



Litigation privilege: what is it and how can you protect it? - a checklist for directors and managers

What is litigation privilege?

The law relating to litigation privilege developed to allow parties to investigate potential disputes without worrying that the documents they create during their investigations might be scrutinised by the other party. Claiming privilege over a document is a valuable right for a potential litigant: a document that is privileged can be withheld from the opposing party (although in litigation it is withheld from the inspection process but its existence must still be disclosed).

When a dispute arises, expert advice is often needed to help analyse the facts and technical and legal issues. Communications with solicitors relating to legal advice will normally be covered by Legal Advice Privilege. But what about your or your solicitors' confidential communications with other third party experts?

When you or your solicitor instructs an expert, Litigation Privilege will apply where the instruction and consequent communications are made in contemplation of litigation. However, Litigation Privilege can be lost – or indeed not arise at all in certain cases.

For privilege to exist, the document over which it is claimed must meet fairly strict criteria. In particular, it must be a communication between the lawyer or client and the third party, a document made by or on behalf of the client or the lawyer, confidential, be made for the dominant purpose of litigation and litigation must be pending reasonably contemplated or existing;

In a recent case, [Starbev GP Ltd v Interbrew Central European Holding BV \[2013\] EWHC 4038 \(Comm\)](#), there was insufficient evidence to show that the documents in question had been prepared for the dominant reason of preparing for litigation. As a result, the defendant had to disclose documents which revealed its early investigations and thought processes. How do you avoid getting into a similar situation? How do you protect your right to litigation privilege and avoid having to disclose documents you regard as privileged?

It is important to ensure that your early contact with third parties is handled in a way that protects litigation privilege: after all, you do not want to be in the position of handing over documents that reveal the results of your initial investigations and thought processes. This checklist will help you to do that.

Do keep in mind that not all of the work done by in-house lawyers is privileged. In correspondence, in-house lawyers should separate their legal functions from their business and administrative functions.

Please note: this checklist is for guidance only and is not a substitute for legal advice. In each disputed case, the appropriate action for resolving your dispute will depend on the particular facts and law. If you are in any doubt about the applicability of any of the above steps or the legal issues involved, please contact Gwendoline Davies.

Tips for protecting a client's right to litigation privilege

- At the first hint of a dispute, consider what work and investigations you need to carry out to establish your position.
 - Do you need third parties to investigate? If yes, how will you deal with these third-party, non

lawyer, advisors and experts.

- Ask yourself is there is a risk of litigation? Is that impending litigation the dominant reason for your instructions?
- If you want to claim litigation privilege over your communications with the parties, your main reason for instructing them must be in contemplation of litigation. Bear in mind that even in this case, privilege will not always arise.
- If litigation is anticipated, ensure your instructions to your third party advisers and experts refer specifically to the potential dispute. Explain that their work is being sought for the dominant reason of helping with your pre-action investigations. Ensure all correspondence dealing with the third party's work and the issues in dispute refer to your genuine concerns about the potential dispute.
- Mark your correspondence 'confidential' and head it up with a note that it is 'prepared with a view to litigation'.
- Ensure that your team know there's the potential for litigation and that they must therefore preserve all relevant documents (including electronic documents).
- Ensure all contemporaneous correspondence reflects the fact that the third party was instructed to assist in relation to the anticipated litigation.
- Keep the documents within as small a team as possible. Ensure that both your team and the third party advisers treat the documents as privileged. Also, do not risk waiving that privilege by showing the documents to persons unconnected with the dispute.
- If there are other reasons for investigating the facts and creating documents other than an impending litigation, there is a good chance that your communications will not satisfy the 'dominant purpose test' and will not therefore be privileged. Consider whether you want the opposite party to see the documents you are creating.

(For more on the dominant purpose test, read our briefing on [Why are you creating that pre-action document... more on Litigation Privilege \(especially if you're a liquidator!\)](#))

- If in doubt, or if there are two or more reasons for instructing the third party, privilege in your documents might be better protected by speaking to your solicitor first and asking them to manage the pre-action investigations. Communications between clients and their lawyers are generally covered by legal advice privilege. Alternatively, you could give two sets of instructions to your third party advisers to separate any privileged issues relating to even the smallest chance of a dispute.

Contact Details

For further information or to discuss how to resolve your dispute, please contact Gwendoline Davies.

Direct contacts



Gwendoline Davies, Partner, Commercial Dispute Resolution

+44 (0)113 283 2517

gwendoline.davies@walkermorris.co.uk

Walker Morris LLP

Kings Court

12 King Street

Leeds LS1 2HL

T+44 (0)113 283 2500

F+44 (0)113 245 9412

www.walkermorris.co.uk