

WIPO AIPPI
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Attorney Client Privilege (ACP)
Problem in Japan

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Duplan Corp. v. Deering Miliken, Inc.

(May 30, 1974)

1. Basically, ACP is admitted only to a member of the bar of a court in the U.S.
2. Any communication touching base with the U.S. will be governed by the U.S. Federal Discovery rules.
3. Any communications related to matters solely involving foreign country will be governed by the applicable foreign law.

.Santrade Ltd. V. General Electric Co.

(April 15, 1993)

Article 281 of the Japanese Code of Civil proceeding refers to the applicability of privilege. However, the Code refers only to testimony of the attorney or patent agent and does not allow the client of the Japanese agent to withhold document of the ground of privilege.

Amendment of Code of Civil Proceeding

(1998)

ACP Problem in Japan

.Right to Refuse to testify

[Article 197 Paragraph 1]

A testimony is entitled to refuse to testify
in the following cases:

(ii) Medical doctor, Dentist, ..Attorney at Law,
Patent Attorney.., is required to testify about a fact
which is known through his/her professional duty and
be kept secret.

General obligation to present document

[Article 220]

ACP Problem in Japan

A holder of a **document** shall not refuse the production thereof in the following cases:

(1) In case the party himself is in possession of the document to which he has referred to in the litigation;

Exception [Article 220(4)]

ACP Problem in Japan

(4) Besides the cases mentioned above, in case of the document does not fall in any one of the following cases:

(b) A document which describes facts provided in Article 197(1)(ii) concerning which the duty to keep secret is not exempted.

In camera inspection [Article 223 Paragraph 6]

ACP Problem in Japan

The new law empowers the court to order the parties to present document before court. The court is entitled to examine if the secrecy of the document is to be justified under *in camera* proceeding where only judges are allowed to access the document to determine if the document is to be kept secret.

Privilege of *benrishi* is admitted in:

Knoll Pharms. Co. v. Teva Pharms.
(N.D. III. Nov. 22, 2004)

VLT Corp. v. Unitrode Corp.
(D.Mass. 2000)

Murata Mfg. Co. v. Bel Fuse Inc.
(N.D. III. Feb. 3, 2005)

Eisai Ltd. V. Dr. Reddy's Laboratories
(S.D. N.Y Dec. 21, 2005)

- Documents reflecting legal advice provided by Japanese *benrishi* or requests for such advice are privileged and need not be produced.
- Japanese law accords such a privilege which American courts should respect as a matter of comity.
- It is undisputable that Japanese law extends a privilege to documents created by *benrishi*, and has done so at least since an amendment to the Code of Civil Procedure of Japan in 1998.
- Bristol-Myers does not hold that foreign privilege law must be totally congruent with American attorney-client privilege law (which itself varies from state to state and federal circuit to federal circuit) in order to accord comity.

- .After amendment of Civil Procedure law in 1998, U.S. courts admit the AC privilege over documents produced by *benrishi* without exception.
- .Japanese law, however, still lacks discovery system and amended clause is not actual AC privilege in the meaning of common law system.
- .Establishment of AC privilege treaty is desirable to clarify that communication seeking/providing professional advice is included in the “document” and that privilege is a right of both *benrishi* and client.

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