Preliminary note: As per s 2(2) of the Evidence Act (Cap. 97), all rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions in the Evidence Act, are repealed. Thus, rules of evidence at common law are only applicable in Singapore if they are **consistent** with the Evidence Act. While judges have relied on common law rules of evidence and ignored the effect of s 2(2) Evidence Act at times, this research focusses on the Evidence Act and case law which interprets the relevant statutory provisions.

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.

The rules governing the disclosure of documents in civil and criminal litigations in Singapore are governed by a mixture of statutory provisions and common law duties arising from past case law.
 	
Civil litigation (State and Supreme Court Proceedings)
 	
• The discovery and inspection of documents in a civil case is primarily governed by Order 24 under the Rules of Court (Cap. 322 r 5).
• Under Order 24, Rule 1, the Court may at any time order a party to discover documents which the parties rely on or will rely on and could do any of the following:
    ○ Adversely affect their own case;
    ○ Adversely affect another party's case; or
    ○ Support any party's case.
• **In essence, all relevant documents (whether favourable or unfavourable to a particular party) must be disclosed.**[1]
• Parties will prepare a list of documents made in compliance with Order 24 Rule 1. This is done through the filling of Form 37 of the Rules of Court.

[1] Loong Tse Chuan, Melissa Mak and Tan Xeauwei, 'Litigation and enforcement in Singapore: Overview' (*Thomson Reuters*, 1 April 2021) <https://uk.practicallaw.thomsonreuters.com/9-575-0765> accessed 1st November 2021

- Following this, if there are no objections, parties will be allowed to inspect each other's documents at a specified place and time within 7 days after being served the other parties' list of documents (Order 24, Ruie 9).
- If there are any objections to the production of any document for inspection, the Court may, on the application of the party entitled to inspection, make an order in Form 42 of the Rules of Court for the production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit (Order 24, Rule 11).
- There are consequences for a failure to comply with the orders of the Court, such as the plaintiff's action being dismissed, or a defence being struck out (Order 24, Rule 16).
- Note: In line with the recent Civil Justice Reform proposals, Singapore's Ministry of Law has announced that it will be amending the rules governing the disclosure of documents provided for in the Rules of Court by end 2021.[2]

Criminal litigation (Supreme Court)

- The disclosure of documents in criminal litigation is governed by the criminal case disclosure conference (CCDC) under the Criminal Procedure Code (CPC). For cases in the General Division of the High Court, the CCDC process always applies and parties cannot opt out.
- Pursuant to s 212 CPC, the prosecution and defence shall, unless the Registrar of the Supreme Court for good reason directs otherwise, attend a CCDC not earlier than 4 weeks from the date of transmission for the purpose of settling the following matters:
  - The filing of the Case for the Prosecution and the Case for the Defence;
  - Any issues of fact or law which are to be tried by the trial judge at the trial proper;
  - The list of witnesses to be called by the parties to the trial;
  - The statements, documents or exhibits which are intended by the parties to be admitted at the trial; and
  - The trial date.
- Under this regime, **an accused person can therefore obtain his prior statements given to the investigators.**

[2] 'Response to Public Feedback on the Civil Justice Reforms' (*Ministry of Law*, 11 June 2021) <https://www.mlaw.gov.sg/news/press-releases/2021-06-11-response-to-public-feedback-on-the-civil-justice-reforms> accessed 26 November 2021.

- **However, the disclosure obligation on the prosecution does not extend to material which it does not intend to rely on at trial.**[3]
- Instead, this is governed by the common law. In ***Muhammad bin Kadar and another v PP* [2011] 3 SLR 1205** (“***Kadar***”), Singapore’s Court of Appeal laid out the guidelines relating to the prosecution’s common law **duty to disclose evidence prior to the trial, even if it did not intend to rely on these**. In essence, the prosecution must disclose to the Defence material which takes the form of:
  - any unused material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused; and
  - any unused material that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.
- Note that this process differs slightly for cases heard in the State Courts. In brief, the CCDC will only be mandatory for certain offences specified. For all other offences, the CCDC will not apply unless all parties consent to have the procedures apply (s 159 CPC).

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.

Yes, the notion of legal privilege is recognised in Singapore. There are two broad categories of legal professional privilege: legal advice privilege and litigation privilege. It is both a procedural and a substantive issue.

Legal professional privilege is primarily governed by s 128 and s 131 of the Evidence Act. It is a statutory right and these two sections cover legal advice privilege and also an element of litigation privilege (***Skandinaviska*, at [27]**). Nonetheless, common law developments have expanded the doctrine:

- According to s 2(1) of the Evidence Act, legal professional privilege provided for in s 128 and s 131 is only applicable to proceedings in or before any court, but **not to affidavits presented to any court or officer, nor to proceedings before an arbitrator.**
- On a literal reading, privilege therefore does not apply to interlocutory proceedings and pre-trial matters.

[3] Chooi Jing Yen and Zhang Yu Ying, ‘The extent of an accused person’s right to statements and disclosure of evidence in criminal proceedings: are the current rules fair?’ (*Eugene Thuraisingam LLP*, 14 February 2020) <https://thuraisingam.com/resources/the-extent-of-an-accused-persons-right-to-statements-and-disclosure-of-evidence-in-criminal-proceedings-are-the-current-rules-fair> accessed 26 November 2021.

