



# LEGAL PROFESSIONAL PRIVILEGE – PRACTICE NOTE FOR ADVOCATES

PUBLISHED BY THE CHAMBER OF ADVOCATES

1 OCTOBER 2021

CHAMBER OF ADVOCATES

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This practice note is intended for practising advocates to set out and clarify the status of Legal professional privilege, explain the principal tenets of LPP and the responsibilities of advocates in this respect and how they ought to act when legal professional privilege is either challenged or under stress.

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## 1. The conceptual notion

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Legal professional privilege (“LPP”) is crucial to the proper functioning of any system based on the rule of law.

**It is a right of the client, not the advocate and it is only the client who can waive it.**

It protects from disclosure communications, and records evidencing such communications, that occur between an advocate and his client, and in some instances even with third parties.

LPP 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.

## 2. Advising Clients about LPP

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Advocates have a duty to inform and advise their clients about their right to assert LPP. It is not a right which can be asserted in all circumstances, and therefore advocates have a duty to ensure that their advice to clients properly sets out when proper grounds for asserting LPP exist. It is unacceptable that advocates are in any way criticised for advising clients on their entitlement to rely upon LPP.

Advocates have a duty to ensure that LPP is only asserted on behalf of their clients when there are proper grounds for doing so, and abuse of LPP can give rise to disciplinary action against advocates.

## 3. Public bodies and Enforcement authorities

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Recently, LPP seems to have come under attack. The Chamber is aware of such instances not only in social media but unfortunately also particularly from regulatory bodies, and other public bodies and enforcement agencies.

Concerns have been expressed as to whether advocates might assist clients to misuse this right by advising them to assert LPP without any justifiable basis in order, for example, to hide evidence of illegal behaviour. These concerns are usually misplaced and demonstrate a misunderstanding of the nature and scope of LPP, including its status as a right which belongs to the client and not the lawyer.

Complete vigilance is required not only to protect and safeguard LPP, but to foster a culture for a better overall knowledge of the importance and value of LPP and to urge

legislators, regulatory bodies, and enforcement authorities to act in ways that actively uphold LPP as a right.

In terms of Maltese law, LPP cannot 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 LPP 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 LPP – 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 believes that this would negatively affect both compliance with the law and the administration of justice.

#### 4. The legal basis for LPP

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The Criminal Code<sup>1</sup> defines items subject to legal privilege as *any communication between a professional legal adviser and his client or any person representing his client and any document or record enclosed with or referred to in such communication and made in connection with the giving of legal advice or in connection with or in contemplation of legal proceedings and for the purposes of such proceedings, but the expression does not include items held with the intention of furthering a criminal purpose.*

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<sup>1</sup> Article 350 (1) of Cap.9 of the Laws of Malta

In addition, the criminal code also exempts advocates and legal procurators from being compelled to give evidence about circumstances or facts where the knowledge of such matters is derived from the professional confidence which a person may have placed in their assistance or advice<sup>2</sup>.

Indeed, it is a criminal offence for any advocate to disclose any secret entrusted to him/her by reason of his profession<sup>3</sup>, and any such advocate, if convicted, is liable to a fine and/or imprisonment<sup>4</sup>. Art 257 of the criminal code allows disclosure of information to a public authority without however committing an offence, where such disclosure is compelled by law and made to a public authority, when the matter refers to certain offences<sup>5</sup>. This exception however does not apply to a member of the legal profession, who remains bound by the duty of confidentiality.

The code of organization and civil procedure also makes reference to the confidential nature of the client attorney relations and communications<sup>6</sup>. The effect is that no advocate may be placed on a witness stand to depose on matters or circumstances which may have been stated to that advocate by his/her client in professional confidence.

In further reinforcement of the legal professional privilege an entry and search warrant that may be issued by a Magistrate under article 355E of the criminal code may extend to items of legal privilege<sup>7</sup>. The power of the police to enter and search premises of any person under arrest on the basis that they have reasonable grounds for suspecting that there is evidence that relates to an offence being investigated by a person who is under arrest is also proscribed to exclude items subject to legal privilege. Indeed, they cannot have access to, seize or retain anything which is subject to legal privilege<sup>8</sup>.

