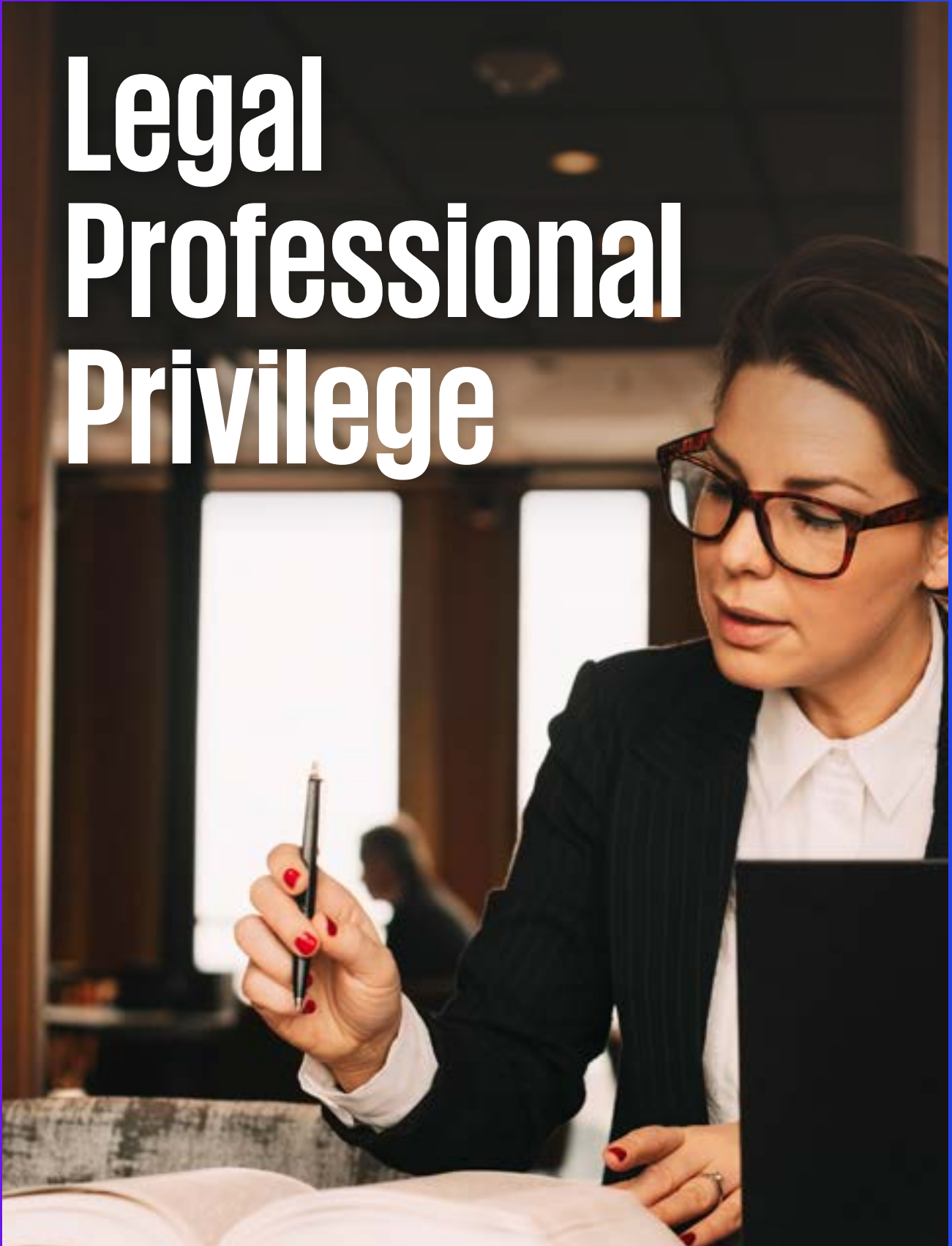


Legal Professional Privilege





In this guidance note we explain legal professional privilege. We examine its purpose, the criteria needed for it to apply, the extent of the power it can confer and its limitations.