- However, in ***Yap Sing Lee v MCST No 1267*** **[2011] 2 SLR 998**, the High Court held that **common law legal privilege** was applicable to govern issues of privilege in a non-judicial setting. The Court also noted that at common law, privilege was more than a rule of evidence. It is a substantive legal right and therefore should not be limited to the court room (at [15]).
- The judge in *Yap Sing Lee* referred to the Court of Appeal's decision in *Skandinaviska* [at 24 & 25] and took the view that as the Court of Appeal had referred to the common law legal privilege by reference to English case law, the High Court was similarly justified in applying the common law in the case before it.
- Furthermore, in *HT S.R.L v Wee Shuo Wen* [2016] 2 SLR 442, it was held that common law legal professional privilege applied to affidavits filed in interlocutory proceedings which precede a trial. There was a successful application to expunge the Defendant's affidavit (based on leaked documents from the Plaintiff's computer systems) on the ground of privilege.

Litigation privilege is primarily a common law rule. It was recognised by the Singapore Court of Appeal in ***Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd*** **[2007] 2 SLR(R) 367** ("***Skandinaviska***").

- Although litigation privilege exists by virtue of the common law, s 131 of the Evidence Act envisaged the "concept" of litigation privilege, and thus there was no inconsistency between the common law and the statutory provisions, with the result that s 2(2) of the Evidence Act applied to "confirm the applicability of litigation privilege" at common law.[4]

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.

s 128(1) and s 128A Evidence Act

- s 128: Legal advice privilege protects communications between lawyers and their clients, and it is provided for in s 128(1) Evidence Act. In essence, an advocate or solicitor shall not (unless with express consent):
  - **(i) disclose any communication** made to him **in the course and for the purpose of his employment** as advocate or solicitor **by or on behalf of his client**; or
  - **(ii) state the contents or condition of any document** which he has become acquainted with for the purpose of his employment; or
  - **(iii) disclose any advice given by him to his client** for the purpose of such employment.

[4] See *Skandinaviska* at [67]; Colin Liew, *Legal Professional Privilege* (SAL Academy Publishing 2020) 331.

    - N.B. The obligation stated in this section continues after the employment has ceased.
- s 128A(1): After amendments were made to the Evidence Act in 2012, under s 128A(1), legal advice privilege in s 128(1) also applies to communications between "entities" and their legal counsel (*i.e.*, in-house legal counsel).

These are the elements of s 128(1) and s 128A:

- "Course of employment";
    - Has to be consulted in the capacity of a lawyer (*Smith v Daniel* 44 LJ Ch 189);
    - The contemplation of litigation is not necessary (*Greenough v Gaskell* (1833) 1 My & K 98);
    - Retention is not necessary (s 2(1) Legal Profession Act).
- Under limb (i), what is the scope of communications?
    - This includes advising the client on what should sensibly be done in the **relevant legal context** (*Skandinaviska*, referencing the English Court of Appeal decision of *Balabel v Air India* [1988] 1 Ch 317 at 330 ("***Balabel***")).
    - It is possible for communications to include integrated information the lawyer received from a third party (*Skandinaviska*).
        - The Court of Appeal in *Skandinaviska* considered the Australian position in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 207 ALR 217 ("***Pratt Holdings***"), but did not apply it as it was not cited in argument by counsel.
        - The test that *Pratt Holdings* provides is that communications from a third party for the **dominant purpose of obtaining legal advice** is protected.

<u>s 131 Evidence Act</u>

- **131** —(1) **No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser** unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.
- (2) In subsection (1) and section 129, "legal professional adviser" means —
    - (a) an <u>advocate or solicitor</u>; or

- (b) in the case of any communication which has taken place between any officer or employee of an entity and a legal counsel employed, or deemed under section 128A(4) or (5) to be employed, by the entity in the course and for the purpose of seeking his legal advice as such legal counsel, that legal counsel.

Exceptions to the rules outlined in s 128 and s 128A Evidence Act

S 128(2)(a) and (b) provide for two situations in which privilege does not operate (note: 128A(2) applies *pari passu* to companies and legal counsels).

- Para. (a) concerns communication made in furtherance of an illegal purpose.
  - Illustration (a): "I have committed forgery and I wish you to defend me." (Privileged)
    - Defending an accused is NOT in furtherance of an illegal purpose.
  - Illustration (b): "I wish to obtain property by use of this forged deed. I request that you sue." (Not privileged)
- Para. (b) pertains to the situation in which the advocate and solicitor becomes aware of a crime or fraud committed by the client after the engagement of the advocate and solicitor.
  - Illustration (c): *A*, being charged with embezzlement, retains *B*, a solicitor, to defend him. In the course of the proceedings *B* observes that an entry has been made in *A's* account-book, charging *A* with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by *B* in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

The High Court case of *Gelatissimo Ventures v Singapore Flyer* [2010] 1 SLR 833 ("***Gelatissimo***") was the first to consider the exceptions in s 128(2)(a) and (b). It adopted a wide approach which is generally similar to the common law position.

