



Episode 64

Sent, Shared, Waived? Threats to legal client privilege

Intro

This is Risk on Air by Lawcover, and today's episode is privileged until it isn't.

Julian: Welcome to Risk on Air. I'm Julian Morrow and today we are talking about privilege and it's a privilege to have Alex Haslam from Gilchrist Connell with us to talk us through.

Alex, welcome.

Alex: Thank you, Julian. It is a privilege to be here.

Julian: Well, let's see when we lose the privilege one way or the other. Let's just talk about the fundamentals first, Alex. Could you just give us a brief introduction to the nature of privilege and the limbs of privilege that are particularly important for lawyers to be aware of?

Alex: Absolutely, Julian. When I'm talking about privilege, what I'm talking about is client legal privilege or what's sometimes called legal professional privilege and it's a bedrock protection in Australian law. It ensures that confidential communications between a client and their lawyer are protected from disclosure to third parties or courts unless the client chooses otherwise and it's an essential protection for clients to be able to seek legal advice without fear that their communications will be later used against them in some form.

Julian: Absolutely fundamental to the practice of law. What sort of contexts does client legal privilege apply in? It's not just litigation, is it?

Alex: No, so there are two main limbs of client legal privilege. The first is legal advice privilege, which covers confidential communications between a client and a lawyer made for the dominant purpose of giving or receiving legal advice. As you say, it doesn't matter whether litigation is on foot or not. It covers advice, rights, obligations, liabilities, extends to, in most cases, draft documents, notes, internal memorandums, things like that, if the dominant purpose is for legal advice. But there is also litigation privilege and this covers confidential communications that are created for the purpose of litigation, whether it is on foot or about to be on foot. This can include communications between third parties, experts, consultants, other professionals, again, provided that the dominant purpose is the litigation. It can cover all sorts of documents. It's slightly broader than legal advice privilege, but again, there needs to be litigation on foot or anticipated. But in both cases, the privilege is the right of the client. It's not the solicitor's right.

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- Alex:** As a solicitor, you can't waive the client's privilege without its approval, and it can survive after a retainer is over or even after the client's death. It's a substantive common law right. It's not just a rule of evidence and it applies outside the courtroom. So, it can respond to things such as regulatory investigations and compulsory notices.
- Julian:** And as you say, it's a common law right. It's got a long and storied history but also got a bit of statutory backup these days. What's the sort of relationship between the common law client legal privilege and relevant statutory provisions?
- Alex:** Well, client legal privilege started as a common law doctrine, but in Australia it's been enshrined into the Uniform Evidence Acts that exist in both federal and across state jurisdictions. There are two main sections in the Evidence Acts that deal with privilege, client legal privilege that is. The first is section 118, which deals with legal advice privilege, which is what we were just talking about. It prevents evidence being admitted if it would reveal a confidential communication between a client and a lawyer, made for the dominant purpose of legal advice, and section 119 of the Evidence Act, which relates to litigation privilege again, stops evidence being adduced of confidential communications or documents made for the purpose of providing legal services in relation to litigation or anticipated litigation. Now, these sit alongside the common law. The common law still applies in situations not covered by the Evidence Act such as search warrants, regulatory investigations and some other notices to produce outside of court.
- Julian:** Most of the time, the overlap between the statutory and the common law is going to be pretty comprehensive. But are there circumstances where only one of them applies?
- Alex:** Yes, as I just said, I think when you've got situations when you're not adducing evidence as such, but you are compelled to produce documents, then the Evidence Act may not apply, but the common law doctrine will certainly apply.
- Julian:** So obviously, what is and isn't privileged becomes a critical issue in litigation. And needless to say, every litigant thinks that all the documents over which they claim privilege are privileged and all the claims by the other side are a bit open to question. How do these disputes get resolved when there are issues about privilege in litigation?
- Alex:** Well, they often come up in discovery, which is when you are compelled to produce documents or on interlocutory matters. But it's up to the person claiming the privilege to expressly state that these documents are privileged. So for example, in discovery, you have to provide a list of documents to the other side and the court and there will be sections that will say privileged, non-privileged documents. And if the other side considers that your claim for privilege shouldn't exist, then they'll agitate that before the court and the court will determine it. Now it was the case until quite recently that producing documents to the court in response to a request for discovery or a subpoena or the like could be seen to have been waiving your privilege. And we'll get on to waiver in a minute. But now there is express provision, I know in New South Wales in the Uniform Civil Procedure Rules that says if you produce those documents to the court for the purpose of the court determining whether privilege exists, that's not a waiver of privilege.

