

# Legal Professional Privilege and Professional Secrecy in Hong Kong: Overview

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A Practice Note providing an overview of the laws in Hong Kong relating to the protection available to lawyer-client communications and the best practices for preserving the confidentiality, privilege, and secrecy in those communications in business and commercial situations. In the context of privilege and professional secrecy rules, this Note also considers the definition of lawyers and clients, the impact of a common interest or joint representation on the applicability of privilege, and the application of privilege in an internal investigation or an M&A transaction.

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This Note provides an overview of the law related to:

- Parties' disclosure obligations.
- The rules related to legal professional privilege and professional secrecy.
- Who are considered to be lawyers and clients for the purposes of legal professional privilege and professional secrecy.
- How local courts consider privilege and professional secrecy issues when clients share counsel or a common interest with a third party.
- How a party can protect privileged documents during an internal investigation or in an M&A transaction.

For information on the different approaches to legal professional privilege, and professional secrecy in common law and civil law jurisdictions, see [Practice Notes, Legal professional privilege, legal confidentiality and professional secrecy: Cross-border](#) and [A world tour of the rules of privilege](#).

## General Disclosure Rules

### Rules of Disclosure in Civil Litigation

The rules of disclosure in civil litigation in the High Court and District Court of Hong Kong are contained in Order 24 of the Rules of the High Court (Cap 4A) and in the Rules of the District Court (Cap 336H), respectively. These rules do not apply to claims in other courts or tribunals, including the Magistrates' Courts, Small Claims Tribunal or Labour Tribunal.

Under Order 24 of the Rules of the High Court, there is an automatic discovery process (general discovery), which the parties must fulfil without necessitating a court order. Accordingly, a party to a court action must generally file and serve a list of documents within 14 days after close of pleadings. Each party must also allow the other parties to the proceedings to inspect and take copies of the disclosed documents. If a party does not comply with the general

discovery requirement within the prescribed time, any other party to the proceedings may apply for a court order on general discovery against that party.

The scope of discovery is very wide, in accordance with common law rules. Generally, discoverable documents include all documents:

- On which a party relies.
- That adversely affect that party's case.
- That adversely affect the other party's or parties' case.
- That support the other party's or parties' case.

Therefore, the parties are under a duty to provide the opposing party or parties with documents that can negatively impact their case.

"Document" is defined widely as anything in which information of any description is recorded. This extends to electronic documents. Electronic document covers any document held in electronic form, including:

- Email.
- Other electronic communications such as text messages and voicemail.
- Word-processed documents and databases.
- Documents stored on portable devices, such as memory sticks and mobile phones.

In addition to documents that are readily accessible from computer systems and other electronic devices and media, it includes documents that are stored on servers, back-up systems and deleted documents. It also includes metadata and other embedded data that is not typically visible on screen or a print-out.

A party need only disclose documents that are, or have been, in their possession, custody or power where:

- A document is, or was, in their physical possession.
- They have, or have had, a right to possession of it.
- They have, or have had, a right to inspect or take copies of it.

*(Order 24, Rules of the High Court.)*

The court has wide powers to give orders on discovery, which, depending on the circumstances, can be more or less onerous than general discovery. For example, the court can order that a party discloses the documents on which it relies (in support of its case), at the same time as requesting specific documents from the other party (*Order 24, Rule 7, Rules of the High Court*).

A party has a continuing obligation to give discovery, therefore, the duty of disclosure continues until the proceedings are concluded. In practice, if a document comes to the notice of a party at any time during the proceedings, and the document falls within the remit of discovery under Order 24 (or as the court orders), that document must be disclosed to every other party to the proceedings.

Once a party receives another party's list of documents, it may make an appointment with that party's solicitors to inspect the disclosed documents, usually within seven days after receiving the list. It may also request copies of the disclosed documents, subject to payment of reasonable photocopying charges.

A party may claim privilege in disclosed documents in the list of documents and refuse to allow the other party to inspect them. The documents over which the party claims privilege are set out, in general terms, in that party's list of documents.

The rules of privilege, or their equivalent, emanate from the common law or statutes.

## Rules of Specific Discovery

The court can compel a party to disclose specific documents, on the application of another party to the action or on its own initiative.

In particular, the court may order a party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in its possession, custody or power, and if not then in its possession, custody or power when the party parted with it, and what has become of it (*Order 24, Rule 7, Rules of the High Court*).

In making its decision, the court considers all the circumstances of the case and only orders production of documents if it is necessary for fair disposal of the cause or matter, or for saving costs (*Order 24, Rule 13, Rules of the High Court*). The court should also consider the underlying objectives of the court rules under Order 1A, Rule 7 of the Rules of the High Court. These include ensuring that a case is dealt with as expeditiously as reasonably practicable, promoting a sense of reasonable proportion and procedural economy in the conduct of proceedings, and so on. Consideration should be given to the following:

- The importance of the case.
- The complexity of the issues.
- The financial position of each party.
- Ensuring that the case is dealt with expeditiously and fairly.

The court generally does not allow a discovery request that is so extensive that it becomes oppressive to the requested party.

The court aims to avoid a fishing expedition. Applicants must be focused in their request, clearly describing the documents of which they seek specific discovery.