- Held that **s 128(2)(a) and (b) constitute the "fraud and crime" exception which includes "criminal and *civil* fraud"** ([30] and [37]).
- Proper to apply a "balancing approach" **to resolve the issue of whether legal privilege should give way to other countervailing public policy considerations.**
  - Factors to be considered for penumbra (non-core) elements:
    - Privilege may be lost **even if person claiming it had not acted dishonestly;**

- Degree of culpability is an important factor;
- Court **must evaluate claim against public policy considerations;**
- Claim is **stronger if information is covered by both litigation and legal advice privilege;**
- Claim is stronger if conduct of claimant is itself an issue in the proceedings rather than being a separate and distinct factor; and
- Party seeking to lift privilege must adduce "at least some prima facie evidence" that the privileged communications were made as part of an ongoing fraud.

  - **The balancing test is part of the process of defining what is fraud under s 128(2) of the Evidence Act, and thus it does not mean that legal advice privilege can be waived as long as there is competing public interest of sufficient weight (at [66]).**
  - "Language may be inherently flexible, but there is a limit to how much any particular word can be stretched beyond its natural meaning to take on meanings which it cannot reasonably encompass. For example, **I cannot see how an argument for privilege to be lifted in order to facilitate national security aims can possibly be construed as falling within the ambit of the fraud exception**".

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.

The common law rule of litigation privilege protects documents created for the purposes of litigation. Beyond communications between a client and a lawyer, it also protects communications between (1) unrepresented clients and 3rd parties, and (2) the lawyer and 3rd parties, for the dominant purpose of litigation (*Skandinaviska* at [23]).

The seminal case which confirms the existence of litigation privilege and outlines the test for determining when it arises is *Skandinaviska*.

- In *Skandinaviska*, it was held that litigation exists by virtue of the common law and is consistent with the statutory provisions under the Evidence Act.
- The Court of Appeal adopted the two-stage test in *Waugh v British Railways Board* [1980] AC 521 (UKHL):
  - Stage 1: Is there a reasonable prospect of litigation when the advice/ information is sought? [69-73]

        - Turning to the basic principles or requirements of litigation privilege, the threshold question is **whether litigation must have been contemplated.** This is only logical and commonsensical, for if litigation was not even contemplated to begin with, how could any party invoke litigation privilege in the first instance?
        - **This is a question of fact. The question is: At the time the client sought legal advice or consulted his lawyer, did he have the prospect of litigation in mind?** To determine his state of mind, we would need to know the circumstances in which legal advice was sought. In this respect, we are of the view that Taylor LJ's concept of a legal context in *Balabel* (although originally expounded in the context of legal advice privilege) is appropriate for this purpose. Was, in other words, the legal context in the present case one in which litigation was contemplated?
    - Stage 2: If so, is the information/advice obtained for the dominant purpose of litigation? [74-77]
        - There is, however, the second requirement that has to be satisfied before litigation privilege can be successfully established, assuming that litigation was contemplated as having been reasonably in prospect. **This second requirement relates to the purpose for which legal advice had been sought. If, of course, the sole purpose, on the facts of the case concerned, was for seeking legal advice in anticipation or contemplation of legal proceedings, there would be no problem – and *vice versa***.
        - However, difficulties arise when **<u>there is more than one purpose for seeking such legal advice in a given case.</u>**
        - In the leading House of Lords decision of *Waugh v British Railways Board* [1980] AC 521 ("***Waugh***"), the House of Lords held that if the dominant purpose for which legal advice had been sought and obtained was in anticipation or contemplation of litigation, then the advice concerned would be protected by litigation privilege.
        - The "dominant purpose" test in *Waugh* has, in fact, been endorsed in the Singapore context (see, for example, the Singapore High Court decision of *Wee Keng Hong Mark v ABN Amro Bank NV* [1997] 1 SLR(R) 141 at [5] and the Singapore Court of Appeal decision of *Brink's Inc v Singapore Airlines Ltd* [1998] 2 SLR(R) 372 at [20]).

<u>Exceptions</u>

- There is a right to claim litigation privilege, subject to the exceptions of waiver (discussed in Q11), fraud, and necessity (*PP v Soh Chee Wen* [2019] SGHC 235).
- Exception (1): Fraud

- In *Gelatissimo*, the High Court held that the fraud exception applied to both legal advice privilege and litigation privilege. Considering that both stem from the same public policy of facilitating access to justice for non-legally trained persons, it would be anomalous if the exception to one were much broader than the other (at [30] – [36] and [67]).
- Affirmed in ***PP v Soh Chee Wen***: if there is sufficient reason to think that the witness's testimony is tainted by misconduct or abuse of process, such as witness tampering or witness coaching, then the litigation privilege in the communications pursuant to which such misconduct was carried out would also fall away. Held that the touchstone of fraud is misconduct.

- Exception (2): Necessity
  - In *PP v Soh Chee Wen*, the accused was allowed to argue that privileged evidence was necessary to be relied on. The test was whether his competing interest outweighed the Prosecution's interest in withholding the communications (Prosecution was asserting litigation privilege).

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.

