Legal professional privilege

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The law of England and Wales recognises two main types of legal professional privilege:

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Legal privilege - 10 tips

- Legal advice privilege, and
- Litigation privilege.

Legal professional privilege is important because a document that is privileged does not have to be disclosed or produced either in English legal proceedings or to regulators or other third parties.

A document for these purposes is anything that is recorded and therefore includes emails, letters, voicemails, tape recordings, documents on a computer, diaries and many more communications.

Legal professional privilege exists so that clients can discuss their legal position candidly with their lawyers, in the knowledge that the information conveyed will not have to be provided to anyone else.

Scope of legal professional privilege

Confidentiality

Legal professional privilege only protects documents which are confidential. Documents which contain a legal analysis which is already in the public domain or (with some exceptions) which has been shared with third parties will not be privileged. Documents filed at court, attendance notes of meetings where both parties to a dispute are present and communications with opposing parties cannot be privileged, because they are not confidential.

1. Legal advice privilege

Legal advice privilege protects confidential communications between a lawyer and their client made for the purpose of giving or obtaining legal advice and internal communications recording or discussing the advice for the purpose for which it was given. Breaking down this test:

What are communications?

A document must be intended to transfer information between a lawyer and his client. A standalone document or a document that is not addressed and delivered to a lawyer specifically for advice may well not constitute a communication for privilege purposes. Note however that a draft of a document is protected even if the final version was not sent, as long as it was intended, if sent, to seek or give legal advice. The rules on communication
are also more flexible where the non-communication is by a lawyer, meaning for example that a lawyer’s notes made in order to advise a client will be privileged even if they have not been communicated.

Who is the lawyer?

A lawyer for privilege purposes includes all members of the legal profession: solicitors, in-house lawyers, barristers within the UK (in each case with practising certificates) and duly accredited foreign lawyers. Whether foreign in-house counsel who are not permitted to be a member of their local Bar and whose advice in their own jurisdiction is not protected by professional secrecy (as is the case in some jurisdictions) would still qualify is currently untested.

Communications with non-lawyer employees of solicitors, such as legal executives, paralegals, trainee solicitors and secretaries, will be privileged on the basis that they are acting under the direction of a solicitor.

Legal advice given by other professionals, such as accountants, is not privileged (except for very limited statutory exceptions covering patent agents and registered conveyancers).

Who is the client?

The client will comprise only those few individuals who are actually charged with obtaining legal advice and who directly communicate with the lawyer, whether external or in-house, or who need to consider and act on the advice for the purposes for which it was given. 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.

Consequently not every employee in a company will be the client for the purpose of attracting privilege. In fact, often those with direct knowledge of the facts or matters in issue will not be the client, so care needs to be taken when interviewing or obtaining information from them. It is good practice for both in-house and external lawyers to specify clearly who the client is. In the case of external lawyers, this is usually done in the engagement letter.

If a copy of legal advice is disseminated more widely for future reference or general interest, then that copy may well not be privileged.

Was the communication for the purpose of giving or obtaining legal advice?

Legal advice privilege attaches to advice as to what should prudently and sensibly be done in the particular situation (including how best to present facts in light of legal advice given). There must first be a relevant legal context. Once that is established, all documents forming part of the continuum of communications between lawyer and client for the purposes of obtaining legal advice will be privileged. Note however that privilege will not attach to advice which is purely commercial or strategic. Business or management input from (most commonly) an in-house lawyer may well not be a communication for the purpose of giving legal advice, and will not therefore be privileged.

2. Litigation privilege

Litigation privilege protects confidential communications between a lawyer and their client, and between a lawyer and/or their client and third parties once litigation is reasonably in prospect. The communications must have come into existence for the sole or dominant purpose of litigation.

Breaking down this test:

Is litigation reasonably in prospect?

There must be a real likelihood of litigation, rather than a mere possibility. This means that litigation must be pending, reasonably contemplated or existing before the communication comes into existence. These concepts can be quite nebulous in practice.

What is litigation for these purposes? Court proceedings and arbitrations (including foreign court litigation) qualify, as long as the proceedings are adversarial rather than simply inquisitorial. The position is less clear with inquiries, of which some may be adversarial and others not, and some may begin as investigations and turn into legal proceedings.
There can also be a fine line in the context of regulatory investigations, where matters can develop over time from fact-finding enquiries into regulatory proceedings with a real possibility of prosecution or other sanction. The correct position will turn on the facts of the particular matter.

The distinction can also be highly sensitive for public sector clients subject to the Freedom of Information Act, as legal advice privilege does not provide a complete protection from disclosure obligations whereas litigation privilege in the context of live proceedings affords a higher level of protection.

**What is the dominant purpose of the communication?**

For a communication to be subject to litigation privilege, it must have been made with the dominant purpose of being used in aid of or obtaining legal advice from a lawyer about actual or anticipated litigation. Determining the dominant purpose is often clear-cut. However difficulties arise where a document was created for more than one purpose. In such a case, the court will look at the purpose of the document objectively.

If the dominant purpose of a document with a dual purpose is indeed actual or contemplated litigation, solicitors and their clients should make this very clear on its face (although remember that labelling a document “privileged” will not of itself make it privileged). Individual documents may come under close scrutiny if assertions of privilege are challenged in court.

Documents created before adversarial proceedings are reasonably in prospect will not attract litigation privilege, although they may attract legal advice privilege, if the requirements for legal advice privilege are met (see above). This can be a major risk area as often an internal technical report will highlight facts and make comments that give rise to a risk of liability but it is not possible to assert credibly that the report itself was prepared in contemplation of litigation (although it may be the trigger that brought such litigation into contemplation).

