
REPUBLIC OF IRELAND

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1. DEFINITION - PRESENTATION

- 1.1 Legal professional privilege denotes the privilege that attaches to communications between a lawyer and a client, where these contain confidential information supplied by a client to his legal adviser, or legal advice supplied by the lawyer to the client. The fundamental principle of legal professional privilege is that certain communications between a client and their lawyer are privileged and immune from disclosure, even where such disclosure is sought as part of court or regulatory proceedings.
- 1.2 Legal professional privilege incorporates two categories of privilege known as 'legal advice privilege' and 'litigation privilege'.
- 1.3 Legal advice privilege protects from production confidential communications between a lawyer and a client, which were created for the sole or dominant purpose of giving or seeking legal advice, whether or not proceedings are contemplated or in being. Legal advice privilege only protects communications seeking or giving legal advice as distinct from legal assistance. In practice this is a difficult distinction to maintain and the precise boundaries of what constitutes legal advice are difficult to delineate.
- 1.4 However, case law has illuminated the criteria which can assist in determining whether a communication is legal advice or legal assistance.¹ It has been established that in order to attract legal advice privilege, it is not sufficient that a document merely advises what the law is. It must "*include advice as to what should prudently and sensibly be done in the relevant legal context*".² It has also been held that legal advice privilege should only extend to communications which were "*closely and proximately linked to the conduct of litigation and the function of administering justice in the courts*".³
- 1.5 Litigation privilege protects from production confidential communications between a lawyer and his client/an expert third party made in contemplation of litigation/adversarial proceedings or after litigation/adversarial proceedings have been commenced. It has a broader application than legal advice privilege as it applies to communications with expert third parties and applies to all documents created for the purpose of the litigation.
- 1.6 The party seeking to assert legal advice privilege or litigation privilege must establish that the dominant purpose of the creation of the documents was, for the purposes of legal advice privilege, the giving/receiving of legal advice, or, in the case of litigation privilege, the litigation itself. It is not sufficient if litigation was one of a number of reasons for the document coming into existence but is not the dominant purpose.⁴
- 1.7 Legal professional privilege is a privilege of the client, who can always waive it. It does not attach to members of the legal profession.

¹ *Ochre Ridge Limited v Cork Bonded Warehouses Limited and Port of Cork Company Limited* Unreported, High Court, Lavan J. 13th July 2004), where Lavan J. sets out twelve criteria which can assist in determining whether a relevant communication can be said to be made in the context of legal advice on the one hand or legal assistance on the other.

² *Mc Mullen – v- Kennedy* [2007] IEHC 263 (Murphy J citing the case of *Balabel .v. Aer India* [1988] Ch. 317 with approval)

³ Finlay C.J in *Smurfit Paribas Bank Ltd v. AAB Export Finance Ltd* [1990] 1 I.R. 469, at 478

⁴ *Gallagher –v – Stanley* [1988] 2. I.R. 267; *Hansfield Developments – v- Irish Asphalt* [2009] IEHC 90

2. **SOURCES**

- 2.1 In Ireland, legal professional privilege is a common law principle stated by the courts in their decisions as a fundamental feature of the administration of justice and rule of law. The scope and applicability of privilege has been developed over the years in the decisions of the Irish courts. Decisions of other common law jurisdictions, especially England, are of persuasive value and are often considered by the Irish courts. There is no statutory framework.
- 2.2 Legal professional privilege is protected by Article 8 of the European Convention of Human Rights which was incorporated into Irish law by The European Convention of Human Rights Act, 2003.

3. **SCOPE/LIMITS**

3.1 **General Observations**

Legal professional privilege is not absolute and remains subject to limited exceptions.

3.1.1 **Waiver**

Legal professional privilege belongs to the client and may be waived either expressly or impliedly by conduct.⁵ The mere fact that a document has been disclosed to a third party does not in itself automatically result in a waiver of legal professional privilege and depends on the circumstances. Intention, purpose, breadth of disclosure and the relationship between client and recipient are all factors to be considered when waiver is an issue.⁶ The ultimate question is whether it is reasonable in the circumstances to conclude there was an implied waiver of the privilege.⁷

Privilege will not be lost where there is a limited disclosure to parties with a common interest (addressed at 3.2.2 below).⁸

3.1.2 **Inadvertent Disclosure**

Privilege may be lost if a document is mistakenly disclosed. There are exceptions but the general rule is that privilege will be waived if the document is referred to on affidavit or has been inspected by a third party.⁹

⁵ *Fyffes plc v DCC plc* [2005] 1 I.R. 5.