The overall widening of investigative powers of law enforcement agencies and their ability to search and investigate offences, such as under the Prevention of Money Laundering Act<sup>9</sup> have not diluted the legal professional privilege, indeed they have further reinforced

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<sup>2</sup> See Article 642(1) Cap.9 of the Laws of Malta

<sup>3</sup> See Article 257 of Cap.9 of the Laws of Malta

<sup>4</sup> Maximum fine of €46587.47 and/or imprisonment for a term not exceeding 2 years

<sup>5</sup> Cap. 101.(a) any of the offences referred to in article 22(2)(a)(1) of the Dangerous Drugs Ordinance; or Cap. 31.(b) any of the offences referred to in article 120A(2)(a)(1) of the Medical and Kindred Professions Ordinance; or Cap. 373.(c) any offence of money laundering within the meaning of the Prevention of Money Laundering Act:

<sup>6</sup> See Art 588(1) of Cap 12 of the Laws of Malta

<sup>7</sup> See Art 355G of Cap 9 of the Laws of Malta

<sup>8</sup> See Art.355L of Cap.9 of the Laws of Malta.

<sup>9</sup> Cap 373 of the Laws of Malta

that privilege. An investigation order issued under the provisions of Art.4 of the Prevention of Money Laundering Act, has very broad parameters, but is proscribed where legal professional privilege is concerned and will not confer any right

*“to production of, access to, or search for communications between an advocate or legal procurator and his client, and between a clergyman and a person making a confession to him, which would in legal proceedings be protected from disclosure by article 642(1) of the Criminal Code or by article 588(1) of the Code of Organization and Civil Procedure<sup>10</sup>”*

Advocates have an obligation of confidentiality towards their clients which is clearly and expressly spelt out in the criminal code.<sup>11</sup> An advocate who discloses secret information to a competent public authority, is held liable of a criminal offence and the defences available to other professions or persons do not apply to a member of the legal profession<sup>12</sup>. This position is again reiterated under the Professional Secrecy Act<sup>13</sup> which allows a person to disclose in good faith secret information to a competent public authority in Malta in the reasonable belief that such disclosure is reasonably necessary for the purpose of preventing, revealing, detecting or prosecuting the commission of acts that amount or are likely to amount to a criminal offence, or to prevent a miscarriage of justice, but even here the law saves the legal professional privilege under the provisions of art 642(1) of the criminal code and 588 (1) of the code of organization and civil procedure.

Accordingly, an advocate would still be liable for the criminal offence established under art.257 of the criminal code if he/she makes such disclosure in good faith.

In line with this body of law therefore an advocate cannot be compelled to disclose information otherwise covered by professional secrecy, and no authority may compel an advocate to breach his/her duty of professional secrecy, and thereby commit a criminal offence. This includes any competent law enforcement or regulatory authority investigating a criminal offence or a breach of duty; the Security Service established by

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<sup>10</sup> Art.4(3) of Cap 373 of the Laws of Malta

<sup>11</sup> Art.257 of Cap 9 of the Laws of Malta

<sup>12</sup> See second proviso to art. 257 (cap9 of the Laws of Malta), which disapplies the first proviso of that article allowing defences to the disclosure of confidential information to a competent public authority.

<sup>13</sup> See Art. 6A of Cap 377 of the Laws of Malta

the Security Service Act; a magistrate in the cause and for the purposes of *in genere* proceedings; and by a court of criminal jurisdiction in the course of a prosecution for a criminal offence.<sup>14</sup>

More recent legislation relating to criminal investigations has also protected legal professional privilege. The enactment of the Proceeds of Crime Act<sup>15</sup> empowers the director, and any member of the Directorate staff of the Asset Recovery Bureau (established by the Act), to seek from any person or authority any information with regard to any person or with regard to any matter, and the person in possession of such information shall notwithstanding the provision of any law to the contrary be obliged to give the Director or any such member all information so requested, these powers exclude advocates or legal procurator from being compelled to disclose information derived from the professional confidence.<sup>16</sup>

Using the distinction under art. 350(1) of the criminal code, LPP arises in one of two ways:

- (a) The giving of legal advice – legal advice privilege; or
- (b) In connection with or in contemplation of legal proceedings, and for the purpose of such proceedings – litigation privilege.

This note shall now deal with each of the two limbs of LPP.

