoshi is only authorized to file applications to LAB, to represent the client before civil courts in very small cases, and to render legal advice in relation thereto. Shiho-shoshi’s initial role was to cope with the once poor judicial infrastructure when the government limited the number of new fully-qualified jurists (judge, public prosecutor, and bengoshi) to 500 per year (which resulted in approx. only 350 new bengoshis per year for whole Japan), until the judicial reform was started. In rural areas where there are only a limited number of (in extreme cases, none) bengoshis practicing, shiho-shoshi serve as de-facto lawyers in such areas.

Gyosei-shoshi is only authorized to file applications to administrative authorities (e.g. filing application with surface transportation authority for driver’s license) and to render legal advice in relation thereto. Gyosei-shoshi has been a typical Japanese profession in that it was intended to support citizens to cope with complicated bureaucracy which had been an unavoidable component of Japanese post-war de facto socialism.

As a result of the judicial reform under which a number of fully qualified bengoshis are supplied to the market, shiho- and gyosei-shoshis are seeking for new *raison d'etre*. Since both of the shoshis are more or less comparable to paralegals abroad (indeed, competent shoshis are hired by leading law firms in Japan as paralegals), a “lawyer” in this memo only refers to a bengoshi.

1.2 Confidentiality Obligations

A lawyer is subject to confidentiality obligation with respect to client information acquired in the course of his business. Namely, if a lawyer or ex-lawyer discloses without good reason information that he acquired in the course of his business, he is punished with imprisonment of up to six months or a fine (§ 134 of the Criminal Code). § 23 of Lawyers' Law further sets forth that a lawyer or ex-lawyer has the right and duty not to disclose any information that he acquired in the course of his business. The details of the right as mentioned therein have not been provided and no in-depth discussions on this point have been made so far.

1.3 Civil Procedure

1.3.1 Right to refuse testimony

§ 197 Item 2 of the civil procedure code ("CPC") sets forth that, among other specified professions, lawyers and registered foreign lawyers (gaikokuho jimubengoshi, "GJB"), or those who used to be such professions, may reject to give testimony on the facts that have come to his attention in the course of his business, if he is asked to testify on facts that he is obliged to keep secret.

1.3.2 Documents Production Order

Although CPC does not have a pre-trial disclosure system like in the US, CPC provides for a Documents Production Order ("DPO," bunsho teishutsu meirei) system for the sake of effective and fair fact finding at the trial. If a DPO issued by the Court is neglected, the Court may decide that the alleged fact, which the party who has the burden of proof tried to prove with the relevant document, is true. Furthermore, the party who failed to submit the document is subject to administrative fine (§ 224 CPC).

§ 220 CPC sets forth that a party cannot reject the DPO if:

- (i) the party possesses the document which he cited in the proceeding;
- (ii) another party who has the burden of proof (the "Proving Party") is entitled to receive or review the document;
- (iii) the document was produced for the benefit of the Proving Party, or produced in relation to the legal relationship with the relevant party and the Proving Party; or
- (iv) even in case of documents other than (i) to (iii) above, if the document does not fall under any of the following items: ...(omitted)...document which contains the fact as referred to § 197 Item 2 CPC, documents in relation to occupational secrets of public servants, the disclosure of which may harm public welfare or impede fulfillment of official duties, and so on (remaining items omitted).

As mentioned above, § 197 Item 2 CPC enables a lawyer and GJB (or those who used to be such professionals) may reject to give testimony on the facts that have come to his attention in the course of his business. Accordingly, pursuant to § 220 CPC, a document that contains such information does not have to be submitted despite DPO. In this meaning, a legal opinion of a lawyer or GJB does not have to be submitted because it inevitably contains facts that have come to their attention in the course of their business (Shiho- and gyosei-shoshi are not listed herein). In case of doubt, a so-called “in-camera” procedure is provided.

No in-depth discussion on memos prepared by in-house lawyers has been made so far (interestingly, articles dealing with this issue tend to limit themselves to introduce American or European systems to Japanese readers). Another aspect to note is that due to the limited population of lawyers, most of the in-house counsels in Japan have no lawyers’ license. Even if DPO is made regarding memos produced by such in-house counsels, the ordered party may probably reject such order in many cases because they are mere “internal documents” that, according to case law, do not as a matter of principle constitute the “document produced in relation to the legal relationship with the relevant party and the Proving Party” within the meaning of § 220 (iii) CPC. It remains unclear whether this position can be maintained even in a case where lack of corporate governance is the subject matter (e.g., derivative action).

1.4 Criminal Procedure

§ 149 of the Criminal Procedure Code sets forth that, among other specified professions, lawyers, GJB, or those who used to be such professionals, may reject to give testimony on the facts that have come to their attention in the course of the business assigned to him, except for cases in which the relevant person agrees to give testimony, or in which the refusal constitutes abuse of right.

A suspect cannot reject confiscation of documents with his lawyer except for correspondence with lawyer after arrest.

1.5 Anti-Monopoly Law Procedure

To the extent a criminal charge is concerned, the rules on criminal procedures will apply *mutatis mutandis*.

In other aspects there is no special concept of client-attorney privilege. Accordingly, it is not common in Japan that the company has a separate file in which correspondence with external competition lawyers are filed.

2. SOURCES

See section 1 above.

3. WAIVER OF THE PRIVILEGE

As mentioned in section 1 above, in Japan this issue is being discussed more as non-disclosure obligation by the lawyer rather than as his privilege. Accordingly, the lawyer cannot be relieved from this obligation at will. If the client agrees to disclose the information, this is naturally a different issue.

4. IN-HOUSE LAWYERS

See section 1.3 above.

5. PROSPECTIVE

As the influence of American law gets stronger, new interpretation of DPO under CPC with emphasis on lawyer's privilege may be made in the future.

The hottest and the latest topic in this regard in Japan has been the scope of the draft Law on Prevention of Transfer of Criminal Proceeds (hanzai shueki iten boshi ho), the so called "Gatekeeper Law". In the first draft of the law, the professional advisors including lawyers were included in the qualified professions that are, upon taking effect of the law, obliged to notify any criminally suspicious deal to the relevant supervising authority (in case of lawyers, the Japan Federation of Bar Associations, "JFBA"). However, as a result of the strong opposition by JFBA the lawyers will be out of the scope of this law.