When the client doesn't love you anymore: obligations and approach[1]

The Hon Justice Peter Davis[2]

Criminal lawyers, perhaps more than others, deal in cases where the stakes are high. Stakes don't come higher than when the liberty of the subject is at risk. Criminal lawyers are rightly relied upon by citizens in their time of most need and when life must seem very uncertain.

The relationship between lawyer and client is a complicated one, and between lawyer and client charged with a criminal offence, even more so, because ethical obligations of criminal lawyers often clash with their obligations to the client.

Sometimes the circumstances of that clash end up being litigated especially when the result of the criminal proceedings fall below the client's expectations. Sometimes in those circumstances, allegations are made by the former client against the lawyers.

When that occurs, the criminal lawyer is in a particularly difficult position because, while the lawyer can't simply avoid the ongoing litigation, there are continuing, but perhaps changing, obligations to the client. Therefore, it is important firstly, to know what the obligations are and secondly, consider how to best conduct oneself when the court is considering the allegations made by the client against you.

In order to examine those issues, it's best to consider three things:

1. How and why does the conflict with the client arise?

2. What are the lawyers' obligations?

3. How should the allegations be handled?

How does the conflict arise?

It is impossible to categorise all the circumstances which may lead to conflict with a client in a criminal matter. Only a quick perusal of the *Australian Solicitors Conduct Rules* is necessary

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1 A paper delivered to the Queensland Law Society, Criminal Law Conference, 4 August 2022.

2 A judge of the Trial Division of the Supreme Court of Queensland and the President of the Industrial Court of Queensland and the Queensland Industrial Relations Commission.

to see the potential for conflict between the obligations of a solicitor to the client and the solicitor's other obligations.

Rule 8 provides:

> "**8. Client instructions**
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> 8.1 A solicitor must follow a client's lawful, proper and competent instructions."

Rule 8 looks harmless enough but, of course, there is room for great contention around the words, "lawful" and "proper".

The obligation created by r 8 follows from some of the "fundamental ethical duties" created by r 4. In particular, a solicitor must:

> "…
>
> 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client …
>
> 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible…"

All that is subject to r 3:

> "**3. Paramount duty to the court and the administration of justice**
>
> 3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty."

As was shown in *Legal Services Commissioner v Winning*,[3] the obligation under rules like r 3 have to be looked at in the light of the adversarial criminal system and don't throw an obligation upon a lawyer to generally promote the objects of the criminal justice system being the conviction of the guilty.

Against all that, there is r 9 to which I will later return. Rule 9 is framed in terms of "confidentiality" and recognises legal professional privilege.

Then there is r 19 which provides, relevantly here:

> "**19. Frankness in court**
>
> 19.1 A solicitor must not deceive or knowingly or recklessly mislead the court.

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3 [2008] LPT 13.

19.2 A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading. …"

Rule 20 concerns delinquent or guilty clients. Relevantly, it provides:

"**20. Delinquent or guilty clients**

20.1 A solicitor who, as a result of information provided by the client or a witness called on behalf of the client, learns during a hearing or after judgment or the decision is reserved and while it remains pending, that the client or a witness called on behalf of the client:

20.1.1 has lied in a material particular to the court or has procured another person to lie to the court;

20.1.2 has falsified or procured another person to falsify in any way a document which has been tendered; or

20.1.3 has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court;

must –

20.1.4 advise the client that the court should be informed of the lie, falsification or suppression and request authority so to inform the court; and

20.1.5 refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the solicitor to do so but otherwise may not inform the court of the lie, falsification or suppression.

20.2 A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:

20.2.1 may cease to act, if there is enough time for another solicitor to take over the case properly before the hearing, and the client does not insist on the solicitor continuing to appear for the client;

20.2.2 in cases where the solicitor continues to act for the client:

(i) must not falsely suggest that some other person committed the offence charged;

(ii) must not set up an affirmative case inconsistent with the confession;

(iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;

(iv) may argue that for some reason of law the client is not guilty of the offence charged; and

(v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged;

20.2.3 must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence. …"

Rule 21 concerns the responsible use of court process and privilege and, relevantly here:

"**21. Responsible use of court process and privilege**

21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:

21.1.1 is reasonably justified by the material then available to the solicitor;

21.1.2 is appropriate for the robust advancement of the client's case on its merits;

21.1.3 is not made principally in order to harass or embarrass a person; and

21.1.4 is not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court.

21.2 A solicitor must take care to ensure that decisions by the solicitor to make allegations or suggestions under privilege against any person:

21.2.1 are reasonably justified by the material then available to the solicitor;

21.2.2 are appropriate for the robust advancement of the client's case on its merits; and

21.2.3 are not made principally in order to harass or embarrass a person.

