

Legal Professional Privilege and Professional Secrecy: Overview (Ireland)

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A Practice Note providing an overview of the laws in Ireland relating to the protection available to lawyer-client communications and the best practices for preserving the privilege in those communications in business and commercial situations. In the context of legal professional privilege, this Note also considers the definition of lawyers and clients, the impact of a common interest or joint representation on the applicability of privilege, and the application of privilege in an internal investigation or an M&A transaction.

The concept of legal professional privilege, and legal advice privilege in particular in Ireland, is rooted in the core principle that clients must be able to openly and honestly communicate with their lawyers, and therefore their communications must be protected from disclosure. Although this concept is recognised by legal systems around the world (though not always by the same name), its nature, scope, and application varies. It is worth noting that professional secrecy is not a legal concept in Ireland. Although not identical, the concept of professional secrecy is most closely aligned with legal advice privilege.

In the globalised and interconnected world of today, the provision of legal services is no longer confined to a single jurisdiction, rather it is spread across multiple jurisdictions. Conflicting rules and expectations on privilege and confidentiality can therefore pose great challenges for practitioners involved in cross-border matters, particularly since the protections available to lawyer-client communications may often lack consistency and predictability. As a result, it is important to understand the scope of protection offered by the applicable laws and to exercise restraint and caution in communicating with clients and counterparties.

This Note provides an overview of the Irish law related to:

- Parties' disclosure obligations.
- The rules related to legal professional privilege, which can be split into two main categories: legal advice privilege and litigation privilege.
- Who are considered to be lawyers and clients for the purposes of legal professional privilege.

- How local courts consider privilege issues when clients share counsel or a common interest with a third party.
- How a party can protect privileged documents during an internal investigation or in an M&A transaction.

For information on the different approaches to legal professional privilege, and professional secrecy in common law and civil law jurisdictions, see [Practice Notes, Legal Professional Privilege and Professional Secrecy: Cross-border](#) and [A world tour of the rules of privilege](#).

General Disclosure Rules

The Irish Courts are entitled to have at their disposal all relevant evidence to resolve disputes in line with the law of evidence. In *Livingstone v Minister for Justice [2004] IEHC 58*, the High Court observed that:

"The principle underlying the right to discovery is that all relevant evidence is not only admissible but is also compellable. Litigants must have an opportunity to be heard to put forward arguments and to place all evidence relative to their claims before the court. Arguments without facts are just as sterile as arguments without legal authority."

Documents are usually disclosed through the discovery process (as governed by Order 31, Rule 12 of the [Rules of the Superior Courts](#)), which enables a party to compel disclosure and production of relevant documents held by the counterparty that fall within specifically requested categories of documents that are relevant to the matters at issue between the parties.

The obligation under Irish law in court proceedings to disclose documents through the discovery process is broad. All non-privileged documents that are in the power, procurement, or possession of a party and that are relevant and necessary to dispose of the issues in Irish proceedings must be disclosed to the other side during the discovery stage.

Full disclosure is required. There is an obligation to disclose not only documents that assist a party's case, but also any relevant documents that may hinder its case. This is subject to any privilege the parties may validly assert, including the legal professional privilege exceptions referred to below.

The disclosure of documents is made on oath by way of affidavit, with the details of the documents included by way of schedule. The affidavit is filed with the court and served on the other parties, who can request to inspect the documents.

Legal Professional Privilege and Professional Secrecy Rules

Legal professional privilege protects confidential communications between a client and the client's lawyer where certain conditions are met. The two most important types of legal professional privilege are:

- **Litigation privilege.** This privilege protects confidential communications between the client and lawyer, client and third parties, and lawyer and third parties, when the dominant purpose of the communication is in furtherance of actual or reasonably apprehended litigation or a regulatory or criminal investigation.
- **Legal advice privilege.** This privilege protects confidential communications between lawyers and their clients that are exchanged for the dominant purpose of seeking or receiving legal advice.

The Irish courts have drawn a clear distinction between communications involving the seeking or giving of legal advice, which are privileged, and those seeking or providing legal assistance, which are not privileged (*Smurfit Paribas Bank Ltd v AAB Export Finance Limited [1990] I.L.R.M. 588*). For example, legal advice would express an opinion on legal rights, remedies, obligations, or consequences, but legal assistance would provide detail by way of commercial advice or administrative input.

Parties to litigation can refuse to disclose documents in the course of proceedings based on the rules relating to legal professional privilege if they fall within an existing category of privileged documents. Legally privileged documents remain legally privileged if they are in the

hands of the person who sought or received legal advice if the confidentiality of those documents is maintained.

While a non-party can be ordered to make discovery by the court, it is entitled to refuse to disclose documents over which it can assert privilege.

Non-Contentious Matters

Legal advice privilege can be relied on in all circumstances, including in non-contentious matters that may require the production or disclosure of documents (for example, pursuant to a request from a regulator).

