Confidentiality, competency and the retainer – an ethical teaser

I act for an elderly client who is charged with indictable offences. I have seen the client on a couple of occasions. At each interview the client has said that he and his mates have weapons which could cause damage to the Police. I am concerned. I think that the client is an angry man. He seems frustrated; on occasions he appears agitated and sometimes seems to be confused. Can I disclose my concerns? Can I terminate my retainer?

Should I be concerned about his competency?

Imminent Physical Harm Exception

When considering the possibility that a client may harm themselves or others, we must recall that our duty of confidentiality is absolute, unless we can identify a permitted exception under **Rule 9.2** of the *Australian Solicitors Conduct Rules (ASCR)* to disclose such information. The obligation of confidence arises in contract, equity and under the *ASCR*: it aims to ensure we preserve the client's confidences, so that we can render effective legal services to the client.

Our duty of confidentiality must be distinguished from the evidentiary rule of client legal privilege. The ethical rule is wider and applies without regard to the nature or sources of the information or the fact that others may share the information.

We owe the duty of confidentiality to every client, without exception, and whether or not the client is a continuing client or casual client. This duty survives the professional relationship, and continues indefinitely after we have ceased to act for the client. Generally we should not disclose having being consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.

Rule 9.2 does provide a permitted exception; we can disclose information for the purpose of preventing imminent serious physical harm to our client or to another person. This is an exceptional situation, we need to be satisfied that imminent serious physical harm is going to occur and needs to be prevented. We must remember that if we do exercise the discretion to disclose we should not disclose more information than is required. In assessing whether disclosure of the confidential information is justified to prevent imminent serious physical harm we should consider a number of factors including:

a) the likelihood that the potential injury will occur and it's imminence; and

b) the circumstances under which we have acquired the information.

How and when disclosure should be made under this sub-rule will depend on the circumstances. If confidential information is to be disclosed under this exception then we should prepare a written note as soon as possible, which should include such things as:

a) the date and time when the disclosure is made;

b) the grounds we relied on to make the disclosure;

c) the harm intended to be prevented;

d) the identity of the person who we disclosed to; and

e) the content of the disclosure made, how we disclosed and to whom we disclosed.

Termination of the Retainer

In deciding whether we can terminate our retainer, we should have regard to any written retainer that may exist between us and the client. Many retainers expressly permit termination where a client no longer has trust and confidence in us. Trust and confidence is a two way street, the client must have trust and confidence in our representation and we must have trust and confidence in the information that the client is providing to us.

Before accepting a retainer, or during a retainer, if we have suspicion or doubts about whether we may be assisting a client in a dishonest, fraudulent, criminal or illegal act, we should make enquiries about the client and about the subject matter and objectives of the retainer.

Rule 13.1 sets out default rules for when a client's matter can be terminated in the absence of express grounds. An engagement can be terminated by mutual consent or the client can discharge us or we can terminate the retainer for **just cause and on reasonable notice**.

Generally we should complete the task undertaken, unless there is a justifiable cause for terminating the relationship. It is inappropriate for us to withdraw on capricious or arbitrary grounds.

No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly we may cease acting will depend on the circumstances. When the matter is covered by statute, or rules of Court, these must be taken into account. The governing principle is that we should protect the client's interest to the best of our ability and should not desert the client at a critical stage of a matter or at a time where withdrawal would put the client in position of disadvantage or peril. The client should be given sufficient time to retain and instruct a replacement lawyer.

If there is a serious loss of trust and confidence then the circumstances may exist to withdraw: we must have a reasonable cause for the withdrawal, for example, if we are deceived by our client or the client refuses to accept or act upon the reasonable advice or recommendations we make on a significant issue; or the client is persistently unreasonable or uncooperative in a material respect, or we are facing difficulty in obtaining adequate instructions from the client. However, we should not use the threat of withdrawal to force a hasty decision upon the client on a difficult question: See *R v Nerbas* [2012] 1 Qd R 362.

Capacity

Our relationship, with a client presupposes, the client has the requisite ability to make decisions about his or her legal affairs and to give us competent and proper instructions **(Rule 8 *ASCR*)**.

A client's ability to make decisions may depend on such factors as age, intelligence, mental and physical health. A client's ability to make decisions may change over time. A client may be capable of making some decisions but not others.

If we believe a person may be incapable of giving instructions we should decline to act on such instructions. If the matter is before a Court we have a professional obligation to bring the matter to the Court's attention. This obligation arises from our position as an officer of the court not from the retainer (see *Goddard Elliott v Fritsch* [2012] VSC 87). Incapacity, will not, necessarily, terminate the retainer (*Blankley v Central Manchester & Manchester Children's University Hospitals NHS Trust* [2014] EWHC 168 (QB affirmed by the *Court of Appeal in Blankley v Central Manchester and Manchester Children's University Hospital NHS Trust* [2015] EWCA Civ 18).

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