



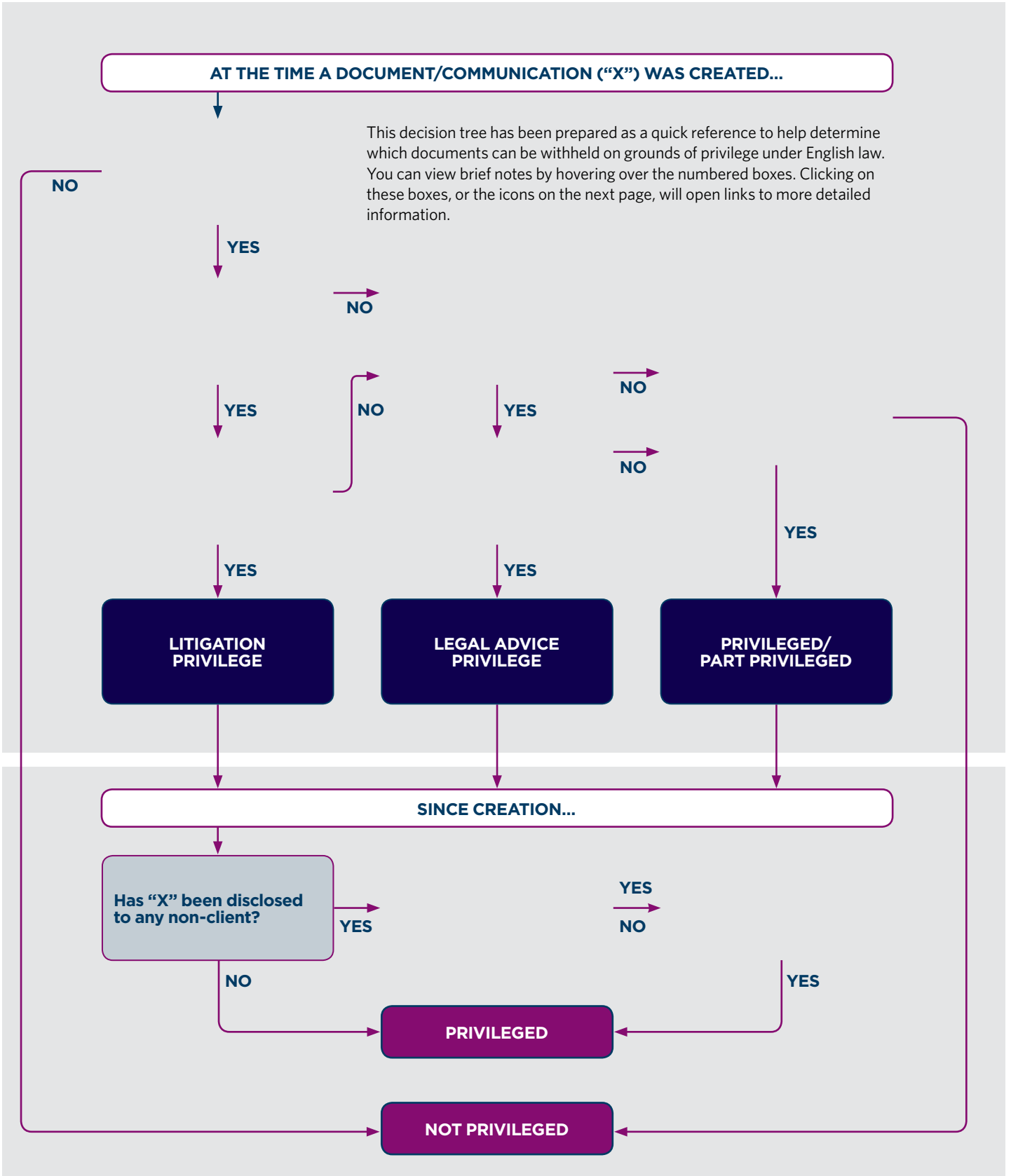
HERBERT  
SMITH  
FREEHILLS



# HANDY CLIENT GUIDE TO PRIVILEGE

**UPDATED**  
JUNE 2017

# LEGAL PROFESSIONAL PRIVILEGE: A DECISION TREE



# DECISION TREE NOTES

## 🔗 Links to more detailed information

- 1 **Confidentiality:** Every privileged communication must be confidential, but not every confidential communication will be privileged.
- 2 **Litigation in reasonable prospect:** Litigation means “adversarial” proceedings. The chance of litigation need not be greater than 50%, but it must be more than a mere possibility. Litigation can be subject to contingencies, so long as there is sufficient prospect of those contingencies occurring.
- 3 **Dominant purpose of litigation:** The document must have been created with the dominant purpose of obtaining advice or evidence in relation to the contemplated litigation. If there is a dual purpose, and it cannot be established that the litigation purpose was dominant, litigation privilege will not apply. In *SFO v Eurasian Natural Resources Corporation Ltd* (ENRC) [2017] EWHC 1017 (QB) the High Court took a very strict approach, finding that even if litigation was in reasonable contemplation, documents prepared to investigate the truth of allegations made by a whistleblower and decide on next steps were not prepared for the dominant purpose of that litigation. The case also contains a surprising suggestion that documents prepared for the dominant purpose of *avoiding* contemplated litigation are not privileged (though the court accepted that advice given in connection with the conduct of litigation may include advice relating to settlement of that litigation once it is in train).
- 4 **Lawyer/client communication:** This raises a number of issues.
  - (a) **Who is a lawyer?** A solicitor or barrister or qualified foreign lawyer. Under English law (but not EU law) in-house lawyers are also included, so long as they are acting in a legal rather than an executive capacity. Privilege also extends to non-legally qualified personnel (eg, trainees or paralegals) acting under the supervision of a lawyer.
  - (b) **Who is the client?** The Court of Appeal decision in *Three Rivers District Council v Bank of England* [2003] EWCA Civ 474 (*Three Rivers No 5*) led to a risk that not all employees of a company or organisation will be part of the “client” for this purpose. This risk has increased in light of the High Court decision in *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), which interpreted *Three Rivers No 5* as restricting the “client” to those individuals who are authorised to seek and obtain legal advice on behalf of the organisation, **not** including those who are authorised only to provide information to the lawyers. This approach was endorsed in strong terms in *ENRC*. Where a third party (or an employee who is not held to be part of the client) provides information to the lawyer, this will not be privileged outside the litigation context.
