

# White Collar and Investigations Practice

September 24, 2019

## THE CONCEPT OF PRIVILEGE - WHAT DOES IT MEAN FOR YOU? A SNAPSHOT OF THE PRACTICAL ASPECT OF LEGAL PRIVILEGE

'*Confidentiality*' is critical to the practice of law. The raid conducted last year in the office of Michael Cohen, one of President Trump's personal lawyers, seizing records on payment to porn actress Stormy Daniels and Trump Jr.'s June 2016 meeting with a Russian lawyer with ties to the Kremlin, have reignited the debate on the scope of *attorney-client* privilege. Similar issues arose in India and Germany, with the law enforcement agencies attempting to pierce the *attorney-client privilege* and raiding law firms in the 'Nirav Modi-Punjab National Bank' fraud and the 'Dieselgate issue' respectively. The Panama Papers leak had also opened a Pandora's box on applicability of these principles in the context of cross-border transactions. Such issues have time and again compelled courts across the globe to re-examine principles of *confidentiality* and *privilege*.

The law recognizes the need for confidentiality. The concept of "*privileged communication*" has evolved over centuries and has been debated. Most common-law jurisdictions regard *legal privilege* as a substantive right whereas civil law countries are of the view it is a *procedural* issue. Broadly speaking, the over-arching policy rationale of *legal privilege* is to encourage the seeking of legal advice on a confidential basis. The key reason for maintaining *confidentiality* is that the information should not be used to the detriment of the client, but rather only to advance the client's interests.

Communication for non-legal advice purposes are not covered by the *attorney-client privilege*. Mere presence of an attorney in a meeting of two individuals does not accord any privilege to the communication. The test is whether a communication satisfies the elements necessary to establish the privilege—not how the communication is identified or labeled.<sup>1</sup> The privilege will not apply if a lawyer is hired solely as an accountant,<sup>2</sup> or when the lawyer acts as a negotiator or business agent.<sup>3</sup> Lawyers cannot act as a '*safe haven*' for the client to hide information though there are certain exceptions to it as well.<sup>4</sup>

Divergent views are held by jurisdictions with respect to affording *privilege* to in-house counsels with respect to legal and regulatory proceedings as well as extending it to professionals outside the legal field. Courts across several jurisdictions have adopted myriad interpretations on the application of *attorney-client privilege*. In the world where traditional borders have become invisible, global corporations are getting entangled in investigations touching several jurisdictions. This has raised a plethora of issues. The laws and procedures governing *privilege* and related aspects in such internal investigations vary across jurisdictions.

### DIVERGENT VIEWS: PRIVILEGE IN INVESTIGATIONS

• **India:** India has adopted a strict approach on privileged professional communication between clients and legal advisors. Sections 126 to 129 of the Indian Evidence Act, 1872 ("**Evidence Act**") deal with confidentiality of data that the client shares with his attorney<sup>5</sup>. *Privilege* extends only after the creation of attorney-client relationship and not prior to that.<sup>6</sup> However, ascertaining the creation of *attorney-client* relationship is not easy. It may be by way of signing of an engagement letter or even an oral agreement. Under Indian law, *in-house lawyers* are not included within the ambit of Section 126 of the Evidence Act. There is no statutory privilege accorded to the communication between in-house lawyers and their employers; this continues to be a matter of concern.

The Evidence Act includes within its scope *baristers, attorneys, pleaders or vakils* and not *in-house lawyers*. The Advocates Act, 1961 defines an advocate to include only those lawyers who have enrolled with the specific State Bar Council. The Bar Council of India Rules provide for enrolment of lawyers as advocates; lawyers in India, once they join a company under full time employment, are under an obligation under such rules to surrender their registration as an advocate.<sup>7</sup> If they have given up their registration, the applicability of the above-mentioned statutes do not arise and therefore cannot claim privilege, as they are only employees of the company. However, in the event the in-house lawyers do not give up their registration and continue to render legal advice to their employer as an advocate, sanctity of communication exchanged between them and their employers (i.e. the client), whether privileged or not remains to be tested to its finality. Application of privilege would depend on the facts of the case including content of the communication, capacity of the in-house counsel i.e. whether in full-time employment or not.

Several High Courts have contemplated that privilege should be extended to in-house lawyers in relation to all legal communications exchanged with the employer where legal advice is sought or is in relation to conduct or probable litigation, but not including any form of administrative or executive work.<sup>8</sup> However, the Supreme Court in *Satish Kumar Sharma v. Bar Council of Himachal Pradesh*<sup>9</sup> clarified the position and held "*If a full-time employee is not pleading on behalf of his employer, or if terms of employment are such that he does not have to act or plead but is required to do other kinds of functions, then he ceases to be an advocate. The latter is then a mere employee of the*

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government or the body corporate". The government and other professionals can be compelled to be disclosed before any competent authority as no privilege is extended to other professionals.

