**Waiving goodbye to privilege:**

**expert evidence, ethical obligations and maintaining and waiving privilege[[1]](#footnote-1)**

**The origins of this paper**

In preparing this presentation, I have looked back a decade, to a time of *joie de vivre*, when I was a young solicitor. I had just relocated to Melbourne. One of my first appearances in Court was to argue why my client, the Defendant, should not have to hand over witness statements, whose evidence appeared to inform the opinions of the experts engaged by my client.

The experts did not actually have any Defendant witness statements. None the less, a Judicial Registrar ordered that they be handed over, for privilege had apparently been waived.

Because of pressing time periods, the Court ordered that the witness statements be handed over the next day. That next day, I myself went to the Prothonotary and filed appeal papers. Given the urgency, I was asked to go immediately to appear before a Supreme Court Judge to seek a stay of the Registrar’s orders.

With my supervising partner unavailable, I appeared. I looked up at the Judge, who seemed miles away on a throne, my voice (and body) shaking, and sought to explain the basis of the appeal and the need for an urgent stay.

Thankfully, the Judge granted a short stay, giving me time to gather my wits, and brief counsel! The case then settled.

But this left two burning questions in my mind – first, why hadn’t I learnt something about privilege at University? More importantly, though, what was the law on waiver of privilege in these circumstances – why should the Plaintiff have access to more than our own expert had, namely the witness statements?

10 years on, the latter question still troubles me. This paper seeks to address the limited learnings on the issue.

In this paper, I will first address general principles of privilege, waiver and experts. I will then delve into the law on privilege and waiver as it relates to experts and their reports, conference notes and solicitors’ letters of instructions. Next, I will provide some scenarios to apply the law to facts based on complex cases. Finally, I will look at draft reports, Order 44 statements, interactions with expert witnesses outside of Court and provide some practical tips for practitioners.

**Brief refresher on privilege**

We are dealing here with “client legal privilege”,[[2]](#footnote-2) sometimes styled as legal professional privilege or just ‘LPP’.[[3]](#footnote-3) In simple terms, the privilege can be broken into two categories thus: (a) legal advice, and (b) litigation. This extends to engaging experts on a client’s behalf for those two purposes, which I will come to shortly.

This privilege has been described as a “fundamental principle” of law and even as a human right, no less.[[4]](#footnote-4) Chief Justice Spigelman has written a fascinating piece on what he calls the “common law bill of rights”, something probably under-appreciated in the great common law system, one of which is the right of a client to converse freely with their lawyer.[[5]](#footnote-5)

This is an interesting time to discuss the content of a client’s privilege.

One can mount a fair argument that, in many areas, the law is prying into confidential affairs like never before. Recent raids by the Federal Police on the ABC and journalist Annika Smethurst’s home force us to question the balance between keeping significant matters confidential (like a journalist’s source) and having them revealed, in this case ostensibly because of national security concerns.

Another area facing scrutiny is the privacy of the confessional.[[6]](#footnote-6) Here, the competing interests are the rights of religious people to confess their sins to God through a priest, weighed against the importance of priests reporting confessed crimes to Police.

As regards client legal privilege, there is a tension between the Court getting to the truth of the issue in dispute, and a client’s rights to communicate freely with a lawyer in the preparation of a potential court case or during litigation.

This frequently leads non-lawyers to ask, “but what if your client says that he ‘did it’?” [[7]](#footnote-7) Why should that be kept confidential? A lawyer’s ethical obligations prevent a lawyer from mounting a case that he did not do it in those circumstances.[[8]](#footnote-8) And the highest obligation of a lawyer is to the Court, which a lawyer must never mislead. But those questions are, in truth, at the margins.

The real issue is a simple one. If everything that a client told their lawyer was capable of being revealed to the opponent or the Court, it would lead to chaos. Clients would likely withhold key information from their lawyer, without the legal know-how of what they should and should not tell the lawyers. Lawyers would probably not seek proper instructions for fear of knowing things they had to reveal. This would hardly assist the Court in getting to the truth of the matter.

Concerned for the rights of its citizens, the common law has long sought to protect confidential communications between clients and their lawyers.

