

1. What are the rules governing disclosure of documents in civil and criminal litigations in your jurisdictions? Can a party be compelled to make specific disclosures of certain documents? Please refer to any relevant texts or case law in that respect.

There are two forms of disclosure in England & Wales:

- General Disclosure (also known as Standard Disclosure);
- Specific Disclosure.

Each are discussed below.

### **General Disclosure Rules**

The disclosure regime can be found in Civil Procedure Rule ("**CPR 31**") and Practice Direction ("**PD**") 31A and 31B.

#### **What is disclosure?**

- Disclosure is defined in CPR 31 as "*stating that the document exists or has existed*". In practice, this means that each party must make and serve to the other a list of documents. Note that disclosure (as referred to in the English context) does not involve the production of documents (this is a separate step, known as 'inspection', which is discussed below).
- The duty of disclosure continues until judgement or settlement, as per CPR 31.11(1).
- General disclosure applies to all claims except a claim on the small claims track.

#### **Which documents must be disclosed?**

As per CPR 31.6, a party is required to disclose:

- i. documents on which he relies; and
- ii. documents which (a) adversely affect his own case, (b) adversely affect another party's case, or (c) support another party's case; and
- iii. documents which he is required to disclose by a relevant PD.

#### **General rules**

- The duty of disclosure is limited to documents which are, or have been in a party's control, as per CPR 31.8(2).
- Documents include "*anything in which information of any description is recorded*", as per CPR 31.4. This includes all electronic documents.
- Each party must make a reasonable search for documents.

#### **Procedure**

The procedure for standard disclosure is set out in CPR 31.10. Each party must make and serve to the other a list of documents in Form N265 or N265 (CC) (in the Commercial Court). The list must contain a disclosure statement which complies with CPR 31.10 and PD 31A.4.

### **Withholding documents from disclosure**

Disclosure and inspection are two separate procedural steps. Inspection permits the party who has disclosed documents to allow the opponent to view the disclosed documents, however certain categories of documents may be withheld from inspection, including privileged, irrelevant and commercially sensitive documents.

#### Business and Property Courts

The Disclosure Pilot Scheme, under PD 51U is a mandatory scheme which operates in the Business and Property Courts. It has been in operation from 1 January 2019 and was initially scheduled to run for two years, but was extended to 31 December 2021, and has been extended again for a further year, until 31 December 2022.

### **Specific Disclosure Rules**

Under CPR 31.12 the court may order a party which has given inadequate disclosure to:

- i. disclose additional documents or classes of documents; and/or
- ii. carry out a search for additional specified documents, and disclose documents located as a result of that search.

CPR 31.12(1) does not set out any specific criteria to be satisfied in order for specific disclosure to be granted. However PD 31A states that:

- i. a party may make an application for an order for specific disclosure if they believe that the disclosure of documents given by a disclosing party is inadequate (PD 31A.5.1); and
- ii. in deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case, in particular, the overriding objective described in CPR 1.

If the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise) the court will usually make such order as is necessary to ensure that those obligations are properly complied with (PD 31A.5.4).

### **When and how to make an application for Specific Disclosure**

The court has jurisdiction under CPR 31.12 to make an order for specific disclosure at any time, whether or not standard disclosure under CPR 31.5 has taken place.

The requesting party must make a written request to the opposing party before making an application to court for specific disclosure. The procedure for making a specific disclosure application is set out in PD 31A.5.2 to 31A.5.5. The key stages are: (a) file an application notice, via Form N244 specifying the order sought, the grounds for the application, the documents or classes of documents sought, including supporting evidence, (b) pay the court fee, and (c) file a copy for the court.

Business and Property Courts

CPR 31.12 (i.e. Specific Disclosure) does not apply for cases that are within the scope of the Disclosure Pilot Scheme (PD51U). Note that the Commercial Court Guide and Technology and Construction Court Guide have not been updated to refer to PD 51U. The Commercial Court Guide still includes guidance on CPR 31.12 (Section E6), however that is not relevant to the Disclosure Pilot Scheme.

2. Is the notion of legal privilege recognized in your jurisdiction? If yes, what is its legal basis? Is it considered a procedural or substantive issue? Please refer to any relevant texts or case law in that respect.

There are two main forms of legal privilege (also known as Legal Professional Privilege) in England & Wales:

- **Legal Advice Privilege;** and
- **Litigation Privilege**

These are each discussed in more detail in the sections that follow.

