

Riskwatch is prepared by Law Claims to assist practitioners in identifying risky areas in practice and to highlight risk prevention strategies to allow for safer, more enjoyable practice. Riskwatch appears as a monthly column in the Law Society Bulletin as well as being distributed on a monthly basis to members of the Law Society's Professional Indemnity Scheme who do not receive the Law Society Bulletin.

Lawyers and Police Investigations

By Scott Henchcliffe, Barrister, Edmund Barton Chambers



What do you do in the situation whereby police investigating an alleged crime contact a legal practitioner and seek information from him or her relating to legal services and advice previously provided to a client?

What follows below is advice explaining how a legal practitioner can properly reconcile the duty of client confidentiality, the principles of legal professional privilege and the duty to assist in the proper administration of justice.

Lawyer-Client Relationship

A lawyer-client relationship exists if there is a retainer between the lawyer and the client for the provision of legal services. A retainer is simply another word to describe a contract between a lawyer and a client. Whether or not a retainer exists depends on whether the usual requirements of a contract are present.

There can be no retainer unless the elements of a contract are present, principally *consensus ad idem* (agreement) between the parties, which may be evidenced orally or in writing or inferred from all of the circumstances.¹

Duty of Confidentiality and Exceptions

If a retainer exists between a lawyer and a client, a term will be implied at law that the lawyer will keep the client's confidences. A lawyer has a duty to maintain a client's confidences.²

The duty of confidentiality is sourced from both contract law and equity and stems from the peculiar relationship of lawyer and client. A contractual term of confidentiality is implied by law into the retainer agreement.³ In addition, equity protects confidential information from unauthorised use or disclosure.

As well as contract law and equity, the Law Society of South Australia Rules of Professional Conduct and Practice (effective from 1 March 2003) (the Rules) specifically deal with the subject. Paragraph 3 of the Rules states:

¹ Du Pont, *Lawyers' Professional Responsibility*, 3rd Edition, 2006, Thomson Lawbook Co. at [3.05], [3.45]

² *Baker & Campbell* (1983) 153 CLR 52 at 65 per Gibbs CJ

³ *Unioil International Pty Ltd v Deloitte Touche Tohmatsu* (1997) 17 WAR 98 at 108 per Ipp J

“3. Confidentiality

- 3.1 *A practitioner must never disclose to any person, who is not a partner director or employee of the practitioner’s firm any information, which is confidential to a client and acquired by the practitioner or by the practitioner’s firm during the client’s engagement, unless:*
- 3.1.1 *the client authorises disclosure;*
 - 3.1.2 *the practitioner is permitted or compelled by law to disclose;*
 - 3.1.3 *the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client’s claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence;*
 - 3.1.4 *the information has lost its confidentiality; or*
 - 3.1.5 *the practitioner obtains the information from another person who is not bound by the confidentiality owed by the practitioner to the client and who does not give the information confidentially to the practitioner.*
 - 3.1.6 *In the practitioner’s opinion the disclosure of the information is required to prevent imminent serious physical harm to the client or to a third party.*

A lawyer’s duty of confidentiality is not ousted by the termination of the retainer with the client or by the death of the client.

Assuming a lawyer-client relationship exists, a practitioner is bound by a duty of confidentiality to not make disclosure to police of any confidential information they have obtained by virtue of their retainer, unless one of the exceptions applies.

Client Consents to Disclosure

One of the exceptions to the duty of confidentiality, expressly recognised in the Rules, is that a client may authorise a disclosure of confidential information.

Disclosure Expressly Permitted or Compelled by Law

Another exception to the duty of confidentiality, again expressly recognised by the Rules, is that a duty of disclosure permitted or compelled by law overrides a legal practitioner’s duty of confidentiality to a client.

Some investigating authorities (for example, ASIC or the ACC) have statutory powers which can compel citizens, including legal practitioners, to provide information or documents to them. If such coercive powers are used, a legal practitioner is not in breach of the duty of confidentiality by disclosing such confidential information.

The South Australian Police do not have general coercive powers by which they can compel a citizen (including a legal practitioner) to answer questions or provide information or documents. The South Australian Police have some limited specific powers to compel the disclosure of information, for example the power in certain circumstances to require a person to state his or her full name and address⁴. They also have broad powers to search and seize documents and exhibits, provided certain prerequisites are met.⁵

However, disclosures compelled or documents seized pursuant to statutory powers do not include information that is legally professionally privileged, unless the statutory power expressly provides that legal professional privilege is abrogated.⁶

⁴ Section 74A of the *Summary Offences Act, 1953 (SA)*

⁵ See for example, sections 67 and 68 of the *Summary Offences Act, 1953 (SA)*.