Introduction

Legal professional privilege is an important legal right which permits a party to lawfully refuse to disclose certain confidential material it would otherwise be required to disclose.

The requirement for parties to disclose evidence is a fundamental part of our legal system. It means parties to court actions must disclose to each other all evidence that is relevant to the issue between them unless an exception applies. This is irrespective of whether the evidence assists or harms a party's position. Legal professional privilege is one of a very limited number of exceptions to this disclosure requirement.

Any query concerning legal professional privilege should be assessed from the set of facts that apply to that query and the information contained in this note should be used only as a guide. If you have questions relating to legal professional privilege, please contact KPMG Law.



LEGAL PROFESSIONAL PRIVILEGE KEY FEATURES

Parties to litigation and civil proceedings are entitled to disclosure of all documents relevant to the matters in dispute which are within the power, possession, or procurement of the other party, unless they are immune from disclosure because of legal professional privilege.

✓ Legal status

The application of legal professional privilege can have profound effects on the outcome of court actions and is critically important to the administration of justice. It is a common law concept with a constitutional foundation¹ and is distinct from the professional duty to keep clients' affairs confidential. It has been recognised as a fundamental right in the case law of the Court of Justice of the European Union² and the European Court of Human Rights³.

✓ Purpose

Legal professional privilege developed as a common law concept through decisions by the courts over many years to allow clients (or prospective clients) maintain confidentiality over their communications with legal advisors, or with others as part of their preparations for court proceedings. This promotes full and frank disclosure between lawyers and clients and the proper assessment of the merits of a client's position, and in doing so it advances the administration of justice.

✓ Two distinct forms

Through its decisions the courts have established two distinct forms of legal professional privilege, known as legal advice privilege, and litigation privilege. The courts have also established criteria necessary for each of these forms to apply.

1: legal professional privilege is protected as a dimension of the administration of justice under article 34 of the Constitution of Ireland

2: AM&S v Commission [1982] ECR 1575 and Akzo Nobel Chemicals v Commission [2010] 5 CMLR 19

3: Niemietz v Germany (1982) 16 EHRR 97; Campbell v UK (1993) 15 EHRR 137



LEGAL ADVICE PRIVILEGE

Legal advice privilege is the form of legal professional privilege that permits a client to lawfully refuse to disclose a confidential communication or continuum of communications between a lawyer and a client that are made for the purposes of obtaining legal advice.

Who is the lawyer?

The “lawyer” for the purposes of legal advice privilege includes a practicing solicitor, barrister, in-house legal adviser, and foreign lawyer. The advice must be sought or provided as part of a professional legal relationship. In the UK, the House of Lords has confirmed that tax advice provided by accountants does not qualify for legal advice privilege⁴.

For legal professional privilege to apply it must be asserted by the party seeking to benefit from it and can only be granted at the discretion of the court. Assertions are typically made by way of affidavit in response to a request from another party for disclosure of evidence.

Advice (including legal advice) provided to a client by non-lawyers (including accountants and tax advisors) will not attract the protection of legal advice privilege. While in certain circumstances legal professional privilege can extend to communications with non-lawyers, the nature of the non-lawyer’s engagement in the matter will be a critical factor (see scope of legal advice privilege on next page).

Who is the client?

The client can be a natural or legal person. When the client is an organisation, legal advice privilege can only attach to confidential communications with individuals authorised to seek and receive legal advice on behalf of the organisation, where the individuals are acting in that capacity.



⁴: *R (on the application of Prudential Plc & Anor) v Special Commissioner of Income Tax & Anor* [2010] EWCA Civ 1094



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For a communication to be protected by legal professional privilege, it must have been made confidentially and confidentiality must have been retained at all times. As a rule of thumb, if it's not confidential, it's not privileged.



What advice is covered?

