Privilege: what you need to know

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Introduction

Legal professional privilege protects an individual's right to obtain legal advice in confidence. Privileged communications can be withheld from third parties unless the client consents to their disclosure. It is based on the premise that a person should be able to seek advice about legal rights and obligations without concern that those communications will later be the subject of scrutiny.

At one stage, it was a common misconception that legal professional privilege extended to all communications between a lawyer and a client. As the law currently stands, this is not the case.

In addition to legal professional privilege, English law also recognises without prejudice privilege/protection, which prevents the disclosure of communications exchanged between parties to a dispute where there is a genuine attempt to settle the dispute.

There are also certain exceptions to privilege, which include where the communication came into existence to further a criminal or fraudulent purpose (known as the "iniquity exception").

This guide covers:

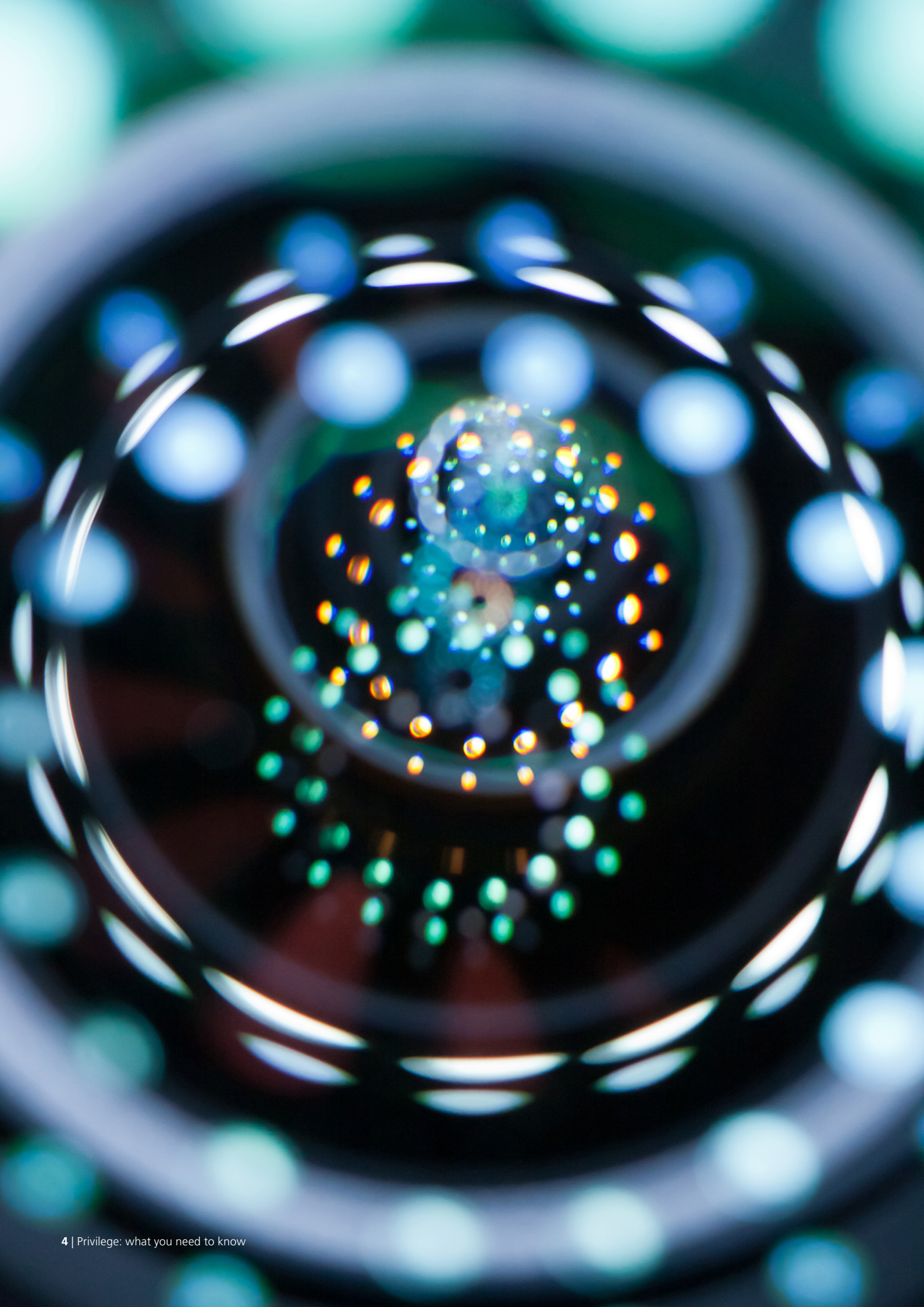
— The two main types of privilege: legal advice privilege and litigation privilege

