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# DISPUTE RESOLUTION ALERT

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### The shield of legal professional privilege

Lawyers are often, and necessarily so, the repositories of their clients' secrets, and there is good reason for this. The right to have one's confidential communications with a lawyer protected is an indispensable part of legal systems throughout the world, including South Africa. Clients confide in lawyers in order to take appropriate advice on the basis of full disclosure of the facts. If such confidences were subject to forced disclosure the administration of justice would be undermined.

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## The shield of legal professional privilege

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Important distinctions nevertheless need to be made between the concept of confidentiality and legal professional privilege. The former relies on the person to whom the communication is made to retain such confidence. The latter is a right a client may assert to prevent disclosure and which the lawyer must respect as a duty to their client. Legal professional privilege is therefore a shield against disclosure.

### Types of privilege

There are two types of legal professional privilege. First, communications made by clients to attorneys for the purposes of obtaining legal advice are privileged. Second, anything exchanged between attorneys and clients in the context of litigation are covered by what is called litigation.

Legal professional privilege is a narrower concept than confidentiality. While documents or information may be subject to confidentiality, they are not necessarily subject to privilege. For example, although confidentiality clauses in contracts are common, they bind the contracting parties only. While confidentiality is a component of privilege, it does not establish privilege in its own right. The communication is only privileged if it was made for the purpose of obtaining legal advice or in the context of litigation. Moreover, legal professional privilege will never protect the disclosure or commissioning of unlawful conduct.

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In this context it must also be understood that it is only when the information is given to lawyers that privilege applies. This includes lawyers who are not in private practice but who, for example, work for the state or a corporate body. The privilege does, however, not extend to non-lawyers, even if they have expertise in a particular legal field. So, for example, legal tax advice given by an accountant will not be privileged. Informal advice given by someone who happens to have legal training is also not privileged – a casual fireside chat with a friend or family member who happens to be a lawyer will not be privileged.

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## The shield of legal professional privilege...*continued*

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Privilege against disclosure therefore extends only to lawyers acting in that capacity and to no one else. As a precaution, we always recommend to clients that where there is a possibility that a matter may become litigious in the future, a lawyer should attend internal discussions regarding the issue in order to establish professional privilege. For similar precautionary reasons, communicating through lawyers (or in an email chain including lawyers) minimises the risk of losing legal privilege.

If for any reason privileged information comes into the public domain there is no remedy to suppress its disclosure. Once control is lost, it is lost forever. This is why clients and their attorneys should ensure the protection of privileged information. Introductory proceedings are available to prevent threats of disclosure, but once the *"cat is out the bag"*, it is too late. In this regard both legal practitioners and their clients should take particular care with what is communicated via electronic means and confidential communications in particular should be password protected.

### Public interest

In certain situations, public interest may override legal professional privilege. For example, section 46 of the Promotion of Access to Information Act 2 of 2000 obliges public bodies to grant access to a record, even if it is subject to legal privilege, if the disclosure would reveal *"evidence of substantial contravention or a failure to comply with the law"* or *"an imminent and serious threat to safety or environmental risk ... where public interest in the disclosure clearly outweighs the harm [of breaching privilege]"*.

There has been criticism of the fact that recent tax legislation and the Financial Intelligence Centre Act 38 of 2001 intrude upon or conflict with privilege. This tension has not been resolved. Nevertheless, legal professional privilege should always be asserted when appropriate in order to protect a client's interest.

This was summarised by Judge Sutherland in the case of *South African Airways v BDFM Publishers* [2016]:

- Legal advice privilege is a negative right to refuse to disclose, in proceedings, any confidential information exchanged between an attorney and their client.
- Legal advice privilege cannot be invoked to assert a positive right to the protection or preservation of information whose confidentiality has or may be breached through unauthorised means as a result of which the information has become or may become known to strangers.
- The limitations on the application of legal advice privilege position do not inhibit a person from seeking relief to prevent publication of confidential information, whether confidential because of the claim of privilege or because it is confidential in a general sense.
- Any relief sought from a court to protect any form of confidential information can be overridden by recognised public interest. This requires a balancing of contending values in a fact-specific context.

In sum, clients can continue to confidently disclose secrets to their lawyers for the purpose of obtaining legal advice or in the context of litigation subject to the limited concerns set out in this article.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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