SRI LANKA

Legal privilege global guide

DLA PIPER

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About

Welcome to DLA Piper's Legal Professional Privilege Global Guide, the ultimate guide to legal professional privilege around the world.

Legal professional privilege protects the confidentiality of communications between lawyers and their clients and it has become an exception to the general principle of public policy for full disclosure. It is, in substance, a fundamental human right.

Although the concept of legal professional privilege is universal, its scope and limitation differ between jurisdictions. We are aware that many of our clients operate on a global platform, so it is of critical importance that they are aware of these differences in order to make informed decisions about the countries in which they are active and about how their business interests may be protected.

This global guide is a dynamic resource containing up-to-date details of the varying concepts and scope of legal professional privilege across dozens of jurisdictions globally. New jurisdictions are regularly being added to the guide, so if you cannot find the jurisdiction you are seeking, please let us know.

How to use this guide

Let us provide a few examples:

1. You are a Compliance Director for a listed company located in Country A and you have found that problematic conduct has occurred within your subsidiary in Country B.

Scenario A: You are about to send an e-mail to your in-house colleague in Country B with a legal assessment of the conduct in question. Before you push the button, you think about the scope of legal privilege. You will ask yourself: "Does Country B protect in-house lawyer communications? Or can my e-mail be seized by inspectors or discovered in court?" Our guide provides a first answer.

Scenario B: You plan to forward the legal advice received from DLA Piper to your colleague in Country B. Then you ask yourself the following question: "What is the scope of legal privilege in Country B?" Indeed, virtually all jurisdictions recognize the concept of privilege, but there is a big difference in terms of when privilege applies (e.g. only after the start of an investigation) and how broad is the scope. Again, our guide provides a first answer.

2. You are a freshly appointed Compliance Director for your internationally active company, and no clouds darken your horizon - yet. Before launching a new communications policy, you want to find out about the underlying privilege issues. Our guide provides initial guidance for your strategic legal communications and planning, and will help shape your strategy for sourcing and storing legal advice.

But remember, our Legal Professional Privilege Global Guide **does not constitute legal advice**. While this guide will be essential reading for those who need to find out more about the scope of legal professional privilege around the world, it is imperative that you contact the contributors to the individual chapters for more comprehensive guidance and legal advice in your particular case.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

Sri Lanka

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Concept of legal professional privilege

In Sri Lanka, the concept of legal professional privilege stems almost exclusively from legislation. In particular, it comes from the Supreme Court (Conduct of and Etiquette for Attorneys-at-Law) Rules 1988 of Sri Lanka (the Supreme Court Rules) and the Evidence Ordinance No. 14 of 1895 of Sri Lanka (as amended) (the Evidence Ordinance).

Scope of legal professional privilege

What is protected by legal professional privilege?

While neither the Evidence Ordinance nor the Supreme Court Rules explicitly reference the term "legal professional privilege," legal professional privilege operates in Sri Lanka in a similar manner to other common-law jurisdictions.

Evidence Ordinance

Under the Evidence Ordinance, no attorney is permitted, unless with a client's express consent, to disclose:

- Any communications made to them in the course of, and for the purpose of, their employment
- The contents or conditions of any document with which they have become acquainted in the course of, and for the purpose for, their professional employment; or
- Any advice given by them to their client in the course of, and for the purpose of, their employment.

Such limitations also apply to interpreters and the clerks or servants of the Attorney-at-Law and notaries.

The Evidence Ordinance also stipulates that no one shall be compelled to disclose to the court any confidential communication which has taken place between them and their legal professional advisor, unless they offer themself as a witness. In which case, they may be compelled to disclose such communications to the court only if it is necessary to explain any evidence which they have given.

Supreme Court Rules

The Supreme Court Rules stipulate that an attorney must keep in strict confidence "all information, whether oral or documentary, acquired by him from, or on behalf of, his client in any matter in respect of and concerning the business of his client." While this is framed as a "duty of confidentiality," it is not very different from the concept of legal professional privilege that arises in other common law jurisdictions.

According to Rule 2 of the Supreme Court Rules, the duty of confidentiality (i.e. legal professional privilege) will extend to all attorneys admitted and enrolled by the Supreme Court of the Democratic Socialist Republic of Sri Lanka. In addition, under Section 2 of the Evidence Ordinance, this concept applies to all judicial proceedings, both civil and criminal, with the exception of proceedings before a court martial or arbitrator.

The duty of the attorney to refrain from disclosing such confidential information survives not only during the existence of their professional relationship with their client, but also after the attorney ceases to act for the client and after the death of the client.