## 5. Legal advice privilege

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### 5.1 The rationale

The underlying principle sustaining legal advice privilege is the key function that it plays in underpinning the rule of law and the administration of justice. The basis adopted by the criminal code in determining what constitutes material which is subject to privilege finds its source in English law, where the courts have developed the principle since the 19<sup>th</sup> century. In a 1996 House of Lords decision, the rationale for legal advice privilege was restated as follows:

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<sup>14</sup> See Art.6B of Cap.377 of the Laws of Malta

<sup>15</sup> This law was enacted in February 2021

<sup>16</sup> See Art.16(1) of the Proceeds of Crime Act



*“The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.<sup>17</sup>”*

In *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*<sup>18</sup> Lord Hoffmann described legal professional privilege as:

*“...a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may be afterwards disclosed and used to his prejudice.”*

## 5.2 The extent of legal advice privilege

Legal advice privilege is extensive and wide ranging.

All communications, of whatever nature, form or medium between an advocate and the client *made in connection with the giving of legal advice* are covered by legal advice privilege. That expression affords a significantly wide net as to what is covered by the legal advice privilege.

Legal advice privilege will cover:

- Any communication from the client seeking advice from the advocate;
- Any further communication which would provide context and factual circumstances for the advocate to be able to provide such advice;
- Documents provided by a client to the advocate, and which is intended to assist the advocate to prepare and formulate the advice;

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<sup>17</sup> per Lord Taylor in *R. V Derby Magistrates' Court ex parte B* [1995] UKHL 18.

<sup>18</sup> [2002] UKHL 21,

- Any research and working papers used by the advocate in formulating and preparing the advice;
- The advice itself, whether written or otherwise;
- A continuum of communications between client and advocate which are aimed at keeping an advocate informed so that advice may be sought and given as required, and if need be, at short notice.

This covers communications on any medium and includes:

- Verbal communication - whether such communication is made at a physical meeting or virtual meeting; or over a phone call; irrespective of whether a recording of that call is retained or otherwise.
- Written communication - all written communications, including electronic communication or hard copy communication, and all records or copies of such communications.

The term communications must therefore be understood in its broadest sense if the underlying rationale for legal advice privilege is to be maintained.

### 5.3 Corporate clients and In-house counsel

A word of caution for corporate clients and in-house legal counsel is important in determining whether:

- All communications between the corporate client and the advocate are covered by legal advice privilege; and
- advice received from in-house counsel is indeed covered by the same legal advice privilege as that of outside counsel.

In determining who the client is, whenever a corporate is concerned, is relatively simple. There is no doubt that the company or other corporate entity for whose benefit the advice is sought is the client. The issue that may however arise is whether all communications from any officer of the company will be considered as falling within the privileged communications under our criminal code.

There can be very little doubt that all communications with the officers or employees within the company who sought the advice and who are entrusted with seeking the advice and authorised to instruct the advocate are protected. By extension any personal assistants or delegates of these officers should also be covered, it is however a moot point

as to whether other officers and/or employees would be covered in the same way. Accordingly, caution ought to be exercised in communications of this nature and in determining whether and who should be the recipient of such communications. It is therefore useful to consider who is the client at the outset of an instruction and establish whether the person with whom an advocate will have day to day contact is properly authorised to provide instructions and receive legal advice for the organisation.

These issues may have greater impact in the case of cross-border litigation or multi-jurisdictional transactions on which an advocate is asked to advise.

The issue of whether advice provided by in-house counsel is covered by legal advice privilege in the same way as that provided by outside counsel.

In-house legal advisers, may need to give special consideration as to whether or not the purpose or principal purpose of communications between in-house legal advisers and their clients is to give or receive legal advice. If not, legal advice privilege will not apply. For example, merely copying an in-house lawyer into an email that is sent in order to obtain non-legal commercial advice will not make the communication privileged. These issues become particularly acute where the in-house lawyer is advising the internal client together with other specialists within the company.

## 6. Litigation privilege

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### 6.1 *Introduction*

Litigation privilege applies to confidential communications between advocates or their clients and any third party. It applies to confidential communications made for the sole or principal purpose of conducting existing or reasonably contemplated litigation which is adversarial rather than investigative. However, whether it applies depends on the purpose of the communication. In principle the same protection is afforded to communications between an advocate and a client under this head as under legal advice privilege referred to in the previous section of this practice note.

