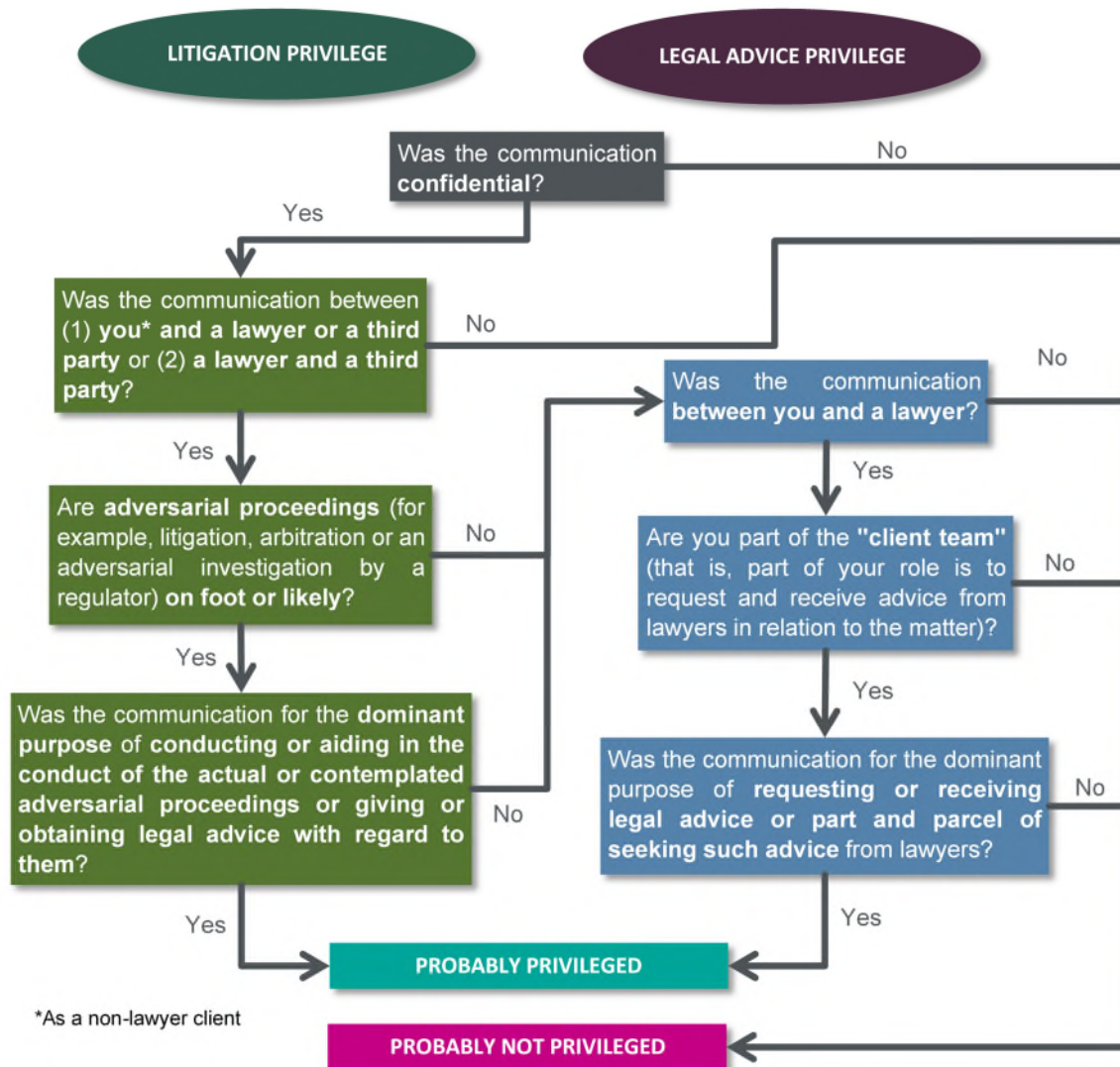


## Privilege Overview

Any record of a communication (for example: emails, recorded phone conversations (including voicemails), letters, memoranda, computer records etc) may have to be produced to the other party in litigation or other adversarial proceedings if the record is relevant to the proceedings. One exception is where the record is privileged. Privilege can protect confidential communications between lawyers (in-house or external) and clients where the dominant purpose of the communication is to seek/obtain legal advice ("**legal advice privilege**"). It will also protect some confidential communications with third parties, where there are actual or likely adversarial proceedings ("**litigation privilege**"). The flowchart below and the rules on the back of this document highlight the key points from an English law perspective, including some common pitfalls and how to avoid them. However, privilege is a complex area of the law and you should therefore seek specific guidance from your in-house counsel or external lawyers in any given situation.



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## Ten rules for retaining privilege