21.3 A solicitor must not allege any matter of fact in:

21.3.1 any court document settled by the solicitor;

21.3.2 any submission during any hearing;

21.3.3 the course of an opening address; or

21.3.4 the course of a closing address or submission on the evidence,

unless the solicitor believes on reasonable grounds that the factual material already available provides a proper basis to do so.

21.4 A solicitor must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the solicitor believes on reasonable grounds that:

21.4.1 available material by which the allegation could be supported provides a proper basis for it; and

21.4.2 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

21.5 A solicitor must not make a suggestion in cross-examination on credit unless the solicitor believes on reasonable grounds that acceptance of the suggestion would diminish the credibility of the evidence of the witness.

21.6 A solicitor may regard the opinion of an instructing solicitor that material which is available to the instructing solicitor is credible, being material which appears to the solicitor from its nature to support an allegation to which Rules 21.1, 21.2, 21.3 and 21.4 apply as a reasonable ground for holding the belief required by those Rules (except in the case of a closing address or submission on the evidence).

21.7 A solicitor who has instructions which justify submissions for the client in mitigation of the client's criminality which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the solicitor believes on reasonable grounds that such disclosure is necessary for the proper conduct of the client's case.

21.8 Without limiting the generality of Rule 21.2, in proceedings in which an allegation of sexual assault, indecent assault or the commission of an act of indecency is made and in which the alleged victim gives evidence:

21.8.1 a solicitor must not ask that witness a question or pursue a line of questioning of that witness which is intended:

(i) to mislead or confuse the witness; or

(ii) to be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and

21.8.2 a solicitor must take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks."

Rule 22 raises obligation upon a solicitor when communicating with opponents. Relevantly here:

> "**22. Communication with opponents**
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> 22.1 A solicitor must not knowingly make a false statement to an opponent in relation to the case (including its compromise).
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> 22.2 A solicitor must take all necessary steps to correct any false statement made by the solicitor to an opponent as soon as possible after the solicitor becomes aware that the statement was false. …"

Amongst all those conflicting duties and obligations, common complaints by clients are:

The client regrets the plea of guilty and blames his legal advisers

Often there are personal and emotional reasons why a person can't admit or be seen to be admitting guilt of a particular offence notwithstanding a mountain of evidence which will clearly convict the client. An example of that is child sex offending within the family unit. Often the offender just can't admit guilt because it will mean being ostracised from the family. The offender is often more prepared to maintain denials, suffer the consequence of being found guilty and then spend the rest of his or her life maintaining his innocence to his or her family and blaming the complainant, police, lawyers, etc.

However, where the case is strong, the lawyers are obliged to advise accordingly. As McMurdo P (as her Honour then was) observed in *R v Ogborne*:[4] "Argument or advice that seeks to persuade an accused to plead guilty is not improper conduct, no matter how strongly the argument or advice is put."[5]

Sometimes, upon advice as to risk at trial and the benefits of a plea, the client might enter a plea of guilty without actual belief in his guilt.[6]

No matter how carefully those matters are approached by the lawyers, the client sometimes regrets the entry of the plea and alleges they were pressured by the lawyers.

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4 [2006] QCA 161 following *Meissner v The Queen* (1995) 184 CLR 132.
5 At 10.
6 *Meissner v The Queen* (1995) 184 CLR 132 at 157 and 141.

The lawyers didn't follow instructions

A criminal trial, like nothing else, is a very dynamic exercise. Reduced to its most basic characteristics, it is a public airing of allegations where both parties are usually armed with professional advocates, the combat is supervised by a judge and the case is determined by 12 random strangers known to no-one, including the court. Unsurprisingly, forensic decisions have to be made constantly throughout the trial, not only by the barristers, but also by the solicitors. Not only are there forensic reasons for making decisions, but there are also ethical constraints.

No matter how carefully the lawyers take instructions, and no matter how carefully those instructions are recorded, and even when those instructions are in writing and signed by the client, allegations are made that the case was not conducted as the client wished it to be and instructed it to be. Examples abound: the client didn't give evidence and now thinks he should have, a witness was called who shouldn't have been, a witness who should have been called wasn't, Crown witnesses weren't taken to task on certain things,[7] objections should have been taken to evidence and they weren't, etc, etc.

Ethical duties clash with the interests of the client

Very difficult ethical issues can and do arise in criminal proceedings.