— Other forms of privilege/protection

— Waiver of privilege

— Best practice to protect privileged communications

The existence or otherwise of legal professional privilege in specific documents or material is highly fact-specific. As the issue of privilege is both important and likely to vary according to the facts of each case, the law continues to evolve very quickly. It is very difficult, and arguably contrary to principle, to lay down hard and fast rules that can be relied upon in every case. The discussion below identifies key principles and examples that are particularly relevant to the commercial and corporate world. For any specific case, one should, of course, seek individual legal advice.



Legal advice privilege

Legal advice privilege attaches to confidential communications passing between a lawyer and client where they are prepared for the dominant purpose of seeking or receiving advice in a relevant legal context.

Legal advice privilege extends to all documents that are:

— confidential

— a direct communication between a lawyer and client;

— documents which evidence such communication; and

— documents which were intended to be such a communication even if not in fact communicated.

1. The importance of confidentiality

Legal advice privilege can only be claimed if the document in question is confidential. Therefore, care should be taken when communicating the document to multiple parties, as if it is shared too widely, confidentiality in the document may be lost (and consequently privilege will also be lost).

2. What is legal advice?

Legal advice is not confined to telling the client the law, but also includes advice as to what should prudently and sensibly be done in the relevant legal context.

However, not everything that passes between a client and their lawyer will necessarily attract privilege. Legal advice does not include administrative or more general business correspondence, even if provided by a lawyer. The lawyer must be advising their client in their capacity as a lawyer, not a compliance officer, general business adviser, or any other commercial role. The test is whether the lawyer is reasonably being consulted because of their legal skills.

Documents that form part of the "continuum of communications" between lawyer and client to keep the lawyer and client informed so that legal advice can be given as required, will also be privileged, even if they do not expressly refer to legal advice.

However pre-existing documents do not become privileged merely because they are sent to a lawyer for the purpose of seeking legal advice.

Requests for advice from a lawyer on how to do something illegal will never be privileged as this would undermine the public policy justification for legal professional privilege.

3. What is meant by "dominant purpose"?

For legal advice privilege to apply in respect of a communication, the communication must have been created or sent for the dominant purpose of obtaining (or giving) legal advice. If there is more than one purpose, the dominant purpose must be to obtain legal advice.

Where a multi-addressee email is sent to various individuals which include a lawyer, it will be important to ascertain the dominant purpose of the communication. If the dominant purpose is to obtain the commercial views of a non-lawyer addressee, the communication will not be privileged, even if a subsidiary purpose is to seek legal advice from the lawyer. Where the email as a whole is not privileged, it may nevertheless be possible to redact those parts of the email that are privileged (i.e. because they are communications to a lawyer seeking legal advice).

4. Who is the client?

Where the client is a corporate entity or other large organisation, it will be important to ascertain who the "client" is for the purpose of attracting privilege. The current legal position is that the "client" is limited to those individuals who are authorised to seek and receive legal advice on behalf of the organisation. This restrictive approach to defining the "client" means that communications with other employees outside this narrow group, or with former employees of the organisation (even where they are authorised by the organisation to so communicate) will not be privileged.

Care must therefore be taken with preparatory or fact gathering exercises carried out with a view to seeking legal advice involving individuals that are not the "client", since the work product of such exercises is unlikely to attract legal advice privilege. This is particularly so where litigation privilege (on which see below) does not apply.

5. Who is the lawyer?

Legal advice privilege only applies to communications between a lawyer and their client. A "lawyer" will include members of the Bar, the Law Society and the Chartered Institute of Legal Executives and, by extension, foreign lawyers. This includes in-house counsel and trainee solicitors and paralegals if they are acting under the supervision of a solicitor.

It is not the lawyer's job title that is determinative of whether or not they are considered to be a "lawyer", but whether or not they are exercising professional skill as a lawyer when giving advice. This distinction is most pertinent for an in-house lawyer whose role often extends beyond that of a pure legal adviser. Where an in-house lawyer is acting outside their capacity as a legal adviser, communications may not be privileged.