- Julian:** But sometimes documents get just mischaracterised accidentally and it wouldn't be unusual perhaps for solicitors to look at a document and think, oh, surprised that's turned up in the non-privileged list. Is that a waiver?
- Alex:** Yes, it is. So that's probably the biggest trap for solicitors is waiver.
- Julian:** If that happens inadvertently, is that a waiver of privilege?
- Alex:** It may be. It may be, but you need to move quickly. If you accidentally produce privileged documents in a list, or discovery or a notice to produce, or you've inadvertently emailed a privileged document to the wrong person, or you forwarded advice to third parties inadvertently without thinking about it, then as soon as you realise you need to move quickly, you need to write to the person to whom you've disclosed it to say that document was inadvertently produced, it's privileged, destroy it, give it back, undertake that you're not going to use it, but it depends. If it's a long time between the disclosure and the attempt to rescind that disclosure, then the court might say, well, you should have acted fast. And I mean, it's a problem because as I said before, it's not the solicitor's privilege, it's the client's privilege. And if a solicitor has inadvertently waived privilege, that could be heavily criticised by the courts and the client may have an action against the solicitor.
- Julian:** No one wants to be in a situation of thinking, oh God, we've sent through privileged documents. It's perhaps less stressful to be on the receiving end of that correspondence, but what are your obligations as a solicitor if you do get the panicked email from the other side?
- Alex:** Well, in the first instance, if you get a document from the other side and you start reading it and it either says on it privileged and confidential or you start reading it and you think, actually this has been inadvertently produced, your obligation is to stop reading it immediately and then notify the person who has disclosed that document to say, I think you've sent this to me inadvertently, please confirm, I won't read it until you tell me otherwise. And then you will get that immediate phone call that says, yes, sorry, that was done by mistake and please destroy it. But if you get it before you read it, then you have an obligation to not read it.
- Julian:** Has that happened to you much?
- Alex:** It has happened to me on the other side. So there but by the grace of God go I. But it has happened. And I have had those emails come through to say, please don't read this, this has been inadvertently disclosed, or I have read it, I've started reading something and think I actually shouldn't be reading this. So I stop. And then you either pick up the phone or send an email to the other side to say, did you mean for me to have this? I started reading it but I've stopped because as soon as I thought it might be privileged. I mean, that's your obligation as a solicitor. And I mean, obviously there's immense gratitude from the other side. I mean, it happens. We all make mistakes, but some can be quite critical.
- Julian:** And a lot of the time it will be resolved between the parties in that way. If it doesn't, and there's actually then a litigated fight over whether or not the inadvertent production has produced a waiver, what's the test?

- Alex:** The test is have you acted in a way that was consistent with the maintenance of privilege? So if it was clearly an error, then the court will look as to what your processes were. So it's really a procedural thing as to, well, did you take enough care to maintain your client's privilege? And if it was very sort of flippant, oh, here are the documents, just go through them, get a paralegal to go through them and you haven't supervised it enough, the court will probably be quite critical and say, unfortunately, you didn't act in a way that was consistent with the maintenance of your client's privilege and therefore you've waived it. And then it's up to the client to work out what he or she does about that with the solicitor.
- Julian:** Conversations it's better not to be a part of.
- Alex:** Yes, no, I'm sure that's a very bad conversation to have.
- Julian:** Alex, we've been talking there about unintentional conduct by a solicitor that could waive privilege, but as you say, it's the client's privilege and they can waive it. How important is it to advise clients about the nature of privilege and the risks of clients inadvertently waiving?
- Alex:** It's very important. So when you are advising a client, you should say, well, this is a document that I'm sending you. I'm your lawyer. It's subject to legal privilege. Don't circulate it without discussing with me first. I mean, there are different levels of clients. Some are sophisticated and have experience of this before. Some are novel to the law. So you would need to say to them that my communications with you are what's known as subject to client legal privilege. I can't disclose them to anybody else without you saying, and I suggest that you don't disclose them to anybody else without consulting me first because it might waive your privilege and this will contain information that you would not really wish for others to see. And in the circumstances that is fundamental to the essence of what privilege is. It is about being free. So the client being able to be free and frank with their lawyer without fear that communication is going to be used against them. And that's fundamental to the system of justice because without free and frank communications between clients and lawyers, then you can't be confident that you're going to get frank advice in return. So if you don't tell your lawyer everything, how can that lawyer advise you properly? So it's imperative that clients are aware of what privilege is and how it benefits them.
- Julian:** The communication between a client and an external lawyer, counsel or solicitor probably is clearer to flag as a communication that's privileged. What about communications within a company or a business, particularly when legal counsel's involved? It's a harder area to distinguish there, isn't it?
- Alex:** It's far more of a grey area, yes. So in-house legal counsel advice or communications with in-house legal counsel can be subject to client legal privilege. It's again, what is the dominant purpose of that communication? Whether you're going to your in-house legal counsel to seek legal advice on what to do or often in in-house roles there's a mix between legal and commercial advice and that's where it gets grey because in-house counsel could be asked about many things that an external legal counsel may not be.

