

The Law of Privilege in England & Wales

BAKER & MCKENZIE

LEGAL ADVICE PRIVILEGE

A document that has ceased to be confidential is no longer privileged.

Take care when circulating privileged documents, even within single company.

Includes:

- Oral or written communications
- Any document which evidences the substance of such communications

All qualified lawyers:

- Solicitors
- Barristers
- Foreign lawyers
- In-house lawyers (unless EU competition investigation)

Includes trainees and paralegals, provided they are supervised.

Does not cover advice – even if on the law – by other professions e.g. accountants.

Covers **confidential communications** between a **lawyer** and a **lawyer's client** for the purpose of giving or receiving **legal advice** in a **relevant legal context**.

Unlikely that all client employees will be covered.

Test: Does the employee have express or implied authority by the company to give instructions to the lawyer and to seek and receive legal advice?

In-house lawyer advising business:

- Legal advice → likely to be privileged
- Business advice or administration → no privilege

Take care not to mix legal and non-legal advice in the same document.

Not confined to advice on the law. Includes advice as to what should sensibly be done in the relevant legal context.

Broad test. Includes situations where advice sought on rights, liabilities, obligations or remedies of the client under public or private law.

LITIGATION PRIVILEGE

A document that has ceased to be confidential is no longer privileged.

Take care when circulating privileged documents, even within single company.

Includes:

- Oral or written communications
- Other documents created by or on behalf of a lawyer/client

Lawyer does not have to be involved.

Important distinction between legal advice privilege and litigation privilege.

Covers **confidential communications** made between a **lawyer/client** and a **third party** provided **litigation** is at the time **existing or anticipated** and the **dominant purpose** of the communication is litigation.

Test: Are proceedings adversarial in nature?

- ✓ Civil & criminal litigation
- ✓ Arbitral proceedings
- ✓ Adjudication

Take care with:

- Investigations
- Inquiries
- Tribunals
- Disciplinary panels

Many communications have dual role, e.g. prepare for litigation and prevent recurrence of situation.

Litigation privilege will only arise if the dominant purpose of the communication is its use in litigation.

If another objective is predominant - e.g. risk management - no litigation privilege will arise.

Chance of litigation need not be >50%, but must be more than mere possibility.

Doesn't matter if litigation does not actually follow.

Litigation can be subject to contingencies, provided there is sufficient prospect of those contingencies occurring.

COMMON INTEREST PRIVILEGE

Covers disclosure of a privileged document to a third party who has a **common interest** in the subject matter of the document or the litigation.

Includes:

- Co-defendants
- Insured and insurer
- Agent and principal
- Companies in the same group

WITHOUT PREJUDICE PROTECTION

Not limited to statements relevant to the dispute in question.

In many cases it prevents WP material being produced in subsequent proceedings.

Doesn't apply if parties have merely asserted their case or criticised the other side's case.

Can apply to genuine settlement negotiations that take place before a claim is issued.

Doesn't matter if case actually settles or not, provided it is a genuine attempt.

Prevents written or oral **statements** made in a **genuine attempt to settle an existing dispute** from being put before the court as evidence of **admissions**.

Labelling

Labelling a document 'without prejudice' won't make it so, if it's not.

Conversely, failing to label a document 'without prejudice' doesn't stop it being so, if it is.

However, court has held that "competent solicitors will always use the 'without prejudice' label where appropriate".

Unlabelled WP correspondence may create rebuttable inference that it is open.

Doesn't mean a formal admission, but any statement which might at a later stage be used to prove a fact against the maker of the statement.

'Without prejudice save as to costs'

Used when a party wants the protection of WP but also wants to be able to put correspondence before the court on the issue of costs.

Important note. This is a simplified guide. It should not be relied upon without further advice specific to your circumstances. Arbitral tribunals with a seat in England and Wales may not apply the law of privilege of England and Wales. Correct as at 7 April 2016.

www.bakermckenzie.com

For more information, please contact:



Benjamin Roe
Professional Support Lawyer,
Dispute Resolution
+44 207 919 1017
benjamin.roe@bakermckenzie.com