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SPECIAL REPORT ARTICLE June 2021

Once privileged, always privileged? – a toolkit for in-house counsel

BY ROB PALMER AND CATHRYN NEO

One hundred and twenty-three years after Sir Nathaniel Lindley uttered his oft-quoted principle "once privileged, always privileged", privilege issues continue to impact the day-to-day role of every in-house counsel. Distinguishing between what is privileged, what is not, and what has been waived is not always a straightforward task.

In this article we provide an overview of certain key principles of privilege under English law, before suggesting some practical steps that in-house counsel can adopt in generating and handling potentially privileged material.

Privilege – an overview

Under English law, privilege grants individuals and corporate entities the right to resist disclosure of certain confidential and potentially sensitive material. The best-known type of privilege under English law is legal professional privilege, which covers communications involving lawyers. There are broadly two types of legal professional privilege – legal advice privilege and litigation privilege. In addition, in-house counsel may find themselves dealing with joint or common-interest privilege. Each of these is explained briefly below, together with an explanation as to how privilege may be lost.

Legal advice privilege refers to confidential communications between a legal adviser and his or her client for the dominant purpose of giving or receiving legal advice. The rationale for the privilege is that a client should be able to place unrestricted confidence in their lawyer. Therefore, and while other common law systems may take different approaches, under English law legal advice privilege does not apply to communications with a third party by the client or the lawyer.

English courts have typically construed 'client' narrowly, and as referring only to a select group of employees in a company tasked with giving instructions to lawyers (rather than referring to all employees). While this restrictive position has been criticised in several Court of Appeal cases, the position has yet to be overturned.

The dominant purpose test determines whether a particular document falls within legal advice privilege (that is, whether it was created or sent for the dominant purpose of giving or obtaining legal advice).

After much uncertainty and debate over the applicable test, the Court of Appeal recently confirmed this position in *Civil Aviation Authority v R Jet2.com Ltd* (2020), aligning English law with other common law jurisdictions such as Singapore, Hong Kong and Australia.

Litigation privilege is wider in scope and covers communications between the client, their solicitors and third parties for the sole or dominant purpose of ongoing or reasonably contemplated legal proceedings. There must be a real likelihood rather than a mere possibility of such proceedings occurring. Proceedings must also be adversarial rather than investigative or inquisitorial.

Proceedings where judicial functions are exercised by a court or tribunal are likely to fall under this category. However, the position is less clear with regard to other tribunals, public inquiries or statutory investigations. For example, an inquiry likely to lead to follow-on claims may attract litigation privilege even though it is investigative. On the other hand, litigation privilege is unlikely to arise in a fact-gathering exercise.

Joint or common interest privilege occurs when two or more parties share a joint or common interest in the subject matter of a privileged communication. Such privilege can allow those parties to assert privilege against the rest of the world. Joint privilege applies when there is a joint retainer to the same solicitor or, when parties have not jointly retained the same solicitor, they have a joint interest in the subject matter. Examples of relationships which give rise to a joint interest include those between beneficiaries and trustees, partners, parent company and subsidiaries, and a company and its directors.

Common interest privilege similarly extends the privilege enjoyed by a party to adversarial proceedings or a recipient of legal advice to a third party with the same interest. While it is presently unclear as to the types of common interest that will fall under this form of privilege, courts have found common interest privilege to exist in relationships between co-defendants, between insured and insurer, agent and principal and companies within the same group.

Privilege may be lost in three main ways: (i) if a document is made publicly available, meaning that confidentiality of the document is lost; (ii) if there is an express waiver, for example where documents are provided to a regulator in order to demonstrate cooperation; and (iii) through inadvertent disclosure, for example where documents are made available to another party to litigation proceedings during the document inspection process.

Maximising the protection of privilege

Typically, in-house counsel will want to maximise their ability to rely upon the protection of privilege. In this section, we consider some best practices that in-house counsel can incorporate in day-to-day operations, where a potential dispute or contentious situation has arisen and where formal proceedings have commenced.

Day-to-day operations

Most in-house counsel are required in their roles to wear two 'hats' – one as legal adviser and another as the 'man or woman of business'. Business advice provided by in-house counsel is unlikely to attract the privileges described above, and so it is important to be clear as to what is the role being performed at any given time. Usually, best practice is to separate communications generated in each of those roles.

Even where a matter involves in-house counsel acting in a 'legal' role, it is important to remain alive to the fact that litigation privilege will not provide a blanket protection over all communications generated. In-house counsel should therefore exercise caution in purely internal investigations and in internal communications discussing settlement options, as these may not be protected.

More generally, appropriate document generation and handling practices can assist. Before creating any document, consider if it is really necessary to pen it down and the risks if its content is exposed. Mark any communications seeking legal advice as 'privileged and confidential' and 'do not forward' – although it should be highlighted that pure labelling or copying in legal counsel (internal or external) will not automatically render that communication privileged. Furthermore, and before commencing any project, put engagements in place with external counsel involved and create a designated team authorised to seek and receive legal advice.

Potential disputes

Where a potential dispute or contentious situation has arisen, in-house counsel should be particularly careful in generating documents.

Before creating any new documents, apply the test: 'am I happy for the other side to read this document or any response it might elicit?' Particular care should be taken in relation to board papers and minutes, especially where these contain a mix of legal and commercial discussions. If the company intends to commence internal investigations, ensure that these investigations are lawyer-led, with interviews and reports prepared by lawyers. In some cases, it may be possible to increase the likelihood of such reports being deemed as privileged by intermingling legal analysis with factual findings. Alternatively, reports and interview notes might be prepared on the assumption that they will not attract privilege at all. These options should be carefully assessed, ideally in conjunction with external counsel.

Where a claim to litigation privilege is available, various steps can be taken to support such a claim. These include instructing external lawyers (indicating the existence of potential proceedings), recording in engagement letters with lawyers and external consultants that their instruction is for the purposes of proceedings and notifying employees within the company that they should take steps not to destroy documents in contemplation of future proceedings.

Formal proceedings

In court litigation, any disclosure of documents will be carried out under the relevant civil procedure rules of that jurisdiction. In common law jurisdictions, parties typically are required to provide to the other side and the court a list of documents in the disclosing party's control,

along with a brief description of each document. Often, in-house counsel will have a key role assisting external counsel to collate and catalogue those documents. In so doing, it is important to remain alive to the status of any privileged documents in order to avoid the risk of inadvertent disclosure.

Document disclosure procedures may be less clear-cut in the context of arbitration, particularly if parties come from different jurisdictions. Dispute resolution clauses seldom provide the applicable privilege regime and arbitral tribunals will frequently conduct disclosure by reference to 'soft law' instruments such as the International Bar Association's Rules on the Taking of Evidence 2020.

Factors which a tribunal may take into account in deciding whether to order disclosure of documents include the need to protect confidentiality of a document made in connection with and for the purpose of providing or obtaining legal advice or for the purpose of settlement negotiations, the expectations of parties and their advisers at the time privilege is said to have arisen, any possible waiver, and the need to maintain fairness and equality as between the parties. It is therefore key that in-house counsel have these factors in mind when working with external legal counsel in a dispute.

A word of warning

It is beyond the scope of this article to cover the range of privilege regimes which may apply in an increasingly global business environment. However, the international nature of many businesses means that a range of privilege regimes may be applicable. This article has provided some guidelines for best practice under English law. While many of these suggestions are applicable more generally, it is important for in-house counsel to remain alive to the scope and application of privilege under other systems of law that may be relevant to their own situation and which may limit the protections available to them and their organisations. ■

This article first appeared in the June 2021 issue of Financier Worldwide magazine.
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