  - (c) **Requirement for communication?** As well as actual communications, privilege applies to draft communications and to lawyers’ working papers. The status of clients’ working papers is more problematic. Communication includes communication through agents, but this is quite limited.
- 5 **Giving/obtaining legal advice:** All communications between lawyer and client will be covered provided they take place in a relevant legal context and are directly related to the performance of the lawyer’s professional duty as legal adviser. This is sometimes referred to as the “continuum of communications” for the purpose of giving or obtaining legal advice, which includes advice as to what should prudently and sensibly be done in the relevant legal context.
- 6 **Documents evidencing privileged communications:** Privilege will apply to communications or documents (or parts of either) that report or summarise a privileged communication (eg, a board minute reporting on legal advice received). Where only part of a document is privileged, it can be redacted and the remainder disclosed.
- 7 **Subsequent dissemination of privileged material:** In certain circumstances, privileged communications can be shared with others without losing privilege. This can be on two bases:
  - (a) **Common interest:** The extent of common interest required is less than clear, but examples include insurer and insured, company and shareholder, principal and agent. The common interest must exist at the time the advice is shared.
  - (b) **Confidentiality:** A party is entitled to share its privileged material with others on confidential terms without losing privilege as against the rest of the world.

Note: This publication addresses only legal professional privilege (ie, legal advice privilege and litigation privilege). Other forms of protection may be available, eg, “without prejudice” privilege, privilege against self-incrimination, or public interest immunity.

The contents of this publication, current as at 5 June 2017, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication. © Herbert Smith Freehills LLP 2017

# PRACTICAL TIPS FOR MAINTAINING PRIVILEGE

## COMMUNICATIONS WHERE LITIGATION IS NOT IN PROSPECT

### Do not exhaustively define the “client”

The Court of Appeal decision in *Three Rivers No 5* led to a risk that the “client” could be limited to some smaller group within the client company or organisation rather than all employees. That risk has increased in light of The High Court decision in *The RBS Rights Issue Litigation*. Views differ as to whether it is helpful to list those within the client organisation who are part of the “client”, but on any basis it is unlikely to be helpful to set out an exhaustive definition. A better approach may be to list the primary individuals responsible for instructing the legal team and obtaining legal advice, but leave it open for instructions to be taken from, and advice given to, other appropriate individuals as the matter progresses.

