GIR KNOW HOW PRIVILEGE

United Kingdom

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Scope of the privilege

1. Are communications between an attorney and client protected? Under what circumstances?

Under English law, communications between a lawyer and their clients are protected if they are confidential and covered by legal professional privilege (LPP). To be protected under LPP, either legal advice privilege or litigation privilege must apply to the relevant communication in addition to the communication being confidential.

Legal advice privilege covers confidential communications between a lawyer and client that are made for the dominant purpose of obtaining or giving legal advice. This includes not just advice relating to the law, but more broadly, what is done within a legal context. For example, the exchange of draft contracts between one potential party to a contract and the party's lawyers remains privileged up until the point where such draft is shared with another party who is not the client or that client's lawyer.

Outside the litigation context, only lawyer–client communications are covered by privilege. Legal advice privilege (unlike litigation privilege) does not cover communications with third parties, even if they are for the purpose of obtaining information to enable the lawyer to advise (see, for example, Price Waterhouse v BCCI Holdings (Luxembourg) SA (1992) BCLC 583).

Litigation privilege applies to communications and/or documents that were created for the dominant purpose of obtaining or providing advice or evidence in respect of litigation that is in reasonable prospect.

Litigation means 'adversarial' proceedings (Re L [1997] AC 16), which includes court (English, UK or foreign), arbitral or employment tribunal proceedings, but not fact-finding investigations or inquiries. However, the proceedings do not need to have commenced, nor does there need to be at least a 50 per cent chance that litigation will occur, only that there is a real or reasonable prospect of litigation.

Litigation privilege does not cover documents that relate to the conduct or communication of the litigation more broadly, rather it only applies to documents that have been created with a dominant purpose of obtainingor providing advice or evidence in relation to litigation. Inquiries and investigations that are fact-finding and insufficiently adversarial in nature, will not be covered by litigation privilege.

Additionally, where there is a dual purpose to a document or communication, unless a dominant purpose for the litigation of can be established, litigation privilege will not apply to the document or communication.

2. Does the privilege only protect legal advice? Does it also protect non-legal communications between an attorney and client, such as business advice?

As a general rule, LPP only applies to legal communications. The communication between a lawyer and their client could be confidential, but that does not automatically make it privileged, unless it satisfies the dominant purpose test (ie, the communication was created for the dominant purpose of obtaining/providing any legal advice or any evidence in relation to litigation). However, the dominant purpose test for both legal advice privilege and litigation privilege is fairly broad and can encompass documents that may not appear to be legal communications but satisfy the dominant purpose test. For example, a client may provide their lawyer with an update on the progress of a commercial matter that, on the face of it would appear to be confidential but is not legal – however, where the purpose of the relevant email was to provide the lawyer with an update of the client's commercial dealings, so that the lawyer can suitably advise the client in due course, this will be covered by LPP.

Additionally, in respect of litigation privilege, pre-existing documents that did not satisfy the dominant purpose test when created, may later satisfy the dominant purpose test and become subject to litigation privilege. For example, documents that have been gathered as part of the evidence to be adduced on behalf of one party will be privileged as a selection of documents (even if as individual pre-existing documents they were not privileged). Also, if a lawyer selects pre-existing documents that weren't already held by the client (for example, case-law authorities) for the purposes of advising the client or preparing for litigation, then LPP can apply to the selection.

3. Is a distinction made between legal advice related to litigation and other legal advice?

The doctrine of legal professional privilege is split into two categories – legal advice privilege and litigation privilege. Legal advice privilege applies to confidential communications between lawyer and client where the dominant purpose of the communications is giving or obtaining legal advice. While this could encompass a variety of different forms of legal advice, there is a separate category of privilege that deals with litigation.

Litigation privilege covers anything created and/or communicated for the dominant purpose of litigation where litigation was in reasonable prospect. Litigation privilege can apply to a wide range of documents and includes, not only communications with the client with a view to providing advice, but also communications between lawyer and client or between either of them and third parties with the dominant purpose of obtaining or providing advice or evidence in relation to litigation (including communicating with third parties with a view to securing witness or real evidence for the purposes of the contemplated litigation).

