

Factsheet - Privilege

The word “privilege” joins together two ideas; that of privacy and that of having a special rule or regime. It helps us to identify material or communications which, for whatever reason, are subject to a special procedure to ensure they have enhanced confidentiality. This matters a good deal in a legal system where the rules governing the conduct of civil litigation require parties to disclose non-privileged material to their adversary.

Legal advice privilege

This protects confidential communications between a lawyer and his client relating to legal advice.

Who is the lawyer?

Assuming that a person claiming to be a lawyer is qualified to practice as such, privilege applies to advice given by lawyers in private practice and those practising in-house.

Privilege extends beyond the lawyer supervising the matter and applies to; legal executives, paralegals and trainee solicitors.

An exception should be noted in respect of in-house lawyers who give advice to their employers; this advice will be disclosable and will not be protected by privilege.

Who is the client?

Privilege only applies between the legal adviser and the client, so it is imperative to establish exactly who the client is.

In certain circumstances “the client” will only include those individuals specifically tasked with obtaining legal advice from the legal adviser. The definition of ‘client’ will not always extend to an entire organisation seeking the advice, or even the whole department seeking advice. Communications between the lawyer and individuals outside the “client’s team” will also not always be privileged.

Advice covered

Legal advice privilege is not just confined to advice on the law itself, but also includes advice as to what should be done in the relevant legal context. This will cover commercial and strategic advice provided it relates to a client’s legal rights, obligations or liabilities.

Litigation privilege

For litigation privilege to apply, the litigation must be actual adversarial proceedings, or situations where there is a “reasonable prospect” of litigation. There must be more than a mere possibility of litigation. Litigation privilege will not extend to situations such as internal grievances or disciplinary proceedings.

Documents are often created for more than one purpose. If a document is created for a specific purpose, but at the same time the document is created actual litigation is taking place or is anticipated, it is likely that the document will have litigation privilege as, in addition to the first purpose for which it was created, it was also created for the purpose of actual or anticipated litigation.

Sometimes in litigation there is a need to voluntarily share privileged documents with a third party, for example, an appointed expert. Legal privilege will be preserved in shared documents that are disclosed in this way, whether it is in relation to legal advice or litigation. For common interest privilege to apply, the common interest must exist at the time the document was disclosed.

General guidance

- Where legal advice is required, lawyers should be brought on board as soon as possible to maximise the protection afforded by privilege.
- Although labelling communications as “privileged – created for the purposes of obtaining legal advice or in contemplation of litigation” is not conclusive, it certainly reinforces the main condition which must be satisfied if privilege is to be established. All employees should be in the habit of marking all communications in relation to legal advice with the appropriate privilege statement.
- The circulation of any legal advice received should be restricted even within teams. Even where the original advice is privileged, if a copy is taken for a non-privileged purpose it may result in the copy losing its privileged status.
- Before emails are forwarded to others they should be reviewed. Where emails contain legal advice it may be necessary to send a separate email.
- Any discussion or analysis of legal advice in written memoranda or minutes of meetings should be discouraged. If there is a need to document the discussions, any notes or minutes should be marked ‘private and confidential’.
- If it is ever necessary to disclose privileged material to a third party, it should always be provided on confidential terms.
- Where manuscript notes are made on privileged documentation, bear in mind that such notes are unlikely to be privileged.

For expert legal advice or more information on any of our legal services, please contact us:

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