

Legal Professional Privilege

This article looks at Legal Professional Privilege – its nature and the practical effects it has on clients of law firms.

What is Legal Professional Privilege?

Also termed "client legal privilege", it is a particular right of a client not to have documents revealed to the other party in litigation, attaching to certain documents drafted by a lawyer for a client and to certain communications in the course of the lawyer/client relationship, in limited circumstances. Legal professional privilege – including how and when it comes into existence, when it may be claimed and how it may be lost – is covered by Sections 117 to 126 of the Evidence Acts (both NSW and Commonwealth).

What does it mean?

If a document or communication is privileged, it need not be disclosed to the other side in litigation and if the court decides, its very existence may be kept secret.

When does it arise?

Legal professional privilege arises in limited circumstances. It arises when:

1. A client seeks legal advice from a lawyer; AND
2. That advice is sought from the lawyer in their legal capacity; AND
3. The advice is of a legal nature; OR
4. The advice relates to actual or contemplated litigation.

Legal professional privilege attaches only to certain documents, for example, file notes, letters of advice and the like. It may not be claimed for pleadings (documents issued in court proceedings, such as a Statement of Claim or a Defence), as these are documents which have been made public, however it may attach to drafts of pleadings or notes taken to assist in the preparation of pleadings.

Legal professional privilege may attach not only to communications between the client and the lawyer, but between communications between the lawyers and third parties (on behalf of the client) or between the client and third parties.

When may it be claimed?

It may be claimed in the context of litigation or obtaining legal advice, when the documents or communications to which the privilege is to be attached have been drafted by a lawyer for their client who is a party to that litigation.

Which communications are privileged?

Only communications which satisfy the above criteria and have not been made public or whose content has not been revealed to the other parties to litigation may be privileged. Once documents are made public or privilege has been waived, it is forever lost in relation to those documents.

Aren't all documents privileged?

No – client legal privilege only exists in relation to certain documents in limited circumstances. For example, it does not exist in a situation in which a lawyer gives financial advice to a client, or when a lawyer is advising a client generally prior to litigation. Generally speaking however, once a costs agreement for the purposes of

litigation is entered into, that is enough to signify that communications after that point are in relation to the litigation and therefore privileged.

The difference between legal professional privilege and confidentiality

Confidentiality exists in relation to all documents and communications passing between a client and their lawyer. Legal professional privilege is something more. Whilst confidential documents may still be required to be served on the other party to litigation or adduced as evidence in court, privileged documents may not.

When/how privilege may be lost or waived

Privilege may be waived either expressly or by implication. Express waiver requires the client to give their (usually written) consent for material that would otherwise be the subject of legal professional privilege to be allowed into evidence. Implied waiver occurs when the client publishes the material or makes it available to the other side, or when enough details of the privileged documents become known so that in large part, the content of the privileged document(s) is known to the other side.

Comasters can advise clients on legal professional privilege.

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Important: This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

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