

Factsheet Legal privilege

Companies often share sensitive and highly confidential information with their lawyers or civil-law notaries. Lawyers (i.e. members of the Dutch Bar) are obliged to maintain confidentiality about everything that comes to their knowledge during their work. That is why lawyers and civil-law notaries are also entitled to invoke legal privilege (remain silent) when asked to give evidence about the matters entrusted to them by the company. Privileged information does not need to be shared with other parties or government bodies. In other words, this information remains confidential between the client and their lawyer.

That is important. Lawyers can only effectively assist and advise their clients when fully apprised of all relevant information. Legal privilege is based on the public interest in being free to obtain assistance and advice from a lawyer without fear of disclosure of the matters discussed. It has a constitutional function.

Lawyers enjoy legal privilege and decide which information is privileged

Lawyers enjoy legal privilege. Even if released from their confidentiality obligation, they can still invoke legal privilege. It is also generally up to lawyers themselves to decide which information is privileged. That means that the lawyer's position should be accepted, unless it is undeniably incorrect.

Who has legal privilege?

Lawyers and civil-law notaries who conduct their practice independently or in a collective with others are entitled to legal privilege.

Inhouse counsel also enjoy legal privilege if their employer has signed a charter that provides guarantees for inhouse counsel in terms of independence and the right to comply with the rules of professional practice. The same applies to visiting foreign inhouse counsel from the EU, the EEA or Switzerland. This is on condition that (i) they have a similar charter or an equivalent agreement under the laws of their country of origin, (ii) they have legal privilege in their country of origin and (iii) their work entitles them to legal privilege under Dutch law. An exception to inhouse counsel's legal privilege has only been accepted by the CJEU with regard to Union competition law.

Lawyers' and civil-law notaries' staff have derivative legal privilege. Third parties engaged by a lawyer or civil-law notary, such as an accountant or loss adjuster, can also invoke derivative legal privilege.

Finally, while clients themselves do not have direct or derivative legal privilege, they do have valid reasons to refuse to provide information if this would result in the disclosure of privileged information.

Which information is privileged?

As a main rule, all oral and written client or case-related information received, drawn up or shared by a lawyer or civil-law notary in the performance of their duties can be assumed to be privileged. No distinction is made between confidential and less confidential information.

Privileged information includes, for example:

- emails and letters from or to the lawyer or civil-law notary;
- advice provided by the lawyer or civil-law notary;

- reports and minutes of conversations with the lawyer or civil-law notary;
- the lawyer's or civil-law notary's invoices;
- company notes, memos, etc., intended for the lawyer or civil-law notary;
- internal representations or summaries of lawyer or civil-law notary advice.

Exceptions

Legal privilege can be overridden if documents or information are the subject of the criminal offence or were used in its commission. In addition, lawyers and civil-law notaries must report unusual transactions under the Money Laundering and Terrorist Financing Prevention Act (*Wet ter voorkoming van witwassen en financieren van terrorisme*), unless this information comes to their knowledge as part of the determination of a legal position, representation in court, or advice for, about or after legal proceedings. Lastly, in a more general sense, exceptional circumstances are conceivable that may justify overriding the legal privilege.

How to deal with legal privilege

Companies often share highly sensitive and confidential information with their lawyers or civil-law notaries. They therefore have a major interest in keeping the information confidential. Various situations can nevertheless entail a risk of disclosure, for example when another party demands the provision of documents or a government body requests information or even carries out a dawn raid. It is vital to invoke legal privilege correctly and in good time in those cases. In addition, measures can be taken in advance to ensure that privileged information is identifiable as such, in order to limit the risk of this information being examined inadvertently.

Houthoff has profound expertise in the area of legal privilege and extensive experience handling situations where the safeguarding of legal privilege is essential.

Contact

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