An order for specific discovery may be made before general discovery occurs. Parties can seek discovery before proceedings begin (pre-action discovery) (*section 41, High Court Ordinance (Cap 4)* and *Order 24, rule 7A, Rules of the High Court*). The court can also make a discovery order that a third party disclose certain documents (*section 42, High Court Ordinance (Cap 4)* and *Order 24, rule 7A, Rules of the High Court*). An application to the court under these sections must be supported by affidavit evidence showing that:

- The applicant and the person against whom the order is sought are likely to be parties to subsequent proceedings.
- The documents requested are relevant to an issue arising or likely to arise in the proceedings and the person against whom the order is sought is likely to have or have had them in their possession, custody, or power.

## Legal Professional Privilege and Professional Secrecy Rules

Legal professional privilege protects certain communications between lawyers, clients and third parties. A party who claims privilege is entitled to withhold inspection of these communications from the other party and from the court.

Without prejudice privilege protects confidential communications that contain evidence of genuine settlement discussions between the parties from being seen by the court. These documents cannot be shown to the court, unless they are considered privileged save as to costs. If this is the case, they can be produced at court at the costs stage only.

There are two types of legal professional privilege in common law:

- Legal advice privilege.
- Litigation privilege.

Common law applies to Hong Kong under Article 8 of the Basic Law. (For more information, see [Purpose](#).)

Parties to litigation can refuse disclosure of documents, usually by claiming legal professional privilege if the following requirements have been met:

- The communication in question has been made in confidence.
- To a legal advisor acting in a professional capacity.
- The dominant purpose which the communication has been made is for pending litigation or for obtaining professional advice.

Although traditionally confidential information other than those passing between parties to litigation and their legal advisors is not covered by privilege, the Hong Kong courts have further extended the scope in two aspects, including:

Litigation privilege which covers all communication produced or generated with the dominant purpose of its author or of the person or authority whose direction, whether particular or general, is aimed at using the communication to obtain legal advice or to conduct or aid in the conduct of litigation, which is in reasonable prospect at the time of communication

For the purpose of litigation privilege, the concept of "client" is now construed widely, and it also covers communications produced by employees on behalf of or for a corporate entity for the purpose of anticipated, pending, or ongoing litigation.

If a document in which legal professional privilege subsists is given to a non-party and the content ceases to be confidential, the privilege is usually lost and there may be an obligation to disclose privileged material to the

court. This is because the act of giving the document is inconsistent with the continuing intention to maintain confidentiality.

However, there are two exceptions where the non-party may refuse to disclose privileged materials to the court in response to a court order:

- Common interest privilege.
- Joint interest privilege.

Common interest privilege operates where the person entitled to the privilege and the non-party have a common interest in relation to the subject matter of the privilege and the sharing of the content is consistent with an ongoing intention of preserving the privilege against third parties (*Marshall v Prescott* [2013] NSWCA 152).

The doctrine of common interest privilege can only be invoked where:

- The relevant communication is subject to legal professional privilege.
- The interest said to be common can be identified.
- The exchange of the information or advice subject to legal professional privilege is related to that interest.

(*Lane v Admedus Regen Pty Ltd* [2016] FCA 864.)

A joint interest privilege arises where two or more persons communicate with a legal advisor for the purpose of retaining that legal advisor's services or obtaining that legal advisor's advice. A joint interest privilege also arises where there is a joint interest in the subject matter of a privileged communication. Joint interest privilege may arise in relationships between beneficiaries and trustees, a company and its shareholders, and partners.

(See [Disclosure to Entities with a Common Interest](#) and [Disclosure to Entities Represented by the Same Counsel](#).)

## Non-Contentious Matters

Legal advice privilege applies in situations where legal advice is sought and given. This type of privilege applies to confidential communications between the lawyer and their client, for the dominant purpose of giving or receiving legal advice. It also covers internal documents prepared by the client for that purpose.

## Civil Litigation

Litigation privilege applies in contentious circumstances, in addition to legal advice privilege. Litigation privilege is sometimes a wider form of privilege than legal advice privilege because it can include confidential communications between the lawyer, their client and third parties. The communications must be for the dominant purpose of litigation that must be existing, pending or in reasonable contemplation (see [Purpose](#)). Litigation privilege is less commonly claimed than legal advice privilege because litigation must be at least in reasonable contemplation for it to apply.

## Criminal Litigation

The same principles of legal advice privilege and litigation privilege apply in criminal litigation. (For more information, see [Privilege in Unique Contexts](#).)

## Regulatory Proceedings

Legal professional privilege applies in the context of proceedings before regulatory authorities in Hong Kong. There are specific rules regarding the rules of privilege in investigations by regulatory authorities, for example the Competition Ordinance (Cap 619) and the Securities and Futures Ordinance (Cap 571). In addition, some regulators issued detailed guidelines relevant to their practice (see *Competition Commission: Investigation Powers of the Competition Commission and Legal Professional Privilege*, December 2015).

The Securities and Futures Commission (SFC) may offer leniency to a party who is willing to waive legal professional privilege, if that helps facilitate the SFC's investigation or prosecution work. However, there are no specific guidelines or policies, and the terms of any leniency measures are discussed on a case-by-case basis.

