

Legal Professional Privilege

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Legal professional privilege facilitates open and frank communications between a client and their legal representative. Anyone dealing with the legal advisor should be aware of any action that may undermine it.

Introduction

Legal professional privilege is a common law right that grants protection over the confidentiality of communications between a client and their professional legal representatives, or in appropriate circumstances, communications with a third party.

How Legal Privilege Works

Information shared with a client's legal representative is protected against disclosure to third parties in the absence of the express permission of the client. The confidentiality is owned by the client, not the legal representative. There are two forms of legal professional privilege:

- Legal advice privilege - protects confidential communications (written or oral) between a client and a lawyer for the purpose of giving or receiving legal advice. Legal advice privilege also protects documents which reflect such a communication
- Litigation privilege – protects all confidential communications (written or oral) between client or lawyer on the one hand, and third parties on the other, such as an expert witness, where litigation is either in process or is reasonably anticipated

Why Would I Want It?

In investigating a concern or a specific incident it is possible that an organisation could uncover information about the management of the business that will make uncomfortable reading. A well-managed business will then set about resolving those issues, but regardless of that, may not wish those findings to become public knowledge.

In an instance where litigation is being considered or is pending, there is even more reason to want to keep information obtained in the course of the investigation confidential. Normally, this type of information would be **'discoverable' by enforcing authorities or the third party's legal representatives. However, legal professional privilege allows for the sharing of information between a client and their legal representative, without fear that information will have to be shared with the enforcement authority or the opponent's legal representatives.**

Establishing legal professional privilege is essential for there to be open and frank discussions about the findings of an internal investigation, without risking that information being made public.

In certain circumstances, an organisation may be compelled to cooperate with the enforcing authorities and in doing so is dissuaded from lying or concealing evidence, but that does not mean they have to make the **prosecution's case for them by volunteering** prejudicial information. In such circumstances, where that information is privileged it is immune to disclosure.

How Do I Get It?

In order to ensure that legal advice privilege applies to a particular document/discussion, the communication must be between the legal adviser and their client with the primary purpose of giving or receiving legal advice.

The communications between the legal adviser and the client must be maintained as confidential. For example, if the recipient at the client organisation subsequently copies in other parties on the response, that would no longer be regarded as a privileged communication.

Litigation privilege, meanwhile, require certain conditions in order to be satisfied. The litigation has to be in progress or reasonably in contemplation, the communications must be made with the sole or dominant purpose of conducting that anticipated litigation and the litigation must be adversarial, not investigative, or inquisitorial.

Examples of documents to which privilege might apply if the necessary conditions are in place:

Legal Advice Privilege

- **Lawyer's attendance notes, drafts of legal advice, instructions to counsel**
- Minutes summarising and attaching legal advice (would not include internal notes or emails)

Litigation Privilege

- Note of meetings investigating a dispute
- Notification of a claim to insurers
- Minutes summarising and attaching legal advice
- Reports by third parties prepared on the instructions of a client/lawyer for purposes of litigation (would not include internal notes)

How Do I Maintain Legal Privilege?

Maintaining confidentiality is really the key to maintaining privilege. **To ensure this, it's important to follow these precautions:**

- For communications to remain privileged it must be clear that the person acting on behalf of the client had the authority to do so
- Only authorised employees should prepare submissions to the legal representative; involving other employees in preparing, dealing with, discussing, etc. such communications, could result in the loss of privilege
- Where an internal investigation is conducted it would normally be wise to consult a professional legal adviser who can advise on the scope of the investigation and ensure legal advice privilege is engaged. If an internal investigation is conducted without acting on legal advice, the product of the investigation may not be privileged unless the conditions required to invoke litigation privilege are met
- Any report resulting from internal investigations should primarily focus on preparing for the conduct of adversarial litigation, or enabling lawyers to give advice about its conduct as opposed solely to determining matters of causation, lessons learned and remedial actions
- **Just because you are asked for a document it doesn't mean you have to supply it. Be wary of requests to disclose internal investigation reports and other documents over which you believe privilege exists. In such cases, seek legal advice before agreeing to any such requests, even if they are made by the enforcing authorities**
- Communications between a client and the legal adviser are not privileged if they occur as a result of an attempt to commit fraud or a crime

Summary

The establishment and maintenance of legal professional privilege is essential for a client and their legal representative to have open and frank conversations about a particular incident.

Although legal professional privilege is relatively easy to establish, it is also easily undermined. It is an important part of the normal contingency planning process to have these discussions with your legal advisers before any such incident occurs; to establish the relevant protocols and to establish and maintain an understanding of those **employees authorised to act as 'the client'**.

Checklist

A generic Legal Professional Privilege checklist in Appendix 1 which you can tailor to your own organisation.

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- Corporate Manslaughter and Sentencing Guidelines
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Email us at riskadvice@aviva.com or call 0345 366 6666.*

*Calls may be recorded and/or monitored for our joint protection.

Appendix 1: Legal Professional Privilege Checklist



	Legal Professional Privilege	Y/N	Comments
1.	Have you had a conversation with your legal counsel regarding legal privilege and what it means for your business?		
2.	Have you agreed the sort of event that might trigger the need to invoke privilege?		
3.	Have you agreed a protocol as to how this will be implemented between the company and its legal advisors?		
4.	Have you agreed an internal protocol as to who will initiate the privilege conversation with your legal advisor(s)?		
5.	Have you agreed an internal protocol as to who is included in relevant communications and how you control documentation?		
6.	Do the relevant staff understand their roles in initiating/maintaining privilege?		
7.	Have privilege arrangements been included in your Business Continuity and Crisis Management Plans?		
8.	Additional Comments:		

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