



PROTECTING YOUR CLIENTS' CLAIM TO CLIENT LEGAL PRIVILEGE

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Solicitors have a fundamental duty to act in the best interests of their clients,¹ including protecting claims to legal professional privilege. It is perhaps better described as client legal privilege, as the privilege belongs to the client.²

Protecting your clients' claims to privilege requires you to be well-informed on the elements of privilege and how it might be waived.

This set of Frequently Asked Questions discusses the elements of this important legal right, and the considerations lawyers should have when assessing whether a claim to privilege exists and how to safeguard this right for their clients.

Q1: What is client legal privilege?

Client legal privilege is a common law right that has existed for over 400 years. However, it is now also encoded in the various Evidence Acts of the states and territories and the Commonwealth Evidence Act.³

Its purpose is to ensure that people (whether individuals or corporations) disclose all relevant information about their affairs when seeking legal advice or services. This right is fundamental to helping lawyers properly pursue and defend their clients' rights.

Privilege was originally a right that could only be exercised in legal proceedings.⁴ This is because, when the principles relating to privilege were developed, there were no powers to compel the giving of information or documents other than those that were available in legal proceedings.⁵ However, the scope of privilege expanded significantly in the 20th century to encompass immunity from the exercise of coercive government information-gathering powers.⁶

Privilege is therefore now not a mere rule of evidence; it is a rule of substantive law. This means that the right to privilege may be relied upon to resist all forms of compulsory disclosure, including in judicial or quasi-judicial proceedings and in the context of non-judicial investigatory procedures.⁷

Q2: How do you determine if a claim for privilege exists?

A person can claim privilege over "communications" that are:⁸

- (a) confidential, and
- (b) were created for the dominant purpose of:
 - i. providing legal advice or services, or
 - ii. for use in existing or anticipated litigation.

The term "communications" is widely construed. The privilege extends to material gathered by the lawyer or client in preparation for litigation, even in the absence of communication in the strict sense.⁹ For example, a draft letter that is not sent to the client and never leaves the solicitor's office may be privileged if its contents reveal privileged communications.¹⁰

However, privilege does not extend to documents that constitute or evidence transactions. For example, a contract for the sale of land. These types of documents are not considered to be communications for the dominant purpose of legal advice or litigation.¹¹

Q3: Does privilege automatically attach to communications?

No. Privilege must be claimed in order for it to have any effect.¹²

Q4: How do you determine the "dominant purpose" of communications?

Determining the "dominant purpose" of a communication is a question of fact, to be objectively determined at the time when the communication was made.¹³

A piece of communication may have been created for a number of purposes; however, there can only be one dominant purpose. The dominant purpose is "the ruling, prevailing, paramount or most influential purpose."¹⁴

When assessing dominant purpose, consider the following:

- 1. The purpose for which the communication was created.** For example, a request from a client for legal advice on their prospects of success in anticipated legal proceedings will likely be privileged. However, trust account records are generally not considered privileged because they do not constitute communications for the purpose of obtaining legal advice.¹⁵
- 2. Whether the entirety of the communication has the same dominant purpose.** Privilege may not attach to all parts of a communication. For example, the most recent email in an email chain may be privileged but previous emails in that chain may not be.
- 3. The capacity of the person who created the document.** Privilege attaches to communications between a legal adviser and client only if the advice is provided by the legal adviser in his or her capacity as a professional legal adviser.¹⁶
- 4. Who the communication was intended for.** Communications must be confidential and for the dominant purpose of legal advice or services, or for use in existing or anticipated litigation. Communication to a third party outside the solicitor-client relationship will unlikely be privileged.

Q5: Can privilege be waived?

Yes. Under common law and statute, a person can waive their right to privilege. Some common examples of waivers are:

1. Inconsistency

If the client has acted in a way that is inconsistent with maintaining confidentiality over the communication in respect of which privilege is claimed, then the client loses their right to claim privilege.¹⁷

In *Cooper v Hobbs* [2013] NSWCA 70, the client adduced evidence in court, through his affidavit, about advice his solicitor had given him in a letter. The Court found that by adducing this evidence, the client had waived privilege over the letter, because it was inconsistent for the client to “deploy the substance” of the solicitor’s advice “for forensic purposes” while also claiming his right to privilege over the same advice.

2. Knowing and voluntary disclosure

If the client has knowingly and voluntarily disclosed the privileged communication, then the client has lost their right to privilege over the communication.¹⁸

In *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited* [2014] FCA 481, a solicitor prepared a report for their client. The client then sent a notice of claim to their insurer and included within it a complete copy of the report their solicitor had prepared. The Court found that the client had waived its privilege over the report, because the client had knowingly and voluntarily provided it to their insurer.

3. Disclosure of substance of information

If the client has disclosed, or expressly or impliedly consented to disclosure of, the “substance” of the communication,¹⁹ then the client may have lost their right to privilege. There could be inadvertent disclosure, for example, where the legal advice is summarised in an email or public report.

