



HERBERT  
SMITH  
FREEHILLS

# HANDY CLIENT GUIDE TO PRIVILEGE

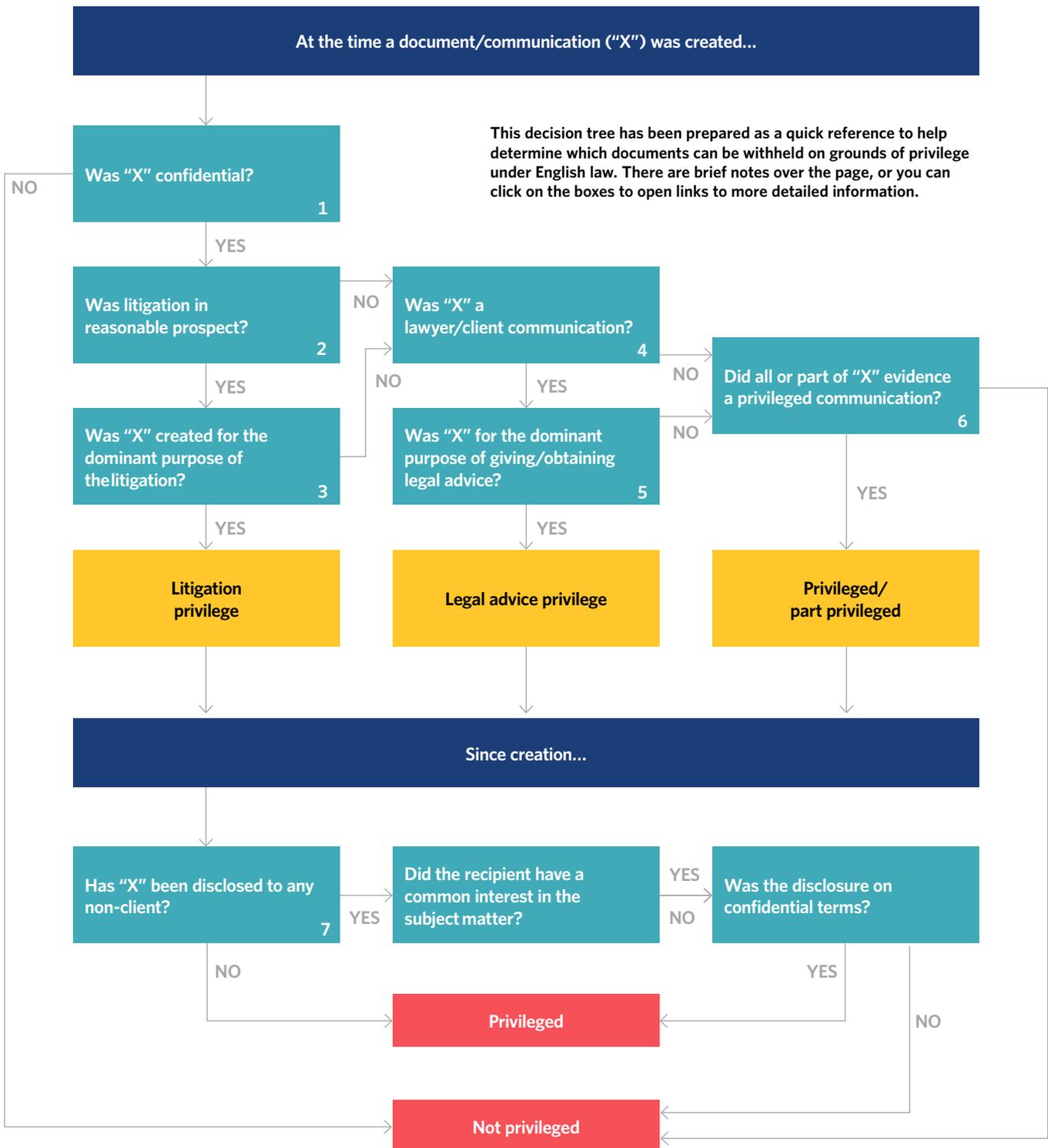
---

UPDATED JUNE 2021



# Legal professional privilege: A decision tree

Click on the boxes for more detailed information



# Decision tree notes

## Links to more detailed information

1. **Confidentiality:** Every privileged communication must be confidential, but not every confidential communication will be privileged.
2. **Litigation in reasonable prospect:** Litigation means "adversarial" proceedings. The chance of litigation need not be greater than 50%, but it must be more than a mere possibility. Litigation can be subject to contingencies, so long as there is sufficient prospect of those contingencies occurring.
3. **Dominant purpose of litigation:** The document must have been created with the dominant purpose of obtaining advice or evidence in relation to the contemplated litigation, not the conduct of the litigation more broadly (see *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652). Conducting litigation does however include avoiding or settling litigation that is in reasonable prospect (see *SFO v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006). If there is a dual purpose, and it cannot be established that the litigation purpose was dominant, litigation privilege will not apply.
4. **Lawyer/client communication:** This raises a number of issues.
  - a **Who is a lawyer?** A solicitor or barrister or qualified foreign lawyer. In-house lawyers are also included, so long as they are acting in a legal rather than an executive capacity. Privilege also extends to non-legally qualified personnel (eg, trainees or paralegals) acting under the supervision of a lawyer.
  - b **Who is the client?** Following the Court of Appeal decision in *Three Rivers District Council v Bank of England* [2003] EWCA Civ 474 (*Three Rivers No 5*), as interpreted in subsequent case law and confirmed by the Court of Appeal in *SFO v ENRC* [2018] EWCA Civ 2006, the "client" is limited to those individuals who are tasked with seeking and obtaining legal advice on behalf of the organisation. It does not include those who are authorised only to provide information to the lawyers. The Court of Appeal in *ENRC* expressed doubts as to the correctness of *Three Rivers No 5*, but said it was bound by precedent to apply it. Accordingly, unless and until the issue is revisited by the Supreme Court, where a third party (or an employee who is not held to be part of the client) provides information to the lawyer, this will not be privileged outside the litigation context. It is necessary to think carefully about which lawyer is advising and who is that lawyer's client in the particular circumstances. So, for example, where an in-house lawyer is merely gathering information from employees of the company to enable external lawyers to advise, those communications will not be privileged where the employees are not the external lawyers' client – see *Glaxo Wellcome UK Ltd v Sandoz Ltd* [2018] EWHC 2747 (Ch).
- c **Requirement for communication?** Privilege applies to draft communications as well as actual communications. Communication includes communication through agents, but this is quite limited.