That great legal mind and historian, Lord Sumption, captured felicitously the history of the privilege attaching to legal advice in his Lordship’s dissenting opinion in a UK Supreme Court case in 2013:[[9]](#footnote-9)

*The starting point for any analysis of these matters is the rationale of the privilege attaching to the process of obtaining legal advice. It has been described by the Supreme Court of the United States as "the oldest of the privileges for confidential communications known to the common law": Upjohn Company v United States 449 US 383, 389 (1981). In some respects its development has been peculiar to the English common law and those legal systems which have adopted it. In most civil law countries, the protection of professional confidences is founded on the status of the adviser.*

*… It originated in the practice of the Court of Chancery in the years after the statute of 1562 which first made witnesses compellable: see Berd v Lovelace (1577) Cary 62; Dennis v Codrington (1579) Cary 100…*

So, for almost 500 years, the common law has jealously guarded the rights of clients to communicate confidentially with their lawyers.

As an aside, Lord Sumption is currently delivering a series of captivating lectures on “the Law’s Expanding Empire”, which can be downloaded Online.[[10]](#footnote-10)

**Privilege and expert evidence**

Expert witnesses have been called upon in litigation since at least the 18th Century.[[11]](#footnote-11) Freckelton, in *Expert Evidence*,[[12]](#footnote-12) describes expert evidence as the “mainstay” of litigation in all areas of law. We know this to be true from our own work.

Because of their importance to the legal process, and therefore sitting comfortably with the privilege between a client and their lawyer, the privilege extends to experts engaged for litigation (or anticipated litigation).

An expert, however, will not be left in a silo, cut off from access by the other side of litigation, for there is no property in a witness. By way of example, it is not uncommon for a plaintiff expert to be subpoenaed and called by a defendant to give evidence, and vice versa. What is protected is the client’s privilege in communications between the client, their lawyer and the expert. As we will see, that privilege may be and often is waived.

Likewise, it is important to remember that matters outside of communications between the client, their lawyer and the expert may not attract privilege, because privilege is about communications to and from a client (or their lawyer). Working notes of an expert may well fall outside a “communication” of this kind. This is why it is *prima facie* not improper to subpoena a witness to produce their file, although some of that file may well contain privileged information that the party who issued the subpoena will have no right to inspect.

**Application of the *Evidence Act 2008* (Vic)**

Until quite recently, client legal privilege was a creature of the common law, not found in the statute books. Today, it is almost the opposite.

Part 3.10 of the *Evidence Act 2008* (Vic) sets out a number of provisions relating to ‘privilege’.

It is difficult to think now of examples where the *Evidence Act 2008* (Vic) would not apply to disputes concerning privilege and waiver. This is because Part 3.10 applies both to “adducing evidence” in a trial setting, but also to all interlocutory disputes in a proceeding.[[13]](#footnote-13)

Sections 117 to 119 are key to determining the application and extent of client legal privilege applicable under the *Evidence Act*.

Section 118 provides that, where there are confidential communications between a client and a lawyer or “another person”, that are made for the dominant purpose of the lawyer providing legal advice, then that evidence is not to be adduced (because it is privileged).

Similarly, section 119 provides that, where there are confidential communications between a client and a lawyer or “another person”, that are made for the dominant purpose of the lawyer relating to an Australian or overseas proceeding or anticipated proceeding, then that evidence is not to be adduced (again, because it is privileged).

So, section 118 relates to legal advice and section 119 relates to proceedings or anticipated proceedings.

Section 117 defines a ‘confidential communication’ as a communication made in circumstances where the person who made it, or to whom it was made, was “under an express or implied obligation not to disclose its contents…” Obviously enough, this extends to an expert retained by a party to litigation or anticipated litigation or to assist a lawyer providing advice to a client.

The “dominant purpose” test replaced the old common law that such communications had to be made for the “sole purpose”.[[14]](#footnote-14)

Of course, where the *Evidence Act* does not apply, in some pre-litigation case, for example, the common law principles of privilege continue to apply. It is now difficult to see what material difference there is between the common law test and the test under the *Evidence Act* in respect of client legal privilege.[[15]](#footnote-15)

**Waiver of the privilege**

While the law attaches great importance to client legal principle, as we have seen, it is not sacrosanct. If it were, it would be open to abuse.

Let us take a basic example. Party A retains an expert. The expert’s report is mostly favourable, but to some small extent is highly damaging. It would be absurd for Party A to be entitled to serve that part of an expert’s opinion that assists Party A and claim that privilege applies to the balance of it.

The common law, mindful of the potential abuse, developed a series of rules on waiver of privilege. Such rules are now captured in the *Evidence Act*.