### Only those likely to be part of the “client” should communicate with the lawyers

Whether or not there is a formal list, communications with the lawyers from individuals outside the core team responsible for instructing the lawyers and obtaining their advice should be avoided.

### Consider creating preparatory materials as draft communications seeking legal advice

Factual summaries or reports for the purpose of obtaining legal advice are more likely to attract privilege if they form part of a communication to the lawyer whose advice is sought, rather than a freestanding note or note to other non-lawyer employees. They should be prepared by those who are most likely to fall within the “client”.

### Copying in a lawyer will not create privilege

Simply copying in a lawyer to a communication between two non-lawyers will not create privilege. Where you are seeking advice from a lawyer, do so in a direct communication to the lawyer and make it clear you are asking for advice, ideally using the heading “Confidential and legally privileged”.

### Avoid third parties communicating with the lawyer

Outside the litigation context, such communications will not be privileged (unless the third party is communicating as the client’s agent, but this is quite narrow).

## IN-HOUSE LAWYERS

### Ensure appropriate supervision of non-legally qualified staff

Advice from non-qualified staff (eg. trainees or paralegals) will only be privileged if they are acting under the supervision of a lawyer.

### Keep your practising certificate up-to-date

There is some doubt as to whether advice from lawyers without a current practising certificate (or the equivalent for foreign lawyers) will be privileged. Privilege may however be available if the lawyer in question is acting under the supervision of a lawyer who holds a current practising certificate.

### Do not mix legal and business advice in the same communication

Communications with in-house lawyers are privileged only if they are acting in a legal rather than an executive capacity. Mixing legal and business advice may muddy the waters.

### Make sure any advice is marked “Confidential and legally privileged”

This label does not create privilege, but will help to identify privileged material in any later review.

### Ensure it is clear which entities you are advising

If you advise group companies other than your direct employer, make sure it is clear (either in your employment contract or otherwise) that you are employed to give legal advice to any group company.

### Training non-legal staff is key

Ensure non-legal staff are aware that anything they put in writing, including e-mail, or on a recorded phone line, could come back to haunt them. If in doubt, staff should speak to the in-house legal team.

### Remember that the same rules do not apply everywhere

Courts in other jurisdictions will have their own rules of disclosure / privilege. In international arbitration, tribunals have considerable flexibility in determining which rules should apply.

### If you want to be able to assert privilege in an EU competition investigation, use outside counsel

The well-publicised decision of the European Court of Justice in the *Akzo Nobel* case confirmed that privilege is not available for communications with in-house lawyers in the context of EU competition investigations.

## RECEIVING/COPYING LEGAL ADVICE

### Do not make notes on copies of legal advice received

Those notes may have to be disclosed, even if the legal advice itself is privileged.

### Be clear what is legal advice and what is not

A copy or report of a privileged communication will be privileged. Analysis of or comments on the advice by non-legal staff will not be privileged, nor will discussions as to what should be done in light of the legal advice. The safest course is to forward a copy of the original privileged advice.

### Take care in Board discussions/minutes

Try to ensure that any sensitive issues are dealt with as part of a report of legal advice, ideally given first-hand by a lawyer who is present at the meeting. If a non-lawyer is summarising a lawyer's advice, make sure this is clearly stated. Ideally, the minutes should simply state that legal advice was given and cross-refer to a separate document setting out the advice.

### Ensure any communication of the advice is on confidential terms

A party is entitled to share its privileged advice with others on confidential terms without losing privilege as against the rest of the world. Similarly, privilege will not be lost if the advice is shared with a third party that has a common interest in the subject matter of the advice. It is advisable to put in place an express confidentiality / non-waiver agreement setting out the purpose for which disclosure is made and restricting further use, and possibly also recording the nature of any common interest.

### Do not circulate legal advice too widely

Doing so increases the risk that the advice will be circulated inappropriately and that confidentiality, and therefore privilege, will be lost. When circulating legal advice, particularly by e-mail, consider including express instructions not to circulate further.

### Be particularly careful in copying legal advice outside the UK

The rules of privilege vary in different jurisdictions. A communication that is privileged in England and Wales may be disclosable elsewhere.