## Arbitration Tribunals

There are no set rules on how an international arbitral tribunal should deal with the issue of privilege. The matter is complicated by the fact that common law and civil jurisdictions deal with privilege very differently. It is for the tribunal to decide all procedural and evidential matters, including in relation to privilege.

In the absence of any prior agreement by the parties, the tribunal can decide to adopt the Hong Kong rules of legal professional privilege. In addition, the [International Bar Association Rules on the Taking of Evidence in International Arbitration 2020](#) provide some general guidance on how a tribunal should resolve a claim of privilege.

## Employment Tribunals

Legal professional privilege applies in the same way to proceedings in the Labour Tribunal.

Questions have been raised about whether privilege can apply to non-legal professionals representing or advising parties in employment tribunals since there is sometimes a practice in employment tribunal proceedings of non-legal professionals, for example HR consultants, working in roles usually occupied by lawyers.

## Purpose

### Legal/Litigation Proceedings

Litigation privilege applies to any document:

- That is a confidential communication.
- That passes between:
  - the lawyer and the client;
  - the lawyer (acting in a professional capacity) and a third party; or
  - the client and a third party.

- Where the dominant purpose in creating the document was to obtain legal advice, evidence or information for use in the conduct of litigation.
- When litigation was reasonably in prospect at the time the document was created.

For litigation privilege to apply the litigation must be adversarial, not investigative or inquisitorial (see *Three Rivers District Council v The Governor and Company of the Bank of England* [2004] UKHL 48 (Three Rivers (No 5))). Adversarial proceedings include proceedings in the High Court, District Court, tribunals and, where it is subject to Hong Kong procedural law, arbitration. However, the position is less clear regarding public inquiries or statutory investigations. Each must be considered on a case-by-case basis.

For a document to be protected by litigation privilege the dominant purpose for which the document was created must be litigation. If the dominant purpose in its creation was not litigation, the document will not be covered by litigation privilege (although it may fit within the definition of legal advice privilege). The courts assess the document objectively. This can mean looking at the objective purpose of the document, rather than what the author considered the purpose to be.

For litigation privilege to apply, litigation must also be either pending, existing or in reasonable contemplation. Litigation should be a real likelihood rather than a mere possibility, although the chance does not need to be higher than 50% (*USA v Philip Morris & Another* [2004] EWCA Civ 330).

### Legal Advice

For legal advice privilege to apply, the document must be a confidential communication that was prepared for the purpose of giving or receiving legal advice.

In *Citic Pacific Ltd v Secretary for Justice (No 2)* [2015] 4 HKLRD 20 (Citic Pacific (No 2)), the Hong Kong Court of Appeal declined to adopt the narrow definition of "client" in the English case of *Three Rivers (No 5)*. The dominant purpose test is adopted and a document is protected by legal advice privilege if it came into existence as part of the continuum of communication between a lawyer and a client with a dominant purpose of giving and receiving legal advice. For a corporate client, the client not only includes the employees designated to receive legal advice, but also the employees who communicate with the lawyer for the dominant purpose of giving or receiving legal advice.

## Scope of Legal Privilege and Professional Secrecy Rules

### Communications

Under the court rules, the term "documents" is not defined but effectively includes anything in which information is recorded. It is not restricted to paper documents, but extends to anything on which evidence or information is recorded in a manner intelligible to the senses or capable of being made intelligible by the use of equipment (for example, tape recordings of evidence or information). Documents include, but are not limited to:

- Paper documents, including letters, faxes, or manuscript notes.
- Electronic documents, including word documents, emails, presentations, or meta data.
- Recordings and transcripts of telephone conversations.
- Copies of any of the above.

Documents evidencing privileged communications are privileged (in relation to that content only). On the lawyers' side, these documents are sometimes known as the "lawyers' working papers". An example would be an email between lawyers within a firm discussing a phone call with the client or an attendance note setting out the contents of a meeting or a telephone conversation between a lawyer and a client.

A document evidencing privileged communications is also protected under legal professional privilege (*Three Rivers District Council and others v Bank of England* [2003] EWCA Civ 474). This is because the privilege arises from the purpose for which the document is created, not the fact of its communication.

Legal professional privilege has been held to extend to notes, memoranda, minutes or other documents (made by the client or officers of the client or the legal adviser of the client) of communications which are themselves privileged or containing a record of those communications (*Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-6).

Draft communications between a lawyer and a client attract privilege even if they are never actually communicated (*Three Rivers District Council and others v Bank of England* [2003] EWCA Civ 474). It is also clear that the working papers and notes of lawyers are generally privileged. The area of difficulty is in the client working on its own papers and notes, as this depends on timing.

*Three Rivers (No 5)* confirmed that documents evidencing privileged communications are themselves privileged. Therefore, a client's internal summary of a meeting with a lawyer after it takes place is privileged. However, if the client introduces additional information or its own reactions to the advice, these parts of the document will not attract privilege. Care should be taken to ensure that privilege is not lost in the whole document.