**Sub-sections 122(2) and (3) of the *Evidence Act***

Section 122 of the *Evidence Act* provides (relevantly):

*Loss of client legal privilege—consent and related matters*

*(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.*

*(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.*

*(3) Without limiting subsection (2), a client or party is taken to have so acted if—*

*(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or*

*(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.*

*…*

*(5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because—*

*(a) the substance of the evidence has been disclosed—*

*(i) in the course of making a confidential communication or preparing a confidential document…*

Looked at from this perspective, waiver of privilege occurs where:

1. the client consents to providing the otherwise privileged communications;
2. the client acts in a way that is inconsistent with the maintenance of the privileged communications;
3. the substance of the otherwise privileged communications is disclosed.

**Consent: section 122(1)**

The first of the three categories of waiver is clear enough.

A client might say – I want the other side to have a copy of Counsel’s advice because they will realise the flaws in their case. If the advice is handed over, privilege is lost.

This is not to be confused with the provision of documents by mistake. In the aptly named *Expense Reductions* case,[[16]](#footnote-16) the High Court was critical of a party who had received documents by mistake, under voluminous discovery, who sought to make use of them.

**Acting inconsistently with the maintenance of privilege: section 122(2)**

The second of the three categories has been much litigated.

It is really an implied waiver of privilege based on inconsistent actions of the party over the maintenance of the privilege claimed.[[17]](#footnote-17)

One often hears people quote fairness when considering whether privilege has been waived. It is in this context that fairness becomes relevant. Going back to the example of providing only some of the expert opinion to the other side, it would be acting inconsistently with maintaining privilege to provide only some of an expert’s opinion. Guided by principles of fairness in the context of the litigation and the expert evidence, it seems clear in such a case that privilege would be waived over the expert’s views *in toto*.

The plurality in *Mann v Carnell*,[[18]](#footnote-18) albeit under the common law, considered the ‘inconsistency’ said to give rise to the waiver of privilege, stating:[[19]](#footnote-19)

*What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.*

The High Court again considered the application of ‘fairness’ in the context of inconsistency, in *Osland v Secretary, Department of Justice*:[[20]](#footnote-20)

*Waiver of the kind presently in question is sometimes described as implied waiver, and sometimes as waiver 'imputed by operation of law'. It reflects a judgment that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances.*

The Victorian Court of Appeal[[21]](#footnote-21) has held that there is no settled list of actions which give rise to (implied) waiver, each case having to be looked at on its own facts.

**Disclosing the substance of the evidence: section 122(3)**

The third category relates to disclosure of the substance of evidence over which privilege is claimed. Taking another example, if Party A in open correspondence wrote to Party B and said that it had obtained the opinion of an expert, whose opinion was X, Y, Z, it may be said that that has disclosed the substance of that evidence. Party A could then not claim privilege over the expert’s evidence, having disclosed already its substance.

Under section 122(3) of the *Evidence Act*, if the Court is satisfied that the Defendant has disclosed “the substance of the evidence”, then privilege is lost, without more (i.e. it is not about conduct or unfairness).[[22]](#footnote-22) This is a powerful provision.

In *Adelaide Steamship Co Ltd & Anor v Janis Hunars Spalvins & Ors*,[[23]](#footnote-23) the Court said that “the substance of the evidence” requires a “quantitative” assessment of what has been disclosed, stating:

*The test is a quantitative one, which asks whether there has been sufficient disclosure to warrant loss of the privilege. If what is disclosed falls short of the test posed by the section, there is no waiver. Importantly, the subsections are not concerned with any principle of "fairness" such as that developed by the common law and by which waiver may be imputed.*

Justice Almond in *Lactalis Jindi Pty Ltd & Anor v Jindi Cheese Pty Ltd & Ors*[[24]](#footnote-24) held that the “*appropriate test is whether there has been sufficient disclosure to warrant loss of the privilege*”.

**Section 126 of the *Evidence Act***

Section 126 of the *Evidence Act* is a substitute of the old “derivative” common law waiver, now styled “loss of privilege over related communications and documents”.

Section 126 provides:

*If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.*

Justice J Forrest in *Mullett v Nixon & Ors*[[25]](#footnote-25) was of the view that section 126 has narrowed the application of common law derivative waiver, which is not about fairness or inconsistency, but now about having a proper understanding of the primary document:

*This statutory form of derivative waiver in s 126 is different from that at common law as it ‘is not cast in terms of either unfairness or inconsistency (or for that matter, inconsistency informed by notions of unfairness).’*

*…*

*notwithstanding the restrictive nature of statutory provision (as opposed to the previous common law position), it is clear that* ***it is not necessary that the derivative document be referred to in the primary document****. What is necessary is whether the derivative document assists in reaching a proper understanding of the primary document. The converse also holds good. As Derham AsJ held, a reference to a potentially derivative document in a primary document does not in and of itself mean that the derivative document is required to be produced unless it goes to ensuring an understanding of the primary document.*

[emphasis added]

**Onus of establishing privilege and waiver**

The onus of establishing the claim for privilege is on the party claiming the privilege. The onus of establishing waiver falls to the party who asserts there has been a waiver.

