Australian Society of Building Consultants

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"Legal Professional Privilege" Presentation

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Overview of presentation - Legal Professional Privilege – what's covered & what's not

1. Notes
2. Drafts
3. Final Reports

Legal professional privilege

Two categories

- (a) legal advice, and
- (b) litigation

This extends to engaging experts on a client's behalf for those two purposes

Legal professional privilege

A communication must be made in confidence to attract the protection of LPP and must be kept confidential if the privilege is to be maintained.

Whether a confidential communication attracts LPP is a question of the purpose for which the communication was made.

A communication must be made for the dominant purpose of one of the two limbs of LPP, being either for the purpose of:

- seeking or providing legal advice; or
- preparing for actual or anticipated litigation.

Legal professional privilege

At common law, privilege attaches to confidential **communications**, not documents, although documents will often contain the relevant privileged communication.

If the *Evidence Act 1995* applies, confidential **documents** brought into existence for the dominant purpose of a party being provided with legal advice or legal services relating to current or anticipated litigation will also be covered.

Generally, the Evidence Act 1995 applies to proceedings in State and Federal courts and before other persons or bodies required to apply the laws of evidence.

Legal professional privilege

A range of documents ancillary to a privileged communication, although themselves not the privileged communication, are protected from disclosure on the basis that their disclosure would also disclose the content of the privileged communication, including:

- letters from lawyers to expert witnesses;
- notes and memos taken during discussions with expert witnesses; and
- draft reports.

Notes

- Documents generated unilaterally by an expert witness, such as working notes, are generally not the subject of LPP.

- They are not in the nature of, and would not expose, confidential **communications** between the expert and the lawyer.

- However, such working notes created for the preparation of an expert report may be privileged if they are brought into existence for the dominant purpose of a party being provided with legal advice or litigation in the form of an expert report if the *Evidence Act 1995* applies.

Drafts

- Commonly, draft reports attract privilege, because they are prepared for the dominant purpose of providing legal advice or services to a client.
- But, there is potential that draft reports, if created predominantly for preparing the final report itself, means that there is no privilege as such drafts would be characterised merely as working notes.
- There will be a waiver of privilege if there is something in the final report that refers to earlier correspondence and material changes being made to the draft report.

Final Reports

- Obviously, if the final report is served, privilege will have been waived.
- If a final report is not served, then provided it was created for the dominant purpose of the provision of legal advice or in relation to anticipated or current litigation, it will be privileged.
- However, there is no property in a witness, including an expert witness. So, it is not unheard of for a plaintiff's expert to be subpoenaed and called by a defendant to give evidence, and vice versa.


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Case study

Ghorbanzadeh v Western Sydney Local Health District [2023] NSWSC 1330

Background

- The plaintiff sued the LHD alleging that the method by which she gave birth caused her injuries, and that the hospital staff were negligent in declining her request for a caesarean section.
- The defendant's solicitors instructed Dr Roach, a medico-legal expert, via letter enclosing hospital records, the statement of claim, and the report of the expert retained by the plaintiff. Dr Roach was instructed to review the brief of materials and then discuss his verbal opinion with the instructing solicitor.
- After Dr Roach received the letter of instruction and brief of materials, he composed two pages of handwritten notes. He then had a telephone conference with the defendant's solicitor on and referred to the document in this conference. The defendant's solicitor subsequently gave written legal advice to her client and included the information she had gleaned from the telephone conference.

Ghorbanzadeh v Western Sydney Local Health District [2023] NSWSC 1330

- Dr Roach was then instructed to prepare a written report, which was served on the plaintiff's solicitors.
- The plaintiff issued a subpoena to produce to Dr Roach. The handwritten notes were caught by the subpoena. The defendant claimed privilege.

The issues

- The plaintiff submitted that the handwritten notes were no more than a "piece of paper" and was not a communication.
- The defendant said that they had converted the handwritten notes into a communication, because Dr Roach stated that he used the document in question as the basis for expressing his verbal opinion to the defendant's solicitor.

Ghorbanzadeh v Western Sydney Local Health District [2023] NSWSC 1330

Judgment

- The Court ruled that the document was not a communication, but merely a working note on which Dr Roach's discussion or opinion may have been based.
- The Court cited *Ryder v Frohlich* [2005] NSWSC 1342 at [12]:

The point made here is that privilege can only attach to documents which embody communication between the expert and the litigant by whom the expert is retained (or the litigant's lawyer). A draft report prepared by the expert is not, of its nature, such a communication. It may be that the draft report is, in fact, given or sent by the expert to the litigant or the litigant's lawyer, but that does not change its character as something prepared by the expert which is not intended to be a means of communication with the litigant or lawyer.

Ghorbanzadeh v Western Sydney Local Health District [2023] NSWSC 1330

- On waiver, the Court commented:

Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to …, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents.

- The Court noted that Dr Roach did **not** say in his affidavit that the handwritten notes played no part in the formation of his opinion.
- While the report Dr Roach ultimately produced was an answer to six specific questions, unlike the discussion during the telephone conference, there was nothing to say that the six questions did not cover material that was contained in the handwritten notes.

Questions

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