

Privilege, confidentiality and reporting suspicious activities

Lawyers are subject to unique ethical and legal obligations because of their role within the justice system, the work they undertake and consequently the special nature of the relationship with their clients.

“The relationship between lawyer and client is one of confidence and trust that must never be abused,” says rule 5.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC).

There will be times when competing tensions may arise between a lawyer’s ethical duties to their clients, and the obligations placed on lawyers under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act)

A lawyer faced with suspicions about a client’s proposed activities may need to make some hard decisions about what information to report under the AML/CFT regime and whether they are able to report at all. This briefing outlines some of the issues lawyers will need to consider and steps to be taken. The Law Society has also prepared a guide in this “Preparing for AML/CFT” series on *Suspicious transactions and activities* which may be of assistance.

CONFIDENTIALITY

Lawyers are subject to strict professional obligations of confidentiality. These are reflected in Chapter 8 of the RCCC. A lawyer must hold all information about the affairs of clients in confidence indefinitely.

This requirement is subject to limited exceptions, which are provided for in the RCCC. These exceptions include mandatory disclosure when the information relates to the proposed commission of a crime punishable by imprisonment for 3 years or more or disclosure is required by law (see rule 8.2(a) and (d).)

A lawyer must also “not knowingly assist in the concealment of fraud or crime” (rule 2.4).

LEGAL PROFESSIONAL PRIVILEGE

Related to the relationship of confidence and trust is the long-established common law protection afforded to lawyers’ clients by legal professional privilege (LPP).

LPP has been described as more than a rule of evidence. It is a human right which provides the necessary conditions for a client to fully discuss matters with their lawyer. The client is free to disclose all relevant matters to their lawyer safe in the knowledge that these communications cannot be disclosed or compelled.

LPP absolutely precludes communications between a lawyer and client made for the purposes of obtaining or receiving legal assistance from being disclosed without the permission of the client (see: *B v Auckland District Law Society* [2004] 1 NZLR 326).

PRIVILEGE AND CONFIDENTIALITY UNDER THE AML/CFT ACT

The provisions of the recently amended AML/CFT Act reflect the fundamental importance of LPP by specifically excepting privileged communications from the disclosure regime established under the legislation.

The AML/CFT Act requires lawyers to file reports of suspicious activities. These are known as suspicious activity reports (SARs). Lawyers are not required, however, to disclose any information the lawyer believes

on ‘reasonable grounds’ is legally privileged information (section 40(4) of the AML/CFT Act).

In addition, nothing in the AML/CFT Act requires disclosure of privileged information to the AML/CFT supervisor (the Department of Internal Affairs is the supervisor for lawyers).

Confidential information which is not privileged is in a different category. Under the AML/CFT Act, non-privileged but confidential information must be disclosed. This is consistent with the mandatory disclosure exception to confidentiality provided for in RCCC rule 8.2(d).

‘PRIVILEGED COMMUNICATIONS’

Any lawyer considering the scope of his or her disclosure obligations will need to assess what information is likely to be privileged (keeping in mind the statutory requirement for a lawyer to have ‘reasonable grounds’ for such an assessment).

The AML/CFT Act protects ‘privileged communications’ from disclosure. ‘Privileged communications’ are defined in section 42. The definition is consistent with definitions of LPP found in the Evidence Act 2006 (see sections 54-56). The definition covers the established concepts of legal advice privilege and litigation privilege.

Legal advice privilege

Legal advice privilege is provided for in section 42(1)(a) of the AML/CFT Act (consistent with section 54 of the Evidence Act). This privilege relates to confidential communications between lawyer and client made in the course of, and for the purpose of, obtaining or giving legal assistance or advice.

The conditions for legal advice privilege are essentially:

- that the lawyer holds a current practising certificate;
- that the document for which privilege is claimed must have come into being in the course of and for the purposes of obtaining professional legal services; and
- that the communication is intended to be confidential.

Litigation privilege

Litigation privilege is recognised in section 42(1)(b) of the AML/CFT Act (consistent with section 56 of the Evidence Act).

