

PRACTICE BRIEFING

Compulsion of Client Information and Responding to a Search Warrant

INTRODUCTION

The Law Society regularly receives enquiries from lawyers concerned about their obligations to disclose client information under compulsion from Police or other government agencies

The intention of this Practice Briefing is to provide assistance to lawyers faced with the difficulties arising from a request or formal requirement to disclose client information. It outlines issues which may need to be considered and practical steps to take. The information is not intended as a substitute for legal advice which may need to be sought.

CLIENT CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE

Lawyers have an overriding duty of confidentiality owed to their client. The obligation is reflected in Chapter 8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (RCCC). The duty continues indefinitely beyond the life of the retainer and captures any disclosure in respect of a proposed retainer (even if one never eventuates).

Rules 8.2 and 8.4 of the RCCC set out the limited and exceptional circumstances when a lawyer must disclose confidential information and also when disclosure is permissible.

Mandatory disclosure under rule 8.2 must occur when it is required by law or order of a court.

Any disclosure made in reliance on rules 8.2 or 8.4 must only be to an appropriate person and to the extent reasonably necessary for the required purpose.

Legal Professional Privilege is a fundamental and ancient privilege recognised in the common law which attaches to communications between a lawyer and a client seeking his or her advice. In the leading case *B v Auckland District Law Society* [2004] 1 NZLR 326 the Privy Council referred with approval to the approach of the English courts in *R v Derby Magistrates Court ex parte B* [1996] 1 AC 487. This approach recognises that legal professional privilege is more than a rule of evidence; it is a principle which is fundamental to the entire administration of justice.

Legal professional privilege protects only those confidential communications falling under the heads of either 'advice' (sometimes referred to as 'solicitor-client') or 'litigation' privilege. The Evidence Act 2006 sections 54 -56 provides a statutory restatement of the common law in respect of legal professional privilege.

Recognising the over-arching importance of the privilege, it is well established that Parliament may only abrogate legal professional privilege through the clearest of language. This principle was established in *CIR v West-Walker* [1954] NZLR 191 (CA) (see also *Rosenberg v Jaine* [1983] NZLR 1; (1983) 1 CRNZ 1 and *Russell McVeagh v Auckland District Law Society* [2003] UKPC 38 (PC)).

The privilege belongs to the client and may only be waived with the client's express consent.

DISCLOSURE REQUIREMENTS

In New Zealand there are a number of statutory provisions which intersect with the concepts of client confidentiality and legal professional privilege. Under these provisions an authorised body carrying out a public function may compel disclosure of certain client information by lawyers.

A lawyer who is provided with a request to disclose client information is often placed in the difficult position of balancing competing obligations. It will often fall on the lawyer to assert privilege on behalf of his or her client and to ensure privilege is protected and maintained.

An initial checklist is provided below of some of the issues a lawyer in this situation will need to consider. Undertaking this assessment may assist the lawyer in clarifying what their obligations are in a particular situation and what next steps are required.

CHECKLIST OF ISSUES TO CONSIDER

1. What is the specific authority for the request? Is the information compellable under a particular statutory provision or court order?
 - » It is recommended that a lawyer who receives a request for disclosure of information requires the requesting agency to produce a formal notice to produce under the relevant empowering provision or sights the relevant court order.
 - » If there is no clear power of compulsion, then obligations of client confidentiality and legal privilege restrain disclosure.
 - » If appropriate, a lawyer could seek their client's consent to disclose the information. However, the lawyer would need to consider the client's interests to ensure that he or she is fully advised and protected in respect of the risks of any disclosure.
2. If there is a clear power of compulsion, does it extend to legally privileged material?
 - » The provisions of the empowering statute should be carefully considered to check whether there is an express provision overriding privilege. It may also be helpful to check any relevant text for commentary on disclosure powers. A non-exhaustive list of specific powers of compulsion is provided at the end of this Practice Briefing.

- » In exceptional cases, it may be important to consider the practical impact of the common law 'fraud/criminal purpose exception' which provides that there is no privilege where the solicitor-client communication is undertaken to assist the commission of a crime or fraud (whether the lawyer is aware or not of the unlawful purpose)- *R v Cox* (1884) 14 QBD 153. The exception is also consistent with the conduct rule which provides that a lawyer may not assist any person (including concealment) in any activity the lawyer knows is criminal or fraudulent (rule 2.4 of the RCCC)
- 3. If legal privilege is not overridden by the relevant power, what information is protected from disclosure?
 - » This will require a careful consideration of what information would fall within the definition of legal professional privilege. It is important to remember that not every communication with a client or client related information will be legally privileged (See *Professional Responsibility in New Zealand*, "Legal Professional Privilege", Liesle Theron, LexisNexis Online at 390,010 onwards).
- 4. Is there is any legal impediment to disclosing the request for disclosure to your client?
 - » This will require a consideration of a lawyer's duty of candour to his or her clients under rule 7 of the RCCC and any 'tipping-off' provisions in the relevant legislation overriding these obligations by restraining disclosure. A lawyer may also have disclosure obligations to a client under the Privacy Act 1993.

