

Keep those confidences

At common law, in equity and under the Legal Profession (Solicitors) Rule 2007 (the Solicitors Rule) we owe a duty of confidentiality to our clients. Two of the most frequently asked questions the Ethics Centre receives concern the extent of the duty and if there are any exceptions to the duty. This note examines some of these issues.

The essence of the ethical rule is that we must never disclose to any person, any information which is confidential to a client and acquired by us during the client's retainer, unless the client authorises the disclosure, or we are permitted or compelled by law to disclose, or we are otherwise permitted or required by Rule 3 of the Solicitors Rule and its exceptions.

Confidentiality is not the same as client legal privilege. Privileged communications will be confidential, but not all confidential information communicated to us during the course of a retainer will be privileged. Legal client privilege is a substantive right that our client is entitled to. It is a right that our client has to resist the disclosure of confidential information (whether in a document, oral or in some other form) that is brought into existence for the dominant purpose of giving or obtaining legal advice or for the use in existing or anticipated litigation: *Eso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49.

Client legal privilege is directed to encouraging a client to make full and frank disclosure to us and thereby enhancing our relationship with the client. It fosters trust and effective representation. The duty of confidence is one of the most important duties we owe a client. A breach of the duty of confidence can have adverse consequences for us: a client may be entitled to seek damages for its breach (*Taylor v Blacklow* (1836) 3 Bing NC 235; 132 ER 401 – a case concerned with breaching the confidence of a client by revealing to a proposed lender a defect in title) or we may be exposed to disciplinary proceedings (*Legal Services Commissioner v Tampoe* (2009) LPT 14; *LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and TROWELL* [2009] WASAT 42 – both cases arising from the representation of Schapelle Corby).

The practice of a criminal defence law solicitor raises certain unique dilemmas concerning the duty of confidentiality.

On occasions we will represent a young person who is facing charges in the Children's Court. Understandably the parents or guardian of the young person will want to be present during our conference. It is of course the young person who is our client, notwithstanding that the parent or guardian may be paying our fees. The duty of confidentiality means in this context that our client must consent or authorise us to inform the parent or guardian of the details of any communication that may transpire between us and our client. At the commencement of our retainer with the young person we should explain our duty of confidentiality and explain the entitlement to claim privilege to certain communications. These discussions should take place in the absence of the parent or guardian. It is for the client to determine whether and what information will be given to his or her parent or guardian. If a client is happy to have his

or her parent or guardian present then that is what should occur, but we should remain mindful of the need to protect the client's privilege.

Representing multiple clients (who may seem to have a common interest) in a criminal law matter will in many circumstances be extremely difficult; it is not something that the Ethics Centre recommends. A conflict of duties can easily arise – what may have been seen as common interests can easily diverge. If such a conflict does arise then we will need to withdraw from representation of both clients.

We may sometimes be contacted by an accused that is on the run or at large. We cannot assist them to evade apprehension. Our obligation is to advise the client to surrender, and to attempt to gain agreement that the client do so in a way that least prejudices the client's interests. The communication of the client's location to us as the solicitor is at the very least confidential information (and may be privileged) and cannot be voluntarily disclosed by us to the authorities, unless disclosure is authorized by the client or we are compelled to do so by statute or court order or one of the discretionary exceptions in rule 3 of the Solicitor's Rule applies.

One of the recognised exceptions to our duty of confidentiality is an entitlement to defend ourselves against an allegation of impropriety or incompetence. This might arise in a variety of ways: (a) through a disciplinary complaint made against us; (b) by a civil claim alleging negligence; or (c) by a former client asserting in a criminal appeal, incompetent representation.

In each of these circumstances our ability to divulge privileged communications is not dependent on whether we are a party to the proceedings in which the allegations arise.

The Courts have recognised that in such circumstances the client has waived client legal privilege (*R v Paddon* [1999] 2 QdR 387 at 398). But as the court noted in *Paddon* "the waiver does not operate with respect to all communications". The waiver is only available as to our conduct that is indicative of or the product of incompetence. Particulars are normally identified in the notice of appeal. In criminal matters it is for the Crown to decide whether they will approach us as the former representative. We should ensure that if such an approach is made that we receive all the information that is being alleged (whether as an affidavit by the former client or submissions) so that we are aware of the issues and the extent to which we can comment so as to preserve client legal privilege where applicable.

We need to keep in mind:

1. The duty of confidence does not cease at the end of our retainer (unlike the duty of loyalty). The duty persists even after the death of the client and is owed to the client's successors;
2. The duty may be owed to potential clients even when no retainer is created between us and an enquirer. We must remember that it is our responsibility to control the way in which we receive information. A failure by us to put in place ethical infrastructure to

- control the receipt of information could result in a conflict of duties between existing and potential clients (the enquirer);
3. The duty prevents confidential information being used by us to promote our self-interest (e.g. financial gain) nor should we use the information to benefit other clients, without the client to whom we owe the duty authorising the release of such information);
 4. We should have in place appropriate policies to avoid inadvertent disclosure;
 5. Talking to colleagues in a public location – a pub, or sporting venue could lead to confidential information being over heard. Think carefully about where you talk on your mobile or using social media such as Twitter or Facebook;
 6. Our duty of confidentiality requires that client documents be retained securely and confidentially (Rule 7.2 Solicitors Rule). Client documents, cannot, be destroyed unless the client has given written authorisation to such destruction. If authorisation is given by the client the destruction must be carried out in such a way that the duty of confidentiality is maintained;
 7. We have a duty to protect the confidential information of our client as against third parties. Where we hold client documents and are served with a subpoena to produce, or served with a search warrant pertaining to the client's documents we must assert the client's legal privilege where that privilege exists; and
 8. On occasions we may be asked to lodge an appeal for a client based on incompetent representation or to apply to withdraw a guilty plea in either of those circumstances we should warn our client that such allegations may waive the duty of confidentiality and client legal privilege that existed between the client and his or her former solicitor. The waiver will not operate with respect to all former confidential communications. The waiver will be limited to those aspects of the prior representation which are indicative of the allegations being made.

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If you wish to comment on or discuss any of the issues raised by this note or require guidance on any other ethical issue, contact the Ethics Centre on 07 3842 5843 or ethics@qls.com.au