- According to Colin Liew,[5] at common law, communications in the course of negotiations genuinely[6] aimed at settlement of a dispute are privileged from disclosure in court.[7]
- These communications are considered to be "without prejudice" to the position of the maker of the statement should his terms not be accepted,[8] and the terminology "without prejudice privilege" is convenient shorthand for describing the protected nature of such communications.
- It is common practice for parties who intend to invoke without prejudice privilege to expressly label their communications "without prejudice".
- However, the presence or absence of these words is not conclusive.[9]

Civil proceedings

[5] Colin Liew, *Legal Professional Privilege* (SAL Academy Publishing 2020) 13 ("**Colin Liew**").
[6] *Ernest Ferdinand Perez De La Sala v Compania De Navegacion Palomar, SA* [2018] 1 SLR 894 at [90] – [95].
[7] *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 at [14].
[8] *Walker v Walker* (1889) 23 QBD 335 at 337, per Lindley LJ.
[9] *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [24].

- In civil proceedings, without prejudice communications have been partially codified under s 23 Evidence Act.
- s 23(1) Evidence Act provides that, in civil cases, no admission is relevant if it is made:
  - (a) "upon an express condition that evidence of it is not to be given"; or
  - (b) "upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given".
- As noted by Colin Liew, by its terms, s 23(1) is clearly based on the rationale that without prejudice privilege should be given effect to because the parties have expressly or impliedly agreed that without prejudice negotiations should not be admissible in evidence.[10]
- Accordingly, s 23 only applies as between parties to the without prejudice negotiations who try to adduce evidence of those negotiations in a dispute between them.[11]
- Nonetheless, at common law, without prejudice privilege extends to multi-party situations, so as to prevent the without prejudice negotiations between A and B from being disclosed to or by C.[12]

Criminal proceedings

- Colin Liew observes that it has long been the convention that representations made to the police and the AGC to engage in plea-bargaining, or to ask for a lighter sentence to be considered are "without prejudice" and the Prosecution will not seek to admit them in evidence against the accused in a criminal trial.
- The exact juridical basis for this convention is obscure. In a series of cases such as *PP v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 and *Ng Chye Huay v PP* [2006] 1 SLR(R) 157, Yong CJ sought to put this convention on a legal footing by holding that s 23 of the Evidence Act could be extended to criminal cases.
- However, in *Law Society of Singapore v Tan Guat Neo Phyllis*,[13] the Court of Appeal strongly disagreed with Yong CJ's reasoning in *Knight Glenn Jeyasingnam*.

Exceptions/Caveats

[10] Colin Liew, *Legal Professional Privilege* (SAL Academy Publishing 2020) 14; *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd* [2006] 4 SLR(R) 807 at [26].
[11] *Mariwu Industrial* at [25] and [27].
[12] Ibid at [28].
[13] [2008] 2 SLR(R) 239 at [122].

- In *The Enterprise Fund II Ltd v Jong Hee Sen* [2016] SGHC 259 at [18], [19], [20(a)], and [20(b)], it was held that if the communications contained **a clear admission of liability such that no dispute remained, they could not be considered to be part of a course of settlement negotiations**. Thus, without prejudice privilege would not apply in such an instance.
  - However, if the communications contained a clear admission that some liability existed, but a dispute remained as to the quantum of the liability, they could still be considered to be part of a course of settlement negotiations and thus protected by "without prejudice" privilege.
  - N.B., the judge commented that this is sometimes referred to as an exception to "without prejudice" privilege; more accurately, it is simply a situation where one of the pre-conditions of the privilege – a dispute between the parties – is not present.
- "Without prejudice save as to costs", *i.e.*, a Calderbank offer. Such communications will be protected, but can be adduced in the determination of the apportionment of costs of the proceedings.

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.

As noted in Q5, communications between lawyers in the context of negotiations are protected as "without prejudice" communications. Where lawyers are acting as co-counsel, jointly representing one or more clients, their communications would be protected by legal advice privilege and/or litigation privilege, subject to the same rules set out above. Beyond that, there are no rules that protect communications between lawyers. Neither legal advice privilege or litigation privilege protects communications between lawyers, merely on the basis that they are attorneys. As a matter of professional courtesy, however, lawyers will often keep matters raised in confidence where so requested by his/ her counterpart.

While litigation privilege can apply to communications between a litigant (or his lawyer) and a third party, a third party is generally anyone who is neither the client nor the lawyer, *i.e.*, a stranger to the client-lawyer relationship,[14] such as an expert witness. Nevertheless, even in such situations, the privilege still would not apply to communications by a lawyer with opposing counsel.

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.

Apart from legal professional privilege, there are other rules which protect other types of sensitive communications. Here are some examples:

- Marital privilege under s 124 Evidence Act:

[14] *Foo Ko Hing v Foo Chee Heng* [2002] 1 SLR(R) 664 at [14].

- **124.**—(1) No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.
- (2) Nothing in this section **protects from disclosure any such communication made that is relevant in any criminal proceedings in respect of a specified offence.**

- State affairs under s 125 Evidence Act:
  - **125. No one shall be permitted to produce any unpublished official records relating to affairs of State**, or to give any evidence derived therefrom, except with the permission of the officer at the head of the Department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister.
- Official communications under s 126 Evidence Act:
  - **126.**—(1) No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure.
  - (2) No person who is a member, an officer or an employee of, or who is seconded to, any organisation specified in the Schedule to the Official Secrets Act (Cap. 213) shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure.