SPECIFIC POWERS OF COMPULSION

A number of statutory regimes contain both specific protections for legal professional privilege and carve outs from that protection. For example, some statutory regimes expressly provide that lawyers trust account records are not to be considered privileged communications for the purposes of the particular Act.

The authors of *Ethics, Professional Responsibility and the Lawyer*, 3rd edition (Duncan Webb, Kathryn Dalziel and Kerry Cook, LexisNexis NZ Ltd, Wellington 2016 at 8.8.2) note that a warrant should expressly exclude privileged material and unless the legislature makes it absolutely clear that privilege is overridden, the Court will presume it continues to be protected (*Rosenberg v Jaine* [1983] NZLR 1 at 8, per Davidson CJ; *CIR v West-Walker* [1954] NZLR 191 (CA)).

It is vital that a lawyer responding to any request or direction for disclosure is familiar with the provisions relating to disclosure and privilege in the particular statute in question. Often there may not be much time to respond to a request and a lawyer may need to urgently seek legal advice. A request could be made to the requesting agency to ascertain if an extension of time is possible to enable advice to be taken.

Some examples of the different statutory provisions under which client information may be compelled are provided below. This is a non-exhaustive list which is current as at February 2017. (Reference should be made directly to the particular statutory scheme to check for any legislative amendment). It is provided to assist lawyers to accurately identify the types of statutory provisions to search for and consider when responding to a specific disclosure requirement.

Search and Surveillance Act 2012

Under the Search and Surveillance Act 2012 (SSA) the protection of LPP is recognised. However, there is a specific exception to LPP based on communications or information created for a ‘dishonest purpose’ or facilitation of an offence (‘dishonest purpose exception’) (see, for example, sections 136 and 102 of the SSA).

A specific procedure is specified under s143 of the SSA for execution of a search warrant in respect of a lawyer or at a lawyer’s office. Such a warrant cannot be executed unless the lawyer or his or her representative is present and then only after the lawyer has had an opportunity to claim privilege on behalf of his or her client. If the lawyer cannot be contacted, then there is provision for another lawyer to be nominated by the New Zealand Law Society to attend the execution of the warrant and claim privilege, if required.

Under section 146 of the SAA there are interim steps to secure evidence that are to be taken pending resolution of a disputed claim of privilege by a Judge or in accordance with direction of the court in the relevant warrant (for example by nomination of an independent lawyer).

Criminal Proceeds (Recovery) Act 2009

Section 160 of the Criminal Proceeds (Recovery) Act 2009 (CPRA) preserves LPP subject to a ‘dishonest purpose exception’. However, the concept of ‘privileged communication’ specifically excludes financial records kept by the lawyer in relation to those aspects of practice subject to the Financial Transactions Reporting Act 1990 (s160(4)) (sections 136 and 102 of the SSA).

Financial Transactions Reporting Act 1990

The Financial Transactions Reporting Act 1990 (FTR) provides that defined ‘privileged communications’ are protected. There is an exception for communications made for the purpose of committing or furthering the commission of an offence (see section 19).

Trust accounting records are also excluded from the definition of ‘privileged communications’ at section 19(3). The search warrant procedures in the FTR have been repealed and are replaced by the provisions of Part 4 of the Search and Surveillance Act 2012.

Serious Fraud Office Act 1990

The Serious Fraud Office Act 1990 expressly preserves legal professional privilege save for the ability of the SFO Director to compel a lawyer to provide the last known name and address of a client in circumstances related to an investigation (please refer to section 24). There is also an exception for information related to the commission or furtherance of an offence.

The Act expressly overrides a duty of confidentiality (see section 23). Section 24(4) provides that lawyers trust account records are not within the scope of a ‘privileged communication’.

Financial Markets Authority Act 2011

The FMA Act is otherwise silent on legal professional privilege but does provide that witnesses (and ‘counsel’ who are referred to only in the heading) have the same privileges and immunities as a witness before a proceeding in court (section 56).

Insolvency Act 2006

The Official Assignee may seek disclosure of information about a bankrupt's affairs and sections 165 and 171 of the Act are often used to compel this information from lawyers.

There is no express provision in respect of legal professional privilege but the established principle is that the bankrupt's right to assert privilege passes to the Official Assignee upon adjudication.

However, if information is sought by the Commissioner from a lawyer acting for a person other than the bankrupt then legal professional privilege issues may arise in the ordinary way and need to be carefully considered.