As was said in *ML Ubase Holdings Co Ltd v Trigem Computer Inc*,[[26]](#footnote-26) per Brereton J:[[27]](#footnote-27)

*I treated this as an objection to production of documents on the ground that the documents were privileged documents. On such an objection, the party claiming privilege bears the onus of establishing the basis of the claim, but once that claim is established, the onus of proving that privilege has been lost by waiver shifts to the party who asserts that there has been a waiver.*

**Expert evidence and waiver**

So far, this paper has set the scene for the general operation of privilege and waiver. I now wish to turn to the application of those principles to experts.

For good reason, most cases in this area start by quoting *Australian Securities & Investments Commission v Southcorp Limited*, per Lindgren J.[[28]](#footnote-28) However, care needs to be taken, because these principles derive from the common law, and do not apply the statutory wording now required.

The general principles are:

a. generally speaking, confidentially briefing or instructing an expert to provide an opinion to be used in anticipated litigation or litigation attracts client legal privilege

This makes sense. As we have already explored, sections 118 and 119 extend to communications between third parties, such as experts, if the communications are for the dominant purpose of legal advice or proceedings.

b. documents provided confidentially to an expert for the purposes of the expert providing an opinion are also generally subject to client legal privilege

This also makes sense, because the documents provided are for the purposes of the confidential communications and the provision of the expert report.

c. documents generated unilaterally by an expert witness, such as working notes, are generally not the subject of client legal privilege because they are not in the nature of, and would not expose, confidential communications between the expert and the lawyer

This is because, as noted in section 117, it is only confidential communications that are captured by privilege.

However, in *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd,[[29]](#footnote-29)* White J was of the view that such working papers prepared for the preparation of an expert report may well be privileged, if they are brought into existence for the dominant purpose of a party being provided with legal advice or legal services in the form of an expert report.

d. generally speaking, disclosure of an expert’s report leads to the waiver of privilege over instructions to the expert and the documents provided to the expert if it can be said that those instructions and documents influenced the report

Looked at under the *Evidence Act*, this principle could be said to derive both from acting inconsistently with the maintenance of privilege or from a derivative waiver under section 126 of the Act to make sense of the report. It would seem inconsistent, for example, for a party to serve an expert report, yet seek to maintain privilege over the letter of instructions to the expert or documents influencing the report, when that letter and documents were relied on by the expert in producing the report.

e. once the report is disclosed, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents

Again, this makes sense under the *Evidence Act* provisions relating to inconsistency and derivative waiver.

Justice Lindgren boils the principles down in a simple way. Unfortunately, applying those principles to disparate factual disputes, and applying the *Evidence Act*, is challenging.

I will now propose several scenarios and link those to Justice Lindgren’s expert evidence and waiver tests.

Scenario 1

Party A provides a letter of instructions to an expert and three documents with that letter of instructions. The letter of instructions does not mention the documents, other than that they are enclosed.

The expert provides a report, specifically quoting two of the three documents. The third document is referred to in the body of the report, where the expert only said, “I have read all of the enclosures provided, which are A, B and C documents”.

Is Party B entitled to the third document once the expert’s report is served on it?

Answer

One way to look at this scenario is under section 126 of the *Evidence Act* (derivative waiver). It is probably not reasonably necessary to have the third document to understand the expert’s report.

But the expert did say that they read the documents. Maybe it did influence the report?

Another way to look at this scenario is under section 122 – has Party A acted inconsistently with the use of the third document by providing it to its expert, whose report it then served? Perhaps not, if the expert merely referred to having seen such a document, without more.

It may be that, before trial, there is not enough to establish a waiver over the document given there is no real evidence of it influencing the report.

This could, of course, change at trial. It may be that the expert does rely on the third document, for example in cross-examination. Privilege would then be waived over the document.

Having said all of that, gut instinct says that the other side should have access to the material the expert has referred to in the report, even without more. Perhaps this is where ‘fairness’ will come into the equation.