It is also noted that where sensitive documents are concerned, parties often sign non-disclosure agreements ("**NDA**"s) beforehand, and therefore those documents would be contractually protected as confidential. However, NDAs are not addressed herein since they go beyond the scope of this report.

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.

Legal advice privilege

- Protects communications between lawyer and client.
- As per s 128 Evidence Act, an advocate or solicitor shall not (unless with express consent):
  - **(i) disclose any communication** made to him **in the course and for the purpose of his employment** as advocate or solicitor **by or on behalf of his client**; or

  - **(ii) state the contents or condition of any document** which he has become acquainted with for the purpose of his employment; or
  - **(iii) disclose any advice given by him to his client** for the purpose of such employment.
- For legal advice privilege to apply to the communication(s) here, the communication must have been "advice as to what should prudently and sensibly be done in the relevant legal context."
  - "The test here is whether the communication or other document was made confidentially for the purposes of legal advice," with the court construing these purposes broadly. (*Skandinaviska* applying *Balabel*).
  - In other words, legal liability must be the background of the communications (*Three Rivers District Council & Ors v Governor and Company of the Bank of England (No. 6*) [2005] AC 610) ("***Three Rivers District (No. 6)***").
- Following from this, communications that do not specifically seek and convey legal advice may also be privileged if "they are part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate." The Singapore Court of Appeal has justified this on the grounds that modern business conditions are now highly complex so that "the nature of the advice that lawyers may be asked to give may also extend to other fields of learning which go beyond what was traditionally legal advice" (*Skandinaviska* applying *Balabel*).
  - This also includes advice that safeguards the client's public law rights and liabilities (*Three Rivers District (No. 6*)).
  - However, cases which appear to extend privilege without limit to all lawyer and client communications upon matters within the ordinary business of a lawyer and referable to that relationship are too wide *(Skandinaviska).*
- In *Comptroller of Income Tax v ARW* [2017] SGHC 16, the High Court applied the aforementioned principles and found that documents created by a public authority in the process of an investigatory audit were not protected by privilege.
  - There was no evidence that the documents were created for the lawyers to advise on the whole of the audit and the decisions taken after (at [49]).
  - At [28]: "Legal advice privilege could not be successfully invoked either as the evidence did not show that the documents in question were created for the purposes of obtaining advice from lawyers".
- It is possible for communications to include integrated information the lawyer received from a third party (*Skandinaviska*).
  - The Court of Appeal in *Skandinaviska* considered the Australian position in *Pratt Holdings Pty Ltd v Commissioner of Taxation*, but did not apply it as it was not cited in argument by counsel.

- The test that *Pratt Holdings* provides is that communications from a third party for the **dominant purpose of obtaining legal advice** is protected.

Litigation privilege

- Litigation privilege is apt to protect communications between the client (or on his behalf) and a third party (including his lawyer), as well as other materials (documentary or otherwise), that may be generated in preparation for or in connection with litigation.[15]
  - This may include an affidavit that was finalised and intended to be used later at trial, but not yet served or filed (*UOB Ltd v Lippo Marina Collection Pte Ltd* [2018] 4 SLR 391 at [48] – [50] and [65]).
- Thus, litigation privilege can cover communications between a client and a lawyer, but also communications between (1) unrepresented clients and 3rd parties, and (2) a lawyer and 3rd parties, for the dominant purpose of litigation (*Skandinaviska* at [23]).

Without prejudice privilege

- Communications in the course of negotiations genuinely[16] aimed at settlement of a dispute are privileged from disclosure in court.

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.

Fundamentally, privilege is a right that belongs to the client, not to the lawyer. However, the lawyer is under a duty to assert privilege. (See further, Q10 below.)

Legal advice privilege

- Advocates and solicitors
  - s 128 and s 131 of the Evidence Act apply to an "advocate or solicitor". This includes a public officer in the Attorney-General's Chambers as per s 3(6) of the Evidence Act.

[15] Colin Liew, *Legal Professional Privilege* (SAL Academy Publishing 2020) 345.
[16] See *Ernest Ferdinand Perez De La Sala v Compania De Navegacion Palomar, SA* [2018] 1 SLR 894 at [90] – [95].

- Non-lawyers supervised by lawyers
  - s 129 of the Evidence Act provides that s 128 and 128A "apply to interpreters and other persons who work under the supervision of legal professional advisers".
  - This includes paralegals, trainees and secretaries etc.
- In-house counsel
  - An in-house counsel is protected under s 128A of the Evidence Act. An in-house counsel is defined as "legal counsel in an entity".
  - A legal counsel is defined by s 3(7) of the Evidence Act, which provides that a legal counsel means a person (by whatever name called) who is an employee of an entity employed to undertake the provision of legal advice or assistance in connection with the application of the law or any form of resolution of legal disputes.
- Foreign lawyers
  - According to Colin Liew, the position of foreign lawyers is complicated under the Evidence Act.
  - Whereas at common law, communications with foreign lawyers are privileged, in *CIFG v Polimet*, Wei J was of the opinion that communications with foreign lawyers would "clearly" fall outside the ambit of the Evidence Act.[17]
  - However, it is unclear why a foreign-qualified in-house counsel would not fit the definition of a "legal counsel" within the meaning of s 3(7) of the Evidence Act.

