

## Legal Professional Privilege: The Law Society Guidance on its Usage

1. Legal professional privilege (LPP) is one of the highest rights recognised by English law. It arises when clients approach lawyers for legal advice or for assistance with resolving contentious issues. LPP, which has existed for over 400 years, is treated under English law as a fundamental common law right and as a human right. It is a necessary corollary of the right of every person to seek legal advice and it plays a crucial role in ensuring the proper administration of our justice system. Accordingly, it is a precious right, vigorously protected by our judiciary and usually treated with the utmost respect by Parliament when it legislates. Despite the central position that LPP occupies in our justice system, it can easily be overlooked that this is a right, not of lawyers or the legal profession, but of our clients – whether individuals or corporates. Lawyers therefore have a duty to advise clients of the availability of this right and their entitlement to assert it. Also overlooked, on occasion, are the English legal authorities which state in clear terms that no adverse inference may be drawn from a valid assertion of LPP.
2. The purpose of this guidance is not only to remind practitioners of the unique right that LPP confers on our clients when they approach us for legal advice and assistance, but also of the corresponding responsibility that is placed on legal professionals to ensure that LPP is only asserted on behalf of our clients where there are proper grounds for doing so.
3. This balance between the clients' right and the legal professions' obligations is particularly important when concerns are expressed from time to time as to whether this long-established right is one that the legal profession is guilty of misusing by advising their clients to assert LPP without any justifiable basis for doing so.
4. These concerns are usually misplaced and often demonstrate some ignorance as to the proper scope of LPP, and especially as to the nature of LPP as a right which belongs to the client and not the legal adviser. This fact notwithstanding, the last few years have seen increasing criticism of the legal profession for the way in which LPP is asserted in some arenas, with growing attempts by some parts of government to encroach upon the sacrosanct nature of LPP. In addition, certain regulatory bodies and enforcement authorities have voiced concerns that they see LPP sometimes being used to frustrate their efforts to undertake fully informed investigations because clients, on advice, advance claims to LPP which are not necessarily made in good faith.

5. It would be a dereliction of duty if solicitors fail to advise clients when proper grounds for asserting their privilege exist. It follows that solicitors cannot and should not be criticised for advising clients on their entitlement to rely upon LPP. If those clients justifiably assert their privilege, then in accordance with long-standing common law principles, they should not in any way be criticised or penalised for doing so, nor regarded as being uncooperative – nor should their legal advisers. Indeed, a legal adviser who waives privilege without the informed consent of the client would be in breach of his professional duties.

### **Purpose of this guidance**

6. There can be delicate and difficult balances to be drawn in some situations and for this reason it is critical that lawyers think very carefully in all circumstances as to the correctness and appropriateness of advising clients that LPP is available and that it is proper for the clients to assert LPP. With the aim of helping to defuse some of the tensions that have begun to emerge around LPP, The Law Society has produced this short guidance. Its aim is two-fold. First, to remind practitioners of the essential elements of legal advice privilege and litigation privilege. While this Guidance is not intended to be a substitute for detailed research on this sometimes complex area of the law, it will nonetheless help to remind practitioners of frequently encountered situations in which it is appropriate for them to advise their clients when they can and cannot assert LPP. Secondly, to help solicitors think about and to navigate some of the particular challenges that tend to arise in certain types of investigations where pressures to waive LPP are more frequently encountered, albeit that it is impossible to anticipate in this guidance every situation which solicitors will encounter.
7. **Overview of LPP.** LPP protects from disclosure confidential communications, and material evidencing such communications, that take place between clients and/or their lawyers and in some circumstances also between those lawyers and third parties. It is a common law principle, jealously guarded by the courts. Specific definitions of LPP may be adopted by statute for specific purposes; some of which reflect its common law scope and some of which do not.<sup>1</sup> Whether the source is common law or statute, LPP arises in two ways: in connection with the client consulting a lawyer (legal advice privilege), and in connection with litigation (litigation privilege).
8. **Legal advice privilege.** Confidential communications between a lawyer and a client, and all material forming part of the continuum of those communications,<sup>2</sup> will attract legal

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<sup>1</sup> See, e.g.: section 10 of the Police and Criminal Evidence Act 1984; section 330(10) of the Proceeds of Crime Act 2002; section 413 of the Financial Services and Markets Act 2000.

