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Précis Paper

Legal Professional Privilege: tips and traps for practitioners

An in-depth discussion of the tips and traps concerning legal professional privilege practitioners should be aware of.

Discussion Includes

- Overview of legal professional privilege
- Confidentiality
- Communications
- Made for the dominant purpose of giving or receiving legal advice
- Made for the dominant purpose of preparing for existing, or anticipated, litigation
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Video Title

1. In this edition of BenchTV, Peter Butler AM RFD (Partner, Herbert Smith Freehills, Sydney) and Sally-Anne Ivimey (Senior Associate, Herbert Smith Freehills, Sydney) discuss in depth the tips and traps concerning legal professional privilege practitioners should be aware of.

Overview of legal professional privilege

2. Privilege attaches to confidential communications between a lawyer and his or her client. These communications must be made for the dominant purpose of giving or receiving legal advice, or preparing for existing, or anticipated, litigation.

3. Privilege also protects communications between a lawyer and a third party where documents have been brought into existence for the dominant purpose of seeking legal advice.

4. There are therefore two types of privilege:
    i. the simple advice given by a lawyer to their client; and
    ii. the communications between a lawyer and a third party (such as an expert witness), commonly seen in litigation, and made for the purpose of assisting that litigation, or anticipated ligation.

Confidentiality

5. If a communication is not confidential it cannot be privileged. In most cases where a communication has lost the ability to be privileged, it is because something has gone wrong with confidentiality.

6. When creating a document that is to be privileged, lawyers are advised that it is essential to maintain its confidentiality.

Communications

7. Communications are not just documents; they can be oral as well as written. Emails, letters, memos, reports, parts of board papers, text messages, are all communications. There is therefore a broad spectrum of types and forms of communication.

8. Emails tend to be written and sent without much reflection or thought, the sender imagining these communications to be private. However, if the matter becomes litigious, the confidentiality of the communication will be compromised.

9. As such, if a lawyer has a client about to get involved in a dispute, it is very important that they limit the flow of email correspondence within their organization, as one day these communications will be potentially discoverable, and some of them can be very damaging.

10. Examples of non-confidential communications are:
    i. communications between solicitors;
    ii. notes of proceedings with other parties or their lawyers;
    iii. communications between the legal representatives of two opposing parties.

Made for the dominant purpose of giving or receiving legal advice

11. The question which must be asked in determining whether a confidential communication is privileged is: what was the dominant purpose of bringing about the communication? If the dominant purpose of bringing about the communication was not to provide legal advice or to further litigation, then the communication cannot be privileged.

12. Until *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67 ("*Esso*"), the courts held that the test for determining whether a communication was privileged was the "sole purpose" test - that is, what was the sole purpose for the communication? Under the sole purpose test, if the communication had to do with something other than legal advice or furtherance of litigation, it could not be privileged.

13. The fact that this was a very high threshold was recognised in *Esso* . However, even the more lenient dominant purpose test established in that case can still pose a trap for practitioners. This is because when a practitioner makes a communication such as providing legal advice, they are often not only thinking of providing legal advice, but also matters of commerciality.

14. Therefore, when a practitioner, in making a communication, moves from talking about legal issues to commercial issues, there might be a danger of the communication having lost the privilege because it is no longer talking about the dominant purpose. This point has application to issues faced by in-house legal counsel.

15. This raises the question that, as long as the dominant purpose of the communication is to provide legal advice, even if there is a secondary purpose to the communication, that does not necessarily prevent it from being privileged? This question has been examined by the courts. In *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* [2002] VSCA 56, it was held by Batt JA at [10] "the purpose which was the ruling, prevailing, or most influential purpose is the dominant purpose". Practitioners should consider these words every time they send a communication.

16. Ultimately, it does not matter that there is a secondary purpose; it is the dominant purpose that is critical.

Made for the dominant purpose of preparing for existing, or anticipated, litigation

17. When is litigation deemed to be "anticipated"? This point has been vigorously, repeatedly tested. Often, parties who had a sense that there was a fight coming have tried to have privilege extended to apply to a communication made in that context, even though litigation was a long way from being anticipated.

18. The courts have held that for litigation to be anticipated, there needs to be a real prospect of litigation; it must be likely or reasonably probable. A vague apprehension of litigation is insufficient. If a practitioner is therefore able to honestly say that they did not have a vague anticipation, but thought there was a real prospect that they would be involved in a dispute, that would probably qualify as "anticipated litigation".

Examples of privileged and non-privileged communications

19. Some examples of privileged communications are:
    i. an email from client to lawyer seeking legal advice;
    ii. a draft letter of legal advice;
    iii. notes of a meeting between lawyer and client;
    iv. parts of board papers, emails, or other documents summarising the legal advice received from the lawyer;
    v. draft contracts sent by lawyer to client.