This scenario is based loosely on *Gillies v Downer EDI Limited*.[[30]](#footnote-30) In this case, an unredacted letter to the ATO was given to an expert, Ms Wheatley, of the Defendant for the purposes of preparing her report. The report was served on the Plaintiff. In its letter of instructions, the Defendant’s solicitors asked the expert a number of questions, which were directly relevant to the ATO letter.[[31]](#footnote-31) The Plaintiff argued that mere reference by the expert to the ATO letter was not enough to waive privilege over it. However, there were opinions in the letter that the expert agreed with.[[32]](#footnote-32) Because of the nature of the use of the ATO letter and the use to which it was put, the judge found that privilege had been waived.[[33]](#footnote-33)

Scenario 2

Party A retains an accounting expert to provide an opinion on the financial affairs of a certain company. The expert provides a series of draft reports, seeking confirmation from the solicitors that her assumptions in the report are accurate and the like. In her final report, the expert clearly states the assumptions relied on (provided by the lawyers) in coming to her conclusions on the financial state of the company. There is no reference in the final version to any draft reports or communications between the expert and lawyers about the drafts.

Is Party B entitled to see the draft reports and communications between the expert?

Answer

There are two separate categories here – one the communications between the lawyers and the expert relating to assumptions, the other about draft reports.

In *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd*,[[34]](#footnote-34) per White J, the Defendant sought draft expert reports between the expert, Mr Smith, a partner of KPMG, and the plaintiffs’ solicitors. Justice White refused the application on the basis that the final report clearly set out all the facts and assumptions.

But this must be assessed on a case by case basis. If there was something in the final report that referred to earlier correspondence and significant changes being made to the report, it may be that there is a waiver of privilege over those communications – either under section 122 or 126 of the *Evidence Act*.

I will come back to draft reports shortly.

Scenario 3

Party A retains an expert engineer to opine on the cause of a motor vehicle accident. Together with the letter of instructions, the expert is asked to assume various facts from an undated and unsigned proof of evidence of a witness.

The expert relies heavily on the proof of evidence and carefully extracts, in the body of his report, the relevant parts of the proof of evidence.

Is Party B entitled to the proof of evidence once the report is served on it?

Answer

Minds may differ on this scenario. On one view, the fact that the expert has relied on the proof of evidence means that its substance has been revealed in the report and it should be produced.

On another view, the expert has clearly set out the contents of the proof of evidence relied on and there is nothing more to be gained from having the document.

I think the better view is that, given the reliance by the expert on the document, privilege over it has been waived.

In *Bellenjuc Pty Ltd v Kentish Council*,[[35]](#footnote-35) a case applying common law principles, the Court found that the expert has complied with his obligations to set out the facts and assumptions of his report and there was no requirement, on service of the report, to disclose the proof of evidence given its use in that scenario. I have some reservations about its application under the *Evidence Act*.

Scenario 4

Party A provides a detailed letter of instructions to its expert. The expert is asked to assume a number of significant facts relating to the cause of a mine collapse and the events that unfolded in the critical minutes before the collapse.

It is apparent from the letter of instructions that the assumptions are not contained in any discovered materials and have seemingly come from instructions from witnesses.

The expert sets out in clear terms the assumptions used in the report. Party A serves both the report and the assumptions relied on.

Is there a waiver over the evidence of any witnesses underlying the assumptions?

Answer

You will recall this is like the scenario I faced as a junior solicitor.

One answer to this scenario is to say that there is nothing about the expert’s report that could, per se, amount to a waiver of privilege because the expert relied on nothing more than the letter of instructions to form views.

But another way to look at this scenario is from the point of view of the letter of instructions and to ask, has the letter of instructions divulged the content of otherwise privileged communications, or does the letter simply set out assumptions? Can those assumptions be looked behind? Are they really assumptions or are they facts that should be tested to get to the bottom of an expert’s evidence? What’s more, how would this affect the briefing of experts in all cases, without setting out some assumptions taken from instructions of the parties or witnesses?

These difficult questions remain unresolved. There are good arguments either way and the nature of the “assumptions”, their detail for example, may well influence the outcome of any contest.

**Unifying principles**

By marrying the common law waiver principles and the *Evidence Act*, we can distil what seem to be unifying principles:

1. disclosure – if you serve the report, you need to disclose the letter of instructions and documents relied on;
2. influence – what material has influenced the report? Why should that material not be in the hands of the party served with the expert report? The converse is also true – why should the party served with the expert report have materials that had no influence on the expert report?;
3. fairness – this dictates that a party who wishes to serve the report should expose all the underlying materials on which the opinion is based;
4. the role of the expert and getting to the truth of the issue – both the parties and the Court should have access to all the materials relevant to the report to determine its probative value in the proceeding and to get to the truth of the issue.

