

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

**Treatment of legally privileged information in competition proceedings – Note by
the United States**

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This document reproduces a written contribution from the United States submitted for Item 2 of the 128th Working Party 3 meeting on 26 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

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United States

1. The United States has long recognized the attorney-client privilege alongside several other means of protecting confidential material.¹ The privilege is grounded in the belief that to best exercise their legal rights and fulfill their legal duties, individuals must be able to confide in a legal expert who will vigorously defend their position. Absent the privilege, clients will be circumspect in what they tell their lawyers and when they tell them. Such circumspection undermines effective representation.²

2. In *U.S. v. Upjohn*, the U.S. Supreme Court explained that the purpose of privilege “is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”³ The court further explained that the privilege protects “not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice.”⁴

3. As the U.S. legal system favors transparency, privileges, including the attorney-client privilege, are usually narrowly applied. The person or entity asserting the privilege bears the burden of establishing that the circumstances warrant application of the privilege.⁵

4. There are four elements necessary to establish the attorney-client privilege. First, the person or entity asserting the privilege must be a client. Second, the person to whom the communication is made must be licensed as an attorney. Third, the communication must be intended to be confidential. And, fourth, the communication must be made for the purpose of seeking legal advice or representation. Responsive communications from an attorney to a client are privileged to the extent they would reveal the client’s privileged communication.

¹ These include the governmental deliberative process privilege, and perhaps most relevant, the attorney work product doctrine. This last protection serves to shield an attorney’s mental impressions, opinions and legal conclusions from discovery by opposing counsel. Unlike the attorney-client privilege detailed in this submission, work product protection belongs to the attorney, not the client, and extends beyond material communicated to the client. The work product doctrine was established in the United States in *Hickman v. Taylor*, 329 U.S. 495 (1947), and is now codified in Federal Rule of Civil Procedure 26(b)(3).

² See generally, <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-federal-commission>.

³ 449 U.S. 383, 389 (1981).

⁴ *Id.* at 390.

⁵ Consequently, U.S. rules for civil proceedings require that the entity asserting the privilege “shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Fed. R. Civ. P. 26(b)(5)(A).

5. The attorney-client privilege covers both oral and written communications between the client and the attorney and extends to memorializations of those communications. The privilege also covers confidential communications made for the purpose of retaining counsel. The privilege may extend to communications made in the presence of or shared with the attorney's paralegals and support staff.
6. The privilege does not, however, cover all communications or information shared between a client and attorney. Most obviously, the privilege does not cover communications where the client's primary purpose is not to seek legal advice or where the attorney is not providing such advice. Similarly, the privilege does not cover most communications that also involve third parties. Nor does the privilege encompass communicated facts obtained from other sources.⁶
7. The attorney-client privilege does not extend to advice that aids in the commission of illegal or fraudulent activity. Thus, the privilege does not shield communications in furtherance of ongoing or future criminal or fraudulent act, such as participating in a cartel. The privilege may, however, extend to discussions between attorney and client as to how to defend against allegations of criminal activity.
8. Attorney-client communications dealing with business matters may be covered by the privilege if their primary purpose is to seek or provide legal advice on those matters. However, when an attorney such as in-house counsel participates in business decisions, it is important to distinguish between communications that primarily give or solicit legal advice about a business issue and those communications about corporate matters, management decisions, or business advice. The former are protected; the latter are not.
9. The attorney-client privilege belongs to the client and therefore may be waived only by the client. Client waiver of the privilege may be express or implied (*i.e.*, from actions suggesting that the client did not intend communications with an attorney to be confidential, such as conversations made in the presence of, or subsequently shared with, third parties). However, "inadvertent" disclosure of attorney-client information does not constitute a waiver of the privilege.⁷
10. The U.S. agencies will not specifically seek from parties during civil or criminal investigations information that is privileged under U.S. law.⁸ The agencies do require

⁶ This means that a document created by or received from a third party that the client shares with an attorney while seeking legal advice does not thereby become privileged. Similarly, a company cannot protect its own documents from discovery merely by disclosing them to counsel while seeking legal advice.

⁷ Federal Rule of Evidence 502(b) provides:

Disclosure of attorney-client communications when made in a federal proceeding or to a federal office or agency, does not operate as a waiver in a federal or state proceeding (*i.e.*, the disclosure is considered inadvertent and thus not waived) if:

1. the disclosure is inadvertent;
2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
3. the privilege holder promptly took reasonable steps to rectify the error. . .

