



## Disclosure of Unhelpful Material in Family Proceedings (Children)

- Purpose:** To guide family barristers whose case includes material that is unhelpful to their client
- Overview:** Unhelpful material – obligations of full and frank disclosure – obligations of counsel – legal professional privilege – privilege against self-incrimination – concurrent family and criminal proceedings – confidentiality duties – reasons to disclose even if privileged or confidential – when withdrawal may be necessary
- Scope of application:** All practising family barristers
- Issued by:** The Ethics Committee
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- Status and effect:** **Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.**

### Introduction

1. The Ethics Committee of the Bar Council regularly receives enquiries from barristers undertaking family law cases about the nature and extent of their professional obligations when the question arises of whether or not to disclose material which is unfavourable to their client's case. The unfavourable material may be provided in the form of instructions given in conference or may be contained within documents generated for the purposes of family proceedings in which counsel is instructed e.g. witness proofs. In many cases in which queries arise, the client seeks to withhold information which is likely to be relevant to the court in determining the child's welfare and may even be detrimental to the child if the same is withheld. Alternatively, queries may relate to a client's expressed intentions towards other family members.

2. Family law practitioners need to be familiar with all of the Core Duties set out in the BSB Handbook (CD1-10); in particular, your duties to the client (CD2, CD6) and

to the court (CD1). You also need to have a good understanding of the legal duties relating to disclosure, the principles of privilege, particularly legal professional privilege and privilege against self-incrimination, and relevant case law. Only essential principles are distilled in paragraph 5 onwards below.

3. It has become clear to those responding to ethical enquiries that if, at the outset, barristers were to explain to clients their professional obligations in the context of family proceedings, then difficulties which can emerge surrounding disclosure of information could be avoided.

4. Accordingly, the Ethics Committee suggests that you should advise the client of the following at the earliest appropriate opportunity:

- (i) Your role is to represent your client and to present your client's case to the best of your ability.
- (ii) You are not in a position to conduct a trial or proceedings, or to continue to represent them, whilst withholding or concealing relevant information from the other parties and the court.
- (iii) The duty of confidentiality which you owe to your client (see Core Duty 6) may be overridden where permitted by law. In particular, any information which reveals a serious risk to the welfare of a child, or serious harm to a third party, may have to be disclosed even if your client dis-instructs you.

### **Professional obligations**

5. The BSB Handbook CD1 provides that:

*"You must observe your duty to the Court in the administration of justice."*

6. Your duty is to act in the best interests of each client (CD2), to provide a competent standard of work and service to each client (CD7) and to keep the affairs of each client confidential (CD6).

7. However, rC4 provides that your duty to act in the best interests of your client is subject to your duty to the court. Your duty to the court does not require you to act in breach of the duty to keep the affairs of each client confidential (rC5) but you must not knowingly or recklessly mislead or attempt to mislead the court (rC3.1).

8. RC15.5 further provides that:

*"you must protect the confidentiality of each client's affairs, except for such disclosures as are required or permitted by law or to which your client gives informed consent"*.

9. In relation to disclosure and in particular the failure to make proper disclosure to the court or to another party, rC25 provides that you must cease to act and return instructions if:

“.2 the client refuses to authorise you to make some disclosure to the Court which your duty to the Court requires you to make; or

.3 you become aware during the course of a case of the existence of a document which should have been but has not been disclosed, and the client fails to disclose it or fails to permit you to disclose it, contrary to your advice”

See also the Guidance at gC11 and gC13 in this respect.

10. FPR 2010 does not provide a disclosure code for parties to family proceedings or their representatives. Rather, parties must refer to the common law, which is best summarised in CPR, Part 31. The general rule is that a fair trial demands that the court makes its decision on the basis of all available relevant evidence, which includes documentary evidence. This general rule is subject to a limited number of exceptions which are considered below.

11. The Practice Direction suggests that the duty is owed both by the parties and by the legal representatives of the parties. However, the Practice Direction does not, of itself, deal with legal professional privilege, or the status of a client's instructions. Furthermore, this Practice Direction is not understood by the Bar Council to mean that you have a duty to disclose which is distinct from that of your client, or that you are ordinarily under a personal obligation to disclose against the instructions of your client.