The communications must also have been created for the purpose of obtaining legal advice or information relating to the litigation.

### *6.2 The basis for litigation privilege*

Litigation privilege is grounded in the protection of one of the most fundamental rights - the right to a fair trial. The basis is the very nature of the adversarial system of judicial proceedings - where each party should be free to prepare his/her case to the fullest extent possible without the risk of the other party having access to materials generated by or used for the proper preparation of addressing those proceedings. This requires that potential litigants are able to unburden themselves, without reserve, to their legal advisors.

### *6.3 What does litigation privilege cover?*

Litigation privilege only applies to confidential communications between lawyers or their clients and any third party to the extent that such communications are made for the sole or principal purpose of conducting existing or reasonably contemplated litigation, which is adversarial, rather than investigative or inquisitorial. Litigation in this context should also be considered to include adversarial criminal or regulatory processes<sup>19</sup>.

Whilst existing litigation is somewhat easy to determine, providing advice in connection with contemplated litigation may well be more difficult to identify and determine. This is a matter of fact that would need to be determined on a case by case basis and there must be a reasonable basis why litigation would be contemplated. Litigation can hardly be considered as reasonably contemplated or reasonably in prospect where it is only a mere possibility, rather than a likely prospect. Normally, this could be determined through correspondence or records of meetings between disputing parties where the basis of a dispute is established; the filing and notification of judicial letters; or applications for the issuance of precautionary warrants. Whilst these need not be conclusive evidence, they are indicative to sustain a reasonable prospect of litigation.

Questions may arise as to whether the principal purpose of communications is to conduct litigation. This includes communications for the principal purpose of avoiding or settling

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<sup>19</sup> In England this was determined in *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 6.

proceedings which were reasonably in contemplation, that are therefore also covered by litigation privilege.

In order to assert litigation privilege, it is also important to be able to provide evidence indicating that the principal purpose for the creation of the relevant document or communication was to obtain legal advice or evidence in connection with the anticipated litigation. Documents in which such information or advice cannot be disentangled, or which would otherwise reveal such information or advice, are also covered by privilege.

#### 6.4 When does litigation privilege not apply?

Just like legal advice privilege. Litigation privilege is a right of the advocate's client, with a corresponding obligation for the advocate. It is therefore only the client that can waive it, and the law that can supersede this privilege.

## 7. Responding to investigations

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### 7.1 What is the issue?

Advocates sometimes play a key role in facilitating business and financial transactions that underpin the development and growth of economic activity within Malta.

Because of this important role, criminals may target professional services to help them commit financial crimes or to launder the proceeds of those crimes.

As a result, law enforcement may seek access to client files to investigate whether the client, and possibly the advocate, has committed a criminal offence.

Advocates have a duty to abide by the law, including the legal requirement to keep client's information confidential.

This section of this practice note aims to provide practical assistance on how to manage these competing obligations and refers to the main powers available to law enforcement when conducting financial crime investigations, and the legal provisions that protect

advocates' and legal privilege of their clients, a short description of which is set out in section 4 of this note.

If you yourself, as the advocate, are the subject of a financial crime investigation or are still unsure of how to appropriately comply with a request from a law enforcement agency, you should seek legal advice from a specialist criminal law practitioner.

This section covers:

- when an advocate's professional and legal obligations apply
- how those obligations may be overridden; and
- how to practically manage requests from law enforcement agencies

#### 7.2 Confidential information and Information subject to Legal Professional Privilege

Section 4 of this note sets out a comprehensive list of the laws that require advocates to maintain client information confidential, together with the legal provisions that safeguard that confidentiality.

The obligation of confidentiality extends to all matters revealed to you, from whatever source, by a client, or someone acting on the client's behalf.

This clearly signifies that you must not volunteer information about a client to law enforcement agencies, and that you may only provide information where you are required by law or a court order pursuant to an express provision of law or are otherwise exempted from your confidentiality by your client.

If you are approached by a law enforcement agency for information about a client or transaction they are investigating, you must ask if you can either:

- seek the client's consent to provide the information;
- be served with a notice or order requiring disclosure.

