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LEGAL PRACTITIONERS & NOTARIES PUBLIC

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Breaking the Code of Silence: The Lawyer-Client Privilege Explained.

Introduction

Lawyer–client privilege (often called attorney–client privilege) is the legal rule that protects confidential communications between a client and their lawyer made for the purpose of seeking or receiving professional legal advice or representation.

The doctrine encourages full and frank disclosure, allowing lawyers to provide accurate and strategic counsel. In practice, it means information a client shares with their lawyer is confidential and may not be disclosed without the client's consent, subject to limited exceptions. A communication is "confidential" when it is not intended to be disclosed and is made in a manner reasonably calculated to keep it from third parties, other than persons whose involvement is in furtherance of the legal advice, for example, members of the legal team or those reasonably necessary for the transmission of the communication.

Typical privileged communications include: personal details relevant to the brief; facts, documents, and context about the legal issue; exchanges (emails, letters, calls, meetings) between lawyer and client; strategy and legal analysis; and, where relevant, information about a client's mental or emotional state to the extent it informs the legal advice.

When Does Lawyer-Client Privilege Apply?

Privilege generally attaches where:

1. A client or prospective client communicates with a lawyer about a legal matter;
2. The lawyer is acting in a professional capacity (providing legal advice or representation); and
3. The client intends the communication to be private and acts accordingly.

If these elements are present, the lawyer is duty-bound to maintain the information's confidentiality. Privilege survives the end of the lawyer–client relationship and, importantly, continues after the client's death. In such cases, the right to assert or waive privilege typically passes to those legally entitled to act for the deceased's estate.

Who May Claim the Privilege

The following persons/entities may assert privilege in respect of a protected communication:

- The client;
- A guardian acting for the client;
- The personal representatives of a deceased client;
- The successor of a corporate (artificial) client; and
- The client's lawyer at the time of the communication (asserting it on the client's behalf).

What Information Is Protected?

Privilege protects confidential communications for the purpose of legal advice or representation, including:

- The instructions a client gives to the lawyer;
- The lawyer's written or oral legal opinions and advice;
- Documents or notes created as part of giving or seeking legal advice; and
- Copies/extracts of existing documents to the extent they would reveal the substance of legal advice or the trend of counsel's thinking.

Pre-existing documents that exist independently of the legal advice are not privileged merely because they are shown to a lawyer. However, a lawyer's selection or compilation of such documents may be privileged if it would disclose the nature, scope, or strategy of the advice.

When Will Privilege Not Apply (or Be Lost)?

While privilege is robust, it is not absolute. Disclosure may be permitted or required in the following circumstances:

- **Client consent:** The client authorises the lawyer to disclose specified information.
- **Defending a claim:** A lawyer may disclose privileged information to defend against allegations made by the client (e.g., in a professional complaint or claim).
- **Crime–fraud exception:** Communications are not privileged where a client seeks a lawyer's assistance to commit or conceal a crime or fraud. By contrast, seeking advice after a past offence has been completed remains privileged—unless the advice is sought to cover up the offence.
- **After death—disputes within the estate:** Privilege may not prevent disclosure where litigation arises between heirs, legatees, or others claiming under the deceased, and the communications are directly in issue.
- **Common-interest / joint clients:** Where two clients are represented by the same lawyer in the same matter, neither may assert privilege against the other in a later dispute about that joint matter.
- **Public information:** Information that is already public or not intended to be confidential will not be protected from disclosure.
- **Presence of unnecessary third parties:** If confidential communications are shared with or made in the presence of third parties who are not part of the legal team and not reasonably necessary for the communication, privilege may be waived as to those third parties.

Practical Tips to Preserve Privilege

- Mark relevant communications "Privileged & Confidential – Legal Advice".
- Limit circulation to those who need to know for the purpose of obtaining legal advice.
- Prefer direct communication with your lawyer; avoid unnecessary group chats and non-secure channels.
- Keep business/operational discussions separate from requests for legal advice.
- When in doubt, ask your lawyer how best to communicate to preserve privilege.

Conclusion

Confidentiality is a bedrock of the lawyer–client relationship.
While the rule of privilege is firmly established, its application depends on context: who is involved, how the communication is made, and whether confidentiality is maintained.
Handle sensitive issues with care, and seek guidance early to ensure your communications remain protected.

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This article is for general information only and does not constitute legal advice. For tailored guidance, please contact Zoe, Akyea & Co.

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