Global Attorney-Client Privilege Guide - Hong Kong

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# 01 - Discovery

## What disclosure/discovery is required in litigation?

Discovery is a process by which the parties to a civil proceeding or matter are permitted to obtain, within certain defined limits, full information as to the existence and the contents of all relevant documents relating to the matters in question between them.

In any action begun by writ in the High Court and District Court, each party must (unless otherwise agreed or ordered), within 14 days after close of pleadings, disclose to each other all relevant documents (including those that are privileged or otherwise protected from inspection) that are or have been in their possession, custody or power by setting them out in a list of documents, which includes a brief description of the document. Once the lists of documents have been exchanged, the parties are entitled to inspect the documents referred to in the list, other than those privileged or protected from inspection, and to take copies of them.

This early exchange of information is intended to prevent trial by ambush, facilitate thorough trial preparation and an early assessment of the strengths and weaknesses of the parties' respective cases, and encourage settlement.

Only documents relating to matters in question are required to be disclosed. This includes documents that would tend to prove or disprove a matter in issue as well as documents which it is reasonable to suppose might enable the other party either to advance its own case or to damage the case of its adversary, or which might fairly lead to a train of inquiry that might have either of those two consequences.

Relevance is generally tested by reference to the pleadings and further particulars provided, but may extend to matters which, in the ordinary way, may be expected to be raised in the course of the proceedings. However, discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action, nor in respect of an allegation not made in the pleadings or particulars. Discovery will also not be allowed to enable a party to "fish" for witnesses or for grounds upon which to found their case. Nor will discovery be ordered in respect of documents leading an applicant to a train of inquiry that would only lead to matters not admissible in evidence.

Each case must be considered according to the issues raised. Where there are numerous documents of slight relevance, and it would be oppressive to produce all of them, some limitation may be imposed by the courts. Courts are empowered to, and will, by way of case management, limit the scope of automatic discovery that the parties would otherwise be required to make.

Where a party fails to make discovery or makes inadequate discovery, another party can apply to the court for an order for "general discovery." Where a party is dissatisfied with the list of documents from their opponent, further disclosure may also be obtained by applying for a further and better list (either in general terms or limited to certain classes of documents), or applying for an order of specific discovery of documents.

# 02 - Type of privilege

## Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Legal professional privilege is a substantive legal right recognized in both statute and common law. It is applied in Hong Kong to protect the confidentiality of certain types of communications made between clients and their lawyers and, in some circumstances, their communications with third parties.

Privilege over such communications is to protect clients and not their lawyers. The protection afforded is not confined to what lawyers and clients say or write to each other, but naturally extends to information gathered or generated in certain circumstances and under certain conditions.

There are two types of legal professional privilege in Hong Kong.

**Legal advice privilege** protects confidential communications between clients and their lawyers that are made for the dominant purpose of seeking or giving any legal advice or related legal assistance. It is not necessary that litigation was pending or contemplated, and the protection is not restricted to specific requests for advice and to documents containing advice — it extends to communications aimed at advising a client during the continuum of communication between the lawyer and client.

As a result of the Hong Kong Court of Appeal decision in *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20, legal advice privilege in Hong Kong applies more widely to communications between employees of corporate clients and external lawyers, and its application is subject to the dominant purpose test of obtaining or seeking legal advice.

**Litigation privilege** protects confidential communications between clients and their lawyers, as well as between clients or their lawyers and third parties (such as a factual or expert witness), where such communications came into existence for the dominant purpose of use in connection with actual, pending or contemplated litigation.

The Hong Kong Court of Final Appeal in *Akai Holdings Ltd* *(In Compulsory Liquidation) v. Ernst & Young (A Hong Kong Firm)* (24/02/2009, FACV28/2008) confirmed that such protection turns on the issue of dominant purpose and will apply if the documents were brought into existence in order to obtain legal advice in connection with litigation that was in active contemplation and in real prospect at the time. Where there is no actual or pending litigation, the Hong Kong Court of First Instance in *Citic Pacific Limited v. Secretary for Justice & Anor* (19/12/2011, HCMP767/2010) considered that litigation must be a real likelihood rather than a mere possibility.