**Draft reports and entering dangerous territory**

Different views have been expressed about whether lawyers may be involved in finalising an expert’s report.

On one view of the issue, a lawyer should be able to assist an expert witness with the structure and form of a report, to ensure that it is admissible.[[36]](#footnote-36)

This is particularly so when a party’s lawyer and expert have obligations to present material into Court that is relevant, admissible, intelligible and set out in a way that assists the Court.

On the other hand, Dixon J in *Hudspeth[[37]](#footnote-37)* said that it is never proper for a lawyer to ‘settle’ an expert report, at least without disclosure of the changes, because an expert must be independent, and the expert must themselves adhere to the Expert Witness Code of Conduct. His Honour said:[[38]](#footnote-38)

*…lawyers should not ‘settle’ the evidence of experts, who must remain true to the Expert Code. The undisclosed settling of an expert’s report by a lawyer could place the expert in breach of the Expert Code, and the lawyer in breach of his or her duty to the court, if the expert’s evidence was changed or modified in a material respect.*

There seems nothing objectionable in a lawyer writing to an expert to seek to clarify matters in the expert’s draft report, or to ask the expert to address key matters missed in the draft, to fix typographical errors, or the like, as opposed to ‘settling’ the report, but one must bear in mind that such correspondence could become the subject of cross-examination of the expert.

**Waiver over draft reports**

It is as well to remember another danger about draft reports - that such drafts may end up in the hands of the other side. If that occurs, they could be used to undermine the expert’s final report.

In *New Cap*, White J was of the view that, commonly, draft reports would attract privilege, because they are prepared for the dominant purpose of providing legal advice or services to a client. Yet his Honour recognised that there is potential that such materials, if created predominantly for preparing the report itself, means that there is no privilege. In effect, such drafts would be characterised merely as working notes, not “confidential communications” that attract privilege. Privilege cannot be manufactured by the expert either, such as by sending the file to the solicitor as a “confidential communication”.[[39]](#footnote-39)

If there is privilege in the draft reports, such privilege could also be waived, particularly if something about the final report and, say, instructions from a client, become an issue, as occurred in *Hudspeth*’*s* case.

**Order 44 statements following service of a report**

Practitioners and experts must bear in mind Rule 44.03(3) of the Rules of Court, which provides:

*(3) If the expert provides to a party a supplementary report, including a report indicating that the expert has changed the expert's opinion on a material matter expressed in an earlier report—*

*(a) that party shall forthwith serve the supplementary report on all other parties; and*

*(b) in default of such service, the party and any other party having a like interest shall not use the earlier report or the supplementary report at trial without the leave of the Court.*

Evidently enough, this provision relates to a further opinion or an opinion that changes the expert’s previous views. Simply conferring with a witness in preparation for trial, where the expert does neither of those things, would not appear to attract this rule.[[40]](#footnote-40) It seems accepted that such “supplementary report” includes an oral report in conference with lawyers, which report must be reduced to writing.

If Rule 44.03(3) is captured, then it is important for the expert to continue to keep in mind the requirements of an expert to comply with the Expert Code of Conduct, which includes setting out the facts and assumptions on which an expert’s report is based.

It is also important for practitioners to bear in mind that their own conference notes with the experts may be called upon by the other side on receipt of further Order 44 statements, as privilege may have been waived over the conference given the requirements of Rule 44.03(3).

**Interacting with an expert witness before or during trial**

Practitioners and experts must at all times keep in mind that discussions between them may become the subject of a claim of waiver of privilege.

An interesting example is *Huntington v Kew Golf Club & Anor.*[[41]](#footnote-41) An issue arose at a view, where counsel, solicitors and the expert attended Kew Golf Club. The Defendants made application to restrain plaintiff’s counsel from appearing at the trial, for they said counsel may be witnesses in the case. Counsel cannot appear if they are going to be called as witnesses. Emails from the expert to the solicitors were provided to the defendants’ solicitors. The emails indicated that counsel had intimate knowledge of the case and may have imparted some of that information to the expert. The Defendants’ solicitors’ complaint was that they did not know what instructions were provided to the expert at the view from this intimate knowledge as none of this was disclosed in the expert’s reports.

On the evidence, Zammit J did not accept that there was evidence of any significant information provided from counsel to the expert, and nor did her Honour accept any real risk of counsel becoming witnesses in the trial.

