

## Legal professional privilege: a guide for in-house lawyers

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They have wide-ranging and relevant experience to help clients and are able to respond quickly to the required challenge.

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## What is legal professional privilege?

Privilege, once established, gives a party an absolute right to withhold a privileged document from production to the court or to a third party. This includes protection from disclosure during the course of litigation as well as from disclosure to a prosecuting regulator or authority.

There are a number of types of privilege, including legal professional privilege (**LPP**) which covers both 'litigation privilege' and 'legal advice privilege'.

In summary:

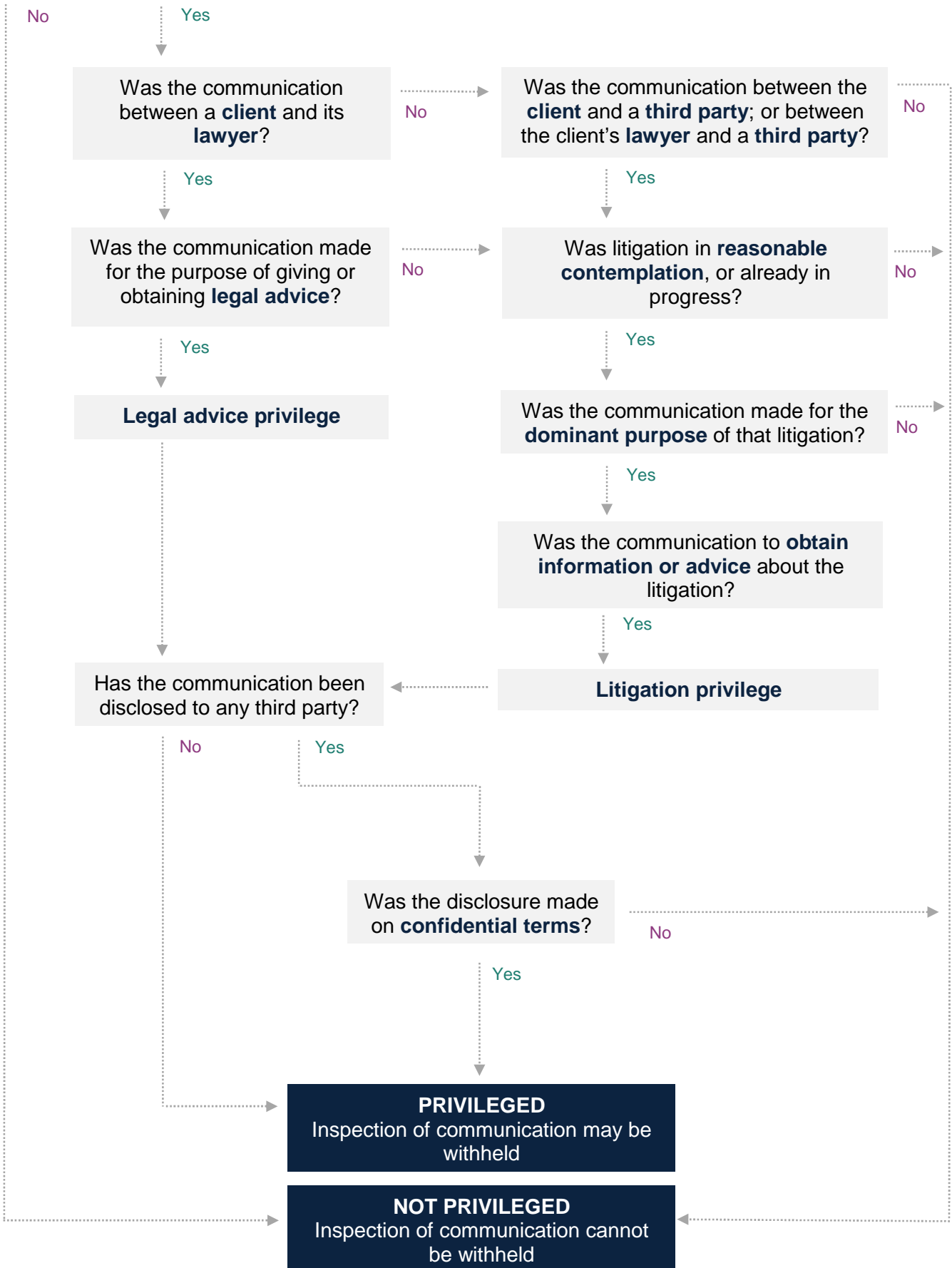
<b>Litigation privilege</b>	<ul style="list-style-type: none"><li>• confidential communications (written and oral)</li><li>• between:<ul style="list-style-type: none"><li>• a client and their lawyer;</li><li>• a client's lawyer and a third party; or</li><li>• a client and a third party</li></ul></li><li>• created for the sole or dominant purpose of adversarial litigation which has already commenced or which is in reasonable contemplation  (i.e. litigation is a real likelihood, as opposed to a mere possibility, although the chance of litigation need not be greater than 50%)</li><li>• for the purposes of obtaining information or advice about the litigation</li></ul>
<b>Legal advice privilege</b>	<ul style="list-style-type: none"><li>• confidential communications (written and oral)</li><li>• between a client and their lawyer</li><li>• given for the purpose of giving or receiving legal advice</li></ul>

Privileged information may sometimes be shared with third parties without losing its privileged status. This may be due to:

**Confidentiality:** a party may share privileged information with a third party without losing privilege as against the rest of the world, so long as it is shared on confidential terms (for example, a confidentiality agreement is entered into before the information is distributed).

**Common interest:** it is possible to share privileged information with a third party without losing privilege so long as, at the time that the privileged information is disclosed, the third party has a common interest in the subject matter of the privileged document or in the underlying litigation. Examples include co-defendants, companies in the same group, and insured and insurer.