5. **Giving/obtaining legal advice:** The dominant purpose of the communication must be to give or obtain legal advice, rather than commercial input. However, legal advice is interpreted broadly in that: (i) it is not limited to what the law is, but includes advice as to what should be done in a relevant legal context; and (ii) the protection includes the exchange of communications aimed at keeping both lawyer and client informed so that advice may be sought and given as required (sometimes referred to as the "continuum of communications").
6. **Documents evidencing privileged communications:** Privilege will apply to communications or documents (or parts of either) that reveal the substance of a privileged communication (eg, a board minute reporting on legal advice received). Where only part of a document is privileged, it can be redacted and the remainder disclosed.
7. **Subsequent dissemination of privileged material:** In certain circumstances, privileged communications can be shared with others without losing privilege. This can be on two bases:
  - a **Common interest:** The extent of common interest required is less than clear, but examples include insurer and insured, company and shareholder, principal and agent. The common interest must exist at the time the advice is shared.
  - b **Confidentiality:** A party is entitled to share its privileged material with others on confidential terms without losing privilege as against the rest of the world. This applies regardless of whether there is a common interest.

Note: This publication addresses only legal professional privilege (ie, legal advice privilege and litigation privilege). Other forms of protection may be available, eg, "without prejudice" privilege, privilege against self-incrimination, or public interest immunity.

The contents of this publication, current as at 11 June 2021, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication. © Herbert Smith Freehills LLP 2020

# Practical tips for maintaining privilege

## Communications where litigation is NOT in prospect

### Do not exhaustively define the “client”

The Court of Appeal decision in *Three Rivers No 5*, as applied in subsequent case law, means that the “client” is likely to be limited to some smaller group within the client company or organisation rather than all employees. Views differ as to whether it is helpful to list those within the client organisation who are part of the “client”, but on any basis it is unlikely to be helpful to set out an exhaustive definition. A better approach may be to list the primary individuals responsible for instructing the legal team and obtaining legal advice, but leave it open for instructions to be taken from, and advice given to, other appropriate individuals as the matter progresses.

### Only those likely to be part of the “client” should communicate with the lawyers

Whether or not there is a formal list, communications with the lawyers from individuals outside the core team responsible for instructing the lawyers and obtaining their advice should be avoided.

