



PRIVILEGE

Under English law “legal professional privilege” entitles a party to withhold evidence (electronic, written, or oral) and not disclose it to either 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 the 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.
2. **Litigation privilege:** protects communications between a client, their solicitor and any third parties and the client and a 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, once the confidentiality of a document is

undermined, privilege is lost and it cannot be regained, and that document then becomes disclosable.

If privilege is waived e.g. by the client putting the document before the court, then the other related documents are disclosable, this is known as a “collateral waiver”.

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 to be the “client”.

It is important therefore 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.

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 “lawyer” extends to inhouse lawyers acting in a legal capacity, but it is important to note that not all jurisdictions include “in-house lawyers” and they will not for example be included in EU competition investigations.

Other forms of privilege

Without prejudice privilege: This applies to communications between parties to a dispute whose

genuine purpose is to try and reach a settlement. Without prejudice privilege is intended to encourage clients and their legal advisers to negotiate openly. Whilst you should mark all such communications with the heading “without prejudice”, it is the substance, rather than the form of the document that will determine whether it is privileged. A note of caution that not all jurisdictions apply the without prejudice protection.

Care should be taken when using without prejudice correspondence outside of England and Wales. Similarly, applying the label will not result in a non-without prejudice communication becoming so.

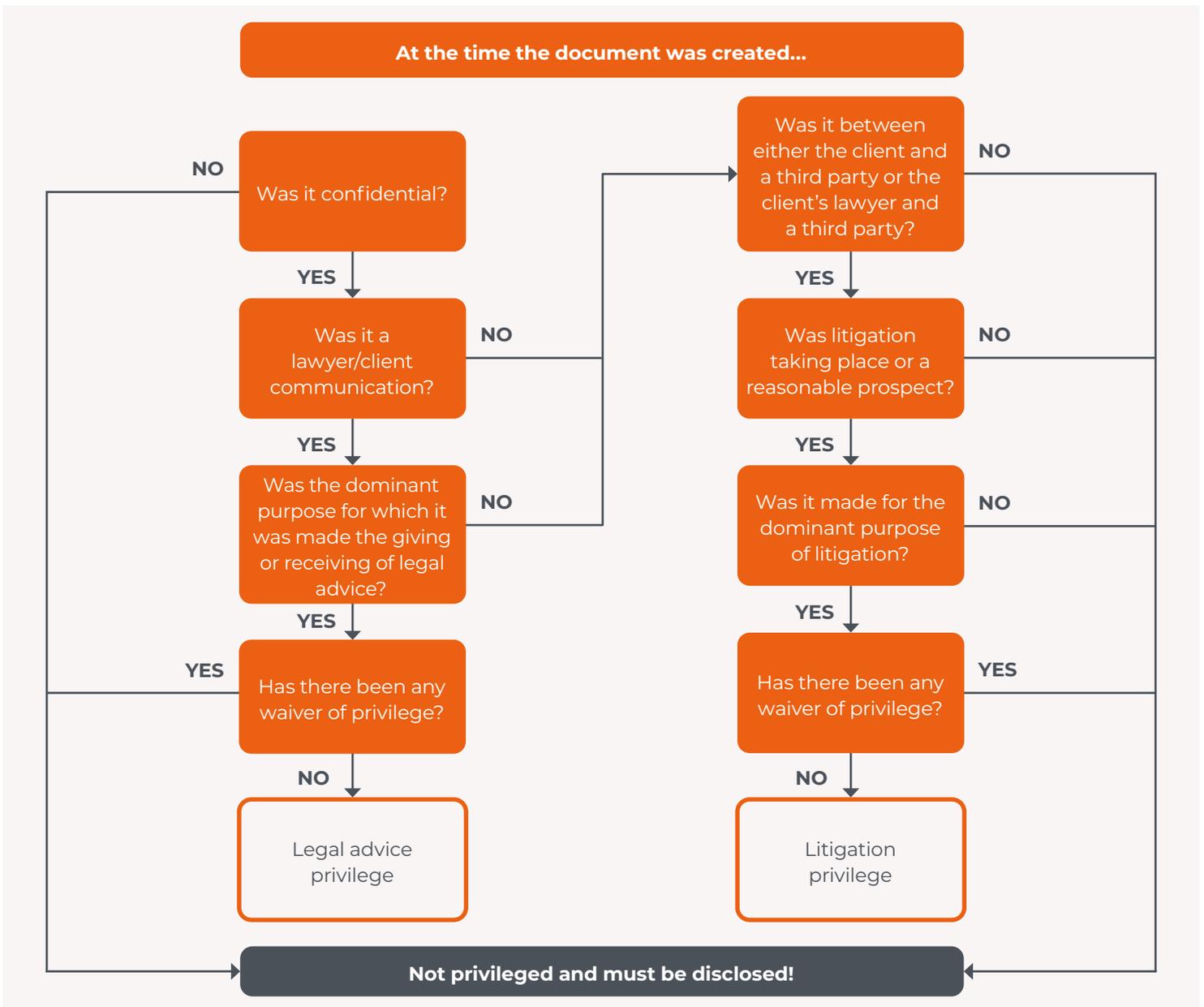
Common interest privilege: This covers the voluntary sharing of privileged documents with a third party who has a shared or common interest in the subject matter of the privileged document, or the litigation to which the document relates e.g. insured and insurers. Care should be taken when sharing documents on this basis,

as shared interests might diverge. You should obtain an agreement setting out the scope of the shared, or common interest, which also confirms that privilege is not being waived more widely.

Exceptions

- Where disclosure is accidental, the document can not 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.
- Foreign jurisdictions do not always recognise legal professional privilege and so before transmitting to a foreign jurisdiction, local legal advice should be taken.
- Legal professional privilege will not apply where the advice or document will further or assist a criminal act.

The flowchart below will help determine whether your communications will be covered by legal professional privilege.



Practical tips for protecting legal professional privilege

- Instruct solicitors early: legal advice privilege only applies to communications when a lawyer is receiving instructions or giving advice.
- Assert privilege and confidentiality: 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 which establish who is responsible for obtaining and acting on the legal advice (i.e. “the client”), and ensure strict confidentiality is maintained.
- 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]”**.
- 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.
- Do not circulate privileged documents outside of your jurisdiction without first checking whether they will remain privileged under local law.
- Maintain a list of those to whom the privileged documents are circulated.

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.



NICOLA GARE

Professional Support Lawyer
Dispute Resolution

T +44 (0)20 7264 8158

E nicola.gare@hfw.com

Reviewed: 27 May 2020

hfw.com

© 2019 Holman Fenwick Willan LLP. All rights reserved.

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Americas | Europe | Middle East | Asia Pacific