CONCEPT OF LEGAL PROFESSIONAL PRIVILEGE IN ENGLAND AND WALES

The concept of legal professional privilege is a rule which protects from disclosure in the context of legal proceedings certain documents which if unprivileged would have to be disclosed to the other side in litigation/arbitration prior to trial or could be seized/inspected by investigators in most regulatory procedures and which could then be relied on as evidence at a trial.

The law of England and Wales recognises two main types of legal professional privilege:

- Legal advice privilege
- Litigation privilege

Other types of legal professional privilege which are occasionally asserted are joint privilege and common interest privilege.

Legal professional privilege is a substantive legal right (not a procedural rule). It enables a person to refuse to disclose certain documents in a wide range of situations. No adverse inference can be drawn from a valid assertion of legal professional privilege.

Legal professional privilege only protects documents which are confidential. If documents which would otherwise be privileged contain information which is already in the public domain or which has been shared with third parties, legal professional privilege will be lost.

The legal professional privilege belongs to the client, not the lawyer, and does not depend upon the document being in the lawyer’s custody. Privileged documents can (and frequently are) held by the client.

SCOPE OF LEGAL PROFESSIONAL PRIVILEGE IN ENGLAND AND WALES

What is protected by legal professional privilege?

Litigation privilege

Litigation privilege affords a wider protection than legal advice privilege since, where it applies, it can protect communications with third parties, as well as those between a lawyer and his or her client. It applies where adversarial proceedings are reasonably in prospect (for instance, where negotiations over a contractual issue are breaking down or one party sends or receives a formal letter before action). Enquiries by regulatory authorities, requests for staff to give witness evidence, third party disclosure orders and other investigative processes will not normally be considered
adversarial, although regulatory proceedings in which judicial powers are being exercised are likely to be considered adversarial for these purposes. A good approach to determining whether proceedings are in prospect is to consider whether there is a legal issue to be determined as between the parties to the relevant process.

If adversarial proceedings are reasonably in prospect, a ‘dominant purpose’ test will apply to protect as privileged all confidential documents prepared for the dominant purpose of giving or getting legal advice with regard to that litigation or aiding the conduct of that litigation. Determining the dominant purpose can be problematic.

Litigation privilege has no retrospective effect.

Documents created before adversarial proceedings are reasonably in prospect will not attract litigation privilege (although they may attract legal advice privilege).

Legal advice privilege

If no adversarial proceedings are in contemplation, legal professional privilege will only attach to documents which constitute confidential communications between a lawyer and his or her client made for the purpose of giving or obtaining legal advice and documents which evidence such communications, including material forming part of the continuum of those communications. Each part of this test requires further explanation.

Communications

Must actually transfer information between a lawyer and his or her client. A document which stands in its own right or is not addressed and delivered to a lawyer specifically for advice may not constitute a communication. A statement prepared by an employee at the request of a manager to record the employee's recollection of events is unlikely to benefit from legal advice privilege – even if the employee believes that the document will be passed to lawyers for advice – since it is not a communication with a lawyer.

Lawyer

Includes all members of the legal profession: solicitors, in-house lawyers, barristers within the UK and duly accredited foreign lawyers (whether foreign in-house counsel who are not required to be a member of their local Bar would still qualify is currently untested). Where appropriate provisions for supervision are in operation, it can also include legal executives, paralegals and trainee solicitors. Care must be taken, when communicating with an in-house lawyer, to place the communication within the correct lawyer/client relationship. An in-house lawyer may need to maintain two such relationships; one with the business, in which he is the ‘lawyer’, and one with external lawyers, in which he (alone or together with others) is the ‘client’.

Client

Not every employee in a company will be the client for the purpose of attracting privilege. The ‘client’ will only comprise those few individuals who are actually charged with obtaining legal advice and who directly communicate with the lawyer, whether external or in-house. This might be an ad hoc committee or group formed to respond to a specific issue or incident. Or it might be members of senior management. Often, however, those with direct knowledge of the facts or matters in issue will not fall within the concept of ‘client’ and particular care will therefore need to be exercised when inter-viewing or obtaining information from such employees.

Documents made for the purpose of giving or obtaining legal advice

Legal professional privilege only attaches to legal advice that includes advice as to what should prudently and sensibly be done in the particular situation (including how best to present facts in light of legal advice given). There must first be a relevant legal context – an important practical distinction for in-house lawyers to bear in mind, since privilege will not attach to advice they provide which is purely commercial or strategic.

Difficulties arise when determining the status of copy documents and documents which are only privileged in part.
Further difficulties can arise if privilege has been impliedly or expressly waived. These issues are beyond the scope of this brief summary. Expert legal advice should be taken.

**Legal professional privilege in the context of criminal investigations**

Regulatory investigations in the UK are not automatically considered to be adversarial from the outset and hence litigation privilege may not arise. The result is that legal advice given in the context of such an investigation will attract legal advice privilege, but documents including notes, transcripts and/or expert reports for the purpose of giving advice or evidence may not be privileged and so could be disclosable to a regulator or in subsequent litigation.