### Consider creating preparatory materials as draft communications seeking legal advice

Factual summaries or reports for the purpose of obtaining legal advice are more likely to attract privilege if they form part of a communication to the lawyer whose advice is sought, rather than a freestanding note or note to other non-lawyer employees. They should be prepared by those who are most likely to fall within the “client”.

### Copying in a lawyer will not create privilege

Simply copying in a lawyer to a communication between two non-lawyers will not create privilege. Where you are seeking advice from a lawyer, do so in a direct communication to the lawyer and make it clear you are asking for advice, ideally using the heading “Confidential and legally privileged”.

### Avoid third parties communicating with the lawyer

Outside the litigation context, such communications will not be privileged (unless the third party is communicating as the client’s agent, but this is quite narrow).

## In-house lawyers

### Ensure appropriate supervision of non-legally qualified staff

Advice from non-qualified staff (eg trainees or paralegals) will only be privileged if they are acting under the supervision of a lawyer.

### Keep your practising certificate up-to-date

There is some doubt as to whether advice from lawyers without a current practising certificate (or the equivalent for foreign lawyers) will be privileged. Privilege may however be available if the lawyer in question is acting under the supervision of a lawyer who holds a current practising certificate.

### Do not mix legal and business advice in the same communication

Communications with in-house lawyers are privileged only if they are acting in a legal rather than an executive capacity, and the communications are for the dominant purpose of giving or obtaining legal advice rather than commercial input. Mixing legal and business advice may muddy the waters.

### Make sure any advice is marked “Confidential and legally privileged”

This label does not create privilege, but will help to identify privileged material in any later review.

### Ensure it is clear which entities you are advising

If you advise group companies other than your direct employer, make sure it is clear (either in your employment contract or otherwise) that you are employed to give legal advice to any group company.

### Training non-legal staff is key

Ensure non-legal staff are aware that anything they put in writing, including e-mail, or on a recorded phone line, could come back to haunt them. If in doubt, staff should speak to the in-house legal team.

### Remember that the same rules do not apply everywhere

Courts in other jurisdictions will have their own rules of disclosure/privilege. In international arbitration, tribunals have considerable flexibility in determining which rules should apply.

## Receiving/copying legal advice

### Do not make notes on copies of legal advice received

Those notes may have to be disclosed, even if the legal advice itself is privileged.

### Be clear what is legal advice and what is not

A copy or report of a privileged communication will be privileged. Analysis of or comments on the advice by non-legal staff will not be privileged, nor will discussions as to what should be done in light of the legal advice. The safest course is to forward a copy of the original privileged advice.

### Take care in Board discussions/minutes

Try to ensure that any sensitive issues are dealt with as part of a report of legal advice, ideally given first-hand by a lawyer who is present at the meeting. If a non-lawyer is summarising a lawyer's advice, make sure this is clearly stated. Ideally, the minutes should simply state that legal advice was given and cross-refer to a separate document setting out the advice.

### Ensure any communication of the advice is on confidential terms

A party is entitled to share its privileged advice with others on confidential terms without losing privilege as against the rest of the world. This is often referred to as the principle of limited waiver. Similarly, privilege will not be lost if the advice is shared with a third party that has a common interest in the subject matter of the advice. It is advisable to put in place an express confidentiality/non-waiver agreement setting out the purpose for which disclosure is made and restricting further use, and possibly also recording the nature of any common interest.

### Be particularly careful in copying legal advice outside the UK

The rules of privilege vary in different jurisdictions. A communication that is privileged in England and Wales may be disclosable elsewhere.

### Disclosure in one jurisdiction may lead to loss of privilege in another

Where disclosure in another jurisdiction leads to a general loss of confidentiality, privilege will no longer be available under English law. Further, depending on the extent to which a jurisdiction recognises the concept of limited waiver of privilege, disclosure may result in a wider loss of privilege even if it would not do so under English law.

## Think carefully before relying on privileged material in proceedings

If a party seeks to rely on some privileged material, while holding back the remainder, there is always a risk it will be taken to have waived privilege more widely.

## Internal investigations

### Litigation privilege unlikely to be available

Unless litigation is in reasonable prospect, notes prepared by, and/or communications between, non-lawyer employees are unlikely to be privileged. Lawyers should be involved at an early stage to maximise the prospects of being able to claim legal advice privilege.

### Take care with the form of communications

To improve the prospect of privilege being available, any written materials should be prepared by lawyers (after interviewing relevant staff as necessary). If non-lawyer employees prepare materials for consideration by the lawyers, consider creating these as draft communications to the lawyers seeking legal advice, rather than stand-alone notes. They should be prepared by those who are most likely to fall within the "client".

