

Maintaining Legal Advice Privilege in England and Wales: Don't Let Bad Habits Creep Into 'New Normal'

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Businesses' ability to adapt to the "new normal" of remote working in the UK has been astonishing and commendable. However, the official communication lines that protect legal privilege (amongst other things) may be eroded if these dramatic changes in how colleagues interact are left unchecked.

Despite the countless other issues demanding the attention of senior management at this time, it is vital that proper consideration is given to the protection of legal privilege. In the current environment, senior management must give careful thought to how legal advice is to be sought, delivered and disseminated.

Legal Advice Privilege (LAP):

The components

- Confidential
- Communication
- Between client and lawyer
- For the dominant purpose of giving or receiving legal advice

While it is quite right that a significant amount of attention has been given to the issue of the identification of the "client", each of the above components presents its own challenges (both practically and legally).

A confidential communication

Confidentiality is key: If a document loses confidentiality, it loses privilege. While it is relatively straightforward for initial communications to be confidential in nature, too often that confidentiality is lost by subsequent dissemination to "non-client" employees or third parties. We return to this later.

As a general rule, for material to be privileged, it must pass between the client and its lawyer. While a lawyer's preparatory work will usually be privileged, the same is not true of a client's equivalent work.

To avoid the proliferation of documents containing sensitive material that may not be covered by privilege, it is vital to maintain a centralised system of document production during this time of remote working. Where a number of individuals are working on a document intended for a lawyer, that document should be saved centrally and each individual should work on that central document rather than preparing separate documents that will feed into a master version.

It is vital that anyone producing sensitive documents keeps in mind the fact that a document that is not privileged when produced does not subsequently become privileged simply by being sent to a lawyer.

Between a client and its lawyer

The "client" for LAP purposes will often not be the organisation as a whole. The larger the organisation, the more likely it is that the client will be deemed to be a small subsection of individuals.

The case law on the identity of the client for LAP purposes has been widely discussed. In short, the "client" is that group of individuals within an organisation who are authorised to seek and receive legal advice. This is a highly restrictive definition and can lead to real practical difficulties for organisations. But, despite repeated suggestions in England and Wales by the Court of Appeal that this issue should be reconsidered by the

Supreme Court, this test remains good law.

Defining which individuals within the organisation constitute the "client" from the outset of any matter will be of paramount importance. However, this exercise may well present difficulties: Having a broadly defined "client" could be interpreted as an artificial construction by the courts, and this approach therefore risks losing privilege over any documents that were widely circulated; while defining the client restrictively could present practical difficulties for a large organisation trying to progress a complex legal issue. It will usually be good practice to document both the individuals within the scope and the reasons for their inclusion. There are two key questions to be asked of each individual being considered for designation as the "client": (i) Are they sufficiently senior to have authority to seek and receive legal advice; and (ii) are they sufficiently involved in the particular matter to justify inclusion within the "client" group?

Those who are not designated as being within the "client" group must be made aware of that fact and understand that any documentation they produce will not be privileged. A common mistake is for non-"client" employees to assist in the preparation of reports to be sent to lawyers. Any documents produced by those non-"client" employees are unlikely to be privileged, even if they are subsequently sent to a lawyer by a "client" employee.

For the dominant purpose of giving or receiving legal advice

The "dominant purpose" test is a familiar component of litigation privilege but until recently was not part of the standard formulation of LAP. That changed with the Court of Appeal's recent judgment in *Civil Aviation Authority v R (on the application of Jet2.com Ltd)*¹. Any party claiming LAP must now demonstrate that the dominant purpose of the communication in question was to obtain or give legal advice.

With teams physically separated at the current time, the tendency may be to keep people "in the loop" by sending emails to, or having conference calls with, large groups covering a range of subjects. Communication on legal matters must not feature in such widespread communications of this nature. Where a communication covers both legal and commercial issues there is a real risk that the dominant purpose test will not be met and that privilege will not be considered to have arisen.

In *CAA v R*, the correspondence in question was emails and a draft document circulated to multiple addressees, including CAA's in-house lawyers. In considering the application of the dominant purpose test to such correspondence, the court set out the following guidance:

- If the dominant purpose of the communication is to settle instructions to the lawyer then that communication will be covered by LAP. That will be the case even if the communication is sent to the lawyer as information, or as part of a continuum of communications with the dominant purpose of instructing the lawyer
- If the dominant purpose of the communication is to obtain the commercial views of the non-lawyer addressees, then it will not be privileged. That will be the case even if a subsidiary purpose of the email is simultaneously to obtain legal advice from the lawyer addressees

While this case specifically concerned multi-addressee emails, the principles would apply equally to multi-party conference calls and meetings.

Now more than ever, distinct communication lines for legal advice and commercial advice must be enforced. Having clear protocols regarding the identification and treatment of communications regarding legal issues would be helpful. Everyone must be disabused of the fallacy that privilege can be conveyed simply by copying a lawyer into communications; or that privilege can be conferred on documents at a later date when enforcing privilege is deemed desirable. What matters is the substance of the communication at the time it was created: If privilege is sought, the communication must be demonstrably produced for the purpose of giving or seeking legal advice.

Subsequent dissemination of legal advice

Having laboured the importance of restricting the communication of legal advice, it should be acknowledged that, in order to put that legal advice into practice, some dissemination of advice may be required. The law allows for this albeit within strict limits.

A client may share legal advice with non-"client" employees in order to achieve a particular purpose. In order

that privilege is not lost, the client must ensure the following: (i) A specific purpose has been identified that requires disclosure of the legal advice; (ii) only as much advice is shared that is necessary to achieve the required purpose; and (iii) the employees with whom the advice is shared keep the information confidential and do not pass it on to others.

Top tips

- Do keep tight control of communication lines between your employees and in-house counsel or external lawyers
- Do define which of your employees is authorised to seek and receive legal advice
- Do make it clear why you are forwarding legal advice (if necessary)
- Don't mix commercial and legal matters in the same communications
- Don't forward or otherwise disseminate legal advice without considering the implications

Notes

1. [2020] EWCA Civ 35

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