

To keep a confidence

Maintaining lawyer-client confidentiality can present genuine ethical challenges



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Confidentiality goes to the heart of the lawyer-client relationship. Across the common law world, and indeed broadly in civil legal systems, both the law and relevant professional rules treat as confidential information that is communicated or derived in the course of representing a client. Indeed, a century ago an English judge observed that “the degree of the confidential character of the [lawyer-client] relation ... is in the eyes of the law the very highest”.¹

The principal justification for lawyer-client confidentiality has traditionally focused on the value of engendering trust by clients in their lawyer, safe in the knowledge that information communicated or derived by the lawyer within the lawyer-client relationship will remain under the confidentiality umbrella. The attendant trust means, it is reasoned, that clients will freely communicate with their lawyers, with the result that lawyers will be best positioned to provide advice.

More so than any other legal or professional obligation, it is lawyer-client confidentiality that arguably gives rise to genuine ethical issues — in the sense of issues that can truly pique the conscience — in legal practice. Issues of this kind surface, in particular, where retaining the confidentiality of information could adversely affect the interests of one or more third parties. To adhere to the confidentiality obligation, in these circumstances, involves the lawyer giving priority to the interests of the client ahead of other persons whose ‘moral’ stake may, according to community standards, be more compelling than that of the client. That a ‘good’ person would disclose the information, whereas lawyer-client confidentiality suggests the contrary, is what gives colour to the ethical dilemma facing the lawyer.

In what is often touted as the leading American legal ethics case — known as the *Lake Pleasant* case² — this was precisely the dilemma. There two lawyers represented a client charged with murder. The client disclosed to the lawyers that he had committed two other unsolved murders. Even though the parents of the

victims of these two murders had made public appeals for information, the lawyers did not come forward, even after having confirmed the client’s story by visiting the site at which the bodies were located. In retaining client confidentiality, the lawyers were found to have acted ethically so far as their professional obligations were concerned.

Under the terms of the *Australian Solicitors’ Conduct Rules* (in this regard, replicating the substance of the Western Australian rules),³ the same would ensue in Australia. Although those rules envisage a variety of scenarios where confidentiality is not absolute, including ‘for the sole purpose of avoiding the probable commission of a serious criminal offence’ or ‘for the purpose of preventing imminent serious physical harm to the client or to another person’,⁴ unlike their predecessor — which was phrased to include the *concealment* of a serious criminal offence⁵ — they provide no ‘out’ for lawyers in *Lake Pleasant* scenario. In any case, the tendency of Australian professional rules in this context to be phrased in discretionary terms, and thereby leave the question of disclosure to the individual lawyer, emphasises the need for ethical judgment.

So even if the professional rules give a lawyer the discretion to disclose confidential information in a particular setting, it cannot be assumed that, by opting *not* to disclose, the lawyer will always reflect broader community values. At least, though, the lawyer has a choice in this instance. But where there is no ‘out’ supplied by the rules, the lawyer is likely to be in an ethical straitjacket. A lawyer who, in this event, nonetheless discloses the confidential information risks disciplinary sanction (as well as the prospect of civil proceedings for losses triggered by the breach of confidence).

Consider the following facts. The court appoints L as an independent children’s lawyer, to represent a child’s interests in a custody (‘parenting’) dispute. In that capacity L speaks to a police officer with carriage of criminal charges against the child’s father, and is informed that

the father has been diagnosed with schizophrenia, and smokes marijuana to self-medicate. The charges, inter alia, generate orders that regulate the father’s contact with the child. Following a telephone call by the father to attend the child’s school with a view to dropping off the child’s bike, L receives a call from a teacher at the school requesting L’s advice. Motivated by concern about the welfare of the child, and of others at the school, L informs the teacher of the father’s history of mental illness.

While, in this factual scenario, the father is not L’s client, the information surrounding his mental state has come to L as a result of the retainer to act as an independent children’s lawyer. As a result, it is confidential information, and absent evidence to support the probable commission of a serious criminal offence or the need to prevent imminent serious physical harm, under the rules L can proffer no basis — in law or professionally — for breaching that confidence. It is perhaps unsurprising that, in facts analogous to these, a tribunal has found L guilty of unsatisfactory professional conduct, and issued a reprimand.⁶ The sanction would have been more severe, it seems, had it involved a lawyer with other than an unblemished and distinguished record. Yet I suspect that many people would view L’s actions as ethically ‘right’, especially in view of L’s position as a “best interests representative” for the child. It nonetheless reveals that the standards expected of lawyers can sometimes present even experienced (and ethical) lawyers with real dilemmas.

NOTES

1. *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831 at 840 per Fletcher Moulton LJ.
2. *People v Belge* (1975) 372 NYS 2d 798.
3. Legal Profession Conduct Rules 2010 (WA) r 9(3)(d), 9(3)(e).
4. *Australian Solicitors’ Conduct Rules*, r 9.2.4, 9.2.5.
5. Law Council of Australia, *Model Rules of Professional Conduct and Practice*, r 3.1.3.
6. *Legal Profession Complaints Committee v Johnston* [2013] WASAT 159.