1	<b>Involve lawyers at the beginning</b>	<ul style="list-style-type: none"> <li>Where legal advice is likely to be required, involve lawyers at the beginning so that privilege is on the agenda before potentially damaging communications are produced and internal structures can be put in place to minimise the creation of unnecessary non-privileged records.</li> <li>Where there is no present prospect of adversarial proceedings, privilege only attaches to confidential communications between clients (see rule 2) and lawyers for the dominant purpose of seeking and receiving legal advice (and some incidental communications between them as part of that process).</li> </ul>
2	<b>Identify the client</b>	<ul style="list-style-type: none"> <li>The "client" is the group of employees whose role is to request and receive legal advice from the lawyers in relation to the matter on which legal advice is being sought. It is neither everyone in the company, nor is it likely to be everyone in a particular division or department of the company.</li> <li>It is important to try to identify (with the assistance of the lawyers involved) who is in the "client team" at the outset and to keep that under review as the matter develops.</li> <li>Where there is no present prospect of adversarial proceedings, communications between lawyers and people outside the "client team", and between people inside and outside the "client team", will generally not be privileged.</li> </ul>
3	<b>Avoid creating unnecessary records</b>	<ul style="list-style-type: none"> <li>If you are part of the "client team" your written communications with your lawyers for the dominant purpose of obtaining/receiving legal advice should be privileged. If you have to discuss those issues with someone else (other employees or third parties) in circumstances where there is no present prospect of adversarial proceedings, such discussions may not be privileged: a telephone call or meeting will therefore be a better option than a note or an email.</li> <li>Where possible, limit circulation/dissemination of legal advice that you have received: circulation to people outside the "client team" or to third parties runs the risk of the loss of privilege and should only be done with care and where possible after consulting your lawyers.</li> </ul> <p>TIP: If you must circulate legal advice outside the "client team", circulate the original advice. Do not create a new document, such as a summary or a commentary, which is less likely to be privileged.</p> <p>TIP: Review an email string before forwarding it to be sure that it does not include material that may be privileged. If in doubt, send a fresh email.</p> <p>TIP: A document with manuscript notes on it is a different document from the version without those notes. Unless they are privileged, your notes may have to be produced in any subsequent adversarial proceedings.</p>
4	<b>If you are asking for legal advice in writing, say so</b>	<ul style="list-style-type: none"> <li>Start any request to lawyers for advice with the words "I want your legal advice on..." or similar. Not only will that support any claim to privilege later on, but it will help you focus on whether you are really asking for legal advice at all (and therefore whether you may potentially be able to claim privilege).</li> <li>When asking for legal advice, label your communications with lawyers "privileged &amp; confidential" or "for the purposes of legal advice". This is not conclusive (the court will decide whether records are privileged or not) but can help to persuade a court or regulator of the true purpose and nature of a record.</li> </ul> <p>TIP: Do not merely cc the lawyers as a way of asking for advice. Create a fresh request for advice from the lawyers – and cc others in the "client team" if necessary but not those outside of it. Avoid including requests for legal advice in the same communication as requests for commercial advice. Use separate communications for topics other than legal advice and draft any such communications carefully, being mindful that they may have to be produced in future.</p>
5	<b>Spot the dispute (and record it)</b>	<ul style="list-style-type: none"> <li>Because the likelihood of adversarial proceedings widens the range of subsequent communications which may be privileged, it is helpful to be able to point to when that likelihood arose.</li> <li>Identifying this point in time can be difficult. Adversarial proceedings must be reasonably in prospect: a general apprehension is not enough, although a greater than 50% chance is not required. When you think you are over the threshold, make a note on the file, document the reasons for that conclusion and record the point in your next communication with your lawyers. If in doubt, check with your lawyers.</li> </ul>
6	<b>If litigation is in prospect, don't destroy anything potentially relevant</b>	<ul style="list-style-type: none"> <li>Destroying relevant records after adversarial proceedings are on the horizon can be extremely damaging. As soon as adversarial proceedings look like a possibility, steps should be taken to preserve any potentially relevant records.</li> <li>Ask your lawyers for advice on what needs to be preserved.</li> </ul>
7	<b>Clear further communications with your lawyers</b>	<ul style="list-style-type: none"> <li>Once adversarial proceedings are likely, get advice from your lawyers about who you should and should not discuss the dispute with, both internally and externally, and how to do it. Remember that comments about a dispute made at the outset may be particularly interesting and potentially helpful to your opponents in subsequent adversarial proceedings.</li> <li>Once adversarial proceedings are likely, and apart from communications with your lawyers, you should try not to forward or create new records in relation to the dispute or general information about it, without agreeing an appropriate process with your lawyers first. Any record of this sort might have to be produced.</li> </ul> <p>TIP: Label documents that you prepare in relation to a dispute as "privileged and confidential – prepared for the purpose of proceedings". Remember, though, that this is not conclusive.</p>
8	<b>Stick to the facts</b>	<ul style="list-style-type: none"> <li>Make all communications as factual as possible. Unless you are communicating with your lawyers, or the lawyers have said that a communication will be privileged, try not to record your views on whether something was done well or badly or on potential weaknesses.</li> <li>If, as sometimes happens, the business requires you to create records which are unlikely to be privileged, they should be factual and accurate: always consider how they might be deployed in the hands of opposing lawyers if they have to be produced.</li> </ul>
9	<b>Let the lawyers direct the leg work</b>	<ul style="list-style-type: none"> <li>Records of information gathered internally or externally (even for the dominant purpose of obtaining legal advice or for proceedings) may not be privileged.</li> <li>Your lawyers should direct the process of collecting the information necessary to produce the legal advice and/or to deal with the proceedings.</li> <li>Be careful about investigating the circumstances surrounding a possible dispute or collecting evidence yourself (for example, by interviewing staff or producing reports) unless you have been advised by your lawyers that the records you produce will be privileged.</li> </ul>
10	<b>Be careful in discussing the dispute with the counterparty</b>	<ul style="list-style-type: none"> <li>Any communications with a counterparty will probably have to be produced in subsequent proceedings unless they are part of "without prejudice" negotiations.</li> <li>Once adversarial proceedings are on the horizon, check with your lawyers whether communications with the counterparty are appropriate and, if so, what form they should take. Unless you have checked with your lawyers, such communications should be avoided.</li> </ul> <p>TIP: There is no such thing as an "off the record" conversation in litigation. Only conversations that are agreed to be "without prejudice" are protected from disclosure.</p>