In India, owing to the highly subjective nature of such investigations, there is no set mechanism or procedure prescribed, for conducting such investigations. In the absence of any judicial interpretation in relation to this subject, it continues to remain a grey area and will continue to evolve over time based on judicial precedents. Therefore, as a matter of practice, while conducting internal investigations, clients choose to engage external legal advisors and also forensic experts through such external legal advisors, to protect privilege to the extent permissible. There have been recommendations in the past in various Law Commission Reports for extending the applicability of provisions of Evidence Act on legal privilege to other professionals; however, the same were not implemented as yet.

• **United States:** The United States Court of Appeals in a recent decision of *In re: Kellogg Brown & Root, Inc.*<sup>10</sup> confirmed the application of the attorney-client privilege to internal corporate investigations as set forth by the Supreme Court over thirty years ago in *Upjohn Co. v. United States*<sup>11</sup>. The Supreme Court in *Upjohn* had stated that the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice. The internal investigations are protected to the extent that they are made for the *predominant purpose* of obtaining legal advice<sup>12</sup>. In the *Kellogg Brown* case, District Court first applying the '*but for*' test held that the party invoking the privilege must show the communication would not have been made '*but for*' the fact that legal advice was sought. Overruling this verdict, the Court of Appeals stated that so long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, *attorney-client privilege* applies, even if there were also other purposes for the investigation and even if the investigation was mandated rather than simply an exercise of company discretion.

• **United Kingdom:** Privilege in U.K. is not restricted and includes both legal advice privilege and litigation privilege under the broader umbrella of legal professional privilege. Solicitors and barristers, foreign lawyers and those acting under their direction attract *legal advice privilege*, provided they are acting in a legal capacity.<sup>13</sup> In *Blackpool Corporation v. Locker*<sup>14</sup> the Court observed that for privilege to apply, what matters is not the lawyers' job title but whether he is exercising professional skill as a lawyer. The very principle of applying *privilege* is that a person should be able to obtain legal advice with absolute confidence that his disclosures to his advisor remain private.<sup>15</sup> It encourages full and frank communication between lawyers and their clients which promotes the rule of law and the administration of justice. Privilege does not extend to the corporate entity or to all its employees but only to those employees of a corporation who are expressly given the responsibility of obtaining legal advice from either external or in-house lawyers (who are considered the 'client'). The Three Rivers<sup>16</sup> ruling that set out the narrow definition of who constitutes the client for the purpose of legal advice privilege is controversial and has been the subject of much criticism in commentary and subsequent decisions. Communication of privileged advice from the recipient within the company to a company's board of directors should not cause loss of privilege (either in the original document or in the subsequent communication), nor should oral submissions of advice at a board meeting. However, internal communications forming preparations for the instructions requesting legal advice are not privileged.

Privilege in relation to internal investigations is heavily tested. The courts are still grappling with it on a case-by-case basis. There have been a number of recent cases in which the English courts have considered the scope and concept of both legal advice and litigation privilege in investigations. The English Court of Appeal<sup>17</sup> recently ruled that: Litigation privilege will apply to communications between clients and their attorneys if there is reasonable contemplation of proceedings, and litigation must be the sole or dominant purpose of the investigation. It further observed that documents prepared by the solicitors and forensic experts forming part of the investigation following formal instructions of the solicitors would be protected. However, in the *RBS Rights Issue Litigation*<sup>18</sup> where legal advice privilege was asserted, documents created during internal investigations into allegations of bribery and corruption, on factual accounts of things rather than legal advice sought or provided was not protected. Although the employees were expressly authorized to speak to the lawyers by RBS, the court refused to treat them as the 'client' for the purpose of the legal advice privilege test and regarded them as third parties.

In the *ENRC* decision the court held that litigation privilege extends to documents concerned with the settlement or avoidance of litigation. However, in a subsequent judgment that is difficult to reconcile with *ENRC*, the English Court of Appeal held that internal corporate communications exchanged between Board members of a company relating to commercial proposal or settlement offer would not be privileged.<sup>19</sup> The Court of Appeal adopted a narrow view of privilege and held that only correspondence exchanged for the dominant purpose of obtaining advice or evidence in respect of litigation, would be protected by litigation privilege. Therefore, settlement proposals and commercial issues related to litigation are also not protected unless it is shared with lawyers and involves legal advice from them, thus restricting the scope of privilege. The English Court of Appeal reiterated the position in *Sotheby's v Mark Weiss Ltd & Ors*,<sup>20</sup> upholding that litigation privilege applies to documents created for the dominant purpose of litigation which is pending, reasonably contemplated or existing. Documents exchanged with experts which fail to disclose any purpose may not be protected under litigation privilege, unless it is carefully drafted and can establish that it was created for the purposes of litigation.

