

Has your file been subpoenaed?

By Matthew Harding
and Kaveetha Kumar

Protecting privilege when producing documents under compulsion of law

Matthew Harding is a partner and Kaveetha Kumar is a senior associate at HWL Ebsworth Lawyers.

Practitioners issued with a subpoena or otherwise compelled by law – for example, under a statutory notice – to produce a client's file or documents to a third party should seek authority from the client before producing any documents recording confidential communications.

If you produce confidential communications without the client's consent, you are at risk of waiving the client's right to claim legal professional privilege, and potentially being liable for any losses the client suffers as a result.

Seek instructions and check yourself

When receiving a request to produce documents that relate to a client, keep in mind that any right to claim privilege in confidential communications belongs to the client and remains with them after the file is closed.

Copying a file may be an administrative task but providing one to a third party is not. While the right to claim privilege is the client's, you should not merely leave it to them to exercise that right. Check whether documents you are requested to produce record communications which could be the subject of a claim for privilege or are otherwise confidential.

Time pressure

Practitioners are often under time pressure. Checking the contents of a file to identify if it records confidential

and potentially privileged communications and seeking instructions take time and there may be no prospect of being paid by the client for time spent on the task if the file has been closed.

Sometimes former clients may be difficult or even impossible to contact. You may not have current contact details. There are always time limits to comply with subpoenas and statutory notices to produce documents and there are often consequences for practitioners if they do not comply with the request or do not comply within the time limit.

If necessary, seek an extension of time to comply. If you need to comply with a subpoena and have not been able to obtain authority from the relevant client, records of any confidential communications ought to be produced to the court in a sealed envelope and it needs to be made clear to third parties that the client retains the right to claim privilege in the confidential communications.

In one instance, a solicitor received a notice issued by a trustee in bankruptcy under the *Bankruptcy Act* requiring the solicitor to provide within 14 days copies of all files relating to a former client who had become bankrupt.

In order to avoid the penalty for non-compliance with the notice, the solicitor provided the entire file in a rush, without first contacting the former client or reserving the former client's right to claim legal professional privilege concerning confidential communications.

In proceedings brought by the trustee in bankruptcy against the former client of the

lawyer, an issue was whether the lawyer had inadvertently waived the former client's right to claim legal professional privilege in the confidential communications. Consideration was given to whether the confidential communications recorded in the file had been voluntarily and intentionally disclosed by the lawyer on behalf of the client.

Another issue was whether the lawyer had breached the duty of confidentiality. All these complications, and the further time devoted to dealing with them, could have been avoided if the lawyer had sought instructions at the outset.

When served with a notice

When served with a subpoena or statutory notice to produce documents that relate to a client:

- always review the contents of a file to identify if the documents required to be produced record confidential communications which could be the subject of a claim for legal professional privilege;
- inform the client of any right to claim legal professional privilege. You may need to provide advice to the client about the nature and scope of the subpoena or statutory notice and the documents that fall within it and to identify which communications in the file could be the subject of a claim for privilege and those that would not;
- seek authority from the client (or former client) before producing the documents to a third party; and
- if compelled by law to disclose information which is considered privileged,

consider whether to produce the material in a sealed envelope and make a claim for privilege over the documents.

Revised Professional Conduct and Practice Rules 1995

Rule 2: Confidentiality

2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless –

- 2.1.1 the client authorises disclosure;
- 2.1.2 the practitioner is permitted or compelled by law to disclose; or
- 2.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony.