



Explainer: Protecting Legal Professional Privilege

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This Explainer sets out some high-level principles about legal professional privilege (**privilege**) and waiver of privilege.

If you have had confidential communications with a lawyer about getting legal advice, or about actual or anticipated litigation, you may hold privilege over those communications. Sharing those communications (or their substance) with third parties might waive that privilege. It is important to consider the risks of waiving privilege before sharing any legal advice or other confidential communications received from a lawyer.

What is privilege?

Privilege is a concept designed to support free and frank communication between clients and their lawyers. Privilege protects certain communications between a client and their lawyers from being disclosed to third parties. For example, this protection might apply if a party is requested to produce documents under a subpoena or some other compulsory process, such that the client could avoid having to produce the privileged documents.

Privilege applies where:

- there are communications (written or verbal)
- that are confidential (i.e. where there is an express obligation not to disclose the contents of the communication, or, where the communication does not explicitly state it is ‘confidential,’ it can be shown that the communication is meant to be confidential due to surrounding circumstances)
- between a lawyer and a client (or their agents or, in the case of litigation privilege, certain other third parties)
- which are made or prepared for the ‘dominant purpose’ of:
 - the lawyer giving legal advice (sometimes referred to as ‘advice privilege’) OR
 - actual or anticipated litigation (sometimes referred to as ‘litigation privilege’)

Privilege only applies to communications and information meeting all of the above tests. If the communication includes information that is not prepared for the dominant purpose of legal advice or litigation, that information is not protected by privilege. For example, information that is

not protected could include administrative information or information about a client's media plans.

Waiver of privilege

Privilege can be lost, or 'waived', when the privilege holder acts in a way that is inconsistent with maintaining confidentiality of the privileged communication. This can occur through:

- Express waiver - where privileged communications are deliberately shared with third parties in a non-confidential setting (e.g. for the purpose of negotiations between parties or public advocacy)
- Implied waiver - where the substance, contents or conclusions of privileged communications are shared with a third party in a non-confidential setting (e.g. 'we received legal advice that said [conclusion of advice]'). Partial disclosure of legal advice can amount to a waiver of the whole of the advice, although just referring to the existence of legal advice (as opposed to its substance) will not necessarily waive privilege. If you wish to refer to the existence of legal advice publicly or in communications with other parties, it is important to first obtain legal advice about the proposed disclosure and whether it may risk waiving privilege
- Unintentional or inadvertent disclosure of privileged communication to a third party (e.g. the accidental forwarding of an email containing privileged information) will not necessarily result in waiver of privilege. You should take action quickly to address the accidental disclosure (e.g. by asking that the accidentally forwarded email be deleted by the third party)

Waiver is most relevant where a party is required to produce a privileged document to another party or a court. This may occur in court proceedings during discovery processes or in response to a subpoena. If a communication that was originally privileged is required to be produced, but privilege has been expressly or impliedly waived, the privilege holder can no longer rely on privilege to refuse to hand over the communication.

In this regard, it is important to remember that subpoenas can be issued to parties who are not directly engaged in court proceedings. As such, privilege, and the potential waiver of privilege, should always be considered when proposing to share legal communications - even where litigation is not contemplated.

Avoiding waiver of privilege

Sharing information with third parties can, but will not always, waive privilege. The more broadly a privileged communication is shared, the more likely it is that privilege may be waived.

There may be an exception to waiver of privilege where privileged information is disclosed on a confidential basis to a third party who shares a sufficient 'common interest' in the legal advice or litigation to which the privileged information relates. However, each case depends on its facts. Accordingly, caution should be used when relying on common interest to protect privilege.

Alternatively, privileged information may be shared on a confidential basis with a third party for a limited and specific purpose. This "limited waiver" allows the disclosing party to share the information with a specific party but maintain privilege against the world in general, provided that

strict confidentiality obligations are in place that allow the disclosing party to prevent further dissemination of the information.

As each case depends on its own specific facts, it is important to seek specific legal advice before sharing any privileged communication to minimise the risk of waiving privilege. However, if a privilege holder intends to share privileged information with third parties with whom it shares a common interest (in the privileged information), or on the basis of limited waiver, it may be prudent to:

- write ‘**Confidential and subject to legal professional privilege, not for further circulation**’ on any communications (noting that labelling is insufficient in itself to maintain confidentiality and privilege, and broad distribution is more likely to result in waiver of privilege).
- in the case of common interest privilege, sign a confidentiality agreement with the third party before sharing the communication, which clearly sets out the common interest, confidentiality obligations and the intention not to waive privilege.
- in the case of limited waiver, sign a confidentiality agreement with the third party before sharing the communication, which clearly sets out the strictly limited and specific purpose for sharing the communication, confidentiality obligations and the intention not to waive privilege.

Should I send my legal advice to a third party?

It is ultimately a decision for the client to decide whether they wish to send a privileged communication to a third party and risk privilege being waived. However, before making that decision, it would be prudent for the privilege holder to obtain legal advice about the risks associated with waiving privilege and ways to minimise these risks.

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