The duty also extends to partners, associates and employees of the attorney. If such an individual becomes aware of such confidential information, the attorney would be obliged to take all reasonable steps to prevent the disclosure of the confidential information. This duty also continues beyond the termination of the attorney's relationship with such people.

An attorney who possesses privileged information concerning their client is barred from undertaking any other professional matter, where such privileged information could be used against the client.

Are communications with in-house counsel protected by legal professional privilege?

Yes, communications with in-house counsel are protected by legal professional privilege. The Supreme Court Rules are applicable to all attorneys admitted and enrolled by the Supreme Court of Sri Lanka. As such, there is no distinction between in-house counsel and any other attorney, provided they are admitted and enrolled by the Supreme Court of Sri Lanka.

As a result, all communications with attorneys, including in-house counsel, will be protected by legal professional privilege if the communications arise in the course of an attorney-client relationship.

Does legal professional privilege apply to the correspondence of non-national qualified lawyers?

The scope of the Supreme Court Rules is limited to attorneys who have been admitted and enrolled by the Supreme Court of Sri Lanka. As such, the legal professional privilege afforded will be applied to correspondence between a client and their attorney when the attorney falls within the scope of the Supreme Court Rules, i.e. they are admitted and enrolled by the Supreme Court of Sri Lanka.

Therefore, legal professional privilege will not extend to correspondence with non-national qualified lawyers.

How is legal professional privilege waived?

For legal professional privilege to be waived, the express consent of the client should be obtained. The Supreme Court Rules permit disclosure if it is expressly or impliedly authorised by an attorney's client in writing or in the event of the death of their client, by the legal representative of the client. Even then, the attorney must be careful to disclose only information deemed necessary in the circumstances.

However, both the Supreme Court Rules and the Evidence Ordinance provide that the client's consent is not required for waiver of legal professional privilege if the confidential communications are made in furtherance of an illegal purpose, or where disclosure is necessary to prevent the commission of a crime or fraud.

In addition, the Supreme Court Rules allow attorneys to disclose confidential information in order to defend themselves, their associates or their employees against any allegation of misconduct or malpractice made by a client, or to prevent the commission of a crime, fraud or illegal act.

Furthermore, in the case of a joint retainer, or where the client has a joint interest with others, disclosure of the confidential information is allowed to the members of the joint retainer or to those having a joint interest with the client.

The Prevention of Money Laundering Act No. 5 of 2006 and Financial Reporting Act No. 6 of 2006 of Sri Lanka also make allowances for the Financial Intelligence Unit of Sri Lanka to require an attorney to disclose privileged communications, if such communications were made for the commission or for furthering the commission of any illegal or unlawful activity.

According to the Evidence Ordinance, privilege is not considered waived purely on the grounds of a party giving evidence, voluntarily or otherwise. However, if a party agrees to appear as a witness, the court can compel them to disclose confidential communications if the court deems it necessary to explain any evidence given.

Legal professional privilege in the context of merger control

There are no specific legal professional privilege requirements in the context of merger control under Sri Lankan law. However, the general duty of nondisclosure of privileged information will be applicable when communications arise in the course of an attorney-client relationship.

Recent cases and/or other legal developments

There have been no recent cases or legal developments impacting the application of legal professional privilege in Sri Lanka.

Data privilege

1) Privilege in Investigations

a) Is there a specific legal privilege arising in the context of internal investigations, criminal investigations and/ or data protection matters? If yes, what are the elements required for these categories of investigation?

No, there are no specific or additional legal privileges afforded to internal investigations. Under Rule 2 of the Supreme Court Rules and Section 2 of the Evidence Ordinance, legal professional privilege will be applicable in the same manner for both civil and criminal proceedings.

b) Are there specific time periods which apply to legal privilege? Do they vary depending on whether the privilege relates to legal advice or litigation?

There are no specific time periods which apply to legal privilege, irrespective of whether the attorney is involved in litigation or providing legal advice.

As stated above, the duty of nondisclosure of privileged information conferred on an attorney will continue after their professional relationship with the client has ceased to exist and indefinitely thereafter, even after the death of the client.

c) Are communications to / by companies and in-house counsel protected by privilege?

Yes, as stated above, all communications with an attorney falling within the description of Rule 2 of the Supreme Court Rules will be protected by legal professional privilege. The fact that the attorney is acting in their capacity of an in-house counsel has no bearing on the protection afforded to the communications between the said attorney and their clients, provided the attorney in question is admitted and enrolled by the Supreme Court of Sri Lanka.

d) Are there any specific requirements of a privileged incident response engagement letter?

No.

2) Documents and Reports

a) Does privilege protect notes or transcripts of employee interviews, third-party expert reports or expert reports prepared or obtained for the purpose of giving legal advice?