Several preliminary points are worth noting:

- Privilege entitles a party (or their successor in title) to withhold evidence from production to a third party or the court. This evidence may be either written or oral.
- Once privilege has been established, an absolute right to withhold the document in question arises. Therefore the court will not be called upon to exercise any discretion, whether on the grounds of public policy or otherwise.
- Similarly, the fact that a privileged document may be relevant is of no consequence; were it not relevant, it would be unnecessary to claim privilege at all.
- A litigant's entitlement is to withhold inspection of privileged documents, although the obligation to include the documents in the list of documents remains (as per CPR 31.10, as above). No adverse inference can be drawn by the court if privilege is claimed.
- Both forms of privilege set out above are substantive rights; they can, therefore, protect a party from having to disclose privileged documents in a broad range of situations (for example, following a request from public authorities such as the police or tax authorities), unless there is clear statutory provision to the contrary.
- To claim privilege, the evidence in question must be confidential. There is an important distinction between the loss of confidentiality and the waiver of privilege.
- Legal professional privilege belongs to the client, and the client's lawyer is under a professional obligation to assert the privilege until it is waived by the client.

3. What are the rules protecting communications between attorneys and clients in your jurisdiction? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

### **Legal Advice Privilege**

#### **Defining "lawyer"**

The ability to freely access a lawyer's professional skill and judgment is one of the key principles underlying the concept of privilege. In this context, this includes all members of the legal profession: solicitors, barristers, in-house lawyers and foreign lawyers. It also includes legal executives and licensed conveyancers who are employed to give advice on English law by a licensed body.

As far as foreign lawyers are concerned, Moulder J confirmed in *PJSC Tatneft v Bogolyubov and others [2020]*, that legal advice privilege extends to communications with foreign lawyers, including where they are "in-house", provided they are acting in the capacity or function of a lawyer. There is no additional requirement that foreign lawyers should be "appropriately qualified" or recognised or regulated as "professional lawyers".

With regard to in-house lawyers, the part of their work which is business advice or administration will not be privileged. They should therefore avoid including communications relating to their executive, business, or administrative function in the same document as communications relating to their legal function. Confusion here could lead to loss of privilege in the whole document. The issue will be whether they gave the advice in their professional capacity as lawyers and "*whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law*" (see Lord Scott in the *Three Rivers (No 6)* case).

#### **Defining "client"**

In *Three Rivers (No 5)*, the Court of Appeal gave a very restrictive definition of client and held it would only cover communications between the lawyer and a small group of the bank's employees actually charged with instructing the bank's lawyers. This means where the client is a company, you cannot assume that all documents produced by employees and sent directly to lawyers will be privileged.

In *Re The RBS Rights Issue Litigation [2016]* the restrictive approach to the definition of client was confirmed. The court found that "the client" consisted only of those employees authorised to seek and receive legal advice from the lawyer, and that legal advice privilege did not extend to information provided by just any employees/ex-employees to a lawyer.

#### **Parameters of Legal Advice Privilege**

The purpose of legal advice privilege is to enable a client to place unrestricted confidence in their lawyer (as confirmed in *Three Rivers (No 6)*).

Legal advice privilege applies to:

- i. confidential communications;
- ii. which pass between a client and the client's lawyer; and

- iii. which have come into existence for the dominant purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context. In this respect:
- Background documents that might be included by the client when seeking advice from a lawyer will not benefit from legal advice privilege if they existed before the need to seek legal advice arose (unless they were already protected by a pre-existing privilege).
  - It seems from the decisions in *Balabel v Air India* and *Three Rivers (No 6)* that the vast majority of work done by lawyers is likely to have a "*relevant legal context*" which involves them using some aspect of their legal skills, as a result of which their communications will likely be protected by legal advice privilege.

Such communications are privileged at all times unless privilege is waived by the client or inadvertently lost: *Addlesee and others v Dentons Europe LLP* [2019]: "The client must be sure at the time when he consults his lawyer, that without his consent, there are no circumstances under which the privileged communications will be disclosed without his consent."

Legal advice privilege is narrower in ambit than litigation privilege but can be claimed more commonly. It will only attach to communications between a lawyer (see "*Defining "lawyer"*" above) and the lawyer's client (see "*Defining "client"*" above). It will not therefore attach to communications with third parties (in contrast with litigation privilege – described below). Further, legal advice privilege will not attach where the solicitor is acting not as the client's legal adviser, but as the client's "*man of business*" (*Three Rivers (No 6)*).

4. What rules (if any) protect documents created for purposes of arbitration/litigation? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

### **Litigation privilege**

Litigation privilege arises from the principle that a litigant or potential litigant should be free to seek evidence without being obliged to disclose the results of their research to their opponent.