Based on *Citic Pacific (No 2)*, documents drafted by clients in preparation of obtaining legal advice are privileged, as long as they came into existence for the dominant purpose of seeking legal advice.

## Third Parties

For legal advice privilege to apply, the communication or document must pass between the lawyer and the client. It was held in *Citic Pacific (No 2)* that documents that came into existence for the dominant purpose of seeking or giving legal advice would be privileged. These include internal preparatory documents and communications within a client (in other words, internal communications within a corporate client) for the purpose of seeking legal advice. However, the Court of Appeal in *Citic Pacific (No 2)* expressly left open the question of whether third party communications may be covered by legal advice privilege.

Litigation privilege can apply to communications between the lawyer and a third party, or the client and a third party, provided that the other requirements are met.

Legal advice privilege can also apply to communications between the client and lawyer through an agent. This is only the case if the agent does not themselves add something to the communication (except under the direction of the lawyer), and must only act as a letter box.

Third party communications between the third party and the lawyer, or the third party and the client, are protected if they fall within the definition of litigation privilege. As the Court of Appeal in *Citic Pacific (No 2)* did not rule on the coverage of legal advice privilege over third-party communications, the courts' clarification of this issue will be welcome.



## Confidentiality

For a document to be privileged it must be confidential. Therefore, notes of meetings between the parties to litigation and transcripts of court proceedings can never be privileged.

As confidentiality is a prerequisite to privilege, if confidentiality is lost, so is privilege. However, if a document is disclosed on confidential terms, privilege will not be lost for the wider world.

Loss of confidentiality can also be inadvertent (see [Scope of Waiver](#)).

## Adverse Inferences

No adverse inference can be drawn from a refusal to waive privilege. In Hong Kong, the right to confidential legal advice is enshrined in Article 35 of the Basic Law.

The Hong Kong Court of Appeal applied the English law principle in *Wentworth v Lloyd* (1864) 10 HL Cas 589 in *HKSAR v Leung Oi Yin Scarlettte* [2016] 2 HKLRD 472 at 490, paragraph 35 (see *Chu Po Ling v Chung Chun Shing* [2014] HKDC 324; *DCCJ* (unreported) 28 March 2012 and *Singh Arjun by his next friend Singh Anita Guruprit v SOJ* [2016] HKDC 626; *DCEO 9/2011* (30 May 2016, unreported) at [248] per HH Judge Ko).

## Exceptions

Privilege can be lost or cannot be claimed (aside from waiver, loss of confidentiality and inadvertent disclosure) in the following circumstances:

- The fraud or iniquity exception, which provides that communications and documents which came into existence for a criminal purpose are not protected by privilege.
- Documents relating to dissolved companies. If a company no longer exists, it cannot assert any right to privilege.
- In the context of foreign proceedings, a document considered privileged under Hong Kong law is not necessarily privileged in another jurisdiction. Separate local advice should be taken on this point. A Hong Kong Court will not order the disclosure of documents on the request of a foreign court or enforce a foreign order for disclosure of documents if it would contravene Hong Kong law.

Specific exceptions to privilege are set out in the following laws:

- Competition Ordinance (Cap 619).
- Securities and Futures Ordinance (Cap 571).
- High Court Ordinance (Cap 4).
- Crimes Ordinance (Cap 200).
- Theft Ordinance (Cap 210).
- Companies Ordinance (Cap 622).

## Defining the Client

In light of *Citic Pacific (No 2)*, the significance of the definition of "client" for the purpose of legal advice privilege under Hong Kong law is not as complex as it is under English law. The more pertinent question is whether or not the confidential document in question came into existence for the dominant purpose of seeking or giving legal advice.

However, corporate clients should try to minimise internal communications containing confidential information and ensure that all communications with lawyers are made through designated members (who are expressly named in the lawyers' retainer/engagement letter) within the corporate client. This will reduce the risk of any finding by the court that a document was not created for the dominant purpose of legal advice and, therefore, not covered by legal advice privilege.

## Defining the Lawyer

### Lawyers' Employees

Legal professional privilege can apply to paralegals and trainees but only if they are properly supervised by a qualified solicitor. Their work is viewed as that of the department they belong to rather than as their own. Communications with the client are only privileged if the paralegal or trainee gives advice, or helps to give advice in the context of the relationship between the client and the qualified solicitor acting on their behalf.

The determining factor is the supervision by a qualified solicitor rather than a person being a legal professional in training or working in the legal sector. Therefore, communications to a client from other employees of a law firm, such as personal assistants, can also be privileged if those employees act under the supervision of a qualified lawyer.

### Foreign Lawyers

Where advice is sought from foreign lawyers for the purposes of Hong Kong proceedings, it is permissible to claim privilege for that advice.

Section 39A(2) of the Legal Practitioners Ordinance (Cap 159) provides that solicitor-client privilege exists between a foreign lawyer and their client to the same extent as solicitor-client privilege.

The Hong Kong court adopted the common law *lex fori* principle. Accordingly, the question of privilege is a procedural matter governed by Hong Kong law. In general, if a communication satisfies the requirements of the Hong Kong law of privilege, privilege may be claimed for communications between a foreign lawyer (whether or not the lawyer practises in Hong Kong) and a foreign client.

