

## Legal professional privilege when working in-house

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Updated 20 November 2024 (Date first published: 18 November 2024)

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### Status

This guidance does not set out any new regulatory standards or requirements beyond those in our current Standards and Regulations. We will have regard to it when exercising our regulatory functions.

### Who is this guidance for?

This guidance is for in-house solicitors, Registered European Lawyers and Registered Foreign Lawyers that we regulate. Where we use the term solicitors in this document this includes Registered European Lawyers and Registered Foreign Lawyers.

### Purpose of this guidance

This guidance is to help you understand the key issues that in-house solicitors face when considering legal professional privilege (privilege) and how you can navigate them. This guidance does not provide a full examination of the law of privilege however, it is intended as a starting point to explore specific questions relevant to solicitors when working in house.

Legal advice given by in-house solicitors will attract privilege in the same way as any other solicitor. [Case law has shown](https://caselaw.nationalarchives.gov.uk/ewca/civ/2020/35?query=Balabel) [<https://caselaw.nationalarchives.gov.uk/ewca/civ/2020/35?query=Balabel>] that the scope of privilege in the in-house context is more complex than in private practice. You will need to pay particular attention to:

- identifying the client in relation to any given instructions
- understanding what communications attract privilege, particularly when your role and any given communications can mix both legal and non-legal elements
- when privilege can be lost or in fact never existed.

Finally, we set out steps you can take when you want to report wrongdoing within your client and/or it is seeking to withhold material that is not privileged.

### The purpose of legal professional privilege

Legal professional privilege is a fundamental legal right which, when properly applied, allows a party to withhold disclosure of certain communications and documents. It flows from the established relationship of trust that exists between a client and their lawyer. Clients must be able to speak openly with their lawyer in order that they can receive the best advice and do so knowing that those communications, in specific contexts (described further below), will not be disclosed without their consent. It is important to note that not all communications and documents will be privileged.

### Confidentiality as a precondition of privilege

Communications and documents must be confidential for privilege to be engaged. However, if a document or communication has been disclosed and the disclosure was not on confidential terms, then both confidentiality and privilege will be lost (see below).

### Types of privilege

Privilege has two distinct limbs (i) litigation privilege and (ii) legal advice privilege.

Litigation privilege covers confidential communications between the client, their lawyer and third parties for the purpose of pursuing or defending actual or proposed litigation. It is well established that:

- the litigation must be in progress or reasonably in contemplation. The question of whether litigation is reasonably in contemplation will be fact specific and the court will look at the facts as a whole.
- the communications must be made with the sole or dominant (main) purpose of pursuing/defending litigation or collecting evidence for use in the litigation. Where a document is not created for a sole purpose (that is because it deals with a mix of issues), then careful consideration must be given to each of the reasons for its creation to decide if there is one dominant purpose.
- the litigation must be adversarial, not investigative or inquisitorial.



You do not need a lawyer to be involved for litigation privilege to apply; the communications can be between a client and a third party. It is the litigation itself that triggers the privilege, not the involvement of a lawyer.

## Legal advice privilege

Legal advice privilege (LAP) covers confidential communications between a client and lawyer, made for the dominant (main) purpose of giving or receiving legal advice.

This limb of privilege will apply in circumstances where no litigation is in progress or contemplated at the time the communications or documents are created.

Identifying when LAP is engaged will usually be straightforward for external legal advisers and this may be the basis on which your client understands privilege. However, given the varied roles that an in-house lawyer might fulfil, and the way in which we communicate in business and within client organisations (for instance multi-addressee emails), identifying if LAP applies when you are an in-house solicitor can be a complex question.