Legal advice privilege can only protect the confidential communication of requests for legal advice, or the provision of legal advice. This would include advice on legal rights and obligations, or a legally permissible course of action, but would not include legal assistance, such as that provided in connection with the filing of documents. Where documents contain information which is subject to legal advice privilege and information which is not, the documents will usually be disclosed with the privileged information redacted.

What is the scope of legal advice privilege?

Legal advice privilege applies to confidential communications between a lawyer and a client for the purpose of seeking or providing legal advice. While this can be extended to protect confidential communications with an agent of the client (which could be an accountant or tax advisor) where that agent is appointed for the purposes of obtaining

legal advice from the lawyer on the client's behalf⁵, this will only apply where all other relevant criteria are met, and significant caution must be exercised when considering any assertion of legal advice privilege over a communication which is not between a lawyer and a client.

How long does legal advice privilege last?

Legal advice privilege is not time bound, so once legal advice privilege has been successfully asserted, the protection it provides against disclosure remains in place.



IN-HOUSE COUNSEL AND LEGAL ADVICE PRIVILEGE

Some in-house counsel also carry out other functions for their employer, such as company secretarial functions. An important consideration for those in-house counsel is that only confidential communications where they are acting in their capacity as legal adviser are protected. In addition, communications between an in-house solicitor and client may not be protected by privilege in an investigation by the EU Competition Commission⁶.

⁵: *Director of Corporate Enforcement v Football Association of Ireland and John Delaney (Notice Party)* [2022] IEHC 593

⁶: *Akzo Nobel Chemicals v Commission* [2010] 5 CMLR 19



LITIGATION PRIVILEGE

Litigation privilege is the form of legal professional privilege that permits a client to lawfully refuse to disclose confidential documents communicated between a lawyer and a client, or between either of them and another party, where the communication is made for the dominant purpose of preparing for litigation or contemplated litigation, including an attempt to agree matters to avoid litigation.

What is meant by “litigation”?

For the purposes of litigation privilege, the meaning of litigation is wider than just proceedings brought before a court and can include other adversarial processes where the right to a fair procedure will be affected if the documents are disclosed. This can include the exercise by a regulator of a statutory power, such as the power to carry out regulatory investigations or enforcement actions⁷.

When is litigation contemplated?

For the purposes of litigation privilege, litigation is anticipated where the party believes there is a reasonable likelihood litigation will commence, and the mere possibility litigation will commence or take place will not be sufficient. In the UK, it has been decided that ongoing business-related tax advice does not qualify for litigation privilege as that advice is prepared primarily with the intention to fulfil tax obligations and not for litigation purposes⁸. The position could well be different if the Revenue commence a tax audit, and would clearly be different if an assessment is raised that a client wishes to dispute.

What is the dominant purpose?

It is often the case that a communication is made for one of several purposes. Litigation privilege can only apply where the dominant purpose of the communication is litigation (actual or anticipated). Where the dominant purpose is not clear, it falls for the court to determine this after assessing all relevant facts, including the state of mind of at least one party to the communication at the time it was made⁹.

Who are the parties to communications protected by litigation privilege?

These communications may be between a lawyer and client, or between one of them and another party, such as an expert witness or advisor¹⁰. This means a communication need not necessarily include a lawyer for it to be amenable to an assertion of litigation privilege. However, the dominant purpose of the communication must be actual or anticipated litigation.

What is the scope of litigation privilege?

As litigation privilege can extend to confidential communications not just between a lawyer and a client, but also between either of them and another party, and can protect not just legal advice but also non-legal advice, its scope is potentially wider than the scope of legal advice privilege.

How long does litigation privilege last?

Litigation privilege is time bound and only extends to the scope of the relevant proceedings, unless closely related proceedings ensue. This means that evidence which has been subject to protection from disclosure by litigation privilege could later become available to adversaries. For this reason, a client will typically prefer to assert legal advice privilege where possible.