4. What kinds of documents are protected by the privilege? Does it cover documents that were prepared in anticipation of an attorney–client communication? Does it cover documents prepared during an attorney-led internal investigation?

Privilege is determined based on a dominant purpose test rather than by reference to the type or kind of document. Typically, privileged documents or communications will fall into one of two categories – legal advice privilege and litigation privilege.

Documents or communications will be covered by legal advice privilege where the document or communication between lawyer and client was made for the dominant purpose of seeking or providing legal advice. It must also be confidential. Documents covered by litigation privilege are communications or documents between lawyer and client that were created for the dominant purpose of litigation. Litigation does not have to have commenced but it must be in reasonable prospect. Litigation privilege can also attach to communications with third parties (such as witnesses, experts or other potential parties to litigation).

Therefore, documents prepared in anticipation of a lawyer-client communication will not be covered by legal advice privilege if it is a document prepared by a third party or if it is prepared by the client or lawyer where the dominant purpose test has not been fulfilled.

Documents prepared during an internal investigation, for example, notes prepared by, and/ or communications between, non-lawyer employees are unlikely to be privileged. The same goes for interview memoranda unless the interviews are conducted for the dominant purpose of obtaining advice or evidence in connection with reasonably contemplated litigation.

5. To what extent must the communication be confidential? Who can be privy to the communication without breaking privilege?

For a document or communication to be privileged, it must be subject to the client's confidentiality. Communications with third parties conducted for the dominant purpose of litigation (for example, a note of a proofing session with a witness) will be covered by litigation privilege provided the communication with the third party is subject to the relevant client's confidentiality.

It is important to note that once a privileged document/communication is no longer confidential (ie, it has been disclosed to a third party) then it ceases to be privileged. However, if a document has been disclosed to a select group of parties – because, for example, they need to be aware of its contents, on the express basis that the document remains subject to the client's confidentiality as against persons outside the group, then confidentiality is preserved and the document will remain privileged as against persons outside the group.

6. Is the underlying information privileged if it can be obtained from a non-privileged source?

Conceptually, LPP applies to the communication and/or document evidencing the communication itself, not to the underlying information. For example, if a client emails his lawyer asking for a summary of the Companies Act 2006, that email request and any response will be privileged, regardless of the fact that the underlying substance is publicly available information.

Whether or not a communication and/or document contains publicly available information does not impact the privileged status of the communication provided that it satisfies the tests for legal advice privilege or litigation privilege.

7. Are there any notable exceptions or caveats to the privilege?

Legal professional privilege has been characterised as fundamental human right that can only be overridden in narrow circumstances (Quinn Direct Insurance Ltd v Law Society of England and Wales [2010] EWCA Civ 805).

The main exception is that there is no legal professional privilege in a communication or document if it came into being/operates for the purpose of furthering a criminal or fraudulent design. This is referred to as the iniquity exception (Kuwait Airways corporation v Iraqi Airways Company [2005] EWCA Civ 286). The rationale for this is that a fraudulent party who communicates with their solicitor for the purposes of furthering fraud or crime is not communicating with the solicitor in the ordinary course of the professional communications and it would be 'monstrous' for the court to afford protection from production of communications that are made for the purpose of furthering crime (Bankque Keyser Ullman SA v Skandia (UK) Insurance Company [1986] 1 Lloyd's Rep 336).

In certain other circumstances, legal professional privilege may be overridden or abrogated by express statutory provision.

Statutes where LPP does not apply or is overridden:

- Freedom of Information Act 2000 (FOIA) – Documents can be requested through the FOIA, yet there is an exception to protect legally privileged information under section 42. In certain instances, there are exceptions to section 42 where legally privileged information could be disclosed if it is in the public interest. The FOIA includes a non-exhaustive list of what is considered in the public interest.
- The Regulation of Investigatory Powers Act 2000 and the Investigatory Powers Act 2016 provide, among other things, for the collection, monitoring and interception of communications in relation to intelligence operations. Where communications are so harvested by law enforcement they may enable law enforcement to collect material covered by LPP (for example, when communications are required to be intercepted /monitored to guard against serious threats to safety). Privileged material so obtained cannot be used as evidence in court, however.
- The Solicitors Regulation Authority (SRA) has the statutory authority and power to investigate, upon notice, incidents of misconduct and require Solicitors to produce information and documents. The SRA has the power to see documents even if they are confidential and/or privileged.

