

CLEARY GOTTLIB



# Legal Privilege For In-House Counsel

A Roundtable Inspired By The Rotterdam District Court's Recent Shell Judgment

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# Current Developments

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# A Recap On Legal Privilege

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# English Law – Legal Professional Privilege



## LEGAL ADVICE PRIVILEGE (“LAP”)

— protects confidential lawyer/client communications (or documents evidencing those communications) made for the dominant purpose of giving/obtaining legal advice.

## LITIGATION PRIVILEGE (“LIP”)

— protects confidential communications (or documents evidencing those communications) where adversarial litigation was in reasonable contemplation, and which were created for the dominant purpose of litigation. Includes communications between the client or lawyer and a third party.

## WORKING PAPERS PRIVILEGE

— protects documents which, although not necessarily communicated by or to a client, would give the recipient of the papers a clue to the trend of the advice given by the lawyer.

# Legal Advice Privilege



## WHO IS A LAWYER?

- Includes communications with overseas lawyers.
- Includes in-house lawyers.
- Includes non-legally qualified personnel (trainees, paralegals, secretaries etc.) where, at the time of the communication, the individual is acting under the supervision of a qualified lawyer.

## WHO IS A CLIENT?

- Narrow definition. Only a limited class of employees with express or implicit authority to seek and receive legal advice on behalf of the company qualify as “the client” for the purpose of LAP.
- Communications with other officers or employees cannot benefit from LAP (regardless of their seniority).
- The RBS Rights Issue Litigation [2016] EWHC 3161 (Ch) endorsed strict definition of client and suggests that only individuals “*constituting part of the directing mind and will of the corporation*”, or the “*duly authorised organ of the corporation*” are a client for LAP.
- This interpretation has been consistently upheld by the English courts, although criticisms have been made of it (e.g. Serious Fraud Office v ENRC Limited and another [2018] EWCA 2006).

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# Litigation Privilege



Unlike LAP, it applies to communications between the client or lawyer and a third party, but the threshold is high, and the precise ambit of LIP is uncertain and fact-specific.

## — Adversarial proceedings:

- Does not include administrative, inquisitorial, investigative or fact-finding.
- Proceedings must be at a stage where formal allegations have been asserted.
- Includes litigation or arbitral proceedings (whether domestic or overseas) involving the party asserting privilege.
- A criminal or regulatory prosecution will also constitute adversarial litigation.

## — Reasonable Contemplation:

- Litigation must be a “*real likelihood rather than a mere possibility*”.
- The chance of litigation need not be greater than 50%.
- A “*general apprehension of future litigation*” or a “*distinct possibility that sooner or later someone might make a claim*” are insufficient.

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# The Attorney-Work Product Doctrine



Established in *Hickman v. Taylor*, U.S. Supreme Court (1947) and now embedded in rules of civil procedure.

The work product doctrine applies to:

- 1 a document or tangible thing
- 2 prepared in anticipation of litigation
- 3 prepared by or for a party, or by or for his representative

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# Attorney-Client Privilege



[T]o encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.”

*Upjohn Co. v. United States*, U.S. Supreme Court (1981).

## Applies to:

Applies to **all** attorneys admitted to the bar and anyone working on their behalf (paralegals, secretaries, translators, experts, etc.)

## Requires:

- A confidential
- Communication
- Between a client (including a corporation)
- And counsel
- For the purpose of giving or receiving legal advice

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# What Attorney-Client Privilege Does NOT Cover?



Communications made in the presence of third-parties outside the attorney-client relationship

Communications made for the purpose of rendering business advice, e.g., drafts of documents prepared by business, meetings for the purpose of making business decisions

- Many courts apply heightened scrutiny to distinguish in-house counsel's legal advice from business advice. Communications that mix both legal and business advice are generally considered privileged if the legal issues are predominant. *See, e.g., In re County of Erie*, 473 F.3d 413, 422 (2d Cir. 2007); *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984).

