



LEGAL PROFESSIONAL PRIVILEGE: WITNESS STATEMENTS AND EXPERT REPORTS IN LITIGATION

06 May 2022 | Australia

Legal Briefings - By **Graeme Johnson, Andrew Eastwood, Danielle Briers and Brendan Donohue**

[Download PDF](#)

This article is part of our [Legal Professional Privilege in Australia](#) series where our regulatory and disputes specialists have developed a suite of resources to provide practical guidance on common questions and scenarios when dealing with LPP in Australia.

While care is always necessary when dealing with questions of legal professional privilege, particular caution should be exercised when handling issues of privilege regarding witness statements and expert reports to be used in litigation. Importantly, appropriate steps should be taken to ensure privilege in these documents is not unintentionally waived.

WITNESS STATEMENTS

A draft statement of a potential witness is generally protected by privilege. A draft witness statement may be used for a range of purposes. It may be communicated to a client in order for a lawyer to provide legal advice. It may be used by a lawyer to facilitate the investigation, preparation and presentation of the client's case in anticipated or extant litigation. Legal professional privilege will attach to documents made in furtherance of those uses.¹ In addition, delivery to the witness of a draft statement, provided its confidentiality is maintained, will not destroy legal professional privilege. However, once the statement is filed and served in a proceeding, it loses its confidentiality and, as a result, no privilege remains in it.

Having regard to those general principles, the following are some practical points to properly maintain privilege in the preparation of draft witness statements for a court proceeding:

- **Appropriate labelling:** draft witness statements should be clearly and appropriately marked. For example, one option is to mark drafts as a “draft” and identify that they are “confidential and subject to legal professional privilege”.
- **Maintain confidentiality:** the relevant witness and client should know and understand the importance of maintaining strict confidentiality in respect of the draft statement. The witness should ideally agree to keep the draft statement confidential, or at least acknowledge that the statement is to remain confidential. If the witness is not willing to agree to keep the witness statement confidential, a risk assessment may need to be made with the assistance of legal advisers. In any event, the draft statement should not be disclosed for purposes that are inconsistent with the maintenance of confidentiality and privilege. A document “created to enable its deployment for a use which is inconsistent with the maintenance of lawyer/client confidentiality is not a document to which legal professional privilege attaches”.²
- **Carefully review the statement:** before a witness statement is finalised, filed and served, the statement should be carefully reviewed to ensure no privileged material is unintentionally disclosed in the proposed final version. For example, annexures and exhibits need to be assessed before the evidence is served to ensure that privileged documents have not been inadvertently included.
- **Review the draft statement’s content:** the content of a witness statement should be carefully considered. The statement should not contain material which might be viewed as inadvertently waiving privilege in other documents. Such material tends to be productive of complex pre-trial disputes as to privilege.

EXPERT REPORTS

Privilege will attach to a draft expert report and related communications, subject to the principles set out below, if the dominant purpose for the report is use in litigation. Expert reports commissioned outside of litigation (such as for general commercial purposes or as part of an investigation following an incident) may not be privileged, depending on the purpose for which the report is commissioned. Legal advice should be sought prior to engaging an expert to ensure the privilege position is understood.

Five general principles concerning privilege and expert reports are often cited:³

1. **Instructions:** a lawyer's confidential instructions to an expert to provide a report to be used in anticipated litigation will ordinarily attract privilege.
2. **Copies of documents:** privilege will ordinarily attach to copies of documents – whether the originals are privileged or not – that were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness.
3. **The expert's documents:** documents generated unilaterally by the expert witness (such as working notes, field notes, and the witness's own drafts of his or her report) do not attract privilege because they are not in the nature of, and would not expose, communications.
4. **Disclosing the expert's report:** disclosure of the expert's report, for the purpose of reliance on it in the litigation, will ordinarily result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above. This implied waiver arises at least "if the appropriate inference to be drawn" is that such documents were used "in a way that could be said to influence the content of" the relevant expert's report.⁴ This is because, in these circumstances, "it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents".⁵ In view of this principle, it is common for experts to attach to the expert's report letters of instruction (or a relevant brief) given to the expert for the purposes of the report.
5. **Documents used by the expert:** privilege similarly cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert encountered the documents. But it may be difficult to establish at an early stage whether documents which were before an expert witness influenced the content of his or her report, in the absence of any reference to them in the report.

Having regard to those principles, some practical tips include:

- Documents provided to the expert for the purposes of the expert's report should be provided by a legal adviser with instructions. This will ensure privilege is properly maintained, at least until the relevant expert's report is relied on in a court proceeding.
- It is prudent to generally assume that any record of communications with an expert, or materials provided to or by the expert, will not be protected by legal professional privilege. It is prudent to assume that such communications will ultimately need to be produced in the relevant litigation.
- Refrain from providing experts with privileged material, if possible.

QUESTIONS ABOUT PRIVILEGE AND DOCUMENTS TO BE USED IN LITIGATION?

Considerable complexity can arise in relation to issues concerning privilege and documents to be used in litigation. There are also specific procedural rules in some Australian jurisdictions that may affect whether privilege over expert reports is available at all. It is prudent to contact your legal advisers when addressing these matters

Please reach out to your usual Herbert Smith Freehills contacts with any queries you might have on Legal Professional Privilege.

To subscribe to receive LPP Australia updates, click the link below, select the 'Australasia' drop down, tick 'Legal Professional Privilege' and enter your contact details.

[Subscribe](#)

1. *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2)* [2014] FCA 481 at [47].
2. *Australian Securities & Investments Commission v Southcorp Limited* [2003] FCA 804 at [21].
3. *Australian Securities & Investments Commission v Southcorp Limited* [2003] FCA 804 at [21].
4. *Australian Securities & Investments Commission v Southcorp Limited* [2003] FCA 804 at [21].
5. *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2)* [2014] FCA 481 at [37].

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



GRAEME JOHNSON
PARTNER, SYDNEY

+61 2 9225 5405
Graeme.Johnson@hsf.com



ANDREW EASTWOOD
PARTNER, SYDNEY

+61 2 9225 5442
Andrew.Eastwood@hsf.com



DANIELLE BRIERS
SENIOR ASSOCIATE,
SYDNEY

+61 2 9322 4177
danielle.briers@hsf.com



BRENDAN DONOHUE
SENIOR ASSOCIATE,
MELBOURNE

+61 3 9288 1090
brendan.donohue@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

© HERBERT SMITH FREEHILLS LLP 2022