# 03 - Scope of privilege

## Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

Lawyer-client communications that satisfy the relevant requirements, whether original or copies, are protected by privilege. This protection applies regardless of whether the originals and/or copies are in the lawyer’s or the client’s possession. The protection can, however, be lost if the communications are sent to an external third party, including for consideration and/or comment beyond the scope of litigation and legal advice privilege.

## Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Legal professional privilege extends to protect communications between in-house lawyers and corporate clients (i.e., their employer). However, the claim for privilege will be subject to particular scrutiny. Communications with in-house lawyers must be made to or by in-house lawyers in their capacity as lawyers, as opposed to another capacity (for example, of an executive nature). Moreover, the communications must relate to legal matters, as distinct from administrative or business matters. There is no single test that will enable all situations to be classified as falling on one side of the line or the other. However, there are two helpful benchmarks:

Whether the in-house lawyer’s communications involve the use of skills for which an external lawyer could claim privilege

Whether an external lawyer could be engaged on the matter on which the in-house lawyer was instructed by their client employer

If the answer is yes in either case, the communications are likely to be privileged. If not, they are unlikely to be privileged.

## Does privilege extend to internal communications between in-house lawyers?

Legal advice privilege extends to all communications created for the dominant purpose of advising a client, and during the continuum of communication between the lawyer and client. Privilege will extend to internal communications between in-house lawyers so long as the internal communications are for the dominant purpose of advising their corporate client (i.e., their employer) and are between in-house lawyers acting in their capacity as lawyers as opposed to any other capacity (such as those that are administrative or executive in nature).

In *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20, it was held that legal advice privilege is subject to the dominant purpose test of obtaining legal advice. Despite the wider scope of legal advice privilege, it remains good practice to identify who needs to be part of the communication group so as to avoid any waiver of privilege.

## Are foreign lawyers recognized for the purposes of privilege?

Foreign lawyers practicing in Hong Kong are recognized as lawyers for the purposes of legal professional privilege, but the protection afforded by the privilege only applies in proceedings brought in Hong Kong.

## Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

The Hong Kong Court of Appeal in *Super Worth Int’l Ltd & Others v. Commissioner of the ICAC & Another* [2016] 1 HKLRD 281 followed the UK Supreme Court decision in *R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax and another* [2013] UKSC 1 and held that legal professional privilege does not extend to advice given by professionals other than lawyers, even where that advice was legal advice that the professional was qualified to give.

# 04 - Sharing documents with third parties

## In what circumstances (if any) can a document be given to a third party without losing protection?

The loss of privilege can occur where (i) there is loss of confidentiality; (ii) privilege is waived intentionally; (iii) the clients or their lawyers attempt to make some limited use of privileged documents without reserving privilege; or (iv) when a partial disclosure of privileged documents occurs. It can also occur when a third party is able, by whatever means, to produce secondary evidence of the contents of a privileged communication.

There are limited exceptions where sharing a document may not result in the waiver of privilege.

**Partial waiver**

The Hong Kong Court of Appeal in *Citic Pacific Limited v. Secretary for Justice and Commissioner of Police* [2012] 2 HKLRD 701 held that Hong Kong law recognizes the concept of partial waiver of privilege. A privileged document may be disclosed to one party for a limited purpose, thus waiving the privilege to that document as against that party alone only for the specified purpose. However, the privilege to the document is retained as against all other third parties. In order to maintain the privilege, it is important to specify in writing at the time the privileged document is disclosed that it is provided confidentially and the purpose for which the privileged document is disclosed.  The scope of the disclosure should be sufficiently limited so that a wider blanket waiver is not implied.