#### 7.3 Crime exception

No privilege can arise where your assistance has been sought to further a crime, or in furtherance of a criminal purpose. Whilst the point is very clear in terms of the exclusion

from legal professional privilege in art. 350 of the criminal code, its exact practical significance is of difficult application. Where an advocate is aware that he/she has assisted in furthering a criminal purpose, then the communications will not fall within the privilege and are disclosable to an investigating officer.

The mere allegation by an investigating officer or a public authority that certain communications are disclosable because they evidence the furtherance of a criminal purpose is not sufficient to displace the legal professional privilege and the duty of professional secrecy. If you are confident that there was no material exchanged with the client that would evidence any criminal purpose then the material should, at least, *prima facie*, still enjoy legal professional privilege and therefore should not be disclosed.

If, on the other hand, you know that a transaction you're working on is a criminal offence, you risk committing an offence yourself. In these circumstances, communications relating to such a transaction are not privileged and should be disclosed.

Of course, the problem arises where you yourself have certain suspicions that the client might be committing a criminal offence, and that you are being unwittingly involved in assisting the consummation of that offence. In these instances, one's suspicions need to be at least supported by some form of *prima facie* or circumstantial evidence of a criminal purpose or intent, in which case you would be well-advised to disengage with the client at the earliest available opportunity. You may also decide to seek guidance from the Chamber or a senior lawyer of how best to address the situation.

In principle however, you should always consider a client file (whether in hard copy or held digitally in an electronic system) to be protected by LPP, at least on a *prima facie* basis. An advocate should not volunteer or otherwise allow the seizure of a client file.

There seems to be a growing tendency that LPP should give way to some overarching duty of an inquiring magistrate to search for the truth. An inquiring magistrate does have the duty to do all such things as may be necessary to search for the truth<sup>20</sup>, that duty however must be read in the context of respecting laws that limit the powers of the magistrate in the methods that can be used to search for the truth; in particular laws that

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<sup>20</sup> See Art. 554(1) of Cap9 of the Laws of Malta

safeguard LPP. The powers granted by law to an inquiring magistrate can and ought only to be exercised and conducted within the limitations provided for by law. Accordingly, there is no overarching duty to search for the truth that is not also proscribed by law; or that may do away with LPP, without first having established that the crime exception exists or that there are compelling grounds that would convince an inquiring magistrate that amongst client materials held by an advocate there is evidence of criminal purpose. That determination is fundamental before the crime exception can be exercised and the general rule in favour of LPP displaced.

#### 7.4 Can privileged material ever be requested?

Privileged information can be disclosed if either:

- the client consents or has waived privilege; or
- the crime exception applies

The power to request or seize documents does not extend to material that is subject to LPP. Whilst not all the material in a client file may necessarily be covered by LPP, it is reasonable to consider that unless a proper independent review of the material in the file is conducted, the file actually contains at least some LPP material and should therefore not be disclosed.

It is, unfortunately, not the practice for instance for search and seizure or other warrants issued by courts or magistrates to contain any statement on the face of the order, that a warrant does not extend to LPP materials, notwithstanding that article 355G of the criminal code is amply clear that a search and seizure warrant does not extend to items subject to legal privilege. It would constitute best practice for such a statement to be made on the face of the relevant notice or order as this would avoid a possible ambiguity when investigative officers are executing that warrant. If the order is silent, the provisions of article 355G would still apply and should therefore be respected.

**If faced with a search and seizure order that purports to extend to what you believe to be legally privileged materials you should:**



- **read the search and seizure warrant carefully and establish the exact parameters of that warrant and the powers which the investigating officer is granted under that order;**
- **if no exclusion is made on the face of the order for legally privileged materials then you ought to inform the investigating officer that you will abide by the order only to the extent that the order must be interpreted as not requiring you to disclose materials that are privileged;**
- **inform the investigating officer that you are an advocate;**
- **that the information is covered by LPP and that disclosure of confidential information as well as privileged materials would involve you to be in breach of article 257 of the criminal code;**
- **that article 355G of the criminal code limits any search or seizure to materials that are not covered by LPP, and that such warrants cannot extend to LPP materials;**
- **refrain from handing over any client files which contain confidential or privileged communications. Client files should be presumed to contain at least some confidential information and privileged communications;**
- **refrain from allowing access to any electronic or digital system that provides access to client data and communications;**
- **As soon as possible file an application in the same acts of the warrant issued to explain the position to the magistrate issuing the order.**

