

Editor's note

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme in collaboration with Panel Solicitors Howse Williams, issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

PROTECTING CLIENT PRIVILEGE

One of the fundamental aspects of the solicitor-client relationship is the privilege that attaches to many of the communications between the solicitor and the client. It is critical for solicitors to understand the different kinds of privilege that can arise, how privilege can be lost, and how to protect privileged information. Failure to do so can expose solicitors to civil claims and can also amount to professional misconduct. Although issues relating to privilege arise most frequently in litigation, these principles are important to both contentious and non-contentious lawyers. This bulletin is not intended to be a comprehensive guide to client privilege, but to highlight some of the key points for practitioners.

Privilege explained

- Solicitors are under a strict duty of confidentiality as regards all information acquired in relation to their clients. This is a legal obligation that arises from the fiduciary relationship that exists, and is also a matter of professional misconduct (see Chapter 8 of the Hong Kong Solicitor's Guide to Professional Conduct ("**Guide**")). Only the client can waive this confidentiality. However, confidentiality can be over-ridden by other duties, including the discovery obligations that arise in Court proceedings.
- In order for lawyers and their clients to be able to communicate freely, so that clients can be properly advised, the Courts have recognised that some forms of communication between them should be privileged from disclosure. These are:
 1. confidential communications between a solicitor and their client which are for the purpose of giving or receiving legal advice ("**legal advice privilege**"), and
 2. communications passing, directly or through an agent, between a solicitor and a non-professional agent or a third party, which come into existence in contemplation of litigation and which are made for the dominant purpose of that litigation ("**litigation privilege**").
- For the purposes of litigation privilege, it is sufficient that there is a bona fide belief or reasonable apprehension that there may be litigation.
- Confidentiality is therefore a necessary component of privilege. For example, while legal advice obtained by a partnership is protected by legal advice privilege as against third parties, the same does not apply as between the partners themselves since the information will not be confidential between them. The exception to this is where legal advice is obtained by a partnership in respect of a dispute with a partner in which case the advice will be protected by legal advice privilege as against that partner.
- Under Hong Kong law, legal professional privilege is a fundamental human right that can only be over-ridden by legislation.

Who attracts privilege?

- Privilege extends to communications with barristers as well as solicitors. However, it is important for lawyers to remember that it is the client's privilege, not the lawyer's.
- It does not extend to medical advisors, accountants or trustees, nor does it extend to patent attorneys or trade mark agents.

- There is no privilege in the case of a solicitor who is merely assisting a friend (even if the solicitor was approached specifically for their legal knowledge). This situation arises quite frequently in practice, when solicitors are asked by family friends to, for instance, help with probate matters.

Documents protected by privilege

- Privilege attaches to the documents which contain the privileged communications. The question of whether a document is privileged is a question of substance, not form, so simply marking a document as privileged is not determinative. Similarly, documents which are otherwise not protected do not usually become privileged merely because they are transmitted between the solicitor and the client or because the solicitor has made copies of the documents (even for the purpose of litigation).
- Examples of documents commonly found in a solicitor's matter file:
 - Attendance notes – if these record a meeting which involves privileged communications, then they will be privileged.
 - Notes of proceedings – these are not normally privileged if they relate to proceedings which took place in public.
 - Bills – not normally privileged, although narratives which record privileged information (such as details of the advice given) may be privileged.
 - Accounting records - not normally privileged.
 - Information provided by employees of the client – if this is obtained by the company for the dominant purpose of seeking legal advice, then it will be privileged (see *Citic Pacific Ltd v C-J* [2016 1 HKC 157]).
 - Land and company searches conducted by solicitors – not privileged, even if obtained for the purposes of legal proceedings.

Communications with third parties

- Confidential communications between the solicitor and third parties may be covered by litigation privilege if they came into existence in contemplation of litigation and are made with the dominant purpose of that litigation.
- The most common example is communications with an expert witness. Communications with an expert will normally be privileged, as will the solicitor's drafts of the expert's report, however service of the final report upon the other side may lead to a waiver of privilege over the instructions and communications.
- Given the importance of the expert's independence and the consequent restrictions on the involvement of parties' legal representatives in the preparation of expert reports, the question of what has and has not been provided to the expert can become a live issue. Parties should therefore be cautious about involving experts in privileged communications about the litigation.
- A draft witness statement of fact, prepared for the purpose of litigation, is privileged.
- Communications with a witness of fact may be privileged, provided they are confidential. Solicitors should nevertheless be very cautious when communicating with factual witnesses.
- Where a client communicates with a third party themselves, it will be necessary to establish that they did so for the dominant purpose of obtaining advice from their solicitor. Clearly in this situation there will be room for dispute over whether the communications are privileged, and if there is any potential issue with privilege it is preferable for the solicitor to communicate with the third party.

Common interest privilege

- Where there are communications between 2 parties who have a joint interest in maintaining the privilege (such as joint clients of the same solicitor, a trustee and beneficiary, or a director and shareholder), or to a third party who has a common interest (such as an insurer or co-defendant) then those communications are normally protected by common interest privilege.

Duration

- Once material is privileged, it remains so until the privilege is waived.
- Privilege therefore continues notwithstanding:
 - the end of the action for which the privileged communications came into existence;
 - the termination of the solicitor's retainer; and
 - the death of the client.
- It is the solicitor's duty to claim privilege over the documents in question until privilege is waived.