⁶ *Carter v Managing Partner, Northmore Hale Day & Leake* (1995) 183 CLR 121

The Law Would Probably Compel Disclosure for the Sole Purpose of Avoiding the Probable Commission or Concealment of a Serious Criminal Offence

The first question in deciding if this exception applies to confidential information is to determine whether the law would probably compel the disclosure of the information for the sole purpose of avoiding the concealment of a serious criminal offence, despite a client's claim of legal professional privilege.

The second question is whether a legal practitioner should actually disclose the confidential information, since this exception in the Rules permits the disclosure of information, but does not compel it. Disclosure pursuant to this exception is at a legal practitioner's discretion, even if the first question is answered in the affirmative.

Legal Professional Privilege

For legal professional privilege to exist there must be a lawyer-client relationship and a retainer between the lawyer and the client. However, legal professional privilege exists quite distinctly from the duty of confidentiality. Whilst they have a common origin and some similarities, they are not the same.

Legal professional privilege does not depend upon a contractual, equitable or professional duty owed by a lawyer to a client. Rather, it rests on the wider basis of public policy and the public interest in fostering trust and candour in the relationship between a lawyer and a client. By privileging certain communications from disclosure, legal professional privilege encourages clients to fully and frankly disclose relevant circumstances to their legal advisers without fear of subsequently being prejudiced by disclosure.

Like the duty of confidentiality, legal professional privilege can be waived by a client. So a legal practitioner is free to advise investigating police of the totality of their dealings with a client, including any advice they gave to the client, if the client consents to that course.

It is also important to note that legal professional privilege does not attach to communications between a client and a lawyer, even if the other requirements of privilege are met, if the communications relate to advice sought or given in furtherance of, or to facilitate, criminal, fraudulent or other unlawful purposes.⁷ This is so irrespective of whether the lawyer was a party to, or ignorant of, the unlawful purposes. The relevant question is what was the purpose of the client in seeking the advice?

Duty to the Administration of Justice

There is no general positive legal duty which compels citizens, including legal practitioners, to assist police with their investigations.⁸ Whilst legal practitioners do have duties relating to the proper administration of justice, these exist in particular contexts, for example a prosecutor's duty of fairness in presenting the prosecution case and the duty of all legal practitioners not to mislead a court.

Legal practitioners should be aware of the general offences in sections 241 and 256 of the *Criminal Law Consolidation Act, 1935* (SA), and ensure their actions in assisting or advising clients are not capable of constituting the commission of these offences. A legal practitioner must ensure they do not meet the requirements of an accessory as defined in section 241(1).

Section 241(1) provides that subject to section 241(2), a person (the accessory) who, knowing or believing that another person (the principal offender) has committed an offence, does an act with the intention of impeding the investigation of the offence, or assisting the principal offender to escape apprehension or prosecution or to dispose of the proceeds of the offence, is guilty of an offence.

However, section 241(2) provides that an accessory is not guilty of an offence against section 241(1) unless it is established that the principal offender in fact committed the offence that the accessory knew or believed the principal offender had committed (or some other offence was committed in the same or partly in the same circumstances), or if there is lawful authority or reasonable excuse for the accessory's actions.

⁷ *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 145 per Gibbs J, at 152-153 per Stephen J, at 161-162 per Wilson J

⁸ However, as previously stated, there are some specific statutory powers which can be used by investigating authorities to legally compel a person to provide information or documentation in certain circumstances.

Section 256 of the *Criminal Law Consolidation Act, 1935 (SA)* relevantly provides that a person who attempts to obstruct or pervert the course of justice or the due administration of the law is guilty of an offence. To commit this offence, a person (including a legal practitioner) must intentionally do some positive act having this effect. This offence will not be committed if a person simply declines to co-operate with police by providing information they have requested.

Conclusion

Legal practitioners should not voluntarily provide police with any information relating to their dealings with a client, if the information is either confidential or is the subject of legal professional privilege (unless one of the exceptions previously discussed is applicable). If none of the exceptions apply, such information should only be provided to police if the client has agreed to waive legal professional privilege and any duty of confidentiality owed to them and consented to disclosure of the information. As an added precaution, this waiver by the client should be recorded in writing.

For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.