Litigation privilege can only be asserted when litigation or a regulatory investigation is in being or is reasonably apprehended. It does not apply to litigation or regulatory investigations that are concluded except in very limited circumstances.

Participants in non-contentious proceedings (such as statutory inquiries) can rely on the right against self-incrimination where applicable.

Civil Litigation

Legal professional privilege allows a party to refuse to disclose confidential documents over which it validly claims privilege. Where litigation privilege is asserted, that privilege generally only applies for the duration of the litigation. However, while litigation privilege is linked to particular proceedings, there are instances when litigation privilege can continue for later related proceedings (see *McMullen v Kennedy [2008] IESC 69 (McMullen)*), where the subject matter of the initial proceedings is subsequently litigated in related proceedings.

Criminal Litigation

Legal professional privilege applies in both criminal and civil litigation. However, privilege may be lost where the document or communication in question was created in furtherance of a criminal or fraudulent activity or conduct injurious to the administration of justice. This is often referred to as the "crime-fraud" exception.

Regulatory Proceedings

Legal professional privilege can be relied on before tribunals, inquiries, and regulatory or criminal investigations. The exception to this general rule is that in competition investigations conducted by the European Commission, legal professional privilege does not apply to legal advice provided by in-house lawyers to their employers or to communications between in-house lawyers and their employers.

Arbitration Tribunals

Unless the parties agree otherwise in advance, the Irish High Court can make orders in respect of the discovery and disclosure of documents, compelling either party to produce relevant documentation in the context of Irish arbitration proceedings. The court's powers in this regard are subject to the same legal professional privilege protections that are afforded to parties within the context of litigation.

While the question has yet to be formally decided, it is likely that the Irish courts would consider litigation privilege to include confidential communications exchanged between a party or its agent and third parties, where the dominant purpose of the communication is in furtherance of actual or reasonably apprehended arbitration proceedings. This is in circumstances where the Irish courts have, in other contexts, repeatedly declared their support for and deference to the efficacy of Irish arbitration proceedings (in accordance with the provisions of the [Arbitration Act 2010](#) and the [UNCITRAL Model Law on International Commercial Arbitration](#), which has been incorporated into Irish law).

Employment Tribunals

Employment disputes are heard in Ireland by the Workplace Relations Commission, for first-instance determinations, and the Labour Court, for appeals.

Both the Labour Court and adjudication officers appointed by the Workplace Relations Commission have certain powers to compel parties to produce relevant documents. However, these powers are expressly subject to the same legal professional privilege protections that are afforded to parties in the context of litigation before other courts.

Purpose

Legal advice privilege arises only in the context of a professional legal relationship between a lawyer and a client for the purpose of giving or receiving legal advice.

Litigation privilege describes the privilege attached to confidential documentation created for the conduct of litigation or the dominant purpose of which is to assist in conducting the litigation.

Unlike legal advice privilege, litigation privilege covers confidential communications between clients or lawyers and third parties (as well as lawyer-client communications). It protects communications between the client and their legal team (solicitors and barristers) and communications between members of the legal team. Privilege also attaches to information compiled by a legal professional in connection with legal

proceedings, known colloquially as the lawyer's "work product." Litigation must be "reasonably apprehended" (reasonably proximate or at least very probable) and must be the dominant purpose of the communications for litigation privilege to apply.

Scope of Legal Privilege and Professional Secrecy Rules

Communications

When discovery is requested, the definition of "documents" is interpreted broadly. It includes, but is not limited to, all forms of hard copy and electronic communications, information and data, such as agreements, letters, emails (from all email addresses, whether business email addresses or private email addresses), facsimiles, notes, diary entries (including but not limited to private diaries, business diaries, and electronic devices), memoranda, minutes, text messages (from both business and private mobile phones), instant messaging, telephone records for landlines and mobile phones, voicemails, electronic and digital recordings (including recordings of meetings), PowerPoint presentations, photographs (whether digital or otherwise), internet pages, tender documents, proposals, pitches, portfolio analyses, property valuations, security reviews, pensions and funding analyses, lending and borrowing, analyses, submissions, spreadsheets, accounts, cheques, receipts, invoices, ledger entries, and any other documents like these, whether in draft or final form and whether in written, printed, micro fiche, or electronic form.

While the interpretation of "documents" is broad, whether legal professional privilege applies depends on the contents and the context in which the document was created and shared.

Confidential documents that record communications between lawyers and clients, such as notes of oral conversations or documents that reproduce or incorporate legal advice previously given, can be privileged. Records of this kind are usually protected, assuming the other conditions of legal advice privilege are met. However, for example, details on a solicitor's attendance note recording information other than matters passing between the client and lawyer, does not attract privilege.

The law does not protect from disclosure a "pre-existing document," meaning a document created for some other purpose before the client sought legal advice.

Legal advice privilege applies only to requests for legal advice communicated to a lawyer and to advice (and further communications concerning the same that might

disclose the legal advice sought or given) between the client and lawyer.