In certain cases, a communication and/or document will be partially privileged. If a document is partially privileged, is not possible for the company to assert privilege over the whole document. A typical example of this is found in corporate board minutes, where a lawyer would be present, updating the board on privileged and confidential matters; however, where the rest of the meeting does not discuss anything covered by LPP. In certain circumstances, a company may be required to disclose these meeting minutes (disclosure, information requests, corporate due diligence) and there is a question whether the company can assert privilege. In this instance, it would be necessary to redact all parts of the document that are privileged before disclosing the document to preserve the privilege in the relevant sections.

Legal advice or litigation privilege can also be waived expressly, by conduct or by implication.

During the course of litigation, privilege may be waived in certain documents once they are deployed in the course of the proceedings. Statements of case, witness statements and affidavits all lose their privileged status once they are served. Additionally, any document named in, or referred to in, an expert's report, skeleton arguments or referred to in oral representations in court, will lose any privilege that originally existed in the document.

8. Are there laws unrelated to privilege that may protect certain communications between attorney and client?

Documents that pass between lawyers and clients that are confidential will always be protected by confidentiality unless such confidentiality is overridden.

The General Data Protection Regulation ((EU) 2016/679) (GDPR) came into force in 2018 along with the Data Protection Act 2018 (DPA). Together GDPR and DPA provide a robust legal framework for data protection (including of personal data) in the UK. While these rules do not directly relate to the protection of communications between lawyers and clients, law firms have data protection obligations (including in respect of the personal data of their clients that will need to be protected).

Protected parties

9. To what extent does the privilege extend to in-house counsel?

Communications with in-house counsel will be protected (provided the dominant purpose test of legal advice or litigation are satisfied) but this is, obviously, limited to the legal work that in-house counsel do for the organisation. In-house lawyers often have commercial, business and administrative roles in addition to their legal roles should be aware that communications or documents created under the guise of these other responsibilities will not be covered by privilege.

Fundamentally, the privileged status of communications of/with in-house counsel falls to be determined in line with the dominant purpose tests of LPP and the key question will be whether they gave the advice or made the communication in their professional capacity as lawyers and 'whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law' (Three Rivers District Council and others v Governor and Company of the Bank of England (No 6) [2004] UKHL 48).

10. Does the privilege protect communications between an attorney and a corporate client's employees? Under what circumstances? And who possesses the privilege - the corporate client, the employee or both?

Where the involvement of the employee in communications with a corporate's lawyer relates to ongoing litigation, then communications are likely to be privileged provided the dominant purpose test is satisfied, but in respect of legal advice privilege, the position is more complicated. The definition of 'client' in the Three Rivers case was given a restrictive definition by the Supreme Court and one cannot assume that all documents produced by employees and sent directly to in-house lawyers will be privileged. Marking an email as privileged and confidential does not automatically lead to the communication being privileged – the test looks at the substance of the communication and not the form. For the same reason it is unlikely to cover internal documents generated by employees of the client, even if the documents are necessary to provide information to lawyers to obtain legal advice.

In The RBS Rights Issue Litigation [2016] EWHC 3136 (Ch) the High Court held that certain employees did not form part of the client for the purpose of legal advice privilege and as a result, records of interviews conducted with employees and ex-employees were not covered by legal advice privilege. Most importantly, the case found that 'the client' only consists of employees authorised to seek and receive

legal advice from the lawyer and so privilege does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.

The Court of Appeal in SFO v ENRC [2018] EWCA Civ 2006, also held that the "client" is limited to those individuals who are tasked with seeking and obtaining legal advice on behalf of the organisation and does not include those who are authorised only to provide information to the lawyers. While the Court of Appeal expressed doubts as to whether Three Rivers No 5 was correctly decided, it was bound by precedent to follow it.