If the notes, transcripts and reports were prepared by a third party, who does not fall within the description of an attorney as envisaged by the Supreme Court Rules, they will not be protected under privilege, even if the documents were subsequently used by an attorney for the purpose of giving legal advice. In other words, to benefit from the protection of privilege under Sri Lankan law, the relevant documents will need to be prepared by an attorney.

However, if the notes, transcripts of employee interviews (where it is retained by the attorney to carry out such interviews) and reports were prepared *by* the attorney for the client, they would be protected under legal professional privilege.

b) Does it matter whether the documents are located at the premises of the client or the lawyer?

No, for the purposes of privilege, it does not matter whether the documents are located at the premises of the client or the lawyer.

c) How are seized documents put into evidence in a criminal / civil procedure?

Documents may be seized in the manner provided for under the Code of Criminal Procedure Act No. 15 of 1979 or the Prevention of Terrorism Act No. 48 of 1979.

Objections against the admissibility of such documents can be made by making an application to the Sri Lankan courts under the Evidence Ordinance, under grounds such as privilege or irrelevance of the document to the case in question. The admissibility of the seized documents as evidence and the veracity of the objections will be determined by the presiding Judge.

3) Waiver of Privilege

a) Are there exceptions to the legal privilege rules in your jurisdiction, such as waiver? If yes, what are the elements required to establish these and are there practical steps that can be taken to ensure that privilege is not lost?

See the answer to the above question "How is legal professional privilege waived?"

In order to ensure privilege is not lost, a client can make a stipulation within the Letter of Engagement or Non-Disclosure Agreement between himself and the attorney which states that no disclosure of information or documentation is to occur except with prior written consent from the client. This would preclude the attorney from relying on implied consent as a basis for privilege to be waived.

b) In data breach litigation does a company ever need to rely on the findings of internal investigations and, if so, does that mean privilege has been waived?

There is no mandatory requirement for a company to rely on the findings of an internal investigation in the course of a data breach litigation.

Note, however, that Sri Lanka does not currently have any specific laws or rules relating to data breaches, therefore, data breach litigation is rare in Sri Lanka. The Personal Data Protection Bill is currently pending enactment by Sri Lanka's Parliament.

c) If reliance means a waiver, does notification to affected individuals of the findings of internal investigations or a sharing of the findings with third parties mean a waiver, too?

As mentioned above, internal investigations which are conducted by individuals who are not attorneys in Sri Lanka, will not be considered as privileged.

In the event the internal investigation is conducted by an attorney, notifying those affected only of the findings, as opposed to the contents or any extract of the internal investigation report, will not result in the loss of privilege of the internal investigation report.

4) Privacy Litigation

a) Were there any data breach privilege cases in your jurisdiction in the last 5 years? If so, please provide details.

There are no public court records (ie judgments issued by the Supreme Court and Court of Appeal of Sri Lanka) of any data breach privilege cases in Sri Lanka within the last five years.

b) In data breach litigation, does a company ever need to rely on the findings of internal investigations and, if so, does that mean privilege has been waived?

There is no mandatory requirement for a company to rely on the findings of an internal investigation in the course of a data breach litigation.

Note, however, that Sri Lanka does not currently have any specific laws or rules relating to data breaches, therefore, data breach litigation is rare in Sri Lanka. The Personal Data Protection Bill is currently pending enactment by Sri Lanka's Parliament.

c) Would privileged data outside your jurisdiction be treated as privileged data in your jurisdiction?

No, the fact that data is considered privileged outside the Sri Lankan jurisdiction would not necessarily make the data privileged within Sri Lanka, unless the elements of legal professional privilege under Sri Lankan law have been met.

d) How is privileged data in your jurisdiction treated in the event of a civil/ criminal investigation outside the jurisdiction to ensure privilege is maintained?

If data is considered to be privileged under Sri Lankan law, then irrespective of whether the investigation takes place within or outside of Sri Lanka, legal professional privilege can be invoked by the party in question.

Practical steps, such as marking the privileged information as "Privileged and Confidential," or the signing of a Non-Disclosure Agreement with the parties in question may assist in protecting the privilege afforded to the information in question.

This would be subject to the exceptions set out above relating to the disclosure of crime, fraud or furtherance of an illegal purpose, and subject to relevant local laws in the jurisdiction where the civil/criminal investigation takes place.

Key contacts

Maurice Burke
Head of Investigations, Asia
maurice.burke@dlapiper.com
T: +65 6512 9560

Rishikeesh Wijaya
Associate
rishikeesh.wijaya@dlapiper.com
T: +65 6512 9515

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