### In-House Lawyers

Legal professional privilege applies in the same way to in-house lawyers. However, communications made by in-house lawyers relating to management or administration, or communications that contain commercial advice, do not attract privilege. There is a risk of privilege being lost in the whole document where it contains non-privileged information.

Where the elements of privilege are satisfied, communications between an in-house lawyer and a subsidiary are privileged. For example, the advice should be given in a relevant legal context for legal advice privilege to apply (for

example, see *Gotha City v Southeby's* [1998] 1 WLR 114 and *Berezovsky v Hine and others* [2011] EWCA Civ 1089). Each subsidiary is deemed a separate client of the in-house lawyer.

It is sensible to accurately record the companies for which the in-house lawyer is retained. If this has not been done, any communications will still be privileged if they fall within the definitions of legal professional privilege.

## Other Professionals

Legal professional privilege does not extend to other professional advisers who may give advice on points of law, for example, accountants providing tax advice (*Super Worth International Ltd v Commissioner of ICAC* [2016] 1 HKLRD 281). While such other professionals may be subject to confidentiality rules under their respective professional conduct rules, the law does not afford legal professional privilege to their advice, even though their advice involves legal matters.

## Duration of Privilege

There is a general rule that once privileged, always privileged. Therefore, documents generally remain privileged in subsequent proceedings. There are, however, certain circumstances where the documents must be disclosed, for example, where a client sues a legal adviser who must refer to the privileged documents to establish a defence.

(For more information, see [Exceptions](#) and [Scope of Waiver](#).)

## Loss and Waiver of Privilege

### Scope of Waiver

Privilege belongs to the client. As a result, only the client can waive privilege. If the lawyer considers that a waiver of privilege should be made for a particular document or class of documents, they must obtain consent before waiving privilege.

Privilege can be lost by:

- Loss of confidentiality (see [Confidentiality](#)).
- Waiver of privilege.
- Inadvertent disclosure.

Waiver refers to where a party to litigation voluntarily produces a privileged document to the other party or to the court. This can be intentional or unintentional.

Privilege is waived intentionally where a party serves documents in the course of litigation. This intentional waiver includes service of:

- Witness statements.
- Experts reports.

- Pleadings.
- Documents in open correspondence with the other party.

More specifically, making reference to a privileged document in court documents, such as pleadings and affidavits, gives the other party the right to inspect the document (*Order 24, Rule 10, Rules of the High Court (Cap 4a)*). Reference to a privileged document may result in a party waiving its right to withhold inspection of the document.

In addition, referencing a privileged document, or intentionally waiving privilege in a document, could lead to the waiver of privilege in all other associated documents. These must then also be produced. For example, waiving privilege over a letter of advice from a solicitor may lead to the waiver of privilege over all letters from the same solicitor dealing with the same issue.

Parties should be aware that privilege cannot be waived over part of a document. Waiving privilege over part of a document could lead to the whole document losing privilege (see [Partially Privileged Documents](#)).

Privilege is not waived if a privileged document is disclosed to a third party, or to a limited class, for an expressly stated purpose. This is known as the doctrine of limited waiver, which is recognised by the Court of Appeal in *Citic Pacific (No 2) v Secretary for Justice [2012] 2 HKLRD 701*. If any disclosure is intended for a particular purpose, it is advisable to disclose the documents on the express understanding that privilege is only waived for a limited purpose.

Advice should be taken, however, before pursuing any of these courses of action, and more generally on the content of documents communicated to the other party or a third party. Waiver is a complex and fact sensitive area of law and errors have potentially far reaching consequences.

Where a party's lawyer inadvertently discloses privileged documents to other parties in court proceedings, the question arises as to whether there has been any waiver of privilege.

The English common law position has persuasive power in Hong Kong. The position is set out by the UK Court of Appeal in *Al-Fayed v Commissioner of Police of the Metropolis [2002] EWCA Civ 780*, as follows:

- If a party allows inspection, it is generally too late to claim privilege. The receiving solicitor is entitled to assume that privilege is waived.
- The court can grant an injunction where justice requires, including where the documents made available for inspection was an obvious mistake.
- A mistake is likely to be obvious where the solicitor appreciates that a mistake was made before using the documents, or where it would have been obvious to a reasonable solicitor in that position that a mistake was made.

Care should be taken that confidentiality is not lost by sharing the document with third parties. If, however, a document is disclosed to a small number of individuals on express confidential terms, it will only lose its confidentiality to those individuals.

Communicating privileged advice at a board meeting orally or in the form of minutes should not result in loss of privilege. Parties are however recommended to obtain legal advice on the matter.

Documents disclosed for compliance are unlikely to result in the loss of privilege as these documents should be covered by legal advice privilege, although the confidential nature of the information must be made clear. This is,

however, not certain, and parties should take legal advice before deciding how to disseminate the information within the organisation to ensure that the information falls within the definition of legal advice privilege.

In general, documents shared within an organisation should include wording that they are privileged and confidential, and that there is no waiver of privilege intended in sharing them. It should be made clear that the documents are only to be shared with those who are required to have knowledge of their content and not disseminated further.

