STEPHENSON HARWOOD

It's an absolute privilege ...

How to ensure that your legal professional privilege remains intact: practical points for in-house lawyers

Legal professional privilege is extremely important. In short, a document which is privileged can be kept private and does not need to be shown or produced to a third party or a court even if a court has made an order for disclosure which would otherwise cover the document.

Bear in mind that compulsory disclosure orders can be made by a court against an organisation both (i) in a case involving the organisation, or (ii) in a case only involving other parties but where the organisation is in possession of relevant documents. Asserting privilege over certain documents is an organisation's shield against compulsory disclosure of those documents.

Where privilege exists, it is absolute and one of the only ways to undermine it is for a party to establish that it has somehow been lost through disclosure to others or has been otherwise waived. It is therefore extremely important for in house lawyers to understand which documents are covered by legal professional privilege and how to ensure that privilege is not inadvertently lost (including by the actions of others).

In this note:

- A brief recap on legal professional privilege.
- Practical points for in-house lawyers on how to keep privileged information private.
- A one page handout to give to non-lawyers in your organisation.
- Our contact details.

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A brief recap on legal professional privilege

Legal advice privilege

- Confidential communication
- Between client and lawyer
- Dominant purpose of obtaining or giving legal advice

Litigation privilege

- Confidential communication
- Between client and lawyer; or client and third party; or lawyer and third party
- Adversarial litigation has started or is pending or is in reasonable prospect
- Dominant purpose of litigation

For the purposes of privilege under English law, in house lawyers are "lawyers" and so an internal communication in an organisation between the in house lawyer and a colleague can be a communication between "lawyer" and "client".

It is important that the in house lawyer is communicating in their professional capacity as a "lawyer" (and that the advice relates to the rights, liabilities, obligations or remedies of the "client") and is not fulfilling another function such as giving commercial input, acting as company secretary or undertaking administrative tasks.

Anyone other than a "lawyer" who is advising on the law (such as tax advisers or accountants) will not satisfy the definition of "lawyer" for the purposes of legal professional privilege.

Remember that the same privilege rules will not apply in jurisdictions outside of England & Wales and, importantly, in house lawyers may not count as "lawyers" for the purpose of assessing privilege in other jurisdictions. Where another jurisdiction is involved, consider the position on legal professional privilege with local lawyers.

Legal advice privilege

Legal advice privilege protects confidential communications between client and lawyer where the dominant purpose is to obtain or give "legal advice". The dominant purpose test applies to each communication.

"Legal advice" is widely defined and includes the concept of a "continuum of communications" i.e. the communication does not need to contain or request formal legal advice but it must be part of the ordinary flow of information and instructions between lawyer and client relating to the matter.

Legal advice privilege applies to all communications in which legal advice is contained. This includes (i) the document from the lawyer containing the advice, (ii) the client's own written record of advice (whether given in writing or verbally), (iii) any communication passing on, considering or applying the advice internally (for example the minutes of a committee meeting), and (iv) any communication passing on the advice to third parties on confidential terms.

Accordingly, communications to which legal advice privilege attaches can be shared with third parties without losing privilege, but only if they are shared in confidence and in a way which is not inconsistent with their privileged status.

If a document contains a mixture of legal and non-legal material, the presence of the legal material will not cloak the non-legal material with the same privileged status. Where legal and non-legal material is contained within one document, there is a risk of a court ordering that either (a) the document is not privileged at all, or (b) the document should be severed so that the privileged parts remain private (if necessary they can be redacted) and the rest of the document is produced to the party seeking it.

The same principles apply to meetings. Unless the dominant purpose of the meeting is to give or receive legal advice, the meeting as a whole will not benefit from legal advice privilege. Legal advice privilege will still apply to sections of the meeting where legal advice is given or received.

Litigation privilege

Litigation privilege protects confidential communications between (i) client and lawyer; or (ii) client and a third party; or (iii) lawyer and a third party, where litigation is in "reasonable prospect". This does not mean it has to be more than 50% likely but on the other hand it must be more than a mere possibility.