7: *Quinn & Ors v Irish Bank Resolution Corporation Ltd and Ors* [2015] IEHC 315

8: *Sports Direct International Plc v The Financial Reporting Council* [2020] EWCA Civ 177

9: *Blaise Gallagher (A Minor) suing by his mother and next friend, Avril Gallagher v. Joseph Stanley and The National Maternity Hospital* [S.C. No. 217 of 1997]

10: *Ahern v Mahon* [2008] IEHC 119, [2008 No. 150 JR]

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LEGAL PROFESSIONAL PRIVILEGE - KEY ISSUES

The principle of confidentiality

Confidentiality is an essential element of the concept of legal professional privilege and in general, evidence that is not confidential will not be amendable to protection by legal professional privilege. This means that to benefit from legal professional privilege, communications must be confidential when they are made, and that confidentiality must be maintained.

In granting an assertion of legal professional privilege, a court must in effect conclude it is in the interests of justice that the right of the party to the claim for privilege should outweigh the right of the party requesting disclosure to be provided with all relevant evidence. The court is only likely to make this conclusion when the evidence has been kept confidential and if it has been disclosed to third parties without valid reasons then the court will have great difficulty in allowing a party the privilege of lawfully refusing to disclose it to a party that would otherwise be entitled to it.

Waiver of privilege

A right to assert legal professional privilege may be lost or waived where the advice or communication is disclosed to third parties in a manner that means it is no longer deemed confidential. It will be very difficult to reassert privilege once it has been waived. This is the case even if disclosure is inadvertent and so caution needs to be exercised when dealing with documentation which is or may be the subject of an

assertion of legal professional privilege.

For this reason, care should be taken to ensure that any legal advice provided by KPMG Law over which a client may wish to assert legal advice privilege in the future should be kept confidential to KPMG Law and the relevant client, and as a general rule should not be shown to any third parties (including accountants or other tax advisors). Where a client does wish to share legal advice with third parties, the client should first take legal advice on the impact this may have on its ability to successfully assert legal advice privilege.

A client may wish to waive privilege to a document which contains information that is helpful in advancing a client's case. However, this should only be done after careful consideration of the potential wider implications, which can include a determination by a court that all related documents have been waived.

Limited waivers of privilege can be made under agreement¹¹ or pursuant to statute¹². This can mean confidential information may be disclosed to a third party (for example a regulator on a confidential basis) for a specific and limited function, without waiving the right to assert privilege against other parties.

11: Commonly referred to as a Limited Waiver of Privilege or "Fyffes" Agreement

12: Section 34A of the Central Bank (Individual Accountability Framework) Act 2023

Claims of legal professional privilege over work done by non-lawyers including accountants and tax advisors

In modern professional services relationships it is often the case that different advisors, including lawyers and tax advisors, accountants and business consultants are involved in the preparation or communication of a document.

Where disclosure of that document is subsequently sought and the client wishes to assert legal professional privilege as a reason for refusing disclosure, the question arises as to the impact of the involvement of the non-lawyers on the validity of the assertion.

The answer to this question is not straightforward and must be approached with caution. The mere involvement of a lawyer or other non-lawyer will not of itself determine whether that assertion is valid. Instead, validity is determined by assessing the relevant information concerning the evidence in question against the established rules and criteria described above. This will lead to assessments of a range of matters including:

- the extent to which advice in a document concerns the client's legal rights and obligation
- the purpose of creating a document and where there was more than one purpose, what the dominant purpose was
- the nature and extent of the relevant inputs into a document by a lawyer and a non-lawyer
- the lawyer's knowledge of and familiarity with the information purporting to be legal advice
- the extent of the consideration by a lawyer of information provided by a non-lawyer which is included in the lawyer's legal advice
- the identities of persons to whom a document has been communicated and the reasons why the document was communicated to those persons