Accordingly, currently, where a third party (or an employee who is not part of the client) provides information to the lawyer, this will not be privileged if it is not provided for the dominant purpose of litigation. SFO v ENRC confirms, however, that while fact finding interviews conducted, not simply to investigate allegations but, as 'part and parcel of preventing or defending litigation', provided that litigation (whether civil or criminal) is in reasonable contemplation, such interviews or communications will be covered by litigation privilege.

11. Does the privilege protect communications between non-lawyer employees of a corporate client if they are acting at the direction of counsel or gathering information to provide to counsel?

For the purposes of defining the 'client', English law does not distinguish between legal and non-legal employees at an organisation. According to the Three Rivers (No 5) line of cases, the client is restricted to the narrow group of employees actually charged with instructing the lawyers (for the purposes of seeking and receiving advice).

If the employees gathering information are not the individuals seeking advice from the lawyers (whether in-house or external) – and, hence, are not the client – this means that communications with such employees falling outside of this group, does not fall within legal advice privilege.

If the information is being gathered by the employees for the dominant purpose of contemplated litigation (eg, evidence gathering for litigation) litigation privilege will apply.

12. Must the attorney be qualified to practise in your country to invoke the privilege?

The definition of lawyer within the context of privilege includes all members of the legal profession, be it solicitors, barristers, in-house lawyers or foreign lawyers. It also includes legal executives and licensed conveyancers who are employed to give advice on English law by a licensed body.

The English courts have further confirmed that legal advice privilege extends to communications with foreign lawyers including where they are in-house, provided that they are acting in the capacity or function of a lawyer.

13. Does the privilege extend to non-lawyer third parties? In which circumstances does the privilege protect communications with third parties if they are providing advice related to a legal matter? What measures in such circumstances should an attorney take to protect those communications?

Legal advice privilege can only protect legal advice given by members of the legal profession. However, privilege will extend to certain regulated professionals who, although not qualified lawyers, are recognised as providing a legal service if they are an 'authorised person'. Section 190 of the Legal Services Act 2007 provides that communications and documents relating to services provided by a person who is an authorised person in relation to rights of audience, the conduct of litigation, conveyancing or probate services, all of which are protected from disclosure as if they were a solicitor themselves. It is important to note that an authorised person for legal advice privilege is one who is authorised by an approved regulator.

In R (Prudential plc and another) v Special Commissioner of Income Tax and another [2013] UKSC 1, the Supreme Court refused to extend the availability of legal advice privilege to accountants. It makes no difference if the advice given by the non-lawyers was modelled on advice previously given by lawyers, it won't be covered by privilege (R (Emblin and others) v Revenue and Customs [2018] EWHC 626 (Admin)) and companies should be aware that when choosing who to receive advice from on certain areas (for example, tax advice), only choosing to instruct a lawyer over another type of advisor will afford the protection of privilege. The Supreme Court has confirmed that any change to this will require an Act of Parliament.

14. Does the privilege apply to communications with potential clients?

If there is an exchange of legal advice or an exchange of confidential information from the potential client to the lawyer, or the communication itself betrays the nature of the legal advice sought or provided, then the communication will most probably be privileged provided the dominant purpose test is met. But it is important to note that not all communications with potential clients will be privileged. For example, an unsolicited approach from a lawyer to a potential client will not be privileged until there is an exchange of confidential information for the purposes of obtaining or providing legal advice.

It is crucial to note that the information needs to be confidential (for example, a legal case note or summary by way of a briefing note sent from a law firm to a potential client will not be privileged).

Ownership of the privilege

15. Does the attorney or the client hold the privilege? Who has rights under the privilege?

LPP belongs to the client, and it is the lawyer's professional obligation to assert privilege until it is waived. The courts have confirmed that privilege is a 'fundamental human right' (Quinn Direct Insurance Ltd v Law Society of England and Wales [2010] EWCA Civ 805) and unless the client waives privilege, the lawyer is not bound to disclose the document or communication (not even to their professional indemnity insurer) without the client's consent (unless some provision of law expressly overrides the privilege).