### Prepare reports in the form of legal advice

Where possible, any written reports on sensitive issues should be in the form of a report of legal advice so that a claim to privilege can more easily be made – even if litigation is in reasonable prospect, to the extent that there is any uncertainty regarding the dominant purpose of the report.

### Keep non-privileged written materials as factual as possible

Where reports or other documents need to be prepared and may not be privileged, they should be kept as factual as possible. Comments on sensitive issues should be dealt with orally.

## Statutory protections

The question of what can be withheld from regulators (such as the FCA) may be governed by statute (eg, section 413 of the Financial Services and Markets Act 2000). Such protections are broadly similar to common law privilege, but there are some differences.

## Practical tips for maintaining privilege

### Communications relating to potential litigation

#### Note in writing when you consider litigation to be in reasonable prospect

This will not be determinative, but contemporaneous records of this sort may assist in establishing that litigation was reasonably in prospect at the relevant time.

#### Make sure this is consistent with timing of document hold

As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. It may be more difficult to argue that litigation was reasonably in prospect at a time no such notification had been given.

#### Remember narrow scope of dominant purpose test

Litigation privilege will not apply unless the dominant purpose is obtaining advice or evidence, not conducting litigation in a broader sense. Accordingly, litigation privilege may not apply where the dominant purpose is (for example) litigation strategy, or reputation management, or cost control, or funding, as opposed to advice or evidence in relation to the litigation.

#### Record the purpose of the communication

This is particularly important when communicating with a third party, as you will not be able to rely on legal advice privilege and will need to establish that the document was prepared for the dominant purpose of advice or evidence in relation to the litigation.

#### Beware the dual purpose communication

Where there are multiple purposes, and only one or some relate to the prospective litigation, you should consider obtaining separate reports on the different issues.

#### If in doubt, assume litigation privilege will not apply

If it is arguable that litigation is not in contemplation, or there is doubt as to dominant purpose, assume that privilege will apply only to lawyer/client communications for the dominant purpose of giving or obtaining legal advice.

### Experts

#### Avoid disclosing privileged documents to an expert or commenting on the merits of the case in the expert's instructions

Under CPR 35.10 the instructions to an expert (unlike the expert's reports) are not privileged, although disclosure will not be ordered save in limited circumstances.

#### Test a potential expert's views robustly before obtaining views in writing

Where a party changes expert and requires the court's permission to adduce the new evidence, it will normally be required to waive privilege in the earlier expert's report as the price of obtaining permission.

#### Consider appointing as "advisory" expert only until it is clear an expert will be able to support the case

Where an expert has been instructed to advise privately at a party's own expense, rather than to prepare a report for the purposes of the proceedings, the court will not normally require privilege to be waived in the report even if a different expert is subsequently appointed.

#### Communications with an expert will not be privileged outside the litigation context

If litigation is not in reasonable prospect, or is not the dominant purpose of the communication, communications with a third party expert will not be privileged, even if sent to/from a lawyer.

# Herbert Smith Freehills contacts



**Damien Byrne Hill**  
Managing Partner, Disputes  
T +44 20 7466 2114  
[damien.byrnehill@hsf.com](mailto:damien.byrnehill@hsf.com)



**Craig Tevendale**  
Partner, Arbitration  
T +44 20 7466 2445  
[craig.tevendale@hsf.com](mailto:craig.tevendale@hsf.com)



**Anna Pertoldi**  
Partner, Litigation  
T +44 20 7466 2399  
[anna.pertoldi@hsf.com](mailto:anna.pertoldi@hsf.com)



**Susannah Cogman**  
Partner, Contentious  
Regulatory  
T +44 20 7466 2580  
[susannah.cogman@hsf.com](mailto:susannah.cogman@hsf.com)



**Julian Copeman**  
Partner, Litigation  
T +44 20 7466 2168  
[julian.copeman@hsf.com](mailto:julian.copeman@hsf.com)



**Lisa McLaughlin**  
Partner, Alternative Legal  
Services  
T +44 28 9025 8211  
[lisa.mclaughlin@hsf.com](mailto:lisa.mclaughlin@hsf.com)



**Maura McIntosh**  
Professional Support  
Consultant  
T +44 20 7466 2608  
[maura.mcintosh@hsf.com](mailto:maura.mcintosh@hsf.com)

For a full list of our global offices visit [HERBERTSMITHFREEHILLS.COM](https://www.herbertsmithfreehills.com)

---