### Disclosure in one jurisdiction may lead to loss of privilege in another

Where disclosure in another jurisdiction leads to a general loss of confidentiality, privilege will no longer be available under English law. Further, depending on the extent to which a jurisdiction recognises the concept of limited waiver of privilege, disclosure may result in a wider loss of privilege even if it would not do so under English law.

### Think carefully before relying on privileged material in proceedings

If a party seeks to rely on some privileged material, while holding back the remainder, there is always a risk it will be taken to have waived privilege more widely.

## INTERNAL INVESTIGATIONS

### Litigation privilege unlikely to be available

Unless litigation is in reasonable prospect, notes prepared by, and/or communications between, non-lawyer employees are unlikely to be privileged. Lawyers should be involved at an early stage to maximise the prospects of being able to claim legal advice privilege.

### Take care with the form of communications

To improve the prospect of privilege being available, any written materials should be prepared by lawyers (after interviewing relevant staff as necessary). If non-lawyer employees prepare materials for consideration by the lawyers, consider creating these as draft communications to the lawyers seeking legal advice, rather than stand-alone notes. They should be prepared by those who are most likely to fall within the "client".

### Prepare reports in the form of legal advice

Where possible, any written reports on sensitive issues should be in the form of a report of legal advice so that a claim to privilege can more easily be made – even if litigation is in reasonable prospect, to the extent that there is any uncertainty regarding the dominant purpose of the report.

### Keep non-privileged written materials as factual as possible

Where reports or other documents need to be prepared and may not be privileged, they should be kept as factual as possible. Comments on sensitive issues should be dealt with orally.

### Statutory protections

The question of what can be withheld from regulators (such as the FCA) may be governed by statute (eg, section 413 of the Financial Services and Markets Act 2000). Such protections are broadly similar to common law privilege, but there are some differences.

## PRACTICAL TIPS FOR MAINTAINING PRIVILEGE

### COMMUNICATIONS RELATING TO POTENTIAL LITIGATION

#### **Note in writing when you consider litigation to be in reasonable prospect**

This will not be determinative, but contemporaneous records of this sort may assist in establishing that litigation was reasonably in prospect at the relevant time.

#### **Make sure this is consistent with timing of document hold**

As soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents. It may be more difficult to argue that litigation was reasonably in prospect at a time no such notification had been given.

#### **Record the purpose of the communication**

This is particularly important when communicating with a third party, as you will not be able to rely on legal advice privilege and will need to establish that the document was prepared for the "dominant purpose" of the litigation.

#### **Beware the dual purpose communication**

Where there are multiple purposes, and only one or some relate to the prospective litigation, you should consider obtaining separate reports on the different issues.

#### **If in doubt, assume litigation privilege will not apply**

If it is arguable that litigation is not in contemplation, or there is doubt as to dominant purpose, assume that privilege will apply only to lawyer/client communications to give/receive legal advice.

### EXPERTS

#### **Avoid disclosing privileged documents to an expert or commenting on the merits of the case in the expert's instructions**

Under CPR 35.10 the instructions to an expert (unlike the expert's reports) are not privileged, although disclosure will not be ordered save in limited circumstances.

#### **Test a potential expert's views robustly before obtaining views in writing**

Where a party changes expert and requires the court's permission to adduce the new evidence, it will normally be required to waive privilege in the earlier expert's report as the price of obtaining permission.

#### **Consider appointing as "advisory" expert only until it is clear an expert will be able to support the case**

Where an expert has been instructed to advise privately at a party's own expense, rather than to prepare a report for the purposes of the proceedings, the court will not normally require privilege to be waived in the report even if a different expert is subsequently appointed.

#### **Communications with an expert will not be privileged outside the litigation context**

If litigation is not in reasonable prospect, or is not the dominant purpose of the communication, communications with a third party expert will not be privileged, even if sent to/from a lawyer.

