



PRIVILEGE

Under English civil law, legal professional privilege entitles a party to withhold evidence (electronic, written, or oral) and not disclose it to the other side, the court, or regulatory bodies (subject to certain exceptions).

Legal professional privilege: general principles

English law recognises two main types of legal professional privilege:

1. **Legal advice privilege:** Protects confidential communications between a client and their lawyer, provided that the dominant purpose is the giving or receiving of legal advice i.e. business advice given by the lawyer will not be covered.

In the case of *Addlesee v Dentons Europe LLP*¹, the Court of Appeal restated in the strongest terms that legal advice privilege is a “*fundamental human right*” with the House of Lords stating in *Three Rivers No. 6*² that it “*cannot be overridden by some supposedly greater public interest*” as the intention of the principle is for individuals to obtain confidential legal advice without fear of this being disclosed to their prejudice. Once privilege attaches to a communication, it will remain, unless or until it is waived.
2. **Litigation privilege:** Protects communications between a client, their solicitor and any third parties, and the client and any third party – provided that the dominant purpose is either:
 - the giving or receiving of legal advice in connection with litigation; or
 - the collection of evidence for use in litigation.

The litigation need not be active, but must be in *reasonable contemplation*, i.e. more than simply a possibility. In this context, adversarial proceedings such as arbitration and tribunal proceedings are also covered by litigation privilege.

Confidentiality

Privilege can only be claimed if the communication is confidential. If the confidentiality of a document is undermined, privilege is lost and it cannot be regained, the document then becomes disclosable.

Waiving privilege

If privilege is waived e.g. by the document being put before the court or into the public domain, then the other related documents may be disclosable, this is known as a *collateral waiver*.

Waiver can extend to documents impliedly mentioned in a claimant’s witness statement that would otherwise have been privileged. Caution must be exercised in waiving privilege more widely than intended.

Lawyer/client communications

Privilege belongs to the client not the lawyer. Not all employees of a corporate entity are regarded as the client for privilege purposes. Only those specifically tasked with obtaining legal advice from in-house or external lawyers, and able to give instructions, will be considered the client. This was the much-criticised rule in the case known as *Three Rivers No. 5*.³

It is important that there is a clear understanding of which employees are responsible for instructing the legal team, and that privileged communications are not shared more widely within the organisation.

¹ *Addlesee v Dentons Europe LLP* [2019] EWCA Civ 1600

² *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610

³ *Three Rivers District Council & Others v The Governor & Company of the Bank of England* [2003] EWCA Civ 474

The identity of those instructing lawyers is not necessarily privileged. Privilege will only be established if the communication itself is privileged and revealing the identity of those who instructed the lawyers would undermine that privilege.⁴

The definition of a lawyer includes all members of the legal profession including barristers, solicitors, qualified foreign lawyers, and trainee solicitors.

In-House lawyers

Under English law the definition of a lawyer extends to in-house lawyers acting in a legal capacity, but it is important to note that not all jurisdictions include in-house lawyers when affording privilege, and they will not, for example, be included in EU competition investigations.

Complexities of cross-border privilege

Regardless of where the legal advice was given, many jurisdictions will apply the law in relation to the rules of privilege of the jurisdiction in which the dispute is being heard (the *lex fori*). It is important to be aware that the rules around privilege vary between jurisdictions, and that caution should be taken to ensure communications between a client, their lawyer, or a third party, will be privileged within that jurisdiction, and if not, to act accordingly.

Other forms of privilege

- **Without prejudice privilege:** This applies to communications between parties to an existing dispute, whether in writing or orally, whose genuine purpose is to try and reach a settlement. Without prejudice privilege is intended to encourage and enable clients and their legal advisers to negotiate openly.

Whilst you should mark all appropriate communications with the heading “*without prejudice*”, to “*make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial*”,⁵ it is the substance, rather than the form of the document, that will determine whether it is privileged. Therefore, applying a without prejudice label will not result in a document becoming privileged if it does not meet the criteria.

Without prejudice discussions can develop into open communications, and as such will be available to the court. If a party alleges that the communication became open, the burden will be on that party to prove this. It is not enough to state the word open, the change must be made completely clear.

A note of caution that not all jurisdictions apply the without prejudice privilege protection. Care should be taken when using without prejudice correspondence outside of England.

- **Common interest privilege:** This covers the voluntary sharing of privileged documents with a third party, who has a shared or common interest in the subject matter of the privileged document, or the litigation to which the document relates e.g. insured and insurers.

Common interest privilege applies to documents covered by both litigation privilege and legal advice privilege.

However, care should be taken when sharing documents on this basis, as shared interests may diverge at a later date, or when subsequently reviewed be found not to have existed at the time that the sharing took place.

It would be prudent to obtain an agreement setting out the scope of the shared or common interest and confirming that privilege is not being waived more widely.

Practical tips for protecting legal professional privilege

- Instruct solicitors early: legal advice privilege only applies to communications where a lawyer is receiving instructions or giving advice.
- Assert privilege and confidentiality when appropriate: mark all communications in relation to obtaining legal advice “**Privileged and confidential – prepared for the purposes of [litigation or arbitration]**” or “**Attorney – client privilege**”. Although labelling is not conclusive, it is a helpful indication of the substance of the document.
- Acknowledge when a dispute has arisen: make a note of the date on which you consider litigation to be a reasonable prospect (i.e. more than a possibility).
- Take care when you share: privilege can be unintentionally waived if documents are disseminated too widely. Put in place internal structures that establish who is responsible for obtaining and acting on the legal advice (i.e. “*the client*”), and ensure strict confidentiality is maintained.
- Maintain a list of those to whom the privileged documents are circulated.
- Copying/receiving legal advice: copies of privileged advice may have to be disclosed, care should be taken when copying legal advice, only do so where necessary and make a note of what was done with the copies, to whom they were sent etc.
- Understand what constitutes legal advice: analysis or comments on privileged advice by non-legal staff will *not* be privileged. If legal advice must be shared, forward a copy of the original advice on strictly confidential terms marked as “**Privileged and confidential – prepared for the purposes of [litigation or arbitration]**”.
- Similarly, circulate summaries of legal advice, or extracts without additional commentary, marked “**Privileged and confidential – prepared for the purposes of [litigation or arbitration]**”.
- Store privileged documents appropriately: ensure, as far as possible, that privileged documents are easily identifiable and stored separately from non-privileged documents, in appropriately marked non-transparent folders.
- Do not annotate privileged documents.

⁴ *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd* [2022] EWHC 1136 (Comm).

⁵ *Rush & Tompkins Ltd v Greater London Council and others* [1988] UKHL 7

- Do not circulate privileged documents outside of your jurisdiction without first checking whether they will remain privileged under local law.

Exceptions

- Where disclosure is accidental, the document cannot generally be used without permission of the court.
- The Regulation of Investigatory Powers Act 2000 will, in certain circumstances, override legal professional privilege, legal advice should be obtained if this is relevant.
- Legal professional privilege will not apply where the advice or document will further or assist a criminal act.

The flowchart below is a quick reference to help determine whether your communications will be covered by legal professional privilege.

This client guide was produced by the HFW Knowledge Management team, should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact them at KM@hfw.com or your usual HFW contact to discuss.



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Updated: September 2022

At the time the document was created...



