

## I am not your lawyer! But hey, tell me your secret...

### A. Live scenario

Look, you are here as an employee investigated by the company.

I am a lawyer for the company, not yours.

But hey, you know what, you should tell me your secrets because you are an employee of the company, so whatever you are going to tell me will be protected by solicitors-client privilege.

### B. Upjohn Warning

This, in essence, is what the Supreme Court of the United States termed as an “*Upjohn*” warning<sup>1</sup>, in conjunction with the Justices’ grounds in the landmark decision of **Upjohn Co. v. United States**, 449 U.S. 383.

Across the Atlantic Ocean, Lady Smith sitting in the English Employment Tribunal in the United Kingdom also acknowledged the notion and importance of an “*Upjohn*” warning. In the words of Lady Smith, an “*Upjohn*” warning is routinely given in the United States prior to an interview with an employee of a company to ensure the protection of **attorney-client privilege**<sup>2</sup>.

Taking a step further, Her Ladyship even gave examples of how an “*Upjohn*” warning is administered.

- Please keep in mind that the [company’s solicitor] represents the Company, and not any individual employee of the Company, including you. In other words, the [company’s solicitor] are the Company’s lawyers, and not your lawyers.
- Nevertheless, because the [company’s solicitor] represents the Company and you are an employee of the Company, your interview with the [company’s solicitor] is protected by the **attorney-client privilege** under the law, meaning that the Company cannot

# Shipping & Maritime Update

APRIL 2023

Shearn Delamore & Co  
7<sup>th</sup> Floor

Wisma Hamzah Kwong-Hing,  
No 1, Leboh Ampang  
50100, Kuala Lumpur, Malaysia

T: 603 2027 2727

F: 603 2078 5625

[info@shearndelamore.com](mailto:info@shearndelamore.com)

[www.shearndelamore.com](http://www.shearndelamore.com)

[www.linkedin.com/company/shearn-delamore-&-co](http://www.linkedin.com/company/shearn-delamore-&-co)

under most circumstances be forced to reveal to anyone what is discussed at your interview.

- At the same time, if you disclose what is discussed during your interview to anyone that attorney-client privilege can be lost. For this reason, it is important that you keep what we discuss today confidential. You should not discuss our conversations with anyone except the [company's solicitor].
- Because the [company's solicitor] represents the Company, the attorney-client privilege belongs to the Company, and only the Company.

## C. Attorney-client privilege

In [Discoveries In Maritime Claims: \(Part One\) Pre-Trial Discovery and Specific Discovery of Documents](#), we discussed briefly about how a “*privileged document/information*” is not susceptible to a Discovery exercise.

Documents or information cloaked under the Attorney-client privilege (or better known as solicitor-client privilege in Malaysia) are one of those “*privileged documents/information*” that is not susceptible to a Discovery exercise.

In fact, there are more to that than just not being susceptible to a Discovery exercise. Once a document/information is cloaked under Attorney-client privilege, the legal protections afforded to the document/information are two-fold.

## D. First layer: Hush! Don't say a thing until I allow you to!

The first layer of legal protection afforded to documents/information cloaked under Attorney-client privilege is prescribed under section 126 of our **Evidence Act 1950**<sup>3</sup>.

In simple terms, when a client informs or communicates with his solicitor to obtain legal advice and/or legal representation, the solicitor cannot disclose the communication and information exchanged during the course of the communication to any third party<sup>4</sup>.

Yes, not even to the Court.

## E. Once privileged, always privileged.....until the privilege is waived

Of course, like the examples given by Lady Smith above, the legal privilege belongs to the client. Therefore, the “owner” of the legal privilege has the right to waive that legal privilege and allow the solicitor to disclose the information or communication formerly cloaked under Attorney-client privilege.

This proposition was affirmed by our Federal Court where the Federal Court, in summary, held that *“once a document/information is privileged, the document is always privileged”*. The legal privilege is absolute until the “owner” of the privilege, i.e. the client, waives the privilege<sup>5</sup>.

Putting this established legal principle into the context of an “Upjohn” warning, **the “client” of the company’s solicitor is the Company** (not the employee under investigation). As such, the Company is entitled to waive the Attorney-client privilege and allow the company’s solicitors to disclose the information or *communication exchanged during the interview conducted with the employee to a third party*.