In *Fenwick v Wambo Coal Pty Ltd (No 2)* [2011] NSWSC 353, the client had drafted an email to the other side but had never sent it out. The draft email referred to a letter of advice from the client’s solicitor, and explained both the conclusions of the advice and the reasoning behind those conclusions. The client later produced this unsent draft email at discovery for inspection by the other side. The Court found that, although the client had not disclosed the actual letter of advice, they had disclosed the “substance” of the advice at discovery, and therefore the client had waived their privilege over that piece advice.

Q6: Are there types of disclosures by the client that do not waive privilege?

Yes. There are certain disclosures which are not taken to be waivers of privilege.

For example, the NSW and Commonwealth Evidence Acts provide that a client has not acted inconsistently with claiming privilege over certain information *merely* because they have disclosed the substance of the information in the following contexts:²⁰

- in the course of making a confidential communication or preparing a confidential document, or
- as a result of duress or deception, or
- under compulsion of law.



An example is in the matter of *TerraCom Ltd v Australian Securities and Investments Commission*.²¹ TerraCom had disclosed a privileged investigation report to a communications advisory firm, who was bound by a duty of confidentiality to TerraCom and therefore had to keep the report confidential. The Court found that TerraCom's disclosure of the report in this instance did not waive privilege. However, when TerraCom subsequently made a public statement about the content of the same investigation report in a letter to its shareholders and via an ASX announcement, the Court found that privilege had been waived.

Q7: How do you ensure that your client retains the option to claim privilege over communications?

You should clearly mark your advice to show that it is subject to privilege.

Be careful not to circulate legal advice widely by email; the email should only be sent to those the advice is intended for. Bear in mind that disclosing even the most general information about your advice may compromise its privileged status (see Q6 above). You should make sure that you advise the recipients of your advice about the importance of keeping the advice confidential.

When obtaining reports for litigation purposes, make sure the report writers are subject to non-disclosure requirements.

Q8: Does carbon copying a lawyer into an email make it privileged?

Not necessarily. The communication must not only be confidential between the lawyer and client but also for the dominant purpose of providing legal advice or services to the client or for use in existing or anticipated legal proceedings.

Q9: What process should solicitors follow to protect their clients' claim to privilege?

If anyone, such as an opposing party or a government agency, requests information or documentation, the solicitor must consider whether that information or documentation is privileged.

If the solicitor assesses that the information or documentation contains privileged communications, then it would be appropriate for the solicitor to:²²

- separate those they believe to be privileged from other material;
- gather the privileged material and clearly identify it as such; and
- let the requesting entity know that part of the information requested contains material that is privileged.

Q10: Will the Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) reforms affect clients' rights to privilege?

A person's right to privilege, and a solicitor's duty to protect it, are preserved under the AML/CTF reforms. The amended *AML/CTF Act 2006* (Cth) provides that nothing in the Act affects the right of a person to refuse to give information or produce a document if the information or document is subject to privilege.²³

You can find out more about the AML/CTF reforms by reading, '[An Update for Legal Practitioners](#)' and '[Top five tips to prepare for AML reforms](#)'.

The Law Society of NSW is keeping the profession updated on all developments in AML/CTF legislation, including any implications for client legal privilege.

ENDNOTES

¹ *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, section 4.1.1.

² *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 570; Baker, 85.

³ Client legal privilege is provided for by statute in the federal jurisdiction (*Evidence Act 1995* (Cth) (Commonwealth Evidence Act)), New South Wales (*Evidence Act 1995* (NSW) (NSW Evidence Act)), Victoria (*Evidence Act 2008* (Vic)), the ACT (*Evidence Act 2011* (ACT)), the Northern Territory (*Evidence (National Uniform Legislation) Act 2011* (NT)), Tasmania (*Evidence Act 2001* (Tas)).

⁴ *Baker v Campbell* (1983) 153 CLR 52 (Baker), 61.

⁵ *Ibid.*

⁶ Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000), 13.

⁷ Baker, 132.

⁸ See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [9]; NSW Evidence Act, ss 118 & 119; Commonwealth Evidence Act ss 118 & 119.

⁹ G Dal Pont, *Solicitors Manual, Elements of the Legal Professional Privilege*, at [10,030.5].

¹⁰ *Ibid.*

¹¹ *Ibid.*, at [10,030.10].

¹² *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64, [70].

¹³ G Dal Pont, *Solicitors Manual, Elements of The Legal Professional Privilege*, at [10,040].

¹⁴ *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416.

¹⁵ G Dal Pont, *Solicitors Manual, Elements of The Legal Professional Privilege*, at [10,030.30].

¹⁶ *Re Proudfoot v HREOC* (1992) 28 ALD 734, 740; *Rich v Harrington* [2007] FCA 1987, [36]-[46].

¹⁷ Section 122(2) *Evidence Act 1995* (NSW), *Mann v Carnell* (1999) 201 CLR 1

¹⁸ Section 122(3)(a), (4)-(5) *Evidence Act 1995* (NSW); *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12

¹⁹ Section 122(3)(b) *Evidence Act 1995* (NSW)

²⁰ *Evidence Act 1995* (NSW), section 122(5)(a); *Evidence Act 1995* (Cth), section 122(5).

²¹ *TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCA 208.

²² G Dal Pont, *Solicitors Manual, Elements of The Legal Professional Privilege*, at [10,025].

²³ Section 242 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