For litigation privilege to apply, the material in question must satisfy the following three conditions:

- First, it must be a communication between:
  - i. a lawyer (acting in a professional capacity) and the lawyer's client (this will also be protected by legal advice privilege, provided the other criteria are satisfied); or
  - ii. a lawyer (acting in a professional capacity) and a third party; or
  - iii. a client and a third party(note, in relation to the above, that in all cases the lawyer or client/litigant may use an agent, so long as the agent is simply a medium of communication).
- Second, it must be made for the dominant purpose of litigation which is pending, reasonably contemplated or existing.
- Third, it must be confidential.

The burden of proof is on the party claiming privilege (*West London Pipeline*).

**Dominant purpose**

To attract litigation privilege, the communication must have been made for the sole or dominant purpose of litigation which is pending, reasonably contemplated or existing. The concept of "purpose" is broad and can cover many aspects of the litigation process. The "purpose" test is for dominance and not exclusivity.

The court will look at the purpose of the document objectively. The following will not necessarily be determinative of the issue:

- Statements within a document that it was prepared to enable the lawyer to advise on the litigation.
- Evidence put to the court that the document was prepared for a particular purpose.

Even if litigation is reasonably in prospect at the time a document is created, litigation privilege will not be available unless the document was created for the dominant purpose of that litigation. The litigation need not be the sole purpose of the document, but it is not sufficient to establish that the litigation was one of a number of purposes of equal importance.

It has been acknowledged that establishing the dominant purpose is particularly tricky where documents are produced for a dual purpose. In *Waugh v British Railways Board [1980]* the House of Lords concluded that, in order to claim privilege, the litigation purpose would have to be the dominant purpose.

What matters may not be the state of mind of the author of the communication but of the party that commissioned or procured it (as per *Guinness Peat Properties v Fitzroy Robinson Partnership*).

Further, litigation must be a real likelihood rather than a mere possibility (*USA v Philip Morris and British American Tobacco*), although the chance of litigation need not be greater than 50%. From the moment that litigation is pending, reasonably contemplated or existing, all communications between the client and the client's solicitor or agent, or between one of them and a third party, will be privileged if they came into existence for the dominant purpose of giving or receiving advice in relation to the litigation, or collecting evidence for use in the litigation.

Litigation privilege applies to proceedings in the High Court, the County Court, employment tribunals and, where it is subject to English procedural law, arbitration.

5. What rules (if any) protect communications or documents exchanged in the context of settlement negotiations? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

Solicitors and in-house lawyers should ensure that their corporate clients are aware that internal communications prepared to discuss settlement options may not be protected by privilege.

The case of *WH Holding Ltd and another v E20 Stadium LLP [2018]* concerned emails passed between a company's board members and stakeholders. The Respondent claimed that the emails were composed with the dominant purpose of discussing a commercial proposal for settling the parties' dispute at a time when litigation was in reasonable prospect. The court held that:

- The concept of "conducting litigation" included deciding whether to litigate and whether to settle the dispute giving rise to the litigation.
- However, there was no authority or justification for extending the scope of litigation privilege to purely commercial discussions.
- Litigation privilege would protect documents in which advice or information obtained for the sole or dominant purpose of deciding whether to litigate or to settle could not be disentangled, and those which would otherwise reveal the nature of the advice or information. In addition, even if a document was not covered by litigation privilege, it might yet be covered by legal advice privilege.
- However, documents created with the dominant purpose of discussing a commercial settlement did not fall within the scope of the privilege.

6. What rules (if any) protect communications between attorneys? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

Lawyer-to-lawyer communication made on behalf of the same client will benefit from litigation privilege if it satisfies the criteria of litigation privilege, as set out above.

#### Joint retainers

Parties may retain the same solicitor to advise them on a transaction. In these circumstances:

- They are entitled to see any privileged communications arising under the retainer to which they have not been a party.
- They are not entitled to claim privilege against each other in respect of those communications in any subsequent litigation.
- They can claim privilege against all the rest of the world.
- They are not entitled to waive privilege unilaterally.

#### Lawyers' employees

In relation to a lawyer's employees (such as paralegals and trainees), as long as they are properly supervised by a qualified solicitor in accordance with solicitors' regulatory requirements, their work will be the work of the legal department rather than the advice of the paralegals or trainees themselves. Their communications with the client will therefore attract legal professional privilege, provided they are giving, or helping to give, legal advice in the context of the professional relationship between their solicitor employer and the client (*Taylor v Forster (1825) 2 C&P 195*).

7. What rules (if any) protect other types of sensitive communications or documents (settlement negotiations, State secrets, et al.)? Are there exceptions to those rules? Please refer to any relevant texts or case law in that respect.