This note addresses the position in England and Wales, but the treatment of legal professional privilege differs in other EU member states, and you will need to check the position if you are operating in those jurisdictions. For example, the position in EU competition law is somewhat different. A significant ruling from the European Court of Justice (ECJ) in 2010 confirmed that legal professional privilege applied under Community law to communications between a lawyer and client provided that:

— the communications are made for the purposes of the exercise of the client's rights of defence; and
— they emanate from independent lawyers qualified to practise in the EEA.

In particular, the ECJ found that an in-house lawyer was bound to its company by way of employment and was not therefore independent.

As such, legal professional privilege does not extend to communications between companies and their in-house lawyers for European competition law purposes, creating a number of challenges for companies managing European competition investigations. However, it remains a complex area, given the wider application of legal professional privilege enjoyed in the UK, and a pending French legislative proposal which aims to expand the concept of legal professional privilege to in-house lawyers.

Legal advice privilege will also not extend to cover advice on tax law issues between tax accountants and their clients.

Litigation privilege

Litigation privilege attaches to confidential communications made with the dominant purpose of obtaining evidence or information to be used in or in connection with adversarial proceedings that are either pending, reasonably contemplated or existing. This privilege extends beyond the client/lawyer relationship and includes communications between the client or the lawyer and a third party, such as witnesses or experts.

1. What is contemplated litigation?

To be classed as "litigation", the proceedings must be adversarial as opposed to investigative or inquisitorial.

Litigation must also be pending, reasonably contemplated or existing at the time of the communication and this means that **litigation must be a real likelihood rather than a mere possibility**. Neither a distinct possibility that sooner or later someone might make a claim, nor a general apprehension of future litigation is enough.

2. What is meant by "dominant purpose"?

The dominant purpose of the document must be to seek or receive legal advice or evidence for use in the proceedings. Seeking or receiving legal advice or evidence need not be the exclusive purpose, but the burden of showing which purpose was dominant falls on the party claiming privilege. It will be helpful to be able to show that the document would not have been created in the absence of a prospect of proceedings.

The dominant purpose must be assessed from an objective standpoint, looking at all the relevant evidence, including evidence of the relevant person's subjective purpose. Where communications may have been for a number of purposes, the burden is on the party claiming privilege to establish the dominant purpose was litigation.

Internal communications prepared with the dominant purpose of discussing a commercial settlement will not be protected by litigation privilege, since purely commercial discussions, where the parties are not obtaining information or advice in connection with the conduct of the litigation, are not privileged.

Other forms of privilege/protection

1. Without prejudice protection

Without prejudice protection prevents statements relating to a genuine attempt to settle a dispute from being put before a court as evidence of an admission against the interest of the party that made them (whether the statement was made in writing or orally). This protection can apply to genuine settlement negotiations that arise before a claim has even been formulated, but the final settlement between the parties will not attract without prejudice protection and so may be admissible as evidence.

Without prejudice protection belongs to both parties seeking to resolve a dispute – it cannot be waived by one side alone or used by one side against the other.

There are certain exceptions to without prejudice protection which are beyond the scope of this guide.

2. Common interest privilege

Common interest privilege is a secondary form of legal professional privilege, which applies to both legal advice privilege and litigation privilege. It applies when a party voluntarily discloses a privileged document to a third party who has a common interest in the subject matter of that document. Examples of situations where the courts have found common interest privilege to apply include co-defendants, insurers and insureds and group companies. It is not necessary for the parties to have the same lawyer for common interest to apply. The common interest must exist at the time of disclosure by the disclosing party to the receiving party.

Where the privilege applies, the document will remain privileged despite being disclosed to the third party, and the third party can assert the disclosing party's privilege against other parties.

3. Joint privilege

Joint privilege is another form of secondary privilege, which arises where two or more parties enter into a joint retainer with the same lawyer or where two parties (not covered by the same retainer) have a joint interest in the subject matter of a privileged communication at the time of its creation. Where there is no joint retainer, an individual claiming joint privilege will need to show that:

— they communicated with the lawyer for the purpose of seeking advice in an individual capacity;
— it was made clear by them to the lawyer that they were not seeking legal advice as a representative, but in an individual capacity;
— the parties with whom the joint privilege was claimed either knew or ought to have appreciated the legal position;
— the lawyer knew or ought to have appreciated that they were communicating with the third party in that individual capacity; and
— the communication between the third party and the lawyer was confidential.

