

The Lawyer and Client Proposed Illegality

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How Should Lawyers Ethically Respond to Illegality in Client Decision-making?

It is trite to observe that persons in the community engage the services of the legal profession when they have a legal issue to address. In each case, a lawyer is approached because the client has an issue or problem that needs to be addressed or resolved. The lawyer is retained to effect a solution to the issue or problem. But to say that all clients approach lawyers with the utmost respect for the law and legal process is hardly realistic. Human nature being what it is, clients may wish to utilise the services of a lawyer to secure objectives that may be legally questionable, or even downright illegal.

It is, likewise, trite in this regard to observe that, as important actors in the administration of justice, members of the legal profession must not act in a fashion that undermines or imperils how justice is to be properly administered; that is, according to law and due process. For instance, for a lawyer to counsel or advise a client to breach the law is hardly consistent with the proper administration of justice. Few lawyers, one would hope, fall into this trap, even when pressured by a client who seeks the lawyer's endorsement for a course of conduct that the lawyer believes to be clearly illegal.

That the prospects of the client being 'found out' are slim or remote, and that the benefits to the client of pursuing the illegal conduct are perceived to (well) exceed the risk of detection, should be strictly irrelevant to the lawyer's advice. The Western Australian State Administrative Tribunal in *Legal Practitioners Complaints Committee v Segler*¹ succinctly stated that:

"... a legal practitioner is not entitled to advise a client to act in an illegal manner simply because he or she believes that the client will not be prosecuted"

and that:

"... [i]t is inimical to the role and function of a legal practitioner that he or she advise or encourage a client to breach the law, regardless of whether the breach might be detected or prosecuted".

Yet to blithely assume that the risk of detection or prosecution is irrelevant to the client's decision-making processes is to ignore the likely reality. In an environment punctuated by situational ethics and moral relativity, it is hardly uncommon for the ethics (or even legality) of proposed behaviour to be assessed against the likely consequences, good and bad, of that behaviour.

It follows that lawyers will, in the course of their practice, be asked to indicate to clients the risk of detection or prosecution of illegal behaviour. And this presents a genuine ethical issue for lawyers. When a client requests that type of information, it is reasonable to assume that the lawyer's response will factor into the client's decision-making. Otherwise there would have been little reason for the client to so inquire. Accordingly, the lawyer knows that proffering a 'risk assessment' of this kind may, in the client's 'risk calculus', incline the client to engage in illegal behaviour.

The lawyer could, to this end, decline to give the client any indication of the risk of detection or prosecution and, instead, inform the client that this is a legally irrelevant consideration. This is an entirely ethical response, albeit one that may produce client dissatisfaction. Alternatively, the lawyer could give the client an indication of the risk in question, but at the same time emphasise in writing that, irrespective of the risk, the lawyer's advice is strongly against pursuing illegal conduct. There is arguably no ethical impediment to couching advice in these terms.

But at this stage the boundaries of ethical behaviour become murky. Knowing or strongly suspecting the reason for the inquiry is to make an assessment of whether or not to engage in illegal behaviour, a lawyer who fails to address the issue in his or her advice could, at least from an ethical perspective, be perceived as endorsing the client's choice to engage in illegal behaviour, to the extent of even being a participant in the client's illegality. The point assumes added significance in that the lawyer is precluded by the duty of confidentiality from disclosing to others, including the relevant authorities, a client's illegal behaviour other than in very limited circumstances.² The illegality may, as a result, never come to light, and yet the lawyer's advice has contributed to its perpetration.

The boundaries are clearer as regards advice to act in a manner contrary to the law. Advice of this kind can clearly generate professional disciplinary consequences. In *Segler*, mentioned above, the lawyer advised a client that he could carry out building projects despite being unregistered as a builder. Though this was clearly the advice the client wanted to hear, the Tribunal found that, on the evidence, the only inference reasonably open was that the lawyer was aware that the cancellation of the client's registration precluded the client from legally carrying on business as a builder; in giving advice to the contrary the lawyer had committed professional misconduct.

Moreover, there may be circumstances where giving the client advice that amounts to encouraging or sanctioning illegal behaviour could expose the lawyer to criminal responsibility. Over 80 years ago a New South Wales judge warned, to this end, that though in acting for a client, a lawyer is necessarily associated with the client and is compelled to some extent to appear as if acting in combination with the client, "combination is one thing and improper combination, amounting to conspiracy to commit a crime or a civil wrong, is another thing".³ In each case,

therefore, especial care is essential to ensure that lawyers are not, and are not perceived to be, instruments of client illegality.

Notes

1. [2009] WASAT 205 at [87].
2. As to the circumstances where a lawyer may disclose a client's illegal behaviour, see Dal Pont GE. *Lawyers' Professional Responsibility*, 4th edn. Sydney: Lawbook Co., 2010, [10.100]–[10.125].
3. *R v Tighe & Maher* (1926) 26 SR (NSW) 94 at 108 per Street CJ.

Risk Management



Deadline Management

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'Time problems' form a significant proportion of claims and complaints made against legal practitioners in Western Australia each year. They arise in all areas of law and not only relate to failing to comply with statutory and contractual time periods but also failing to respond to client demands. The former usually results in claims for professional negligence; the latter, in complaints to the Legal Practitioners Complaints Committee. It is, in some respects, not surprising that there are so many time problems, given the many different deadlines that arise in legal work. In reality most things do get done on time, and, if not, extensions of time can be obtained and the failure to meet a deadline has no serious consequences.

Nevertheless, practitioners spend a lot of time and resources trying to fix matters that were entirely preventable in the first place.

Why aren't time problems being prevented? Why can't legal practitioners be relied on to get things done on time? These questions are worth considering and will be dealt with in more depth in articles over the coming months, but the following questions should be considered:

- Do practitioners know the relevant limitations and critical dates required?
- Do practitioners inform themselves of the deadlines that are important to the client?
- Do practitioners have good diary, work and time management systems?
- Do practitioners understand their fundamental professional obligations with respect to avoiding unreasonable delay?

An analysis of 1600 missed deadline claims by the Law Society of British Columbia found the underlying causes could be categorised as follows:

- 55% due to oversight.

- 25% due to legal error.
- 10% due to communication errors.
- 10% due to engagement issues.

An analysis of the underlying reasons for 'time claims' in Western Australia show the causes to be:

- Ignorance of time limits due to inexperience or not keeping up-to-date with changes in legislation.
- Ignorance of time limits, despite experience; for example, new or obscure areas of law.
- Relying on a client's calculation of a date or client's advice to the solicitor of the wrong relevant date.
- Relying on your own miscalculation of the relevant date.
- Entering the wrong date in a diary system.
- Having an inadequate reminder system.
- 'Deadline fatigue' from having so many deadlines and being under too much pressure or having too much work.
- Procrastination.
- Dabbling outside the area of expertise and being unaware of relevant dates.
- Not being upfront with clients in relation to delay.
- Leaving no margin for error and doing things at the last minute.
- Understaffing, staff unavailability or inability to work.

Many deadline issues arise because the practitioner should not have taken the matter on in the first place. They were too busy or the client had deadlines that were unable to be met. One of the best risk management practices is to say no if there is any doubt whether the work can be performed in a timely manner.