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.

- First, the Court or Tribunal will not order the production of privileged documents and/or communications.
- Beyond this, legal practitioners have a duty to assert privilege on behalf of their client.
  - Professor Tan Yock Lin has stated that "[w]hatever the circumstances in which disclosure of privileged communications is sought of a solicitor, he has a duty, even though he is unable to obtain instructions from his client, to assert the privilege on behalf of his client or to resist the production of any documents subject to the privilege".[18]

[17] *CIFG Special Assets Capital I Ltd v Polimet Pte Ltd* [2016] 1 SLR 1382 at [58].
[18] Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (2nd ed., Singapore: Butterworths Asia, 1998), pp. 525-526.

- It has also been stated that under s 128 of the Evidence Act, "[a] lawyer must claim privilege on his client's behalf" and a failure to do so is tantamount to "a breach of the legal profession rules and he may be open to disciplinary action".[19]

- Advocates and Solicitors of Singapore have a duty of confidentiality under Rule 6 of the Legal Profession (Professional Conduct) Rules 2015.
- Rule 6 reads:
  - (1) The following principle guides the interpretation of this rule:
    - A legal practitioner's duty to act in the best interests of the legal practitioner's client includes a responsibility to maintain the confidentiality of any information which the legal practitioner acquires in the course of the legal practitioner's professional work.
  - (2) Subject to paragraph (3) and any rules made under section 136, 150 or 166 of the Act, a legal practitioner must not knowingly disclose any information which —
    - (a) is confidential to his or her client; and
    - (b) is acquired by the legal practitioner (whether from the client or from any other person) in the course of the legal practitioner's engagement.
  - (3) A legal practitioner may disclose any information referred to in paragraph (2), if –
    - (a) the client referred to in paragraph (2) authorises the disclosure;
    - (b) the legal practitioner is permitted or is required by law, by an order of court, or by a tribunal to make the disclosure;
    - (c) the legal practitioner discloses the information in confidence, for the sole purpose of obtaining advice in connection with the legal practitioner's legal or ethical obligations;
    - (d) the legal practitioner discloses the information in confidence to a provider or broker of the legal practitioner's professional indemnity insurance, in connection with any claim or potential claim, or any complaint or potential complaint, by any person against the legal practitioner; or
    - (e) the legal practitioner discloses the information for the sole purpose of responding to or defending any charge or complaint, relating to the legal practitioner's conduct or professional behaviour, brought against the legal practitioner in court, before a Review Committee, an Inquiry Committee or a Disciplinary Tribunal, before a complaints committee appointed under

[19] Chen Siyuan and Lionel Leo, *The Law of Evidence in Singapore* (2nd ed., Singapore: Sweet & Maxwell Asia, 2018), pp. 608-609.

section 36S(5) of the Act, or before any relevant professional disciplinary body of a state or territory (other than Singapore) in which the legal practitioner is duly authorised or registered to practise law.

- In violating the rule of legal professional privilege, it is most likely that the legal practitioner will have also breached his/her obligation to maintain confidentiality under Rule 6 of the Legal Profession (Professional Conduct) Rules 2015.
    - This is because the scope of the rule of confidentiality is broader than that of legal professional privilege.[20] In essence, Rule 6 stamps every communication as confidential if the legal practitioner acquires it in the course of the legal practitioner's professional work.
- If the legal practitioner violates Rule 6 of the Legal Profession (Professional Conduct) Rules 2015, he/she may face disciplinary proceedings under Part VII of the Legal Professional Act.
    - Under s 83 of the Legal Professional Act, advocates and solicitors who have been found guilty of a breach of the rules under the Legal Professional (Professional Conduct) Rules 2015, including Rule 6, shall be liable to be:
        - (a) struck off the roll;
        - (b) suspended from practice for a period not exceeding 5 years;
        - (c) to pay a penalty of not more than $100,000;
        - (d) to be censured; or
        - (e) to suffer the punishment referred to in (c) in addition to the punishment referred to in (b) or (d).
    - Regulated foreign lawyers will only be subject to similar sanctions under s 83A of the Legal Professional Act.

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.

In *ARX v Comptroller of Income Tax* [2016] 5 SLR 590 at [51], the Court of Appeal held that legal professional privilege may be lost through an express waiver or an implied waiver. It may also be lost due to a waiver through disclosure ("**partial waiver**").

Waiver of legal advice privilege

[20] Jeffrey Pinsler, *Ethics and Professional Responsibility* (SAL Academy Publishing 2007) 15-022.

