Privilege in litigation proceedings

Client Guide

CLIENT GUIDE

PRIVILEGE IN LITIGATION PROCEEDINGS

The purpose of this client guide is to provide general information on privilege. It is not intended to give clients all the information or advice that is required on this topic. Also, the law on this area is subject to evolution, so whilst every effort has been made to make this briefing note up to date at time of writing, the law may have subsequently changed. Please seek further advice before making any decision regarding this subject matter.

We recommend that you read this in conjunction with our guide on discovery.

Deciding whether a document is privileged is not always easy, and great care must be taken when deciding whether privilege applies to a document, as the disclosure may make all the difference to your case.

Disclosure and privilege

When proceedings are issued, the parties will be required to disclose all relevant documents to the other side at the stage referred to as "discovery". For general information on your discovery obligations please refer to our client guide on discovery.

As a general rule, litigants need to disclose every document relevant to their case whether it helps or harms their case. An exception to this rule is that parties do not have to disclose documents which are protected by the principle of privilege. Deciding whether a document is privileged is not always easy, and great care must be taken when deciding whether privilege applies to a document, as the disclosure may make all the difference to your case.

Whilst privileged documents do not need to be physically disclosed, their existence must nonetheless be referred to in the list of discovery documents. The other side will therefore closely check to see from the description of the document, whether a document referred to should actually be covered by privilege or not. Parties should expect to be asked questions when the privilege is not abundantly clear, and if the other side does not accept those answers, you may find the opposing party challenging the privilege.

The most common type of privilege is legal professional privilege. This species of privilege is based on the public policy consideration that a person should be free to take confidential legal advice, and to conduct his litigation without having to reveal that advice and related documentation. Generally speaking, once a document becomes privileged, it remains so for all subsequent proceedings in which it might be relevant.

Legal professional privilege is divided into two parts:

- Legal advice privilege; and
- Litigation privilege

There is a third additional ground of privilege:

- Common interest privilege

Legal advice privilege

Communications between a lawyer in his legal capacity and his client are privileged if:

1. they are passed directly between lawyer and client; and
2. they include advice which is sought or given within a relevant legal context.

Where a lawyer is retained to provide advice on legal rights and obligations, communications between lawyer and client are likely to be privileged regardless of whether they involve a contentious or non-contentious matter.

The House of Lords' decision in *Three Rivers1* means that when deciding whether legal advice privilege can protect a document from being disclosed, no regard need be given to the document's subject matter, so long as it falls within a "relevant legal context". When deciding if a document falls into such a legal context the court is likely to ask itself if the lawyer *"had put on his legal spectacles"* when preparing it.

It must of course have genuinely been made for the purpose of giving legal advice, and each document must be considered on its own individual merit.

As legal advice privilege only applies to communications between lawyer and the client, particular care should be made when looking at the definition of *"client"*. In the earlier Three Rivers case2, the Court of Appeal held that for corporate clients *"clients"* only includes employees whose job it is to instruct and receive information from external lawyers. The House of Lords declined to make a ruling on this point and until such a time as clarification is made, particular care should be employed when generating documents within a business. In particular, companies should note that persons who fall outside this narrow band of people could generate communications (even if internal) which may become disclosable.

Legal advice privilege includes documents evidencing the substance of advice sought or given about the client's rights and obligations, such as a lawyer's internal notes and records. These may include documents created for the purpose of considering that legal advice with a view to implementing a commercial policy based upon it. In this regard, however, an in house lawyer with executive functions in addition to legal duties, must take extreme care when creating documents. Also within the scope of this privilege are instructions and briefs to Counsel, Counsel's opinions, advises, drafts and notes.

It should also be emphasised that legal advice privilege does not protect a communication between a client or lawyer on one side, and a third party on the other (such as an expert witness), and these sorts of communications can only be protected by litigation privilege.