Tax Administration Act 1994

Section 17 of the Tax Administration Act empowers the Commissioner of Inland Revenue to compel disclosure of information about a person's tax affairs.

However, section 20 of the Tax Administration Act 1994 protects from disclosure any information, book or document subject to LPP (following the earlier approach by the Courts in *CIR v WestWalker*). This is subject to a 'dishonest purpose' exception and there is a procedure for application to a District Court Judge for determination of validity in respect of a claim of privilege.

Anti-Money -Laundering and Countering Financing of Terrorism Act 2009

The AML/CFT Act currently provides for the preservation of legal professional privilege (see section 40(3)). A lawyer's trust account records are excluded from the scope of 'privileged communication' (section 42(2)).

However, as the legislative regime is extended to apply to lawyers in mid-2018, lawyers will need to familiarise themselves with amended provisions of the Act relating to LPP, reporting obligations and required disclosure.

DISPUTES ABOUT PRIVILEGE

There are a number of specific statutory mechanisms for dealing with disputes over the assertion and protection of legal professional privilege. For example, under section 160(5) of the CPRA, section 20(5) of the Tax Administration Act and section 24(5) of the SFO Act an application may be made to a District Court Judge for an order determining whether or not a claim of privilege is valid. This application may be made by the person asserting privilege or the entity attempting to compel disclosure.

Police or other law enforcement agency at times secure and take documents in a sealed envelope in respect of which privilege is claimed. This is on the basis that the documents will not be accessed until such time as the question of privilege may be determined. This practice is provided for in section 146 of the SSA. It is recommended that if this occurs the lawyer ensures

that the restricted basis on which the documents are taken is clear and preferably recorded in writing.

In general terms, under section 67 of the Evidence Act 2006 a Judge may disallow a claim of privilege under that Act in circumstances when there is a prima facie case that the communication or information was received or compiled for a dishonest purpose or to facilitate an offence. A Judge may also disallow a claim of privilege if the Judge is of the opinion that evidence of communication or information is necessary for the defence of a person in a criminal proceeding. Any information disclosed in accordance with a disallowance of privilege under this provision cannot be used against the privilege holder in any New Zealand proceeding.

PRACTICAL STEPS AND ASSISTANCE

There are some practical steps any lawyer facing a difficult request for disclosure can take. These may assist in providing greater certainty and reduce any potential risk to clients or the lawyer concerned.

In summary, it is recommended that a lawyer takes steps to:

- » Clarify the authority on which a request of direction to disclose client information.
- » Consider the particular power to compel disclosure and any protection or overriding of privilege. Any Court order or notice should be sighted to check the extent of the disclosure sought and whether there is a 'non-disclosure' or 'tipping-off' prohibition. This should be clarified with the enforcement agency and legal advice taken if any doubt remains.
- » Check whether there is a specific statutory definition which may impact on the scope of protected privilege (for example, is there a 'privileged communication' definition or specific exception for documents such as trust accounting records?)
- » Advise the client of the request and discuss whether the client wishes to waive privilege and consent to disclosure. This is subject to any legal impediment to disclosure such as a 'tipping off' offence created by the particular empowering legislation and the need to provide legal advice on the potential ramifications of disclosure for the client.
- » Consider if there is any potential conflict between what the lawyer believes are his or her obligations and the interests of the client. The client may need to be advised to consider seeking independent advice.
- » If legally privileged material is not compellable, then care needs to be taken to identify what falls within the privileged category.
- » A record of any documents taken is made for the client and the basis on which documents are taken is made clear. For example, if the Police take documents in respect of which a claim to privilege is made, the documents should be securely sealed and the restrictions on access recorded (ie, it is made clear that no privilege is waived and the documents must not be accessed until the claim of privilege has been determined).
- » If in doubt, consider whether there is a statutory mechanism to deal with disputes over privilege. If there is no mechanism, could agreement be reached with the enforcement

agency allowing an independent lawyer to review the relevant material to ascertain whether it is privileged?

- » Ensure that no inadvertent disclosure of information relating to other clients is made (for example, if electronic files or spreadsheets are provided).

If a lawyer remains concerned or uncertain about their ethical obligations and the requirement to disclose, advice should be taken from a senior colleague. A member of the Law Society's Panel of Friends may also be able to assist.

NEW ZEALAND LAW SOCIETY

Law Society Building
26 Waring Taylor Street
WELLINGTON 6011

PO Box 5041
Lambton Quay
WELLINGTON 6140

(04) 472 7837

Information in the Practice Briefing series is provided by the Law Society as a service to members. This briefing is intended to provide guidance and information on best practices. Some of the information and requirements may change over time and should be checked before any action is taken.

April 2017