Exception

- Communications which are made for a fraudulent or illegal purpose do not attract privilege.

Waiver

- Waiver of privilege normally occurs where there has been disclosure of privileged information to a third party. Waiver may be express or implied from conduct, and it may be accidental. The question of whether privilege has been waived involves an objective analysis, and it does not matter whether a party intended to waive privilege or not.
- Merely referring to the fact that legal advice has been obtained will not amount to a waiver of privilege over that advice. The gist, substance or conclusion of the advice must be disclosed. Thus, the assertion that a client has been advised that they will succeed in litigation probably amounts to a waiver of privilege over that advice.
- There may only be a partial or limited waiver of privilege e.g. where privileged information is provided to a third party (such as a regulator) for a specific, limited purpose (see *Citic Pacific Limited v S-J* [2012] 4 HKC 1, [2012] 2 HKLRD 701 (CA)). Practitioners dealing with third parties should always consider whether they need to seek to limit the extent of any waiver of privilege.
- However, once there has been a disclosure of privileged material, the disclosing party may be required to disclose more privileged information relating to the same matter, so as not to give the Court a misleading picture. This is known as collateral waiver or the 'cherry picking' rule (parties are not permitted to cherry-pick their disclosures and only disclose what they think will help them). Attempting to make a partial waiver of privilege is therefore potentially problematic.
- Waiver may occur through disclosure to a third party directly by the client. Clients may sometimes deliberately disclose their lawyers' advice to their opponent. In some situations, the client may share an information storage system (such as a computer server) with their opponent, and as a result the opponent may gain access to privileged material. In that situation, the Courts have held that there is no automatic waiver of privilege. A client who is sufficiently reckless about protecting privileged material may, however, be deemed to have waived privilege.
- However, waiver of privilege is often the result of actions taken (deliberately or otherwise) by the client's legal advisers, for example:

- referring to privileged material in correspondence or a document produced to the other side.
- deploying privileged material in Court e.g. adducing it into evidence at a hearing.
- sending privileged information to the opponent e.g. by misdirecting an email.
- Lawyers who waive their client's privilege inadvertently or without express authority may face civil liability and disciplinary action.

Privilege in the context of claims against solicitors

- A client who alleges negligence or some other form of wrongdoing against their solicitor is deemed to have waived privilege – see also Principle 8.17 of the Guide.
- Similarly, a lawyer who brings a wasted costs application against their own solicitor will be a waiver of all relevant privileged matters. However, there is no such automatic waiver of privilege if the wasted costs application is made by the opponent.

Recovering privilege

- Privilege normally operates as a shield, but it can also operate as a sword where there has been inadvertent disclosure (the relevant principles were laid down in *Al Fayed v Commissioner of Metropolitan Police* [2002] EWCA Civ 780).
- The Court will not normally intervene if the privileged material is disclosed through a step in the litigation proceedings (e.g. privileged documents are formally provided for inspection as part of the discovery process). The rationale is that the disclosing party's solicitor has ostensible authority to waive privilege as necessary, and the receiving party owes no duty and is entitled to assume any waiver of privilege is deliberate.
- However, the Court may intervene to prevent the use of the documents where justice requires e.g. where the documents were obtained by fraud.
- In the absence of fraud, the Court may grant an injunction if the documents were received by mistake. In particular, if:
 1. the lawyer who received the documents had realised a mistake had been made, or
 2. it would have been obvious to a reasonable solicitor in his position that a mistake had been made.
- The state of mind of the receiving party's solicitor is therefore the first consideration. It may be possible to determine that they realised they had received privileged material. If this cannot be determined, then it becomes a question of whether the mistake was obvious.
- Arguably, in many cases of accidental disclosure, it will usually be fairly obvious that it was not intentional. Factors include:
 - the extent and complexity of the disclosure: the greater the volume, the less likely it is unintentional.
 - the circumstances of the disclosure: if it has been rushed or done 'on the cheap' then it is more likely to be unintentional; if the privileged material has been carefully inserted then it is more likely to be deliberate.
 - Whether (and how quickly) the disclosing party raises the mistake.
- Once the Court is satisfied that a mistake or fraud has been established, it will normally grant the injunction unless there is some other factor that makes it unjust to do so.
- The relief available includes orders for the return of the documents and restraining the use of the documents. The Court can also prevent the receiving party's solicitors from continuing to act. This may be appropriate if the solicitors have read the documents in question.

- It is therefore vital that solicitors not only protect their own client's privilege, but also avoid abrogating the opposing party's privilege – or they risk being removed from the proceedings altogether.

Takeaways

- Privilege is one of the fundamental aspects of the solicitor-client relationship.
- The privilege belongs to the client, and continues until it is waived. It should only be waived with the client's express authority.
- Waiver of privilege can be implied from conduct. It can also occur by accident. Practitioners who waive their client's privilege without authority or through inadvertence face potential civil liability and disciplinary action.
- Once privilege is waived, the disclosing party may be required to disclose more privileged information.
- Practitioners should therefore be aware of how privilege comes into existence, how it can be lost, and how to protect it.
- Practitioners should also be aware of the principles which apply to the recovery of privileged information which is disclosed as a result of fraud or a mistake, and take the appropriate steps.