

Loss Prevention Standards

Legal Professional Privilege

Introduction

The following guide is intended as a general introduction for non-legal professionals to help them understand legal professional privilege, why they might want it and how to maintain it.

What is Legal Professional Privilege?

Legal professional privilege is a common law right that confers protection over the confidentiality of communications between a client and their professional legal representatives, or in appropriate circumstances, communications with a third party. This confidentiality is owned by the client, not the legal representative. The information shared with the legal representative is protected against disclosure to third parties in the absence of the express permission of the client. There are two forms of legal professional privilege:

- **Legal advice privilege** – this protects all confidential communication between legal advisers and their clients
- **Litigation privilege** - this protects all confidential communications between professional legal advisers, their clients and third parties, such as an expert witness, where litigation is either in process or is reasonably anticipated

Why would I want it?

In investigating a concern or a specific incident it is possible that an organisation could uncover information about the management of the business that will make uncomfortable reading. A well-managed business will then set about resolving those issues, but regardless of that, may not wish those findings to become public knowledge.

In an instance where litigation is being considered or is pending, there is even more reason to want to keep information obtained in the course of the investigation confidential. Normally, this type of information would be 'discoverable' by enforcing authorities or the third party's legal representatives. However, legal professional privilege allows for the sharing of information between a client and their legal representative, without fear that information will have to be shared with the enforcement authority or the opponent's legal representatives.

Establishing legal professional privilege is essential for there to be open and frank discussions about the findings of an internal investigation, without risking that information being made public.

In certain circumstances, an organisation may be compelled to cooperate with the enforcing authorities and in doing so is dissuaded from lying or concealing evidence, but that does not mean they have to make the prosecution's case for them by volunteering prejudicial information. In such circumstances, where that information is privileged it is immune to disclosure.

How do I get it?

In order to ensure that legal advice privilege applies to a particular document/discussion, the communication must be between the legal adviser and their client with the primary purpose of giving or receiving legal advice.

The communications between the legal adviser and the client must be maintained as confidential. If the recipient at the client organisation then copies in all and sundry to the response, that would no longer be regarded as a privileged communication.

Certain conditions must be satisfied to engage litigation privilege. The litigation has to be in progress or reasonably in contemplation, the communications must be made with the sole or dominant purpose of conducting that anticipated litigation and the litigation must be adversarial, not investigative or inquisitorial.



How do I maintain it?

Maintaining confidentiality is really the key to maintaining privilege. For communications to remain privileged it must be clear that the person acting on behalf of the client had the authority to do so. Only authorised employees should prepare submissions to the legal representative; involving other employees in preparing, dealing with, discussing, etc. such communications, could result in the loss of privilege.

Where an internal investigation is conducted it would normally be wise to consult a professional legal adviser who can advise on the scope of the investigation and ensure legal advice privilege is engaged. If an internal investigation is conducted without acting on legal advice, the product of the investigation may not be privileged unless the conditions required to invoke litigation privilege are met. Any report resulting from those investigations should primarily focus on preparing for the conduct of adversarial litigation, or enabling lawyers to give advice about its conduct as opposed solely to determining matters of causation, lessons learned and remedial actions.

Just because you are asked for a document it doesn't mean you have to supply it. Be wary of requests to disclose internal investigation reports and other documents over which you believe privilege exists. In such cases, seek legal advice before agreeing to any such requests, even if they are made by the enforcing authorities.

Communications between a client and the legal adviser are not privileged if they occur as a result of an attempt to commit fraud or a crime.

Summary

The establishment and maintenance of legal professional privilege is essential for a client and their legal representative to have open and frank conversations about a particular incident.

Although legal professional privilege is relatively easy to establish, it is also easily undermined. It is an important part of the normal contingency planning process to have these discussions with your legal advisers before any such incident occurs; to establish the relevant protocols and to establish and maintain an understanding of those employees authorised to act as 'the client'.

Additional Information

Look out for our other titles in the Aviva legal liability series, including:

- The rights of the Inspector
- Incident reports and investigations; do's and don'ts
- Understanding the status of Approved Codes of Practice and Guidance – what it means to you

Further risk management information can be obtained from [Aviva Risk Management Solutions](#)

Please Note

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