<sup>2</sup> *Balabel v Air India* [1988] 1 Ch 317

advice privilege if they relate to public or private rights, liabilities, obligations or remedies or are otherwise made in a "relevant legal context" (as described in *Three Rivers (No 6)* [2005] 1 AC 610). Legal advice privilege will arise not only where the communications directly concern the seeking or giving of legal advice, but may also arise where the communications consist of facts and are part of what the Courts have called a "continuum of communication" between client and lawyer "aimed at keeping both informed so that advice may be sought and given as required".<sup>3</sup> In *Property Alliance Group Limited v The Royal Bank of Scotland PLC* [2015] EWHC 3187 (Ch) Snowden J noted that lawyers are often tasked with investigating relevant information, and must be able to provide clients with candid factual briefings secure in the knowledge that such communications (and any records thereof or of decisions taken in consequence thereof) can only be disclosed with the client's consent.

9. **Legal advice privilege arises equally for legal persons as for natural persons.** The only exception is for communications between a corporate client and its in-house counsel, which as a matter of EU law are not considered privileged for the purposes of any investigation conducted by the EU institutions.<sup>4</sup> Further, legal advisers need to consider the implications of the controversial decision in *Three Rivers District Council v The Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474 which makes clear that not all employees of the company are to be treated as the client for the purposes of legal advice privilege. Privileged information and material may be sensibly and confidentially disseminated within the corporation without legal advice privilege thereby being waived;<sup>5</sup> although the wider the dissemination the bigger the risk of deemed waiver. Shareholders in litigation between them and the corporation are entitled to see legal advice obtained by the company (so long as that advice was not obtained by the company in relation to its dispute with the shareholders).<sup>6</sup>
10. **Litigation privilege.** Litigation privilege can be asserted in respect of communications passing between a broader range of persons, albeit that, in order to apply, criteria relating to the purpose of the communication must be met. Specifically, confidential communications between legal advisers or their clients and any third party are protected if they are made for the sole or dominant purpose of conducting existing or reasonably contemplated litigation which is adversarial, rather than investigative or inquisitorial, in nature.<sup>7</sup> Litigation will be reasonably in prospect where the client is aware that litigation

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<sup>3</sup> *Three Rivers (No 6)*

<sup>4</sup> *Akzo Nobel Chemicals Ltd v European Commission* [2010] 5 CMLR 19

<sup>5</sup> *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) (The Good Luck)* [1992] 2 Lloyd's Rep 540

<sup>6</sup> *Sharp and others v Blank and others* [2015] EWHC 2682

<sup>7</sup> *Three Rivers District Council v The Bank of England (No 6)* [2005] 1 AC 610 at para.102

between himself and a particular person or class of persons is a real likelihood rather than a mere possibility.<sup>8</sup> Litigation can also include adversarial criminal or regulatory processes.<sup>9</sup>

11. **LPP in internal investigations.** Questions may arise about the extent to which LPP applies to communications made in connection with internal investigations by corporates and regulated firms, and the extent to which LPP applies to information and material considered and generated in the course of such internal investigations. Where there are parallel external investigations conducted by law enforcement agencies and/or regulators, these questions may become contentious; as highlighted in a recent speech by Lord Neuberger.<sup>10</sup> This guidance identifies certain categories of disputes which The Law Society understands that practitioners commonly encounter: disputes about whether the information or material is capable of attracting LPP in the first place, disputes about whether any LPP that exists has been waived and disputes about whether the client's actions are such that no LPP has in fact arisen. Provided that these questions are resolved in the client's favour, LPP is absolute and it is the lawyer's obligation to assert it – or at least to advise his client to assert it - in the absence of the client's waiver.
  
12. **Is the information or material requested capable of being privileged?** The Law Society understands from practitioners that a category of LPP claim commonly contested by law enforcement agencies and regulators concerns preliminary interviews with employees, sometimes referred to as 'first accounts'. Whether and what information and material is privileged will in each instance depend on the particular circumstances; not least on the type of LPP in play (the wider litigation privilege or the narrower legal advice privilege). Clear guidance from the courts is lacking but practitioners will need to consider whether the employee can be considered the "client", if only legal advice privilege applies, and whether the wider litigation privilege can be invoked if the necessary criteria of proximity and adversarial nature have been satisfied.
  
13. **Has LPP been abrogated by Parliament?** These situations are rare, and do not generally include disclosure requests made in support of criminal and regulatory investigations. Law enforcement agencies and regulators do not have the power to compel lawyers or their clients to disclose privileged material.<sup>11</sup> You should therefore carefully scrutinise any requests you receive to disclose privileged material and confirm

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<sup>8</sup> *United States of America v Philip Morris and Others* [2004] EWCA Civ 330

<sup>9</sup> *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 6

<sup>10</sup> 'The scope and role of the Legal Professional Privilege and its proper place in the context of corporate internal investigations', 9 March 2016; at para 14.