#### **Commercially sensitive and confidential documents**

Commercial sensitivity and confidentiality, by themselves, are not sufficient grounds on which to withhold disclosure of parts of documents, however, material which is commercially sensitive or confidential and also irrelevant, may be redacted.

Where commercially sensitive material does need to be disclosed, it may be possible to obtain an order for that material to be disclosed on a more limited basis: for example, "lawyers' eyes only".

**Public interest immunity**

Under CPR 31.19 a party is entitled to "*withhold disclosure of a document on the ground that disclosure would damage the public interest...*" The aim is to prevent disclosure of material which would harm the nation or the administration of justice. A without notice application is required to rely on this immunity.

**Disproportionate**

Objection may be raised to disclosing documents where the costs of listing are disproportionate to the sums in issue, as per CPR 31.10. The issue might arise because of the sheer volume of material involved.

**Disclosure List**

As outlined above, during disclosure parties must provide a list of documents. This list is divided into three sections, (i) inspection permitted, (ii) inspection withheld, and (iii) inspection impossible (where the documents are no longer in the party's control). The description of the disclosed document in part one of the list should make it clear if the document disclosed is redacted. The claim to withhold inspection, for example on the ground of privilege, will be made in part two of the list.

8. What communications or documents are protected by the rules mentioned in Q3 to 7? Please refer to any relevant text or case law in that respect.
As above.  A document is " <i>... anything in which information of any description is recorded</i> " (CPR 31.4).
9. Who is protected by the rules mentioned in Q3 to 7 (e.g., in-house counsel, foreign lawyers, third parties)? Please refer to any relevant text or case law in that respect.
As above.
10. What are the consequences of violations of the rules mentioned in Q3 to 7? Please refer to any relevant text or case law in that respect.
Subject to minor exceptions, all parties engaged in litigation in England and Wales are obliged to give disclosure.
<b>Specific disclosure</b>

As above, if a party believes there are missing documents, they can make an order for specific disclosure and, as per CPR 31.12, the court may order a party which has given inadequate disclosure to disclose additional documents or classes of documents or carry out a search for additional specified documents, and disclose any documents located as a result of that search.

**Failing to disclose a helpful document**

CPR 31.21 provides that a party may not rely on any document which they fail to disclose, or in respect of which they fail to permit inspection, unless the Court gives permission. In practice, for obvious reasons, this rarely happens.

**Contempt**

A suspicion that documents that should have been disclosed have been withheld is, in effect, a suspicion that a false disclosure statement has been signed. Contempt proceedings may be brought against a person who makes, or "causes to be made" a false disclosure statement without an honest belief in its truth, as per CPR 31.23. Contempt proceedings on this ground are rare. Other options will be exhausted first and, in practice, the court relies on solicitors to ensure that their clients comply with their disclosure obligations.

**Debarring and unless orders**

Debarring and unless orders are a useful port of call if a party suspects serious shortcomings in its opponent's disclosure (including in the context of a specific disclosure application). These would include, for example, a court order requiring that *unless* the defaulting party produced the document(s) in question, it would be debarred from presenting its case.

In *Hanco ATM v Cashbox ATM Systems [2005]* it was found that the defendants' efforts to comply with their disclosure obligations were so poor that it was difficult to believe that they were genuine. The judge made an unless order requiring each defendant's further disclosure to be supported by a witness statement.

In *Byers v Samba Financial Group [2020]* the court held that a defendant bank that was in breach of an order for standard disclosure should be debarred from defending the claim against it, save, possibly, for five specified issues which could fairly be determined without the documents that it had failed to disclose.

11. Under what circumstances may the protection of the rules mentioned in Q3 to 7 be lost or waived? What are the consequences of a loss or waiver of such protection? Please refer to any relevant text or case law in that respect.

**Loss of privilege**

Privilege may be lost in several different ways, including in particular:

- By loss of confidentiality in the material.
- By implied waiver where there are proceedings between a solicitor and client. However, the implied waiver must be by, or on the authority of, the owner of the privilege.
- By express waiver by, or on the authority of, the owner of the privilege.

**Waiver**

In *Brennan v Sunderland City Council [2008]*, the Tribunal held that the question as to whether waiver has occurred depends on the nature of what has been revealed and the circumstances in which it is revealed. The fuller the information provided about the legal advice, the greater the risk that waiver will have occurred.

The courts have also recognised the possibility of an implied limited waiver of privilege; so, for example, privileged documents may be disclosed to a third party on the understanding that they will only be used for certain limited purposes (*Berezovsky v Hine and others [2011]*).

CPR 31.20 provides that where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it only with the permission of the court.