Global Attorney-Client Privilege Guide - England and Wales

02 - Type of privilege

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# Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Yes. The concept of legal professional privilege is "a fundamental human right, long established in the common law,"[**[1]**](https://resourcehub.bakermckenzie.com/en#UK2_ftn1) "fundamental to the administration of justice"[**[2]**](https://resourcehub.bakermckenzie.com/en#UK2_ftn2) and "jealously guarded by the common law."[**[3]**](https://resourcehub.bakermckenzie.com/en#UK2_ftn3) Legal professional privilege over documents can be waived by the person entitled to it and can be overridden by statute, but it is otherwise absolute unless the document concerned was prepared for, or in connection with, an iniquitous purpose (e.g., in the furtherance of fraud or a crime).

If a document is covered by legal professional privilege, it entitles the party claiming privilege to withhold production from those seeking to inspect it. That is so even where the party seeking inspection is a governmental or regulatory body. If the assertion of legal professional privilege is challenged, the onus is on the party claiming privilege to establish it.

When assessing whether a claim to legal professional privilege exists in respect of specific documents, it should be noted that an email and attachment are not treated as "one communication." Following the Court of Appeal in *Sports Direct International Plc v. The Financial Reporting Council* [2020] EWCA Civ 177, an email and its attachment need to be considered separately for the purposes of privilege. It is quite possible for a legally privileged email to attach a non-privileged attachment. Merely attaching a document to a legally privileged email does not automatically make the document privileged.

**The different types of legal professional privilege**

**Legal advice privilege** covers confidential communications between lawyers (acting in their professional capacity) and clients for the dominant purpose of giving or obtaining legal advice.[**[4]**](https://resourcehub.bakermckenzie.com/en#UK2_ftn4) It does not matter whether the advice sought relates to contentious or non-contentious matters, though if the communication focuses on commercial (as opposed to legal) matters that is unlikely to satisfy the dominant purpose requirement. Legal advice privilege attaches to all material forming part of the continuum of lawyer/client communications even if those documents do not expressly seek or convey legal advice provided that they are part of a necessary exchange of information of which the object is the giving of legal advice as and when appropriate.

**Litigation privilege** covers confidential communications between clients and their lawyers, or between either of them and a third party for the purpose of obtaining information or advice in connection with existing or reasonably contemplated litigation, provided that the following conditions are satisfied:

Litigation is in progress or reasonably in contemplation

Such communications are made with the sole or dominant purpose of conducting that litigation

The litigation must be adversarial, not investigative or inquisitorial

Reasonably in contemplation or prospect does not mean that the prospect of litigation has to be greater than 50% — but it must be more than a mere possibility. Where a litigation hold notice is sent, this is likely to be good, but not conclusive, evidence that litigation is in reasonable prospect

Litigation privilege can extend to documents that are concerned with settling litigation, however, purely commercial discussions regarding settlement will not be privileged. In *WH Holdings Ltd v. E20 Stadium LLP* [2018] EWCA Civ 2652, litigation privilege was claimed over emails passing between company board members (and between board members and stakeholders) on the ground that the emails were created for the dominant purpose of discussing a commercial settlement of a dispute when litigation was in contemplation. The Court of Appeal held that a claim in those terms does not fall within the scope of litigation privilege, on the basis that litigation privilege does not extend to purely commercial discussions.

The *Three Rivers* cases (*Nos. 5* and *6*) remain the principal authorities on legal advice privilege and litigation privilege respectively.[**[5]**](https://resourcehub.bakermckenzie.com/en#UK2_ftn5)

In a judgment relating to *The RBS Rights Issue Litigation* and concerning privilege, Mr Justice Hildyard explained the different types of legal professional privilege as follows:

"Put shortly, litigation privilege protects the assembly and content of evidence for the purpose of the litigation and thus focuses on the purpose for which the documentation has been obtained or assembled; whereas legal advice privilege applies only to the confidential communications between a party and his legal advisers for the purposes of enabling that party to obtain informed and professional legal advice, and thus is confined to confidential communications within that relationship and for the purpose of its fulfilment."