Litigation privilege

This category covers documents and communications, which come into existence after litigation has commenced or is reasonably in prospect, between:

- a lawyer and his client;
- a client's lawyers and third parties for the sole or dominant purpose of such litigation; and
- a client and third parties for the sole or dominant purpose of obtaining information to be submitted to lawyers for advice on, or collecting information for, pending or contemplated litigation.

Common interest privilege

Certain communications, for example, between an insured and his insurer, may attract a special type of privilege, known as "common interest privilege". However, special care must be exercised in the creation of documents with a view to the completion and submission of a report to insurers since they will not necessarily be entitled to privilege.

Internal reports and memoranda

Difficulties can, and often do arise in the context of a company's internal investigations and reports into controversial matters before litigation has been commenced, or crucially, before it is contemplated.

It is only if the company's internal investigation is for the dominant purpose of actual, or (in contemplation of), reasonably prospective litigation, that notes, reports and other documents created during its course, will be protected from disclosure, by virtue of being privileged.

If the dominant purpose of the documents in question was the organisation of the company's procedures to prevent a recurrence of the incident, or to investigate an incident, the documents must, generally speaking be disclosed, even if the possibility of litigation was part of the reason for the inquiry.

Clients should bear in mind that simply copying such a report to the company's lawyers will not create privilege in a document, nor will writing across the top of it the words: "Privileged: prepared in contemplation of litigation". It is necessary, therefore, to take the greatest of care in the production of such documents.

Can I lose the right to claim privilege?

Yes, this can happen voluntarily or by accident.

The right of privilege is yours, not your lawyers. However, the right to privilege may be waived/lost by your lawyer as well as yourself. The consequences of waiver vary according to the circumstances. For example, if a party waives privilege in relation to part of a document, the rest is also at risk of being considered waived. If privilege is waived in respect of one document which is disclosed and which deals with one particular issue, whether such disclosure was deliberate, innocent, negligent or otherwise, there is a risk that privilege has been waived in respect of all documents relating to that issue.

Loss of privilege may also occur inadvertently in the course of litigation. This often happens when privileged materials are disseminated or referred to in non-privileged circumstances. Examples of this are as follows:

- if the legal advice is shown to third parties, for a purpose which is not privileged, such as by releasing a copy of the advice to the press, publicity agents, the police, a parent or subsidiary company, shareholders, auditors, accountants or other interested parties;
- by referring to or quoting from legal advice in correspondence, with an adversary, such as referring to the content of counsel's opinion. It is then possible that privilege in respect of the whole advice may have been waived;
- if legal advice is broadcast amongst the staff of a company involved in litigation, for purposes other than the necessary conveying of legal advice, such as to boost morale in the face of bad publicity.

However, a lawyer who receives privileged material from an adversary, by accident or by illegal means, may be prevented by his professional rules from making use of such material.

Privilege issues in particular cases

Some examples of documents which are unlikely to be privileged are outlined below.

(a) "Without Prejudice" communications

Communications genuinely intended to promote the settlement of a dispute may be considered privileged, and thereby protected from production. For that reason, they

should be headed "without prejudice" as a matter of prudence. However, the mere use of this designation will not protect the production of unguarded or damaging statements which are not genuinely intended to promote the settlement of a dispute. For instance, making a threat to the other side as to what will happen to them if they do not cease the case.

(b) Evidence gathering

Problems can arise when copies of certain documents are made or gathered for a privileged purpose. For instance, if a legal adviser obtains copies of material damaging to his client's case that was in existence before the litigation was contemplated, from a third party, when that material was (until obtained by the legal adviser), not in the client's possession, custody or power. As before it was in a client's possession, custody or power, it was not liable to be disclosed to the other side.

Having said that, clients can take some comfort from the general rule that documents that came into existence after litigation was contemplated, will be privileged if collected by, or on behalf of, the legal adviser for the dominant purpose of obtaining advice in relation to the contemplated litigation..

In order to improve the prospects of ensuring a successful claim to privilege in this regard, it is advisable for such copies to be delivered to the legal adviser himself, by whomsoever has the document in question. However, the safest course is for the legal adviser to inspect the documents held by the third party, before obtaining copies of them.