- Alex:** They would understand the business that they're in better than an external lawyer would so there's often a mix of things in what in-house counsel will advise on or what's in their communications. So a good test is that if in-house legal counsel think, well, this is actually legal advice, then say this is legal advice or market privilege, but don't try and mix in any other commercial aspects. If you get asked, say, two questions, one's a legal advice question, one's a commercial advice question, perhaps answer them as separate emails. One, that this is legal advice, this is privileged. And two, here's my answer to your commercial question. So it is a bit greyer in-house, but there's still a way around it. And it's just a question of clearly marking what the advice relates to.
- Julian:** And as if that wasn't enough grey areas, Alex, AI is changing the way that law is practiced comprehensively and there are a whole raft of emerging questions about how client legal privilege applies in the context of AI. What would you say are the emerging risks associated with the use of AI in terms of maintaining privilege claims?
- Alex:** Well, AI obviously is the new frontier for everything in the world and privilege is part of that. I mean, most lawyers these days use AI tools. A lot of clients expect them to use AI tools for bringing costs down. It's part of the world we live in. As we know, it's growing exponentially. There are, particularly in Australia, moves to try and regulate it more heavily. There's all the international discussions around how we stop AI from growing and taking us over.
- Julian:** And destroying all humanity within 10 years. Yeah, we've got to tick that one off.
- Alex:** In the Terminator movies, yes, it's happening. But the issue is that most AI tools run on cloud platforms, meaning that the information and the data that you put in is sent and processed by third party servers, often overseas and outside of your control. So if you put privileged information into these systems, there is a risk that you might be disclosing it to a third party, which means you're waiving privilege. So it's a live and evolving risk for lawyers, but the two main risks as I see it are if you put that data into an open AI, which is not ring fenced as such, because there are a number of tools that you can use that will ring fence your data, which is effectively like putting it into a filing system. But if it's open AI.
- Julian:** So if it's ChatGPT or Claude, those sort of things.
- Alex:** Absolutely. Effectively that means you are uploading client information to the internet. And there was a case in the UK recently where the court said, that's exactly what you've done. By using an open AI tool to assist you, you've put information onto the internet and therefore you've waived your client's privilege.
- Julian:** Yeah, that's, I mean, that's a fascinating, and concerning for some, finding. Tell us a bit more about that case, because you've written about it. This is the Munir case, is that right?
- Alex:** Yeah, that's right.

Julian: So what was the issue there?

Alex: Well, so it's something that every lawyer would do any day of the week if they are now using AI, which over the last six months is pretty much everybody, I think. You used AI to assist in drafting advice, or in that case, I think it was drafting advice, or the use of summarising client information. That information using an open AI is uploaded to the internet. And the internet is, as you know, viewable by anybody. So that is absolutely not consistent with the maintenance of client privilege. And it's a problem for lawyers. So as I said earlier, there are a number of systems that can be used and that will ring fence the data so it doesn't go to the internet. It can have internet information coming in, but it will never have your information that you input going out. And so when you're using AI, you just need to be very careful about the terms of use, which platform you're using, all of these things you need to think about before using it and your client may need to know as well what you're doing with their data.

Julian: Yeah, that is an interesting outcome in the Munir case, because as you say, it's to do with the fact that the information is moving out into the cloud. But there are so many cloud-based services that lawyers are using. Why or how is the tribunal saying that that's fundamentally different from, I don't know, using cloud word processing or emails?

Alex: That's an interesting point. I mean, emails, again, I think they are ring-fenced to an extent. They don't go into the internet. So it's really sort of going up into the cloud. I know, but obviously you've got emails and servers that are in the cloud. So that's a very good point.

Julian: So in the UK Munir case, which is a tribunal case, there's a clear suggestion that using one of the general AI products, ChatGPT or Claude, is going to create real problems in terms of a claim of privilege. You've also written about an American case of Hepner, United States versus Hepner. This is from February this year where the issue was slightly different. What was the situation in the Hepner case, Alex?

Alex: Well, the client got a grand jury subpoena and he retained lawyers to advise him on what to do. But in the course of that, he used Claude to assist him in preparing for it and inputted some what would otherwise be privileged or confidential information into Claude to help him prepare some documents. He later provided those documents to his lawyers and the issue was whether or not those documents were subject to client legal privilege. What the court found there was they weren't because his production of the document itself wasn't legal advice.

