

# Privilege

Privilege is unique to the legal profession. In short, if privilege applies, it ensures that the opponent will not be able to view certain documentation.

## WHAT IS PRIVILEGE?

Privilege allows you to obtain advice from your legal team, without being concerned that confidential information will be disclosed as part of the dispute. There are two main types of privilege:

- Legal advice privilege - this protects documentation passing between you and your legal advisors for the dominant purpose of obtaining legal advice; and
- Litigation privilege - this protects documentation passing between you, third parties and your legal team created for the sole or dominant purpose of obtaining information or advice in connection with the conduct of existing or reasonably contemplated litigation.

## LEGAL ADVICE PRIVILEGE

- Privilege applies to advice given by a lawyer. This could be in-house lawyers, external lawyers or even legal executives, trainee lawyers or paralegals (provided they are supervised by a qualified lawyer).
- Privilege only extends to the client; it is therefore vital to understand who this is. The client will be deemed to be those individuals specifically tasked with obtaining legal advice either from external or in-house lawyers; it will not include everyone within the organisation or certain departments.
- Privilege will not only be limited to advice on the specific area of law but may also include strategic advice.

## LITIGATION PRIVILEGE

- For privilege to apply, the litigation has to be in existence or “reasonably in prospect”.
- Any documents created will only be protected if they are for the dominant purpose of obtaining information or advice in connection with the conduct of existing or reasonably contemplated litigation.

### HOW TO RETAIN PRIVILEGE

- There are a number of important steps that you can take to ensure privilege is not waived. It is important to note that privilege cannot be attached retrospectively.
- Mark all communications in relation to obtaining legal advice or advice concerning litigation as “Privileged and Confidential - created for the purpose of obtaining legal advice/in contemplation of litigation”;
- Create a core team who will communicate with your legal advisors;
- Ensure privileged documents are easily identifiable;
- Circulate privileged documents to only the designated core team of people;
- Limit the reporting of any advice given outside of the core team to verbal discussions only; and
- If you need to share information with a third party, put a confidentiality agreement in place. Rather than sharing key documents, summarise over the telephone or at a meeting.

### CONSEQUENCES OF LOSING PRIVILEGE

If privilege is lost, documentation could become disclosable to the opponent. This could be detrimental to your case.

If you wish, you can waive privilege. Any waiver of privilege must be approached with caution as if you choose to do this, you must disclose all other documents relating to those that you waive. This will ensure that the court and your opponent have the full picture.

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