# HERBERT SMITH FREEHILLS CONTACTS



**Justin D'Agostino**  
Global head of disputes  
T +852 2101 4010  
justin.dagostino@hsf.com



**Heather Gething**  
Partner, tax disputes  
T +44 20 7466 2346  
heather.gething@hsf.com



**James Norris-Jones**  
Partner, litigation  
T +44 20 7466 2874  
james.norris-jones@hsf.com



**Anna Pertoldi**  
Partner, litigation  
T +44 20 7466 2399  
anna.pertoldi@hsf.com



**Craig Tevendale**  
Partner, arbitration  
T +44 20 7466 2445  
craig.tevendale@hsf.com



**Lisa McLaughlin**  
Director, Alternative Legal  
Services, UK, US & EMEA  
T +44 28 9025 8211  
lisa.mclaughlin@hsf.com



**Julian Copeman**  
Partner, litigation  
T +852 2101 4245  
julian.copeman@hsf.com



**Susannah Cogman**  
Partner, contentious regulatory  
T +44 20 7466 2580  
susannah.cogman@hsf.com



**Maura McIntosh**  
Professional support consultant  
T +44 20 7466 2608  
maura.mcintosh@hsf.com

**BANGKOK**

Herbert Smith Freehills (Thailand) Ltd  
T +66 2657 3888  
F +66 2636 0657

**BEIJING**

Herbert Smith Freehills LLP Beijing  
Representative Office (UK)  
T +86 10 6535 5000  
F +86 10 6535 5055

**BELFAST**

Herbert Smith Freehills LLP  
T +44 28 9025 8200  
F +44 28 9025 8201

**BERLIN**

Herbert Smith Freehills Germany LLP  
T +49 30 2215 10400  
F +49 30 2215 10499

**BRISBANE**

Herbert Smith Freehills  
T +61 7 3258 6666  
F +61 7 3258 6444

**BRUSSELS**

Herbert Smith Freehills LLP  
T +32 2 511 7450  
F +32 2 511 7772

**DOHA**

Herbert Smith Freehills Middle East LLP  
T +974 4429 4000  
F +974 4429 4001

**DUBAI**

Herbert Smith Freehills LLP  
T +971 4 428 6300  
F +971 4 365 3171

**DÜSSELDORF**

Herbert Smith Freehills Germany LLP  
T +49 211 975 59000  
F +49 211 975 59099

**FRANKFURT**

Herbert Smith Freehills Germany LLP  
T +49 69 2222 82400  
F +49 69 2222 82499

**HONG KONG**

Herbert Smith Freehills  
T +852 2845 6639  
F +852 2845 9099

**JAKARTA**

Hiswara Bunjamin and Tandjung  
Herbert Smith Freehills LLP associated firm  
T +62 21 574 4010  
F +62 21 574 4670

**JOHANNESBURG**

Herbert Smith Freehills South Africa LLP  
T +27 10 500 2600  
F +27 11 327 6230

**LONDON**

Herbert Smith Freehills LLP  
T +44 20 7374 8000  
F +44 20 7374 0888

**MADRID**

Herbert Smith Freehills Spain LLP  
T +34 91 423 4000  
F +34 91 423 4001

**MELBOURNE**

Herbert Smith Freehills  
T +61 3 9288 1234  
F +61 3 9288 1567

**MOSCOW**

Herbert Smith Freehills CIS LLP  
T +7 495 363 6500  
F +7 495 363 6501

**NEW YORK**

Herbert Smith Freehills New York LLP  
T +1 917 542 7600  
F +1 917 542 7601

**PARIS**

Herbert Smith Freehills Paris LLP  
T +33 1 53 57 70 70  
F +33 1 53 57 70 80

**PERTH**

Herbert Smith Freehills  
T +61 8 9211 7777  
F +61 8 9211 7878

**RIYADH**

The Law Office of Nasser Al-Hamdan  
Herbert Smith Freehills LLP associated firm  
T +966 11 211 8120  
F +966 11 211 8173

**SEOUL**

Herbert Smith Freehills LLP  
Foreign Legal Consultant Office  
T +82 2 6321 5600  
F +82 2 6321 5601

**SHANGHAI**

Herbert Smith Freehills LLP Shanghai  
Representative Office (UK)  
T +86 21 2322 2000  
F +86 21 2322 2322

**SINGAPORE**

Herbert Smith Freehills LLP  
T +65 6868 8000  
F +65 6868 8001

**SYDNEY**

Herbert Smith Freehills  
T +61 2 9225 5000  
F +61 2 9322 4000

**TOKYO**

Herbert Smith Freehills  
T +81 3 5412 5412  
F +81 3 5412 5413