Legal professional privilege: some practical considerations

June 2014

What is legal professional privilege?

Legal Professional Privilege ("Privilege") entitles a client to refuse to disclose certain confidential, legal communications to third parties including courts, tribunals, regulatory bodies and enforcement agencies. It is an absolute right, once it has been established it cannot be overridden save in very limited circumstances, such as fraud. However privilege can be lost, if the communication loses its confidentiality.

There are two main types of privilege:

- **Legal advice privilege** – this protects confidential communications (and evidence of those communications) between a lawyer and his client (but not communications with third parties) provided that the communications are for the purpose of seeking and receiving legal advice in a relevant legal context.

- **Litigation privilege** – this protects confidential communications (and evidence of those communications) between a lawyer and his client and/or a third party or between a client and a third party, provided that such communications have been created for the dominant purpose of obtaining legal advice, evidence or information in preparation for actual litigation, or litigation that is "reasonably in prospect".

This briefing summarises the law on privilege and sets out some practical steps that clients can take to maximise the protection afforded to confidential, legal communications by privilege.

Who is the lawyer?

Privilege applies to advice given by external lawyers and also to in-house lawyers provided that they act in their capacity as lawyer and not in an executive or compliance capacity and are qualified to practice under the Solicitors Regulatory Authority or Bar Council rules. In the case of solicitors, this will invariably include the need to hold a current practising certificate.

Privilege extends to employees such as legal executives, trainee solicitors and paralegals provided that they are properly supervised by qualified lawyers.

Privilege will also extend to the advice given by foreign lawyers based abroad provided that they are qualified to practise under their own regulatory body and to foreign lawyers based in England & Wales qualified to practise under the Solicitors Regulatory Authority.

There is an important exception: all advice given by in-house lawyers to their employers will be disclosable in an EU Commission Competition investigation as such advice will not be protected by privilege.

Privilege does not apply to other professionals, such as accountants, who give legal advice.¹

Legal advice privilege

- **Who is the client?**

  For legal advice privilege to apply it is important to establish who "the client" is. The client will only include those individuals specifically tasked with seeking and obtaining legal advice either from in-house or external lawyers. The definition of "the client" does not extend to everyone within the organisation or even the whole department or division seeking legal advice. Note that, communications between a lawyer and employees outside the client team and/or between the client team and outside the team will generally not be privileged.

  It should also be noted that communications within the client team may not be privileged if they are not for the purpose of seeking and receiving legal advice. For example, communications between the client team commenting on the merits of a particular matter may not be privileged.

- **What advice is covered?**

  Legal advice privilege is not confined to advice on the law, but also covers "advice as to what should prudently and sensibly be done in the relevant legal context." This will cover presentational, commercial or strategic advice provided that it relates to a client’s legal rights, liabilities, obligations and remedies. It will not apply to advice of a purely strategic or commercial nature which is not provided in a "relevant legal context". Equally, it will not apply to "the fruits of the legal advice, i.e. any agreement/conveyance etc. drawn up".

Litigation privilege

- **What does "litigation" mean?**

  Litigation has to be referable to adversarial proceedings and therefore will exclude, for example, internal grievance and disciplinary proceedings. It also excludes fact finding inquiries and investigations.

  In addition, litigation has to be actual or "reasonably in prospect", i.e. more than a mere possibility. It is not sufficient that there is a distinct possibility that sooner or later someone might make a claim, nor is a general apprehension of future litigation enough.

¹ There are some minor statutory exceptions e.g. patent agents and trade mark agents.
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• Dominant purpose
  Often documents are created for more than one purpose. For example, a company may commission an investigatory report looking into the reasons why an accident happened or fraud had occurred, but at the same time anticipating quite reasonably that litigation will be likely and that such a report is necessary for this purpose. However, if the report is not prepared for the dominant purpose of litigation, litigation privilege will not apply.

Common interest privilege
Often there is a need to voluntarily share privileged documents with a third party and common interest privilege will operate to preserve privilege in documents that are disclosed in respect of both legal advice and litigation privilege. The disclosing party and the receiving party will both share a common interest in the subject matter of the privileged document or in litigation in connection with which the document was brought into existence. The document remains privileged in the hands of the receiving party who can also assert the privilege in documents that are disclosed in respect of both legal advice and litigation privilege. The disclosing party and the receiving party will both share a common interest in the subject matter of the privileged document or in litigation in connection with which the document was brought into existence. The document remains privileged in the hands of the receiving party who can also assert the privilege in documents that are disclosed in respect of both legal advice and litigation privilege.