## **F. Second layer: I might have said something to my solicitors but no, you cannot use it against me**

The second layer of legal protection is afforded by the rule of evidence that prevents admission into evidence those communication cloaked under Attorney-client privilege. In one simple sentence, what this second layer means is that even if a client told his solicitor something incriminating or harmful to his case, the “incriminating and/or harmful” information cannot be admitted as evidence before the Court of Law.

The rationale behind this legal protection had been succinctly promulgated by our Court of Appeal. It goes to the **issue of public interest** and the **administration of justice**. Sound legal advice or advocacy serves the public ends and such advice and advocacy depend upon the lawyers being fully informed by the client. It goes without saying that by protecting client-lawyer communications, the client will be more candid and will disclose all relevant information to his lawyer, even potentially damaging and embarrassing facts<sup>6</sup>.

## **G. Attorney-client privilege is not invincible**

However, although Attorney-client privilege is cardinal to the preservation of public interest and the administration of justice, **it is not invincible**.

Under section 126 of the Evidence Act, the Parliament had incorporated a built-in safety mechanism to cater for exceptional circumstances when Attorney-client privilege ought to take the back seat.

Our High Court in **Re the Detention of Leonard Teoh Hooi Leong** [1998] 1 MLJ 757 had also confirmed that the “veil” of legal privilege may be set aside by the Court in exceptional circumstances.

These “exceptional circumstances” arise when:

- a. communications were made between solicitor-client in furtherance of a fraud or a criminal act.
- b. any fact observed by any solicitor in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

One example of when this “exceptional circumstances” arise is when:

- a. an individual ran away from his family.
- b. the police received a complaint in this regard and the police commences investigation as a kidnapping case.
- c. the individual then appoints a solicitor and the individual informed the solicitor of certain privileged information including his whereabouts.
- d. the solicitor refused to disclose the privileged information including the individual’s whereabouts to the police.
- e. the Court viewed that the communications between the individual (the client) and the solicitor are no longer privileged it involved a criminal investigation.

## H. Key takeaway

An “Upjohn” warning is a key warning that a solicitor representing a company shall give to an employee who is under investigation before:

- a. the solicitor commences an interview with the employee.
- b. the solicitor expects any exchange of communications with the employee where the communication and/or information exchanged are likely to be privileged in nature.

This is to ensure that the communication and/or information exchanged during the interview or communication are protected by attorney-client privilege. This preserves the best interest of the solicitor’s client i.e the Company.

**This article was co-written by Justin Tong and Ally Ong Tze Xian**

<sup>1</sup> **Upjohn Co v United States**, 449 U.S. 383.

<sup>2</sup> **Weatherford UK Ltd v Forbes**, UKEATS/0038/11/BI.

<sup>3</sup> Section 126 **Evidence Act 1950**.

<sup>4</sup> Section 126(1) **Evidence Act 1950**.

<sup>5</sup> **Dato' Anthony See Teow Guan v See Teow Chuan & Anor** [2009] 3 MLJ 14 (para 26).

<sup>6</sup> **Gideon Tan v Tay Por Yee and another appeal** [2017] 1 MLJ 352.

For further information about this article or shipping and maritime issues in general, please contact:



[Rajasingam Gothandapani](#)  
Head  
[Shipping & Maritime](#)  
T: 603 2027 2911  
E: [rajasingam@shearndelamore.com](mailto:rajasingam@shearndelamore.com)



[Nik Azila Shuhada Nik Abdullah](#)  
Partner  
[Shipping & Maritime](#)  
T: 603 2027 2610  
E: [nik.azila@shearndelamore.com](mailto:nik.azila@shearndelamore.com)



[Justin Tong Wei Hang](#)  
Associate  
[Shipping & Maritime](#)  
T: 603 2027 2769  
E: [justin.tong@shearndelamore.com](mailto:justin.tong@shearndelamore.com)



[Ally Ong Tze Xian](#)  
Associate  
[Shipping & Maritime](#)  
T: 603 2027 2695  
E: [ally.ong@shearndelamore.com](mailto:ally.ong@shearndelamore.com)

*Copyright © 2023 Shearn Delamore & Co. All rights reserved.*

*This Update is issued for the information of the clients of the Firm and covers legal issues in a general way. The contents are not intended to constitute any advice on any specific matter and should not be relied upon as a substitute for detailed legal advice on specific matters or transactions.*