



Bird & Bird & First for Disputes

Knowhow briefs
Privilege

Executive summary:

- A party has an absolute right to withhold a privileged document from production to a third party.
- It is only necessary to claim privilege in respect of documents which are relevant to a particular dispute, and which would otherwise have to be disclosed.
- No adverse inference may be drawn by the court if privilege is claimed.

What are the types of privilege?

1. The main categories of privilege under English law are as follows:

- legal professional privilege;
- without prejudice privilege;
- privilege against self-incrimination;
- common interest privilege;
- public interest immunity privilege.

The focus of this brief is legal professional privilege under English law.

What is legal professional privilege?

1. Parties to English litigation are required to disclose all documents on which they seek to rely or which are adverse to their case or the other party's case, or which support the other party's case. Parties to arbitration are also likely to be required to disclose relevant documents.
2. A limited exception to disclosure is where a document attracts legal professional privilege. There are two main types of legal professional privilege:

Legal advice privilege

- Applies to:
 - confidential communications,
 - which pass between a client and his lawyer,
 - which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context.
- Applies whether or not litigation is pending or contemplated.
- Does not apply to communications by a client or his lawyers and a third party.
- Narrower in ambit than litigation privilege but can be more commonly claimed.

Litigation privilege

- Applies to:
 - confidential communications;
 - which pass between:
 - (i) a client and his lawyer;
 - (ii) a lawyer (acting in a professional capacity) and a third party;
 - (iii) a client and a third party;
 - which have been made for the dominant purpose of litigation (which, for these purposes, includes other types of legal proceedings including court proceedings).
- Applies only if litigation is pending, reasonably contemplated or existing.
- Wider in ambit than legal privilege but cannot be claimed as commonly.

What are the common features of legal advice privilege and litigation privilege?

Communication

1. In general, documents must be communicated to attract privilege, although the rules are more flexible where there has been no communication by a lawyer as opposed to no communication by a client.
2. Under the Civil Procedure Rules, a 'document' means anything in which information of any description is recorded, which therefore includes, but is not limited to:
 - paper documents, including letters, faxes, manuscripts notes etc.;
 - electronic documents, including word documents, emails, presentations etc.;
 - recordings and transcripts of telephone conversations.
3. A document will not automatically attract privilege simply because it is communicated to a lawyer; it must also comply with the other necessary requirements to be privileged.

Confidentiality

1. Privilege cannot be claimed unless the material in question is confidential.
2. There can be no confidentiality, and therefore no privilege, in the following types of documents:
 - attendance notes of meetings at which the parties were present;
 - transcripts of proceedings in an open court.

Involvement of a lawyer

1. A "lawyer" for these purposes includes solicitors, barristers, in-house lawyers, foreign lawyers, potentially legal executives and trainees and paralegals if properly supervised.
 - legal professional privilege does not extend to other professional advisers who may give advice on points of law e.g. accountants providing tax advice.
 - communications made by in-house lawyers relating to management or administration, or which contain commercial advice, do not attract privilege.

What are the specific features of legal advice privilege and litigation privilege?

Legal advice privilege

1. Who is the client?
 - The definition of 'client' is very restrictive and therefore privilege will only attach to documents sent between the lawyer and the client as defined in the retainer.
 - Where the client is a company, privilege will only attach to documents communicated by those expressly or impliedly tasked with communicating with the lawyers.
2. What does legal advice privilege cover?
 - Advice as to legal rights and obligations, and advice as to what should prudently and sensibly be done in the relevant legal context.
 - There may be a "relevant legal context" if the advice relates to rights, liabilities, obligations or remedies of the client under public or private law in a particular set of circumstances.
 - It does not cover advice of a purely strategic or commercial nature which is not provided in any sort of legal context.
3. When does legal advice privilege apply?
 - Applies whether or not litigation is pending.
 - Only applies to communications between a lawyer and his client and will not generally cover internal documents generated by employees of the client, even if these documents are necessary to provide information to lawyers to obtain legal advice.