The issue can be less straightforward for drafts and preparatory materials (that is, other than those created by or commented on by lawyers). Depending on the facts, a party may be entitled to assert privilege over documents where disclosure of them might result in disclosure of legal advice sought or obtained from a lawyer. In *Ryanair v Channel 4 Television Corporation & Blakeway Productions* [2017] IEHC 651 (*Ryanair*), Channel 4 asserted legal advice privilege over draft scripts of a television programme in defamation proceedings taken by Ryanair about the content of that programme. Ryanair argued that legal privilege did not apply to the drafts of the scripts because they were not created for the purposes of receiving legal advice. However, the court identified that the issue for consideration was whether the draft scripts would disclose legal advice sought or given about their content. The court held that legal advice privilege did apply to material that, due to various changes made to successive versions of the document, would reveal legal advice given by lawyers to their client.

Privilege generally encompasses information gathered by the lawyer and incorporated into the advice tendered to the client, which might be said to comprise a lawyer's "work product." However, not every fact that may come to the lawyer's attention during the relationship with the client is privileged.

Third Parties

Litigation privilege can apply to confidential communications between a client and their lawyer and to communications from either a client or lawyer to a third party as well.

Legal advice privilege is only capable of applying to confidential communications between a client and their lawyers. There is a limited exception where a third party has a common interest in the legal advice sought by the client or received from the lawyer.

If the document or communication has been specifically created by a third party who is an agent of the lawyer, such as a legally qualified assistant solicitor under the supervision of the lawyer, then privilege over the document or communication may apply if the third party was assisting in the provision of legal advice in the context of the professional relationship between the lawyer and the client.

If the document or communication was prepared by an agent of the client and at the direction of the client in the context of seeking legal advice from a legal adviser, then that document or communication may

be privileged. The agent in this scenario must have the necessary authority to act on behalf of their client.

Confidentiality

A document or communication must be confidential to attract privilege under Irish law. If a document's confidential character is lost, either by waiver, express or implied, or in some instances by accident, disclosure, or dissemination, then privilege does not apply except in limited circumstances.

The Irish courts generally take the view that once a document ceases to be confidential, legal professional privilege is lost. Privilege is generally considered waived where a document or its contents are disclosed to an adverse party unless privilege is expressly reserved.

The limited circumstances where the loss of original confidentiality might not **necessarily** result in a loss of privilege include:

- Where a carefully worded, limited waiver or "Fyffes" (per *Fyffes plc v DCC plc* [2005] IESC 3 (*Fyffes*)) agreement is put in place, strictly limiting disclosure to particular third parties and for a particular purpose.
- Where a "common interest privilege" applies, for instance where disclosure is made in confidence by a person's lawyer with a third party or parties who share a common legal interest with that person, relating to the subject matter of the disclosure.
- Where a privileged document has been inadvertently disclosed to a third party. Clarke J in *Tír na nÓg Projects Ireland Ltd v County Council of County Kerry* [2008] IEHC 48 has summarised the test to be applied in cases of inadvertent disclosure, which is fact-specific:

"Where a document which might be the subject of a proper claim of privilege comes to the attention of the other side in litigation, whether as a result of its formal disclosure in the discovery process, by it being inadvertently handed over... or by virtue of it being placed on a public file or otherwise made publicly available... does not affect the principle. The underlying test which the court must apply is whether a reasonable person would objectively view any privilege that might have attached to the document as having been waived in the light of the circumstances in which the document had come to the other side's attention. Those circumstances are, therefore, material in that they may affect the proper judgment as to whether, objectively speaking, a party might legitimately take the privilege to have been waived. The circumstances do not, however, affect the test."

Adverse Inferences

Civil courts and tribunals cannot draw adverse inferences where legal professional privilege is claimed.

In a criminal context, inferences may be drawn from an accused's invoking of the privilege against self-incrimination or right to silence. An inference may be drawn where the offence concerned is an "arrestable offence" (that is, an offence for which a person can be imprisoned for five years or more) (sections 18-19A, [Criminal Justice Act 1984 \(as amended\)](#)).

Exceptions

Legal professional privilege has general application across all civil law proceedings. However, the Irish Courts have recognised certain exceptions where the benefits of disclosure outweigh maintaining privilege over communications between the lawyer and the client.

Under Irish law, in general, exceptions to maintaining legal professional privilege are possible where there is a recognised public interest imperative requiring disclosure:

- **Crime-fraud exception.** While the categories of exception are not closed, legal professional privilege may be overridden where the communication or document in question came into being for the purposes of the furtherance of crime, fraud, or conduct injurious to the administration of justice. This is often referred to as the "crime-fraud" exception. To invoke the "crime-fraud" exception, it is not enough for the party to merely allege misconduct. Rather, a court must be presented with prima facie evidence that the allegation has a foundation in fact for it to override privilege and compel disclosure.
- **Exception regarding disputes over testamentary dispositions.** Another limited exception under which a court may compel disclosure of privileged documents or communications is in instances of disputes over testamentary dispositions. While privilege usually survives the death of the client and exists for the benefit of the client's successors, the rationale for piercing privilege is in part based on the fact that the deceased client has no interest to be protected other than ensuring their estate is distributed in accordance with their wishes and that the lifting of privilege in this scenario would not have a chilling effect on the lawyer-client relationship. Therefore, in instances of factual dispute over a will, in certain instances the court may be willing to override privileged communications for the purpose of obtaining the truth about a matter.
- **Proceedings involving the welfare of children.** Privilege may also be overridden in certain instances where proceedings involve the welfare of children.