In this case, the Court of Appeal rejected the Hong Kong Secretary for Justice’s contention that when prosecuting authorities come into possession of privileged documents, privilege will be lost, and the information would be available for use by the authorities regardless of how the authorities came about the information. The Court of Appeal made clear that privilege is recognized in the Basic Law of Hong Kong as a substantive legal right of particular importance to the due and just administration of justice. Privilege is not lost unless there is evidence that it has been intentionally waived by the holder of that privilege, and a waiver will not be lightly inferred.

**Common interest privilege**

Common interest privilege arises where one party confidentially and voluntarily discloses the privileged document to another party, who has a common interest in the subject matter of the communication at the time of disclosure. The document will remain privileged, with privilege belonging to the original party, despite the fact it has been shared. The privilege can only be waived by the original party.

**Joint privilege**

Joint privilege can arise in two circumstances: (i) through a joint retainer; or (ii) by sharing a joint interest in the subject matter of the communication at the time that it comes into existence. The effect of joint privilege is that each party is entitled to benefit from all privileged communications and neither party retains any confidence against the other. Both parties need to agree to waive privilege, and disclosure of privileged communications by one party will not automatically result in the waiver of privilege over the document.

# 05 - Investigations

## Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

In Hong Kong, legal professional privilege is a constitutional right and can be applied to protect the confidentiality of relevant communications in civil, criminal, regulatory and investigatory situations.

If protection is sought for documents which came into existence in connection with civil, criminal or regulatory proceedings, or investigations, the application of legal advice privilege or litigation privilege will depend upon the nature of the document and the relevant circumstances.

In Hong Kong, litigation privilege protects communications which came into existence for the dominant purpose of use in connection with actual, pending or contemplated litigation. In *Akai Holdings Ltd* *(In Compulsory Liquidation) v. Ernst & Young (A Hong Kong Firm)* (24/02/2009, FACV28/2008), transcripts and notes from the liquidators’ private examinations and interviews were held to be protected by litigation privilege as they were found to be made in connection with litigation that was in active contemplation and in real prospect. In *Citic Pacific Limited v. Secretary for Justice & Anor* (19/12/2011, HCMP767/2010), the Court of First Instance considered that where there was no actual or pending litigation, litigation must be a real likelihood rather than a mere possibility. The court mentioned that the approach would cover both civil and criminal litigation as well as litigation involving appropriate regulators.

## Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

As a result of the Hong Kong Court of Appeal decision in *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20, communications between employees of corporate clients and external lawyers are given greater protection and are subject to the dominant purpose test of obtaining legal advice. This extends to the whole process of gathering information for the purpose of obtaining legal advice, which may include notes of interviews produced during investigations. Recently, in *Wong Wai Keung v Commissioner of Police* [2022] HKCFI 374, it was reiterated that privilege will not automatically attach to documents collated by the client from its own files, even if the intention is for those documents to be provided to lawyers for the purpose of obtaining legal advice. While the communication to the lawyer may be privileged, the underlying documents still exist separately within the client’s files, and therefore the normal rules of discovery will apply.

# 06 - Regulatory investigations

## Can governmental regulators require a privileged document to be provided to them?

There are a number of statutes in Hong Kong that grant information-gathering powers to governmental and/or regulatory authorities. Some expressly abrogate or curtail the application of legal professional privilege, while others expressly confirm its application. The Hong Kong courts, while recognizing that the Hong Kong legislature can legislate to abrogate or curtail legal professional privilege, have made it clear that, as legal professional privilege is a fundamental right entrenched in the Hong Kong Basic Law, such abrogation or curtailment needs to be made by clear and compelling words in primary legislation or by necessary implication.

# 07 - Recent issues

## What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

The most recent key issue was in the case of *Citic Pacific Limited v. Secretary for Justice & Another* [2015] 4 HKLRD 20. As a result of the Hong Kong Court of Appeal decision in this case, legal advice privilege in Hong Kong applies more widely to communications between employees of corporate clients and external lawyers, and its application is subject to the dominant purpose test of obtaining or seeking legal advice.

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