

Confidentiality and legal professional privilege

* By Tony Young

In this series of articles on professional responsibility I intend, not to systematically survey the subject, but to focus on some interesting areas and unusual problems.

Sometimes professional responsibility is called "legal ethics". The meaning of the word "ethics" is too uncertain, implying issues of morality, when professional responsibility, like any other area of law, is concerned with the application of recognized rules, ultimately relying on sanction not conscience¹. These rules, reflecting diverse influences such as the historical development of the legal profession and public policy objectives, may even prescribe conduct that the general public might see as immoral.

Even a straightforward ethical obligation such as honesty must, in legal practice, coexist with other obligations such as the fiduciary duty of confidentiality and the closely related rule of legal professional privilege.

Students studying professional responsibility, when introduced to the

facts, almost invariably disapprove of the conduct of the American attorneys in the "Lake Pleasant Case" in New York State in 1973. The attorneys, Belge and Armani, failed to disclose that their client had committed two murders other than the one with which he was charged and for which they were representing him.

Garrow, a serial killer, confessed to the other murders, of two young women, and told his attorneys where the bodies were hidden. The attorneys found the bodies, photographed the remains, and said nothing. The parents of one of the young women even approached the lawyers asking for information about the disappearance of their daughter. Later, giving evidence, Garrow confessed to the murders and told the court that he had earlier confessed to his attorneys². The case attracted national notoriety. Both attorneys were indicted before a grand jury but not subsequently charged with any crime (although Belge was charged with public health violations as a result of moving the skull of one of the victims while taking

photographs). They received death threats, lost friends and saw their practices collapse. A state court directed the New York State Bar Association to investigate them. They were exonerated. The confession was protected by legal professional privilege³.

How should a Northern Territory lawyer respond to a similar situation to that faced by Belge and Armani? That is, to a confession by a client of a crime or crimes other than the one with which the client is charged.

Both the fiduciary duty of confidentiality and legal professional privilege are relevant to the answer. Confidential⁴ information given to a lawyer for the dominant purpose of giving or obtaining legal advice or the provision of legal services is protected from compulsory disclosure by legal professional privilege⁵. Other confidential communications, for example, those between a priest and a penitent or a banker and customer are not protected in the same way⁶.

In *Daniels Corporation v ACCC*⁷ the High Court reiterated that legal professional privilege is a rule of substantive law and not to be abrogated except by clear statutory words or necessary implication.

The *Legal Practitioners Act* provides that a legal practitioner "must maintain the client's confidences"⁸ subject to the proviso that the practitioner "must not engage in or assist conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law"⁹. This reflects the common law¹⁰ and appears to be a statement of the

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combined effect of the duty of confidentiality and legal professional privilege by the condition that the disclosure must be for the sole purpose of avoiding the probable commission or privilege.

The professional conduct rules made under the *Legal Practitioners Act* are subject to and reflect the general law. They are an attempt to provide a more detailed statement of a lawyer's obligations.

Rule 2 of the *Rules of Professional Conduct and Practice* is headed "Confidentiality". It provides -

"2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to the client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless -

- 2.1.1 the client authorises the disclosure;
- 2.1.2 the practitioner is permitted or compelled by law to disclose; or
- 2.1.3 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 felony.

2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client"¹¹.

Paragraph 2.1.2 is apparently intended to apply to provisions such as section 110B of the *Work Health Act* which expressly abrogates legal professional privilege in relation to medical reports and similar

documents in that jurisdiction.

It is, unfortunately, less clear how the paragraph might apply to provisions such as section 14 of the *Community Welfare Act*. That section requires the report of maltreatment of a child and provides that such a report is not a breach of a rule of professional conduct nor is it to attract civil or criminal liability. Section 14 does not expressly refer to legal professional privilege and it is not obvious that the section abrogates the privilege by necessary implication¹².

