

GIR KNOW HOW PRIVILEGE

Hong Kong

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Scope of the privilege

1. Are communications between an attorney and client protected? Under what circumstances?

Lawyer-client communications are protected under legal professional privilege (LPP), as guaranteed in article 35 of the Basic Law of Hong Kong, which provides that “Hong Kong residents shall have the right to confidential legal advice ...”.

There are two types of LPP: legal advice privilege and litigation privilege. Legal advice privilege protects confidential communications between lawyers and clients that are made for the dominant purpose of providing or receiving legal advice, even if litigation is not anticipated. Litigation privilege protects confidential communications between a lawyer and client, or between one of them and a third party, which came into existence for the dominant purpose of providing or receiving legal advice in relation to litigation that is in existence or is reasonably contemplated. It is only possible to invoke litigation privilege if there is a real likelihood (as opposed to a mere possibility) of litigation (*Citic Pacific Limited v Secretary for Justice & Anor* (19/12/2011, HCMP767/2010)).

2. Does the privilege only protect legal advice? Does it also protect non-legal communications between an attorney and client, such as business advice?

LPP only protects legal advice and advice given for the dominant purpose of litigation. Non-legal communications between a lawyer and a client, such as business advice, do not fall within the scope of LPP.

3. Is a distinction made between legal advice related to litigation and other legal advice?

Confidential communications between a lawyer and client for the dominant purpose of legal advice related to litigation are covered by litigation privilege, whereas confidential communications between a lawyer and client concerning other legal advice is protected under legal advice privilege.

4. What kinds of documents are protected by the privilege? Does it cover documents that were prepared in anticipation of an attorney–client communication? Does it cover documents prepared during an attorney-led internal investigation?

LPP protects confidential communications intended for legal or litigation advice, which include emails, letters, voicemails and other written materials. There is no specific limitation on the types of documents that could attract LPP.

Documents that were prepared in anticipation of communications between a lawyer and client, and documents prepared during an internal investigation led by a lawyer could attract LPP if such communication or documents came into existence for the dominant purpose of providing or receiving legal advice.

5. To what extent must the communication be confidential? Who can be privy to the communication without breaking privilege?

Preserving the confidentiality of the communication between the client and the lawyer is essential to keeping the communication privileged. The question as to whether LPP has been waived often arises when privileged material is communicated to a third party.

When determining whether LPP is waived or the disclosure to the third party remains subject to the client’s confidentiality against all other persons, the court will consider all circumstances, including what was communicated between the sender and the receiver of the privileged material, and what they must or ought to have reasonably understood.

“Limited” or “partial” waiver of privilege can be invoked where privileged documents are disclosed to a third party only for a specified purpose. In such case, LPP in respect of the disclosed documents is waived as against the third-party recipient, but it is preserved as against the rest of the world.

6. Is the underlying information privileged if it can be obtained from a non-privileged source?

LPP applies to documents that come into existence for the dominant purpose of obtaining or giving legal advice (Re Citic Pacific Ltd (No. 2) [2015] 4 HKLRD 20), but not to the underlying information that is created or came into existence not for such purpose. Accordingly, pre-existing information obtained from a non-privileged source (eg, a publicly available document) is not protected by LPP even if it is sent by/to a client to/from his or her attorney for the purpose of obtaining or giving legal advice.

An exception to this is when the disclosure of such information would, or might reasonably be anticipated to, betray the trend of the advice given (see Phipson on Evidence §§23-51 (20th ed, 2022), in that the collection of such information may be the result of professional knowledge, skill and research of the solicitors, if so, it would attract LPP (Yung Mei Chun, Jessie v Merrill Lynch (Asia Pacific) Ltd [2015] HKCU 324; cited Lyell v Kennedy (1884) 27 Ch D1).

7. Are there any notable exceptions or caveats to the privilege?

Privileged communications and documents that came into existence for facilitating criminal or fraudulent conduct are not protected by privilege. (R v Cox and Railton (1884) 14 QBD 153, Citic Pacific Ltd v Secretary for Justice & Another [2012] 2 HKLRD 701).

In addition, privilege is not an absolute right as it is subject to certain exceptions. For instance, privilege can be expressly overridden by statutory provisions or by necessary implication from those provisions (MK v Registrar of High Court (No. 2) [2024] HKCFA 6).

It is also important to note that a document protected under privilege in Hong Kong law may not necessarily be considered privileged in another jurisdiction, and vice versa.