20. Copying legal counsel into a communication is not sufficient to attract privilege. The reason counsel was copied in is what will determine whether privilege will be attracted. If the purpose of the communication was to obtain legal advice, then it is probably already in privilege territory. However, in absence of this purpose, a mere copying in of counsel will not be sufficient to privilege the communication.

21. Marking a document confidential and privileged is not enough to attach privilege to a document, if its nature is not such that it is already privileged. However, it is still advisable to mark a document as privileged because it evinces a belief on the part of the maker of the document, that when the document was created, it was privileged.

22. Further, later on, if the matter becomes litigious, someone coming across the document in discovery may be uncertain as to whether it is privileged or not. But the fact that it is marked privileged will already be an argument in its favour, and care will be taken before the privilege is discarded. Therefore, while marking a document as privileged is a good starting point, the purpose of the communication will always be the deciding factor.

23. Some examples of non-privileged communications are:
    i. draft contracts sent between lawyers on opposing sides;
    ii. a letter from a lawyer to a regulator;

iii. audit reports;

iv. an email from in-house counsel containing commercial, rather than legal, recommendations;

v. notes from a meeting with a third party or court proceedings

24. Confidentiality is the "golden thread" running through all of these communications - none of them were ever intended to be confidential.

Privilege and regulators

25. This is a very pertinent issue particularly in the wake of increased regulatory actions and the Royal Commission.

26. The question here is: how do regulators feel about a company or individual they are investigating claiming privilege over a document? Where a document is not produced because it is claimed to be privileged, the regulator will want to be satisfied that the privilege is properly made out. The preliminary question is, whether it is possible, in the context of a regulator's powers, for the individual or company to claim privilege over the document at all?

27. There are two key cases addressing this question. In *Commission (NSW) v Yuill* (1991) 172 CLR 319 ("*Yuill*"), the regulator claimed access to privileged documents pursuant to its regulatory powers, but the individual of whom the documents were requested refused to provide them. The regulation providing the regulator with its powers was silent on privilege. As such, the Court held that it was the intention of the legislation that the regulator have, within the scope of its powers, access to privileged documents.

28. For a decade after *Yuill* was decided, the position was that all regulators were able to request production of documents irrespective of privilege. This position was challenged in 2002 in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49, where the High Court reached the opposite conclusion to that in *Yuill*. The Court held that if the statute is silent in relation to documents that are claimed to be privileged, the person of whom the privileged document is requested can maintain the claim.

29. Although this is universally the case, there is an exception to this rule in relation to some Royal Commissions. When a Royal Commission is established, it is very common for the drafter of the relevant legislation to turn their mind to the question of privileged documents. Therefore, if the Commission needs to see a privileged document, that power will commonly be given to the Royal Commissioner. However, this is a rare example.

30. If a regulator requests a privileged document, practitioners are advised to deny the request, and if there is a raid, to tell the regulator that legal professional privilege will be claimed.

Privilege and in-house counsel

31. Clients of in-house counsel enjoy the same protections of privilege as do other clients. Therefore, in-house counsel are able to claim on behalf of their client the same privilege that an external lawyer could claim on behalf of their client.

32. To claim privilege on behalf of their client, in-house counsel will need to establish a number of things:
    i. in-house counsel's advice must be given to the client in a professional capacity;
    ii. the advice must relate to a matter where it is appropriate and proper to obtain legal advice;
    iii. the advice must be given in confidence; and
    iv. the communication must arise from the normal client-lawyer relationship.

33. Courts scrutinise claims for privilege made by in-house counsel carefully, particularly where there is a challenge from the other side. This is due to concerns of the independence of in-house counsel, namely, is their independence compromised by loyalties towards, or the duties and interests of their client, their employer? The independence of external lawyers can be contrasted with the situation of in-house counsel, whose client is their boss.
34. Although the communication would still satisfy the dominant purpose test regardless of concerns of independence, courts scrutinise in-house claims for privilege a bit more carefully.

35. A reverse argument could be made about the independence of external lawyers, who, it could be argued, might give advice tempered by considerations of impressing a new client and retaining their business.

36. However, even though an external lawyer might give a client advice in the context of a commercial reality, the dominant purpose test is still satisfied. In the case of in-house counsel, however, there could be a risk that, in trying to make the advice come alive commercially, the dominant purpose might shift from giving legal advice to the client to helping the company commercially. If the dominant purpose has shifted to helping the company's commercial interests, privilege will be lost.

37. Factors a court might consider in evaluating whether in-house counsel is providing legal or commercial advice are:
    i. in-house counsel's job title or employment contract;

ii. performance review criteria;

iii. reporting lines, eg, if in-house counsel is reporting directly to a CEO.

38. All of these factors will come under great judicial scrutiny if there is a full-on challenge to privilege claimed by in-house counsel. If it can be shown that the culture of the organisation supported the independence of in-house counsel, this will be all-important in maintaining a claim to privilege. For example, if both in-house counsel and their employer regard the former as truly independent, this will help immensely in establishing independence, and therefore the provision of legal, rather than commercial, advice.

