Global Privilege and Professional Secrecy Guide - Malaysia

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# 01 - Discovery

## What disclosure/discovery is required in litigation?

Parties to civil litigation in Malaysia are, in practice, expected only to disclose documents on which they intend to rely in the proceedings, subject to the right of the opposing party to seek an order for wider discovery of documents.

Pursuant to the Rules of Court 2012, the court will give pre-trial directions during case management. Pre-trial directions will typically provide for a period within which the parties must file a bundle of the documents that any party intends to rely on or refer to. However, a party can seek an order for the discovery of documents beyond those that have been voluntarily disclosed. The documents that a party may be ordered to discover are:

The documents on which the party relies or will rely

The documents that could:

Adversely affect the party's own case

Adversely affect another party's case

Support another party's case

# 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?

There are two types of legal professional privilege recognized in Malaysia.

**Legal advice privilege** protects any communication made in the course of the professional employment of a lawyer by a client seeking legal advice.

**Litigation privilege** protects any communication between a client and legal professional advisers or a third party, created at the behest of the party to a litigation or their solicitor, if the dominant purpose of the communication was to obtain legal advice for use in litigation.

The Evidence Act confers protection upon such communications, documents and advice by rendering them inadmissible in any court or judicial proceedings. As such, whatever the circumstances in which disclosure of privileged communications is sought of a solicitor in the litigation process, they are bound to assert the privilege and resist such disclosure unless the client expressly waives that privilege. Furthermore, a document cannot be admitted as evidence if it is privileged, even if it is in the hands of the opposite party or if it has been wrongly released to the opposite side in discovery proceedings.

The only exceptions where disclosure or discovery of otherwise privileged communications is required in litigation are set out in the Evidence Act. These exceptions apply to the following:

Any communication made in furtherance of any illegal purpose

Any fact observed by any advocate in the course of their employment showing that crime or fraud has been committed since the commencement of their employment

It is also worth noting that the Evidence Act provides that where clients have offered to give witness evidence, they may be compelled to disclose any privileged communications as may appear necessary to the court to be known in order to explain any evidence that they have given.

# 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?

Copies of attorney-client communication held by the client are also protected by legal professional privilege.

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

The position in Malaysia is still unclear as to whether legal professional privilege extends to in-house lawyers, as there have been no Malaysian cases on this point.

The term "advocate" used in the Evidence Act is defined as "a person entitled to practice as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia." A strict reading of this definition suggests legal professional privilege does not extend to in-house lawyers or legal advisers who are salaried employees of the client. On this interpretation, privilege would only apply to advocates and solicitors entitled to practice in Malaysia by virtue of being called to the Malaysian bar and holding a practicing certificate or by obtaining an exemption allowing them to practice in Malaysia on an ad hoc basis. An in-house lawyer cannot hold a practicing certificate and cannot appear in court.

The term "legal professional adviser" used in the Evidence Act is not defined, and until there is clear judicial interpretation as to the legislative intent behind the use of the term, there is no basis to limit the application of the provision to confidential communications between a person and their advocate. Arguably, the test of whether in-house lawyers are sufficiently independent to be treated in the same way as external lawyers may be applied, as it has been in some Commonwealth jurisdictions.

As a matter of prudence, it should however be assumed that the concept of legal professional privilege extends only to communications with externally appointed advocates and solicitors.

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

As the position regarding whether the concept of legal professional privilege extends to in-house lawyers is unclear, the prudent approach would be to assume that it does not extend to internal communications between in-house lawyers.

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

Legal professional privilege extends only to Malaysian advocates and solicitors. Foreign lawyers will generally (unless, for example, they have leave of a Malaysian court to practice) not be afforded the protection of privilege.

## 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?

As nonlegal professionals are not "advocates" for the purposes of the Evidence Act, legal professional privilege will not be afforded to nonlegal professionals who advise on legal issues relating to their field.

# 04 - Sharing documents with third parties

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

"Privilege" is not treated as co-extensive with "confidentiality." Insofar as the concept of legal professional privilege is concerned, a privileged document can be given to a third party without waiving privilege in all circumstances, except where the holder of the privilege has waived that privilege for court proceedings. In Malaysia, the maxim applies: "once privileged, always privileged."

# 05 - Investigations

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

The Evidence Act confers protection upon privileged communications only by rendering them inadmissible in any court or judicial proceedings.

A governmental regulator may legitimately require a privileged document to be provided to them, subject to its powers of seizure. Otherwise, there are no differences in how privilege operates in civil and criminal situations.

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

Notes of interviews with employees and documents produced or obtained during investigations in order to obtain information on a matter of expected litigation, for the purpose of submission to advocates and solicitors for advice or the conduct of litigation, are covered by privilege. However, documents which are not produced for submission to the advocates and solicitors, although obtained for the purposes of litigation, will not be covered by privilege.

# 06 - Regulatory investigations

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

A governmental regulator may legitimately require a privileged document to be provided to them, subject to its powers of seizure.

# 07 - Artificial intelligence

## Does the law of privilege or professional secrecy protect inputs by lawyers into generative AI tools and the resulting outputs?

In Malaysia, legal professional privilege could arguably extend to input by lawyers into generative AI tools and the resulting outputs, provided that there is no waiver of privilege. In *Dato' Anthony See Teow Guan v. See Teow Chuan* [2009] 3 MLJ 14, the Federal Court of Malaysia held that "privilege" was not coextensive with "confidentiality"; it is privilege that has to be waived and not confidentiality. Legal professional privilege is absolute and remains so until waived by the privilege holder. Hence, even if client confidentiality is breached in the process of their lawyers producing privileged documents using AI tools, the client's privilege remains intact.