16. Can the privilege be waived? Who may waive it?

Privilege can be waived. The client has the power and right to waive privilege whereas a lawyer only (potentially) has the authority to waive the client's privilege. This leads to potentially problematic situations whereby the client's lawyer can inadvertently waive privilege.

Privilege is waived following the intended sharing of the, otherwise, privileged document or communication.

17. Is waiver all or nothing? Is it possible to waive the privilege for certain communications but not others?

Privilege is waived upon the disclosure of a document that is otherwise privileged. Where a party intentionally waives privilege in a document or communication, without reservation, the waiver of privilege in that communication is usually complete. A party who deploys or relies on privileged material in legal proceedings may also find that the waiver extends further than originally intended. This is known as the principle of 'collateral waiver' or the rule against 'cherry-picking' – which aims to prevent a party choosing to rely on favourable aspects of its privileged material while hiding behind privilege to avoid having to disclose less favourable aspects. Collateral waiver will apply to documents that go to the same issue as the document/communication in respect of which privilege was originally waived.

A party may share its privileged communications with others on confidential terms without losing privilege as against the rest of the world (Gotha City v Sotheby's [1998] 1 WLR 114 (CA)).

If a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may only use it or its contents if the court gives permission under Civil Procedure Rule 31.20.

Where privileged material has been inadvertently provided to a third party, the starting point is that the party receiving the inadvertently disclosed material owes no duty of care to the other party and is generally entitled to assume privilege has been deliberately waived, unless disclosure was procured by fraud, or where there has been an obvious mistake by the party disclosing. Therefore, once a party appreciates that their documents have been inadvertently disclosed by their side, they should notify the receiving party as soon as possible to seek to prevent waiver of privilege.

The party claiming privilege in an inadvertently disclosed document can seek an injunction to prevent the receiving party from using it. Although an injunction will be more difficult or impossible to obtain where there are arguments that the document or information has entered the public domain.

18. If two defendants are mounting a joint defence, can they share privileged information without waiver? What about two parties with a common interest?

English law recognises that legal professional privilege can be preserved under the principle of common interest privilege. This applies where parties wish to cooperate and share privileged information but do not wish for privilege in the shared information to be extinguished.

There must be a common interest between the parties at the time of disclosure, although it is not necessary for there to have been a common interest at the time of the creation of the document. Typical relationships where there is a common interest are: co-defendants, an insured and insurer, companies in same corporate group structure, including parents and subsidiaries, agent and principal, parties who use the same solicitor.

With respect to co-defendants in litigation, it is advisable to establish an information ring, whereby the parties sign up to an agreed set of rules, setting out the parameters for sharing privileged information and other confidential materials.

19. Is it common for attorneys and clients to agree to a confidentiality provision in a contract?

Under English law, solicitors are required to comply with various client care and other professional requirements when advising clients. These will very typically be covered using an engagement letter. This will set out various points that are required by the Solicitors Regulation Authority (SRA) and the Law Society and the engagement letter will usually include the solicitors' duties of confidentiality to the client.

Enforcement considerations

20. Describe the legal basis of the rules governing the privilege. Are these rules found in a constitution or statute, or in case law?

As England and Wales is a common law jurisdiction, the legal basis for the laws on privilege are found in case law. The SRA and the Law Society, who supervise and regulate solicitors' conduct and the Bar Council, who do similarly for barristers, have rules of conduct and guidance that cover confidentiality and privilege.

21. Is the privilege primarily characterised as a procedural or evidentiary rule, or is it characterised as a substantive right?

Privilege is a substantive right. The Court of Appeal in Quinn Direct Insurance Ltd v Law Society of England and Wales [2010] EWCA Civ 805found that privilege is 'a fundamental human right'.

22. Describe any differences in how the privilege is applied in the criminal, civil, regulatory or investigatory context.

