



BETWEEN CLIENT AND COURTROOM: THE BROKER'S TIGHTROPE WALK WITH LEGAL PRIVILEGE

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Imagine this - you're a broker, the trusted bridge between a client and their insurer. The phone rings. On the other end is your client, a doctor, and they're in a panic. A patient has been rushed to casualty after an unexpected reaction to treatment. Suddenly, you're at the centre of a situation that could spiral into a claim and even a courtroom battle.

Doctors care deeply about their patients and understand that medicine isn't perfect. An adverse outcome doesn't automatically mean negligence. But in the heat of the moment, as emotions run high, your client says something like, *"I'm worried I might have made a mistake—I just don't know."* It's not an admission of liability; it's a human response in a crisis.

Now, you're gathering facts, relaying information and coordinating with attorneys. Yet, as the legal wheels start turning, one question quietly nags at you: **If this escalates, could you be compelled to testify against your own client? Is the shield of legal privilege strong enough to protect you?**

— The Privilege Puzzle

Legal professional privilege is one of the oldest and most respected rights in South African law. Legal professional privilege encompasses legal advice privilege and litigation privilege each with their own respective requirements. Broadly speaking, legal advice privilege applies to communications between an attorney and its clients for the purposes of giving or receiving legal advice (and includes documents which reveal the content of such communications), while litigation privilege attaches to communications (usually documents) between a client and their attorney or a third party for the purpose of use in the conduct of existing or contemplated litigation.

It's the invisible cloak of privilege that lets clients communicate freely with their lawyers, knowing those communications won't be dragged into the harsh light of a courtroom. But for brokers, who often act as the third-party conduit between their clients and insurers on the one hand and their clients and appointed attorneys on the other hand, the boundaries of this cloak aren't always clear.



When a claim arises, the broker's role is pivotal. They collect details, interpret policy language and sometimes even help shape the legal strategy. If the broker is simply passing information from the client to the attorney—acting as an authorized agent on behalf of their client—those communications may well be protected by privilege. The law recognizes that sometimes, the broker is an essential part of the legal advice process.

But here's the catch: privilege isn't automatic. If the broker's involvement is more about business, such as ensuring that their client's claim is accepted by the relevant insurer or if information is shared with them for purely administrative reasons, the cloak slips. The courts look for the "dominant purpose" of the communication—was this communication mainly for obtaining legal advice or for use in pending or contemplated litigation? If not, privilege may not apply, and the broker could find themselves exposed.

The Subpoena Shadow

For many brokers, the fear of being subpoenaed is real—and justified. Litigants have the power to compel third parties, including brokers, to produce documents or testify if they possess evidence that is relevant and necessary to the issues the court must decide. Refusing a valid subpoena isn't just risky—it can lead to fines or even jail time.

There's a silver lining, though. If a broker receives a subpoena, they aren't powerless. With the help of an attorney, they can challenge it, arguing that the information sought is privileged, irrelevant or both. But this is a delicate dance. Privilege cannot apply in a vacuum; the assessment of whether privilege applies, like many things in law, largely depends on the unique circumstances of the case. Responding without legal guidance can lead to accidental disclosure of confidential information.

When Brokers Take the Stand

History offers cautionary tales. There have been cases where brokers, caught in the crossfire of litigation, were compelled to testify or hand over documents. Sometimes, this happened because privilege was inadvertently waived—perhaps information was shared too widely, or the broker's role wasn't clearly defined in the litigation process.

The courts are clear: privilege belongs to the client. Only the client (and arguably their agent) can waive privilege. The test for waiver is objective. If the broker's actions suggest the information isn't meant to be confidential, the protection vanishes.

Walking the Tightrope: Practical Wisdom

So, what's a broker to do? The answer lies in clarity and caution. Document your role—make it clear when you're acting as the client's agent for legal advice. Limit the sharing of sensitive information to those who truly need it. And if a subpoena lands on your desk, don't go it alone. Call in an attorney to help navigate the legal maze.

Educate your clients, too. Make sure they understand the risks of waiver and the importance of confidentiality. In the high-stakes world of insurance claims and litigation, a little foresight can mean the difference between protection and detrimental exposure.



The Final Word

The broker's journey through legal privilege is a balancing act—one that demands vigilance, integrity and a keen understanding of the law's nuances. The fear of being subpoenaed isn't just a ghost story; it's a real risk. But with the right steps, brokers can walk the tightrope confidently, safeguarding their clients and themselves.



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