



CIRCULAR TO ALL MEMBERS OF THE PROFESSION

Over the course of the past weeks the Chamber has been advised by certain of its members, that the issue of legal professional privilege or the duty of professional secrecy has been the subject matter of challenge and debate. This is of significant concern to all members of the profession, particularly when such challenge is made from quarters that are part of the wider legal profession. Although there may be practical issues that may need to be sorted out, the law is clear on the matter of legal professional privilege, once established it is absolute - and the only exceptions to it being established are (i) waiver by the client to whom the right belongs; and (ii) where a client/advocate communication (which would otherwise be privileged) is made in pursuit of a criminal purpose. No other exceptions are envisaged by law.

It is in this context that the Chamber has prepared a Practice Note to provide guidance to its members and to all members of the legal profession on the extent of professional secrecy and legal professional privilege, and when this may be asserted, also highlighting when it is not available as an exception to the general rule. This paper is important in that it guides advocates how they should conduct themselves when faced with a situation where their legal professional privilege is being threatened or challenged.

Legal professional privilege and the duty of professional secrecy is a right of an advocate's client and therefore it is only the client who can waive it and not the advocate. In the absence of waiver by the client only the law can provide for exceptions when that duty does not apply. Given that any exception to the general rule that favours the duty of confidentiality, it is only an express provision of law that ought to be relied upon for an exception to be made.

Legal professional privilege is crucial in allowing each and every person to have proper access to independent, frank and honest professional legal advice and to have the peace of mind that neither he/she as the client nor his legal advisor may be compelled to disclose any fact, matter or circumstance disclosed in communications with his/her professional legal advisor nor any advice received from such advisor or from having to disclose the findings of document

searches/information relating to such advice or to existing or future litigation. If privilege were to be lost for communications between lawyers and their clients, this places the right of any person to seek legal advice when required or to determine how best to act in certain circumstances in danger.

This is a right that has been as long standing as the legal profession itself, it is jealously protected by the profession; and has been vigorously defended by our judiciary, and fully respected by the legislature when it legislates.

It is a fundamental right necessary to ensure the proper exercise of any person to his/her right to seek and obtain competent legal advice, and to be able to entrust to the advocate who is advising all pertinent and relevant circumstances and disclose all documents or records, to ensure as far as practicably possible that the advocate has a full picture of the context of the advice that is being sought. It not only allows but actually promotes full and frank disclosure between a lawyer and their client without the fear that this information could be used against them.

It is a fundamental principle that helps to redress the balance of power between an individual and the state. Legal professional privilege is therefore a crucial element in maintaining the rule of law.

In terms of Maltese law, no privilege can arise where a lawyer's assistance has been sought to further a crime or fraud, or other equivalent conduct for a criminal purpose. Rather, many of the circumstances where LPP applies are precisely those where individuals or companies are trying to do the right thing through seeking legal advice. We should dispel the idea that reliance on LPP is some means of encouraging the shielding of wrongdoing.

Principally, the assertion of privilege should be viewed in the wider context of each situation in which it arises: **if the privileged information is available elsewhere, then that is where it should be sought in the first instance.**

There is a broad domestic and international acceptance of the benefits of legal professional privilege – having access to independent, and accurate advice in confidence is essential. In the absence of confidentiality and protection of the disclosure of circumstances, documents and facts which are necessary for the advocate to formulate that advice, the ability of the advocate to provide the client, with independent, considered, frank and honest advice and practical legal guidance will be significantly undermined. Such access is

especially important in complex legal systems where both individuals and corporates need to understand their rights, obligations and duties in a society underpinned by the rule of law.

The Chamber shall continue to jealously protect this fundamental right of clients against any and all attempts to dilute its effect. It is the law that creates this fundamental protection, and the Chamber will vigorously defend against any attempt by any investigating authority to interpret the law in any manner that would lead to the practical erosion of this fundamental right and to take short cuts in inquiries and investigations, by seeking to obtain privileged communications from advocates rather than their clients.

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