



COLLYER BRISTOW

COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

PRIVILEGE

'Privilege' is a key legal concept in litigation. When it applies to a form of evidence it means that the evidence can be withheld from production to other parties and to the court. Legal advice privilege and litigation privilege are the most relevant to commercial disputes.

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LEGAL ADVICE PRIVILEGE

Legal advice privilege (**LAP**) exists so that a client can have “unrestricted confidence” in their lawyer (*Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48).

It applies to confidential communications that pass between a client and their lawyer, and which are made for the dominant purpose of giving or receiving legal advice (*Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583).

CONFIDENTIAL

Privilege can only be claimed over evidence that is confidential. This means that it is necessary for parties to exercise care over the inadvertent disclosure of such evidence, other than to a limited number of recipients and in terms where its confidentiality is expressly maintained. The courts have (somewhat controversially) interpreted the definition of “client” fairly narrowly in the corporate context, so this is important to bear in mind when circulating legal advice internally within an organisation.

COMMUNICATION

The need for evidence to be “communicated” in order to attract privilege has in practice been interpreted broadly, certainly in respect of documents prepared by a lawyer in relation to a client’s matter but not actually communicated to the client themselves.

These will nonetheless usually be considered privileged. The same may not always be true of documents prepared by a client but not communicated to the lawyer.

Lawyers often refer to the concept of the “continuum of communication” between lawyers and clients. This recognises that information passed between them, even where it may not specifically include a request for legal advice by the client, will normally be privileged because the existence of the request for legal advice may be implied.

LAWYER

LAP will only apply to communications between a client and their lawyer (members of the legal profession and usually their employees such as paralegals or trainees, including foreign lawyers), unless the lawyer is acting not as a legal adviser, but as the client’s “man of business” (*Three Rivers (No 6)*).

PURPOSE OF GIVING OR RECEIVING LEGAL ADVICE

LAP will not apply to a document, for example, that existed before the need for legal advice arose, even if it is later attached to a communication between a client and a lawyer seeking advice (although the communication itself would likely be privileged).

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LITIGATION PRIVILEGE

The purpose of litigation privilege (LP) is to protect parties engaged in litigation. It attaches to material that is confidential (normally) and is a communication between lawyer and client (or between one of them and a third party) and was created for the dominant purpose of litigation which was existing or reasonably in prospect at the time.

Some of these requirements overlap with LAP. However, the following are key features of material subject to litigation privilege in particular.

THIRD PARTY

LP may extend to communications by a lawyer with a third party (for example, between a solicitor and a witness in a matter), or a client with a third party. In the latter case, the purpose of the communication will likely be key in determining whether it is privileged or not.

DOMINANT PURPOSE OF LITIGATION

Establishing the purpose for which a document has been created may not always be straightforward, and a court will consider this objectively. It should be the purpose of the commissioner of any document, rather than the author, that is the relevant consideration

LITIGATION REASONABLY IN PROSPECT

Litigation in this context is interpreted as meaning adversarial proceedings – clearly that includes court proceedings, but it might also include certain regulatory investigations although case authority on this point is less clear. What is clearer is that the litigation in question has to be against a specific person or class, and not be merely a mere future possibility (USA v Philip Morris Inc and British American Tobacco (Investments) Ltd [2003] EWHC 3028 Comm).

PRIVILEGE IN PRACTICE

Although privileged documents are not disclosed to the court, it is still necessary to refer to such documents in the list of documents that the parties to litigation have to provide as part of the disclosure of documents process although normally specific details of each such document do not have to be provided. It gives the other party the opportunity to challenge the privilege being claimed. A consideration of privilege is therefore a key component of the disclosure of documents process.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice.

FOR MORE INFORMATION PLEASE CONTACT



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