There are other statutory provisions that would require the disclosure of confidential information. Section 12(2) of the *Coroners Act* compels a person to report unexpected, unnatural or violent deaths to a coroner or the police¹³. It does not refer to legal professional privilege expressly or by necessary implication so would not, according to *Daniels Corporation v ACCC*, abrogate legal professional privilege.

Does paragraph 2.1.3 help in answering the question?

It is difficult to see that the paragraph carries matters any further than 2.1.2. What is intended by the phrase "probably compel", particularly in contrast with the unqualified "compelled to disclose" in 2.1.2? It might apply to confidential information provided to a lawyer and not covered by legal professional privilege.

A confession of a crime to a lawyer not for the dominant purpose of obtaining or receiving legal advice or services would not be covered by legal professional privilege. Such an event might be thought to be unlikely in real life. Another situation might be the communication of an intention to commit a crime. Such a communication is unlikely to be covered by legal professional privilege, either because it was not made for the dominant purpose of obtaining legal advice or, if it was, that communication would be likely to be in furtherance of an unlawful purpose.

Apart from these narrow circumstances it is difficult to imagine that the paragraph has any application. The doubtful utility of the paragraph is completely destroyed by the condition that the disclosure must be for the sole purpose of avoiding the probable commission or concealment of a "felony".

The *Criminal Code* has abolished the common law category "felony" in the Northern Territory. In *Hulley v Hill*¹⁴ Mildren J held that the category "crime" in the *Criminal Code* could not be equated with "felony" for the purpose of the law of citizen's arrest. The same conclusion seems inescapable in relation to 2.1.3. The Law Society may wish to consider whether the paragraph in its present form serves any function.

In conclusion, the duty of a Northern Territory lawyer, faced with the same facts, is to respect legal professional privilege, maintain client confidentiality and remain silent, as did Belge and Armani.

Endnotes

¹ Dal Pont G E, Lawyers

¹ Professional Responsibility in Australia and New Zealand, LBC, 2nd ed, p 3.

² This was apparently a deliberate strategy devised by the attorneys as part of an unsuccessful insanity defence. See www.crimelibrary.com/serial_killers/predators/robert_garrow/

³ In the United States client confidentiality is protected not only by statutes and bar rules but also by the 5th Amendment to the US Constitution. The 5th Amendment says that "No person shall be held to answer for a capital, or otherwise infamous crime, except on a presentment or indictment of a Grand Jury ...nor shall be compelled in any criminal case to be a witness against himself..." This has been held to be a guarantee of legal professional privilege.

⁴ Not all communications from a client to a lawyer are necessarily

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confidential, for example, the identity and address of the client and not all confidential communications will be protected by legal professional privilege: *R v Bell*; *Ex parte Lees* (1980) 146 CLR 141.

⁵ *Daniels Corporation v ACCC* (2002) 213 CLR 543 at 552

⁶ *Baker v Campbell* (1983) 153 CLR 52 at 67

⁷ (2002) 213 CLR 543

⁸ Section 44(1)(a)(v)

⁹ Section 44(1)(a)(ii)

¹⁰ No privilege or confidentiality applies to a communication for the purpose of fraud or unlawful purpose: *R v Cox & Railton* (1884) 14 QBD 153. See also *Re Bell*; *Ex parte Lee* (198) 146 CLR 141 where legal professional privilege was held not to apply to a communication of her address by a parent deliberately flouting a custody order of the Family Court. The High Court divided over whether there was an exclusion of legal professional privilege in the special case of a person attempting to conceal the whereabouts of a child from the court in a custody case or because the confidential communication was in the furtherance of an unlawful purpose.

¹¹ Paragraph 2.2 restates the general law and reflects the distinction between confidential and privileged information.

¹² This lack of clarity should be corrected by the legislature.

¹³ The common law contained an offence called misprision of felony. This was committed when someone knew of the commission of a felony and failed to report it to the authorities. The Northern Territory Criminal Code contains no equivalent offence. The nearest offence is that of accessory after the fact. That offence is not constituted by mere knowledge of the commission of an offence.

¹⁴ (1993) 91 NTR 41



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