Was the communication **confidential**?



## LPP in internal investigations

Internal investigations can be an effective way for organisations to manage and mitigate legal, regulatory and reputational risk.

A company may conduct an internal investigation after, for example, receiving a notice from a prosecuting regulator or authority. Legal advice privilege may apply to communications made in such a scenario. Whether communications generated in the context of an internal investigation can be protected by litigation privilege will depend on the circumstances, including the facts giving rise to the internal investigation and how it was carried out.

Practical tips for dealing with internal investigations:

- Ensure lawyers (you and/or external lawyers) are involved in the investigation from an early stage to maximise the chances of legal advice privilege applying.
- If unsure whether a written communication will attract privilege or not, try to ensure it does not comment on sensitive issues. Any sensitive issues should be discussed orally, as far as possible.
- Any written reports that do deal with sensitive issues should be drafted by lawyers in the form of legal advice to the client to maximise the chance of those documents attracting legal advice privilege.
- If a non-lawyer is conducting the investigation, legal advice privilege will not apply. You should therefore try to limit the investigation team to in-house and/or external lawyers.
- If non-lawyers do assist with the investigation – for example, by conducting interviews with employees – ensure that any written materials they create are: (i) drafted as communications to the lawyers seeking legal advice; and (ii) prepared by those who fall within the definition of the ‘client’ (namely, those in the company authorised to request and receive legal advice about the investigation).
- For litigation privilege to apply, any external investigation must be adversarial, rather than inquisitorial, in nature. Therefore, investigations which may conclude with punitive action are more likely to be considered ‘litigation’ than enquiries which are seeking only to establish the facts and information.

## General practical tips for in-house lawyers

You should take steps wherever possible to maximise the chance of creating and protecting communications benefitting from LPP. A few practical tips for how to do this are set out below.

### 1. Identify the ‘client’

Identify the key individuals or core team within your organisation who will be responsible for giving instructions and receiving legal advice. They will be the ‘client’ for the purposes of determining privilege. The identity of these individuals should be made clear to other employees and any external lawyers as soon as possible.

You should take extra care when corresponding with those outside the ‘client’ group, as such communications cannot be protected by legal advice privilege.

### 2. Label privileged communications

When giving legal advice to the client, take care to label all communications as ‘legally privileged and confidential’. If litigation is in prospect, label all relevant communications ‘legally privileged and confidential: in contemplation of litigation’.

Doing this will not guarantee that such communications are protected by privilege, but it can help reduce the risk of inadvertent disclosure and it can also support a claim later down the line that a certain document is privileged.

### 3. Be conscious of legal vs. commercial advice.

Your role may encompass both legal advice and functions which are purely commercial. Only legal advice given in your capacity as a lawyer will attract legal advice privilege. Any advice you give which is purely commercial will not attract legal advice privilege.

Any purely commercial discussions about a dispute should, wherever possible, be held orally and not recorded in writing. If this is not possible, consider including any sensitive commercial comments in documents which also contain legal advice. This may help to ensure that the sensitive commercial content is protected by the privilege attaching to the legal advice.

### 4. Control the internal distribution of privileged information

You should restrict the internal distribution of privileged documents to circumstances in which it is strictly necessary. If you do need to share privileged information internally:

- Do so on the express terms that the materials are to remain confidential. Make it clear that they are not to be made available to anyone outside the intended group of recipients.
- Keep track of to whom privileged materials have been circulated and when.
- When sending emails:
  - Consider carefully who is cc'd to your email.
  - If an email chain does contain privileged information, consider starting a new email chain instead of forwarding or replying to the original email chain. This should reduce the risk of inadvertent distribution of privileged information.

### 5. Control the distribution of privileged information to third parties

Only share privileged documents with third parties on a 'need to know' basis. If it is necessary to share privileged documents with third parties, consider requiring them to enter into confidentiality agreements before distribution which make it clear that:

- provision of the documents does not constitute a waiver of privilege; and
- documents are to be held in confidence and not to be disclosed without consent.

### 6. Ensure communications with third parties are for the purposes of obtaining advice or information

Litigation privilege will only attach to third party communications which are for the purposes of obtaining advice or information about the litigation. Where possible, try to ensure that communications with third parties are framed in that way.

### 7. Record the moment when litigation is reasonably in contemplation

Clearly document the moment when litigation is reasonably in contemplation – i.e. when proceedings are considered a real likelihood rather than a mere possibility, although the chance of litigation need not be greater than 50%. Neither a distinct possibility that sooner or later litigation might arise, nor a general apprehension of future litigation, is enough to establish litigation privilege.

Doing this should assist you later to argue that documents from this point can benefit from litigation privilege. You should also ensure that documents are preserved from this point.

### 8. Consider the 'dominant purpose' test

If documents are created for more than one purpose (for example, reputation management or cost control, as well as the litigation) make sure that the documents are worded in such a way as to make it clear that the main reason behind the creation of the document was the underlying litigation.



## 9. If a document is part privileged, consider redaction

If a document as a whole is not privileged, but does contain some privileged material, consider redacting the privileged material – a failure to do this may result in an inadvertent waiver of privilege.

## 10. Seek local advice when dealing with LPP in other jurisdictions

The rules of privilege vary between jurisdictions. Therefore, seek local advice where necessary.

## 11. Train employees

Consider basic training for non-lawyer employees on privilege and its importance and implications.

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This publication is a general summary of the law on legal professional privilege. It does not constitute legal advice and should not be relied upon as such. Privilege is a complex and fact-specific area of law. Specific legal advice tailored to your specific circumstances should be sought.

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