<sup>11</sup> It should be remembered that the profession's own regulators are entitled in very limited circumstances to compel the production of privileged information under the Solicitors Act 1974 for the purposes of discharging its regulatory functions, but such compulsion does not amount to a loss of the client's right to assert his privilege.

that the relevant statutory power pursuant to which such a request is said to be made does in fact exclude privileged materials from the relevant powers. The Law Society's separate Practice Note on '*Responding to a financial crime investigation*' warns you not to volunteer information about a client without the client's consent, and to only provide information where required by law or court order.<sup>12</sup> If a law enforcement agency makes reference to section 29 of the Data Protection Act 1998, which exempts data controllers from liability which might otherwise arise under that Act for any disclosures of personal data made for the purpose of preventing, detecting or investigating crime, you are reminded that the exemption does not apply to obligations of confidentiality imposed under the SRA Code of Conduct.<sup>13</sup> Nor does the exemption for the disclosure of personal data permit you to disclose personal data which is protected by LPP.<sup>14</sup>

14. **Has LPP been waived?** Waiver may be implied as well as express, and may in both instances be made on a limited basis.

- *Implied waiver.* You are reminded of the risk that you may inadvertently waive your client's LPP, in the course of acting in the capacity as your client's agent; particularly in connection with litigation. Inadvertent disclosures of privileged material to law enforcement agencies and regulators might be considered to amount to a waiver of LPP, if their privileged status would not have been obvious to the recipient.<sup>15</sup> The measures you take to protect privileged information and material against inadvertent disclosure should be demonstrably adequate, and that the courts might intervene if it is considered that there is real risk of disclosure of privileged material without the client's consent.<sup>16</sup>
- *Express waiver.* Where the client has consented to limited disclosure of certain privileged information or material to a law enforcement agency or a regulator the waiver will be considered to have been made on a limited basis. The limited waiver will not be treated as amounting to a general waiver even if the recipient is permitted to share it with third parties or even make it public, provided that it is not in fact made public.<sup>17</sup> Whether LPP remains after publication will, however, depend on whether the information or material in question retains its confidential nature. Confidentiality is commonly understood to be a prerequisite for LPP to arise, and will have been lost if

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<sup>12</sup> <http://www.lawsociety.org.uk/support-services/advice/practice-notes/financial-crime-investigations/> (14 March 2013)

<sup>13</sup> See SRA Code of Conduct, Chapter 4.

<sup>14</sup> See Schedule 7, Article 10 to the Data Protection Act 1998 ('Personal data are exempt from the subject information provisions if the data consists of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings')

<sup>15</sup> *Rawlinson and Hunter Trustees SA & Others v Akers and another* [2014] EWCA Civ 1129.

<sup>16</sup> *Bolkiah v KPMG* [1999] 1 BCLC 1

<sup>17</sup> *Property Alliance Group Limited v The Royal Bank of Scotland PLC* [2015] EWHC 1557 (Ch)

communications have entered the public domain. It is for the courts to interpret the 'public domain', and confidentiality will not necessarily have been lost just because privileged communications have been made available online on the social media (as concluded by the Singapore High Court in *HT SRL v Wee Shuo Woon* [2016] SGHC 15).

15. **Has LPP been defeated by the client's actions?** No LPP can arise where your assistance has been sought to further a crime or fraud or any other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice.<sup>18</sup> It is irrelevant whether you are aware of the client's iniquitous purpose or whether you are the unwitting victim of a client's mechanism to achieve the client's fraud. In *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm) it was inferred from the iniquitous nature of the strategy pursued by the client in litigation that the lawyers must have been retained with a view to furthering that strategy. In the course of making its finding the court observed that the question of whether a retainer involves an abuse of the ordinary professional engagement of a solicitor is always one of fact and degree. You are reminded that the iniquity exception will not, without more, arise in the "ordinary run of cases" where you are instructed to defend a client of a criminal charge: you would still be performing your proper professional role where the client is doing no more than using you to advance what the client knows to be an untrue case.<sup>19</sup> Furthermore, the iniquity exception does not apply where the client seeks your advice on avoiding the commission of a crime or where you warn a client that their proposed actions could amount to the commission of a crime.<sup>20</sup> Cases where LPP has been found to have been abused, with or without the lawyer's awareness, have been few and far between.
16. **Where a claim to LPP is properly made, it is absolute.** Where LPP properly arises and has not been curtailed by Parliament it cannot be overridden by competing private or public interests in disclosure. The Law Society considers that any form of pressure put on clients to waive LPP undermines the absolute nature of the protection. In the context of criminal investigations such pressure could take the form of a suggestion that a failure to waive LPP will result in the client not being regarded as cooperative. Another form of pressure which The Law Society considers to be equally improper is to suggest that the client should conduct their affairs in such a way that LPP does not arise in the first place.