Retaining privilege on related documents is not allowed and is referred to as collateral waiver. The party is obliged to provide the associated documents to give the court and the other parties a full picture.

The court generally frowns on a party cherry picking which privileged documents to disclose. This could mislead the other parties and the court about the full circumstances of the case.

In these circumstances, it may be possible to retrieve the material in which privilege is waived (to avoid disclosing the further associated documents), but only if it is not yet deployed in court (*R v Secretary of State for Transport ex parte Factortame Ltd* (1997) 9 Admin LR 591).

(See [Partially privileged documents](#).)

## Disclosure to Entities with a Common Interest

Privilege is maintained in a document on disclosure to a third party with a common interest.

The common interest can arise where the third party has a common interest in the subject matter of the privileged document or in litigation in connection with which the document was brought into existence. For example, common interest can arise between co-defendants in a breach of contract claim who have a common interest in defeating the plaintiff's claims and who wish to disclose confidential communications to each other and their respective lawyers. However, as the application of common interest can be unclear, if in doubt, parties should consider disclosure on the basis of express contractual undertakings that privilege in the documents is not waived.

Privilege can be waived unilaterally by the sharing party. Only the party that first had privilege in a document, before sharing it with a party with a common interest, has the right to waiver. No consent is required from any other party. This is in contrast to joint privilege where both parties must agree to waive privilege (see [Disclosure to Entities Represented by the Same Counsel](#)).

Common interest may arise by an express agreement between the parties. However, it may also arise from the circumstances of the relationship between the parties or by inference based on the parties' mutual conduct. Express agreement to preserve the common interest privilege is preferred.

## Disclosure to Entities Represented by the Same Counsel

### Joint Retainer

If parties retain the same solicitor to advise on a matter, they may see any privileged communications to which they have not been a party, and are not entitled to claim privilege against each other for those communications in any subsequent litigation.

## Joint Interest

Where a third party can establish a joint interest in the subject matter of a privileged communication between a lawyer and a client, and that third party is not party to the client lawyer relationship, joint privilege may apply. Examples can include companies and their shareholders, and parent companies and their subsidiaries.

## Requirements to Invoke and Waive Joint Interest

Joint privilege arises if the parties:

- Retain the same solicitor on a matter, creating a joint retainer (question of fact).
- Have a joint interest in a matter, for example, whether the parties could have retained the same solicitor.

The joint interest must exist at the time the communication came into existence. Joint privilege is not lost at a later date if the parties are in disagreement and joint interest no longer exists.

The parties may not waive privilege unilaterally (although the rules vary for executors of a will).

## Partially Privileged Documents

Privileged information contained in a document that is not privileged as a whole can be protected by redaction (which appears as blacked-out or covered sections on the page). A good example of where this may occur is a board minute that may contain a record of legal advice given to the board by its in-house or external lawyer together with regular company business. The legal advice can be redacted.

## Privilege in Unique Contexts

### Privilege Against Self-Incrimination

The privilege against self-incrimination originates from common law privilege, but the rules are modified by statutes in specific contexts, including the Securities and Futures Ordinance (Cap 571) and the Competition Ordinance (Cap 619).

In common law, privilege against self-incrimination exempts a person from being compelled to answer a question when called as a witness, produce documents, or provide information that might be incriminating in criminal proceedings or expose them to a penalty. It can be claimed by a company (*Triplex Safety Glass Co v Lancegagge Safety Glass* [1939] 2 KB 395). The privilege cannot, generally, be claimed for the protection of a third party (*British Steel Co v Granada Television* [1981] AC 1096 and *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547).

However, where specific legislation applies (for example, *Securities and Futures Ordinance* (Cap 571) and *Competition Ordinance* (Cap 619)), the rules in the relevant statutes prevail.

## Spousal Privilege

A spouse is exempt from being compelled to answer a question when called as a witness, to produce documents or provide information within the remit of the privilege against self-incrimination. Spousal privilege is based on common law privilege (*Versailles Trade Finance Ltd (in administrative receivership) v Clough* [2001] EWCA Civ 1509).

The privilege may only be claimed personally or on behalf of a spouse.

## Overriding Powers of the Court

There are circumstances in which the court can override the privilege against self-incrimination and order disclosure. Usually, the Hong Kong courts use these powers under express provisions in the applicable statute, which may, for example, replace the common law privilege with a prohibition on use of the incriminating material in criminal proceedings.

There are some statutory exemptions that allow the court to remove the privilege in certain situations, although there may be restrictions on how the evidence can be used as a result. The exemptions include, but are not limited to:

- Proceedings for infringement of rights pertaining to any intellectual property or for passing off (*section 44A, High Court Ordinance (Cap 4)*).
- Proceedings for recovery or administration of property, execution of a trust or for an account of property (*section 66, Crimes Ordinance (Cap 200)* and *section 33, Theft Ordinance (Cap 210)*).
- Investigations by the Securities and Futures Commission (SFC), in which a person is not excused from providing information to the SFC investigators, but the information provided may only be used in the prosecution of a limited group of offences (*sections 183 and 187, Securities and Futures Ordinance (Cap 571)*).
- Investigation of a company by an inspector appointed by the financial secretary, where the privilege is abolished by *section 863(7) of the Companies Ordinance (Cap 622)*.