8. Are there laws unrelated to privilege that may protect certain communications between attorney and client?

Aside from privilege, a lawyer has a legal and professional duty to keep confidential communications with the client and all information concerning the business and affairs of the client that is acquired during the course of the professional relationship.

Protected parties

9. To what extent does the privilege extend to in-house counsel?

LPP equally protects communications between a corporate entity and its in-house lawyers, if the in-house lawyers are professionally qualified and acts in that capacity in relation to communications with the dominant purpose of obtaining or giving legal advice (Citic Pacific Ltd v Secretary for Justice [2015] 4 HKLRD 20).

However, legal advice privilege does not cover communications between a corporate entity and its in-house lawyer if the latter is engaged to provide commercial or business advice, or advice on management affairs.

10. Does the privilege protect communications between an attorney and a corporate client's employees? Under what circumstances? And who possesses the privilege - the corporate client, the employee or both?

LPP protects communications between a lawyer (external and in-house) and corporate client's employees that were brought into existence for the dominant purpose of obtaining or seeking legal advice (*Citic Pacific Limited v Secretary for Justice & Another* [2015] 4 HKLRD 20).

LPP belongs to the corporate client. The employee may also claim entitlement to LPP if he or she is covered by joint privilege and/or common interest privilege.

Joint privilege arises when two or more parties jointly retain the same lawyer, or they share a joint interest in the subject matter of the communications at the time when they come into existence. In such case, each party is entitled to benefit from privileged communications arising out of the retainer and cannot claim privilege against the other in respect of such communications.

Common interest privilege protects communications between parties who share a common interest in the subject matter of the communications. Where privileged communications are disclosed to a third party who has a common interest in the subject matter, LPP is maintained in respect of the disclosed communications by reason of common interest privilege.

11. Does the privilege protect communications between non-lawyer employees of a corporate client if they are acting at the direction of counsel or gathering information to provide to counsel?

Insofar as communications or documents between non-lawyer employees of a corporate client and the legal advisor are produced for the dominant purpose of getting or giving legal advice, such communications or documents are generally covered by LPP. These would include communications between non-lawyer employees of a corporate client if they are acting at the direction of counsel or gathering information to provide to counsel, if such communications are brought into existence for the dominant purpose of obtaining legal advice (*Citic Pacific Ltd v Secretary for Justice & Another* [2015] 4 HKLRD 20).

12. Must the attorney be qualified to practise in your country to invoke the privilege?

LPP exists between a foreign lawyer and his or her client to the same extent as LPP exists between a solicitor and his client. Under section 39A(2) of the Legal Practitioners Ordinance (Cap. 159), legal advice privilege attaches to advice given on foreign law by registered foreign lawyers in Hong Kong. Accordingly, communications between a foreign lawyer (who is not qualified to practise Hong Kong law) and his local client when advising on foreign law would generally be protected by LPP.

13. Does the privilege extend to non-lawyer third parties? In which circumstances does the privilege protect communications with third parties if they are providing advice related to a legal matter? What measures in such circumstances should an attorney take to protect those communications?

LPP does not extend to non-lawyer third parties, even if their advice may involve points of law, such as tax advice provided by accountants (*Super Worth International Ltd v Commissioner of ICAC* [2016] 1 HKLRD 281). However, litigation privilege is applicable to and protects confidential communications between a client and non-lawyer third parties (eg, auditors, accountants, media consultants) that came into existence for the dominant purpose of obtaining or giving legal advice in anticipation of actual or contemplated litigation. This includes expert reports obtained in investigation undertaken by liquidators of a dissolved company (*China Medical Technologies Inc v Wu Xiaodong* [2023] HKCFI 1892).

14. Does the privilege apply to communications with potential clients?

Whether LPP applies to communications with potential clients depends on the context in which the lawyer has such communications with potential clients, and the role of the lawyer at that occasion.

Where communications with potential clients occur in a social occasion where a lawyer is not acting as a lawyer, generally no solicitor-client relationship is created (*Waxman v Waxman* (1997) 150 DLR (4th) 370).

However, if the relationship between the lawyer and the potential client is sufficiently close, which involves reliance and trust, such that the lawyer's role changed from being a guest in the social function to that of a "quasi-solicitor", the lawyer will be bound by the duty of confidentiality. A quasi-solicitor owes the same duty of confidence to the 'quasi-client' as to a formal client (*Time Success Profits Ltd v Andrew Lam & Co* [2004] 1 HKC 214).