**Legal professional privilege in the context of regulatory investigations**

As noted above, regulatory investigations - as well as administrative procedures such as planning inquiries - are not automatically considered to be adversarial from the outset, hence litigation privilege may not arise. Legal advice given in the context of such an investigation, for example legal advice on a client’s liabilities under the Financial Services and Markets Act (known as FSMA) or legal advice on the presentation of facts to the FCA, will however attract legal advice privilege if the requirements of that privilege are met.

Litigation privilege will apply once it is clear that some form of prosecution or litigation arising from the investigation is in contemplation, or at an earlier stage if the investigation process itself has become sufficiently adversarial such that the company under investigation effectively stands accused of wrongdoing. Keep detailed notes of the purpose of any investigation or report to assist in any later debate about whether privilege applies.

Please consult us for more information on this area.

**Are in-house counsel protected by legal professional privilege?**

Yes, except in the context of an antitrust and competition investigation by the European Commission. This is because the European Commission takes the view that in-house lawyers are not sufficiently independent from their employers.

In-house lawyers must however take particular care to ensure that they distinguish clearly between advice which is legal and advice which is commercial in nature, since the latter will not attract legal professional privilege. They must also take care when instructing external lawyers to ensure that they clearly identify and effectively manage the relevant lawyer/client relationships.

Legal advice privilege can never be used to try to cloak a deliberate wrong-doing. There is no privilege in documents or communications which are themselves part of a crime or a fraud. (The solicitor does not need to be involved in the crime or fraud for the fraud exception to apply.)

**How is legal professional privilege waived?**

There are a number of ways in which legal professional privilege can be waived including:
• Placing the relevant material before a court
• The material in the document, or a version of the document, losing its confidentiality
• A party choosing to waive privilege over certain material (for example a corporate choosing to self-report to a regulator following an internal investigation may also choose to waive privilege) or a public body purporting to rely on the existence of legal advice as justification for a decision (even if the advice is not published). Privilege must then be waived over all documents in the same class on the basis that it would be unfair to allow a party to cherry-pick documents which may provide only one side of the story, and
• On a selective basis to a third party. A privileged document disclosed to a third party for limited purposes may still be privileged for any other purpose. To ensure that such a waiver is effective, the terms of the disclosure must be clearly established in advance by way of a contractual undertaking.

Privilege belongs to the client, not the lawyer. A lawyer has a duty to protect a client’s legal professional privilege and cannot waive it without the client’s express authority.

What if a privileged document is disclosed inadvertently? The recipient will only be able to use the document or its contents with permission of the court. If a privileged document is disclosed by mistake, and the recipient realises that a mistake has been made, or a reasonable solicitor would have realised that a mistake has been made, it cannot be used by the recipient. In practice, inadvertent disclosure can give rise to expensive and distracting satellite litigation.

Other types of privilege

‘Joint privilege’ arises in circumstances where two or more parties jointly retain the same solicitor or else have a joint interest in the subject matter of the privileged communication (even though they have not jointly retained the same solicitor). Examples of joint interests that might arise include a parent company and its wholly owned subsidiary, and a company and its shareholders and a company and its directors. Joint privilege can only be waived with the agreement of all those to whom the privilege belongs. Where solicitors (in-house or external) find themselves advising a company and its directors, particular care needs to be taken in establishing who is the client for the purposes of privilege, whether joint privilege arises and whose consent is needed to waive privilege.

‘Common interest privilege’ arises where Party A discloses a privileged document to Party B, being someone who has a common interest in the subject matter of the communication or in litigation in connection with which the document was brought into existence. Examples include insurers and their insurers, and co-defendants. If a common interest does exist, the document will also be privileged in the hands of the recipient. A material risk in this case is where the “common interest” is not coextensive and hence Party B receives a legal opinion from Party A which also contains advice in which there is no genuine common interest. Clearly there is then a risk of waiver in respect of that element of the advice.

‘Without prejudice privilege’ protects communications between parties to a dispute from being put before the court when those communications are genuinely aimed at settlement.

Please consult us for more information on these types of privilege and when they might arise.

Can you claim legal professional privilege?
Is the communication confidential?

No

Not privileged

Yes

Is litigation reasonably in prospect?

LITIGATION: adversarial proceedings, not investigatory/ inquisitorial inquiries.

REASONABLY IN PROSPECT: Litigation must be pending, reasonably contemplated or existing before the communication comes into existence.

No

Is it a communication between a lawyer and a client or between either of them and a third party?

LAWYER: includes external and in-house lawyers, barristers, foreign lawyers and supervised trainees, paralegals and legal executives. Does not include other professionals (such as accountants).

CLIENT: the person or people specifically charged with seeking and receiving legal advice.

NB: an in-house lawyer will not be able to claim privilege in the context of an EC competition law investigation.

No

Not privileged

Yes

Is there a relevant legal context?

Legal advice is not confined to telling the client the law. It includes advice as to what should prudently and sensibly be done in the relevant legal context.

The advice must relate to the rights, liabilities, obligations or remedies of the client. Will not include situations where advice is sought on purely commercial matters.

No

Not privileged

Yes

Legal advice privilege

Is it sole or dominant purpose litigation?

Did the communication come into existence for the sole or dominant purpose of giving or getting legal advice with regard to litigation or collecting evidence to use in litigation?

No

Not privileged

Yes

Litigation privilege

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