

# Attorney-Client Privilege in the Work of the In-house Corporate Counsel in Israel

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In their day-to-day activities, in-house corporate counsel often deal with matters and take actions that raise issues of attorney-client privilege with potentially far-reaching applications for their “clients”. The first part of this essay briefly sets forth the **basic relevant principles** under Israeli law. The second part, appearing on page 6, is a list of **nine basic protective measures** to aid the in-house counsel in this area, based on Israeli law and general principles. Please note that this essay sets forth a general summary and overview of the relevant principles of Israeli law, and does not constitute legal advice. Each occasion on which the attorney-client privilege may be relevant will be very fact-sensitive, and should be considered in its context and discussed separately with counsel.

## Privilege v. Confidentiality

Israeli law, though not always consistent in this regard, distinguishes between attorney-client privilege and the confidentiality obligation of attorneys.

Under Rule 19 of Israeli Bar Association Rules (Professional Ethics), 1986 (the “**Rules**”), an attorney is prohibited from disclosing to any person information provided to him or her by a client.<sup>1</sup> This **prohibition** applies in all situations in the professional and private life of the attorney, on an **in rem** basis, so long as the information was received by the attorney in the course of provision of professional services to the client, even if the information in question is not directly relevant to the provision of such services. However, if the information is not protected under Sec. 90

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<sup>1</sup> Rule 19 of Israeli Bar Association Rules (Professional Ethics), 1986 states:

“The attorney shall maintain the confidentiality of anything brought to his knowledge by a client or by anyone on the client’s behalf in the course of the attorney’s performance of his duties, unless the client expressly agrees otherwise; this provision does not apply to disclosure in judicial proceedings, investigation or search that is not protected under Section 90 of the [Israel Bar Association] Law.” **This translation and all translations hereunder of Israeli legislation and case law are non-official, convenience translations.**

of the Israel Bar Association Law, 1961 (the “**Bar Association Law**”), the attorney will not be exempted from disclosing the information in judicial proceedings.<sup>2</sup>

Privilege under Sec. 48 of the Evidence Ordinance [New Version], 1971 (the “**Evidence Ordinance**”) safeguards the interests of the client by exempting the client’s **attorney** and **employees of the attorney** from disclosing privileged information, or testifying in regard thereto, in legal proceedings.<sup>3</sup> As opposed to the sweeping confidentiality obligations imposed by Rule 19, this **right** is limited in scope in the following ways. Privilege may be invoked solely before a forum engaged in gathering evidence and applies solely to information/documents that a party seeks to obtain to use as **evidence**. The right may be invoked only with regard to information and documents exchanged between the attorney (or attorney’s employee) and client (or person acting on behalf of client) that are **relevant to the professional services** provided by the attorney to the client (as opposed to confidentiality, which applies to all information and documents received by the attorney in the course of performance of his/her services).

### **The Scope of Privilege**

As noted above, the privilege under Sec. 48 of the Evidence Ordinance (as well as the mirror obligation under Sec. 90 of the Bar Association Law) is limited to information and documents that are relevant to the **professional services** provided by the attorney to the client. The services of an attorney are defined in Section 20 and 22 of the Israeli Bar Association Law (generally: representation in courts and other fora, drafting legal documents, rendering of legal advice and opinions), but have been broadened by the Israeli Supreme Court to include all of the services that are customarily provided by lawyers even if not on that list.<sup>4</sup>

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<sup>2</sup> Under Sec. 90 of the Israel Bar Association Law, 1961, an attorney may not divulge “information and documents exchanged between a client and an attorney that are relevant to the professional services provided by the attorney to the client” in any judicial proceeding, investigation or search, “unless the client has waived the privilege thereof.”

This provision, whose legislative history suggests was intended to safeguard privilege, is worded as if it were a confidentiality provision.

<sup>3</sup> Sec. 48 of the Evidence Ordinance [New Version], 1971 states: “

“(a) An attorney is not required to provide as evidence information and documents exchanged between the attorney and his client or anyone acting on behalf of the client and that are relevant to the professional services provided by the attorney to the client, unless the client has waived the privilege; this is the case with regard to employees of the attorney who receive, in the course of their employ by the attorney, information and documents provided to the attorney.

(b) The provisions of sub-para. (a) also apply to the witness after the witness has ceased to be an attorney or employee of an attorney.”

<sup>4</sup> CA 632/77 **Moscona v. Maor et al**, PD 32(2), 321, 323-324.

