

**Legal Professional Privilege - Communications Protocol
Dealing with Lawyers (Internal and External)**

Rule	Practice Guideline	Comment	Responsibility
Creating, Storing and Sharing Data and Documents			
<p>Document Management Please ensure that all hard and soft files are appropriately created, named, identified and appropriately stored. This may include considering restricted access through HPE (the University's Records management System).</p>	<p>Please seek assistance from Legal and Risk (extension 34539) or the University Archivist (extension 36250) for further assistance.</p>	<p>It will generally be preferable to ensure that meeting notes are minuted and filed and stored by lawyers (internal or external). Where this is not practicable please apply general document management rules.</p>	<p>All parties Legal Counsel University Archivist</p>
<p>Document Management Keep privileged documents and communications separate from non-privileged ones, and restrict access to those privileged documents within the University with a "need to know".</p>	<p>For example, keep privileged documents in a separate and secure physical location or in separate electronic folders which are access controlled and (ideally) password protected.</p>	<p>This is also a good practice for any documents which may not be privileged but which contain sensitive commercial information.</p>	<p>All</p>
<p>Document Management Only circulate privileged or sensitive documents within the University to those that must have access to the information.</p>	<p>Think carefully about whether someone really needs access to the information. Do not circulate privileged or sensitive documents internally within the organization more widely than absolutely necessary. Do not share documents or data with any third party without approval or consent (from Legal and Risk or external lawyers).</p>	<p>Legal Professional Privilege is easily lost, often through inadvertent or 'innocent' disclosures. Unless there is an absolute 'need to know' take a conservative approach to sharing privileged or sensitive documents.</p>	<p>All</p>
<p>Emails When creating, storing, archiving and transmitting emails, please consider all rules under this Protocol.</p>	<p>Please check with Legal and Risk Branch (Legal Counsel).</p>	<p>Simply applying the term 'confidential' will not prevent an email from being discoverable in a court action, whereas genuinely privileged emails can be protected.</p>	<p>All</p>

Rule	Practice Guideline	Comment	Responsibility
<p>Communications with Third parties</p> <p>Do not circulate sensitive information more widely than absolutely necessary.</p>	<p>Before communicating with any third party – think carefully about whether that person really needs access to the information.</p> <p>Be particularly careful when giving a third party access to a document that is or may be the subject of a claim of legal professional privilege by the University, as that may mean the privilege will be lost.</p> <p>If in doubt – obtain legal advice from Legal and Risk (Legal Counsel) or external lawyer Refer Annexure for information</p>	<p>Anyone external to the University is a third party. This includes consultants, police, experts and all Controlled Entities.</p> <p>Although all University personnel are 'internal' please exercise great care in sharing documents – particularly via email. If in doubt – obtain legal advice from Legal and Risk Branch (Legal Counsel) about whether to give the person access and how to reduce the risk of privilege being compromised.</p>	<p>All and Legal Counsel</p>
<p>External Experts</p> <p>If you want to engage an expert or external consultant to report on something that is or may become litigious arrange for Legal & Risk to brief or coordinate a brief to them.</p>	<p>Before communicating or sharing information with the expert discuss the matter with Legal & Risk.</p>	<p>Expert engagement by a lawyer can attract Legal Professional Privilege, which can protect the confidentiality of draft reports and the communication of sensitive information between the University and the expert.</p>	<p>All and Legal Counsel</p>
<p>Witness Statements</p> <p>If you want to obtain evidence from a witness – arrange for Legal & Risk to do or facilitate this.</p>	<p>Communications between non-lawyers and a [potential] witness are unlikely to be protected by legal professional privilege,</p> <p>Communications to a witness or third party should be limited and coordinated by lawyers.</p> <p>Before communicating or sharing information with the [potential] witness discuss the matter with Legal & Risk Branch.</p>	<p>Lawyers are in the best position to take steps to ensure that communications with the witness attract Legal Professional Privilege.</p> <p>Lawyers are trained to communicate with witnesses and to ensure that their assistance is being sought for the purposes of legal advice.</p>	<p>All</p>

Rule	Practice Guideline	Comment	Responsibility
<p>Commenting on Legal Documents If you create, comment on or review draft affidavits or witness statements or court documents, ensure they are only circulated to internal or external lawyers and not to any third party</p>	<p>Do not leave draft documents with a witness or any third party.</p> <p>Be particularly careful when giving a third party access to a document that is or may be the subject of a claim of legal professional privilege by the University, as that may mean the privilege will be lost.</p>	<p>Where attending meetings, decide who is to take minutes or a record of any discussion to ensure privilege is protected.</p>	<p>All</p>
<p>Protecting Legal Advice Privilege Never disclose legal advice to a third party, whether verbatim, paraphrased or in summarised form.</p>	<p>Never say to a third party or to the public anything to the effect, "We have legal advice that the position is X". This will almost certainly result in a loss of privilege.</p> <p>If in doubt – obtain advice from Legal and Risk (Legal Counsel).</p>		<p>All</p>
<p>Protecting Legal Advice In-house lawyers should adopt a practice of confining legal advice to separate documents from those containing non-legal advice; and only marking as "privileged" documents that genuinely are or may be privileged.</p>	<p>Clearly mark sensitive or contentious legal advice as "Confidential and Subject to Legal Professional Privilege"</p>	<p>This will enhance the prospects of the dominant purpose test of privilege being met, and help to ensure that marking a document "privileged" will have some evidentiary value if its privilege status is ever challenged.</p>	<p>Legal Counsel within Legal and Risk Branch (Legal Counsel)</p>
<p>Media Releases and Other Communications</p>			
<p>Media releases or other communications to the public should be carefully reviewed by either in-house lawyers in Legal and Risk Branch (Legal Counsel) to ensure that they do not disclose the substance of legal advice and result in a loss of privilege</p>	<p>Ensure that the University's Media Officers are briefed and updated as necessary.</p>	<p>Where privilege is being managed it is usually the case that there is a sensitive issue or investigation or inquiry being undertaken. It is important that the University's Media Officers are appropriately engaged to ensure that the University's name and reputation are preserved and protected.</p>	<p>Legal Counsel Senior Managers University's Media Officers</p>