Whether the dominant purpose of the document or communication is the giving or receiving of legal advice will be fact specific. Case law tells us that:

- the communication must be made 'in a legal context' but otherwise 'legal advice' is widely defined. Legal advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under [public law](https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.html) [https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.html]. It is wider than telling the client about the law – it can include what should prudently and sensibly be done in the relevant legal context.
- Once a legal context is established, LAP applies, not only to communications which expressly seek or give legal advice but also to the 'continuum of communications' between a lawyer and client aimed at keeping both informed so that advice may be sought and given as required. In practice, this would include continuing discussions which might not be prefaced by a formal request for legal advice, as it will usually be implied in the relationship that the lawyer will at each stage (whether or not explicitly asked) provide [appropriate advice](https://caselaw.nationalarchives.gov.uk/ewca/civ/2020/35?query=Balabel). [https://caselaw.nationalarchives.gov.uk/ewca/civ/2020/35?query=Balabel]
- the court will examine documents and communications individually – therefore you must not take a 'broadbrush' approach to considering if privilege applies. For example, it has been held that it is not possible to claim LAP for pre-existing documents merely because they are attached to emails sent between lawyer and client for the purpose of legal advice – each document would need to be assessed individually (Financial Reporting Council Ltd v Sports Direct International plc [2018] EWHC 2284 ch). Where group emails are sent, the fact that an in-house lawyer is on the distribution list is not sufficient to assert privilege across the entirety of the email exchanges. While your response as an in-house solicitor may be privileged, each individual exchange must be considered separately. For example, exchanges between board members about a potential settlement where there is no connection to legal advice from you, will not be privileged, even if you are copied in to see.
- LAP will not usually apply where the communications are for non-legal purposes such as pure strategic or commercial advice. For example, where you are involved in a conversation about the commerciality of a deal you will want to consider if your involvement falls into the category of a lawyer acting in the course of their professional duties and providing legal advice. The analogy from *Jet2* was to consider whether the lawyer was being asked 'to put on legal spectacles' when reading, considering and commenting on material.
- LAP applies not only to the document from the lawyer containing the advice and the client's own written record of advice but in some circumstances it will also apply to communications passing on, considering or applying that advice internally. For example, sharing the privileged advice with a company's board of directors, or with employees if they need the advice for the purpose of their work. However, this will not always apply. For example, privilege may not attract to board minutes which document discussion regarding legal advice. And caution should be taken when sharing the advice outside of the client group to avoid loss of confidentiality and therefore privilege, or inadvertent waiver of privilege (see further below).
- Information collected by a client from third parties for the purpose of instructing lawyers is not covered by LAP.

Understanding when LAP arises is particularly important in the in-house context. This only relates to communications between the client and the lawyer (see above). In the in-house context this is limited to your colleagues who are authorised to request and receive legal advice on the client's behalf. We refer to them as the client group – importantly they are not the client (see above).

In order to assist you in identifying your client group to determine if privilege attaches to your communications you might wish to consider:

- putting in place a system to record (and keep updated) who is generally authorised to obtain and receive legal advice on matters within your organisation



- developing a legal advice request form that asks the requestor to confirm that they are authorised to instruct you and seek legal advice
- putting in place special arrangements for specific matters (such as during internal investigations) to designate who is specifically authorised to obtain and receive legal advice.

There will be occasions where you as the in-house lawyer seek and receive advice from external lawyers. In this case you should consider.

- who is the external lawyer's client for that instruction and what role you are playing in the matter. Where relevant you should document that you have authorisation from the client to seek and obtain legal advice.
- whether any information gathering exercise you are undertaking is captured by litigation privilege. If your role is that of client, then it will be – but you should not assume that this is the case.

## **The 'iniquity exception'**

There may be circumstances where an in-house solicitor believes they are being used by their client, or a third party to perpetrate a crime or a fraud, and, by analogy, any other misconduct akin to fraud. This is known as the 'iniquity exception' to privilege. It is also possible that the client will be used (unwittingly) by a third party as an instrument of fraud and that too will come within the iniquity exception: knowledge of the iniquity, or active participation in it, are not required for the exception to be invoked.

No duty of confidence will exist in these circumstances. This prevents such a communication from attracting legal professional privilege

The iniquity exception to privilege is subject to case law and where you consider that this may apply you may wish to consider seeking legal advice.

## **The client**

Privilege belongs to the 'client'. It is the client who can assert privilege and in turn waive privilege. See our [separate guidance for in-house solicitors on identifying your client when working in-house](https://consultations.sra.org.uk/solicitors/guidance/identifying-client-working-in-house-guidance/) [<https://consultations.sra.org.uk/solicitors/guidance/identifying-client-working-in-house-guidance/>].