Legal Advice Privilege – additional steps in a non-litigious situation

• Before seeking and receiving legal advice from internal or external lawyers establish who the “client” is, for example:
  - If you have a commercial manager seeking legal advice in respect of a specific contract on a one to one basis, they will usually be the client
  - In more complex transactions with larger teams, focus on the individuals’ roles, distinguishing between key decision makers and information gatherers. The former group are more likely to be included in your client group seeking and receiving legal advice
  - Where there is an in-house legal team/lawyer instructing external lawyers, they will usually be the client

  Define and document who the “client” is, preferably in the engagement letter if external solicitors are instructed. The list can be revised as the matter progresses. Only the “client” should deal with lawyers (whether in-house or external)

Practical steps
• If legal advice is required, lawyers (external or internal) should be brought on board as soon as possible to maximise the protection afforded by privilege and internal structures need to be set up to minimise the creation of unnecessary non-privileged records

Common interest privilege

• Start any request to lawyers for advice with the words “I want your advice on...” or similar. This will support a claim to privilege later on and help focus on whether what is being requested is in fact legal advice. Do not merely cc the lawyers as a way of asking for advice. Create a fresh request for advice from the lawyers – and cc others in the “client team” if necessary

• Instruct colleagues/employees to mark all communications in relation to obtaining legal advice as “Privileged and Confidential – created for the purpose of obtaining legal advice/ in contemplation of litigation”. Whilst labelling communications in this way is not conclusive, it is certainly helpful and reinforces a key condition which must be satisfied if privilege is to be established

• Lawyers should direct the process of collecting the information necessary to produce the legal advice and/or to deal with the proceedings

• Be careful about investigating the circumstances surrounding a possible dispute or collecting evidence yourself (for example, by interviewing staff or producing reports) unless advised to do so by lawyers

• Ensure as far as possible that privileged documents are easily identifiable as such and stored separately from non-privileged documents

• Even if the original advice is privileged, a copy taken of it may not be if it is created for a non-privileged purpose and care should be taken when copying legal advice

• Email often results in widespread distribution of documents. Review emails before forwarding them on or copying them. If they may contain legal advice, send a separate email

• Circulate privileged documents on a ‘need to know’ basis only. If privileged documents need to be shared, e.g. between parent and subsidiary, insured and insurer, do so pursuant to a confidentiality agreement

• Avoid creating unnecessary documents. If it is necessary to discuss privileged advice with third parties, consider holding a meeting or a telecon to discuss the advice (rather than disclosing it) and avoid documenting the discussions where possible. If there is a need to document the discussions, mark any notes or minutes “Privileged & Confidential”

• Discourage any analysis or discussion of legal advice in written memoranda or minutes of meetings. Warn of the dangers of making manuscript notes on privileged documentation. Such documentation is unlikely to be privileged. Do not create “new” documents summarising legal advice unless it is for the dominant purpose of litigation

• Unless communicating with lawyers, make all communications as factual as possible. Try not to record views on whether something was done well or badly or on potential weaknesses. If, as sometimes happens, the business requires documents to be created which are unlikely to be privileged, they should be factual and accurate: always consider how they might be deployed in the hands of opposing lawyers if they have to be produced

• Where legal advice is discussed internally (e.g. by the Board) and minutes of those discussions are created it is advisable to produce two sets of minutes, one dealing with legal issues and their ramifications and the other with commercial issues arising from that legal advice

• If it becomes necessary to disclose privileged material to a third party, ensure it is always provided on confidential terms. Where lawyers are advising you as members of a multi-disciplinary team e.g. a corporate transaction, it will frequently be necessary for the legal advice to be copied to other members of the team. This should not amount to a waiver of privilege so long as the disclosure is made on confidential terms.

Legal Advice Privilege – additional steps in a non-litigious situation

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  - If you have a commercial manager seeking legal advice in respect of a specific contract on a one to one basis, they will usually be the client
  - In more complex transactions with larger teams, focus on the individuals’ roles, distinguishing between key decision makers and information gatherers. The former group are more likely to be included in your client group seeking and receiving legal advice
  - Where there is an in-house legal team/lawyer instructing external lawyers, they will usually be the client

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• Only the "client" should prepare briefing notes, letters of instruction, meeting agendas or minutes for the purposes of seeking and obtaining legal advice; employees who are not part of "the client" should not take on this task
• Ensure that any advice sought or given on presentational, strategic or commercial issues is given in the context of the client’s rights and obligations and not as stand-alone advice
• Make it clear to other employees that no documents containing information relevant to the seeking of legal advice should be created without express clearance from the client being obtained first
• If written communications do have to be produced by non-client employees for the purposes of seeking legal advice, ensure that supporting reasons are recorded as this may help to reduce the risk of the status of the document being misconstrued in future by some hostile third party
• Discourage non-client employees from reporting to the client on the subject of which legal advice is being sought or from copying in anyone to these communications.

Litigation Privilege – additional steps in a litigious or potentially litigious situation
• If a fact finding investigation is needed, instruct lawyers to commission the investigation and report for the dominant purpose of anticipated litigation and on the basis that legal advice is needed; the report should principally look at the causes of the incident and then, as a subsidiary issue, consider what improvements could be made for the future
• If proceedings are not already on foot, it would be preferable to be as specific as possible when recording the purpose of the document (for example, by specifying the proposed claimants or defendants to the anticipated litigation).

Attached is a diagram showing at a glance whether or not a particular communication is protected by privilege.

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