The privilege protects communications between a lawyer and their client. Unlike legal advice privilege it also extends to communications with third parties relating to preparation of court proceedings. It enables lawyers and their clients to freely gather evidence and prepare their case without fear of disclosure to their opponents.

The conditions for litigation privilege are essentially:

- that the communication or information came into existence when litigation was either already under way or was “reasonably apprehended” (meaning it’s a serious or realistic prospect); and
- that the “dominant purpose” for creating the document must have been to enable the client’s legal adviser to prepare for the case, conduct the case or advise the client on that litigation.

Litigation privilege, then, is confined to communications made, or information compiled, in order to prepare evidence to advance or defend litigation.

WHEN PRIVILEGE DOES NOT APPLY

If a lawyer has reasonable grounds for believing that client information is a 'privileged communication' they must not disclose this in any SAR or to other people or agencies operating under the AML/CFT regime. The protection afforded to 'privileged communications' will not apply, however, in certain situations.

Section 42(2) of the AML/CFT Act outlines when a communication will not be a privileged communication. The communication is not privileged:

- (a) if there is a prima facie case that the communication or information is made or received, or compiled or prepared –
 - (i) for a dishonest purpose; or
 - (ii) to enable or aid the commission of an offence; or
- (b) if, where the information wholly or partly consists of, or relates to, the receipts, payments, income, expenditure, or financial transactions of any specified person, it is contained in (or comprises the whole or a part of) any book, account, statement, or other record prepared or kept by the lawyer in connection with a trust account of the lawyer ...”

DISHONEST PURPOSE

The common law has long accepted that it is not in the interests of justice to protect documents which are made for a dishonest purpose. This applies to both legal advice privilege and litigation privilege.

Although the phrase “dishonest purpose” is not defined in the AML/CFT or Evidence Acts, courts have applied an objective test, which considers simply whether the party has not acted as an honest person would in the circumstances.

Dishonest purpose covers things less than, as well as different from, an offence.

In *JSC BTA Bank v Mukhtar Ablyazov and others* [2014] EWHC 2788 strong prima facie evidence of advice related to concealment and deceit in relation to a client's assets led to privilege being disallowed. The case recognised that the lawyer him or herself may be deceived as to the purpose of the advice.

There must be prima facie evidence to support the alleged dishonest purpose (for some recent New Zealand authority see *Icepak Group Ltd v QBE Insurance Ltd* [2013] NZHC 3511, *Cityside Asset Pty v 1 Solution Ltd* [2012] NZHC 3162 and *Reynolds v Calvert* [2014] NZHC 1663).

QUESTIONS LAWYERS NEED TO CONSIDER

A lawyer considering making an SAR will need to ask themselves the following questions:

1. What information will I need to include in an SAR?
2. Is any of that information likely to be a “privileged communication” as defined in section 42?
3. Have I stepped back and assessed whether there are reasonable grounds to believe the information is a 'privileged communication' ?
4. **Not privileged:** I must file an SAR without disclosing privileged information.
5. **Privileged:**
 - Can I file a coherent SAR without disclosing privileged information?
 - If I can, I must do so.

- Do any of the exceptions (dishonest purpose or commission of an offence or trust account records exception) apply? Is there prima facie evidence of any dishonest purpose or intended offence?
 - **Exception does not apply:** I cannot disclose the information and to do so would amount to a breach of privilege. However, if I can file an SAR without disclosing privileged information, then I must.
 - **Exception applies:** I must disclose the information to fulfil my obligations under the AML/CFT Act.

PRIVILEGE - WHAT ELSE TO CONSIDER?

To answer these questions, lawyers will need to turn their mind to:

- Assessing the particular information to ascertain if it is a ‘privileged communication’. Not all communications between a lawyer and client may be privileged. Information may be ‘confidential’ yet not amount to a privileged communication. In such cases, disclosure will be required.