But the case does highlight the danger of practitioners getting “too close” to expert witnesses and that this may not only undermine their expertise, but affect the ability of the lawyers to continue to act.

This applies equally to interactions with an expert during a trial itself. One should always be mindful of the watchful eye and keen ear of the other side when interacting with any witness outside of the court room.

**Some practical tips**

To avoid the pitfalls revealed above, practitioners might benefit from the following tips:

* only provide an expert with necessary instructions and documents;
* keep in mind that any instructions and documents provided probably will need to be disclosed to the other side on service of a report;
* be careful what you include in a letter of instructions and how it is framed. Keep in mind that privilege may be waived over content discussed in the letter of instructions;
* keep communications with experts to a minimum to maintain the integrity of the expert’s report. Best practice is to limit conversations to formal communications in writing;
* when engaging in conferences with witnesses, keep in mind the requirements of Order 44.03(3) of the Rules of Court; and
* on receipt of an expert report, go through the report, and consider whether you have received all information and documents referred to or relevant to the expert’s report, such as the letter of instructions, supporting material, underlying documents and documents the subject of facts and assumptions. If not, ask! You may just have a privilege fight on your hands.

Annexure A to this paper sets out a table of what may or may not need to be produced on service of an expert report.

Annexure B sets out the Expert Witness Code of Conduct.

**P G HAMILTON**

Owen Dixon Chambers West

13 June 2019

**ANNEXURE A: WHAT MUST BE PROVIDED TO THE OTHER SIDE ON SERVICE OF AN EXPERT REPORT (IF SOUGHT)?**

|  |  |  |
| --- | --- | --- |
| **Nature of the document** | **Is it privileged?** | **Must it be provided?[[42]](#footnote-42)** |
| Informal discussions with the expert before retaining the expert | Yes, until service, where it may be waived | Arguably |
| Letter of instructions to the expert[[43]](#footnote-43) | Yes, until service | Yes |
| Conversations with an expert regarding instructions | Yes, until service, where it may be waived | Probably |
| Documents underlying instructions in the letter to the expert, but not enclosed | Yes, but on service, waiver is arguable | Arguably |
| Documents provided to the expert by the lawyer and used by the expert | Yes, until service | Almost certainly |
| Documents provided to the expert by the lawyer but not used by the expert | Yes | Arguably |
| Documents obtained unilaterally by the expert and used by the expert | Probably not | Yes |
| Draft reports | Potentially | In some cases |
| Working notes of the expert[[44]](#footnote-44) | Potentially | Potentially[[45]](#footnote-45) |
| Solicitor’s conference notes with experts post service of the expert’s report[[46]](#footnote-46) | Potentially | In some cases |

**ANNEXURE B: EXPERT WITNESS CODE OF CONDUCT**

**Application of Code**

1. This Code of Conduct applies to any expert witness engaged or appointed—

(a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or

(b) to give opinion evidence in proceedings or proposed proceedings.

**General Duties to the Court**

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

**Content of Report**

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide—

(a) the name and address of the expert;

(b) an acknowledgment that the expert has read this code and agrees to be bound by it;

(c) the qualifications of the expert to prepare the report;

(d) the assumptions and material facts on which each opinion expressed in the report is based (a letter of instructions may be annexed);

(e) the reasons for and any literature or other materials utilised in support of each such opinion;

(f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;

(g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;

(h) to the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and opinion expressed by that other person;

(i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report) and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;

(j) any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and

(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

**Supplementary Report Following Change of Opinion**

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.

5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

**Duty to Comply with the Court's Directions**

6. If directed to do so by the Court, an expert witness shall—

(a) confer with any other expert witness;

(b) provide the Court with a joint report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and

(c) abide in a timely way by any direction of the Court.