Examples

- ✓ *Lawyers' file notes, drafts of legal advice, instructions to counsel*
- ✓ *Board minutes summarising or attaching a copy of legal advice*
- ✗ *Ad hoc commercial advice given by a lawyer*
- ✗ *Board minutes discussing legal advice or its implications*

Litigation privilege

1. Who is the client?
 - Since litigation privilege applies to communications with third parties, the difficulties that arise in identifying the client for the purposes of legal advice privilege are not relevant.
2. What does litigation privilege cover?
 - Communications made for the dominant purpose, as opposed to the exclusive purpose, of litigation which is pending, reasonably contemplated or existing.
 - The relevant "purpose" is broad and can cover many aspects of the litigation process. The court will apply an objective test to examine the purpose of a document.
 - "Litigation" for these purposes includes proceedings which are judicial in nature, as opposed to investigative or administrative, e.g. court proceedings, employment tribunals and arbitrations subject to English procedural law.
3. When does legal advice privilege apply?
 - Applies only if litigation is pending, reasonably contemplated or existing.
 - Litigation must be a real likelihood rather than a mere possibility, but not necessarily greater than a 50% chance.

Examples

- ✓ *Notes of meetings/teleph one calls between lawyers and clients prepared for the purpose of gathering information relating to a dispute*
- ✓ *Notification of claim to insurers*
- ✗ *Internal notes relating to the litigation which are not communicated*

Can privilege be lost?

1. **Loss of confidentiality:** Privilege can be lost when a communication ceases to be confidential, for example, if an email which would otherwise be privileged is forwarded to a third party. If, however, the email is sent in confidence, privilege can still be claimed as against the “rest of the world”.
2. **Waiver of privilege:** This arises where a party to litigation voluntarily produces a privileged document to the other party, or to the court. The waiver may give rise to an obligation to produce further associated privileged documents. In a case in which we acted, we were able to allege that the opposing party had waived privilege in all documents containing advice from its in-house counsel as a result of a quote from its in-house counsel being included in a letter. The opposing party promptly settled the case, partly because of its concerns with having to disclose all of its in-house counsel’s legal advice. In another case, quotes from an expert, who the opposing party had retained as a private advisor, and a reference to that expert’s reports in letters before claim led to a loss of privilege in relation to the expert’s advice.
3. **Inadvertent disclosure:** The Civil Procedure Rules provide that where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it only with the court’s permission. If a party has allowed inspection, it is generally too late for him to claim privilege. However, the Court has the jurisdiction to grant injunctive relief where justice requires, including where the documents have been made available for inspection as a result of an “obvious mistake”. A mistake is likely to be obvious where the solicitor appreciates that a mistake has been made before making use of the documents, or it would be obvious to a reasonable solicitor in his position that a mistake has been made.

Can a document be part privileged?

1. If a document as a whole is not privileged but contains some privileged matter, the privileged matter can generally be redacted. A failure to redact a document correctly may result in a waiver of privilege.

Can a copy of a document be privileged?

1. Generally, a copy of a privileged document is privileged, and a copy of a non-privileged document is not privileged.
2. In some circumstances, however, the copying of a non-privileged document for privileged purposes may result in the copy document attracting privilege. Note that this rule only applies where the litigant did not previously have the original document in its possession. This is a complex area in which there are conflicting authorities and specialist advice should be sought.

Practical application

Legal advice privilege

- Consider carefully how to define “client” at the outset and communicate the members of the client team to the external lawyers as soon as possible.
- Consider whether the wider dissemination of legal advice will result in the loss of privilege because the document will be communicated to a non-client.
- In-house lawyers disseminating legal advice to the wider organisation should include wording to the effect that the document is privileged and confidential.
- Avoid the creation of internal emails among employees relevant to the case, which will not be privileged.

Litigation privilege

- Not all documents created once legal proceedings are on foot are privileged. Therefore, exercise restraint in creating documents relating to the proceedings.
- If sensitive matters need to be discussed in circumstances where there is no reasonable prospect of litigation, consider making a telephone call or arranging a meeting as an alternative to sending an email or letter.
- Mark documents “privileged & confidential: in contemplation of litigation”. Although not determinative, it will help reduce the prospects of inadvertent disclosure.