Reference to established legal texts and case law can be helpful. For example:

- Courts have held material which is not literally a communication or record of a communication is privileged – for example working papers, draft documents and letters and a lawyers’ notes on documents (see, for example, *Kupe Group v Seamar Holdings* [1993] 3 NZLR 209, *Bain v Minister of Justice* (2013) PRNZ 625).
- Copies of non-privileged existing documents will only be privileged if in the circumstances their disclosure would reveal the content of the privileged communication (see *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350).
- When a lawyer simply facilitates a transaction, conveyancing and contractual documents not drafted by the lawyer will not be privileged (see *Kupe Group v Seamar Holdings* [1993] 3 NZLR 209).
- When claiming privilege, lawyers need to establish that proper grounds for the claim exist, as RCCC rule 13.9.2 states that “a lawyer must not claim privilege on behalf of a client unless there are proper grounds for doing so”. The AML/CFT Act itself requires an objective assessment – ie, that the lawyer has reasonable grounds to believe the communication is privileged.
- Correctly identifying the client as this will inform who any privilege belongs to. Identifying the ‘client’ may not always be straightforward, particularly in the case of an entity client.
- Determining whether the communication is confidential, as privilege depends on confidentiality. Material disclosed, for example, in an affidavit or pleading is no longer confidential and therefore no longer privileged.
- Confirming that any privilege in a particular communication has not been lost either by an express or an implied waiver (such as material having been disclosed without an express requirement that it remain confidential).

STRICT TIME LIMIT

Lawyers need to be aware that there is a very tight time window for making the required decisions about privilege and reporting. Section 40(3) of the AML/CFT Act requires reporting entities to report suspicious activities “as soon as practicable but no later than 3 working days after forming its suspicion”.

PROTECTION UNDER THE AML/CFT

The AML/CFT Act affords some protection for lawyers disclosing information under the AML/CFT regime (see s44). No civil, criminal or disciplinary proceedings may lie against a person in respect of disclosure in relation to an SAR.

The protection does not apply if the relevant information was disclosed in bad faith or there were reasonable grounds to believe the information was privileged, but the lawyer disclosed it despite the existence of those grounds.

COMPULSION AND ON-SITE INSPECTIONS

The legislation also provides for the execution of search warrants, compulsion of documents and on-site inspections. These provisions do not abrogate privilege. Lawyers should be familiar with these (see for example, ss132 and 133).

Issues relating to privilege can arise in these areas. There is some guidance available in the Practice Briefing *Compulsion of client information and responding to search warrants* [<http://www.lawsociety.org.nz/practice-resources/practice-briefings/Compulsion-of-Client-Information-and-Responding-to-a-Search-Warrant.pdf>].

Section 159A provides a mechanism by which a District Court Judge can resolve disputes relating to the assertion of privilege. This mechanism does not apply to the SAR process, however.

IF IN DOUBT, SEEK ADVICE

It is recommended that lawyers who are in any doubt about filing a SAR because privileged information may be involved should seek advice from.

- A senior trusted colleague with the necessary expertise; or
- A member of the Law Society's Panel of Friends who is an experienced litigator.

Time is critical when seeking advice, because of the 3 working day period within which to report.

There is further information available which may be helpful:

- The DIA's guidelines for lawyers and conveyancers to be issued shortly
- The Law Society has prepared Preparing for AML/CFT guides on *Suspicious transactions and activities* and *Continuing to act after filing a suspicious activity report*. These may be found at <https://www.lawsociety.org.nz/practice-resources/practice-areas/aml-cft>.
- This Practice Briefing has been prepared with reference to Matthew Palmer QC (ed) *Professional Responsibility in New Zealand* (online looseleaf edition, LexisNexis) and Mathew Downs (ed) *Cross on Evidence* (online looseleaf edition, LexisNexis).

The Law Society will keep lawyers informed about any developments or issues arising in this area.

FURTHER INFORMATION

This guide has been prepared by the New Zealand Law Society to assist the legal profession with its preparation for becoming reporting entities under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 from 1 July 2018.

Further information on AML/CFT requirements is available on the Law Society website at <https://www.lawsociety.org.nz/practice-resources/practice-areas/aml-cft>.