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The Legal Profession Privilege: Once Privileged, Always Privileged

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The law has afforded a special privilege to communications between lawyers and their clients. This protection is described as the absolute protection and is even stronger than the protection afforded to confidential communications.

This alert will discuss the application of legal profession privilege and the scope of protection afforded.

Legal Profession Privilege: A Common Law Concept

"Once privileged, always privileged" is a common law maxim which essentially means that communications between lawyers and clients must be protected and must never be revealed without the client's consent. In *B v Auckland District Law Society*¹, the Privy Council held that "*once the privilege is established, the lawyer's mouth is 'shut for ever'*" but as privilege belongs to the client and not to the lawyer, the client may waive the privilege.

This protection by privilege is an absolute one as described in *Three Rivers DC v. Bank of England*², where the law has afforded this absolute protection to communications between lawyers and clients when it has denied to all other confidential communications between, to name a few, doctor and patient, accountant and client, husband and wife which only protect the confidentiality up to a point.

In *R v Derby Magistrates' Court, ex-parte B*³, the House of Lord observed that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a

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¹ [2003] 2 AC 736

² [2005] 1 AC 610

³ [1995] 4 All ER

particular case. It is a fundamental condition on which the administration of justice as a whole rests.

Privilege Does Not Demand Confidentiality

While difference between privilege and confidentiality have been succinctly discussed, the next question to ask is this: Does privilege require confidentiality? Would privilege be lost due to the loss of confidentiality?

The Federal Court in *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor*⁴ answered in negative. The Federal Court held that:

"[24] It is true that a legal opinion sought is implicitly confidential but the exception under Section 126 has nothing to do with loss of confidentiality elsewhere but with whether the privilege holder ie, the client is prepared to waive the privilege for the court proceedings. It is the privilege that has to be waived and not the confidentiality. Thus, the finding of the Court of Appeal in treating "privilege" as being co-extensive with "confidentiality" is untenable.

[25] Hence, I hold that the legal professional privilege under Section 126 of the Act is absolute and it remains so until waived by the privilege holder, i.e. the client."

In other words, legal profession privilege will survive even after the loss of confidentiality until it is waived by the clients.

Legal Profession Privilege: Taking A Closer Look

The concept of legal privilege is codified in Sections 126 to 129 of the Evidence Act 1950 (EA 1950). Section 126(1) reads as follows:

"No advocate shall at any time be permitted, unless with his client's express consent, to

⁴ [2009] 3 CLJ 405

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disclose any communication made to him in the course and for the purpose of his employment as such advocate 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...”

A plain reading of Section 126(1) would demonstrate that in order to attract legal profession privilege, two conditions must be satisfied:

- (a) The relationship must be a solicitor and client relationship.
- (b) The communication must be made in the course of and for the purpose of the employment of the advocate in such capacity.

Once the legal profession privilege is established, it does not matter if the lawyer’s employment with the client later ceases. However, the protection of privilege is, subject to a few statutory exceptions, i.e.:

- (a) Any such communication made in furtherance of any illegal purpose.
- (b) Any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

The legal profession privilege in Section 126(1) also applies to interpreters and the clerks or servants of advocates by virtue of Section 127 of the EA 1950. Malaysian case law have also established that documents and reports commissioned for the dominant purpose of litigation are protected by the legal profession privilege.

On the other hand, Section 129 of the EA 1950 provides that no one shall be compelled to disclose to the court any

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confidential communication which has taken place between him and his legal adviser unless he offers himself as a witness.

Does The Legal Profession Privilege Apply To In-House Counsel/Foreign Lawyers?

The term “advocate” is defined in the Interpretation Acts 1948 and 1967 as “a person entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia.” The term “legal professional adviser” is not defined but arguably hold the same meaning as the term “advocate” on the basis that Section 126 applies to the advocates and Section 129 applies to the clients.

There have been no cases which deal with the issue on whether communications with in-house counsel or foreign lawyers are protected by legal profession privilege. A strict interpretation of Section 126 suggests that legal professional privilege only applies to advocate and solicitors who are entitled to practise in Malaysia i.e. called to the Malaysian bar or obtained an exemption which allow them to practise in Malaysia on an ad-hoc basis. On this basis, it appears that under statute, legal professional privilege does not extend to in-house counsel who are salaried employees of the respective corporations.

That said, Legal Profession (Licensing of International Partnerships and Qualified Foreign Law Firms and Registration of Foreign Lawyers) Rules 2014 now permits foreign lawyers to practice in certain permitted practice areas in Malaysia. As such, the communications with foreign lawyers may attract the legal profession privilege. In this regard, it would be interesting to see our courts address this matter when the occasion arises.

Authored by Kong Xin Qing senior associate from the Firm’s Dispute Resolution practice.

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