English law does not differentiate between privilege in different legal contexts – LPP is dealt with, broadly, the same throughout civil, criminal, regulatory and investigatory proceedings. There are some practical tips and best-practices of which parties should be aware. The most significant difference is the different requirements and protections between legal advice privilege and litigation privilege.

Legal advice privilege relates to any client–lawyer communication that has the dominant purpose of obtaining or providing legal advice. This is available in transactional or advisory contexts, where there is no prospect of litigation. Litigation privilege exists where the dominant purpose of the communication or document was in relation to litigation that is in reasonable prospect.

During formal proceedings, material that is protected by legal advice or litigation privilege will remain privileged until such time as that privilege is waived (for example, by being disclosed to other parties and/or relied on in public proceedings).

Communications and documents in connection with investigations, inquiries and regulatory proceedings that are not (or insufficiently) adversarial in nature will not attract litigation privilege.

In SFO v ENRC [2018] EWCA Civ 2006, the Court of Appeal held that where the Serious Fraud Office had put the company on notice of the possibility of a future prosecution, it was plain that internal investigations carried out by the company following that revelation were conducted with a view to the prospect of (criminal) litigation and that therefore litigation privilege covered documents created for the purposes of considering the company's position, in the light of such prospect (including internal interviews).

23. Are the rules regarding the privilege uniform nationwide or are there regional variations within your country?

There are no regional differences in the law and practice relating to legal professional privilege under English law in England and Wales. Similar common law also applies in Northern Ireland. Scotland has a separate legal system (substantively and procedurally) to England and Wales. This Guide covers the position under the English law of privilege. While the Scots law position in relation to privilege is in many material respects now similar to that in England & Wales, it is not identical and in this Guide Scottish law is not separately considered. In Scotland, the concept is based on confidentiality of communications, although recently Scottish courts have tended to adopt a similar approach to those of England and Wales referring to legal professional privilege rather than the more historic confidentiality of communications.

24. Does a professional organisation enforce the maintenance of the privilege among attorneys? What discipline do attorneys face if they violate privilege rules?

There is no organisation that enforces the maintenance of privilege among lawyers as such.

If a lawyer has breached rules on privilege it is open to the regulatory and disciplinary bodies to take disciplinary tribunal action against them, where consequences can include being 'struck off' or disbarred from continuing to practise law.

25. What sanctions do courts impose for violating the attorney–client privilege?

There is no statutory provision or common law provision for civil courts (as opposed to appropriate regulatory tribunals) to impose 'sanctions' on lawyers where privilege has been violated. Lawyers owe a professional obligation to their clients, which is codified in the codes of conduct for solicitors (by rules set out by the SRA) and barristers (by the Bar Standards Board). If a lawyer violates privilege, that breach of conduct is usually enforced by the appropriate regulatory bodies; however, it will not have an impact on restoring privilege or providing a remedy to the client if harm was caused by the violation.

Where clients consider that their right to legal professional privilege has been or might be infringed, they can take steps to seek to protect it, including seeking a High Court injunction to prevent disclosure and protect the privilege and can claim damages if they have suffered actionable loss as a result of wrongful disclosure of privileged material.

26. How can parties invoke the privilege during investigations or court proceedings? Can the privilege be invoked on the witness stand?

Parties can invoke privilege (whether that be legal advice privilege or litigation privilege) and can generally decline to provide privileged information in connection to investigations or when providing evidence in proceedings.

There is no specific form of invoking privilege, it is a right and therefore can simply be asserted. However, it is important to note that privilege no longer exists when something is no longer confidential. For example, with witnesses, anything that forms part of the witness statement, or anything referenced within it, is no longer privileged. During the course of investigations, certain documents and communications are disclosed in the course of the investigation, in which case any privilege that originally existed in such documents or communications will have been waived. Unless there is specific provision is statute, such investigations cannot compel the production of privileged material.

In relation to providing oral or documentary evidence in investigations or to a tribunal, privilege will generally only be overridden in cases where the relevant communication (or document) came into being or operates for the purpose of furthering a criminal or fraudulent design or where a statutory provision expressly overrides the privilege.