12. The express duty of full and frank disclosure outlined in this Practice Direction, together with a number of decisions to a similar effect by various Family Division Judges at first instance (see, in particular, judgment of Wall J in **Re DH (A Minor) (Child Abuse) [1994] 1 FLR 679, at 703-704<sup>2</sup>**), has led to a culture in family proceedings whereby upon advice and with the client's consent, unfavourable material affecting the welfare of the child is often disclosed to the other parties, and ultimately the court, and any privilege arising in respect of such material is waived. This may be because clients are being given one or more of the following pieces of advice:

- That whilst their barrister has a duty to present their case to the best of his or her ability, their barrister has a higher duty to the court to disclose relevant material to the court even if that disclosure is not in the interests of the client (per Wall J in **Re DH (A Minor) (Child Abuse) at p.704C**)
- That full disclosure of relevant material will result in a fair and proper assessment of the child's welfare and will assist the court in arriving at the best possible outcome for the child (usually their child)

- That full and frank disclosure is more likely to result in parents' and/or carers' needs being properly identified, which in turn will have a positive impact upon the child if they are considered able to care for the child
- That if relevant information were to be withheld (such as a new relationship with an unsuitable partner), then almost invariably it would emerge during cross-examination or further investigation within the proceedings, and the client might then be heavily criticised and his or her case damaged because of his or her failure to be honest and open with the court at the earliest possible stage.
- that in acting for a client a barrister cannot mislead the court in any way. Thus where unfavourable information is withheld on the grounds of privilege against self-incrimination, a barrister may be obliged to withdraw at a later stage if the client continues to withhold that unfavourable material in oral evidence (where no such privilege can be claimed<sup>3</sup>) and in so doing directly or indirectly misleads the court.

13. Where a client does not accept the merits of disclosing unhelpful material to the other parties and the court, and does not consent to disclosure as advised, you may be obliged to withdraw from the case and return your instructions. You must not continue to act for a client knowing that information exists which ought to have been disclosed has not been disclosed because your client has refused to permit its disclosure.

14. You may also have to make difficult decisions in respect of what can and/or should be disclosed to the other parties and the court notwithstanding your withdrawal. Such decisions require an evaluation of your duty to the client (see below); and whether and how that duty may conflict with your professional duties to the court and the duty for full and frank disclosure.

## **Privilege**

15. The following paragraphs are not intended to be a full statement of the law of privilege but are designed merely to draw your attention to some issues of privilege that may arise in connection with the disclosure of unhelpful material in family proceedings relating to children. You should undertake your own research into the legal position regarding privilege and reach your own conclusions on the law and its application, in any particular case in which you are involved.

## **Legal Professional Privilege**

16. Legal professional privilege may be classified under two sub-headings: legal advice privilege and litigation privilege. Legal advice privilege covers communications between a client and his legal adviser and is available whether or not proceedings are in existence or contemplated. Litigation privilege relates to all

documents brought into being for the purpose of litigation including communications with third parties. These communications are privileged only where proceedings are in existence or contemplated.

(i) Litigation Privilege

17. In **Re L (Police Investigation: Privilege) [1996] 1 FLR 731** the House of Lords decided that litigation privilege does not apply in care proceedings. Lord Jauncey of Tullichettle, with whom the majority agreed, was of the view that care proceedings are non-adversarial in nature. Litigation privilege has no place, therefore, in relation to reports based on the papers disclosed in such proceedings and obtained from a third party within them. Accordingly all such reports must routinely be disclosed and served within proceedings; as should communications from any party with court appointed experts.

18. However, if the report in question was not prepared for the purposes of the care proceedings but for the purposes of criminal proceedings, legal professional privilege may still arise. In **S County Council v B [2000] 2 FLR 161**, Charles J held (at 174C-E) that the father could claim legal professional privilege in care proceedings in respect of his communications with medical experts who had been instructed solely for the purposes of criminal proceedings. Further, the privilege is absolute (see p173B-D) and the duty of full and frank disclosure which arises in care proceedings does not override that privilege (see 183E-185H).

(ii) Communications between clients and their advisers (legal advice privilege)

19. In **Re L** above, Lord Jauncey stated that his decision in relation to litigation privilege "... does not of course affect privilege arising between solicitor and client". In **S County Council v B** (above), Charles J decided (at 179E-F) that **Re L** preserved legal professional privilege in respect of communications between solicitor and client, and draft statements and discussions as to the relevant facts between solicitor and client for the purposes of proceedings under the Children Act 1989: see also Wall J in **A Chief Constable v A County Council [2002] EWHC 2198 (Fam)** at [96]. Accordingly, legal professional privilege applies to communications with the client in family proceedings (see also Lord Nicholls, in **Re L** on this point).

20. Legal professional privilege rests upon the principle that a client must be free to consult his legal advisers without fear of his communications being revealed. In this way, the interests of the administration of justice are maintained. Privilege is absolute and remains so "even where he who asserts the privilege no longer has any recognisable interest in upholding that privilege (**R v Derby Magistrates Court ex parte B [1996] 1 FLR 513**).