The rationale for doing so is that these proceedings are more investigative than adversarial in nature and that the court's primary statutory duty in these cases is to achieve a result that accords with the best interests of the child. The lifting of privilege in these cases does not constitute a blanket exemption to legal professional privilege, but the court assesses any potential need to override privilege on a case-by-case basis.

- **Without prejudice communications.** A further exception to the rule that confidentiality is an essential ingredient to maintaining privilege arises in respect of "without prejudice" communications. Without prejudice privilege allows litigants the freedom to communicate freely without fear that anything said in pursuit of a settlement will be used against them in the proceedings if the negotiations break down. It renders inadmissible any statements or admissions made in a genuine attempt to reach a settlement. Without prejudice privilege is pierced only where:
 - the justice of the case requires it;
 - one party has allegedly engaged in perjury, blackmail, or other improper conduct; or
 - the existence of without prejudice communications may be relevant to an issue of estoppel or delay.

Defining the Client

The client for the purposes of legal advice privilege is the individual or the corporate entity that engages a lawyer for the purposes of obtaining that legal advice. However, ambiguity can arise if there are multiple entities involved, such as group companies, or where there are changes in the make-up of teams that are party to communications on a particular topic or thread.

In the *Three Rivers* case (*Three Rivers DC v Bank of England (No.5)* [2003] EWCA Civ 474), the England and Wales Court of Appeal found that legal advice privilege would only apply if the lawyer was communicating with an employee who had been tasked with seeking and receiving legal advice.

In *Ryanair*, the Irish High Court opted not to apply the stricter test that the English court adopted in the *Three Rivers* case and rejected *Ryanair's* claim that privilege should only apply to communications with a "special unit" within Channel 4 and not to communications with other employees or agents. However, crucial to this decision was the fact that *Ryanair* did not furnish any evidence that any special unit actually existed within Channel 4. On that basis, a conservative approach should be taken on this issue, and clients should be aware of the more restrictive test that the English court adopted in *Three Rivers* to best protect their position.

Practically speaking, this means identifying the relevant stakeholders who will seek and receive advice and ensuring as far as possible that communications are confined to those stakeholders.

Defining the Lawyer

Lawyers' Employees

Documents created or shared by employees, such as trainees, clerks, paralegals, or secretaries, would be protected by legal professional privilege only if they were prepared or communicated by the employee as an agent of a lawyer, where the document would have been privileged if created or communicated by the lawyer.

Foreign Lawyers

Documents created or shared by foreign-qualified lawyers attract legal professional privilege in the same way that those created or shared by an Irish-qualified lawyer would.

In-House Lawyers

Documents created or shared by in-house lawyers attract legal professional privilege in the same way that those created or shared by an external lawyer would, with one notable exception. Communications between in-house lawyers and their employers and legal advice given by in-house counsel to their employers do not attract legal professional privilege in the context of competition investigations carried out by the European Commission.

Legal professional privilege may be maintained where the legal advice is given by an in-house lawyer of a parent company to a subsidiary company in the same group if the necessary element of confidentiality is maintained and the subsidiary company receiving the advice has sufficient common interest in the subject matter of the legal advice.

In the same way that legal assistance provided by external lawyers (as opposed to legal advice) does not attract legal advice privilege, communications from in-house lawyers that do not involve the seeking or giving of legal advice are not legally privileged. Examples of legal assistance that are not legally privileged include providing commercial advice or administrative input.

Other Professionals

Legal advice privilege does not apply to communications between clients and non-lawyers, and therefore could not apply between a client and an accountant, expert, and so on.

Litigation privilege may apply to communications between a client and third parties and therefore could apply as between a lawyer and a tax accountant, expert, or any other individual or entity, if the criteria of litigation privilege are satisfied. In *The Director of Corporate Enforcement v Buckley* [2018] IEHC 51, the High Court recognised that communications between a company director, his solicitor, and an IT expert for the purposes of preparing a draft response to a request from the Office of the Director of Corporate Enforcement for books and documents were legally privileged and did not have to be disclosed.

Duration of Privilege

Legal advice privilege belongs to the client, survives for the duration of the legal relationship, and continues afterwards. It survives the death of both client and lawyer (see *Bullivant v Attorney General of Victoria* [1901] A.C. 196). The purpose behind the permanency is to assure clients that they can freely communicate with their lawyer, without fear of disclosure at any point in the future.

