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Legal Professional Privilege Seminar

Chaired by Mr. Justice Seamus Noonan of the Court of Appeal

Thursday 8th October

2pm to 5.30pm - 3 General CPD hours

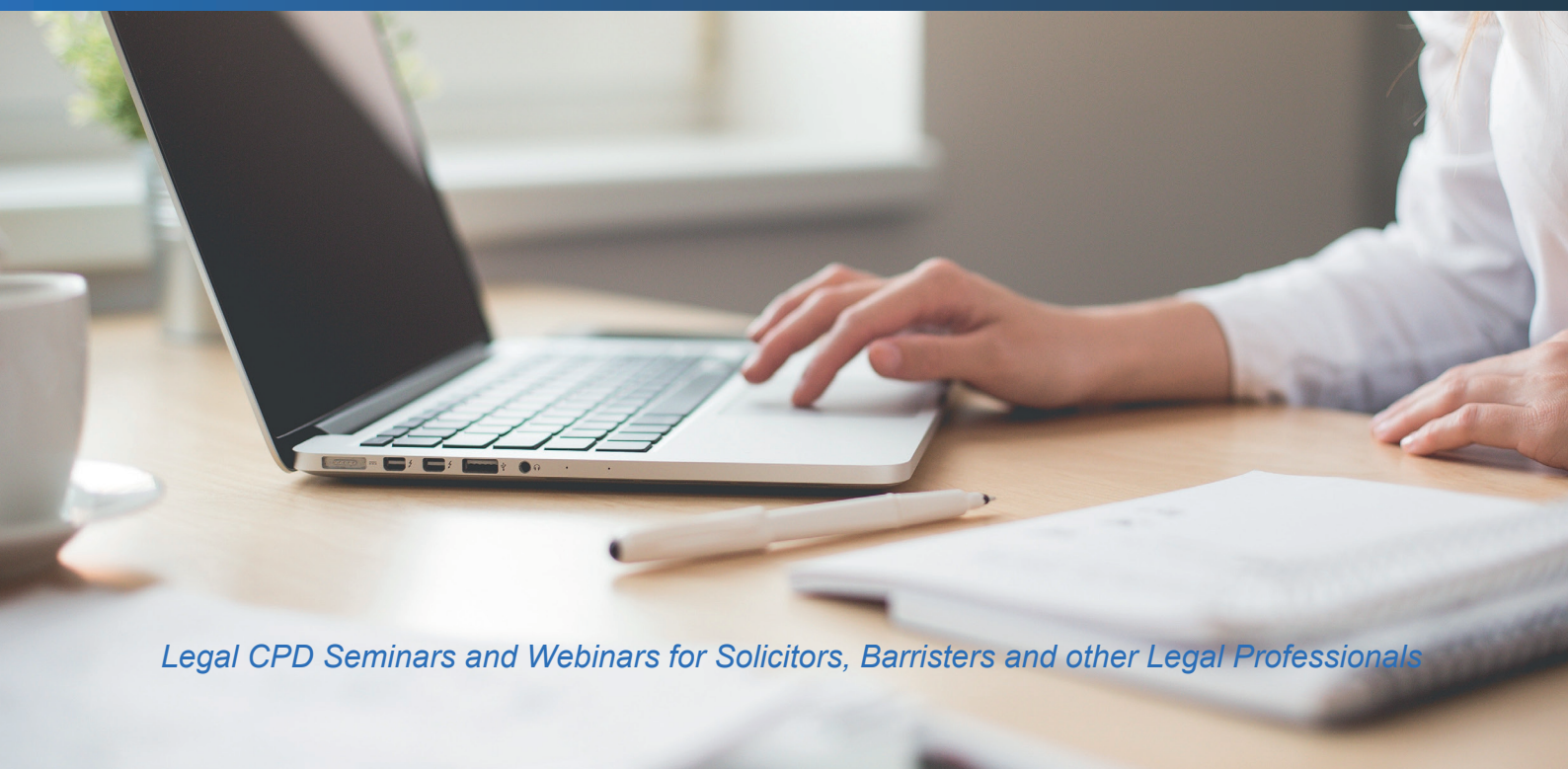
The principle of legal professional privilege has been described as “much more than an ordinary rule of evidence”. It has been stated that it is “a fundamental condition upon which the administration of justice as a whole rests”.

Per Kelly J: Duncan v. Governor of Portlaoise Prison.

The boundaries of legal professional privilege are commonly misunderstood and frequently open to challenge. This seminar will examine the scope of privilege and when it can be asserted. It will provide you with an analysis of recent case law as well as practical tips on how to ensure that claims of privilege are upheld.

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Legal CPD Seminars and Webinars for Solicitors, Barristers and other Legal Professionals

1. Legal Professional Privilege and Civil Litigation

The first session will commence with a brief examination of the prerequisites for legal professional privilege. This will include a discussion of the requirement for confidentiality and the nature of the solicitor-client relationship.

This session will also examine the principal elements of, and the distinction between, each form of privilege. It will explore some recent developments in each of litigation privilege, legal advice privilege and without prejudice privilege.

Legal advice privilege:

- An assessment of the distinction between legal advice, legal assistance and the continuum of communications.
- Does the “dominant purpose test” apply to legal advice privilege?