If the law enforcement agency claims that the law or warrant they are acting under entitles them to confidential or LPP material, then you should require that:

- this should be expressly stated on the face of the notice and the order
- the agency must be able to identify the relevant statutory provision to you

#### 7.5 What happens if there is a dispute over privileged material?

There may be occasions where you believe that certain material is subject to LPP and the law enforcement agency disagrees. Different approaches to managing this dispute may be more appropriate depending on the circumstances.

## Client consent

LPP belongs to the client, not to the lawyer, so the client can always consent to privilege being waived. However, there are issues to consider about whether it's appropriate to discuss a notice or order with the client.

If LPP material is provided to a law enforcement agency without the client's consent, the client can:

- bring an abuse of process application against the agency
- either make a regulatory complaint or take civil action against you as the advocate;
- file a criminal complaint against you for liability under article 257 of the criminal code.

## *Order to produce information*

If you've been served with a notice or order to produce information where:

- the inquiring magistrate has not indicated that he/she is satisfied that the crime exception applies, and
- the investigating officer believes that none of the information on the file would be classified as protected or LPP material or that they should have access to the LPP material,

You may suggest, indeed you ought to insist:

- (i) that the material is handed over directly by you to the magistrate issuing the order and that it is the magistrate that would then have the duty to review, in your presence, the material and determine whether it is covered by legal professional privilege or not. This signifies that until such a determination is made no such material should be accessible to any investigating officer or any public authority;
- (ii) File an application in the records of the order, seeking permission from the magistrate to have the materials reviewed by independent counsel<sup>21</sup> who would report to the magistrate whether the materials in question ought to be saved under legal professional privilege or not.

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<sup>21</sup> Independent counsel here means that such counsel cannot be a member of the Attorney General or the Advocate of State.

You will not be in breach of your confidentiality obligations or of LPP if you voluntarily agree to have independent counsel review the material.

If you disagree with independent counsel as to whether LPP applies to particular material, you may have to apply to the court/magistrate for return of the material to resolve the issue.

In the event that you are faced with a situation where the matter requires the determination of privilege over certain materials, you are advised to contact the Chamber that will be able to assist by sending a representative to intervene in the matter and provide support to you in such a matter.

Whether one opts for a review of the material by the magistrate or independent counsel you should be given the opportunity to attend and make representations to the court/magistrate or independent counsel. Ideally the matter ought to be referred to an independent court to determine the matter rather than to the same inquiring magistrate, who in these situations would not be acting in a judicial capacity but in an administrative and investigative role. The current state of the law however does not specifically provide for such a reference to another court to make such a determination, and it may well be the right time to legislate on this matter.

There will be instances where, an investigation officer, will insist that he is entitled to seize material which you have justifiable reason to believe constitutes LPP material. You may not be able to resist that such LPP material is seized. In such cases you should insist that any material taken by the agency remains sealed, in a manner which would allow you to retain dual control over the sealed contents, until the dispute about the material is resolved.

You have the right to be present at the review of the material and apply to a judge/magistrate for the material to be returned.

If LPP material is inadvertently seized during a search, it must be returned as soon as reasonably practicable. If you believe this has occurred, you should raise this with the investigating officer initially, although if this is disputed, you may need to initiate court proceedings for its return.

## 7.6 General comments

In addition to meeting your obligations of confidentiality, there may be several other restrictions on your ability to discuss the law enforcement investigation with others.

You should have clear processes in place for:

- managing requests from law enforcement agencies
- dealing with clients who are the subject of investigations
- liaising with relevant third parties

You should look at any court order or notice you are given to see whether there is a 'non-disclosure' provision. You must comply with such a provision.

You should consider whether any discussion you are about to have regarding the order or notice is likely to prejudice a confiscation, civil recovery, or money laundering investigation, contrary to the PMLA.

You should document all such discussions in a file held separately to the main client file.

## 8. Suspicious Reports under the PMLA

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This is probably the most delicate area where advocates need to balance out their obligation to maintain confidentiality of information towards their client and the obligation to report to the FIAU any suspicious activity or transaction that a client may be conducting.

