Treading the thin line of client confidentiality

WERNER VAN WYK, SOLICITOR, ETHICS & PRACTICE

Protection of client confidentiality is one of the cornerstones of the practitioner/client relationship. However sometimes practitioners are faced with situations where they may have to consider breaching that confidentiality. Such a breach may only happen within the parameters of the Australian Solicitors' Conduct Rule (ASCR) 9.2, which provides for exceptions to the general prohibition on breaching confidentiality.

This article aims to provide some guidance to practitioners when faced with the question of whether to breach confidentiality under Rules 9.2.4 and 9.2.5. Often this situation is as much a moral dilemma as a professional obligations dilemma.

Rules 9.2.4 and 9.2.5 read as follows:[1]

A Solicitor may disclose confidential client information if:

1.1.4 *the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;*

1.1.5 *the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person;...*

Practitioners in these situations are often unsure whether or not they should take the next step, which would necessarily involve the breaching of confidentiality. This is especially true where the practitioner is confronted with confidential information of some impending criminal activity or harm that may come to the client or others.

Examples include:

- During consultation an unhappy client utters a threat to self-harm if the matter does not go his way;
- During discussions about access to the children the unhappy client threatens to harm the ex-partner;
- The client talks about committing a particular criminal offence.

The difficulty is that there is no mandatory reporting requirement on the practitioner, and further to this the commentary to Conduct Rule 9.2 makes it clear that where reliance is placed on one of the exceptions to breach confidentiality, it will be for the solicitor breaching confidentiality to show that circumstances existed to justify the disclosure.[2]

The practitioner would appear to be walking the proverbial tightrope (once again). The difficulty is normally to distinguish between a client who is merely "venting" and one who is about to follow through on a serious threat.

It is suggested that disclosure of confidential information in circumstances where the practitioner is faced with imminent physical harm or the probability of the commission of an offence, should be approached with "common sense and sound judgement".[3] In such situations the practitioner should consider the following:[4]

- The seriousness of the potential injury;
- The imminence and likelihood of the harm occurring; and
- The likelihood of effectively dealing with the situation without disclosing the confidential information.

Even when the point is reached where a decision in favour of disclosing the confidential information has been made it should be noted that the disclosure should be limited to only what is necessary to achieve the purpose.[5] I would suggest that where the disclosure involves documents it may require the redacting of the documents to the extent as aforementioned.

If however, after exhausting all considerations, you are still unsure what to do, speak to a senior practitioner in the firm or obtain advice from a barrister. Alternatively you can make use of the Lawyers or Young Lawyers Support Groups which are available through the Society, by contacting Annie McRae on (08) 8229 0263.

(Endnotes)

1 Australian Solicitors' Conduct Rules 2011 and Commentary.
2 Ibid.
3 Queensland Law Society, The Australian Solicitors' Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners.
4 Ibid.
5 GE Dal Pont, *Lawyers' Professional Responsibility*, 5th edition, Thomson Reuters, 2013, 347.