The date for when litigation is in reasonable prospect is key. Once litigation is in prospect, the scope of where privilege applies becomes much wider because communications with third parties can be covered.

Further, the document must be created for the dominant purpose of the actual or anticipated litigation (including obtaining information or evidence for the litigation). This includes avoiding or settling litigation. However, documents concerned with purely commercial matters (including commercial decisions on settlement of a dispute) will not be protected from disclosure.

External investigations

Investigations by regulators or other enforcement agencies need very careful consideration to assess whether the criteria for litigation privilege will apply. In short the investigation needs to be sufficiently adversarial in nature, rather than merely inquisitorial for litigation privilege to apply. The distinction between adversarial and inquisitorial proceedings is not straightforward and some proceedings may have elements of each, or begin as inquisitorial and become adversarial at a later stage. Specialist advice should be sought in relation to each specific case.

If the investigation is "inquisitorial" and litigation privilege consequently cannot be relied upon, the documents produced during the investigation are only likely to attract privilege if they fulfil the criteria for legal advice privilege (see above). Notably, material collated within an organisation for the ultimate purpose of instructing lawyers to give advice may not fulfil the criteria.

Regulators or other enforcement agencies may make requests to organisations for information and documents from time to time, the scope of which may be focussed on a particular matter or may be broad. Although privileged documents will be protected from compulsory disclosure, it may be possible (and considered advantageous) to seek to secure credit for cooperation where privilege materials are disclosed. Great care would need to be taken in such circumstances, including by considering the collateral impact of such waiver not only in England but in other applicable jurisdictions. Given that potential for disclosure, always bear in mind when creating privileged material that it may be provided to a regulator or prosecutor in due course, despite its privileged status.

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Practical points for in-house lawyers on how to keep privileged information private

Legal advice – practical tips

- Label privileged communications "Confidential and Legally Privileged". Although the courts will consider the substance of a communication rather than its form, a label may still serve to focus minds and minimise the risk of information being disseminated too widely.
- Consider the role that you are playing in the organisation at all times. Send communications containing legal points in separate emails/messages from communications relating to any non-legal roles that you are undertaking such as when you are giving commercial input, acting as company secretary or undertaking administrative tasks.
- Use language in legal communications which makes clear it is legal advice such as "my legal advice is …", "as a lawyer", "from a legal perspective", "under English law".
- For each piece of advice you give, consider who is your "client" within the organisation? Consider identifying the key individuals within the organisation forming the defined client group for each advice/matter (but keep the position under review).
- Consider who is being copied into each email. For multi-addressee emails, the dominant purpose test applies as if there were a separate, bilateral communication between each sender and recipient.
- When seeking and receiving legal advice from external lawyers, think about which individuals within the organisation are "the client" for this purpose.
- Consider making a contemporaneous record of how matters were structured and why. For example, define the issues upon which legal advice was sought and the individuals tasked with obtaining and considering that advice (keeping the definition flexible enough to incorporate others as circumstances change).
- Control the internal distribution of privileged information as far as possible. Consider whether some discussions should take place orally.
- If you attend a meeting covering a mixture of privileged and non-privileged discussions:
  - Explain at the outset of the meeting when privilege will apply during the meeting and when it will not.
  - Consider the content of any meeting notes carefully. Identify the sections of the meeting notes which record privileged discussions with a suitable heading or note. This will be a useful reminder to others in the future and should assist if privileged discussions need to be redacted from the note in due course.
- Consider whether a document really needs to be shared internally beyond the client group. If it does, share the document on confidential terms and keep a record of the identity of the recipient and the reason for the disclosure.
- Take particular care when a document is being shared with a part of the organisation in another jurisdiction. Take local law advice on how privilege works in that jurisdiction where necessary.
- Consider whether a document really needs to be shared outside of the organisation. Restrict any such distribution where possible.
- If it is necessary to share a privileged document outside of the organisation:
  - Label the document clearly as "Confidential and Legally Privileged" and record the basis on which it is being shared.
  - Consider whether the document can be shared pursuant to "common interest privilege" for example when two companies are considering the same issue or facing the same claim and wish to share certain privileged information between themselves.
  - Consider whether a formal confidentiality agreement could be put in place in order to recognise the confidential and privileged nature of the material and prevent any further dissemination.
  - If you are communicating regularly with the third party recipient on this subject, consider whether they could form part of the defined client group.
- Analyse emails and attachments separately. Consider separating emails from attachments if one needs to be shared, but the other could be kept private.
- Provide non-lawyer colleagues within your organisation with our handout for colleagues (which accompanies this note).

