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It's a privilege to talk to your lawyer

Privilege and withholding embarrassing documents

Are you heading for a legal dispute? Or do you deal with sensitive issues that could be pored over in court later? You should be aware of the law on disclosure of documents and the implications of privilege.

The normal rule in any civil dispute, including tax cases, is that both parties must disclose documents which support *or adversely affect* any party's case. Failing to disclose documents, or destroying them (including deleting emails) may be punishable as contempt of court, and can result in the court drawing inferences from the absence of documents you would expect to see. As soon as a dispute starts, your lawyer should advise you on preserving and securing evidence – but it may be too late by then. If the authenticity of documents may be questioned, particularly in relation to emails and electronic documents and records, you may need to get specialist help to preserve forensic-quality copies of the records with their original date and time information.

But what if you don't want to disclose embarrassing evidence? You may be able to rely on privilege. You are entitled not to disclose privileged evidence, and no inferences can be drawn from your failure to provide it. The courts are fiercely protective of legal professional privilege, which they see as fundamental to our system of justice. Searches (by regulatory authorities, police or under court orders) must be arranged to protect privilege.

There are two kinds of privilege: legal advice privilege, which protects confidential communications between lawyer and client, and litigation privilege. Legal advice privilege covers communications between lawyer and client for the purpose of taking and giving legal advice. It includes documents created for the purpose, but not the client's background preparations or reactions which are not to be communicated to the lawyer. It applies whether or not there is a contemplated dispute. It includes communications with in-house lawyers (except in EU competition cases) but does not include general business advice which is not given in a legal context.

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Litigation privilege covers confidential communications or documents brought into existence for the dominant purpose of use in actual or contemplated litigation, including criminal proceedings or adversarial regulatory investigations, such as competition inquiries by the OFT or FSA investigations. Unlike legal advice privilege, it includes communications with third parties.

Privilege can be waived, sometimes accidentally: if you waive privilege in a document to advance your case on an issue, all other privileged documents relevant to that issue also lose privilege. If you copy documents for some other purpose, privilege may be lost, and it is lost if the documents cease to be confidential. So care is needed to preserve privilege, including appropriate markings: this lies behind the wording often seen on the bottom of emails about privilege.

If your business is dealing with sensitive issues, the last thing you want is for your deliberations to be used in evidence against you. It may make sense to carry out all your internal discussions with or through a lawyer, so that you attract legal advice privilege. No other profession offers this advantage.

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July 2012

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