Litigation privilege:

- Establishing privilege in litigation – including a consideration of *Colston v. Dunnes Stores*, *University College Cork v. ESB* and *Ryanair v. Revenue Commissioners*.
- How is the dominant purpose assessed? Does it depend on the motivation of the person who caused the document to be created, or is it a matter for objective determination by the court?: *Gallagher v. Stanley*
- The attitude of the Court where no one dominant purpose is evident: *Woori Bank and Hansit LSP Finance v. KDB Ireland* ; *Hansfield developments and Anor v. Irish Asphalt Ltd and Anor*

Without Prejudice Privilege:

- Are “without prejudice” communications admissible to determine whether or upon what terms a settlement has been reached?
- Can “without prejudice” privilege apply before proceedings are formally commenced? *Mooreview Developments Ltd v. First Active*
- Is the fact that “without prejudice” negotiations had taken place, admissible to explain delay?

The crime-fraud exception: At what point does the legal advice given become bound up with the fraud committed?

Waiver of legal professional privilege: A discussion of the decisions in *Defender v. HSBC* and *Quinn v. IBRC*

Loss of privilege:

- Is inadvertent disclosure always fatal? What test will be applied by the court in such circumstances? *Byrne and Another v. Shannon Foynes Port Co and Another*; *Tir na nOg Projects Ireland v. County Council of County Kerry*

2. Legal Professional Privilege in the Regulatory Context

The entitlement to assert Legal Professional Privilege is one of the key exceptions to the requirement to disclose and produce material to various regulatory bodies. This throws up a number of significant challenges in practice both in terms of interacting with regulatory bodies on the subject of privilege and how-to co-ordinate responses internally to ensure that privilege is protected when available.

This session will explore the following topics:

- Asserting privilege when responding to data subject access requests and freedom of information requests.
- Asserting legal professional privilege in the context of Data Protection Commissioner investigations and Office of the Information Commissioner reviews.
- How best to frame governance procedures in a manner that ensures that legal professional privilege attaching to documents is not eroded or waived.
- The treatment of privileged material when making voluntary disclosures to regulatory bodies.
- Preserving privilege when making reports to An Garda Síochána pursuant to section 19, Criminal Justice Act 2011.

3. Legal Professional Privilege and Investigations

With the significant rise in enforcement proceedings taken by the regulatory bodies and an increase in internal investigations due to changes in the civil and criminal regulatory landscape, this session will focus on best practice in the conduct of investigations with a view to preserving the privileged status of communications. In particular, it will examine:

- Procedures for asserting privilege in the course of dawn raids and responding to requests for mandatory production of documents.
- How disputes regarding the privilege status of documents are resolved with regulatory bodies.
- The evolution of investigatory privilege: *Re Haughey, Ahern v Mahon, Quinn v. IBRC, Buckley v ODCE*.
- Joint Privilege and Joint Interest Privilege in the context of investigations: Managing actual and potential conflicts between the company and its directors.
- Limited waiver of privileged material to regulatory bodies and managing the risk of collateral waiver.

Managing Internal Investigations:

- The importance of structuring internal investigations correctly to protect legal professional privilege.

4. Panel Questions & Answers: Legal Professional Privilege in Practice

- Practical tips on how to preserve privilege.
- Reflections on the changing landscape of legal professional privilege.

Meet the speakers



Frank Flanagan
Partner
Mason Hayes & Curran

Frank Flanagan, Partner. Frank is a Partner in the Dispute Resolution team in Mason Hayes & Curran. He acts for a broad range of clients, including lenders, State bodies and insolvency practitioners and corporates in complex insolvency and litigation. He advises lenders in relation to litigation strategy and, in that context, advises both sellers and purchasers of portfolios of loans. Frank also advises State bodies and corporates in relation to the regulation of non-food products and communications and energy regulation. Prior to joining our team, Frank had a 20-year career in the communications and computer hardware industries, culminating as Chief Technical Officer of a technology start-up where he was deeply involved in raising significant venture capital funding and in technology licensing/transfer to a Fortune 100 company. Frank is the author of the Irish chapter of Retention of Title in and out of Insolvency, published by Globe Law, 2015 and the co-author of the Irish chapter of Cash Pooling and Insolvency, 2nd Ed. Globe Law, 2016.



William Abrahamson
Barrister at Law

William Abrahamson, BL. William Abrahamson has been in practice as a barrister since being called to the Bar in 2001. He has a broad practice covering litigation and advisory work in the areas of commercial law and chancery. William is a co-author of Discovery & Disclosure, the third edition of which was published in 2019. He was also a contributor to the second edition of Practice & Procedure in the Superior Courts.



Kevin Kennedy
Senior Associate
McCann FitzGerald

Kevin Kennedy, Senior Associate. Kevin Kennedy is a Senior Associate in McCann FitzGerald's Investigations and White-Collar Crime Group. He has extensive experience conducting internal investigations and defending regulatory and criminal investigations on behalf of clients, particularly in fraud and bribery matters. He holds an M. Litt in Law from Trinity College Dublin; his research thesis was entitled "Legal Professional Privilege and the Corporation" and he is a frequent speaker and writer on legal professional privilege and white-collar crime issues.

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