That said, it is unclear whether privilege can be asserted in circumstances where discovery is targeted at the owner of the generative AI tools, which would not be in any position to assert privilege over the matters sought to be discovered.

Given the above, the use of generative AI tools for legal matters should be avoided. In addition to the risk of exposing the inputs and resulting outputs to potential discovery by interested parties, the use of generative AI tools also presents a serious risk of breaching client confidentiality. Even private or enterprise-grade generative AI may put client confidentiality at risk if sensitive information is accessible to unauthorized personnel.

# 08 - Recent issues

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

**Has common law litigation privilege been displaced by the Evidence Act?**

In the 2017 case of *Wang Han Lin & Ors v. HSBC Bank Malaysia Berhad* [2017] MLJU 1075, the Court of Appeal reversed the position in *Tenaga Nasional Berhad v. Bukit Lenang Development Sdn Bhd* [2016] 5 MLJ 127 where the High Court held that litigation privilege at common law had been displaced by section 126 of the Evidence Act as the existence of a statute codifying the law of evidence had removed the basis on which to rely upon the common law. The court in *Wang Han Lin* held that section 126 of the Evidence Act did not fall within the purview of common law litigation privilege and that there are no inconsistencies between the two. Litigation privilege existed before the passing of the Evidence Act and continues to apply in Malaysia.

**Breach of legal professional privilege**

In the 2018 case of *Tan Chong Kean v. Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669, the Federal Court considered the remedies available to a client against their solicitors in an action for breach of legal professional privilege. The client's solicitors had failed to destroy trust deeds prepared by them on the client's behalf, against the client's express instructions. Instead, the solicitors used the trust deeds to support their application for a third-party notice to be issued against the client. The client had sought to claim damages against the solicitors, but the solicitors contended that the client's only recourse was to lodge a complaint against them to the relevant disciplinary body. The court found in favor of the client and made an order for damages to be assessed by the High Court. The solicitors were also prohibited from disclosure, use or retention of the trust deeds.

**Is a document in the form of a "draft" intended to be disclosed protected by privilege?**

Yes, so long as it has not been disclosed to the counterparty. In the 2020 case of *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn. Bhd. & Ors* [2020] MLJU 1421 at the Court of Appeal, it was held that as long as the "draft" is a solicitor work product produced on the client's instructions, it shall remain within the protective umbrella of legal professional privilege until the client is satisfied that the "draft" is ready for disclosure and is so disclosed.

**Is privilege lost or waived in the absence of confidentiality?**

No. In the same case of *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn. Bhd. & Ors* [2020] MLJU 1421, the Court of Appeal held that privilege is still intact notwithstanding the fact that most or all of the contents of a document have been made known to and/or are in the knowledge of the counterparty, so long as the document itself, in its entirety and as a whole, remains undisclosed to the counterparty. Privilege is waived only upon the conscious or deliberate act on the part of the client in disclosing the document directly to the counterparty or through intermediaries such as their solicitors.

**Can a solicitor's client account attract privilege under the Evidence Act?**

Yes. In the 2021 case of *Ketua Pengarah Hasil Dalam Negeri v. Bar Malaysia* [2022] 2 MLJ 428, the Court of Appeal was of the view that any or all financial information or data exchanged between an advocate and their client, and any such data contained in any document and kept in respect of the client's account for the purpose of the advocate's employment as an advocate, would all come within the ambit of section 126 of the Evidence Act. Such privilege extends to documents rendered or kept in the client's account as well as all information relating thereto.

**Extension of scope under section 126 (1)(b) of the Evidence Act**

Section 126 (1)(b) of the Evidence Act does not protect from disclosure any fact observed by an advocate and solicitor which shows commission of any crime or fraud since the commencement of their employment. It follows in section 126 (2) that it is immaterial whether or not the fact (which shows a crime or fraud has been committed) was brought to the attention of the advocate and solicitor. In the 2020 case of *Celcom (M) Bhd & Anor v. Tan Sri Dato' Tajudin bin Ramli & Ors* *and another suit* [2020] 11 MLJ 44, the High Court, based on section 126 (2), extended the scope of section 126 (1)(b) to apply in the following three circumstances:

Willful blindness – when an advocate and solicitor intentionally closes their eyes to any fact which shows the commission of a crime or fraud after commencement of their employment. In other words, Nelsonian knowledge, willful ignorance and/or contrived ignorance on the part of the advocate and solicitor

Recklessness – when an advocate and solicitor is reckless and fails to make such inquiries as an honest and reasonably competent advocate and solicitor would have made regarding the commission of a crime or fraud after commencement of their employment

Knowledge of circumstances – when an advocate and solicitor has knowledge of circumstances which to an honest and reasonably competent advocate and solicitor would indicate commission of a crime or fraud after commencement of their employment

# 09 - Authors

## Authors and contact information

**Eddie Chuah**  
Kuala Lumpur  
+603 2298 7939/+603-2299 6515  
[eddie.chuah@wongpartners.com](mailto:eddie.chuah@wongpartners.com)

**Raymond Tan**  
Kuala Lumpur  
+603 2298 7939/+603-2299 6515  
[raymond.tan@wongpartners.com](mailto:raymond.tan@wongpartners.com)

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