In contrast to this, there is uncertainty as to the duration of litigation privilege. While litigation privilege is linked to particular proceedings, there are instances when litigation privilege can continue for further related proceedings (see *McMullen*), where the subject matter of the initial proceedings is subsequently litigated in related proceedings. Generally, to successfully claim privilege in the second proceedings as to a document that was privileged in the first proceedings, there must be a sufficient connection between both proceedings for the document to also be relevant to the second proceedings, which in turn will lead to the party being able to assert privilege (*Bord na Mona v Sisk* [1989] IEHC 50).

Loss and Waiver of Privilege

Scope of Waiver

Privilege can be waived by the party entitled to claim it, which could be a party or a client, but could also extend to third parties in the case of common interest privilege. Alternatively, an opposing party can establish that the privilege holder has waived privilege.

Privilege can be expressly or impliedly waived, and it may be deliberate or inadvertent and in whole or in part (see *Fyffes*).

Privilege can be lost or destroyed through waiver or disclosure. For example, if a privileged document is openly given to a third party or relied on during legal proceedings, it loses its privileged status.

Where it is apparent that a disclosure was inadvertent and the result of obvious mistake, the court may grant

an injunction restraining the counterparty from making use of the document in the proceedings or disclosing the document further. Where a court makes this order, the party can assert privilege over the relevant documents in the normal way.

Given how important privilege is to the administration of justice, the courts take a cautious approach to the loss of privilege and give consideration to the fairness between the parties (see *Fyffes*).

Privilege can survive disclosure, but only in exceptional circumstances. In *Fyffes*, the Irish Supreme Court found that if limited disclosure is made in confidence and for a particular limited purpose, privilege may still be maintained. This is not absolute, however, and without an express and agreed limitation around the scope of the disclosure (and making it clear that the document is confidential), disclosure to even a small number of people may result in the loss of privilege over the document in question.

Parties can enter a limited disclosure agreement or “*Fyffes* Agreement” (per *Fyffes*) to maintain legal professional privilege. By the terms of this kind of agreement, the parties expressly agree that legally privileged documents are disclosed for a limited purpose only and should not be disclosed to any other party or relied on in any other context.

Courts do not allow a party to gain an advantage in litigation by “cherry picking,” that is, selecting favourable aspects of relevant information for presentation to the court while withholding unfavourable aspects. In *Fyffes*, the Irish Supreme Court held that “a party who seeks to deploy his privileged documents by partially disclosing them or summarising their effect so as to gain an advantage over his opponent in the action in which they are privileged, runs a serious risk of losing the privilege.”

Disclosure to Entities with a Common Interest

An exception to the general rule against dissemination is that legal privilege is not lost where a confidential communication is disseminated, on a confidential basis, to third parties who share a common legal interest in the subject matter of the communication with the lawyer.

The Irish courts (*Moorview Developments v First Active plc. & Ors. [2008] IEHC 274* and subsequent jurisprudence) have developed a two-stage test for establishing a valid claim of common interest privilege:

- First, it must be established that the documents in the hands of the party transmitting the information were confidential and legally privileged documents before their disclosure.

- Second, it must be established that the parties have a common interest in the contents of the documents such that the disclosure of the documents was not a waiver of privilege.

Consider a scenario where A has sought legal advice from her lawyers about making a claim against her employer for unfair dismissal. She shares the legal advice with her colleague B (and her lawyer) who has been similarly dismissed. In Ireland, if colleagues A and B can establish that they have a common interest in the legal advice obtained by Colleague A, they can assert common interest legal advice privilege over the documents, presuming A shared the advice with B because of the common legal interest arising from their dismissals by the same employer.

In *Sports Direct International plc v Minor & Ors. [2015] IEHC 650*, the Irish High Court found that:

“[I]f legal advice obtained by one person is passed on to another person for the sake of informing that other person in confidence of legal advice which that person needs to know by reason of a sufficient common interest between them, it would be contrary to the principle upon which all legal professional privilege is granted to say that the legal advice which was privileged in the hands of the first party should be lost when passed over in confidence to the second party, merely because it was not done in the context of pending or contemplated litigation.”

Consider that, in the scenario above, A files a claim for negligent advice against her lawyer X. Lawyer X, who holds a professional indemnity policy in relation to the proceedings, wishes to share the legal advice he sought regarding the claim with the insurer. Common interest privilege applies between insurers and an insured (*Guinness Peat Properties Ltd. v Fitzroy Robinson Partnership [1987] 1 W.L.R. 1027*) such that by the lawyer X disclosing the legal advice to their insurers, they will not be taken to have waived privilege in that advice.

Consider a scenario where co-defendants in a personal injury claim, who have a common interest in defeating the claims of the claimant, wish to disclose confidential communications to each other and their respective lawyers. Any pre-existing legal professional privilege that could be relied on by one co-defendant would not be lost on account of disclosure to the other co-defendant if the confidential communications to be disclosed between the co-defendants or their respective lawyers are both:

- Privileged to begin with (that is, they meet the test for legal advice privilege or litigation privilege).
- Disclosed expressly on foot of the co-defendants’ common interest in defeating the claimant’s claims.