21. **R v Cox and Railton (1884) 14 QBD 153** provides a well recognised exception to legal professional privilege: namely, where the disclosure or communication amounts to a crime or is intended to further a criminal purpose. Within the judgment of Stephen J, who gave the judgment of the court in **Cox & Railton**, the following passage appears:

"The reason on which the rule [of legal professional privilege] is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule".

22. The limits of what is protected by legal professional privilege should also be noted. Where the client knows of relevant information which ought to be disclosed in accordance with the general duty to disclose relevant information and documents, that information does not become subject to legal professional privilege simply by telling counsel about it. The client remains under a duty to disclose the information notwithstanding the communication of the information to you.

23. On the other hand, the same reasoning would not necessarily apply to information which is likely to lead to a danger of self-incrimination by the client. Such information, if entitled to privilege against self-incrimination before it was told to you, would continue to be entitled to that privilege after being told to you.

24. It is for you to decide, as a matter of law, whether legal professional privilege arises in respect of any unfavourable information which is disclosed to you during the course of dealings with the client. Broadly speaking, and subject to the qualifications already mentioned above, legal professional privilege may apply to discussions between you and your client, and to documents generated as a result of legal advice or instructions (such as witness proofs), whether in contemplation of a case or in the course of it.

### **Privilege against self-incrimination**

25. The privilege against self-incrimination may arise in respect of the disclosure of information which is likely to lead to a danger of self-incrimination by the client or his/her spouse or civil partner (see **Rank Film Distributors Ltd v Video Information Centre [1982] AC 380, 416C, 419F**).

26. The privilege against self-incrimination may permit the withholding of information and non-co-operation with the court's investigation which would otherwise be required in accordance with the duty of full and frank disclosure which arises in care proceedings. However, the privilege does not excuse the client from

giving evidence on any matter or entitle the client to refuse to answer any question put to him in the course of his giving evidence (Children Act 1989, s.98(1)). As Wall J said in **A Chief Constable v A County Council [2002] EWHC 2198 (Fam)** at [96]:

"A lawyer whose client admits child abuse in a conversation covered by legal professional privilege is placed in a very difficult position. Lawyers have a professional duty not to mislead the court, and plainly cannot conduct the parent's case in a manner which is inconsistent with any admission made to them. However, lawyers cannot, without the consent of their clients, breach or waive the privilege. Thus although lawyers may advise their clients to be open and honest with the court, they are also entitled, without breaching professional standards, to advise parents in care proceedings that, subject to section 98(1) of the Children Act 1989, they are not bound to co-operate with the court's investigation. They should, however, in my judgment, advise their clients that anything they say to an expert witness in the context of the latter's investigations, is protected by section 98(2) of the 1989 Act."

27. Further guidance is given below (see paragraphs 34 to 40) where the material for which privilege against self-incrimination is claimed also gives rise to reasonable grounds for believing that there is a significant risk of death or serious injury to an identifiable person or persons, at least (or particularly) if the risk is imminent.

28. In **A Local Authority v PG [2014] EWHC 63 (Fam)** Keehan J gave the following guidance in relation to your obligations to the court in circumstances where there are concurrent public law and criminal proceedings:

"a. when a party to care proceedings is ordered to file and serve a response to threshold and/or to file and serve a narrative statement, that party must comply with that order and must do so by the date set out in the order;

b. the importance of parents or intervenors giving a frank, honest and full account of relevant events and matters cannot be overstated. It is a vital and central component of the family justice system;

c. a legal practitioner is entitled to advise a client of (i) the provisions and import of s.98 of the 1989 and (ii) the ability of the police and/or a co-accused to make application for disclosure into the criminal proceedings of statements, reports and documents filed in the care proceedings;<sup>4</sup>

d. it is wholly inappropriate and potentially a contempt of court, however, for a legal practitioner to advise a client not to comply with an order made in care proceedings;

e. it is wholly inappropriate and potentially a contempt of court for a legal practitioner to advise a client not to give a full, accurate and comprehensive

response to the findings of fact sought by a local authority in the threshold criteria document. This applies both where that advice is limited in time, eg until after a criminal defence statement has been filed and served and, worse still, the advice is given not to make such a response at all.”

29. Where a child who is in care has been abducted and a recovery order has been made requiring a person with information as to the child's whereabouts to disclose it, the privilege against incrimination does not excuse compliance with the requirement (Children Act 1989, s.50(11)). Similarly, under the Family Law Act 1986 section 33(2), or where a Location Order is made in the High Court, in a private law context, the privilege against incrimination does not excuse non-disclosure.