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<sup>18</sup> *Williams v Quebrada* [1895] 2 Ch 751, 755; *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 554, 565; *Barclays Bank v Eustice* [1995] 1 WLR 1238, 1249; and *BBGP v Babcock & Brown* [2011] Ch 296 at [62].

<sup>19</sup> *Ablyazov* at [93]

<sup>20</sup> *Bullivant v Attorney General of Victoria* [1901] AC 196; *Butler v Board of Trade* [1971] Ch 680. You are professionally obliged, however, to refuse to continue acting for a client if you become aware that they have committed perjury or misled the court, or attempted to mislead the court, in any matter unless the client agrees to disclose the truth to the court: SRA Code of Conduct, IB(5.5).

Where pressure to waive LPP is applied by public bodies, it could breach their obligations under section 6(1) of the Human Rights Act 1998 to act compatibly with Convention rights.<sup>21</sup> The Law Society is aware that the courts have on a few occasions condoned the practices of prosecutors in requesting a waiver of LPP from suspects in return for lenient treatment or as a condition of their eligibility for a particular enforcement response.<sup>22</sup> The Law Society is not, however, aware of any support for a general position that law enforcement agencies or regulators must always request privileged material in order to fulfil their investigatory function or in order to avoid giving the appearance of having improperly delegated or abrogated this function to the entity conducting the internal investigation. This would be an extension of any need they might have to satisfy themselves, as part of their disclosure obligations in criminal proceedings, that claims to LPP have been properly made.<sup>23</sup> Given that LPP is sacrosanct, and the law is clear that adverse inferences cannot be drawn from a client's refusal to waive LPP, no regulator or investigator is entitled to pressure a client to waive LPP and in such circumstances it is for the regulator to decide whether the client should in some way be credited if it takes that decision. But equally, no client can be criticised, let alone treated detrimentally, if the decides to assert its LPP, however helpful a waiver might be to the regulator or investigator. The law has long recognised that an assertion of LPP may mean that relevant information is withheld and in such situations regulators, like courts, have to accept the consequences of the exercise of this long established right. In this connection The Law Society notes with concern recent public criticism of solicitors claiming LPP in the context of Parliamentary select committee hearings where clients have not waived LPP, and generally reminds solicitors that their clients should not be criticised or condemned or be treated as uncooperative by any authorities or regulators for asserting a proper claim to LPP.

17. **Law enforcement agencies and regulators are not entitled to decide themselves whether a claim to LPP is properly made.** It is not for you to satisfy law enforcement agencies and regulators that claims to LPP are well-founded, and the protection afforded by LPP would constrain you from doing so in any event – although you are under a duty to advise clients whether claims to LPP under either head are based on proper grounds.

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<sup>21</sup> LPP has been recognised as an aspect of Articles 6 and 8 of the European Convention on Human Rights. See, e.g., *S v Switzerland* (Case 12629/87) [2006] ECHR 984; *Andre and others v France* (unreported), 24 October 2008 (ECtHR); *Michaud v France* (Case 12323/11) [2012] ECHR 2030.

<sup>22</sup> See *R v George, Crawley, Burnett and Burns*, unreported, 7 December 2009; *R v Daniels* [2010] EWCA Crim 2740.

<sup>23</sup> See *R v George, Crawley, Burnett and Burns* for the suggestion that an investigators' obligations to take appropriate steps to obtain relevant third party material in accordance with the *Attorney General's Guidelines on Disclosure* (2005) might involve taking steps to ensure that claims to LPP have been properly made and, potentially, to request a waiver as a condition of leniency/immunity.