## **Waiving and losing privilege**

Privilege can be waived or lost. This might be if the document or communication is provided to a third party deliberately or in error or if your client/you act in a way that undermines its confidential nature. For example, you will want to remind colleagues that referring to extracts or summaries of legal advice in emails, minutes of meetings or other forms of communication might mean that they are inadvertently waiving privilege.

It is important that there are strict controls around sharing privileged material – this is especially important for those working in large organisations. You will want to consider how to store privileged documents to reduce the risk of disclosure in error. Consider the use of passwords to protect confidentiality, separate files and folders, and avoid widespread email distribution of information. Careful and separate consideration must be given to attachments to emails.

Sharing of privileged material beyond the client can be an issue in corporate groups or when material is shared with third parties.

However, you can, in tightly controlled circumstances, share privileged documents with third parties without waiving privilege. If privileged documents need to be shared, for example between parent and subsidiary or with other members of a multi-disciplinary team such as on a corporate transaction, consider whether common interest waiver or limited waiver can be used.

For the former, you should consider what the common interest is, document it and then consider sharing the relevant documents. Case law tells us that relationships where common interest privilege applies include (i) co-defendants, (ii) insured and insurer (iii) companies in the same group. Where this applies, both parties would have to agree to waive any subsequent privilege asserted over the relevant document as against the other party with whom the document was shared on a common interest privilege basis.

Limited waiver is where a privileged document is shared on a confidential basis with a third party for a limited and specific purpose. The basis of and limitations sought should be documented.

As is the case with all the issues raised when considering privilege, you should carefully consider issues at the time, rather than retrospectively. While the court will always look at facts in the round, a file note of your contemporaneous intention can be used to support your case should there be any challenge.

## Labelling

Labels can be useful in order to clearly indicate when a document contains privileged advice, and help to avoid inadvertent disclosure/waiver. Labels should also be added to identify that the information is confidential.

However, you must take care not to use labels improperly and to avoid being misleading. Labelling a document privileged doesn't make it so if the necessary features that attract privilege (above) are not present; and documents cannot simply be labelled as 'privileged' in order to prevent disclosure. You should resist any pressure from your client to use the label of privilege to avoid disclosing documents or communications.

## Privilege and investigations

If your client is the subject of an investigation (either internal or external), the issue of privilege may be relevant.

Whether LAP applies where in-house solicitors are instructed to conduct an internal investigation will be fact specific. One of the factors that the court took into consideration in [Al Sadeq](https://caselaw.nationalarchives.gov.uk/ewca/civ/2024/28?query=Al+Sadeq+Dechert+%5B2024%5D+EWCA+Civ+28) [<https://caselaw.nationalarchives.gov.uk/ewca/civ/2024/28?query=Al+Sadeq+Dechert+%5B2024%5D+EWCA+Civ+28>], was that the lawyers involved were engaged to bring their lawyers' skills to the investigatory process and conduct it through lawyers' eyes. This was the case even though some of the work might have been able to be carried out by a non-lawyer. Where a document is created during the investigation but does not have a legal purpose (for instance for PR purposes) it will not be privileged.

As noted above, where legal advice privilege applies, this will only attach to communications between in-house lawyers and their client.

Documents produced during an internal investigation may be protected by litigation privilege where those documents are prepared for the sole or dominant purpose of adversarial litigation. Again, this will be specific to the circumstances before you; for example in [ENRC](https://caselaw.nationalarchives.gov.uk/ewca/civ/2018/2006?query=The+Director+Serious+Fraud+Office+v+Eurasian+Natural+Resources+Corporation+Ltd+%5B2018%5D+EWCA+Civ+2006) [<https://caselaw.nationalarchives.gov.uk/ewca/civ/2018/2006?query=The+Director+Serious+Fraud+Office+v+Eurasian+Natural+Resources+Corporation+Ltd+%5B2018%5D+EWCA+Civ+2006>] the Court of Appeal found that even though the Serious Fraud Office (SFO) had not commenced a formal investigation, on the facts before it, criminal proceedings were reasonably contemplated for litigation privilege purposes. The SFO had made clear to ENRC the prospect of a criminal prosecution and their legal advisers were engaged in that context. The court noted that legal advice given in order to avoid or settle proceedings was as much protected by litigation privilege as advice given for the purpose of resisting or defending them.

