



Legal Professional Privilege

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When does legal professional privilege apply?

Legal professional privilege describes the protection from disclosure extended to communications (written or oral) made in the course of obtaining legal advice or for contemplated or actual legal proceedings.

Where it applies, the privilege (sometimes called “*client legal privilege*”) can be claimed to resist a legal requirement to reveal a communication. Such a claim can be made in court proceedings, as well as in administrative inquiries (such as [investigations by government agencies](#)).

The privilege applies not only to communications between a lawyer and their client but also between a lawyer and third parties (such as an expert witness) if made for the purpose of anticipated litigation.

Simple examples of the application of legal privilege.

- A witness giving evidence in court would not usually be required, even if asked, to disclose the legal advice given to them earlier, such as at a police station or in preparation for court.
- A report compiled by a lawyer for a company wanting advice about its tax obligations would usually be able to be kept confidential, even if it is sought by the Tax Office or another government entity.
- A person being interviewed as part of an investigation by a government agency (such as the police, the Crime and Corruption Commission, Centrelink, or the Office of Work Health and Safety) would not be obliged to reveal their discussions with their own lawyer in preparing for the interview.

When does legal professional privilege not apply?

Legal professional privilege will not apply where the relevant communication between a lawyer and the client is to facilitate or advance the commission of a crime.

It will also not apply where the privilege has been “*abrogated*” (removed) by an Act of Parliament. This will usually only be in (rare) circumstances where the Act of Parliament makes it very clear - directly or by implication - that legal professional privilege is not to apply.

The purpose of the privileged communication

To be privileged, the communication must have been made for the *dominant purpose* of obtaining or providing legal advice, or the provision of professional legal services in relation to anticipated or actual legal proceedings.

If there are a number of competing purposes for which a communication was made, then it will probably not attract the privilege.

Consider this scenario:

- A child is seriously injured in a school playground.
- The school principal asks the school's lawyer to investigate and take statements from all of the students and teachers who witnessed the accident.
- The lawyer then compiles a report for the school about the accident.
- The child (through his parents) later sues the school for the child's injuries.
- The child's lawyers ask for the school lawyer's investigation report.

Whether that report must be handed over to the other side, or whether it can remain confidential, will depend on whether it is legally privileged.

If the lawyer was retained by the school to do the report specifically in preparation for the legal proceedings likely to emerge from the accident, the report is likely to be privileged.

If, however, the lawyer was retained to “*find out what happened so we can explain it to the students and parents*”, it probably would not be privileged as its dominant purpose was not to obtain legal advice in connection with anticipated legal proceedings.

A document or communication will not be privileged simply because it is made for or given to a lawyer. The mere supply of a document to a legal advisor will not determine its purpose. The real question is whether the dominant purpose of that communication was for the purpose of obtaining advice or legal assistance in relation to anticipated or actual legal proceedings.

How legal privilege can be lost

The most important feature in maintaining legal privilege is that of confidentiality. If a communication is not confidential, it will not usually be privileged. For that reason, material in the public domain is unlikely to be privileged.

A failure to maintain confidentiality will usually result in the loss of any privilege that existed in a communication.

Someone who shows their friends the legal advice received from their lawyer probably causes that advice to lose its privileged status. In other words, privilege can be “waived” (lost) where the person who holds the privilege treats the communication in a manner inconsistent with the maintenance of its confidentiality.

For this reason, great care must be taken in the dissemination of legal documents. If privilege is sought to be maintained over a document (or any confidential communication between you and your lawyer), any distribution needs to be done in a way that strives to maintain strict confidentiality and limits circulation as much as possible.

Privilege can even be waived when the mere “gist” of legal advice is discussed publicly, even if the entire advice is not. For example, if someone involved in litigation says:

“I have received legal advice that my claim against the insurance company is strong and for that reason, I am going to sue for damages”,

then that person has probably waived the privilege in that advice, and the insurance company might well be entitled to demand a copy of it.

Solicitor/client privilege belongs to the client

Importantly, the privilege belongs to the client, not to the lawyer. A lawyer cannot unilaterally waive or lose privilege on behalf of a client unless the client agrees.

Legal professional privilege can be a complicated legal concept. [Anyone wanting further information or advice about their rights and obligations in relation to legal professional privilege should contact us.](#)

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