Where privileged material has been seized by law enforcement agencies pursuant to 'seize and sift' powers in criminal investigations,<sup>24</sup> any allegations that the iniquity exception applies and that the claim to LPP might not be justified should be assessed by independent Counsel. If independent Counsel does not have sufficient information and material at his or her disposal or is otherwise not in a position to make this assessment, the matter should be referred for a court's determination.<sup>25</sup> Where the information or material alleged to be disclosable as a result of the iniquity exception remains in the hands of the lawyer or the client, the relevant enforcement agency should apply to the court for an order.<sup>26</sup> In either instance, a *prima facie* case will need to be shown that the iniquity exception applies.<sup>27</sup> Where the alleged iniquity is the same as, or related to, the matters under investigation, a strong *prima facie* case must be made out; based on freestanding and independent evidence of the iniquity which does not require any judgment to be reached in relation to the issues to be determined.<sup>28</sup>

18. **What to do in the event of a suspected abuse of the retainer.** If you suspect or believe that your client has a fraudulent, criminal or otherwise iniquitous purpose in seeking your advice, you should consider whether you can continue to act,<sup>29</sup> and whether you need to seek directions from the court if privileged material has been sought from you. As suggested in the *Practice Note on responding to financial crime investigations* (referred to above), it would also be open to you to voluntarily agree with the body requesting the disclosure that Independent Counsel be instructed to assess whether the iniquity exception applies. In cases of doubt, assistance may be sought from the Professional Ethics Helpline. If you persist with an assertion of LPP you know to have been advanced in bad faith you may be exposed to liability for conspiracy to pervert the course of justice, as well as regulatory action for breaches of your professional conduct obligations.
  
19. **In all other cases, unless and until your client waives LPP you are professionally obliged to assert it.** The *Practice Note on responding to financial crime investigations* (see above) warns you that disclosing information or material protected by LPP without your client's consent may enable the client to challenge the subsequent use of the

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<sup>24</sup> See section 51 of the Criminal Justice and Police Act 2001

<sup>25</sup> The note produced by the Bar Council's PPC to assist Independent Counsel (last revised 9 April 2013) states that where counsel does not have the information necessary in order to be able to advise on whether the iniquity exception applies, counsel should either refuse to give such advice or should qualify his advice (as appropriate).

<sup>26</sup> Production orders pursuant to the court's discretionary jurisdiction under section 37 of the Senior Courts Act 1981. There is no bar against making such an application at the investigatory stage: *R v Central Criminal Court, ex p Francis & Francis (A Firm)* [1989] AC 346.

<sup>27</sup> *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734.

<sup>28</sup> *R (Hallinan, Blackburn-Gittings & Nott (a Firm)) v Middlesex Guildhall Crown Court* [2005] 1 WLR 766, recently applied by the Court of Appeal in *R v Minchin* [2013] EWCA Crim 2412.

<sup>29</sup> When considering whether there are compelling reasons to withdraw from a criminal case, practitioners should consider the Practice Note, 'Withdrawing from a criminal case', 21 December 2015.

material, take civil action against you and/or make a regulatory complaint against you. The obligation to assert privilege on the client's behalf is separate from but overlaps with the obligation to preserve the client's confidentiality. In accordance with the SRA Code of Conduct, solicitors must keep the affairs of their clients confidential unless disclosure is required or permitted by law or the client consents.<sup>30</sup> A solicitor's failure or refusal to ascertain, recognise or comply with professional or regulatory obligations including requirements imposed by legislation or rules made pursuant to legislation, would provide a basis for the SRA making a finding of professional misconduct and, depending on the circumstances, potentially also a finding of dishonesty.<sup>31</sup>

20. **Where a claim to LPP is properly made no action can be taken against you for asserting it, and no action can be taken against your client for refusing to grant any waiver sought by law enforcement agencies or regulators.** As said above, no adverse inferences should be drawn from a claim to privilege or a refusal to waive privilege;<sup>32</sup> whether under section 34 of the Criminal Justice and Public Order Act 1994 (which permits adverse inferences to be drawn from a defendant's silence when questioned) or otherwise.
21. **LPP protections differ from country to country.** This practice note addresses the position under the law of England and Wales only. In circumstances where your client is facing investigations or proceedings abroad, which is likely to involve taking advice from foreign-qualified lawyers and responding to requests for confidential information and material made by overseas bodies, it should be borne in mind that comparable protections may arise in other jurisdictions but that these are likely to differ in both substance and scope from the protection afforded to LPP under English law.

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<sup>30</sup> Outcome 4.1, SRA Code of Conduct 2011

<sup>31</sup> In accordance with section 44D(1) of the Solicitors Act 1974 or paragraph 14B(1) of Schedule 2 to the Administration of Justice Act 1985 (see the SRA (Disciplinary Procedure) Rules 2010).

<sup>32</sup> *Wentworth v Lloyd* [1864] 10 H.L.C. 589