Clients at Risk

Earlier this year the Coroner made recommendations following an inquest into the deaths of two persons in custody.

Following the Coroners recommendations, the Supreme Court published a "Practice Direction" setting out the Procedure that the Court desired practitioners to follow in respect of clients "at risk" of personal harm.

The Ethics Committee was recently asked to provide advice to practitioners on their duties in implementing these recommendations.

The text of the letter of advice of the Ethics Committee is set out below for practitioners assistance.

The Law Society has written to the Chief Justice requesting some amendments to the Direction as set out in the letter.

The responsibilities of a lawyer in situations where a client might harm himself or herself are ascertained by balancing competing public interests. The result of that balancing process will vary with the facts and the advice of the Ethics Committee and is not intended to necessarily apply in other circumstances.

There are authorities practitioners can turn to for guidance if they have to carry out this balancing exercise themselves or the Ethics Committee can make rulings on specific facts.

1. If a solicitor, in the course of taking instructions from a client in custody, forms the opinion as a result of the conduct, demeanor or statements of the client, that the client is "at risk", the solicitor should inform the client that the solicitor has formed that opinion.

2. If the solicitor forms the opinion referred to above, the solicitor should seek instructions as to whether or not the client consents to the solicitor passing on information concerning the clients potential for self harm to the Court or Prison authorities.

3. If the client does not consent to the solicitor passing on information concerning the clients potential self harm to Courts and Prison authorities, the solicitor should nevertheless inform those authorities that he or she has formed the view that the client may be at risk in order that the procedures set out in Practice Direction No1 of 1998 can be followed.

Not all information that a solicitor receives about a client will be confidential or privileged. Observations made by a solicitor about the conduct or demeanor of a client in prison are unlikely to be privileged or confidential. However, as it is likely that a solicitor's view will be formed by a combination of privileged and no-privileged information, one should answer the question as though the information was privileged.

The existing Conduct Rules on their face do not provide for any relevant exception to the duty to maintain client confidentiality. The relevant rules are:

9.2 "Subject to...any statutory provisions to the contrary and except for such communications as may be incidental to the normal conduct of the matter or unless otherwise instructed by his client, a practitioner shall not (whether his retainer be terminated or not) disclose any information which has come to him in the course of handling any matter."

9A1 "A practitioner shall give undivided fidelity to his clients interest unaffected...by the practitioners perception of the public...interest."

These rules reflect and raise issues of confidentiality and legal privilege.

Both of these principles are grounded in public policy. It is in the public interest that confidential professional communications between solicitor and client should be uninhibited by any fear of disclosure. There is however sufficient authority to deny the existence or operation of the privilege where it would extend to protect communications which were directed against the public interest[1].

The notion of overriding public interest has generally been applied in the context of cases of crime and fraud, but it has been extended to powers used for an alternative purpose and matters contrary to public policy. In the field of health law, it has been used (obiter) in the context of risk to a patients life[2].

It would be against public policy to prevent the disclosure of information which may save a clients life. In such circumstances the public policy principles of privilege and confidentiality would give way, so as to allow disclosure of relevant information.

The exercise is of course a balancing of competing public interests and in other circumstances, the result may be different.

Relevant factors in this case are that the client is already in custody, the person at risk is the client, and the information to be passed on is not against the clients legal interest Further, disclosure to the Court in accordance with Practice Direction No1 of 1998 is an appropriately limited disclosure, save possibly for one issue. Paragraph 1 of the Practice Directions sets out:

> "Where there is *information* available to a prosecutor or counsel for an accused person that a prisoner or person who may become a prisoner may be at risk if remanded into custody or committed to a prison that *information* should be disclosed to the Court as soon as possible."

If the information is available to the prosecutor, it is presumably not privileged or confidential and the detail of the information may be disclosed. In the case of a solicitor for an accused , it may go too far to require the disclosure of the detail of whatever information has been provided to the solicitor The purpose of disclosure to the Court is so that the Sheriff and Prison officers may either immediately classify the prisoner as being "at risk", or at least make independent inquiries. It is sufficient for these purposes if the solicitor advises the Court that he or she has formed the opinion that the client may become "at risk", without disclosing the detail of the information upon which that opinion had been formed.

It may be that paragraph 1 of the Practice Direction is framed too widely in its present form and the Law Society will take up with the Chief Justice the issue of amending the Practice Direction to accord with this advice. It will also take up the issue of ensuring no adverse inference can be drawn as a result of the provision of information or opinion.

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[1] R V Bell: ex parte Lees (1980) 146 CLR 141 A-C (NT) -v- Kearney (1985)158 CLR 500 Rogerson v- Law Society (NT) (1991) 1 BTLR 100

[2] Duncan -v- Medical practitioner Disciplinary Committee (1986) 1 NZLR 513