New Zealand

National Aspects

Under Section 54 of New Zealand's *Evidence Act 2006*, communications between "legal advisers" and their clients are privileged. The definition of "legal adviser" in section 51(1) refers to lawyers, registered patent attorneys, and (as discussed subsequently) "overseas practitioners". The privilege covers communications relating to the obtaining or giving of information or advice concerning intellectual property, which includes copyright and protection against unfair competition.

Discovery procedure and how privilege protection operates against discovery

New Zealand court trials closely resemble those of the United Kingdom and Australia. Pre-trial discovery is limited to document discovery (which is based on similar concepts of relevance to the United Kingdom) and interrogations answered on affidavit. In New Zealand, legal professional privilege is a term that applies to the protection of confidential communications between a lawyer and his or her client. Legal advice protected by legal professional privilege will not need to be produced for inspection during discovery in legal proceedings. Consequently, the opponent in the case will not be able to have access to the privileged document.

Professionals covered by the privilege and secrecy obligation

Amongst the various reforms brought about by the New Zealand Evidence Act 2006, which came into force on August 1, 2007, was a strengthening of the statutory privilege which protects communications between registered patent attorneys and their clients
(also known as "patent attorney privilege"). The privilege also covers in-house lawyers.

Section 54 of the Evidence Act 2006 provides that:

> "Privilege for communications with legal advisors
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> (1) A person who requests or obtains professional legal services from a legal advisor has a privilege in respect of any communication between the person and the legal advisor if the communication was-
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> (a) intended to be confidential; and
> (b) made in the course of and for the purpose of-
> (i) the person obtaining professional legal services from the legal advisor; or
> (ii) the legal advisor giving such services to the person.
>
> (1A) The privilege applies to a person who requests professional legal services from a legal adviser whether or not the person actually obtains such services.
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> "(2) In this section, professional legal services means, in the case of a registered patent attorney or an overseas practitioner whose functions wholly or partly correspond to those of a registered patent attorney, obtaining or giving information or advice concerning intellectual property.

"(3) In subsection (2), intellectual property means one or more of the following matters;

(a) literary, artistic, and scientific works, and copyright;
(b) performances of performing artists, phonograms, and broadcasts;
(c) inventions in all fields of human endeavor;
(d) scientific discoveries;
(e) geographical indications;
(f) patents, plant varieties, registered designs, registered and unregistered trademarks, service marks, commercial names and designations, and industrial designs;
(g) protection against unfair competition;
(h) circuit layouts and semi-conductor chip products;
(i) confidential information;
(j) all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

Thus, under Section 54 of the Evidence Act 2006, privilege may be claimed for communications between "legal advisors" and their clients. The definition of "legal advisor" refers to lawyers, registered patent attorneys and overseas practitioners whose functions wholly or partly correspond to those of a New Zealand registered patent attorney.

Scope of privilege

In accordance with the Evidence Act 2006, privilege applies to communications between a legal advisor and his or her client, where the legal advisor is acting in his or her professional capacity, the communication is intended to be confidential, and the communication is for the purpose of obtaining legal advice.

The statutory intent of the Evidence Act 2006 is to provide all-encompassing protection against discovery during legal proceedings of communications between patent attorneys and their clients concerning the protection, enforcement or use of intellectual property rights. The scope of the privilege is not limited simply to the types of communications listed, but may protect any other communications concerning rights resulting from intellectual activity in the industry, scientific, literary or artistic fields.

The limitations and exceptions to privilege

The protection of legal professional privilege may be lost in two circumstances, express waiver and implied waiver. Express waiver exists when a client chooses to waive privilege in the legal advice and release it. Implied waiver exists when a client refers to the legal advice in a way that would make it unfair to allow the privilege to be maintained.

Consequences of the loss of confidentiality and penalties for disclosure

As in any other common law countries, loss of confidentiality means that the relevant document and communication has to be disclosed and communicated to the party requesting such information. Professionals who make unauthorized disclosure may have to face disciplinary proceedings. Patent attorneys may be subject to the Code of Conduct for Patent and Trade Marks Attorneys under the Patents Act Part 6. Under the Code of Conduct, section 18 states "Unless permitted or required by law, a registered attorney must not use or disclose, or allow to be used or disclosed, confidential information obtained from or on behalf of a client, a former client or a prospective client without the informed consent of the client."

Treatment of foreign lawyers and patent advisors

New Zealand extends the legal professional as discussed subsequently.

Requirements/qualifications for patent attorneys

Requirements and qualifications for a patent attorney in New Zealand are governed by Part 6 of the Patents Act. This provides for joint registration regime for patent attorneys to register and practice in Australia and New Zealand. The joint registration regime provides a single system of accreditation, registration and professional regulation of patent attorneys in both countries. Section 269 of the Patents Act 2013 defines the joint registration regime, which is constituted largely by Part 1 of Chapter 20 of the Australian Patents Act 1990 and any regulations made for the purposes of that Part. Chapter 20 of the Australian Patents Regulations 1991 provide specific pre-requisites of examination qualifications to be met, and practical experience to be gained, in order to become a qualified patent attorney.

Cross-border aspects

Due to an Order in Council of August 2008 issued under the Evidence Act 2006, New Zealand extends the legal professional privilege to communications between a client and his or her foreign legal advisor including foreign patent advisors from 87 countries. The Order specifies countries included in the definition of "overseas practitioner" according to section 51(1)(c) of the Evidence Act 2006.

Section 54 of the Evidence Act 2006 provides that the privilege applies to an

> "overseas practitioner whose functions wholly or partly correspond to those of a registered patent attorney, obtaining or giving information or advice concerning intellectual property."