Subsequently the High Court in the *Bilta decision*<sup>21</sup> while determining whether the documents were created for the sole or dominant purpose of conducting litigation rightly held that steps taken by parties to resist tax assessment as part of a continuum that formed the road to litigation and the collaborative conduct towards HMRC as subsumed under the overarching purpose of defeating the tax assessment. The High Court held that assembling evidence to ascertain the strength of one's position was an ordinary part of litigation and not a separate purpose - and that an intention to dissuade a counterparty from pursuing a claim was inseparable from the wider purpose of conducting litigation.<sup>22</sup> This approach has aligned the position with reality.

The correct application of legal advice and litigation privilege to investigations continues to be the subject of debate in the UK.

• **Germany:** German law differentiates between civil litigation, governmental investigations, and criminal defense representation with regard to *attorney-client privilege*. Attorney-Client communication is protected by seizure

prohibitions, their scope and applicability dependent on the statutory basis of the legal proceedings leading to the seizure of such communications. There is no general duty to disclose information under German law; however the attorney can refuse to testify in civil, criminal and regulatory offence matters with regard to any information he has obtained "*in exercise of his/her profession*" or to release any document he/she has received from the client. German law does not extend protection to documents exchanged before the initiation of formal proceedings nor to documents not in the sole possession of a lawyer. The legal privilege has been recently extended to cover attorneys in case of investigations. The German Code of Criminal Procedure clearly lays down the kind of documents that will be covered under legal privilege. The same principles are applicable for in-house counsels provided there are enrolled with the Bar, tender advice in their legal capacity, solely responsible for the documents and act without any instructions. However, foreign lawyers are not granted privilege unless enrolled with the Bar.

#### STEP IN THE RIGHT DIRECTION:

The concept of privilege has assumed unprecedented importance over the years especially with the rise in internal investigations involving cross-border issues. Privilege is a highly debated topic and has attracted diverging views with respect to scope and kind of privilege extended as well as to professionals to whom it may be extended. The series of decisions on privilege in various jurisdictions have created more awareness on the rights available to companies as well as measures to be taken to protect disclosure of confidential information.

While it may be comparatively clearer in other jurisdictions, when it comes to India, in the absence of legislations and clear precedents and where litigation is the order of the day, protection of one's attorney-client privilege assumes unprecedented importance and is often an act of tight-rope walking!

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– Sahil Kanuga & Payel Chatterjee

You can direct your queries or comments to the authors

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<sup>1</sup> Douglas Richmond, The Attorney Client Privilege and associated confidentiality concerns in the post Enron era, Association of Corporate Practice, available at <http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16057&recorded=1>, last accessed on April 21, 2018

<sup>2</sup> In Re Colton, 201 F. Supp. 13 (S.D.N.Y. 1961).

<sup>3</sup> J. P. Foley & Co., Inc. v. Vanderbilt, 65 F.R.D. 523 (S.D.N.Y. 1974).

<sup>4</sup> "*Crime-fraud*" which allow disclosure of information communicated by the client to use the lawyer's services to commit or cover up a crime or fraud. There are exceptions that would mandate disclosure of confidential information if required under law or authorized by client or in self-defense.

<sup>5</sup> "*No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment...*"

<sup>6</sup> Kalikumar Pal v. Rajkumar Pal (1931) 58 Cal 1379, Para 5

<sup>7</sup> Part VI, Chapter II, Section VII, Rule 49 of the Bar Council of India Rules: An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice and shall, on taking up any such employment intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment. An advocate cannot be a full-time salaried employee.

<sup>8</sup> Municipal Corporation of Greater Bombay v Vijay Metal Works, AIR 1982 Bom 6 and Larsen & Toubro Ltd v Prime Displays (P) Ltd [2003] 114 Comp Cas 141 (Bom)

<sup>9</sup> AIR 2001 SC 509

<sup>10</sup> (D.C. Cir. June 27, 2014) (No. 14-5055)

<sup>11</sup> 449 U.S. 383 (1981)

<sup>12</sup> *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007)

<sup>13</sup> Taylor v Foster [1825]

<sup>14</sup> [1948] 1 All ER 85, 97.

<sup>15</sup> Greenough v Gaskell [1833] EngR 333

<sup>16</sup> [2005] 1 AC 610

<sup>17</sup> Eurasian Natural Resources Corporation Limited v. The Director of the Serious Fraud Office [2018] EWCA Civ 2006

<sup>18</sup> [2016] EWHC 3161 (Ch)

<sup>19</sup> WH Holding Ltd v E20 Stadium LLP [2018] EWCA Civ 2652

<sup>20</sup> [2018] EWHC 3179 (Comm)

<sup>21</sup> Bilta (UK) Ltd (in Liquidation) v Royal Bank of Scotland plc and Mercuria Energy Europe Trading Limited [2017] EWHC 3535 (Ch)

<sup>22</sup> Nicola Peters and Michelle de Kluyver, Litigation Privilege in the context of investigations: The Bilta Decision, 9 April 2018 available at: <https://www.addleshawgoddard.com/en/insights/insights-briefings/2018/litigation/litigation-privilege-in-the-context-of-investigations-bilta-decision/>, last accessed on September 20, 2019

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