⁸ This was most recently articulated in the competition chapter of the United States, Mexico and Canada Agreement (USMCA), in which the signatories specifically committed to recognize the attorney-client privilege. The USMCA requires the respective competition authorities to treat as privileged "lawful confidential communications between the counsel and the person if the

parties that withhold otherwise responsive materials pursuant to a claim of privilege to provide a privilege log that identifies the materials withheld and the privilege providing the basis for withholding. This preserves ability of requesting the agency to challenge the parties' asserted privilege.⁹

11. In the absence of any claim of privilege or of inadvertent disclosure by the parties, agencies generally assume that they are free to examine and use documents produced, even if the disclosed information bears markings suggesting privilege (such as being stamped "confidential"). It is the disclosing party's job to screen for privileged materials and to withhold documents that should not be produced. Companies can and do disclose privileged materials when it serves their interests. In some instances, firms affirmatively decide not to conduct a privilege screen prior to producing materials to the agencies.

12. U.S. agencies may, nonetheless, receive material they believed to be covered by privilege, for example, when it appears to be clear on its face that a document is privileged or when a party has provided timely notification that privileged materials were inadvertently provided. In such instances, agencies will promptly return, sequester, or destroy the information. The agencies will not use the information until the claims are resolved.¹⁰

13. U.S. agencies may not immediately return produced documents subsequently claimed to be privileged and inadvertently produced in circumstances where agency staff has already read or used document. In such instances, the agency must then decide how to resolve the privilege issue. The usual method is for the staff to send the allegedly privileged documents to one or more agency attorneys not on the investigative or trial staff (also known as filter attorneys or a taint team) to be screened for privilege.

14. Filter teams also may be used to screen material seized during execution of a search warrant related to a potential criminal violation of the U.S. antitrust laws. If material seized includes potentially privileged documents, the Department of Justice will make a full copy set for review by the company from which the materials were seized and give the company time to review and provide privilege designations. DOJ will then pull the privileged documents from the seized material and return them to the company.

15. The use of a filter attorney does not eliminate the possibility of judicial involvement. If the screening/reviewing attorney and the party who produced the documents disagree as to the characterization of a document, Federal Rule of Civil Procedure 26(b)(5)(B) provides for the documents to be produced to the court for a

communications concern the soliciting or rendering of legal advice. . . ." (21.2.2c(ii)), and to not disclose, subject to applicable legal exceptions, privileged information obtained during investigations and reviews (21.2.3).

⁹ Thus, U.S. practice is consistent with the ICN's guidance regarding requesting and handling of privileged information. See ICN Guidance on Investigative Process, Sections I.2.2.1 and VI.12, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1146.pdf>.

¹⁰ U.S. agency practice regarding inadvertent productions tracks that dictated by the Rules of Civil Procedure 26(b)(5)(b), which provides that after being notified privileged materials were inadvertently produced "a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified. . . ."

determination of the privilege claim. Until disputes regarding applicability of the privilege are resolved, staff may not use the documents.

16. U.S. agency policy with respect to (1) sharing privileged information with non-U.S. competition authorities and (2) treatment of privileged information received from non-U.S. competition authorities is set forth in the agencies' Antitrust Guidelines for International Enforcement and Cooperation ("International Guidelines")¹¹ and Model Confidentiality Waiver.¹² Section 5 of the International Guidelines, which addresses international cooperation, provides that the "Agencies will protect information received from a foreign authority pursuant to a waiver under applicable provisions of U.S. law. The Agencies will not seek information that is privileged under U.S. law from foreign authorities through waivers or other cooperative activities."¹³

17. Under the agencies' Model Waiver, if parties notify the U.S. agencies of inadvertently produced privileged information, the agencies will not provide a non-U.S. competition authority with copies of such information or will request the return of such information, as appropriate. The Model Waiver assures the parties that the agencies will not seek information protected by a U.S. legal privilege from a non-U.S. competition authority. To the extent possible, an entity providing material to a non-U.S. competition authority should clearly identify the information that would be subject to U.S. legal privilege. If the U.S. agencies receive information from a non-U.S. competition authority that an entity claims is privileged in the United States, the U.S. agencies will treat such information as inadvertently produced privileged information.¹⁴

¹¹ Antitrust Guidelines for International Enforcement and Cooperation (2017) ("International Guidelines"), <https://www.justice.gov/atr/internationalguidelines/download>.

¹² See <http://www.justice.gov/atr/public/international/index.html>; <http://www.ftc.gov/oia/waivers/index.shtm>.

¹³ See International Guidelines, *supra* n. 11, at §5.1.4.

¹⁴ See also Model Waiver of Confidentiality For use in civil matters involving non-U.S. competition authorities Frequently Asked Questions, at §3, available at https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/waivers_faq.pdf.