Of particular importance to corporate counsel and their employers is the application of the common-law concept of privilege<sup>5</sup> by the courts to **internal documents** prepared in contemplation of pending or expected litigation (i.e., even if the document was not drafted by in-house or external counsel or was not addressed to counsel). In a 1995 ruling,<sup>6</sup> the Israeli Supreme Court held that this privilege only applies if the internal document was prepared while litigation was pending or at a time when there was a substantial likelihood that a lawsuit would be filed (as opposed to the existence of a dispute which might conceivably ripen into litigation), and only if the dominant reason for drafting the document was for the purpose of the litigation. This case, and several which have followed it,<sup>7</sup> are viewed as representing a trend in favor of full disclosure and discovery of the truth in litigation at the expense of the interests protected by the privilege.

An **internal audit report** prepared by a company's internal auditor in the normal course of his/her duties will not as such be privileged (this would not be the case if the report were drafted on an exceptional basis, in the expectation of litigation), and though it will not be admissible as evidence at trial,<sup>8</sup> the report will not be exempt from disclosure to other parties to the litigation under discovery proceedings.<sup>9</sup>

In this regard, Israeli case law is quite clear that privilege **cannot be manufactured or "contrived"**. Privilege will not be accorded to a communication between an attorney and client if there is no substantive link between the communication to the protected attorney-client relationship; mere delivery of information or a document to an attorney does not confer privilege on that information or document.<sup>10</sup> The fact that an attorney drafted a document does not confer privilege unless the document was drafted by the attorney in his/her capacity as such and is related to his/her legal duties.<sup>11</sup>

**Settlement contacts and correspondence** that did not come to fruition are privileged, and cannot be used as evidence without the consent of all parties to such discussions.<sup>12</sup> In this case, the privilege is objective in nature, as opposed to personal in nature<sup>13</sup> – in other words, the correspondence itself is privileged and the privilege applies regardless of who has possession of the correspondence.<sup>14</sup> Although the usual

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<sup>5</sup> As opposed to the statutory attorney-client privilege described above - see CC (Jerusalem) 344/93 **El-Abid Salim v. Kilian** (reported at Dinim M'hozi 26(4) 591).

<sup>6</sup> MCA 1412/94 **Hadassah Ein Kerem Medical Organization v. Gilad**, PD 49(2), 516, 522-523.

<sup>7</sup> Such as MCA 4995/95 **Alberici International Foreign Partnership Registered in Israel v. The State of Israel**, PD 50(1) 39.

<sup>8</sup> Sec. 10 of the Internal Audit Law, 1992.

<sup>9</sup> MCA 6546/94 **Bank Igud Le-Israel Ltd. v. Azulai et al.** PD 49(4), 54, 62-64.

<sup>10</sup> Y. Kedmi, **On Evidence - The Law Through the Looking Glass of Case Law** (1999, Vol. 2) ("Kedmi"), p. 778.

<sup>11</sup> Motion 4109/57 (CC 129/57) **Katz v. The Jewish National Fund**, Psakim (M'hozim) 16 148 ("Katz"), 161.

<sup>12</sup> A. Hernon, **Evidence Law** (1977), ("Hernon") p. 120; CC (Tel Aviv) 1519/97 **Shifan v. Kirshenbaum** (reported at Dinim Mehozi 32(8) 251) ("Shifan").

<sup>13</sup> As is the case with regular attorney-client privilege.

<sup>14</sup> Hernon, p. 120; Shifan.

headings on such documents are useful, they are not mandatory if it is clear from the context of the document that it was part of genuine settlement negotiations.<sup>15</sup>

Naturally, there are **exceptions to the privilege**: advice intended to facilitate commission of a crime;<sup>16</sup> the content of legal services (e.g., a contract is not privileged, although the correspondence relating to it is);<sup>17</sup> the identity of the client;<sup>18</sup> the fact whether or not an attorney has in his or her possession a specified document during a court hearing;<sup>19</sup> documents drafted by the client before the client requested legal advice are probably not covered by privilege (unless there is a substantive link to the legal services; see also below regarding communications that somehow find their way to third parties).<sup>20</sup>

### **Specific Issues of Concern to In-house Counsel**

Israeli law explicitly applies the privilege to an attorney regardless of whether he or she is an employee of the client.<sup>21</sup> While this sounds very reassuring, one must bear in mind that **in-house counsel often perform many functions**, both legal and non-legal, and only the former will enjoy privilege.

In other words, the mere fact that one of an in-house counsel's "clients" "cc"s the in-house counsel on an **internal company document** does not guarantee that the document will be privileged. **Drafting** by an attorney is not automatically privileged, unless performed in the attorney's capacity as legal counsel.

The same goes for **internal company meetings** at which an in-house counsel "happens" to be present – participation of the attorney does not by itself render the contents of the meeting privileged, and only matters of a legal nature will remain privileged.<sup>22</sup>

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<sup>15</sup> Kedmi, p. 837; Shiftan.