As stated above, if the originals of such copy documents were ever in the possession, custody or power of the client, they will not be considered privileged, unless the original versions of the copy documents in question were already privileged in the client's hands, and the copies were made for a privileged purpose.

(c) Internal reports

Internal reports prepared before litigation is reasonably contemplated will almost certainly not have the benefit of litigation privilege. Once litigation is a real likelihood, documents will be privileged if they are produced for the dominant purpose of the litigation, and not for internal purposes.

The involvement of independent lawyers may assist in demonstrating such a purpose, but will not disguise the true nature of the inquiry. If the inquiry was not for the dominant purpose of contemplated litigation it will not in the final analysis, be considered privileged by the Court.

For the same reason, marking documents clearly with such words as "privileged and confidential" or "prepared in contemplation of legal proceedings" or "for submission to legal advisers" may improve the chances of making a successful claim to privilege, but such words will not be determinative.

The safest approach is to take the view that all documents created in the course of such inquiries may not be privileged. Care should therefore be taken not to include any commentary that is not strictly necessary and which could be damaging or embarrassing.

(d) Minutes of board meetings

A summary of legal advice to the board of directors of a company and any minute of that advice or copy of the legal adviser's letter attached to the minute, will be privileged, provided the purpose is to convey legal advice. If the board goes beyond this and discusses, for example, the implications of the advice on other aspects of its business, the minute may not remain privileged.

Consider this carefully before a minute is produced. It is also prudent to separate discussions on matters relating to the litigation from other board matters. and to minute this as an item separate from other confidential discussions, irrelevant to the litigation.

(e) Reports to auditors

Letters from legal advisers to auditors concerning the affairs of, or litigation involving, a company can also cause difficulties. The lawyer's communication is with the auditor, rather than the client (and probably not with the auditor in a capacity as agent for the company), and as the purpose of the letter is unlikely to be for the dominant purpose of litigation, the company may not be able to claim privilege over the original document.

The company however, need not give discovery if it does not have a copy in its possession, custody or power. Although, as against that, the legal adviser will usually have retained a copy of letters to auditors, and arguably this copy may be within the client's possession or power.

Ordinarily, as the auditor is not an agent of the company for purpose of litigation proceedings, the client will not be entitled to call for the original, but the auditor might nevertheless, at the instance of an opponent, be compelled by court summons, to bring the document to court.

The auditor may object to the production of the letter, if the letter is irrelevant. Such as if it contains only statements of the lawyer's opinion. The court will only order production if it is necessary in any event.

As with so many areas of law, this is a complicated area, and legal advice should always be sought before commencing on a course of action. However, in broad terms, when letters to auditors are drafted, particular care should be taken to avoid including anything which is unnecessary.

(f) Disclosure letters

Similar problems may arise in the case of disclosure letters written to shareholders or prospective purchasers. Documents relevant to a dispute, and even a lawyer's letter of advice, may be referred to or even attached. Privilege may be lost in relation to those documents when passed to the third party addressees. For the same reasons as in the Auditor letters, in that they are to a third party, not acting on the company's instructions, and are not for the dominant purpose of litigation.

Similarly, if a company acquisition does not complete, documentation (including any legal advice) should only be provided on the strict condition that it is returned forthwith, with no copies being retained by the third party.

It is always important to remember that if any document refers to legal advice the company has received, it can threaten the privilege of that received legal advice. For that reason, the creation of such documents should be curtailed as much as possible.

(g) Communications with regulators/public or private inquiries

Problems may arise in connection with documents and reports compiled in the course of investigations, and inquiries conducted by such bodies as the Jersey Financial Services Commission. A company subject to such an inquiry has little or no option other than to participate. If it does participate through its officers, the question arises as to whether documents produced and statements made in the course of the inquiry will be discoverable in subsequent litigation, although they are likely to be discoverable if relevant to the issues in dispute.

