Legal Professional Privilege

Powers of the Regulators

17 SEP 2018

Raided entities are generally entitled to resist the review and seizure of documents which are covered by legal professional privilege. The law of England and Wales recognises two main types of legal professional privilege: legal advice privilege and litigation privilege.

Other types of legal professional privilege which are occasionally asserted are joint privilege and common interest privilege.

Legal professional privilege is a substantive legal right (not a procedural rule). It enables a person to refuse to disclose certain documents in a wide range of situations. However, it only applies to documents which are confidential. If documents which would otherwise be privileged contain information which is already in the public domain or which has been shared with third parties, legal professional privilege will not attach.

The legal professional privilege belongs to the client, not the lawyer, and does not depend upon the document being in the lawyer's custody. Privilege documents can be (and frequently are) held by the client.

Litigation privilege

Litigation privilege affords a wider protection than legal advice privilege since, where it applies, it can protect communications with third parties, as well as those between a lawyer and his client. It applies where adversarial proceedings are reasonably in prospect.

Regulatory and law enforcement investigations in the UK are not automatically considered to be adversarial from the outset and hence litigation privilege might not arise. The result is that legal advice given in the context of such an investigation will attract legal advice privilege, but documents including notes or transcripts of employee interviews or expert reports prepared or obtained for the purpose of giving advice may not be privileged and so could be disclosable to a regulator or law enforcement authority in subsequent litigation.

Enquiries by regulatory or law enforcement authorities, requests for staff to give witness evidence, third party disclosure orders and other investigative processes will not normally be considered adversarial.

Litigation privilege will apply once it is clear that some form of prosecution or litigation arising from the investigation is reasonably in prospect or, at an earlier stage, if the investigation process itself has become sufficiently adversarial so that the company under investigation effectively stands accused of wrongdoing and should, therefore, be able to claim litigation privilege over witness evidence gathered for the purpose of obtaining advice to defend itself.

Litigation privilege is unlikely to apply in criminal investigations until such time that it is apparent that an offence has actually been committed.
If adversarial proceedings are reasonably in prospect, a “dominant purpose” test will apply to protect as privileged all confidential documents prepared for the dominant purpose of giving or getting legal advice with regard to those proceedings or aiding the conduct of them. Determining the dominant purpose can be problematic.

Litigation privilege has no retrospective effect. Documents created before adversarial proceedings are reasonably in prospect will not attract litigation privilege (although they may attract legal advice privilege).

Legal advice privilege

If no adversarial proceedings are in contemplation, legal professional privilege will only attach to documents which constitute confidential communications between a lawyer and his client made for the purpose of giving or obtaining legal advice and documents which evidence such communications. Each part of this test requires further explanation.

1. Communications

A “communication” must actually transfer information between a lawyer and his client. A document which stands in its own right or is not addressed and delivered to a lawyer specifically for his advice may not constitute a communication. A statement prepared by an employee at the request of his manager to record his recollection of events is unlikely to benefit from legal advice privilege – even if the employee believes that the document will be passed to lawyers for advice – since it is not a communication with a lawyer. Draft requests for advice that are not ultimately sent are likely to attract privilege as a matter of public policy.

The position is slightly more flexible in respect of lawyers, whose non-communications may also attract privilege. The general rule is that if a lawyer writes notes during the course of his retainer that he knows only as a consequence of the professional relationship with his client, then these notes will be privileged. This privilege will not, however, protect transcripts of non-privileged interviews, even if taken by a lawyer.

The communications do not need to explicitly request or give legal advice. During the course of any relationship between a solicitor and his client, a continuum of communications will be created between them. Where information is passed between the two as part of a process of keeping each other informed so that advice may be sought and given, privilege will attach to those communications. It must still be borne in mind that privilege will only attach if the other requirements of legal advice privilege are met, not simply because a document has been sent to a lawyer.

2. Lawyer

A “lawyer” includes all members of the legal profession: solicitors, in-house lawyers (except in the context of an antitrust and competition investigation by the European Commission), barristers within the UK and duly accredited foreign lawyers (whether foreign in-house counsel who are not required to be a member of their local bar would still qualify is currently untested). Where appropriate provisions for supervision are in operation, it can also include legal executives, paralegals and trainee solicitors. An in-house lawyer will have (at least) two types of relationships; one with the business, in which he is the “lawyer”, and one with external lawyers, in which he (alone or together with others) is the “client”.

3. Client

Not every employee in a company will be the client for the purpose of attracting privilege. The “client” will only comprise those few individuals who are actually charged with obtaining legal advice and who directly communicate with the lawyer, whether external or in-house. This might be an ad hoc committee or group formed to respond to a specific issue or incident, or it might be members of senior management. Often, however, those with direct knowledge of the facts or matters in issue will not fall within the concept of “client” and particular care will therefore need to be exercised when interviewing or obtaining information from such employees.

How is legal professional privilege waived or lost?

Legal professional privilege is waived if the relevant material is placed before a court. It is also lost if the material in the document loses confidentiality, where a document came into being for the purpose of furthering a criminal or
fraudulent scheme it will not be privileged. A lawyer has a duty to protect his client's legal professional privilege and cannot waive it without his client's express authority.

It is possible to waive legal professional privilege on a selective basis so that disclosure to a third party of a legal professional privileged document will not mean that it ceases to be privileged for any other purpose. However, for a waiver to be selective, the terms of the disclosure must be clearly established in advance.

Law correct at November 2017

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