Underlying facts

Communications as to which privilege has been voluntarily waived (scope of waiver is facts and circumstances dependent); U.S. authorities require senior level permission to seek waivers

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# EU Competition Investigations



- The European Courts have confirmed privilege protection for three categories of document:
  1. Written communications with external counsel (*Case 155/79 AM&S v Commission*).
  2. Internal notes reporting legal advice from external counsel (*Case T-30/89 Hilti v Commission*).
  3. Documents produced exclusively for the purpose of seeking legal advice from external counsel (*Cases T-125/03 and T-55/03 Akzo Nobel Chemicals and Akcros Chemicals v Commission*).
- However, the scope of this protection is (arguably) limited in several respects.
- Most importantly, in-house counsel advice is not currently protected, and the Commission does not generally accept derogations from that principle.

Limitation	EC Enforcement
In-house counsel advice is not protected	Strictly applied
Only matters related to the investigation are protected	Can be enforced where relevant
Advice from ex-EEA counsel is not protected	Very rarely enforced

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# The Rotterdam District Court's Shell Judgment

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# Background and the Magistrate's Ruling

- Dutch bribery investigation into Shell's acquisition of exploration rights in relation to an oil field in Nigeria.
- Public prosecutor seized documents sent or received by 15 Shell in-house lawyers (all registered outside the Netherlands).
- In October 2019, a Dutch magistrate ruled that *none of the fifteen Shell in-house lawyers* were entitled to LPP in the Netherlands.



## *Foreign in-house counsel established in NL*

- No “professional statute” had been executed to guarantee lawyers’ independence
- Shell’s Head of Legal sat on ExCo, which undermined independence of entire legal department

## *Foreign in-house counsel established outside NL*

- Can be assumed to benefit from LPP if they do so in their home countries.
- But the fact that Shell’s Head of Legal sat on ExCo meant their independence was insufficiently guaranteed.

**Shell appealed to the Rotterdam District Court, which handed down judgment in January 2021. ECLA submitted an *amicus curiae* brief in support of Shell’s appeal.**

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## What Did The ECLA Argue?

**Legal privilege is of fundamental importance for both external and in-house counsel.**

**Membership of the executive committee does not undermine the independence of the General Counsel or the legal function.**

**Membership of the executive committee helps the General Counsel to promote legal compliance.**

**Depriving Shell's legal department of privilege would be a poor policy choice for the Dutch legal system and business community.**

**Denying privilege would violate fundamental legal principles.**

**The court should recognize privilege for foreign in-house counsel registered with their home bar.**

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# What Did the Rotterdam District Court Decide?



- Different jurisdictions are free to make regulations and formulate requirements regarding the practice of law, whether lawyers are employed or self-employed.
- In the Netherlands, independence is a “*decisive element*” when deciding whether an in-house lawyer can benefit from LPP protection.
- The Dutch Legal Profession Rules require in-house lawyers and their employers to put in place a signed professional statute, which “*protects the independent practice of the lawyer against undue influence by his employer with whom, by definition, there is a hierarchical relationship.*”

## ***Foreign in-house counsel established in NL***

- Professional statute as a “safeguard” for in-house counsels’ independence – not a mere formality.
- No reason to distinguish foreign in-house lawyers working permanently in NL from NL-registered in-house lawyers working in NL.
- These in-house lawyers had not signed the statute, and therefore did not benefit from LPP.

**UPHELD MAGISTRATE: NO LPP**

## ***Foreign in-house counsel established outside NL***

- Only nexus to NL was employment by a Dutch company.
- Entitled to rely on LPP insofar as their home jurisdiction rules permitted.
- One in-house counsel established in Switzerland did not benefit from LPP as they were not entitled to LPP protection as a matter of Swiss law.

**OVERTURNED MAGISTRATE: LPP**

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# Observations on the District Court's Judgment

## Clarifications for the Netherlands

All in-house lawyers in the Netherlands (whether or not Dutch lawyers) must enter into a professional statute to benefit from LPP protection in the Netherlands.

LPP rules outside the Netherlands recognised for in-house lawyers registered and working abroad, even where they provide legal advice to a Dutch-headquartered company.

## Broader implications?

No reference to independence of a legal department being undermined by General Counsel representation on board / executive committee.

Respect for LPP rules in jurisdiction where an in-house lawyer is registered and working.

Further support for extension of LPP to in-house counsel.

Companies should remain alert to local jurisdiction rules whenever their in-house lawyers move from one country to another.

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# Discussion



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