<sup>16</sup> A. Zer, **Professional Ethics of Attorneys** (1989) ("Zer"), p. 60.

<sup>17</sup> Zer, p. 56.

<sup>18</sup> Herson, p. 103.

<sup>19</sup> Herson, p. 103.

<sup>20</sup> Herson, p. 99.

<sup>21</sup> Herson, p. 102; Katz, p. 162.

<sup>22</sup> Misc. Civil Application (Haifa) 15659/00 **Zuckerman v. The Regional Zoning Board Haifa Objections Sub-Committee** (reported at Takdin M'hozi 2000(4) 43), in which the court held: "It is difficult to accept the proposition that the mere participation of legal counsel in committee meetings and in internal discussions transforms these events into legal consultations that are privileged. What could be easier than including legal counsel in every meeting and thereby insuring a stamp of approval of privilege. I do not believe that the mere fact of participation means a legal consultation has been held."

### **To Whom Does Privilege Belong and How Is It Waived**

Privilege **belongs to the client**, per Sec. 48 of the Evidence Ordinance, and may only be waived by the client.<sup>23</sup> Rule 19 of the Rules and Sec. 90 of the Bar Association Law reinforce this, requiring that the attorney maintain confidentiality unless the client agrees otherwise.

The wording of Sec. 48 of the Evidence Ordinance makes it clear that the privilege is “personal”, as opposed to “objective”, in nature. In other words, the right of privilege is the client’s vis-a-vis the attorney, and is not attached to the communication itself on an in rem basis. Thus, if the contents of the communication somehow make their way to a **third party**, the communication is no longer privileged.<sup>24</sup> For example, if in-house counsel drafts an opinion (or any other document of a legal nature) for one of his/her “clients”, say the company’s CEO or CFO, and the client then goes ahead and forwards the document to a third party outside the company, the document will no longer be privileged (naturally, the same applies to such documents drafted by outside counsel for the client if the client then passes them onto an external third-party). Likewise, the presence of another person during an otherwise privileged exchange between lawyer and client is deemed a waiver of the privilege,<sup>25</sup> unless the presence of the third party was forced upon the client and lawyer during their communication.<sup>26</sup>

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<sup>23</sup> CA 44/61 **Rubinstein v. Nazareth Textile Enterprises**, PD 15 1601 (“**Rubinstein**”).

<sup>24</sup> Kedmi, p.772-773; Hernon, p. 103.

<sup>25</sup> Rubinstein, p. 1602; Hernon, pp. 101-102.

<sup>26</sup> Criminal File (Tel Aviv) 949/68 **State of Israel v. Moshe Ben Bli Reuven Psakim** (M’hozim) 71 69,70 - in this case, the enforced presence of a police officer during a consultation between a suspect and his attorney.

### **Attorney-Client Privilege: Basic Protective Measures**

Below are nine basic protective measures (some explicitly rooted in Israeli law and others just simple common sense steps) to aid the in-house counsel in an effort to maximize the protection of the attorney-client privilege and minimize the risk of losing the privilege. Bear in mind that interpretation of the attorney-client privilege is very fact-sensitive, and each instance should be considered in its own context.

1. **Specify** when you are acting as legal advisor, as opposed to business advisor, for instance by using language such as “in response to your request for legal advice” in memoranda, by cautioning other employees that the subject matter of a meeting is confidential and that the matters discussed and legal advice given should not be shared with other employees, and by announcing your presence as being to render legal advice at multi-participant meetings.
2. **Mark** your communications as “Confidential: Attorney-Client Privileged Communication”, but be consistent in the application of this marking.
3. **Separate** legal advice from discussions of business considerations in your written work product, and clearly state the legal proposition that is under consideration. If you discuss business issues, state that the discussion is based upon your legal analysis.
4. Maintain a **“legal” correspondence file** for all correspondence between you and your client, and keep legal work product separate from routine office materials and internal corporate correspondence.
5. **Use your title** and, if possible, departmental stationery in all correspondence (both internal and external).
6. **Limit dissemination** of your legal advice to those with a need to know, and discourage repetition or wide distribution of your advice or communications. Make it clear to your clients that conveyance of your work party to anyone outside the company will breach the privilege.
7. When you request information from a non-lawyer employee, specify that the response should be **addressed solely to you**, should state that it is in response to your request, and should not be copied to any non-lawyer in the company.
8. Adopt and enforce a uniform **document retention policy**, but suspend application of the policy and retain all documents if an investigation or litigation commences or becomes imminent.
9. Avoid the presence of **non-clients** at meetings with the client during which you will discuss privileged matters.