⁶ *Hansfield Developments and Ors v Irish Asphalt Limited and Ors* [2009] IEHC 420

⁷ *Hansfield Developments and Ors v Irish Asphalt Limited and Ors* [2009] IEHC 420

⁸ *Redfern Limited v O'Mahony* [2009] IESC 18

⁹ *Hannigan v DPP* [2001] 1 I.R. 378

3.1.3 **Fraud**

Advice sought for the purposes of effecting fraud is not privileged. This principle is founded on public policy. Consequently, a claim to legal professional privilege will be lost where there has been conduct containing “*an element of fraud, dishonesty or moral turpitude*”.¹⁰

3.2 **Communications between lawyers**

- 3.2.1 There is no general rule that communications between lawyers automatically benefit from legal professional privilege.
- 3.2.2 Communications between lawyers acting for parties with sufficiently close interests, where there is a common interest in the advice or litigation, can benefit from “common interest privilege”. This is not a separate category of privilege to litigation privilege and legal advice privilege and is best understood as preserving legal professional privilege where the receiver of the document has a sufficiently close interest in the subject matter of the legal advice or litigation concerned.¹¹ In order to claim this type of privilege it is first necessary to establish that the documents in question would attract either legal advice privilege or litigation privilege, in the hands of the client.
- 3.2.3 Settlement negotiations are generally protected by the “without prejudice” rule. This provides that written or oral communications, marked “without prejudice” or made verbally on a “without prejudice” basis, made for the purpose of a genuine attempt to compromise a dispute between the parties, may generally not be admitted in evidence. In order to rely on “without prejudice” privilege it must be shown that the dispute existed at the time of the communication and that either legal proceedings had commenced or that the communication was in contemplation of litigation.

3.3 **Third Parties**

- 3.3.1 As outlined at 3.2.2 above, third parties can rely on legal professional privilege in a communication if he has a common interest in the subject of the privilege. The parties must be sufficiently closely related that the disclosure does not amount to an implied waiver.¹²
- 3.3.2 Legal advice privilege does not cover communication between a lawyer or his client and a third party.
- 3.3.3 Communications between a lawyer and his client and/or an expert third party, or between a client and an expert third party are protected by litigation privilege if made in contemplation of litigation/adversarial proceedings or after litigation/adversarial proceedings have been commenced. This includes communications with witnesses or experts.

¹⁰ *Murphy v Kirwan* [1993] 3 I.R. 501; *Bula Limited v Crowley* (No. 2) [1994] 2 I.R. 54

¹¹ *Hansfield Developments v Irish Asphalt* [2009] IEHC 420

¹² *Hansfield Developments v Irish Asphalt* [2009] IEHC 420

4. In-house Lawyers

- 4.1 Save for one exception, the position of in-house lawyers in Ireland with regard to privilege is the same as that of external lawyers. The notable exception to the general principle is that all advice given by in-house lawyers to their employers will be discloseable in an EU Commission Competition Investigation as such advice will not be protected by privilege.¹³
- 4.2 In-house lawyers need to be cognisant of the *Three Rivers*¹⁴ decision in England which narrowed the scope of the term “client” for the purpose of invoking legal professional privilege. It established that not all employees within an organisation are “clients” for the purpose of legal advice privilege; only those, for example, who have been tasked with procuring legal advice. The consequence of this decision is that advice may lose privilege if distributed beyond those who sought the advice. Although the Irish courts have not had an opportunity to consider this decision, in-house lawyers should consider who the “client” is within the organisation.

5. Prospective

- 5.1 *“Legal professional privilege is more than a mere rule of evidence. It is a fundamental notion on which the administration of justice as a whole rests”.*¹⁵
- 5.2 Legal professional privilege is well recognised in the Irish courts and a high degree of protection is afforded to it. However, despite recent case law, there remains a difficulty in defining the boundary between legal advice and legal assistance. A difficulty in maintaining the distinction is the fact that the provision of legal assistance may entail the provision of legal advice because a lawyer’s duty of care extends beyond the scope of instructions and requires him to consider the legal implications of the facts. The criteria that are relevant in any particular circumstances will vary significantly depending on the facts of the case and on the nature of the contact between the client and the solicitor concerned. A definitive ruling by the Irish Courts would be welcomed.

¹³ *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission of the European Communities* (Case C-550/07 P)

¹⁴ *Three Rivers District Council and Others v Governor & Company of the Bank of England* [2003] EWCA Civ 474

¹⁵ Kelly J – *Miley v Flood* [2001] 2. I.R. 50