

Legal professional privilege

June 2017

What is legal professional privilege?

There are two forms of legal professional privilege: 'legal advice privilege' and 'litigation privilege'. It is possible for documents to be protected by one or the other, or both, depending upon the circumstances in which they were generated. The effect of both is the same – documents attracting either form of privilege will be protected from disclosure in litigation and other forms of compulsory production of documents.

Litigation Privilege

The rationale for litigation privilege is that in order to limit unnecessary litigation and encourage parties to settle their differences outside of court, a party should be allowed to prepare its case and assess the merits without fear that the documents created during those processes will be used against it by the other side.

In order to benefit from litigation privilege, each document must be:

- **Confidential** – a document that ceases to be confidential cannot be privileged (businesses must be careful who gets to see any sensitive documents; even circulating a document widely within your organisation can cause documents to lose their quality of confidence)
- **Created when litigation is in progress or there is a reasonable prospect of litigation** – more than a mere possibility that it *might* happen
- **Created with the sole or dominant purpose of the litigation** – it is not enough if it just happens to be relevant later (but need not be the exclusive reason)

Legal Advice Privilege

The rationale for legal advice privilege is that parties should be free to discuss their cases openly with their lawyers when seeking advice and so those communications should be protected from production. It is sometimes said that the functioning of our whole justice system depends on every person having the right to seek legal advice confidentially. This is a big deal!

In order to benefit from legal advice privilege a document must:

- **Be confidential** – as with litigation privilege
- **Pass between the "client" and its lawyers** – think carefully about who has the authority to seek and receive legal advice, as discussed below

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- **Be created for the purpose of giving or receiving legal advice** – beware of communications with lawyers that go beyond the legal sphere into general business or presentational advice

For more information please contact:



Gareth Bell

Managing Partner // Guernsey

t: +44 (0) 1481 734214 // **e:** gareth.bell@collascrill.com



David O'Hanlon

Partner // Guernsey

t: +44 (0) 1481 734259 // **e:** david.ohanlon@collascrill.com



Michael Adkins

Partner // Guernsey

t: +44 1481 734 231 // **e:** michael.adkins@collascrill.com