

Legal Professional Privilege: what is it?

1. Legal professional privilege

Legal professional privilege (also referred to as client legal privilege) is a mechanism which is designed to protect certain communications from subsequent disclosure thereby encouraging a free exchange of communication between a client and the lawyer acting for client. There are three types of privilege: advice privilege, litigation privilege and third party privilege. For more, see *Legal Professional Privilege in Australia* by Dr Ronald J Desiatnik, Second Edition, (p24).

2. The test

Whether a communication will be privileged depends on the dominant purpose for which the communication came into existence, where such purpose was (or was not) for advice, litigation or communication with a third party; the fact a document is marked as privileged will not automatically confer privilege.¹ In deciding whether a communication is privileged, a court will have regard to the competing tension between a citizen's right to speak freely with its legal representative and the public's right to all the evidence of the matter in dispute.

3. Exceptions

There are a number of exceptions to legal professional privilege, even when the dominant purpose test is satisfied. These exceptions apply in circumstances where:

- a. the privilege has been waived;
- b. it is in the public interest;
- c. a statute modifies or removes the privilege where the legislature affords a competing public interest a higher priority; and
- d. the communication is for the purpose of facilitating a fraud or crime.

4. Your obligations

As lawyers, our role is to take necessary steps to maintain the privilege that exists in a communication. This obligation subsists even in circumstances where we are unable to obtain instructions prior to taking the steps necessary to maintain the privilege. For example, suppose a government agency turns up at your office and demands your client's documents and your client's documents contain privileged material. As your client's legal representative you have an obligation to take action to preserve the privilege in the material even if that will cause you to incur costs and time in doing so.

5. Assisting your client to maintain privilege

It is the client who has the privilege in the communication. However as the client is unlikely to be aware of this fact, there are things you can do as your client's solicitor to educate your client to assist with the inadvertent waiver of the privilege. Such precautions that you might advise your client to take into account include:

- a. marking documents that include legal advice as 'Strictly Private and Confidential' and 'Subject to Legal Professional Privilege' to highlight the nature of the document;
- b. procedures put in place to ensure that if a document is to be sent to a third party, it is done on an express basis of confidentiality. Where appropriate a copy should also be sent to the relevant legal adviser to comment on the communication;

¹ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67.

- c. privileged documents (or communication of their substance) are not to be circulated wider than necessary and only on a confidential basis; and
- d. when seeking the assistance of third parties in formulating a request for legal advice, make it clear that the information is required for the purpose of obtaining legal advice.

6. Resources

Want to dig deeper? Check out:

- a. The Ethics Centre's resources at https://www.qls.com.au/Knowledge_centre/Ethics/Resources/Confidentiality
- b. *Lawyers' Professional Responsibility* by G.E. Dal Pont;
- c. *Cross on Evidence* by J.D Heydon;
- d. *Riley Solicitors Manual*; and
- e. *Legal Professional Privilege in Australia* by Dr Ronald J Desiatnik.

Dan Phelan

Ethics Solicitor

28 January 2014

(Updated 15 April 2021, Shane Budden, Special Counsel, QLS Ethics and Practice Centre)