

## GUIDE

# The difference between Legal Advice Privilege and Litigation Privilege

Legal professional privilege under English law allows parties to seek legal advice and investigate the merits of their case without being forced to disclose confidential and sensitive documents in legal proceedings or to third parties.

There are complex issues surrounding when this right to privilege applies, and it is not always the case that communications with lawyers and third party advisers are protected. It is easy to lose the protection of privilege by waiver and so care needs to be taken to preserve confidentiality.

There are two distinct types of legal professional privilege that can arise; **legal advice privilege** and **litigation privilege**.

### Legal advice privilege

Legal advice privilege is broader than litigation privilege and allows clients to discuss their legal position with their lawyers in the knowledge that their communications will remain confidential, even when there is no litigation in prospect.

This privilege covers confidential communications between a lawyer and their client for the purpose of giving or receiving legal advice, it applies to both contentious and non-contentious communications and covers all advice in relation to a client's legal rights and obligations. It does not apply to commercial or strategic advice.

Only those at the client engaged in the seeking and receiving of advice from external lawyers are entitled to legal advice privilege. Internal communications made by other employees that contributed to the seeking of that advice are not protected. However, a lawyer's preparatory work will be privileged whether or not it is sent to the client.

Provided the communication is confidential when created, it will remain confidential. As with litigation privilege, the privilege can be lost by circulating privileged material to third parties and once lost, can lead to the loss of privilege in related material.

### Litigation privilege

Litigation privilege is more limited in scope and is designed to allow parties to investigate potential disputes without the worry that those investigations could be disclosed to the other side. It can exist outside of the typical client/solicitor relationship and covers any document or communication which has been produced for the purpose of obtaining information or advice in connection with existing or contemplated litigation subject to certain conditions. Those conditions are that:

1. **The document is a communication between:**
  - (i) lawyer and client
  - (ii) lawyer and a third party (e.g. an expert, witness or other professional), or
  - (iii) the client and a third party;
2. **Litigation must be in progress or in contemplation;**
3. **The communications must have been made for the sole or dominant purpose of conducting that litigation; and**
4. **The litigation must be adversarial.**



### 1. What documents are communications?

Documents regarded as communications for the purposes of privilege include anything that is recorded, including emails, letters, voicemails, tape recordings and documents on a computer, as well as other written documents, including those written in manuscript. Confidential documents that have been created to allow a party to give or seek legal advice may also be protected by litigation privilege, even if they are not physically transmitted to another party.

### 2. The litigation must be ongoing or in contemplation

Litigation privilege will only apply to documentation created in ongoing litigation or where litigation is reasonably contemplated. There have been many cases in this area. In *USA v Philip Morris* [2004] the Court of Appeal held that for litigation privilege to apply, the party must be aware of circumstances which would make litigation a real likelihood rather than a mere possibility. It is not enough that a party has a general apprehension of future litigation, nor is it sufficient that there was a '*distinct possibility that sooner or later someone might make a claim*'.

These arguments were explored further in *Westminster International BV v Dornoch Ltd* [2009], in which the Court of Appeal held that although a mere possibility of litigation is not enough, the chance of litigation does not need to be more than 50% for litigation privilege to apply. Careful analysis of the wording and language used in correspondence is necessary to establish whether it can be said that litigation was reasonably contemplated. In *Tchenguiz and Another v the SFO and Others* [2013] the Court made it clear that litigants and their solicitors need to be wary of making vague statements that a document was produced for the purpose of contemplated litigation, especially where no such litigation has subsequently been commenced. The Court in *Axa Seguros Sa v Allianz Insurance Plc* [2011] held that merely appointing a lawyer would not usually show that litigation was in contemplation, as opposed to being a possibility, and it may just have been an attempt to generate a claim for privilege.

If in doubt and litigation is not already underway, it may be sensible to head up a document with a statement that it is '*prepared with a view to litigation*' or '*privileged and confidential*'. However, merely marking a document in this way does not guarantee privilege and will not protect against waiver of privilege if there is loss of confidentiality.

Advice taken by a client from an expert in the absence of litigation is not privileged.

