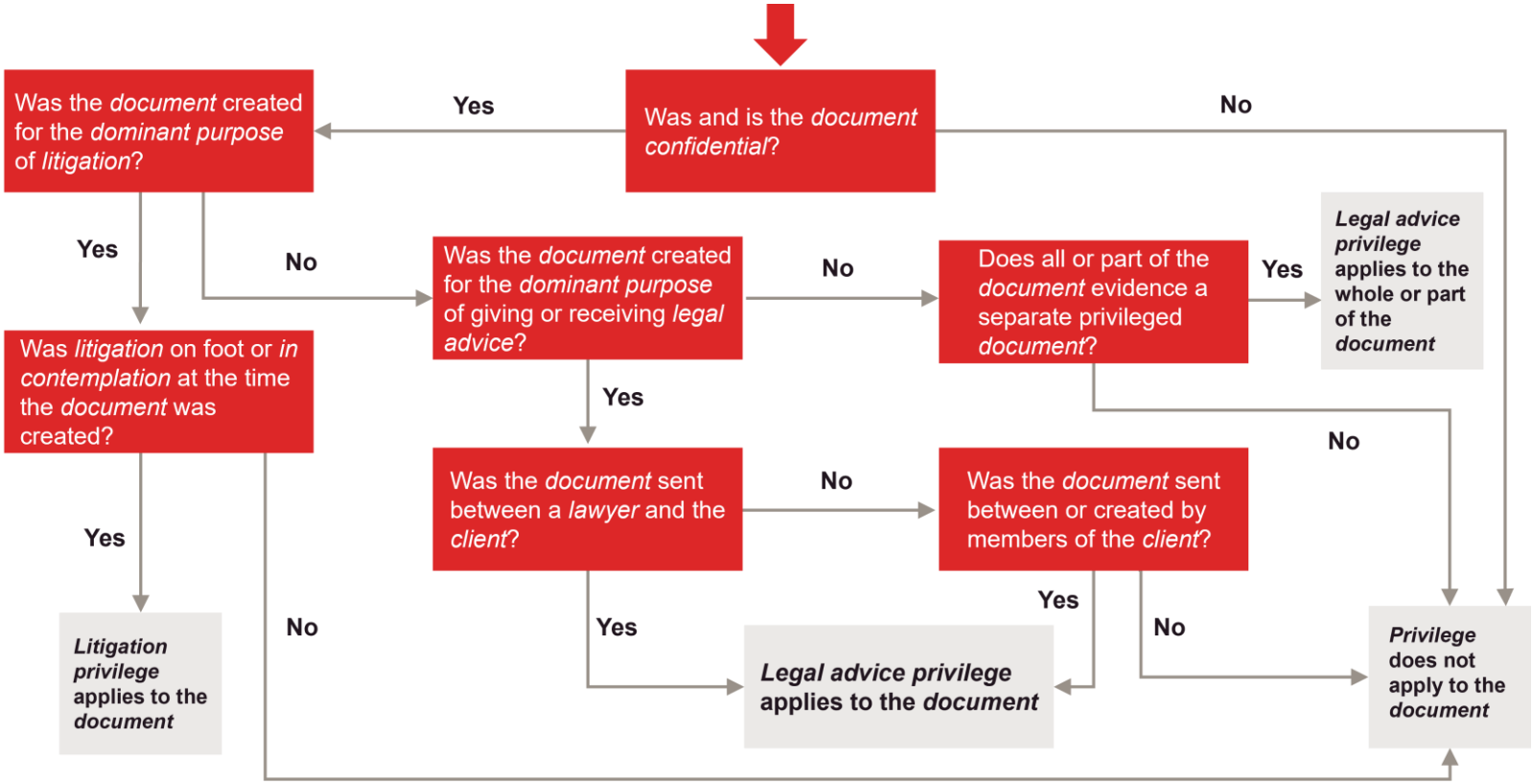
NORTON ROSE FULBRIGHT

Is my document protected by privilege?*



**This flowchart provides an overview of legal advice privilege and litigation privilege from an English law perspective only.*

Explanatory notes to the italicised words are set out in the glossary overleaf. Further advice should be sought in relation to specific situations.