A formal agreement to preserve the common interest privilege between the parties is not necessary, but it is recommended and should include an acknowledgment that any document shared under common interest privilege does not constitute a waiver of privilege, should be held in complete confidence, and will not be disclosed without the legal privilege holder's consent. Depending on the facts, common interest privilege may nonetheless be inferred from the particular circumstances and the parties' conduct.

Disclosure to Entities Represented by the Same Counsel

Parties having a common interest in the subject matter of a privileged communication can share those communications between them without waiving privilege where disclosure is in relation to the relevant subject matter and confidentiality is otherwise preserved. There is no express limit under Irish law as to who may have a shared interest in subject matter in relation to which privileged communication might arise, and relationships like those between a beneficiary and trustees, partners, or a parent and subsidiary company might be found to have common interest in the subject matter, if it can be demonstrated and if the necessary confidentiality is retained in the privileged material as to other third parties.

Partially Privileged Documents

Where a document contains both privileged and non-privileged information, the document should be assessed for relevance. If both the privileged and non-privileged information is relevant, the document should be disclosed with the privileged portions redacted.

Privilege in Unique Contexts

Privilege against self-incrimination is a constitutionally protected right in Ireland. The privilege against self-incrimination goes hand-in-hand with the right to silence in criminal contexts. The privilege against self-incrimination is not an absolute right. There are several circumstances where the right may be curtailed.

In a trial, an accused person cannot be compelled to give evidence at trial, and no inferences can be drawn from a failure to testify (Keane J in *People (D.P.P.) v Finnerty* [1999] 4 IR 365).

As to the pre-trial right to silence, while the general rule is that a suspect is entitled to maintain their silence in response to Garda questions (that is, questions by the police) at interview without any adverse consequences, the legislature has created a number of statutory

exceptions whereby a particular failure of a suspect to answer certain questions in this context can be brought to the attention of the trial court, and the arbiter of fact can be invited to draw inferences from, specific failures of the suspect to answer questions or provide information.

These circumstances include, as to all arrestable offences (meaning an offence for which the accused may be imprisoned for five years or more), an inference can be drawn from:

- An accused's pre-trial failure to account for objects, substances, or marks on their person (section 18, Criminal Justice Act 1984 (as amended)).
- An accused's presence at a particular place (section 19, Criminal Justice Act 1984 (as amended)).
- More broadly, an accused's failure to mention any fact in the pre-trial process that is relied on in defence at trial (section 19A, Criminal Justice Act 1984, as amended)).

Further, there are certain offences in which it is a criminal offence not to answer certain questions or to provide information, such as when the offence is an organised crime offence as provided for under part 7 of the [Criminal Justice Act 2006 \(as amended\)](#).

Spousal privilege is a form of privilege that protects the spouse of an accused from being compelled to give evidence against the accused in a criminal context. In Irish criminal contexts, spouses of an accused generally enjoy spousal privilege save for certain exceptions, such as when the offence in question concerns violence to that spouse, the spouse's or accused's child, or when the offence is a sexual offence involving the spouse's or accused's child or person under 17.

In contrast to the spousal privilege that exists in the criminal context, the statutory spousal privilege that previously applied in civil proceedings to communications made between spouses was repealed by the [Criminal Evidence Act 1992](#). However, by consequence of the Irish constitutional right to a private family life and the ECHR right to privacy, spousal privilege can be invoked in respect of certain communications between spouses due to the confidential relationship between the parties. If successful at invoking spousal privilege by virtue of either of these rights, those communications are not admissible as evidence in civil proceedings. This form of spousal privilege may arise where spousal communications related to the relevant couple's separation or divorce but also may arise regarding private written or oral conversations related to family life. Further, section 112 of the [Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 \(as amended\)](#) provides that certain oral or written

communications are not admissible as evidence in court, for example, certain communications relating to reconciling or dissolving the partnership in question.

Internal Investigation

Where the dominant purpose of the investigation, when it is being carried out, is not to obtain legal advice or for the purpose of anticipated litigation or investigation, the interview notes and the report would not attract legal professional privilege. The subsequent decision to seek legal advice would not alter the non-privileged status of the interview notes or the final report. The law does not protect from disclosure a “pre-existing document,” that is, a document created for some other purpose before the client sought legal advice.

The fact alone that a decision was taken to obtain legal advice before the interviews were conducted or report prepared is not sufficient for legal advice privilege to apply to those documents. The dominant purpose of their preparation would have to have been to enable the company to take legal advice before legal advice privilege would be capable of attaching. For example, if the documents were prepared for the principal purpose of insurance notification or compliance purposes, the fact that they would also be used to obtain legal advice would not be sufficient to attract legal advice privilege.

