

Dispute Resolution

# It's a privilege – legal privilege and why it's important to you

Under the law of evidence, privilege protects disclosure of communications in certain circumstances. Legal privilege arises from the confidential relationship that is formed between a lawyer and a client and exists to ensure that communications between clients and their legal advisors in contentious remains confidential.

Given the growing extent of complex commercial disputes and consequent discovery which has become ever more onerous, close attention will be paid to assertions of privilege. It is no longer acceptable to claim blanket privilege over categories of documents and instead privileged documents now have to be scheduled individually, even though the documents are not being made available to other party.

A successful challenge to an assertion of privilege will lead to the document being released to the other party. This will generally be unhelpful and can be disastrous.

There are many kinds of legal privilege and the most important ones relating to client communications are legal advice privilege and litigation privilege.

#### Legal advice privilege

Legal advice privilege covers communications between a lawyer and a client and entitles the client to refuse to disclose and to have its lawyer refuse to disclose any communications which are connected with the giving and receiving of legal advice. For advice privilege to apply, the communication must be exchanged in the context of professional legal relationship. The communication must be made for the dominant purpose of seeking or giving legal advice. Legal advice privilege does not extend to communications with third parties and therefore the disclosure of legal advice to a third party will potentially waive legal advice privilege and render such communications discoverable. This form of privilege covers the position where litigation is not in contemplation but may cover advices given in the context of litigation as well.

#### Litigation privilege

Litigation privilege protects confidential communications between a lawyer and a client where the dominant purpose of such communication is in connection with existing or potential litigation. Litigation privilege does include communications between the client/lawyer and a third party. To claim litigation privilege the litigation must either be in progress or there must be a reasonable prospect that it will happen and dissemination of such communication in a public domain can lead to a loss of litigation privilege. Conversely litigation privilege will continue to exist even where the claim for which purpose the communication was produced is not pursued or where the dispute is resolved without production of the communication or document in question. Accordingly a document will remain privileged in subsequent litigation even if the subsequent litigation is on a different matter unrelated to the initial dispute.

#### In-house lawyers

Any business might think that advice from its in-house lawyer is covered by legal advice or litigation privilege. The decision of the European Court of Justice in *Azko Nobel v European Commission* held that privilege does not cover exchanges between a company and its in-house lawyers. This decision appears to apply to competition investigations only. The principle that an in-house lawyer does not enjoy a level of professional independence comparable to that of an external lawyer has yet to be fully considered by the ECJ or by the Irish courts. Whilst the issue has yet to be definitively determined in Ireland, caution is required when taking legal advice from anyone other than an external solicitor or barrister.

## Internal investigations

Notes, memoranda and communications arising from an internal investigation are unlikely to attract litigation privilege unless they involve lawyers. Such notes, memoranda and internal communication are certain to be sought in a discovery application in any contentious litigation. Therefore to attract privilege, communications should be in the form of written materials prepared by lawyers or for consideration by lawyers. Any reports or memoranda should ideally be prepared in the form of legal advice. Even if litigation privilege is not directly available, it may be possible to extend legal advice privilege to reports or memoranda which were prepared on the basis of legal advice.

## Internal communications

Neither litigation privilege nor legal advice privilege can be claimed in relation to a document or communication unless such document or communication is confidential. However confidentiality in itself will not confer privilege. In order to claim any form of privilege, an internal communication must either arise from the seeking or obtaining of legal advice or for the obtaining or collecting of evidence for an actual or anticipated dispute or obtaining information which may assist in obtaining or collecting such evidence. A vast majority of internal communications are unlikely to fall into any category of privilege. Therefore notes or memoranda in writing prepared at the time when there is a reasonable prospect of a dispute may assist in establishing litigation privilege. Recording the purpose of the communication is important and if possible separate communications and reports on different issues so that the purpose of each communication is clear.

## Experts

Communication with an expert will not in itself be privileged if such communication takes place outside the context of a dispute. Preliminary or advisory reports prepared by an expert will not normally attract privilege and will therefore be potentially discoverable in litigation. Where a party changes expert and obtains a further report, any prior reports by the former expert may no longer be privileged and may also be discoverable. Instructions to experts will generally have to be disclosed and therefore if possible comments on the merits of the case should be avoided.

## Practical tips to protect privilege

Assume that a claim of privilege may have to be justified and that privilege can be lost. Therefore consider:

- Confidentiality: every privileged communication must be confidential, but not every confidential communication will be privileged.
- Where a dispute is possible then make clear that any specific communication or document is for the purpose of litigation.
- Control the internal dissemination of documents. Internal communications regarding expert witnesses or reports are likely to be discoverable.
- The communication of an expert report or other communication to a third party may very well result in a waiver of privilege in relation to such documents. Therefore carefully consider the necessity of circulating such documentation even when a dispute has resolved.
- If in doubt get the guidance of you in-house counsel or external solicitor.

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