**Conference of Experts**

7. Each expert witness shall—

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

1. Written paper presented as part of the Green’s List CPD series on 13 June 2019. [↑](#footnote-ref-1)
2. To use the nomenclature of the *Evidence Act 2008* (Vic). [↑](#footnote-ref-2)
3. The latter is said to be misleading because the privilege is the client’s, not the lawyer’s. [↑](#footnote-ref-3)
4. *Attorney-General (NT) v Maurice* [1986] HCA 80 per Gibbs CJ and Deane J. [↑](#footnote-ref-4)
5. 2008 McPherson Lectures available for download at -<http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Spigelman/spigelman_speeches_2008.pdf>. [↑](#footnote-ref-5)
6. Section 127 of the *Evidence Act 2008* (Vic) provides protection for members of clergy from divulging the content of a religious confession. [↑](#footnote-ref-6)
7. *Viz.*,a criminal offence. [↑](#footnote-ref-7)
8. See Annesley, R. *Good Conduct Guide: Professional Standards for Australian Barristers* (2019) at [9.42]. [↑](#footnote-ref-8)
9. *Prudential plc & Anor, R (on the application of) v Special Commissioner of Income Tax & Anor* [2013] UKSC 1 at [116]. [↑](#footnote-ref-9)
10. <https://www.bbc.co.uk/programmes/m00057m8>. [↑](#footnote-ref-10)
11. See Lord Mansfield per *Folkes v Chad* 99 E.R. 686; (1783) 3 Doug. K.B. 340, quoted in *Hoyle v Rogers & Anor* [2014] EWCA Civ 257, discussing the principle stated by Lord Mansfield that persons with “special study” may give opinions as “skilled witnesses”. See section 79 of the *Evidence Act 2008* (Vic) for today’s definition of expert opinion evidence and its admissibility in litigation. [↑](#footnote-ref-11)
12. 4th Ed. At [236]. [↑](#footnote-ref-12)
13. See sections 131A and 4(1)(b) of the *Evidence Act*. [↑](#footnote-ref-13)
14. See *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67; 201 CLR 49. [↑](#footnote-ref-14)
15. *Ibid*. [↑](#footnote-ref-15)
16. *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited*: (2013) 250 CLR 303; [2013] HCA 46. [↑](#footnote-ref-16)
17. The Uniform Evidence legislation changed some time ago to remove “intention” of the privilege holder and replace it with “conduct” – see the ALRC Report 102. [↑](#footnote-ref-17)
18. (1999) 201 CLR 1; [1999] HCA 66 per Gleeson CJ, and Gaudron, Gummow and Callinan JJ. [↑](#footnote-ref-18)
19. At [29]. [↑](#footnote-ref-19)
20. (2008) 234 CLR 275; [2008] HCA 37 per Gleeson CJ, and Gummow, Heydon & Kiefel JJ at [45] [↑](#footnote-ref-20)
21. In *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2018] VSCA 118 at [44] and [72]. [↑](#footnote-ref-21)
22. Odgers, S, *Uniform Evidence Law*, 13th Ed, Thomson Reuters, at [EA.122.180]. [↑](#footnote-ref-22)
23. [1998] FCA 144 per Olney, Kiefel and Finn JJ. [↑](#footnote-ref-23)
24. [2013] VSC 475. [↑](#footnote-ref-24)
25. [2016] VSC 129 at [86]-[89]. [↑](#footnote-ref-25)
26. [2007] NSWSC 859. [↑](#footnote-ref-26)
27. At [23]. [↑](#footnote-ref-27)
28. [2003] FCA 804. [↑](#footnote-ref-28)
29. [2007] NSWSC 258 at [29]-[30]. [↑](#footnote-ref-29)
30. [2010] NSWSC 1323. [↑](#footnote-ref-30)
31. See [54]. [↑](#footnote-ref-31)
32. See [61]. [↑](#footnote-ref-32)
33. At [65]. [↑](#footnote-ref-33)
34. [2007] NSWSC 258. [↑](#footnote-ref-34)
35. [2011] TASSC 12. [↑](#footnote-ref-35)
36. *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [29]. [↑](#footnote-ref-36)
37. *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (Ruling No 8)* [2014] VSC 567. [↑](#footnote-ref-37)
38. *Ibid* at [167]. [↑](#footnote-ref-38)
39. Freckelton & Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th Ed), at [426]. [↑](#footnote-ref-39)
40. See *Pierides v Monash Health (No 2)* [2017] VSC 564 for a discussion on whether minor changes in wording amounted to a change of opinion or supplementary report. [↑](#footnote-ref-40)
41. [2017] VSC 612. [↑](#footnote-ref-41)
42. Guide only. Cases will turn on their own facts. [↑](#footnote-ref-42)
43. This may include other pre-report communications with experts if the experts relied on the information for the purposes of the report. [↑](#footnote-ref-43)
44. Although this would probably require a subpoena on the expert to produce this material, because the party who retained the expert would probably not have such materials in their “possession”. [↑](#footnote-ref-44)
45. Query relevance where the report details all facts and assumptions in it. [↑](#footnote-ref-45)
46. In addition to the experts themselves provide Order 44.03(3) statements. [↑](#footnote-ref-46)