### **The duty of confidentiality**

30. You must keep the affairs of each client confidential (Core Duty 6).

31. As stated in rC15, you must protect the confidentiality of each client's affairs, except for such disclosures as are required or permitted by law or to which the client gives informed consent. This exception would apply where the law specifically requires or authorises the disclosure of the information in question notwithstanding the duty of confidentiality. The exception may also apply where disclosure is in the public interest and, in proceedings for breach of confidence, it is referred to as "the defence of just cause and excuse". A balancing exercise is required in the application of the public interest exception. Each case will turn on its own facts.

### **Imminent threats of death or serious injury**

32. One difficult area concerns threats made by your client against others: for example, a threat to do harm to a child if your client does not get custody. If your client makes such threats in privileged or confidential circumstances, the Bar Council suggests that you may wish to adopt the following approach.

33. You should first satisfy yourself that the threat is genuine. If you are satisfied that it is, then you will need to consider what, if any, disclosure you are entitled to make.

34. Rule C15.5 allows you to breach your duty of confidentiality 'as permitted by law'. Broadly, the Bar Council considers that the law permits you to do so where you have reasonable grounds for believing that there is a significant risk of death or serious injury to an identifiable person or persons, at least (or particularly) if the risk is imminent. Authority for such a proposition is sparse, however, and you will need to take your own view on the question of law which this involves, and on whether it applies in the circumstances with which you are faced.



35. There is also no clear authority as to whether this applies to information which is also subject to legal professional privilege or to privilege against self-incrimination; the Bar Council takes the view that it does, but you will need to take your own view.

36. In such circumstances, the Bar Council considers that you may – and, given the seriousness (and potentially the imminence) required to meet the threshold for disclosure, should – report the threat to the police or other appropriate agency (such as the local authority social services department) able to take appropriate protective measures. Any disclosure made without your client's consent should, however, be no wider (both as regards the information disclosed and the person(s) to whom it is disclosed) than is reasonably necessary in the circumstances in order for the threatened victim(s) to be protected.

37. In considering whether to disclose any information covered by client confidentiality without your clients' consent, you should bear in mind the importance which the law attaches to the right of every person to obtain legal advice in confidence.

38. You should also keep in mind that in **Re D (Minors) (Conciliation: Disclosure of Information) [1993] Fam 231**, the Court of Appeal refused to allow any exception to the privilege which attaches to statements made by one or other of the parties in the course of conciliation "save in the very unusual case where a statement is made clearly indicating that the maker has in the past caused or is likely in the future to cause serious harm to the well being of a child." (see 241A-B).

### **General Approach**

39. The Handbook sets out the core duties owed by all barristers. It is professional misconduct to breach these duties, and a breach can result in a barrister being charged with misconduct upon receipt of a complaint by the BSB. You need to be aware of the content of the Handbook and of the relevant law in the context of potentially conflicting duties between the interests of the client and duties to the court in family proceedings.

40. The Ethics Committee suggests that you should advise the client of the duty of full and frank disclosure in family proceedings and of your higher duty to the court at the outset of any meeting with your client.

41. If a client wishes to withhold relevant information in respect of the welfare of the child, the client should be advised of the importance of disclosing relevant information. In most cases, the information is likely to emerge in any event, in cross-examination or in further investigation within the context of the proceedings. It is usually less damaging to a client's case to be honest and open with the court at the outset; and it is always better in assessing the child's welfare that parties are honest.

42. If privilege arises in respect of such information, the client should be advised of his or her right to claim privilege, subject to the qualifications on this.
43. If no privilege arises in respect of the unfavourable information but the client rejects your advice and seeks to withhold that information, you may be obliged to withdraw from the case and return your instructions. You must not continue to act for a client knowing that information exists which ought to have been disclosed in accordance with the duty of full and frank disclosure but which, in breach of that duty, has not been disclosed because your client has refused to permit its disclosure.
44. If legal professional privilege does apply, the privilege is absolute and information cannot be disclosed without the permission of the client, subject only to the possible exception in the case of serious threats which has been explained above. Likewise, the duty of confidentiality cannot be breached, other than as required or permitted by law.
45. In cases of difficulty, you may wish to contact the Ethical Enquiries Service (020 7611 1307, [Ethics@barcouncil.org.uk](mailto:Ethics@barcouncil.org.uk)). Those dealing with such enquiries cannot advise on the law but can discuss the professional judgment to be exercised.

### **Important Notice**

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