You may also find that there are parallel external investigations conducted by law enforcement agencies and/or regulators that need to be navigated.

Find out further [information and guidance on conducting internal investigations](https://consultations.sra.org.uk/solicitors/guidance/internal-investigations/) [<https://consultations.sra.org.uk/solicitors/guidance/internal-investigations/>].

## Reporting wrongdoing

All those we regulate have a duty to report serious concerns regarding the conduct or behaviour of solicitors and authorised firms to us. There might also be occasions where in-house solicitors have concerns about wrongdoing carried out by their client or others outside the scope of our regulation. We strongly support and encourage public interest disclosures and expect the profession to do the same. If you are making a report to us, then we will treat information provided to us sensitively and will always discuss with you any needs or concerns that you may have.

We recognise that making disclosures of this type can be difficult. We have separate guidance on the issue of reporting concerns, to help you in deciding what action to take.

Additionally, there may be questions around privilege to consider.

## Whistleblowing

In-house solicitors will need to be mindful that the protections afforded by the Public Interest Disclosure Act 1998 (PIDA) may not apply if the information you wish to disclose would attract privilege. Section 43B(4) of the Employment Rights Act exempts disclosures made in the course of obtaining legal advice from whistleblower protections.

Generally internal whistleblowing does not breach privilege. If your organisation has an internal whistleblowing reporting line, it is likely that in doing so it will have consented to disclosures of this

nature. You should review any guidance or policy document in relation to the reporting line to be clear about the status of any report you may want to make.

If you whistleblow and your employer makes a referral to us for breach of confidentiality/privilege, we will consider your intention as part of our wider consideration of the circumstances of the case. You should therefore keep a detailed record of your actions so you can justify your decisions.

### **Statutory duty to report**

All solicitors, including in-house solicitors, should be aware of their statutory duties to report, noting where communications will be subject to privilege. For example, to report to the National Crime Agency (NCA) if they suspect or know of money laundering or terrorist financing.

If as an in-house lawyer your employer has a Money Laundering Reporting Officer (MLRO), then an internal suspicious activity report (SAR) would be the appropriate action. The MLRO can then consider the report and submit a SAR to the NCA if appropriate. In these circumstances, again, generally reporting internally in accordance with your organisations policies and procedures will not breach privilege.

However, if your organisation does not have an MLRO you will need to consider submitting a SAR yourself, and it is important that privilege is taken into account in considering the information you are able to provide.

See further [AML guidance \[https://consultations.sra.org.uk/sra/news/sra-update-114-lsag-guidance/\]](https://consultations.sra.org.uk/sra/news/sra-update-114-lsag-guidance/).

### **How to make appropriate disclosures**

There may be circumstances where an in-house solicitor will need to consider carefully whether they must share information or whether they should report wrongdoing and therefore disclose information which may be the subject of privilege.

It is important to explain to your client at the outset what constitutes privileged information. You may also want to explain the situations where you might be under an obligation to report matters externally, where privilege might be overridden, and that you may wish to seek independent advice in some circumstances. Having an early conversation with your client is beneficial to ensure clarity and mutual understanding in advance of an issue arising.

If you are in doubt about whether information is privileged and to whom it can be shared you should seek advice. You may also want to discuss with your client whether you are entitled to use information, including privileged information, to seek that advice.

Where your client has agreed to this, this will support your conversation with a lawyer. However, we recognise that in some situations difficult judgment calls may need to be made. Where your client does not permit you to use privileged information when seeking advice, you will still be able to seek advice, but you may not be able to share all relevant information. Sources of confidential support and advice are set out in the section headed Further Advice and Support (below).

### **Pressure to withhold information**

We have seen examples where the label of privilege has been used to wrongly suppress the disclosure of information, where the information can and should properly be disclosed. And where privilege has wrongly been asserted solely on the basis that lawyers have been copied into correspondence.

This could be because of pressure brought to bear on in-house solicitors by their client, or due to complacency or even deliberate misconduct by the in-house solicitor. This type of behaviour damages the trust and confidence that the public has in the legal profession.