**Who is the client?**

The *Three Rivers (No. 5)* case confirmed that legal advice privilege only applies to communications between a client and its legal advisers, to documents evidencing such communications and to documents that were intended to be such communications even if not in fact communicated. The court found that legal advice privilege does not extend to documents obtained from third parties to be shown to a solicitor for advice. The court further rejected the notion that communication from employees are different and stated that information gathered from an employee stands in the same position as information from an independent agent even if the information is collected by or in order to be shown to a solicitor to enable fully formed advice to be given to the client corporate entity. The judgment concluded that legal advice privilege attaches only to communications between the lawyer and those individuals who are authorized to obtain legal advice on that entity's behalf.

The decision in *Three Rivers (No. 5)* has been the subject of criticism and debate, principally concerning the fact that the decision provides a narrow view of legal advice privilege which means that communications between an employee of a corporation and the corporation's lawyers are not privileged unless that employee was authorized to seek and receive such advice on behalf of the corporation. This is likely in practice to be senior employees, and not necessarily those with the relevant factual knowledge relating to the issue in question upon which advice is to be sought. In *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006, the Court of Appeal was clear that if the ambit of *Three Rivers (No. 5)* is to be decided differently, then that decision will need to come from the Supreme Court. Notwithstanding this, the court went on to express the view that there was much force in the arguments put before it that the decision in *Three Rivers (No. 5)* was wrong and that if it had been open to them to depart from that decision, they would have been in favor of doing so. One of the observations of the Court of Appeal was that the decision in *Three Rivers (No. 5)*, as interpreted by the English courts, puts English law at odds with the international common law on the question of communications with employees. For example, in Hong Kong, where the "client" is a corporation, the corporation is the "client" for the purpose of legal professional privilege and its general employees (including in-house counsel) can be regarded as being authorized to act for the corporation in the process of obtaining legal advice or in connection with actual, pending or contemplated litigation.

In a more recent judgment, the Court of Appeal again indicated that it would be disinclined to follow the *Three Rivers (No. 5)* judgment on this point, had it been in its power to do so.[**[6]**](https://resourcehub.bakermckenzie.com/en#UK2_ftn6) However, until such time as the Supreme Court has an opportunity to reconsider legal advice privilege and the decision in *Three Rivers (No. 5)*, "the client," for the purposes of legal advice privilege, are those individuals who are authorized to communicate with their legal advisers for the purpose of seeking and obtaining legal advice. Merely being authorized to communicate facts to a lawyer does not mean that individual is part of the confidential client/lawyer relationship for the purposes of legal advice privilege.

As is clear from the discussion above, the question of "who is the client" for the purposes of legal advice privilege is very different to the question of "who is the client" in terms of the entity to which a law firm owes professional duties. It may be helpful in practice to define who falls within "the client" and establish clear lines of communications with those individuals at the outset, though the "client" team can change over time.

[[1]](https://resourcehub.bakermckenzie.com/en#UK2_ftn1a) Often quoted Lord Hoffman comments in *R (Morgan Grenfell Ltd.) v. Special Commissioner for Income Tax* [2003] 1 A.C. 563 (paragraph 7).

[[2]](https://resourcehub.bakermckenzie.com/en#UK2_ftn2a) Lady Justice Gloster at paragraph 39, *Dechert LLP v. Eurasian Natural Resources Corporation Limited* [2016] EWCA Civ 375.

[[3]](https://resourcehub.bakermckenzie.com/en#UK2_ftn3a) Mr Justice Burnett at paragraph 31, *R (on the application of Colin McKenzie) v. Director of the Serious Fraud Office* [2016] EWHC 102 (Admin).

[[4]](https://resourcehub.bakermckenzie.com/en#UK2_ftn4a) *Civil Aviation Authority v. R Jet2.com Ltd* [2020] EWCA Civ 35

[[5]](https://resourcehub.bakermckenzie.com/en#UK2_ftn5a) *Three Rivers District Council and Ors v. Governor and Bank of England (No. 5)* [2003] QB 1556 and *Three Rivers District Council v. Governor and Company of the Bank of England (No. 6)* [2005] 1 AC 610.

[[6]](https://resourcehub.bakermckenzie.com/en#UK2_ftn6a) *Civil Aviation Authority v. R Jet2.com Ltd* [2020] EWCA Civ 35 at paragraph 57

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