

## **Litigation - Legal Professional Privilege (Episode 7)**

Hi there, my name is Brendan McGrath and I'm an associate under the Disputes and Investigations group. I'm going to talk to you about legal professional privilege and offer some practical tips on how to maintain and preserve a claim of legal privilege when working through a discovery process or regulatory investigation.

When complying with a discovery request or an investigation, there are of course relevant but confidential documents which a party would not want to disclose as to do so may reveal sense of information or could prejudice their legal position or defence.

A defendant or party subject to investigation is entitled to claim legal privilege over documents that record or request legal advice, what constitutes legal advice for a claim of privilege is a technical and complicated issue but for these purposes let's assume it's legal advice provided by external lawyers.

When a party asserts legal privilege over documents, that party can withhold or redact the document from the other side. Recently we are seeing our clients faced with more and more challenges from their counterparties in litigation or investigations on claims over privilege.

While there is no way to guarantee that a challenge to privilege will not succeed, there are a number of useful steps that a party can take to ensure that they can maintain a robust claim of privilege.

The first step a defendant can take is to mark all documents, recording requests for legal advice and all legal advices received as legally privileged. Documents which are generated in furtherance of litigation that is reasonably contemplated or in training should be marked privileged in contemplation of litigation.

While marking documents this way is not determinative of whether the content is actually privileged, it should at least avoid inadvertent disclosure of the document and provide an

opportunity at the discovery stage to decide if a claim of privilege can be properly maintained.

That said, it is equally important to avoid just marking all documents as privileged as this will undermine the credibility of the party's seeking to maintain the claim of privilege. It is also best to avoid generating and disseminating commentaries on legal advice received as those documents may not attract privilege especially if the commentary is part of a document which is a broader scope or purpose.

There's plenty more to be considered in the area of privilege which is often the most time-consuming, challenging and costly part of a discovery or a statutory request process. Early engagement with your lawyers and careful planning in terms of consistent approach to the process is crucial.

Our Disputes and Investigations team has a wealth of experience in dealing with complex commercial litigation discoveries and regulatory investigations. I would be happy to help your organisation if and when the need arises.

That brings us to the conclusion of our defending toolkit series. If you have any queries on any of the material covered or if we can be of any assistance please do not hesitate to contact us.