Solicitors should not withhold information in these circumstances notwithstanding instructions from their client or that this might be in their own interests. Our Principles make clear that solicitors must act with independence and integrity. Solicitors are also officers of the court: They must not mislead the courts or others by their own acts or omissions or by being complicit in those of others, and must uphold the rule of law. These and other principles which safeguard the wider public interest take precedence over an individual client's interests.

In circumstances where colleagues/senior staff/board members are seeking to suppress disclosure of communications/ documentation by wrongly claiming they are privileged: In the first instance you should aim to have a constructive dialogue where you can:

- explain the appropriate approach. This includes explaining that whether privilege applies to a document or communication will depend on the facts and is a question of law. It is not determined



by what the client wants.

- Explain your regulatory obligations.
- Follow this up in written advice to your client.
- Document your actions.

If this approach is not successful, you will need to resist being pressured or persuaded to act contrary to your regulatory obligations. You should consider reporting the conduct or behaviours you have experienced.

See our guidance on reporting client wrongdoing for in-house solicitors, and our guidance on your obligations to report to us.

## Dual reporting

We work with and share information with other agencies. In circumstances where you make a disclosure to certain agencies, for instance when submitting a suspicious activity report to the NCA, they will share information with us. However, if in doubt, you should err on the side of making a report to us.

## Further advice and support

You can speak, on a confidential basis, to:

**Protect** (<https://protect-advice.org.uk/>), the UK's whistleblowing charity has detailed information on whistleblowing as a solicitor. They also run a free and confidential advice line.

Us - If you require assistance, please contact the **Professional Ethics helpline** (<https://consultations.sra.org.uk/contact-us/>). We can provide advice on what information may be provided to us and our powers to receive and consider confidential and privileged information. You can choose to remain anonymous.

Consider sharing with us as much information as possible that does not meet the threshold for privilege, and we can discuss with you what further we may need. We will consider whether to serve a production notice which allows us to obtain information that is privileged and use them for our regulatory purposes. If it is necessary to refer to this in a case that is being dealt with in public, part of the hearing can be in private and clients' identities can be protected by using initials instead of names.

**LawCare** (<http://www.lawcare.org.uk/>) - LawCare provides free, confidential emotional support to anyone working in the law.

**Solicitors' Assistance Scheme** (<http://www.thesas.org.uk/>) - The Solicitors' Assistance Scheme offers free confidential help, advice and guidance to solicitors with a professional or personal problem, from a fellow practitioner.

Further details of these and other sources of support are available at: **The Law Society** (<https://www.lawsociety.org.uk/contact-or-visit-us/helplines/other-support-services/>)

## Related guidance

We have produced a suite of guidance to support in-house solicitors which you may find it useful to read, relating to:

- **Guidance on SAR reporting (PDF 30 pages, 1.2MB)** (<https://www.nationalcrimeagency.gov.uk/who-we-are/publications/650-guidance-on-submitting-better-quality-suspicious-activity-reports-sars-v9-0/file>)
- **Identifying your client when working in-house** (<https://consultations.sra.org.uk/solicitors/guidance/identifying-client-working-in-house-guidance/>)
- **Internal investigations** (<https://consultations.sra.org.uk/solicitors/guidance/internal-investigations/>)
- **Key points for governing boards, chief executives and senior officers in organisations employing in-house solicitors** (<https://consultations.sra.org.uk/solicitors/guidance/governing-boards-chief-executives-senior-officers/>)
- **Law Society Guidance on LPP** (<https://www.lawsociety.org.uk/topics/client-care/legal-professional-privilege>)
- **Proceeds of crime** (<https://consultations.sra.org.uk/solicitors/guidance/proceeds-crime-guidance/>)
- **Reporting concerns about wrongdoing when working in-house** (<https://consultations.sra.org.uk/solicitors/guidance/reporting-concerns-wrong-doing-working-in-house-guidance/>)
- **Understanding in-house solicitors professional obligations employer** (<https://consultations.sra.org.uk/solicitors/guidance/understanding-in-house-solicitors-professional-obligations-employer/>)