In *R v Nerbas*,[8] the accused changed his instructions in the course of a trial. The lawyers formed the view that they were ethically obliged to withdraw and told the client of that fact. The client entered a plea of guilty which he then sought to have set aside on the basis that the lawyers had no obligation or right to withdraw and the threat had placed undue pressure upon him and rendered his plea involuntary. His application failed before the trial judge but was successful on appeal.

It is not necessary to analyse the Court of Appeal's decision in *Nerbas*. It's fair to say, with all due respect to the Court of Appeal, that the correctness of the decision was not universally accepted amongst senior criminal practitioners at the time it was decided. I have always thought that it was rightly decided but raised very difficult questions. It is an example of just how difficult things can become.

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7 *Australian Solicitors Conduct Rules*, r 21.

8 [2012] 1 Qd R 362.

What are the obligations of the lawyers once the dispute has arisen?

The dispute may arise for determination in various ways. There is a well-established jurisdiction of the Trial Division to set aside a plea of guilty at any time before sentence is passed.[9] Therefore, where a client has entered a plea of guilty and alleges that the plea was caused in some way by the misconduct of the lawyers, those allegations will be a live issue on an application brought to set aside the plea. If sentence has been passed, there may be an appeal against conviction with the circumstances of the plea being ventilated in the Court of Appeal.

It is, unfortunately, fairly common after conviction by jury that there are grounds of appeal based on the lawyers' conduct. Often, that is an alleged failure to follow instructions. There have been many infamous examples.[10]

Invariably, whether on an application to the Trial Division or on an appeal to the Court of Appeal, evidence is sought to be led on behalf of the former client establishing the alleged misconduct of the lawyers. That then leads the Crown to knock on the lawyers' door seeking evidence to rebut the allegations.

When faced with allegations of misconduct, the temptation is for the lawyers to join forces with the Crown in order to defeat the allegations and thereby vindicate the lawyers' professional judgment made during the time of acting for the now former client.

However, the fact that the retainer has ended does not mean that the obligations to the former client have ceased. Obligations of confidentiality continue and the client's right to legal professional privilege does not evaporate.

The allegations made by the former client will no doubt concern communications made between the client and the lawyers. Those communications will attract legal professional privilege which enures to the benefit of the client, not the lawyers. Any waiver of the privilege can only be made by the person for whose benefit the privilege exists.[11] A lawyer acting on behalf of a client, or who has acted on behalf of a client, cannot waive the client's privilege unless the lawyer has instructions to do so.[12] It is imperative that lawyers do not place

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9 *R v Mundraby* [2004] QCA 493 at [11] and *R v GV* [2006] QCA 394 at [38].

10 *Nudd v R* (2005) 80 ALJR 614, *TKWJ v The Queen* (2002) 212 CLR 124 and *Ali v The Queen* (2005) 214 ALR 1.

11 *Minter v Priest* [1930] AC 558 at 579.

12 *Carbone v National Crime Authority* (1994) 52 FCR 516 at 526 and *Mann v Carnell* (1999) 201 CLR 1 at [28].

themselves in a position whereby they have breached the privilege by disclosing communications with the former client.

Rule 9 provides:

> "**9. Confidentiality**
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> 9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:
>
> 9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice; or
>
> 9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,
>
> EXCEPT as permitted in Rule 9.2.
>
> 9.2 A solicitor may disclose confidential client information if:
>
> 9.2.1 the client expressly or impliedly authorises disclosure;
>
> 9.2.2 the solicitor is permitted or is compelled by law to disclose;
>
> 9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations;
>
> 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence;
>
> 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person; or
>
> 9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity."

A breach of r 9, or common law privilege, can lead to serious professional ramifications for the solicitor, but it can also lead to other consequences.[13]

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[13] *Lee v The Queen* (2014) 253 CLR 455 which concerns self-incrimination privilege and information improperly falling to the prosecution. This resulted in prosecutors having to withdraw from the case.

As r 9.2.1 contemplates legal professional privilege may be waived by the client in one of two ways:

1. express waiver;

2. implied waiver.

A client rarely expressly waives privilege so as to leave no question marks as to the continuing obligations of the lawyer. I have never seen, for instance, a statement in an affidavit to the effect of, "I hereby waive legal professional privilege as it applies to every communication I have ever had with [the particular lawyer]".

Implied waiver occurs when the person who has the benefit of the privilege does an act inconsistent with its maintenance. The principle was explained by Gleeson CJ, Gaudron, Gummow and Callinan JJ in *Mann v Carnell*[14] in these terms:

> "28 At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that 'waiver' is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.
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> 29 Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank*, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about

[14] (1999) 201 CLR 1.