Julian: Wasn't in the context of that, the retained lawyers?

Alex: Correct. So even though he later produced that to the lawyers, it's a threshold point that the document wasn't produced for the purpose of legal advice, it was for the purpose of him preparing for a response to a grand jury subpoena, even though he later provided it to his lawyers. So it's not a waiver of privilege, it's that privilege never existed in the first place.

- Julian:** Yeah, I mean, that is an interesting scenario and that has significant ramifications. But it all comes down to why the person was using the AI in the first place. Would it have made a difference if the lawyer had said, well, get all your facts together and you can use Claude to produce it? That feels like it would be closer to the legal relations.
- Alex:** I think it's certainly closer. I wouldn't be sure that it necessarily still attracts privilege. Ideally, what the lawyer might do in that circumstance is say, give us all of the documents and we'll summarise them for you. Or if you want to come in to our office and we can go through them together and produce something via AI, that would, I suspect, fall under the umbrella of privilege. But it's the dominant purpose test again. What was it for? It wasn't, he himself, wasn't communicating with his lawyers about it. So as I said, it's a threshold issue. It wasn't privileged from the start, so it couldn't then later attract privilege.
- Julian:** And all these things are going to turn on the particular facts of the case. But it's interesting that those examples, particularly that one where it feels like it's litigation adjacent, if nothing else.
- Alex:** Absolutely.
- Julian:** But critically, those documents ended up not having the protection of privilege that the client was after. So what are the ramifications of this for Australian lawyers in 2026 thinking about their use of AI, Alex?
- Alex:** I think it's really important to have firm-wide policies on how to use AI, what tools you're using, instructions for your staff, as well as how you use them. It's critical to have, I would say, closed AI systems.
- Julian:** But your ChatGPT and Claude in particular are going to be sources of problems.
- Alex:** Absolutely. So there are legal specific platforms that are in use and I'm sure there'll be far more coming and there are certain firms who have created their own platforms, which I think is very useful because then there's full proprietary ownership over the system and how it operates and how information goes in and goes out. But I think it's just essential that you have a policy, you know what AI you're using, where the data is going to go. And if you're not sure, then don't use it. Or if you're not sure, and you still want to use it, then use redacted documents, paraphrase, just get general principles if you need to use it for that purpose, but don't input client data.
- Julian:** Yeah. And in line with what we were talking about before, obviously you don't want the solicitors to be inadvertently waiving the privilege by their use of AI. But this is something that clients should be aware of as well with material that comes from their legal advisors, I imagine there's quite a temptation. So I'll just pop that into Claude and see whether Claude agrees with the advice I've just paid for. But there are going to be privilege risks associated with that.
- Alex:** Absolutely. So I think with the warning that you give your clients in any event that this is legally privileged and this is how you should use it, I think nowadays you have to give that advice.

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- Alex:** You'd have to say if you are going to use AI to assist you with either understanding this document or improving a case or whatever, don't input it into open AI systems because that may have the effect of waiving any privilege over the advice I've just given you.
- Julian:** It's a constantly evolving space, rapidly evolving, and we've talked about a tribunal decision in the UK, a court in America. What's the state of these things being addressed explicitly by Australian courts, whether that's in cases or just things like practice notes?
- Alex:** Well, I mean, a lot of the jurisdictional courts have got practice notes now in place to say this is how you use it. But in terms of privilege, there's nothing. There's nothing yet. I suspect there will be a case at some point that comes up that's not unlike the English or the American cases we've just referred to. But there's nothing at the moment. There's nothing that I've seen that either at a judicial or a government level that the people are trying to do anything about this. But as we know, Australia is the home of regulation. And even recently, the Prime Minister said to the UN that we want to be the forefront of regulating AI. So I suspect as part of that, it may come out, but it hasn't as yet.
- Julian:** And I suppose from a risk management perspective, you should do all the things we've been discussing so that you don't inadvertently become the test case that will have these issues fleshed out publicly.
- Alex:** Absolutely. Nobody wants to be the test case or the guinea pig for this because reputationally, it's obviously very terrible for a lawyer to be in front of the court for something as fundamental as maintaining client legal privilege.
- Julian:** Well, Alex, there's a lot to think about, but if you get those procedures right early and speak to both your staff internally and your clients about it, the risks will be better managed.
- Thanks so much for joining us on Risk on Air.
- Alex:** No problem, Julian. Thanks for having me.

Outro

Thanks for listening to Risk on Air by Lawcover. And to stay up to date, join us for the next episode on current risks in legal practice.