**Communications Protocol
Dealing with Lawyers (Internal and External)
Legal Professional Privilege**

ANNEXURE – WHAT IS LEGAL PROFESSIONAL PRIVILEGE?

Legal professional or client legal privilege is the immunity that a client (the University) has from being compelled to disclose certain communications or records of proposed communications:

- (a) between themselves and their lawyers; and
- (b) in some cases – between themselves and a third party, or between their lawyers and a third party.

Legal professional privilege is an important immunity which applies both in the courtroom and out of it: it is not just a rule of evidence.

Whose owns it?

The privilege belongs to the University as client (or other entities as “joint clients”), not to a University employee, servant or agent or the lawyer.

What is it for?

The purpose of the privilege is to promote the public interest by encouraging the University to make a full and frank disclosure of relevant facts and circumstances to the University’s legal advisors – whether that is obtained from within the Legal Office in Legal and Risk Branch (Legal Counsel) or from an externally appointed lawyer. If the University knows that communications with its lawyers will be kept confidential, and that the University will not be compelled to disclose the communications to third parties later on – e.g. in court proceedings – the University is more likely to give the lawyer a truthful and complete account of the relevant circumstances.

This means that legal advice may contain embarrassing admissions or other statements that the University would prefer to keep confidential.

How is it created?

For a communication to be privileged it is essential that it:

- (a) be treated as confidential;
- (b) meet the “dominant purpose” test, i.e. created for the dominant purpose of:
 - a. providing or obtaining legal advice; or
 - b. use in connection with existing or anticipated legal proceedings; and
- (c) be between a lawyer and their client (subject to very limited exceptions).

If something is marked “privileged” you should pay special attention to it, but remember that simply marking a document “privileged” does not automatically attract the protections of privilege – it must meet the three key criteria.

Examples of potentially privileged documents include:

- (a) a letter of legal advice from an external law firm to the University;
- (b) a memo of legal advice from an in-house lawyer within the University to anyone within the University;

- (c) a summary of documents or a chronology prepared by a lawyer (internal or external) for the dominant purpose of giving advice or for use in a court case;
- (d) a letter of instruction from the University to its external lawyers;
- (e) a memo prepared by an officer of the University (being any member of the University staff) seeking legal advice from an in-house lawyer;
- (f) draft notes or memos prepared by an officer of the University for the purposes of giving instructions to an external or in-house lawyer (even if never actually given to the lawyer);
- (g) observations and briefs of documents given to barristers for the purposes of giving advice or use at a court hearing;
- (h) reports prepared by third parties if they are created for the dominant purpose of seeking or obtaining legal advice from lawyers or use in anticipated legal proceedings; and
- (i) internal investigation reports prepared by the University for the dominant purpose of seeking or obtaining legal advice.

Final Business Documents

Documents that constitute or evidence transactions (for example contracts, conveyances, declarations of trust) or which record commercial or normal business communications or other internal University-business matters will generally not be privileged, because they do not meet the dominant purpose test or are not treated as confidential communications between a lawyer and a client. Drafts of such documents may be privileged (unless they have been forwarded to another party to the transaction) if they were created for the dominant purpose of the giving or receiving of legal advice.

How is it lost - Waiver

Privilege can be easily lost or “waived”. This usually happens when:

- (a) the document recording the communication ceases to be confidential;
- (b) the contents of a privileged communication are disclosed (deliberately or otherwise);
- (c) the substance of what is said in the privileged communication is disclosed to a third party in a manner which is inconsistent with the confidential character of legal advice – i.e. a disclosure of the underlying legal message rather than a verbatim disclosure of the legal advice.

From time to time, the University might want to tell a third party or the public that “we have legal advice that X is the case”. This may be intended to highlight the strength of the University’s position, or to justify or explain the University’s actions. Whatever the reason behind the disclosure, doing so almost certainly means that the University will lose privilege in the advice and the reasoning behind it (and possibly other privileged communications as well). The effect of this is that the University may be required (in Court proceedings) to disclose the advice to the opposing party.

The circumstances in which privilege can be lost are now very technical areas of law. If you are in any doubt as to whether something is privileged, or whether disclosing it to someone else will result in a loss of privilege, make sure you first get advice from the University’s Legal and Risk Branch by:

Email: helpdesklegal@adelaide.edu.au

Telephone: Ext 34539

Or by contacting any of the University’s lawyers directly, see: <https://www.adelaide.edu.au/legalandrisk/legal/>

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