The only ground on which production may be refused might be "public interest immunity". This is complicated area of law, but simply put, if the court finds that a document is relevant to the litigation in question, the court will then carry out a 2 stage process. First, it will determine whether there is a public interest in the production of the document, by reason of both (i) relevance to matters in question; and (ii) necessity for disposing fairly of the case. Secondly, it will then carry out a balancing exercise as between the public interest that substantial harm should not be done to the public authority by the disclosure of the documents, as against the public interest that the administration of justice should not be frustrated by the withholding of documents, necessary for the fair determination of proceedings.

Once public interest immunity is properly raised, the burden is on the applicant seeking disclosure to show that the document should be disclosed.

Therefore, the greatest of care should be taken when preparing reports and making written statements to such bodies. Moreover, communications between the company and its lawyers advising it in relation to public or private inquiries, are likely not to be privileged if the lawyers are merely advising the company on the best way of presenting evidence to the inquiry, rather than advising on the company's legal rights and obligations.

(h) Witnesses

Whilst documentation generally produced for inquiries may not be subject to privilege, it is different for legal advice to witnesses in those public or private inquiries.

As a general rule, legal advice privilege should apply to any lawyer-client communications, where the witness is concerned about the risk of legal liability, as a result of his or her role in the matter under inquiry.

Lawyers may provide advice to witnesses or potential witnesses, who are to give evidence in court proceedings, or at public or private inquiries. If advice is given to witnesses in court proceedings, then litigation privilege should also apply.

Where the witness' concern is solely for his or her reputation, the position is uncertain. It is possible that lawyer-client communications relating to individuals giving evidence in their private capacity may be protected, whereas those relating to witnesses giving evidence on behalf of an institution or body corporate will not.

(i) Proceedings to obtain evidence

Clients may become involved in separate proceedings to obtain evidence. An example of this would be letters of request from a foreign court to produce evidence and/or documents relevant to a dispute, to which the client is not a party. Although such proceedings may be adversarial, litigation privilege is unlikely to apply, as the client is not a party to the substantive dispute. Although legal advice privilege may be available to the extent that the client requests and receives advice concerning their legal rights and obligations in relation to the proceedings to obtain evidence.

Maximising claims to privilege

As soon as litigation, or a regulatory investigation is reasonably in prospect, the following safeguards can, and in the author's view should be implemented to ensure that documents remain privileged from production to the other parties:

- Independent lawyers should be involved in the process of document creation. Where necessary or appropriate, documents may be addressed to lawyers in draft form for comment;
- Notes generated internally should be restricted to:

  (a) disseminating legal advice in relation to the dispute only when it is essential to do so, and only to those persons to whom it is necessary and appropriate to do so; and (b) seeking information requested by lawyers;
- impose restrictions on the copying of privileged documents, and on the routine destruction of documents;
- on no account permit copies of sensitive or damaging documents to be circulated or despatched to third parties, unless they are sent under advice from and under cover of a letter from independent lawyers;
- ensure that correspondence with third parties, such as potential expert witnesses, is routed through independent lawyers or that communication is oral;
- generally ensure that evidence gathering is handled or at least supervised by independent lawyers;
- ensure that all documents produced at the request of lawyers or for the purpose of obtaining legal advice are marked "privileged";
- avoid creating internal memoranda, notes and board minutes, which analyse or comment on legal advice given in relation to a dispute;
- ensure that privileged documents are kept in a "privileged" condition - scribbled notes on a privileged document may not be privileged, and the fact that those notes are on a privileged document, may serve to waive that privilege;
- before initiating the drafting of a report to insurers, or others, seek legal advice on its form and content. It may be advisable for your independent legal advisor to compile the report on your behalf;

Summary

When dealing with public or private inquiries, great care will need to be taken as regards the creation of documents, including documents intended to be sent to lawyers, assisting clients with the inquiry. Broadly speaking, such documents will be privileged if they are requests for advice concerning legal rights and obligations, but not if they advise on presentation of evidence.

Contact us

If you would like more informtion on privilege in litigation proceedings, please contact our team at Viberts who will be happy to help.

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IH_1360_V1_03012017