The analysis is the same where the investigation is being conducted after a decision to pursue litigation has been taken. The investigation must have been conducted for the dominant purpose of that intended litigation to be capable of attracting litigation privilege.

In an internal fact-finding investigation, and in circumstances where no decision has been taken to obtain legal advice or to pursue litigation in respect of the interview notes or report, the participation of an in-house or external lawyer is not sufficient to attract privilege.

Corporate entities should consider whether they are required to implement a legal hold in the circumstances of an internal investigation if the matter is likely to lead to become contentious. A legal hold is an instruction directing employees to preserve (and refrain from destroying) information that may be relevant to the subject matter of pending or anticipated litigation. The obligation to preserve information and documents where discovery is deemed to be likely to be required is a creature of case law that evolved to support the operation of the court rules concerning discovery. In meeting the threshold for preservation, parties must take “reasonable steps to preserve relevant documentation” as soon as they become aware of a matter which is likely to require discovery. (*McNulty v The Governor and Company of the Bank of Ireland, t/a Bank*

of Ireland Group [2021] IECA 182, Hurley v Valero Energy (Ireland) Ltd [2022] IEHC 651, McNally v Molex Ireland Ltd & Molex Incorporated [2022] IEHC 555.)

To establish privilege over documents in an internal investigation, the dominant purpose of each document created must be to obtain legal advice or in furtherance of anticipated or actual litigation (and must satisfy the other privilege criteria). Accordingly, for a note of an employee interview to attract legal advice privilege, for example, the note would have to have been prepared by a lawyer for the purpose of advising the investigating company. If an interview note contained a purely factual account of matters, this would not satisfy this requirement even if prepared by a lawyer.

Corporate entities should carefully consider the dominant purpose of each document, and, where possible, expressly identify the purpose of that document (that is, that it was prepared by a lawyer to provide legal advice, or to prepare for actual or imminent litigation).

To preserve privilege once it is established, care should be taken to ensure that any privileged documents are stored in a separate folder to those containing other documents relevant to the investigation. The purpose of doing so is to ensure any privileged documents pertaining to the investigation remain confidential and are not accessible to persons outside of those with a need to have access to them. A list of persons that have a legitimate need to access the privileged materials could be recorded (including the reason for that need), therefore providing proof that the documents were confidential and provided on a “need to know” basis.

Further, confidential privileged documents should not be disseminated any more than necessary, and care should be taken to avoid generating copies. The greater the dissemination, the greater the risk of inadvertent disclosure or waiver of privilege. Where possible, circulation of privileged documents should be restricted to internal and external lawyers.

M&A Transactions

The parties to the transaction could agree to a privilege limited waiver agreement to share privileged material for a defined purpose. To maintain privilege, the agreement should clearly document the persons who will have access to the privileged material and the purpose for which it was shared. It should also ensure to limit the use of or reference to that material to the purpose or purposes for which it was shared and specifically limit the dissemination of material or copies.

A seller can take several practical steps to protect its privileged materials from the buyer before closing.

Of central importance is that a deal team considers the issue of privilege before commencing any disclosure exercise.

The first essential ingredient of legal privilege is that confidentiality in the document is maintained. If a privileged document is disclosed to a third party (for example, the seller), that risks destroying the confidentiality in that document resulting in a loss of privilege.

A deal team should therefore identify the seller's privileged materials and, as a general principle, refrain from including those documents in a data room or providing them to the buyer as part of due diligence.

There may be some privileged documents that the buyer considers would be beneficial to share with the seller. If sharing specific materials, there are a number of practical steps the seller can take:

- Clearly label privileged documents as legally privileged and confidential.
- The seller should ensure that the privileged documents are provided only to the necessary individuals within the buyer organisation such that confidentiality can be maintained if possible. For example, the documents could be shared on a separate and secured platform to the data room, where only certain persons have access and where printing or downloading of the documents is restricted. Password protection could also be applied to privileged documents.
- A seller should consider only sharing privileged materials with a buyer when the deal-making process is at an advanced stage. If the document has been shared with multiple prospective buyers, it is unlikely the document would satisfy the requirement of confidentiality.
- Sharing information orally between legal counsel can be an alternative approach to providing access to privileged materials. Another alternative is preparing a summary of relevant facts and only including advice in that summary if it is strictly necessary to do so.
- If privileged materials are to be shared between the seller and buyer, the parties may consider entering into a privilege limited waiver agreement or a common interest privilege relationship that records the limited basis of the disclosure and that privilege is not intended to be waived.

Cross-Border Matters

The general rule is that Irish courts or regulatory authorities apply the law of the forum where the case is being heard (that is, Irish law).

The impact of disclosure in one jurisdiction on proceedings in another jurisdiction may to a large degree depend on

how the documents are disclosed and the attitude of the latter jurisdiction's courts to legal professional privilege. In cross-border litigation, it is therefore best to proceed with caution and adopt the strictest jurisdiction's approach to maintaining privilege where possible.