## Internal Investigation

In a situation where an internal fact-finding investigation is being carried out in relation to an alleged misconduct or fraud in a company (with no legal advice being sought or litigation contemplated) an issue may arise as to whether employees' interviews or the final report to the board of directors will be considered privileged if the board subsequently decides to obtain legal advice.

The answer turns on the definition of legal advice privilege. For legal advice privilege to apply there must be a confidential communication that both:

- Passes between a lawyer and a client.
- Was prepared for the dominant purpose of giving or receiving legal advice.

Therefore, as the interviews with the employees or the final report given to the board were conducted before the decision to obtain legal advice, they are probably not covered by legal advice privilege, because they were not prepared for the purpose of giving or receiving legal advice.

If, on the other hand, the interviews with the employees or the final report given to the board were conducted after the decision was taken to obtain legal advice, they should be covered by legal advice privilege as they were prepared for the purpose of giving or receiving legal advice.

However, the answer actually hinges on the dominant purpose for which the interviews were conducted and the report (and any other documentary evidence) was prepared. If an internal report following the company's investigation is prepared for the dominant purpose of seeking legal advice, it will be covered by legal advice privilege. Moreover, any additional documentary evidence that was created or came into existence for that purpose is also privileged.

If the investigation is carried out after the decision is taken to pursue litigation, the documents will also probably be covered by litigation privilege. Litigation privilege will apply to the interviews as long as the dominant purpose of carrying out the interviews is for the purpose of obtaining legal advice, evidence or information for use in the conduct of the litigation. This principle is demonstrated by the recent English decision in *Bilta (UK) Ltd (In Liquidation) v Royal Bank of Scotland* [2017] EWHC 3535 (Ch).

(For more information, see [Recent Developments](#).)

The participation of an in-house lawyer or an external lawyer in leading the investigation or conducting the employee interviews does not always ensure that privilege is maintained. Litigation privilege is likely to apply in this situation if the client agrees to pursue litigation. However, where this is not the case, whether or not legal advice is taken, it is unlikely that the interviews will be covered by legal advice privilege unless it can be demonstrated that the investigation was conducted for the dominant purpose of seeking legal advice and the relevant documents are prepared for that purpose.

It is worth noting that there are some good practices that corporate entities would be advised to follow to ensure that privilege associated with documents and information relevant to an internal investigation is preserved and not inadvertently lost. Consideration should be given to the definition of "client". Although Hong Kong does not follow the narrow definition under English law, it remains advisable to adopt an appropriate definition in the lawyer's engagement letter. A wide and possibly artificial definition encompassing too many individuals could be subject to challenge. Likewise, a very narrow definition may be too restrictive and therefore not practical for the particular situation.

Communications regarding the investigation should be directed, where possible, through the in-house lawyer to try and retain privilege. In very sensitive situations, it may be prudent to instruct an external lawyer to ensure legal advice privilege is in play if litigation privilege cannot attach to the situation, although this does not necessarily ensure privilege attaches to the communication.

Parties should also consider whether communications must be committed to writing. Oral discussions may protect these communications from production further along the line.

If legal advice or documents subject to privilege must be disseminated, whether to the internal client or more widely within the company (for example, to a subsidiary), the information should be flagged as private and confidential to ensure that the confidential nature of the communication is not lost. It is also good practice to copy a document in full rather than to rewrite it. If the advice must be sent to a third party, it should be made clear that the advice or documents are confidential and privileged, and that their provision does not amount to a waiver of privilege.

## M&A Transactions



Where a potential buyer of a company has requested access to privileged documents related to some of the past litigation in which the target company has been involved and the selling target company does not wish to waive its privilege in the confidential material, the issue may arise as to whether the privileged documents be shared with the potential buyer and still retain their privileged status by asking the buyer to sign a contractual undertaking.

In general, a client can engage in a limited sharing of privileged material with another in confidential circumstances in which the other agrees to respect and to maintain the confidentiality (and, therefore, the privilege) of the shared materials. While there are some circumstances in which the sharing can be conducted without a loss of privilege, the courts usually require some legal or commercial justification for engaging in the sharing. Sharing with a potential buyer on agreed terms would almost certainly be regarded by an English court as not amounting to a loss of privilege.

The UK Court of Appeal recognised sharing in this way (see *Gotha City v Southeby's* [1998] 1 WLR 114 where a confidential sharing took place between defendants to litigation).

There are inevitably dangers with sharing, not least the prospect that the sharing will attract a claim that privilege is waived. Careful thought should be given before engaging in the sharing of privileged communications with anybody because of the risk of losing control over the further dissemination of the information. If sharing is necessary, it is important to ensure that the terms are clearly documented. Conversely, where litigation is material, the buyer and its lawyers are likely to want to see the documents relating to it.

The seller management company can ask the buyer to sign a contractual undertaking such as a non-disclosure or confidentiality agreement to protect the information. A duty of confidentiality is unlikely to be implied in this situation and the seller should seek express and binding obligations from the buyer extending to its officers, employees, agents, and contractors (who should only be given access to the information on a need-to-know basis). The confidentiality obligations should include an obligation to destroy or return the information if negotiations are terminated.

