



# Legal Professional Privilege: Claiming LPP

## Quick Guide

### Key points

- Common law or Evidence Act test may apply. Always check what test applies to the situation.
- LPP applies to communications, not documents (but may exist in documents that disclose communications).
- LPP can apply even if the communication was not sent. It is about the purpose at the time of creation.
- Confidentiality is pivotal to privilege – was the document truly confidential, and did it remain so?
- Dominant purpose may be more difficult in cases involving in-house counsel or where there are multiple purposes (e.g. detecting root causes as well as obtaining legal advice).
- Privilege in communications with third parties can exist in Australia and no longer requires the third party to be the ‘agent’ of the client, but this is a complex area with no ‘one size fits all’ approach.

### What is legal professional privilege?

Legal professional privilege, or client legal privilege (**LPP**), exists when there are:



If you can show that LPP applies to a document (or part thereof), you are generally not required to disclose that document or part, including in response to a regulatory notice or demand, or in court proceedings.

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## Common law and Evidence Acts

LPP may be regulated by either the common law or an Evidence Act, depending on the context and jurisdiction. Generally speaking, outside court or tribunal proceedings, questions of LPP will be answered by reference to the common law, and the test described above will apply.

Within proceedings, the position differs depending on the jurisdiction and context (eg pre-trial discovery, answering a notice to produce or giving evidence at trial). It is important to always check the relevant court rules and Evidence Act when considering privilege in proceedings.

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## Key elements of the test for LPP

### Communications (or documents?)

LPP applies to “communications”, not “documents”. When privilege is claimed over a document (or part thereof), it is because it constitutes, records or would tend to disclose a communication that meets the test for LPP.

However, LPP can also extend to documents prepared with a view to being used as a communication of that type, even if they are never actually sent. This is because the privilege stems from the purpose for which the document is created, not the fact of its communication. This approach is also reflected in the Evidence Acts, which provide that privilege applies to “communications... whether delivered or not”.

### Confidential in nature

Confidentiality is the cornerstone of LPP – without confidentiality, LPP cannot exist. It follows that LPP cannot exist in a document if the document has been treated in a manner inconsistent with maintaining confidentiality.

The fact that the document is marked “confidential” is not decisive. The question is always: was it truly confidential? For example, courts have held that the final version of a witness statement or affidavit will not be privileged, as the purpose is to serve it on the other party (so it cannot be said to be confidential).

Even if confidential initially, did the document remain confidential? If it was subsequently distributed externally, it may have lost its confidential status and therefore its privilege. Whether that is the case may depend on factors such as:

- who it was distributed to;
- for what purpose; and
- what, if any, statements were made about the purpose of its distribution and the confidentiality with which it was to be treated, or other limits to its further distribution or use.

For further information see our [Quick Guide on Waiver of Legal Professional Privilege](#).

### Legal advice or use in litigation

“Legal advice” is not limited to advice on the law, but it does not extend to advice that is purely commercial or of a public relations character. It includes:



- advice on what should prudently and sensibly be done in the relevant legal context;
- legal services or assistance (for example, assisting the client to draft communications to customers or respond to regulatory inquiries).

Courts have also recognised that it may be impossible to disentangle the lawyer’s views of the legal framework from other reasons that go towards their advice. Generally, there is no need to “pick and choose” which parts of a communication from lawyer to client constitute legal advice, and redact only those parts. If the context is one in which it is reasonable for the client to seek the professional knowledge and skills of a lawyer, and there is nothing to suggest the lawyer was acting in some other capacity, it is generally reasonable to treat the whole communication as privileged. The position may be more difficult when the advice is from in-house counsel.

Privilege will not extend to purely factual investigations, even if conducted or procured by the client’s lawyer. The question is: what was the purpose of the investigation? If it was required for the dominant purpose of enabling the client to obtain legal advice or assistance from a lawyer, then communications in relation to that investigation may be privileged.

Where the purpose is not to advise but for “use in litigation”, this applies to both litigation on foot and litigation that was reasonably contemplated at the time of the communication. A vague or general apprehension of litigation will not suffice, but nor does the contemplated litigation have to be “more likely than not”. It will generally suffice if there was a real likelihood or reasonable prospect (rather than a mere possibility) of litigation.