Privilege and corporate groups

39. How is privilege maintained in the context of the disclosure of legal advice between two related entities within a company, eg, subsidiaries of the same holding company?

40. One way of protecting privilege in such a situation is by ensuring that the standard legal retainer is a joint retainer, covering not just the subsidiary disclosing the advice, but the group of subsidiaries as a whole.

Exceptions to privilege

41. Privilege will not attach to a communication that has to do with a fraud, or which advances the commission of an offence or similar.

42. Privilege can also be waived. There are two types of waiver of privilege: intentional waiver and implied waiver.

43. Intentional waiver occurs where another party is asked to look at or review a privileged communication and is provided with a copy of that communication. It would be impossible to later claim privilege for this communication, as its confidentiality has been lost. This is intentional waiver of privilege as loss of privilege was intended when the communication was disclosed.

44. Implied waiver occurs where privilege has been lost where that result was never intended. There are two forms of implied waiver: disclosure waiver and issue waiver. Where privilege in a document, for example, counsel's advice, is impliedly waived, all material referred to in that document, most likely the entire brief, also loses its privileged character.

45. Disclosure waiver occurs where a communication with another party records the gist or conclusion of legal advice. This is enough to cause loss of privilege not only in the communication recording the conclusion of the advice, but in the entirety of the document setting out the advice. In *Bennett v Chief Executive Officer of the Australian Customs Service*

[2004] FCAFC 237, Gyles J at [65] held that "[t]he voluntary disclosure of the gist or conclusion … amounts to waiver in respect of the whole of the advice to which reference is made including the reasons for the conclusion".

46. A classic example of this disclosure can be seen in the situation of a senior executive who, upon losing a case, tells the media outside court that they have instructed their lawyers to appeal, and based on their legal advice are very confident that they will succeed. This disclosure will probably be enough to waive privilege in the entirety of the executive's communication with their lawyers, including the legal advice.

47. Disclosure waiver happens very commonly and fights on privilege are often lost on this ground.

48. Issue waiver occurs where the advice being given by the lawyer becomes itself a fact in issue in the matter. Therefore, where a party who is entitled to claim privilege over information makes an assertion about, or brings a case based upon, that information, privilege will be waived on the ground that the information is now a fact in issue. As was held in *Commissioner of Taxation v Rio Tinto* [2006] FCAFC 86, "[w]here the privilege holder has put the contents of the otherwise privileged communication in issue, such an act can be regarded as inconsistent with the confidentiality that would otherwise pertain to the communication".

49. Lawyers are advised to be very careful when speaking with a client, as if they have reason to believe that what they are talking about could itself be a subject of inquiry, issue waiver may apply.

<u>Exceptions to loss of privilege</u>

50. There are some circumstances in which privilege is not lost by passing on a privileged communication to a third party.

51. Firstly, if the person receiving the advice has a need to know it to do their job, privilege is not lost by passing on the communication to that person. However, the wider the dissemination of the communication, the greater the risk to confidentiality and therefore, privilege.

52. Secondly, in the case where there are two entities within a group, jointly retaining the lawyer, or the whole group retaining the lawyer, would help protect the privilege in communications passed between the group.

53. Thirdly, common interest privilege may be established if it can be shown that a party has an absolute interest in seeing the advice, and that interest is shared by the party passing on the advice to them.

Protecting privilege when preparing board papers

54. Lawyers are advised to:
    i. keep legal and non-legal communications separate;
    ii. indicate sections of board papers intended to be privileged with headings "Subject to legal professional privilege";
    iii. if a summary of the board papers is required, have lawyers do the summary.

Protecting privilege – some final tips

55. Lawyers are advised to:
    i. keep separate legal and non-legal files;
    ii. ensure that legal roles are carefully delineated from commercial roles;
    iii. in the context of board papers, keep legal advice as a stand-alone report;
    iv. mark legal advice as confidential and privileged to show that it was the intent of the drafter that it be for a privileged purpose;
    v. maintain the nexus between a request for legal advice and providing legal advice.

BIOGRAPHY

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Peter is a senior litigation partner of Herbert Smith Freehills. He has been recognised as one of Australia's strongest litigators. Peter regularly lectures on a variety of litigation topics, including directors' obligations, privilege, and the conduct of litigation in the Supreme and Federal courts. Peter is co-author of *Class Actions in Australia* in *Litigation Issues in the Distribution of Securities: An Internal Perspective*. He is also the Chair of the Herbert Smith Freehills' Global Pro Bono & Citizenship.

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Sally-Anne is a senior associate of Herbert Smith Freehills' disputes practice, specialising in class action litigation. She has experience acting for clients defending product liability, shareholder, and consumer class action claims. Sally-Anne is a co-author of a chapter in *25 Years of Class Actions in Australia*, and holds a Bachelor of Laws (Honours) and a Bachelor of Arts from the University of Sydney.

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