## Cross-Border Matters

Investigating authorities, whether in Hong Kong, or from another jurisdiction, recognise the importance of privilege. The rules on protection of communications differ depending on the jurisdiction involved and the relevant investigating authority. There is no settled rule about whether the courts and regulatory authorities apply local laws or the law of the forum to determine privilege associated with a document.

Traditionally, Hong Kong law has applied the law of the forum (*lex fori*) to determine privilege, following English rules of privilege. In light of recent decisions in Hong Kong and overseas (for example, Australia), which reviewed the countervailing arguments, the issue of whether local laws or the law of the forum should be applied needs authoritative consideration by the higher courts (see *RMBSA Corporate Services Ltd v Secretary for Justice* [2010] 1 HKLRD 737 and *Super Worth International Ltd v Commissioner of ICAC* [2016] 1 HKLRD 281).

The prevailing view is that, in general, the law of the forum (that is, Hong Kong law) should apply. Where local law differs from Hong Kong law, the court or regulatory authorities may decide to apply the local law, subject to the constraints of Hong Kong public policy (see *Charles Hollander QC, Documentary Evidence in Hong Kong* (Sweet & Maxwell Hong Kong, 12th ed, 2015), 183 to 184).

Hong Kong courts apply the principle of *lex fori* in the event of conflicts. To determine whether a document is covered by privilege, the Hong Kong court applies Hong Kong rules of privilege (*Re Duncan* [1968] P 306). Therefore, a document that is not privileged in the country in which it was created or is located may be considered privileged

in the Hong Kong courts and vice versa. However, this can lead to a range of practical complications, especially in jurisdictions where the local definition of privilege may be broader or narrower than Hong Kong law.

In *Super Worth International Ltd v Commissioner of ICAC* [2016] 1 HKLRD 281, the Court of Appeal stated that there is room for flexibility in the traditional *lex fori* rule, without deciding on the issue. The Court of Appeal emphasised that privilege is a right originating in the public interest and its limits are informed by domestic considerations pertaining to that public interest. A client's expectation of confidence is not enough to attract privilege. The court may be prepared to allow for flexibility to the traditional *lex fori* rule in a suitable case.

## Recent Developments

The law of privilege in relation to litigation privilege and legal advice privilege has received commentary by the English courts in recent years, which are of persuasive authority in the Hong Kong courts.

In the English decision of *SFO v ENRC* [2017] EWHC 1017 (QB), the High Court took a restrictive approach when considering whether and at what point litigation privilege applies to a claim brought by a regulator in the context of both criminal and civil proceedings. This was later reversed by the Court of Appeal in *SFO v ENRC* [2018] EWCA Civ 2006 where it was held that the prospect of criminal prosecution was sufficient for establishing that litigation was in reasonable contemplation of the party asserting litigation privilege. The Court of Appeal further commented that whilst it was bound by the authority from *Three Rivers (No 5)* that legal advice privilege cannot apply to communications between a company's legal advisers and its employee unless that employee was tasked with seeking and receiving legal advice on behalf of the client, it was prepared to depart from this authority.

There have been several cases on privilege in the English courts since the decision in *SFO v ENRC* [2018] EWCA Civ 2006:

- In *Bilta (UK) Ltd (In Liquidation) v Royal Bank of Scotland* [2017] EWHC 3535 (Ch), the court held that documents created by a bank and its external litigation solicitors in relation to an investigation by the HMRC had been produced for the sole or dominant purpose of expected litigation, and were therefore covered by litigation privilege.
- In *WH Holding Ltd v E2o Stadium LLP* [2018] EWCA Civ 2652, the English Court of Appeal applied the dominant purpose test and found that internal emails between a company's directors prepared for discussing a commercial proposal for settling a dispute were not covered by litigation privilege, as they were not prepared for the dominant purpose of conducting litigation.
- In *Civil Aviation Authority v R Jet2.com Ltd* [2020] EWCA Civ 3, the English Court of Appeal held that a claim for legal advice privilege required the party claiming privilege to show that the relevant document or communication was created or sent for the dominant purpose of obtaining legal advice.
- In *Sports Direct International plc v Financial Reporting Council* [2020] EWCA Civ 177, the English Court of Appeal confirmed that pre-existing, non-privileged attachments must be disclosed regardless of whether it has been attached to a privileged communication. This is also in line with the principle as set out in the *Civil Aviation Authority v R Jet2.com Ltd* [2020] EWCA Civ 3 in the preceding paragraph. Note the case is pending appeal to the Supreme Court.

In relation to legal advice privilege, the recent decisions in the English courts appear to be in line with the approach set in *Citic Pacific Ltd v Secretary for Justice (No 2)* [2015] 4 HKLRD 20 (*Citic Pacific (No 2)*) that a party claiming legal advice privilege is required to show that the document or communication was created or sent for the dominant purpose of obtaining legal advice.

In relation to litigation privilege, it remains to be seen whether the Hong Kong courts will adopt the approach of the English courts in recent decisions. English authorities are generally of high persuasive value to the Hong Kong courts.

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