When joint privilege applies, either party is entitled to view any privileged communication arising out of the joint retainer and/or the joint interest, and both parties can claim privilege against any third party. It will also be sufficient if only one of them does so. One of the parties also cannot waive privilege without the consent of the other.

Waiver of privilege

Privilege may be waived intentionally or unintentionally, especially during the course of litigation. For example, where a statement of case is served, the maker of the statement cannot later attempt to claim privilege in that document. Similarly, where documents are relied upon in a statement of case, the confidentiality in such documents may be lost in certain circumstances.

However a mere reference to a privileged document will not necessarily of itself amount to a waiver of privilege. Where the contents of a privileged document have not been quoted or summarised and are not relied on, but are simply referred to in the context of explaining the document's effect, there is less likely to be waiver of privilege. However, each case will depend on the specific facts.

Where a party discloses certain documents, but not other documents which would provide the court and/or the opposing party with the relevant context of the documents disclosed, the disclosing party may be obliged to disclose those other documents by way of collateral waiver.

There may be circumstances in which a client wishes to share certain privileged material with third parties, such as a law enforcement agency, regulator or insurer, without waiving privilege more widely. Provided the disclosure is made on a limited basis for a specific purpose and certain conditions are satisfied, there will be no waiver of privilege to the world at large. Such an agreement should be recorded in writing and will need to be carefully drafted to ensure there is no unintentional waiver beyond the intended third party.

Inadvertent disclosure of privileged material may amount to a waiver of privilege, if its privileged status would not have been obvious to the recipient. However, where a party unintentionally discloses a privileged document in litigation and the mistake is obvious, the recipient will usually only be able to use the document with the permission of the court. However, once a party has allowed inspection of a document, it will usually be too late to claim privilege and correct the mistake by way of injunctive relief.

Best practice

At a very early stage in any potential dispute, or where an internal investigation is planned, it is important to seek legal advice to ensure that privilege is maintained in communications. The following points will assist:

— Ensure your document management policy includes consideration of how your organisation wants to protect privilege, taking into account your wider policies on regulatory cooperation and transparency, and ensure that this policy is shared with the wider organisation, and not just the legal department.

— Clearly set out which individuals have primary responsibility for seeking and receiving legal advice on a given matter, while retaining the flexibility to include others as the matter develops.

— When you are advising or seeking advice, make this explicit in your wording.

— Do not mix legal and business advice in the same communication.

— Take particular care in communications involving in-house counsel regarding competition law issues.

— Ensure lawyers in your organisation who are not practising as lawyers, but are in some other role, are aware that advice they give is unlikely to attract privilege.

— Ensure that anyone in the organisation who may become involved in a legal process (transactional, regulatory or contentious) understands when to use and when not to use the markings of privilege on their communications.

— Keep documents created during an internal investigation as factual as possible, avoiding speculation or unnecessary comments. In particular, keep discussion of liability and quantum issues to a minimum. However, bear in mind that if these issues are instead dealt with in conversation, the contents of that conversation may also be disclosable as evidence in legal proceedings.

