

# WILLIAM FRY



## Legal Professional Privilege



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Legal Professional Privilege is the rule of evidence that entitles a party to withhold certain confidential documents from inspection in a discovery process or for use in evidence even if they are relevant. There are two forms of legal professional privilege, legal advice privilege and litigation privilege. The boundaries of each are commonly misunderstood and claims of legal professional privilege are often challenged.

## Legal Advice Privilege

Confidential information contained in communications between a lawyer and his/her client can benefit from the protection of legal advice privilege but only where that confidential communication is for the purpose of seeking, giving or receiving legal advice.

### **WHO IS THE LAWYER?**

The definition of a “lawyer” for the purposes of asserting a claim of legal advice privilege includes both external and in-house solicitors (provided they hold a current practising certificate), foreign lawyers, practising barristers and the Attorney General. Documents created by paralegals, legal executives and trainees may not benefit from legal advice privilege unless there has been input from a qualified lawyer.

### **WHO IS THE CLIENT?**

Where the client is an organisation, legal advice privilege can only attach to communications between the organisation’s lawyers and the “client” being those individuals who are authorised to seek and receive legal advice on behalf of the organisation.

### **WHAT IS LEGAL ADVICE?**

Explanations of a legal position as well as advice on courses of action arising out of a legal position are likely to be deemed to be legal advice for the purposes of a claim of legal professional privilege. However, the mere provision of legal assistance such as reciting provisions of a contract will not be deemed to be legal advice.

### **IN-HOUSE SOLICITOR AND LEGAL ADVICE PRIVILEGE**

An organisation that employs an in-house solicitor is entitled to assert a claim of legal advice privilege over relevant, confidential communications between the in-house solicitor and certain other individuals within the organisation but only where the in-house solicitor is acting in their capacity as legal advisor. This is particularly relevant when the in-house solicitor performs both legal and non-legal (i.e. company secretarial) functions. However it is important to note that it is unlikely communications between an in-house solicitor and client will be protected by privilege in the course of an investigation by the EU Competition Commission.



## Litigation Privilege

Litigation Privilege allows for the full and frank communication between parties engaged in or preparing for litigation or other adversarial proceedings. It operates by protecting confidential communications between a lawyer and client or between one of them and a third party, the dominant purpose of which is for use in the actual or contemplated litigation.

### **WHEN HAS LITIGATION BEEN SUFFICIENTLY APPREHENDED OR ANTICIPATED?**

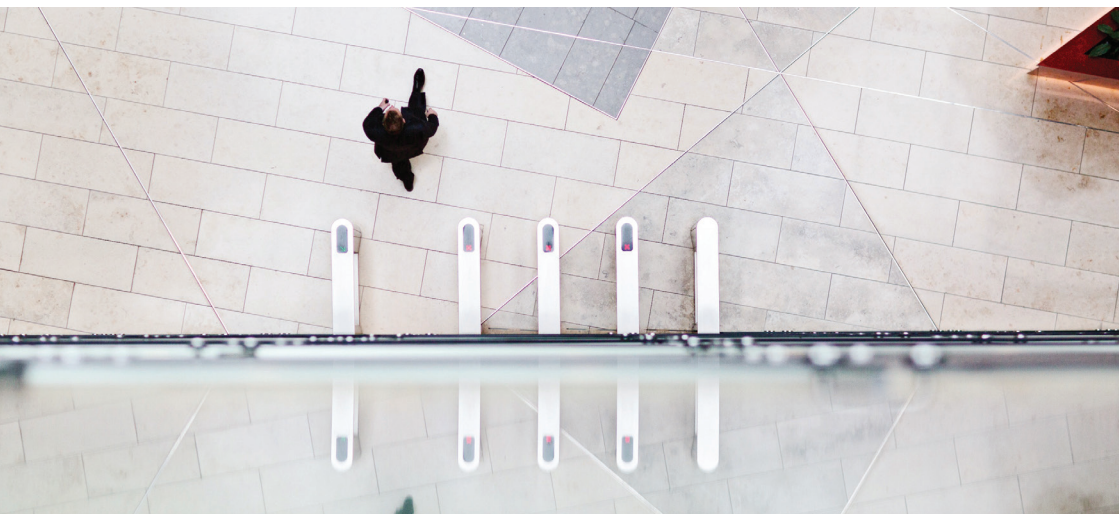
Where litigation privilege is claimed over communications made prior to the commencement of litigation or other sufficiently adversarial proceedings then there must have been at least a reasonable likelihood of that litigation or those other proceedings taking place and a mere possibility they may take place will not be sufficient.