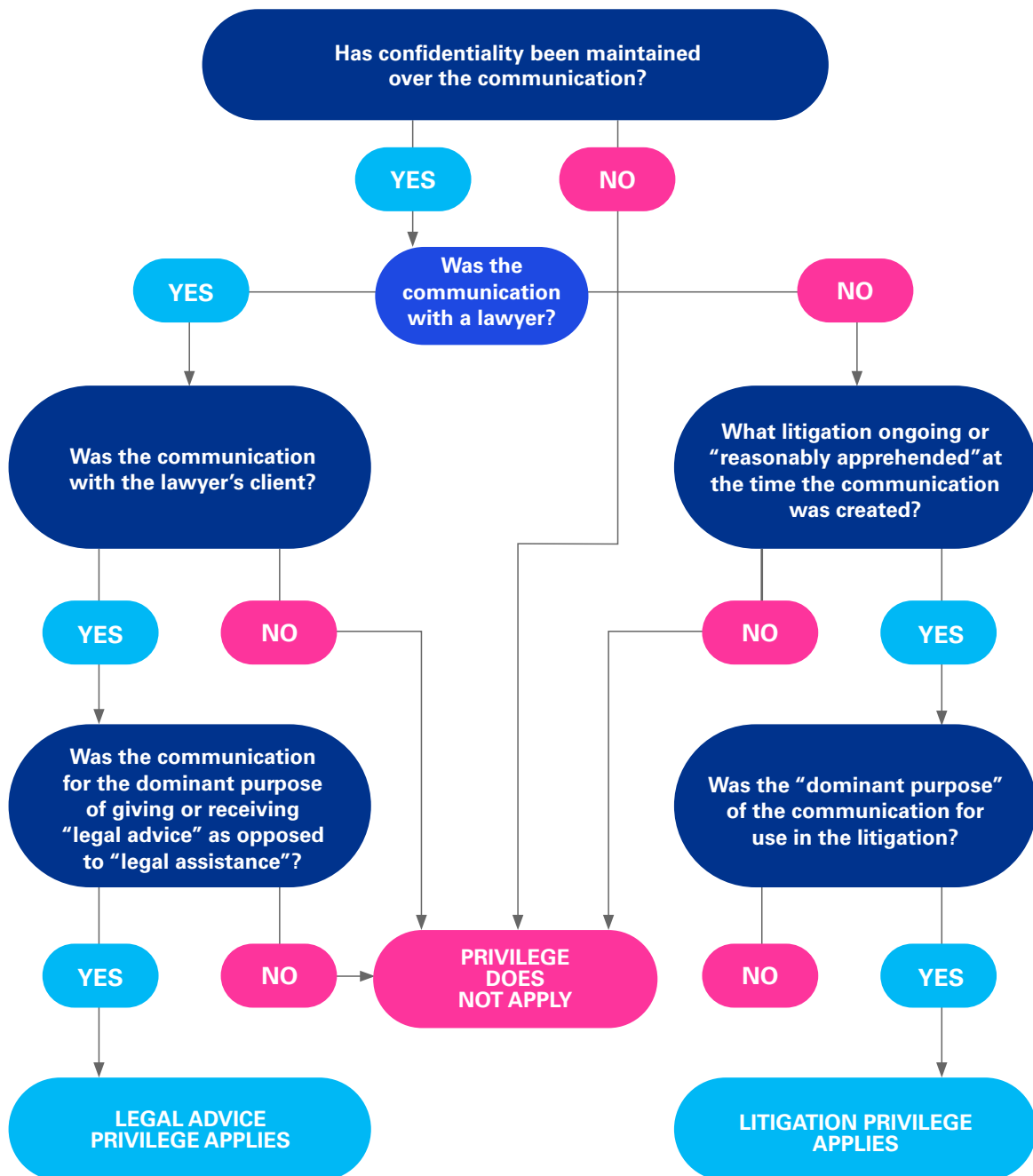
These assessments can involve detailed and sometimes complex considerations of a factual matrix and an individual's state of mind at a particular point in time and must be informed by the precedent set by previous relevant decisions of the courts as well as relevant guidance¹³. For these reasons they should always involve a specialist legal advisor.



13: Law Society of Ireland, Guidance and Ethics Committee; Australian Taxation Office



Legal Professional Privilege Decision Tree



Get in touch to find out how we can help you



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