> the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large."[15]

In the types of circumstances under consideration, the former client will no doubt give a version of a conversation or conversations had with the lawyer. As observed in *Mann v Carnell* and *Benecke v National Australia Bank*,[16] privilege will be waived over that particular conversation or conversations.

Questions arise as to the extent of the waiver. The lawyer may have had a number of conversations with the former client which the lawyer may think are relevant to the allegations now being levelled. The former client may only have revealed one of the conversations. Therefore, has the former client waived privilege over the other conversations?

Perhaps the lawyer has acted for the former client in other cases, and communications during those other cases are relevant in some way to the present issues. Has the former client waived privilege over communications in those other cases?

Legal professional privilege also arises to protect communications between the lawyers and the former client and third parties where those communications have been had for the purposes of the defence of the criminal charge.[17] Where the former client has waived privilege over a particular conversation but there are third party communications which are relevant, has the privilege over the third party communications been waived?

Legal professional privilege extends to documents[18] and similar questions concerning waiver can arise in relation to privilege which attaches to documents.

Very difficult questions can arise. It is very dangerous to assume that because the client has alleged improper conduct by the lawyer and in so doing has disclosed the content of a particular privileged conversation or conversations, the lawyer is at liberty to disclose all communications with the former client.

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15 Citations omitted and emphasis added.
16 (1993) 35 NSWLR 110.
17 See *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-246 approved in *Waterford v The Commonwealth* (1987) 163 CLR 54 at 87.
18 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

How should the lawyer handle the problem?

Whether privilege exists in relation to a particular communication or document, whether it has been waived and the extent to which it has been waived, are all ultimately questions of admissibility of evidence. If privilege exists over a particular communication and that privilege has not been waived, then evidence of the solicitor sought to be given in breach of the privilege is not admissible against the former client. If the former client gives evidence and is cross-examined, he may refuse to answer questions about the communications. Those questions are ultimately ones for the court to determine.

In *R v McNicol*,[19] I thought that the appropriate course of action which should be deployed by a lawyer being asked to swear an affidavit and give evidence against a former client is as follows:

> "1. prepare an affidavit in response to the assertions made by the client. That affidavit will no doubt contain privileged information;
>
> 2. send the affidavit to the former client's current solicitors, not the prosecution, and seek instructions as to whether the client accepts that the privilege has been waived;
>
> 3. tell the prosecution that an affidavit has been prepared, that it contains privileged information and that instructions have been sought from the former client as to whether the privilege has been waived;
>
> 4. if the former client accepts that the privilege has been waived, then the affidavit can of course be delivered to the prosecution. If the instructions are that there is a dispute as to questions of privilege, then the prosecution should be informed of that and told that the lawyer will be in court on the hearing of the application with the affidavit and ready to give evidence and will abide any ruling of the court on the issue of privilege."[20]

By the time you are adopting this strategy, the former client will have sworn an affidavit and given instructions to his new legal advisers. Those legal advisers may, and probably do, have your file but can only guess as to the specifics of what you will say in response to the former client's allegations. Once you have sworn an affidavit and sent it to the former client's current solicitors, those solicitors will have an opportunity to consider your evidence and give advice to your former client. You may find that the allegations against you are withdrawn and that is the end of the matter as far as you're concerned.

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19 [2022] QSC 67.
20 At [35].

If the client persists with the allegations, the solicitors ought to advise you as to whether privilege is waived. They may say that it is or is not waived. If waived, there is no problem. The affidavit may be disclosed to the Crown. However, the matter is not necessarily a "yes" or "no" proposition. The former client may accept that privilege is waived in relation to some communications to which you swear but not others. If so, then the question of privilege is still a live one.

If the former client asserts privilege over all or part of what you have sworn in the affidavit, then the court must rule on the privilege claim. You should remember that while you are bound by any orders and directions which the court gives on the privilege claim, you are not a party to the primary proceedings and it is not your fight. You should not have disclosed any communication over which there might be a claim for privilege. You won't disclose any communications until there's a ruling from the court and you can't be criticised for maintaining the privilege until any dispute about it is resolved by the court.

Conclusions

It is always upsetting when a client blames his or her lawyers for his or her predicament. While there certainly have been cases, and there will be in the future, where advice and actions of a lawyer acting in criminal proceedings have not been up to proper particular standard, that is, thankfully, a rare occurrence.

Professional pride tempts an immediate defensive response to these sorts of allegations but that temptation must be resisted. The continuing obligations to the former client must be honoured and steps taken to ensure that it cannot be alleged that privilege has been breached.