- (1) Express waiver in s 128 and s 128A of the Evidence Act:
  - S 128(1) Evidence Act: No advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose…
  - S 128A(1) Evidence Act: A legal counsel in an entity shall not at any time be permitted, except with the entity's express consent, to disclose…
  - The sections do not specify the form of waiver (whether it has to be oral or in writing).
  - If several parties jointly retain a lawyer, privilege can only be expressly waived if all parties agree to do so (*Gelatissimo*).
- (2) Implied waiver in s 130 and s 131 of the Evidence Act:
  - Per s 131 Evidence Act, if an individual "offers himself as a witness", he may be required to disclose a privileged communication which explains his evidence.
    - s 131(1): No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser **unless he offers himself as a witness**, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.
    - **This means that the legal advice privilege is waived only for communications which relates to the matters that the lawyer/client has offered to be a witness for.**
  - Privilege can also be lost if the individual is called as a witness, and chooses to answer a question that is protected by privilege.
    - s 130(2): If any party to a suit or proceeding calls any advocate or solicitor as a witness, that party shall be deemed to have consented to such disclosure as is mentioned in section 128 **only if that party questions the advocate or solicitor on matters which but for the question the advocate or solicitor would not be at liberty to disclose.**
    - s 130(3): If any party to a suit or proceeding calls any legal counsel in an entity as a witness, that party shall be deemed to have consented to such disclosure as is mentioned in section 128A only if that party questions the legal counsel on matters which but for the question the legal counsel would not be at liberty to disclose.
  - BUT simply giving evidence is not an implied waiver as per s 130(1).
    - **s 130**(1): If any party to a suit gives evidence therein at his own instance or otherwise, **he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 128 or 128A.**

- **Common law? *Tentat Singapore v Multiple Granite* [2009] 1 SLR(R) 42** (“***Tentat Singapore***”) and ***Gelatissimo*** acknowledged the common law principle that a party may impliedly waive his privilege if the facts clearly establish this intention.
  - Not limited to the specific circumstances expressly stated in statute.
  - Privilege militates against public interest in the availability of all relevant evidence for the purpose of adjudication. Hence, a party wishing to maintain his privilege must act in a manner consistent with, and which preserves, his right.
  - **Criticism: Singapore cases have applied the common law position without considering inconsistency with the Evidence Act.**
    - Inconsistent with the express wording of s128(1) which requires “express consent”, and inconsistent with limited categories of implied waiver in ss 130 and 131.
    - Therefore, by virtue of s 2(2) of the Evidence Act, the **common law position should be repealed** and waiver of privilege can only be made by express consent per s 128(1) or implied waiver.
  - N.B., The leading case on implied waiver at common law is *ARX v Comptroller of Income Tax*. However, this was a case regarding communications with in-house counsel. Prior to 2012, such communications fell outside the ambit of the Evidence Act. Thus, instead of discussing the Evidence Act provisions on implied waiver, the Court of Appeal instead focussed on cases of implied waiver at common law.[21]

- (3) Waiver through disclosure (partial waiver)
  - General rule under English common law: Once a privileged document is disclosed to a third party, the privilege ceases and the document may be disclosed (*Calcraft v Guest* [1890] 1 QB 759). This applies even if the document was improperly obtained by the third party (*Lord Ashburton v Pape* [1913] 2 Ch 469).
    - However, the other party who seeks to prevent the production of a disclosed privileged document may apply for an injunction on the basis of a breach of confidence (equitable relief not based on legal advice privilege) as per *Lord Ashburton v Pape*.
    - The principles in *Lord Ashburton v Pape* were elaborated on in *Goddard v Nationwide Building Society* [1986] 3 WLR 734.
      - The English Court of Appeal held that an injunction can be made (on the basis of breach of confidence), but must be done before the other party has adduced it.
      - “If a litigant has in his possession copies of documents to which legal professional privilege attaches he **may**

[21] Colin Liew at 579.

nevertheless use such copies as secondary evidence in his litigation: **however, if he has not yet used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them.**" (May LJ in *Goddard*)

- The crucial point is that the party who desires the protection must seek it **before** the other party has adduced the confidential communication in evidence or otherwise relied on it at trial. (Nourse LJ)
- **Court has power to intervene in the interest of justice, *e.g.*,**
  - **where inspection of the document is tainted by fraud of opposing party; or**
  - **where accidental mistake was so obvious that opposing party ought to have been aware of the circumstances.**
- **Court will take into account all the circumstances in determining if it is just and equitable to grant injunctive relief.**
  - **Principle seeks to strike a balance of fairness between parties.**

- The Singapore courts have had trouble reconciling the positions in *Calcraft* and *Goddard.*
  - In *Tentat Singapore*, the High Court adopted May LJ's pronouncement in *Goddard* that a third party in possession of a copy of a privileged document is **entitled to adduce it in evidence**, **subject to the right of the person claiming privilege to apply to restrain its use** prior to its presentation in court as evidence and its introduction into the public domain.
    - Rationale is that although the person claiming privilege is unable to enforce it once the information is in the hands of a third party, he may obtain equitable relief (*e.g.*, through injunction or declaration) on the basis that there has been a breach of confidence.
    - Doubted the principles in *Calcraft.*
    - However, this outcome may be criticized as the decision in *Goddard* applies the two independent principles of *Calcraft* and *Lord Ashburton v Pape.*
  - In *Gelatissimo*, Lai Siu Chiu J expressed that the principles in *Calcraft* did not apply in Singapore. The High Court was of the view that the Court in *Tentat* had rejected the principles stated in *Calcraft* for a more protective attitude towards privileged documents.