### 3. Dominant purpose

Litigation privilege protects communications so long as the documents were brought into existence for the dominant purpose of

litigation. The House of Lords in *Waugh v British Railways Board* [1979] held that in identifying the purpose of a document and whether litigation was a dominant purpose, the Court should look at a document objectively and ascertain what was the immediate purpose of the individual who actually created the document. Statements within a document remarking that it was prepared to enable the lawyer to advise on the litigation, or evidence put to the Court that the document was prepared for a particular purpose, will not necessarily lead the Court to find that the document was created for the dominant purpose of litigation.

That is not to say that documents produced for a dual purpose will not qualify for litigation privilege. If one of the purposes was in relation to contemplated litigation as well as some other purpose, then the communication could still be subject to litigation privilege. In the *Waugh* case, a report was produced for the dual purpose of (1) reviewing railway operations and safety procedures and (2) obtaining legal advice in anticipation of litigation and the Court held that despite the first purpose being more clear and at the forefront of the report's conclusions, both should be given equal rank and weight. This led to a decision that the second purpose was enough for the document to be protected by litigation privilege.

If litigation is anticipated, it can be prudent for advisers and their clients to ensure reference is made to the potential dispute when addressing instructions to third parties and experts and that they are being instructed for the dominant reason of assisting with pre-action investigations.

### 4. Adversarial

**For a document to qualify for litigation privilege, the proceedings to which the document relates must be adversarial in nature.** This means that litigation privilege can be claimed in proceedings where a Court or tribunal will make an order as the outcome.

The definition of an adversarial matter is still an issue of great contention. The leading case in this area of *Re L (A minor)* [1997] concerned a report used in care proceedings, which was ordered to be disclosed as the proceedings were inquisitorial rather than adversarial in nature. This meant that the care proceedings were not considered subject to litigation privilege.

Reports produced in matters which are merely fact gathering exercises, such as a banking enquiry or any type of administrative tribunal, will not usually be subject to litigation privilege.





### Risk of waiver of privilege

Confidentiality is a key component of litigation privilege. If confidential, privileged information is placed into the public domain by being read out in open Court or communicated to a third party, then it will cease to be privileged.

If a client forwards advice from its lawyer to a third party, then the advice will no longer be confidential and the client will waive its right privilege, not only in that advice, but potentially all communications with its lawyer on that matter.

Instructions to and reports produced by expert *advisers* to advise on a confidential basis on the merits of a case are protected by litigation privilege. However, the position in relation to expert *witnesses* is different. Where it is the intention for an expert to produce a report which is to be relied on in Court, the substance of the instructions to write the report must also be set out within the report. Although the Court will not usually order disclosure of any specific documents surrounding the instructions or permit the expert to be questioned in relation to those instructions in Court, there is obviously the potential for an application to be made for such instructions to be disclosed. Usually such disclosure is only ordered if the instructions are believed to be either inaccurate or incomplete.

In appropriate cases it can make sense to take safeguards to ensure a client is not exposed to unnecessary satellite litigation.

In *Istil Group Inc v Zahoor* [2003], it was held that where privileged documents are held by a third party on a confidential basis, the Court may prevent disclosure of the documents through injunctive relief. Where however the information is held by the third party without an obligation of confidentiality, even though it is privileged in the hands of the party sharing it, it may not be possible to prevent disclosure.

### Proceed with caution

- Great care has to be taken when documents are distributed within a client company to those who are **not** dealing with the litigation within the client on a day to day basis.
- *It is key that any documents produced when litigation may be reasonably contemplated are not circulated more widely than is necessary and certainly not outside of the core client group.*
- No annotation or comment should accompany the document as that element may not be privileged.
- Ideally the information should be provided by the lawyer direct.
- As in the real world that is not always possible or desirable, then at the very least any documents that do need to be circulated should be marked '*confidential and privileged*' and '*not for onward circulation*' to highlight the importance of the privileged information and to try to preserve its confidentiality.
- If possible, internal documents regarding litigation or legal advice should not be recorded in any way, particularly in larger organisations.

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