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Litigation – practical tips

- For each dispute, identify and record the moment when litigation becomes in reasonable prospect. This should make the analysis much clearer and may be helpful evidence down the line in demonstrating the date from which you are entitled to claim litigation privilege.
- In multi-party litigation, identify and record when litigation becomes in reasonable prospect against each party.
- In communications with third parties, ensure that it is clear that the document/communication is being created for the dominant purpose of obtaining advice or information for the litigation.
- Be cautious when documenting internal discussions about a possible settlement, particularly if part of the discussions relate to commercial matters (for example, how any settlement proceeds might be dealt with or any implications for employees). Ensure that discussions are expressly in the context of settling the litigation (and that they are clearly recorded as such).
- See also, the practical tips under the heading Legal Advice Privilege outlined above.

External investigations – practical tips

- Ensure in-house or external lawyers are involved at the earliest stage possible.
- Evaluate at the outset, the nature of any external investigation in order to assess if it is sufficiently adversarial for litigation privilege to apply.
- If only legal advice privilege can apply, when gathering information for investigations or inquiries follow the practical tips outlined above for obtaining and giving legal advice.
- Think through the structure of information flow and document organisation from the outset. For example, could a report be produced either by a lawyer or in the form of a communication to a lawyer, for the purpose of obtaining and/or giving legal advice on the legal risks and obligations.
- If it is decided that privileged material is to be disclosed to a regulator or prosecutor, consider carefully whether it is possible to limit the waiver and also consider the collateral impact of such waiver in this and other jurisdictions.

Our contact details

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Overview

- Legal Professional Privilege ("privilege") is the mechanism by which the organisation can keep private its confidential legal advice and documents related to any litigation, and can protect them from disclosure.
- It is a very complex topic. Where privilege applies, it is important that an organisation takes steps to preserve it and that it is not inadvertently lost.
- The most common way that privilege is inadvertently lost is by sharing information or documents with others.
- Where you are involved with legal advice or with any dispute between the organisation and a third party (whether or not there is formal litigation), speak to legal about how privilege will apply.

Practical tips for non-lawyers on preserving legal professional privilege within the organisation

How to keep privileged material private

- Where you see the words "*Confidential and Privileged*" (or similar) on a document/communication, take extra care to keep that document/communication private.
- Where possible, deal with legal topics in separate emails from emails dealing with non-legal topics.
- Do not forward privileged documents/communications (even internally) without checking with legal first.
- Think carefully about who is being cc'd into emails containing privileged material and avoid using bcc on emails containing privileged material. If in doubt, speak to legal.
- Before responding to or forwarding an email chain, check whether it contains privileged material further down the chain which is not relevant to your email. If it does, start a new email and do not include the chain.
- Take particular care when sharing a privileged document/communication outside of the organisation. Reflect on whether it is necessary to do so at all. If it is, speak to legal about steps you can take to preserve a document's privileged status.
- Avoid saving privileged documents on shared network drives or folders that are available more widely than the direct recipients of the privileged document/communication.

Creating a privileged document/communication

- Check with legal before taking notes or creating documents from oral discussions containing privileged information.
- If you are creating a document/communication that you would like to be privileged, speak to legal about how to do this.
- Remember a "document" is widely defined and can include whatsapp messages etc.
- Keep in mind that simply communicating with a lawyer or copying a lawyer into correspondence with other colleagues will not necessarily mean that communication is privileged.
- Similarly, the fact that a lawyer is present at a meeting will not necessarily mean that the whole meeting is privileged.
- Check with legal before taking notes or creating documents from oral discussions containing privileged information.
- If you have any questions, speak to legal.

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