- However, this appears to be settled following *HT SRL v Wee Shuo Woon* [2016] 2 SLR 442 (HC) and *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829 (CA), citing *Wee Shuo Woon* with approval.
    - The Court of Appeal in *Mykytowych* agreed with *Wee Shuo Woon* and held that the principles in *Calcraft* and *Goddard* are reconcilable.
    - The concepts of admissibility and privilege were distinguished.
        - **Privilege** allows a party to withhold disclosure of information that would otherwise be compulsory to disclose.
        - **Admissibility** relates to whether a piece of evidence may be received by the court, and is governed by whether that evidence is relevant to the matters in issue.
    - Where a document in respect of which privilege is being asserted is already in the possession of the other party, the issue is NOT one of withholding disclosure; the **question is one of admissibility rather than privilege.** Question of whether litigation privilege applies is **irrelevant** to issue of whether it is admissible as evidence, **BUT** may have a **bearing** on whether it should be admitted, as **equity can intervene** to prevent the unauthorized use of information in privileged material of a confidential nature.
    - In *Calcraft* the issue was in respect of the law of evidence and protection afforded by legal advice privilege, while *Lord Ashburton v Pape* discusses the law of confidentiality and protection afforded by equity to confidential information.
        - "These cases can therefore be reconciled with the approaches taken in *Tentat, Goddard, Webster* (unlike the court's finding in *Gelatissimo* that *Tentat* rejected the principles in *Calcraft* 'in favour of a protective attitude towards privileged documents' and that the position in *Calcraft* no longer represented the status of the law of privilege in Singapore)."
- **In essence, if information has been disclosed (even inadvertently), legal professional privilege will have been lost (*Calcraft*). Nonetheless, as long as the information has not been used in court and released to the public (*i.e.*, still in confidence), then the Court may be able to use its equitable jurisdiction to grant an injunction.**
    - In deciding whether to grant an injunction, the court will consider public policy considerations. Public policy also required that a litigant be restrained from using a copy of a privileged document that he had obtained by **stealth, trickery or other impropriety**, including taking advantage of an obvious mistake by an opponent (*Wee Shuo Woon*).
    - In *Mykytowych, Pamela Jane v V I P Hotel*, the court exercised its equitable jurisdiction to restrain the use of a medical report the appellant obtained. Due to the **deceptive manner** in which she obtained it – she deliberately represented to the doctor

that the case was over as judgment had been delivered, and that she was asking for the report in her personal capacity as his patient; she did not make known to the doctor her true purpose, *i.e.*, to use his report against the respondent on appeal.

Waiver of litigation privilege

- Based on case law, common law rules of waiver may apply instead of the statutory provisions given that litigation privilege is mostly a creature of common law.
- (1) Express waiver
  - A **voluntary, informed and unequivocal election** by a party not to claim a right or raise an objection which it was open to that party to claim or raise; it could not meaningfully be said that a party had voluntarily elected not to claim a right or raise an objection **if he is unaware that it is open to him to make the claim or raise the objection**: ***Rahimah bte Mohd Salim v PP* [2016] 5 SLR 1259.**
  - In *Raminah bte Mohd Salim v PP*, the petitioner sought an assessment from IMH out of her own volition so as to assist in her defence; her acceptance of the caution by the doctor that whatever he recorded down may be subsequently produced in court did not amount to a clear election to waive her right to litigation privilege.
- (2) Implied waiver
  - Waiver not to be easily implied: In a situation where the privileged document was disclosed to, presented to, or shared with another, what mattered was the context and purpose for which this was done - the question was **whether a shield of confidentiality could reasonably be expected to exist** following the sharing of the heretofore privileged document: ***UOB Ltd v Lippo Marine Collection Pte Ltd.*** In the context of a **multi-party litigation**, **selective disclosure** of a document to some but not all of the parties did not necessarily constitute waiver of the litigation privilege as against all the parties.
  - Principles of implied waiver of legal advice privilege (at common law) set out in ***ARX v Comptroller of Income Tax*** apply in the same way to implied waiver of legal professional privilege: ***PP v Soh Chee Wen.***
    - Entails examination of all the circumstances of the case, including:
      1. What has been disclosed;
      2. The circumstances under which the disclosure took place;
      3. Whether it may be said that the party had “relied” or “deployed” the advice to advance his case; and
      4. Whether it can be said that there is a risk that an incomplete and misleading impression had been given.

This is a fact-sensitive exercise of judgment. The inquiry is objective and not subjective. Touchstone of implied waiver is fairness.

- (3) Waiver through disclosure
    - Same as in legal advice privilege.
    - In *Mykytowych, Pamela Jane v V I P Hotel* [2016] 4 SLR 829, it was noted that the Court has equitable jurisdiction (before the information in question had been entered into evidence) to restrain unauthorised use in court proceedings of information contained in material protected by litigation privilege.
- Note: A party will waive litigation privilege if he intends to rely on the information in the court proceedings (see Orders 25 and 40A of Rules of Court for expert evidence).
    - Privilege may also be impliedly waived via Order 24 rule 19 of the Rules of Court which concerns inadvertent disclosure of privileged document in the course of discovery.
    - As litigation privilege belongs to the client, he may also consent to the disclosure of the privileged documents.