Ultimately, however, the disclosure of documents in foreign proceedings is likely to impair a client's ability to assert privilege over those documents in Irish proceedings, unless it can be demonstrated that the disclosure was made in express confidence for a particular limited purpose and that there is no "relevant nexus" or tangible link between the proceedings.

The risks related to a voluntary waiver of privilege are compounded in a cross-border scenario. For example, in the US, there is little recognition of the concept of a selective or limited waiver of privilege. Therefore, a privileged document shared on that basis in Ireland may be viewed as available for disclosure in related criminal, regulatory, or civil proceedings in the US.

There appear to be two different approaches taken by UK and US courts on cross border privilege issues:

- **The US Comity / touch base approach.** The US courts appear to apply the privilege rules of either the jurisdiction with the "predominant interest in whether [the] communications should remain confidential," and "the place where the allegedly privileged relationship was entered into" (*Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514 (S.D.N.Y. 1992)). US legislation provides that courts should consider and apply certain factors to identify the jurisdiction with the most significant relationship with the communication (Restatement (Third) of Foreign Relations Law § 442) and should adopt the law of the jurisdiction that favours disclosure unless a "special reason" or "strong public policy" require otherwise (Restatement (Second) of Conflict of Laws § 139).
- **The UK *Lex Fori* approach.** In *Dawson-Damer v Taylor Wessing LLP* [2017] EWCA Civ 74, the Court of Appeal in England and Wales found that privilege applied only to documents that would attract privilege as a matter of English law. In doing so, the court overruled the judge at first instance, who had determined that legal professional privilege also applied to documents which would be protected from disclosure under Bahamian law. Essentially, this means that only the "law of the forum" or jurisdiction applies to the application of privilege in proceedings in England and Wales.

Recent Developments

As part of the test for determining a claim to litigation privilege, the party asserting privilege over documents must prove that the documents were created for the dominant purpose of the litigation. The Irish High Court

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recently considered the relevant factors of this test. The court found that the fact that the asserting party had not identified on affidavit the other purposes of the document meant that it was unable to objectively conclude for what dominant purpose the documents had been created. The court would not be bound by bald assertions in this respect. (*Artisan Glass Studio Limited v The Liffey Trust Limited & Ors* [2018] IEHC 278.)

The Irish Court of Appeal recently ruled that, in respect of documents seized under a Corporate Enforcement Authority investigation, the onus remains on the person asserting privilege over documents to satisfy the court of their entitlement to exclude the documents from discovery. Sufficient information substantiating the claims of privilege and enabling the other side to interrogate the claims must be provided, and bald assertions of privilege are inadequate. As the appellant had failed to discharge the required burden of proof, the Court of Appeal upheld the High Court order directing disclosure of the documents. (*Corporate Enforcement Authority v Cumann Peile na H-Éireann "Football Association of Ireland"* [2023] IECA 226.)

The Irish High Court recently found that privilege had been waived over documents that were prima facie accepted to attract a claim of privilege. The documents had been referred to and relied on for litigious advantage in an affidavit sworn by the respondent. The court found that once a privileged document has been deployed for the purpose of defending proceedings with reference made to the documents in pleadings or on affidavit, the status of the document is altered, and privilege is waived. The court made an order directing that the applicant could inspect the relevant documents. (*Esharkawy v The Minister for Transport* [2023] IEHC 672.)

The Irish High Court recently found that, in respect of data seized by the Commissioner for Communications

Regulation in a dawn raid, the regulator was the entity that should conduct electronic keyword searches on the data to, in part, eliminate privileged documents. The court rejected the argument advanced by the regulated entity that it should apply the searches given the requirement under the legislation that its confidentiality be "maintained" by the regulator. The court noted that confidentiality would never be 100% guaranteed, whether the regulator or regulated entity conducted the search. To require the regulated entity to conduct the search would set the regulator's investigation and powers of search and seizure at nil. The regulated entity was best placed to know what types of privileged information would be contained in the seized data, and the court noted that it expected the regulated entity to cooperate with the regulator in deciding on the search terms. (*Commissioner for Communications Regulation v Eircom Limited* [2024] IEHC 49.)

The *Review of the Administration of Civil Justice* (Dublin, 2020), a report prepared by the Irish Civil Justice Review Group, chaired by Mr Justice Peter Kelly, former President of the Irish High Court (Kelly Report), proposes radical changes for the law of discovery in Ireland. Although the proposed reforms have not yet been implemented, the Kelly Report proposes that the discovery process would be replaced with a procedure known as "production of documents," based on the approach taken by the courts at the Dubai International Finance Centre (DIFC Model). The DIFC Model strikes a balance between the common law tradition (disclosure of relevant documents on which the party intends to rely, or that harm their own case or support their counterparty's case) and the civil law tradition (disclosure only of documents on which a party intends to rely). Under the DIFC Model, a party can still request documents from their counterparty, but that counterparty can object to production based on privilege.

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