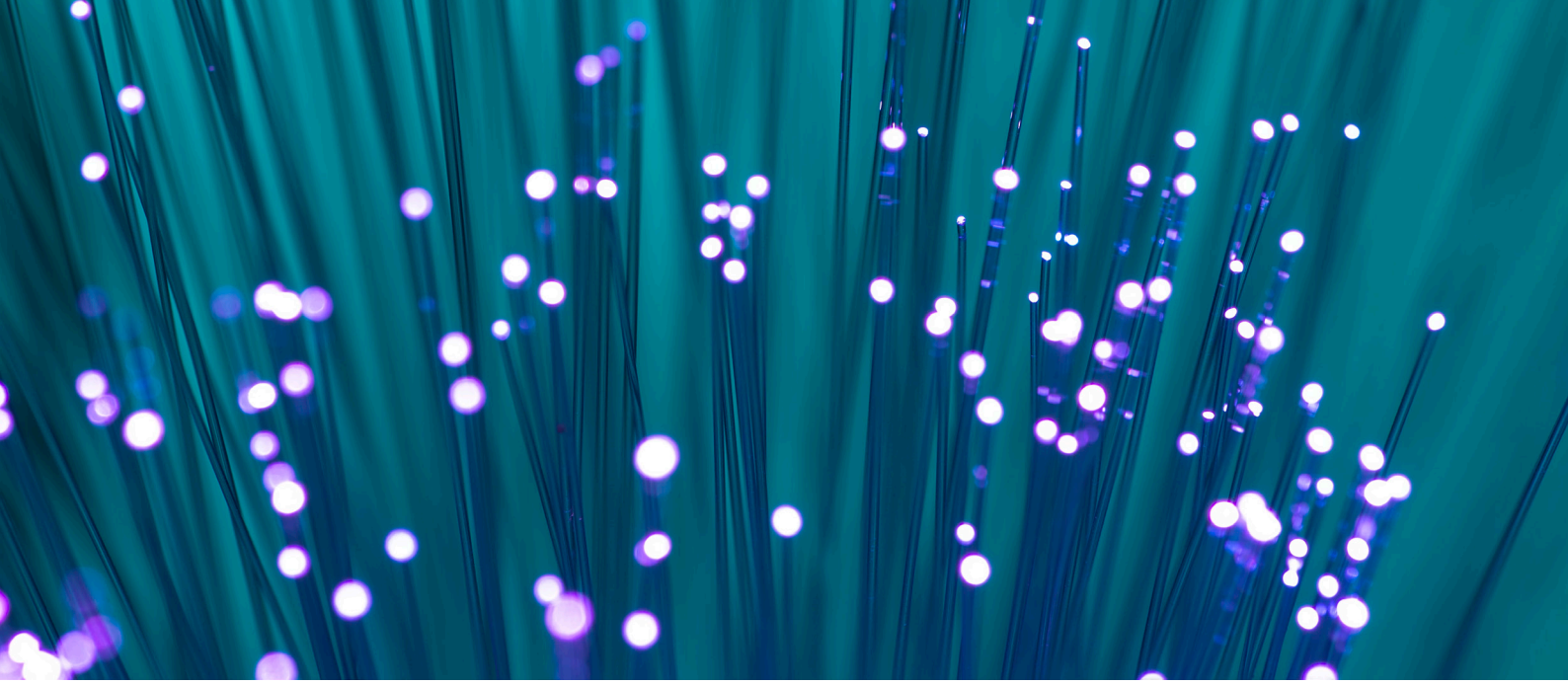
— Carefully control communications with external non-legal advisers to limit the risk of waiving privilege or creating non-privileged documents.

— Prior to disclosing any privileged documents to third parties, procure confidentiality undertakings setting out the terms of the disclosure and the receiving party's obligation to ensure the documents remain confidential.

— Keep copies of privileged and sensitive documents (including electronic copies) to a minimum and circulate them, and the information they contain, on a need-to-know basis only.

— To ease the identification of privileged or sensitive documents in future and prevent accidental disclosure:
  - mark them "legally privileged and confidential" (but be aware that doing so is not conclusive as to whether or not privilege applies); and
  - consider whether it is feasible to store such documents separately from non-privileged material (both electronically and in hard copy).

— Consider carrying out a review as to what kinds of matters your in-house lawyers and external lawyers are advising on and where any proceedings are likely to take place. This will allow you to produce a risk analysis based on how active the regulatory authorities are in that area of activity and whether or not in-house lawyers are protected in the likely forum, and to create communication protocols accordingly.



— Before communicating about legal advice or legal proceedings across jurisdictional borders, check whether the communication will be privileged in the destination country and/or in the jurisdiction where any proceedings are likely to take place.

— If you are operating in a highly regulated context in a jurisdiction where in-house lawyers are not protected by privilege, consider instructing external lawyers at an early stage to maximise protection in the event of an investigation.

— Give separate consideration to e-mails and attachments to those e-mails as regards privilege – do not assume that the privilege that applies to the e-mail will similarly apply to any attachments.

— Whilst legal advice privilege attaches to the communications between a lawyer and a client, it also attaches to any subsequent communication (whether written or oral) of that advice which is passed on e.g. internally within a company or applied, provided that confidentiality is not lost. However, in disseminating that advice internally, it should only be given to parties who need to know the information. The communication disseminating the advice should expressly clarify that the information is confidential and privileged, that the provision of it to those parties does not amount to a waiver of privilege and the documents are to be held in complete confidence.

In summary, legal professional privilege should never be taken for granted. If in doubt, seek advice!

This guide is intended for clients and professional contacts of CMS Cameron McKenna Nabarro Olswang LLP. It is not an exhaustive review of developments in the law and is intended to simplify and summarise the issues that covers. It must not be relied upon as giving definitive advice.

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