

Privilege under attack – the Law Society fights back

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17 December 2019

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The main categories of privilege, as between a client and his/her lawyer, are:

1. Legal advice privilege – covering communications between clients and their lawyers for the purpose of obtaining or giving legal advice; and
2. Litigation privilege – covering communications between clients and their lawyers, or the lawyer or client and a third party, which communication comes into existence for the dominant purpose for use in actual or pending litigation.

Why is privilege important?

The concept of privilege, which permits a party to withhold evidence or documents from production to the court or a third party, is accepted as playing a fundamental role in our justice system and is a key tool in upholding the rule of law.

The right of a client to assert privilege is a common law and human right, and ensures the proper administration of justice by ensuring that communications between a client and his/her lawyer are private and will not be disclosed to a court or opponent. Without this protection, clients would not trust in the power and protection of the law.

Is privilege under attack?

In recent years, there have been a number of potentially alarming developments which threaten the fundamental protection of privilege. The Law Society reports that some parts of government, regulatory bodies and enforcement authorities have criticised lawyers for asserting privilege on behalf of their clients, and that privilege is being used as a tool, sometimes allegedly not in good faith, to defeat investigations. In some cases where a client has asserted his/her right to privilege, the investigating authorities/agencies are viewing such conduct as uncooperative and are drawing negative inferences from the client's conduct, despite privilege being a fundamental right to the proper administration of justice. These bodies and authorities are then using the threat of adverse inferences and conduct 'as if the client has something to hide' to encourage the client's waiver of privilege altogether.

The protection of privilege notably came under attack in the first instance decision in the [Serious Fraud Office's \(SFO\) case against Eurasian Natural Resources Corp. Ltd \(ENRC\)](#). In that case, ENRC instructed lawyers to carry out an internal investigation arising from allegations of bribery and financial wrongdoing made by a whistleblower. Some months later, the SFO opened its own investigation into the allegations

and demanded the disclosure from ENRC of a range of documents, including notes taken by ENRC's lawyers of the evidence provided to them, along with documents created by ENRC's forensic accountants.

Eurasian Natural Resources Corp. Ltd claimed privilege in the documents demanded by the SFO, who then issued proceedings to compel ENRC's production of the documents. At first instance the High Court ruled that privilege did not attach to the documents demanded by the SFO because they were not in contemplation of litigation at the time they were created and that litigation privilege cannot be deployed in relation to the avoidance of future litigation.

On appeal, the Court of Appeal unanimously held that ENRC's internal investigation was reasonably in contemplation of a criminal prosecution and as such, ENRC could not be compelled to disclose the documents, to which privilege was found to attach.

Law Society's practice note

The Law Society's practice note is a timely reminder of the issues affecting privilege and the obligations on lawyers to ensure that their client's right to assert privilege is protected and if appropriate deployed accordingly, often in the face of intense pressure from agencies/regulators for privilege to be waived.

The practice note stipulates that it is not the role of lawyers to satisfy law enforcement agencies and regulators that a claim to privilege has been properly made. The role of the lawyer is to protect the client's right to assert privilege in the face of any regulatory opposition; it is the responsibility of the judge – and the judge alone – to ascertain whether a claim to privilege has been properly made. This reminder is important because it clarifies the case management and daily responsibilities of lawyers in the face of such pressure.

In relation to a lawyer's conduct concerning privilege, any lawyer who waives privilege without the informed consent of his/her client would inevitably be in breach of his/her professional duties. On the flip side, lawyers are being advised to think carefully about the circumstances before them concerning privilege, and whether or not it is correct and/or appropriate for them to advise their clients that the protection of privilege is available to them.

The practice note also provides a reminder in relation to the waiver of privilege, and how privilege is capable of being waived by the inadvertent disclosure of privileged material.

Important considerations

The Law Society is clearly concerned about the increasing number of cases in which the right of privilege is being challenged, such that it has issued an updated practice note on privilege to clarify its stance and to provide updated guidance to practitioners.

If you have not read the Law Society's practice note, you can access it via the Law Society's website or via the link [here](#).

Considering the importance of the right to claim privilege in our justice system, the trend of regulatory bodies in pressuring clients to waive their right to assert privilege is troubling.

The Law Society's practice note, along with its invitation to practitioners to alert the Society to any instances of courts or authorities taking decisions which impinge upon this fundamental right, can be taken as a call to arms for lawyers to take a more active role in protecting their clients from what appears to be a mounting challenge to the protection which privilege affords.

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