The advocate is under a duty to both defend LPP whilst, in the context of AML/CTF, and of course to the extent of advocates undertaking relevant activity, being alert to any suspicion or knowledge of money laundering that may displace this primary duty. Given the potential vulnerability of the advocate when making such an assessment and, potentially, the need to establish a defence to a subsequent non-disclosure offence, the precise steps taken by the professional to establish whether LPP applies are critical.

This section examines the tension between the professional duties of the lawyer and the provisions of the PMLA in marginal cases as to when LPP applies and prevents disclosure under the relevant legislation. This section therefore aims to provide a practical

framework to support the decision-making process of the advocate as they determine whether, in the context of the mandatory reporting obligations under PMLA, a particular document, or conversation, is subject to LPP.

As already discussed in the previous sections, once LPP is established it is absolute and allows of no exception. The issue therefore is whether LPP is established in connection with certain data or information.

#### 8.1 When is an advocate obliged to file a report with the FIAU?

An advocate or independent legal professional only comes within the ambit of the PMLA to the extent that such advocate is considered as a subject person.

The term subject person is defined as any legal or natural person carrying out either relevant financial business or relevant activity<sup>22</sup>. Advocates do not conduct relevant financial business but can provide relevant activities. These are defined in para (c) of the definition of relevant activity as follows:

*when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction or by assisting in the planning or carrying out of transactions for their clients concerning the –*

*(i) buying and selling of real property or business entities; (ii) managing of client money, securities or other assets, unless the activity is undertaken under a licence issued under the provisions of the Investment Services Act; (iii) opening or management of bank, savings or securities accounts; (iv) organisation of contributions necessary for the creation, operation or management of companies; (v) creation, operation or management of companies, trusts, foundations or similar structures, or when acting as a trust or company service provider*

The FIAU has issued an interpretative note on the matter of when advocates are considered to constitute relevant activity<sup>23</sup>. It is clear that advocates can only fall within

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<sup>22</sup> See definition in the PREVENTION OF MONEY LAUNDERING AND FUNDING OF TERRORISM REGULATIONS [S.L. 373.01.7]

<sup>23</sup> The interpretative note is available here: <https://fiaumalta.org/wp-content/uploads/2020/08/Interpretative-Note-Relevant-Activity-Lawyers.pdf>

the ambit of the PMLA where they are subject persons and therefore only with respect to conducting activities that are within the definition of relevant activity.

Regulation 15 of the Regulations<sup>24</sup> creates the obligation on subject persons, including advocates in those instances where they perform relevant activities, to promptly disclose to the Financial Intelligence Analysis Unit any information, supported by the relevant identification and other documentation, where such person *knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to funding of terrorism, or that a person may have been, is or may be connected with money laundering or the funding of terrorism, or that an attempt has been made to carry out a transaction or activity related to such proceeds or funding of terrorism.*

This would by definition include an advocate where the transaction or other activity being undertaken falls within the remit of a relevant activity.

The question therefore is whether this obligation has the effect of overriding legal professional privilege and the duty of confidentiality owed by an advocate to his/her client. The reply to that question is provided by regulation 15(9) of the Regulations. Indeed, the provisions of regulation 15(3) of the Regulation are disapplied with respect to advocates in relation to information that is received or obtained in the course of ascertaining the legal position of their client or performing their responsibility of defending or representing that client in, or concerning, judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

The text of this regulation is probably taken from the FATF guidance for legal professionals<sup>25</sup>. The manner in which this regulation is articulated, in an attempt to be faithful to the FATF guidance, may create some ambiguity in its application. The regulation covers both Legal advice privilege, expressed as information that is received or obtained in the course of ascertaining the legal position of their client; and litigation

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<sup>24</sup> See Regulation 15(3) of the Regulations

<sup>25</sup> GUIDANCE FOR A RISK-BASED APPROACH FOR LEGAL PROFESSIONALS <https://www.fatf-gafi.org/media/fatf/documents/reports/Risk-Based-Approach-Legal-Professionals.pdf>, see page 10 paras.28-33

privilege expressed as performing their responsibility of defending or representing that client in, or concerning, judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

1 October 2021