### **DOMINANT PURPOSE**

Documents are often created for a number of purposes, one of which may well be apprehended or anticipated litigation. However, in order for litigation privilege to apply to documents the dominant purpose for which the documents in question came into being must have been in apprehension or anticipation of litigation. Where only one of the purposes behind the creation of the documents was apprehended or anticipated litigation but where this was not the dominant purpose the courts in Ireland will disallow a claim of litigation privilege.

### **ARE INVESTIGATIONS AND INQUIRIES SUFFICIENTLY ADVERSARIAL?**

Whether an investigation or inquiry is sufficiently adversarial for the purposes of litigation privilege is not always clear and will be determined by a range of factors, including the subject matter of the investigation or inquiry and the manner in which the investigation or inquiry is carried out. If an investigation or inquiry moves from a fact gathering phase to a subsequent more confrontational phase then it may be the case that litigation privilege can apply to the later phase of the process.



## Legal Professional Privilege - Key Considerations

### **CONFIDENTIALITY**

A document must remain confidential to benefit from legal professional privilege. Very often it is the extent of the circulation of a document that ultimately determines whether or not it is sufficiently confidential. As a result, the circulation of documents over which a claim of legal professional privilege has been made or might be made should be minimised at all times.

### **WAIVER OF PRIVILEGE**

Legal professional privilege can be 'lost' or waived expressly or implied by the 'owner' of the privilege, namely the client. A party entitled to assert a claim of legal professional privilege may decide to expressly waive that entitlement. This usually occurs when a document which is the subject of the claim contains information which may be helpful if introduced as evidence by the client. A party entitled to assert a claim of legal professional privilege may be deemed to have implicitly waived that entitlement by its actions, even where it does not expressly do so. This could occur where a document which is subject to legal professional privilege is distributed in a manner that renders it no longer confidential. It is very difficult to reassert privilege once it has been waived.

### **DURATION OF PRIVILEGE**

There is an important durational difference between the two main types of privilege. Litigation privilege may only apply to a document concerning the litigation to which it relates. This means that a document subject to litigation privilege in one case may not be privileged at a later date or in another case. This is in contrast to legal advice privilege which can be indefinite.

### **DUAL ASSERTIONS OF LEGAL PROFESSIONAL PRIVILEGE**

Depending on the circumstances, a document may benefit from both litigation privilege and legal advice privilege. Litigation privilege attaches to an entire document, whereas legal advice privilege may only attach to the part of the document containing legal advice.

### **A NOTE OF CAUTION FOR THE NOTE TAKERS**

A lawyer's notes of a meeting or interview must contain some sort of legal input in order to attract legal advice privilege and a simple note of the meeting or interview is unlikely to suffice. This was the decision of the High Court in England in the recent RBS Rights Issue litigation, which although not binding in this jurisdiction may be influential.

## Top Tips

- Ensure all communications with external lawyers are routed through the appropriate team/ individuals i.e. those most likely to be deemed by a court to be the client.
- Consider marking communications prepared for the purposes of obtaining legal advice “Private and Confidential - Created for the Purpose of Seeking Legal Advice and/or (if related to litigation) Created in Contemplation of Litigation”. Although this label does not of itself confer privilege it may assist.
- Privileged communications should not be circulated unless strictly necessary. Any circulation should be limited and on confidential grounds.
- Try not to mix privileged and non-privileged communications, for e.g., at a meeting where business matters and legal advice are discussed, separate notes should where possible be taken and the notes should be filed separately.
- When communicating potentially privileged information by email try to start a new email where possible rather than forwarding a chain of emails.
- Be aware that rules of privilege vary in different jurisdictions. A communication that is privileged in Ireland may not be privileged in other jurisdictions. This may be of particular importance to adversarial proceedings relevant to more than one jurisdiction and to investigations or inquiries conducted in the context of those proceedings.
- Be aware that in a discovery context, whilst relevant and necessary documents subject to privilege do not have to be disclosed, their existence must be listed individually in the Affidavit of Discovery.

**Note: This general advice note is not intended to constitute a comprehensive description of the complex law on privilege. Specific legal advice should be sought in respect of specific circumstances, where appropriate.**

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