

Legal Professional Privilege and Expert Evidence – What Must an Expert Disclose?

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Legal professional privilege is the right to keep certain communications confidential during the course of litigation, even if the other party requests disclosure of those communications. All communications between clients and their legal advisors are protected by privilege, provided that the dominant purpose of the communication is obtaining legal advice in relation to existing or contemplated legal proceedings. The purpose of legal professional privilege is to promote a relationship of trust and full disclosure between lawyers and clients, to enable lawyers to fully advise their clients without compromising their position.

When will privilege be lost?

Parties to litigation will lose, or “waive”, privilege over a document if they disclose the content of that protected document during the litigation. This disclosure can be express, but it will also be implied if it becomes unfair to maintain the privilege because of the party’s conduct. For example, if a person refers to or uses part of a privileged document, he or she cannot then claim privilege over the remainder of the document.

Privilege and expert reports

The rules of privilege also protect communications between lawyers and third parties, if those communications are made for the primary purpose of preparing for actual or anticipated litigation. This includes communications between lawyers and experts engaged to provide expert evidence in legal proceedings.

However, the extent to which privilege will protect documents produced by experts is unclear. A common question is whether the drafts and notes made by the expert in preparing his or her final report will be protected by privilege, or whether they must be disclosed to the other side.

The general legal principle in this respect was articulated by the High Court in **Attorney General v Maurice [1986] HCA 80**. In that case, Dawson J stated that incomplete drafts of a report will be privileged, because the alterations made in each draft may reveal the content of confidential communications between the expert and the instructing solicitor. However, once the report is complete, it is no longer privileged, as its purpose is to communicate information to others and it is no longer confidential.

On the other hand, the instructions and documents upon which an expert’s report is based will no longer be protected by privilege once that report has been filed and served in legal proceedings. This principle was recently confirmed by the Supreme Court of Victoria in **Prince Removal & Storage Pty Ltd v Roads Corporation [2012] VSC 245**, on the grounds that the instructions and documents given to an expert will inevitably influence the content of the

expert's report, and must therefore be disclosed so that the expert's opinion can be properly evaluated.

It is often unclear which communications will and will not be protected by privilege. In general, it is best not to assume that communications with experts will be covered by privilege, and to exercise caution in providing facts and instructions to those experts, especially when in written form.

Do not hesitate to contact the legal experts at our office for further advice and assistance.

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