Furthermore, preliminary communications between a lawyer and a potential client may be protected by legal advice privilege where confidential information is disclosed to the lawyer at the initial interview. To attract LPP, it is not necessary that the relations should have reached the definite status of solicitor and client. If a person goes to a professional legal adviser for the purpose of seeing whether the professional person will give them professional advice, communications made for the purpose of indicating the advice required will be protected.

In an initial meeting at the lawyer's office, preliminary communications between a lawyer and a potential client may be protected by legal advice privilege. "If a person goes to a professional legal adviser for the purpose of seeing whether the professional person will give him professional advice, communications made for the purpose of indicating the advice required will be protected." (*Minter v Priest* [1930] AC 558.)

Ownership of the privilege

15. Does the attorney or the client hold the privilege? Who has rights under the privilege?

LPP is held by and belongs to the client, and the client alone.

16. Can the privilege be waived? Who may waive it?

LPP belongs to the client and only the client has the right to waive LPP. The test of whether LPP has been waived is an objective one (*MK v Director of Legal Aid (Interested Party)* [2024] HKCFA 6).

17. Is waiver all or nothing? Is it possible to waive the privilege for certain communications but not others?

Hong Kong courts recognise the doctrine of "limited" or "partial" waiver (*Citic Pacific Ltd v Secretary for Justice* [2012] 2 HKLRD 701), which allows a party to waive LPP and disclose privileged documents only for a specified purpose, and to preserve LPP as against the rest of the world.

18. If two defendants are mounting a joint defence, can they share privileged information without waiver? What about two parties with a common interest?

Privileged information shared between two defendants can be protected under common interest privilege if, at the time of the disclosure made confidentially and voluntarily by one party to the other, the other party has a common interest in the subject matter of the communication. The disclosing party is the holder of LPP and only his or her consent is required to waive LPP.

This should be compared with joint privilege, which protects privileged information communicated between parties to a joint retainer or sharing a joint interest in the subject matter. The consent of both parties is required to waive LPP over communications protected under joint privilege.

19. Is it common for attorneys and clients to agree to a confidentiality provision in a contract?

While lawyers must observe the duty of confidentiality and other professional conduct rules when advising clients, it is common to include a confidentiality provision in an engagement letter with clients.

Enforcement considerations

20. Describe the legal basis of the rules governing the privilege. Are these rules found in a constitution or statute, or in case law?

The rules governing LPP are enshrined in article 35 of the Basic Law in Hong Kong, which guarantees Hong Kong residents the right to confidential legal advice, and this is a right recognised at common law. In *MK v Registrar of High Court* (No. 2) [2024] HKCFA 6, the Hong Kong Court of Final Appeal stated that: “LPP is a constitutionally entrenched fundamental human right ... There is an abundance of authority declaring that such a right can only be abrogated by primary legislation by express words or necessary implication.”

21. Is the privilege primarily characterised as a procedural or evidentiary rule, or is it characterised as a substantive right?

LPP is a substantive legal right that is recognised in common law and constitutionally guaranteed in article 35 of the Basic Law.

22. Describe any differences in how the privilege is applied in the criminal, civil, regulatory or investigatory context.

The principles that govern LPP apply equally in the criminal, civil, regulatory and investigatory context. To attract LPP, communications must be for the dominant purpose of giving or receiving legal advice, or for actual or contemplated litigation.

23. Are the rules regarding the privilege uniform nationwide or are there regional variations within your country?

Rules regarding LPP in China are believed to be different from those in Hong Kong, but the authors do not possess any expertise to comment on the rules governing LPP in China.

24. Does a professional organisation enforce the maintenance of the privilege among attorneys? What discipline do attorneys face if they violate privilege rules?

The Law Society of Hong Kong and the Hong Kong Bar Association are the professional organisations with the power to pursue disciplinary proceedings against solicitors and barristers, respectively. Unauthorised disclosure of a client's confidences could result in disciplinary proceedings against the solicitors or barristers who have violated LPP rules.

25. What sanctions do courts impose for violating the attorney–client privilege?

The Law Society of Hong Kong and the Hong Kong Bar Association have power to discipline lawyers for any breach of LPP rules. It is also open to clients to issue a civil claim against their lawyers and seek damages for loss suffered as a result of the wrongful disclosure of privileged materials, and/or obtain an injunction order to prevent disclosure of privileged materials.

26. How can parties invoke the privilege during investigations or court proceedings? Can the privilege be invoked on the witness stand?