Litigation privilege will apply in any case once it is clear that some form of prosecution or litigation arising from the investigation is in contemplation or, at an earlier stage, if the investigation process itself has become sufficiently adversarial so that the company under investigation effectively stands accused of wrongdoing and should, therefore, be able to claim litigation privilege over witness evidence gathered for the purpose of obtaining advice to defend itself.

**Legal professional privilege in the context of investigations by the antitrust/competition authority**

Distinct from legal professional privilege, Part 9 of the Enterprise Act 2002 (‘EA 2002’) creates a statutory confidentiality regime covering most competition-related inquiries undertaken by domestic authorities within the UK. This regime can be significant in any litigation following a competition inquiry where disclosure of documents created during the inquiry is sought by a party to the litigation.

The relevant sections of EA 2002 prevent disclosure by any party of documents disclosed to it by an authority in the exercise of its legal functions (without consent from that authority). In practice, this means:

- Documents received from or authored by the authority itself cannot be disclosed
- Documents created by third parties which came to the authority during the investigation and were then disclosed to the company cannot be disclosed (this might include documents from another company subject to the same investigation)
- Documents created by the company under investigation before the investigation and provided to the authority in the course of the investigation may still be disclosed, and
- Documents created during the investigation relating to employee interviews and witness statements; whether such documents can be disclosed will depend on the author of the documents in question. If they were created by the company, then they may be disclosed. If they were created by the authority from interviews/transcripts with company witnesses, they may arguably not be disclosable.

**Are in-house counsel protected by legal professional privilege?**

Yes, except in the context of an antitrust and competition investigation by the European Commission.

An in-house lawyer must, however, take particular care to ensure that he distinguishes clearly between advice which is legal and that which is commercial in nature, since the latter will not attract legal professional privilege. He must also take care when instructing external lawyers to ensure that he clearly identifies and effectively manages the relevant lawyer/client relationships.

**Does legal professional privilege apply to the correspondence of non-national qualified lawyers?**

Yes, where the question of disclosure is governed by the law of England and Wales. Legal professional privilege applies to advice given by all duly accredited members of the legal profession. It is not necessary for the lawyer to be qualified in England and Wales. The question of whether this extends to in-house counsel in European jurisdictions where those counsel are not required to be members of their local Bar and whose advice in their own jurisdictions would not be protected by local professional secrecy laws remains to be determined by the UK courts.
Where the question of disclosure is governed by European law (such as in the context of an antitrust and competition investigation within the UK by the European Commission), only the advice of an independent lawyer qualified within the EEA is protected by legal professional privilege.

How is legal professional privilege waived?

Legal professional privilege is waived if the relevant material is placed before a court. It is also lost if the material in the document loses confidentiality or if the document came into being for the purpose of furthering a criminal or fraudulent scheme. A lawyer has a duty to protect a client’s legal professional privilege and cannot waive it without the client’s express authority.

It is possible to waive legal professional privilege on a selective basis so that disclosure to a third party of a legal professional privileged document will not mean that it ceases to be legal professional privileged for any other purpose. However, for a waiver to be selective, the terms of the disclosure must be clearly established in advance. This is a complex area. Always seek legal advice.

RECENT CASES AND/OR OTHER LEGAL DEVELOPMENTS IN ENGLAND AND WALES

A mis-selling dispute between a property group and a bank gave rise to a number of questions relating to privilege and disclosure in 2015. Issues included: whether the bank was obliged to disclose documents which were confidential abroad (such as agreements with foreign regulators) and which might, if disclosed in English court proceedings, give rise to a criminal offence in the foreign jurisdiction; whether communications with the FSA (now the FCA) in relation to a Final Notice should be disclosed or whether they were covered by the without prejudice privilege that attaches to settlement communications; and whether a secret recording of a meeting could be privileged. These questions give rise to difficult issues. For more information, please contact the author.

In March 2016, Supreme Court Judge Lord Neuberger gave a speech about privilege, focussing in particular on internal investigations. In July 2016, the Law Society of England and Wales launched a consultation into its guidance on legal professional privilege. Once finalised, this guidance will also focus in particular on investigations. These developments highlight the continuing importance of privilege in English law.

Although there have been a number of other privilege cases during 2016, including Property Alliance Group and RBS, those have simply served to re-affirm the current position; thus not analysed in detail in this section.

KEY CONTACTS

DLA Piper
www.dlapiper.com

Paul Stone
Partner
T +44 113 369 2700
paul.stone@dlapiper.com

All DLA Piper Relationship firms work with DLA Piper to provide a comprehensive and coordinated legal service to clients, locally and globally. These firms have adopted various practices and procedures that are aligned with DLA Piper and enjoy a strong working relationship with DLA Piper, some established over many years.
DISCLAIMER

DLA Piper is a global law firm operating through various separate and distinct legal entities. Further details of these entities can be found at www.dlapiper.com.

This publication is intended as a general overview and discussion of the subjects dealt with, and does not create a lawyer-client relationship. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper will accept no responsibility for any actions taken or not taken on the basis of this publication.

This may qualify as 'Lawyer Advertising' requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

Copyright © 2017 DLA Piper. All rights reserved.