## Dominant purpose

Dominant purpose means the **ruling, prevailing or most influential** purpose, at the time the communication was made.

If the privilege claim is challenged and it becomes necessary to prove the purpose, it may be necessary to call the person with the motivating purpose as a witness (and there may be an adverse inference if this is not done). However, the purpose and whether it was dominant are to be determined objectively, which will involve examining the surrounding circumstances (including documents) to show the relevant context. A witness’s evidence of what their purpose was at the time will not be decisive.

Courts may more rigorously test the asserted dominant purpose of in house counsel (particularly those with dual roles), as they are more likely to provide advice on commercial and operational issues in addition to legal issues. For further information, see our [Quick Guide to Legal Professional Privilege and In-House Counsel](#).

## Third parties including experts

A communication between the lawyer or client and a third party can be privileged if it is confidential and made for the dominant purpose of enabling the client to obtain legal advice. There is no longer a need in Australia for the third party to be an ‘agent’ of the client, or for litigation to be contemplated or on foot.

For example, communications to/from a consultant conducting a factual investigation, or giving expert advice on a technical matter, will be privileged if the investigation or advice was obtained for the dominant purpose of the client obtaining legal advice. Conversely, if the dominant purpose was to find out what went wrong so the client could fix it, the communications would not be privileged.

Confidential instructions from a client’s lawyer to an expert seeking a report to be used in litigation will usually attract privilege. Documents generated or

used by the expert in preparing the report, such as working notes, internal drafts and source documents, do not attract privilege as they are not (and would not disclose) privileged communications. Disclosure of the expert's report may waive privilege in the instructions provided to the expert – this is a complicated area and the answer will always depend on the particular circumstances.

## Practical examples

LPP unlikely to apply	LPP may apply
<ul style="list-style-type: none"> <li>An email attaching a press release sent to a media adviser and copied to a lawyer.</li> </ul>	<ul style="list-style-type: none"> <li>An email from a client to his/her lawyer seeking legal advice, including emails that were not sent.</li> </ul>
<ul style="list-style-type: none"> <li>An email from in-house counsel containing commercial recommendations.</li> </ul>	<ul style="list-style-type: none"> <li>A letter or draft letter of legal advice from a lawyer to his/her client.</li> </ul>
<ul style="list-style-type: none"> <li>Draft contracts sent between lawyers acting for different parties to a transaction.</li> </ul>	<ul style="list-style-type: none"> <li>Notes, memoranda or minutes of a meeting between the lawyer and client.</li> </ul>
<ul style="list-style-type: none"> <li>A letter from a lawyer to a regulatory agency.</li> </ul>	<ul style="list-style-type: none"> <li>Part of a board paper, email or other document summarising legal advice.</li> </ul>
<ul style="list-style-type: none"> <li>An email sent simultaneously to the client's legal adviser, executives of the company and a public relations adviser, where obtaining legal advice was not the dominant purpose of the communication.</li> </ul>	<ul style="list-style-type: none"> <li>Draft contracts sent by a lawyer to his/her client for instructions.</li> </ul>
<ul style="list-style-type: none"> <li>A communication between a client and lawyer that has been very widely distributed.</li> </ul>	<ul style="list-style-type: none"> <li>An email from the client or lawyer instructing a consulting firm to undertake a factual investigation for the dominant purpose of the client then obtaining legal advice.</li> </ul>
<ul style="list-style-type: none"> <li>The final version of a witness statement or affidavit.</li> </ul>	<ul style="list-style-type: none"> <li>Emails between various legal advisers of the client for the purpose of providing the client with legal advice or assistance.</li> </ul>
<ul style="list-style-type: none"> <li>Working notes created unilaterally by an expert in preparing an expert's report for use in court proceedings.</li> </ul>	<ul style="list-style-type: none"> <li>An email from a client's lawyer to an expert instructing the expert to provide evidence for use in anticipated litigation.</li> </ul>
<ul style="list-style-type: none"> <li>An email from the client or lawyer instructing a consulting firm to undertake a factual investigation for the purpose of understanding what went wrong and fixing the client's systems/processes.</li> </ul>	

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

Find a range of Legal Professional Privilege guidance and materials at [www.hsf.com/legalprofessionalprivilegeau](http://www.hsf.com/legalprofessionalprivilegeau).

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