The Rules of Privilege: A comparison across the EU

UK	France	Germany	Italy
Are communications with in-house lawyers protected by privilege?			
Yes. Caution if - as in house counsel - you are performing functions which are administrative, compliance or company secretarial by nature as these communications may not be protected.	No - the concept of in-house lawyer does not exist in France as when employed by a company a French lawyer is no longer registered as lawyer with the French Bar. It can be noted that a law to allow in-house lawyer is in discussion.	Yes, provided that the in-house lawyer is sufficiently independent from the company and is advising on a legal issue.	There are three possibilities: <ul style="list-style-type: none"> - yes, if the in-house lawyer is a consultant and is registered on the Roll ("Albo degli avvocati"); - no: when the in-house lawyer is an employee of the company, according to the Italian Professional Code of Conduct it cannot be registered on the Roll; - yes: when the in-house lawyer is employed by certain major Italian corporations (mainly state-owned companies and public entities), he will be registered on a special section of the Roll List.
Are communications between an external lawyer and his client protected by privilege?			
Yes. Legal Advice privilege - applies to confidential communications between a lawyer and his client created for the purpose of giving or receiving legal advice. Caution (as above) does not cover administrative, compliance etc functions. Also narrow definition of client (<i>Three rivers</i>) -need to identify "client" (may not be company itself) and keep communications within organisation to a minimum.	Yes. Relationship between a lawyer and his client is protected by professional confidentiality obligations, which prohibit him from divulging information obtained by him from his client.	Yes. The client's consent is required before divulging any confidential information/ documents obtained in the course of his professional activities.	Yes. Documents and any information acquired by the lawyer by reason of his profession (including conversations and communications with the clients) are protected by professional confidentiality obligations. Thus, the lawyer must not divulge information in his possession. The following are exceptions to the professional confidentiality obligations: a) documents relating to the defence of the client; b) preventing eventual serious unlawful activities from the client; c) for use in a proceeding between the lawyer against the client; d) for use in a proceeding concerning the way the client's defence was conducted.
What about if the documents/communications are in the client's hands?			
They will still be protected by privilege - privilege protects the document itself. NB only the client can waive privilege in any documents/communications.	A client cannot release his lawyer from his obligation to keep these documents confidential but is not himself bound by this obligation thus could choose to disclose it himself. However parties to civil proceedings generally only disclose the documents that they consider to support their respective cases.	Documents at the client's premises (unless related to the client's defense of criminal or regulatory offences) are not privileged from seizure by regulatory and other investigative bodies. Generally, under German civil procedure law, there is no duty to disclose unfavorable documents to the other side other than those on which a party intends to rely.	From a general point of view, except for specific obligations agreed with the lawyer, under the Italian Lawyers' Code of Conduct a client is not himself bound by a non-disclosure obligation and could disclose confidential documents/information provided by the lawyer himself. However, the lawyer shall keep the confidential duty with respect to such documents/information. In any case communications coming from an external lawyer to his client are protected by privilege and could not be accessed even if found at the premises of the client.
Are there any other occasions where privilege would prevent disclosure?			
Litigation Privilege - arises once litigation is in reasonable prospect. This also covers material from the lawyer or the client to third party. Also without prejudice privilege (and public interest and privilege against self incrimination).	Material written by a lawyer in relation to a client matter, client-lawyer correspondence and correspondence between a lawyer and his opposing lawyers in relation to the matter, is protected by professional confidentiality (unless express indication to the contrary).	Please see the general comment on disclosure under question 3. In addition, documents entrusted to a lawyer in his professional capacity, and which remain in his possession, are protected from disclosure.	The professional confidentiality obligations extend to the past client and include any collaborators of the lawyer involved in the professional activity.