Glossary

Agent
Communications between client and lawyer through an agent will be protected by legal advice privilege but only to the extent that the agent acts as no more than a 'mere conduit' (for example, in the case of an interpreter). Third parties such as accountants who are engaged to provide their own intellectual input will not be regarded as agents for the purposes of legal advice privilege (although such communications may be protected by litigation privilege).

Confidential
In order for a document to be protected by privilege, it must be and remain confidential. The fact a document is confidential does not mean that the document is also privileged. Confidentiality in itself is no bar to disclosure.

Client
In the case of an individual client, the identity of the client is straightforward. When advising a corporate client, however, the definition of client is construed narrowly to mean only those individuals authorised to give instructions and to receive legal advice in relation to the matter in question. This means that not all documents passing between a corporate client and lawyer, nor between members of the client, on any given matter will necessarily be protected by legal advice privilege (although such documents may be protected by litigation privilege).

Document
A document for the purposes of legal proceedings or investigations is defined very broadly and may include anything in which information of any description is recorded – including electronic documents such as emails, text messages, WhatsApps, voicemails, databases and metadata.

Dominant purpose
Only documents created for the dominant purpose of giving or seeking legal advice will qualify for legal advice privilege purposes and only documents created for the dominant purpose of actual or contemplated litigation will qualify for litigation privilege purposes. Where a document has been provided for another purpose, the document will fail the dominant purpose test. Where documents have been provided for more than one purpose, the court must be satisfied that the dominant purpose is seeking or giving legal advice (for legal advice privilege), or litigation (for litigation privilege), from an objective standpoint. It is not sufficient if seeking or giving legal advice or litigation is a secondary or equal purpose.

In contemplation
Only documents created for the dominant purpose of actual or contemplated litigation will qualify for the purposes of litigation privilege. Litigation will be in contemplation if it is 'anticipated', 'apprehended', 'pending' or 'threatened' and will be a question of fact in each case. While there is no need for more than a 50% chance of litigation, it is not enough that there is a 'mere possibility' or even a distinct possibility that sooner or later someone might make a claim. Litigation should be reasonably in prospect, or reasonably anticipated, when the relevant communication is made.

Lawyer
Lawyer includes solicitors, barristers, in-house lawyers, foreign lawyers and those supervised by a qualified lawyer – for example, clerks, trainee solicitors, paralegals and legal secretaries. However, a non-privileged document cannot be made privileged simply by sending it to a lawyer (although any covering email or letter to the lawyer may be).

Legal advice

Legal advice is not confined to an explanation of the law, but also extends to what should be done in a relevant legal context. In practice, this is wide and, so long as the lawyer is advising in their capacity as a lawyer, is likely to include most advice given by a lawyer.

Legal advice privilege

Legal advice privilege protects confidential documents, whether written or oral, created for the dominant purpose of giving or receiving legal advice. The document can be sent between a lawyer and client, or passed between or created by members of the client group without the involvement of a lawyer. Legal advice privilege applies in both contentious and non-contentious contexts.

Litigation

Litigation refers to “adversarial” proceedings, including litigation, arbitration and some – but not all – inquiries. The precise time at which regulatory or criminal investigations become sufficiently adversarial to be treated as litigation will depend on the process in question, but merely fact-finding processes in order to investigate facts giving rise to a concern may not be litigation for the purposes of litigation privilege.

Litigation privilege

Litigation privilege protects confidential oral or written documents between a client, lawyer and third parties, which come into existence once litigation is in contemplation or has commenced for the dominant purpose of use in the litigation.

Privilege

The most common form of privilege under English law is legal professional privilege, of which there are two heads: legal advice privilege and litigation privilege.

Contacts

If you would like further information please contact:



Ruth Cowley
Global Co-Head of International Arbitration
London
+44 (20) 74443396
ruth.cowley@nortonrosefulbright.com



Peter Scott
Global Managing Partner; Managing Partner, Europe, Middle East and Asia
London
+44 (20) 74443834
peter.scott@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

Norton Rose Fulbright provides a full scope of legal services to the world's preeminent corporations and financial institutions. The global law firm has more than 3,000 lawyers advising clients across more than 50 locations worldwide, including Houston, New York, London, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg, covering the United States, Europe, Canada, Latin America, Asia, Australia, Africa and the Middle East.

nortonrosefulbright.com

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

Norton Rose Fulbright © 2025. All Rights Reserved