

PRIVILEGE LOST

PRESERVATION OF PRIVILEGE, PRACTICE POINTERS



Greg Couston is a partner at K&L Gates and is a member of Lawcover's panel. Lucy Williams is a Special Counsel at K&L Gates.



By Greg Couston and Lucy Williams

Legal Professional Privilege or, in the terms of the *Evidence Act 1995* (NSW), Client Legal Privilege, is a fundamental tenet of our legal system. The doctrine has withstood attack from various quarters over the decades; but – like many things of value it has a brittle dimension. A party's legal professional privilege can be destroyed and lost relatively easily (and sometimes through inadvertence) by that party's own conduct, or the conduct of their lawyers. This article contains some pragmatic practice pointers on the issue of loss/waiver of privilege – specifically dealing with preliminary correspondence, discovery and cross-examination.

The starting point

Clients of course can waive legal professional privilege. Waiver can either be express or implied. An express waiver of privilege seldom generates difficulties; but an implied waiver of privilege is much more problematic. It is accepted that where a client conducts himself/herself in a manner which is inconsistent with a claim of privilege, that the privilege will be implicitly waived (s 122 of the *Evidence Act 1995* (NSW)).

Publication

Privilege protects confidential communications with the result that if a client discloses or publishes (in a non-confidential environment) the substance of the legal advice which he or she has received, the privilege is waived and lost. It is surprisingly easy for publication, or a reference to legal advice, to amount to an implied waiver of privilege.

In *Rich v Harrington* [2007] FCA 1987, it was held that privilege had been waived where a statement was made that: "our client has acted at all times with the benefit of legal advice and does not believe there has been any victimisation or other conduct for which compensation could properly be sought". While there are other authorities on this aspect (with varying outcomes), practitioners should be careful in their own correspondence and in drafting communications for clients, to ensure privilege is not unintentionally waived.

Snapshot

- A client's legal professional privilege can be destroyed and lost relatively easily (often inadvertently) by that client's own conduct, or the conduct of their lawyers
- Practitioners should be careful to ensure privilege is not unintentionally waived
- When dealing with privileged material, practitioners need to make sure that their client does not engage in conduct inconsistent with the maintenance of privilege

Discovery

Ordinarily, when a litigation lawyer is preparing documents for discovery, the lawyer will readily identify communications between a solicitor and client; and an appropriate claim of privilege will be made. Nevertheless, it is a far more difficult and nuanced exercise to identify and claim privilege over other secondary documents (or parts of them) that might refer to primary privileged communications.

Many apparently innocuous client documents may include, often obliquely, references to legal advice. If these "second generation" documents are produced (without redaction), this may result in an unexpected implied waiver of privilege.

In *Seven Network v News Ltd (No. 12)* [2006] FCA 348, the Court was referred to discovered board papers, which contained the statement "Our legal advice is that the risk of damages being awarded against Optus is low". The Court accepted that these documents disclosed the "gist" or "conclusion" of legal advice and held that there had been a waiver of privilege in the underlying legal advice. Optus was ordered to produce all of the documents containing the relevant legal advice.

Questions in cross-examination

Legal professional privilege also may be unintentionally and unexpectedly waived

where an advocate fails to object to questions in cross-examination.

In *Global Medical Imaging Management Limited (in liq) v Australian Mezzanine Investments Pty Limited* [2003] NSWSC 430, Einstein J said that where a cross-examiner questions a witness concerning privileged communication, with no objection from the opposing party (who otherwise holds the privilege), such opposing party cannot later assert that it has not knowingly and voluntarily disclosed to another the substance of the legal advice. This approach was recently affirmed (although not adopted in the particular facts of the case) in the recent case of *Owners Strata Plan No. 68372 v Allianz Australia Insurance Limited* [2014] NSWSC 223.

Summary

Practitioners, particularly litigation lawyers, need to take care when dealing with privileged material. They need to make sure that their client does not engage in conduct inconsistent with the maintenance of privilege. The cases noted above provide some examples of where legal professional privilege has been waived and lost relatively simply. If a document is mistakenly or inadvertently disclosed, the court can order the return of the document. The recent High Court case of *Expense Reduction Analysts Group Pty Limited & Ors v Armstrong Strategic Management and Marketing Pty Limited & Ors* [2013] HCA 46 decided that where a solicitor received a document that was inadvertently disclosed during discovery, the court had the power to permit the correction of the mistake and to order the return of the documents. This approach is also reflected in Rule 31 of the NSW Solicitors Rules.

Conclusion

The doctrine of legal professional privilege continues to generate complications and issues – particularly in the area of waiver. This is an area of law which is still developing, and practitioners would be well advised to be very careful with privileged documents and to continue to monitor developments in this field. **LSJ**