The Netherlands	Spain	EU (in the context of investigations by the European Commission)
Are communications with in-house lawyers protected by privilege?		
<p>Yes. Attorneys – including in-house lawyers registered with the Dutch Bar – are considered to have absolute privilege. Consequently, they have the right to decline to give evidence once they appear in court. This includes both the right to refuse to testify and the right to refuse to produce documents.</p> <p>The Dutch Supreme Court has confirmed this privilege in a judgment from March 15, 2013: the case-law from the European Court of Justice is deemed to apply only to situations concerning European Competition law. As there exist sufficient guarantees in The Netherlands for in-house lawyers to conduct their practice in a manner consistent with the code of conduct applicable to all lawyers (regulations binding both the in-house lawyer and his employer, and an obligation for the employer to sign a 'professional statute' which guarantees that the employer will respect the independent practice of and adherence to the code of conduct for lawyers by the in-house lawyer), there is no reason to deny in-house lawyers the privilege granted to other lawyers.</p>	<p>Yes if in house lawyer qualified abogado - for whom membership of the bar is obligatory</p>	<p>No - in house lawyers not considered to be independent of employer (<i>Akzo</i> case). But in-house documents merely reporting an external lawyer's advice are covered by privilege if the communication from the external lawyer would have been privileged if written down (<i>Hilti v Commission</i>).</p>
Are communications between an external lawyer and his client protected by privilege?		
<p>Yes. Attorneys – including in-house lawyers registered with the Dutch Bar – are considered to have absolute privilege. Consequently, they have the right to decline to give evidence once they appear in court. This includes both the right to refuse to testify and the right to refuse to produce documents. Attorney-client privilege covers only information that has been entrusted to the attorney in his professional capacity. The privilege covers all information provided to and from an attorney in his professional capacity and includes notes, correspondence with the client, and correspondence to and from advisers (such as auditors) relating to the privileged information.</p>	<p>Yes. Lawyers must keep confidential all facts and matters that they come to know through the conduct of their professional obligations.</p>	<p>Yes. The principle of privilege has been developed by case law. <i>AM&S</i> established the principle that Regulation 17(EC Treaty) must be interpreted as protecting the confidentiality of written communications between external lawyer and client. The communications must be made for the purpose and in the interests of the client's right of defence.</p>
What about if the documents/communications are in the client's hands?		
<p>Although not clear yet, it is likely that a derivative privilege also applies to the attorney's client. In the pending proposal to amend the disclosure duty under the Dutch Code for Civil Procedure, it is explicitly provided that documents that would normally be covered by privilege but are in the hands of someone else, who himself cannot invoke privilege, do not have to be disclosed. Hence, attorney-client product may not be requested from the client or a third party.</p>	<p>The lawyer (abogado) keeps the confidential duty. NB client may choose to disclose any documents/communications</p>	<p>Will also be protected.</p>
Are there any other occasions where privilege would prevent disclosure?		
<p>In order to prevent attorney-client privilege to be eroded, it is generally accepted under Dutch law that an attorney's duty of confidentiality and the legal privilege not only applies to himself, but also to those who work for him (e.g. his secretary) and to advisers instructed (directly) by him (e.g. auditors or experts).</p>	<p>Litigation privilege. Lawyer cannot be obliged to declare on material from the lawyer or the client to third party.</p>	<p>Privilege also does not cover communications with non-EU qualified lawyers.</p>

Contact:



Steven Baker,
**Co-Head of Dispute
Resolution London**

Direct: +44 (0) 20 7415 6766
stephen.baker@twobirds.com



Ludovic de Walden,
**Co-Head of Dispute
Resolution London**

Direct: +44 (0) 20 7415 6632
ludovic.de.walden@twobirds.com



Sophie Eyre,
Partner

Direct: +44 (0) 20 7415 6642
sophie.eyre@twobirds.com



Peter Knight,
Partner

Direct: +44 (0) 20 7415 6630
peter.knight@twobirds.com



Jeremy Sharman,
Partner

Direct: +44 (0) 20 7905 6214
jeremy.sharman@twobirds.com



Jonathan Speed,
Partner

Direct: +44 (0) 20 7415 6012
jonathan.speed@twobirds.com



Robin Springthorpe,
Partner

Direct: +44 (0) 20 7415 6631
robin.spingthorpe@twobirds.com



Michael Brown,
Partner

Direct: +44 (0) 20 7982 6475
michael.brown@twobirds.com

The content of this handout is of general interest and is not intended to apply to specific circumstances. The content should not, therefore, be regarded as constituting legal advice and should not be relied on as such. Further, the law may have changed since publication and the reader is cautioned accordingly. Readers are advised to seek specific legal advice in relation to any particular problem they may have. © Bird & Bird LLP 2013.

twobirds.com

Abu Dhabi & Beijing & Bratislava & Brussels & Budapest & Düsseldorf & Frankfurt & The Hague & Hamburg & Helsinki & Hong Kong & London & Lyon & Madrid & Milan & Munich & Paris & Prague & Rome & Shanghai & Singapore & Stockholm & Warsaw

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number 0C340318 and is authorised and regulated by the Solicitors Regulation Authority. Its registered office and principal place of business is at 15 Fetter Lane, London EC4A 1JP. Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses and has offices in the locations listed on our web site: twobirds.com. The word "partner" is used to refer to a member of Bird & Bird LLP or an employee or consultant, or to a partner, member, director, employee or consultant in any of its affiliated and associated businesses, who is a lawyer with equivalent standing and qualifications. A list of members of Bird & Bird LLP, and of any non-members who are designated as partners and of their respective professional qualifications, is open to inspection at the above address.