The SRA has the authority and power to investigate, upon notice, incidents of misconduct and require solicitors to produce information and documents. The SRA has the power to compel the production of confidential and privileged information.

27. In disputes relating to privilege, who typically bears the burden of proof?

Where there is a dispute as to whether or not a communication is protected by privilege, the burden of proof is on the party claiming privilege (West London Pipeline Storage and another v Total UK and others [2008] EWHC 1792).

28. Does the privilege protect against compulsory disclosures such as search warrants or discovery requests? Is there a distinction between documents held by the client and documents held by the attorney?

The general rule is that as privilege is a 'fundamental human right', compulsory production notices, procedural disclosure obligations and law enforcement or investigatory notices or search warrants will not override privilege or require production of privileged material.

Where privileged material is seized under a search warrant or on a 'raid', the owner of the document will have an ability to assert privilege over such and prevent its inspection until such time as the claim to privilege has been determined.

29. Describe the choice-of-law rules applied by your courts to determine which country's privilege laws apply. To what extent does your country recognise the validity of choice-of-law provisions in contracts, particularly as they apply to privilege?

The English courts tend to respect the choice of law provisions in contracts. When England & Wales is the chosen jurisdiction but English law not the choice of governing law, only English procedural rules will apply. The courts will respect the contracting parties' choices, and defer to the choice of law in the contract. Therefore, when issues of privilege are a substantive issue in the case, it will be viewed as a matter of the respective foreign law. However, it is important to note that since English procedural law will still apply, there must still be an application of English procedural law as it applies to privilege. For example, parties in the courts of England & Wales are still bound to follow the procedural rules in the Civil Procedure Rules (CPR) and applications to refuse to disclose documents for privilege reasons, will have to follow the necessary CPR procedures.

Termination of the privilege

30. Does the privilege terminate on the death of either the attorney or the client?

Privilege, which is a right of the client not the lawyer, survives the client's death. It may be possible for privilege to be waived by the deceased's successor in title, however.

Where privilege belongs to a company that has been dissolved, the privilege is preserved until the time when there is no prospect of the company being restored to the register (ie, until such time as the prospects of the privilege being asserted have disappeared).

31. Does the privilege terminate on the conclusion of the attorney–client relationship?

No – privilege is maintained until the client waives it and the lawyer's duty to preserve the client's confidentiality and privilege survives the conclusion of the relationship.

32. Is the privilege destroyed if the client communicates information to the attorney to further a crime or perpetuate a fraud?

There is no privilege if the communication or document in question came into being for the purpose of furthering a criminal or fraudulent objective. This is called the 'iniquity' exception. The relevant principles are:

- If a legal professional privilege exists, it is inviolate.
- Such privilege is not prevented from attaching merely because the solicitor is engaged to conduct litigation by unwittingly putting forward an account of events that the client knows to be untrue – the test is communications made in the ordinary course of the solicitor's professional engagement or whether there has been an abuse of the solicitor or client relationship such that privilege over the communications is negated.
- Privilege would not be found in a situation where there was a 'widespread conspiracy to deceive the English court that was acted upon and has been proved to have led not only to perjury but to forgery and the perversion of justice on a remarkable and almost unprecedented scale' – Kuwait Airways Corporation v Iraqi Airways Co (No 6) [2005] EWHC 367 (Comm).

However, if the issue of fraud is one of the issues in the action itself, this exception can only be used to negate privilege where there is a very strong prima facie case of fraud.

33. Is the privilege terminated if the attorney makes an inadvertent disclosure? If such a disclosure is made, can the attorney retrieve the privileged information or otherwise correct the error?

Where privileged material has been inadvertently provided to a third party, the starting point is that the party receiving the inadvertently disclosed material owes no duty of care to the other party and is generally entitled to assume privilege has been deliberately waived, unless disclosure was procured by fraud, or where there has been an obvious mistake by the party disclosing. Therefore, once a lawyer appreciates that their client's documents have been inadvertently disclosed they should notify the receiving party as soon as possible to seek to prevent waiver of privilege. Solicitors who are aware of inadvertent disclosure of privileged material are under a professional duty to comply with requests to return such and to destroy any copies.

The party claiming privilege in an inadvertently disclosed document can seek an injunction to prevent the receiving party from using it. Although an injunction will be difficult or impossible to obtain where there are arguments that the document or information has entered the public domain.

In instances where privileged material has been accidentally disclosed to the general public, and it is not possible to determine a definitive list of the recipients of the disclosure, then it will not be possible to preserve privilege.

34. Is the privilege terminated if a third party is included in the communication or is subsequently forwarded the communication?

The privilege will be extinguished if it is shared with any party other than the lawyer or client (because confidentiality in the communication has been lost).

Privileged material can be shared with third parties provided that is done on terms of confidentiality (ie, expressly preserving the confidence and privilege of the client in the material) or where such material is shared with a party who has common interest in the material, ie, an interest in common with the client).

Where litigation is in prospect, litigation privilege will attach to communications between lawyer and client or between either of them and third parties for the dominant purpose of obtaining advice or evidence in relation to litigation. Therefore, where third parties are included in such communications for that purpose, privilege will not be lost.

Daniel Hudson

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Dan leads Seladore's white-collar and regulatory disputes practice, having more than 20 years' experience (with over a decade as a partner) in Herbert Smith Freehills' corporate crime and investigations' practice and before that as a criminal barrister. Dan also has expertise in advising clients in relation to issues raised by the developing area of business and human rights.

Dan helps clients with some of their most serious, reputationally important issues that go beyond business as usual.

Dan advises and represents corporate, institutional and individual clients on financial crime matters, with a particular focus on bribery/corruption, sanctions (in particular recent sanctions targeting Russia), fraud, regulatory investigations, insider dealing, money laundering, accounting irregularities and connected disputes.

Dan has significant experience working with clients in connection (whether as suspects, witnesses or victims) with internal and external criminal and regulatory investigations, including those conducted by the UK Serious Fraud Office, FCA, Police and HMRC. He represents clients facing prosecution and also assists clients acting as witnesses in domestic and foreign criminal proceedings.

Having also spent over two decades advising in connection with due diligence, corruption and sanctions issues (including in relation to transactions) as well as sanctions, anti-money laundering, anti-bribery and Business and Human Rights procedures, Dan is well placed to advise clients when things go wrong, when they are drawn into investigations and when such matters become contentious.

Simon Bushell

Seladore Legal

Founding partner of Seladore Legal, Simon acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies.

He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in coordinating parallel cross-border disputes and proceedings before a number of courts and tribunals.

Simon regularly advises on high-value complex commercial disputes, including investment banking disputes, breaches of trust and fiduciary duty, professional negligence, money laundering, bribery and corruption, shareholder disputes, as well as a wide range of general commercial disputes.

Simon has a strong reputation for his commercial awareness, and strategic thinking that is coupled with his team leadership skills in managing large, complex cross-border issues.

Max Sherrard

Seladore Legal

Max is an associate at Seladore Legal and has experience working for international corporates and large financial institutions in a range of complex and multi-jurisdictional commercial disputes.

Max also has experience advising on contentious regulatory investigations in both the financial services and sports sectors.

Max's experience includes working on cases involving breaches of competition law, commercial disputes, fraud and white-collar cases. He also has significant experience advising corporates on contentious commercial disputes arising out of contract negotiations, predominantly in the technology and telecommunications sector. Max has advised clients on cases before the High Court, the Court of Appeal, and the Competition Appeal Tribunal.

Prior to joining Seladore, Max trained and qualified at the London office of Allen & Overy LLP and has also worked at Hogan Lovells LLP.

Seladore Legal

Our partnership is made up of experienced litigators with expertise in complex cross-border commercial disputes. Our lawyers have been involved in some of the biggest cases before the High Court.

Our partners' proven track-record of success has enabled us to build long term and successful relationships with a wide range of clients in the UK and internationally, based upon a problem-solving ethos.

We are proud of our professionalism and determination in resolving disputes favourably for our clients and delivering successful outcomes.

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