The judgment of the Court of Appeal in *Citic Pacific Limited v Secretary for Justice & Anor* [No. 2] [2015] 4 HKLRD 20 sets out the following procedures for handling LPP claims:

- the person who claims LPP should identify the materials over which LPP is claimed, specify whether the LPP claimed is legal advice privilege or litigation privilege with respect to each of the materials identified; and set out, by way of statement or affirmation, the special basis or bases and the full factual context upon which LPP is claimed in respect of each of the materials.
- in the event of a disagreement over claims for LPP, the parties should consider instructing an independent lawyer to resolve any disputed LPP claim; and
- if the disputed LPP claim cannot be resolved, either party can apply to the court for directions or determination.

LPP can also be invoked by a witness on the witness stand to resist disclosure of privileged communications.

27. In disputes relating to privilege, who typically bears the burden of proof?

The party claiming LPP bears the burden of proof to make good its claim.

28. Does the privilege protect against compulsory disclosures such as search warrants or discovery requests? Is there a distinction between documents held by the client and documents held by the attorney?

LPP can be invoked to resist compulsory disclosures such as search warrants or discovery requests, and in this context, there is no distinction between documents held by the client and documents held by the lawyer.

Notwithstanding this, the Hong Kong Court of Final Appeal confirmed in *MK v Registrar of High Court* [No. 2] [2024] HKCFA 6, “The right to LPP is not an absolute right. It can be subject to exceptions.” Such exceptions include circumstances where LPP is expressly overridden by statutory provisions or by necessary implication from those provisions.

29. Describe the choice-of-law rules applied by your courts to determine which country’s privilege laws apply. To what extent does your country recognise the validity of choice-of-law provisions in contracts, particularly as they apply to privilege?

It has been suggested in *Super Worth International Ltd v Commissioner of Independent Commission Against Corruption* [2016] 1 HKLRD 281 that Hong Kong courts should adopt *lex fori* (ie, the law of the forum) as the governing choice of law rule in the case of LPP. In that case, the court stated that: “It is a facet of the rule of law and in Hong Kong the relevant legal policy for determining the limits of LPP when documents are seized or discovery is sought for proceedings in Hong Kong is Hong Kong law.” However, there is room for flexibility in exceptional cases where, for example, the documents in question are sought for legal proceedings elsewhere.

Termination of the privilege

30. Does the privilege terminate on the death of either the attorney or the client?

LPP survives the client's death (in the case of a natural person) or dissolution (in the case of a legal person). The death of the lawyer does not terminate LPP as LPP belongs to and can only be waived by the client.

31. Does the privilege terminate on the conclusion of the attorney–client relationship?

LPP remains in existence notwithstanding the conclusion of the lawyer-client relationship.

32. Is the privilege destroyed if the client communicates information to the attorney to further a crime or perpetuate a fraud?

As stated in *Citic Pacific Ltd v Secretary for Justice* [2012] HKEC 432 the Hong Kong Court of Appeal reiterated the rule as set out in *R v Cox and Railton* (1884) 14 QBD 153: "Privilege does not attach to communications between lawyer and client if the purpose of the client in seeking legal advice is to facilitate criminal or fraudulent conduct." It is further stipulated in Hong Kong Solicitors' Guide to Professional Conduct, 8.01 commentary, paragraph 9, that communications made by a client to his or her solicitor before the commission of a crime or during the commission of a continuing crime for the purpose of being guided or helped in the commission of it is not confidential and not covered by LPP, because such communication does not come within the scope of the professional retainer.

33. Is the privilege terminated if the attorney makes an inadvertent disclosure? If such a disclosure is made, can the attorney retrieve the privileged information or otherwise correct the error?

LPP is not terminated by an inadvertent disclosure, where there was no intention to waive LPP. Where such a disclosure is made, the lawyer should retrieve the privileged document or otherwise correct the error, and the recipient (if informed or has reason to suspect that the document has been produced inadvertently) should not read the document but to promptly notify the disclosing party.

If a party seeks to take advantage of an obvious mistake that had resulted in an inadvertent disclosure of privileged documents, the Hong Kong court could order the return of the privileged documents and grant an injunction to restrain the use of such documents (*Zheng Lie Lie v Prosperfield Ventures* (No. 2) [2003] 2 HKC 47).

34. Is the privilege terminated if a third party is included in the communication or is subsequently forwarded the communication?

Generally, LPP is lost due to the loss of confidentiality of the privileged communication. However, where privileged communications are disclosed to a third party alone and the disclosure is made for a specified purpose, LPP is not waived as such disclosure could constitute a "limited" or "partial" waiver such that LPP in respect of the disclosed communication would not be waived against all other persons (*Citic Pacific Ltd v Secretary for Justice* [2012] HKEC 432).



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