A call for improvement in the SRA's guidance on disclosure of 'confidential' information

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About the Authors

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1. The issue of lawyer involvement in wrongdoing has risen up in the public consciousness. A critical issue for lawyers is what to do when they face ethical pressure (e.g. they become aware of, or are asked to advise on or facilitate, unlawful activity or are pressured to behave in unprofessional ways).

2. We believe that proper, accurate and constructive guidance, and support from the professional regulators can help reduce these problems significantly. Such guidance should:

    2.1. cover critical issues on advising independently and objectively

    2.2. being clear who the client is including, in employer-client relationships,

    2.3. reporting up within the client and, occasionally, reporting out in ways which properly balance professional obligations to uphold the rule of law and the best interests of the client.

3. Our own discussions with lawyers in private practice and in-house suggest that the boundaries and issues in this area are not clearly understood. This means that ethical pressure is not always effectively dealt with, including in the context of the employer-client dynamic and the inherent tension that presents. This can result in poor outcomes for clients in the longer term, jeopardy for an array of stakeholders in the relevant business, damage to the public interest in the administration of justice, and acute, sometimes irreparable, harm to the mental health and careers of the lawyers concerned.

4. We also believe there are related, significant misunderstandings and boundary issues around the handling of legal professional privilege. A corollary of this is solicitors asserting confidentiality and privilege to protect reputation and wrongdoing, sometimes inappropriately.

5. As part of our interest in this area, we have taken a close look at the SRA’s guidance on disclosure of confidential information, noting the guidance of other legal regulators may also be relevant here, for example the Bar Standards Board overseeing barristers who work in-house. Our view is that the current SRA guidance is inadequate in a number of respects:

    5.1. It understates the right or duty of disclosure in various specific ways

    5.2. It sometimes appears to get the law wrong

    5.3. It lacks appropriate clarity

    5.4. It often nudges the reader towards non-disclosure rather than stating the position more neutrally

6. For all those reasons, we think that the guidance inappropriately discourages effective reporting of serious misconduct and risks of harm.

7. Improved guidance would provide valuable support to lawyers faced with conflicts between overweening clients (or executives within clients) and their obligations as a

solicitor. The SRA can help address these problems through better guidance and support as well as hosting workshops developing and then rolling out new guidance. The ways in which the SRA supports lawyers more broadly, and in-house lawyers in particular, merits separate attention going beyond our thoughts here.

8. The guidance does not address lawyers' **obligation to report up** within organisational clients when faced with evidence of potential 'iniquity.' This is something that should be done and which many lawyers will or should already be doing. But our experience in talking with lawyers who have faced, raised, or ignored such harms is that they sometimes have a less strong grasp of reporting up obligations than they should. We think the guidance should deal with reporting up problems alongside reporting out issues for maximum utility.

9. In particular, improving the guidance on confidentiality is an opportunity for the SRA to show it has taken onboard the concerns, expressed to them by practitioners and commentators, that they do not take ethical dilemmas within commercial practice seriously enough.

Specific Problems

10. We set out here some of the problems with the guidance.

11. The guidance **appears to be wrong in law** in insisting that solicitors must have information which 'is sufficiently detailed or compelling enough for you to form an opinion that **a serious criminal offence will occur**.'

    11.1. The main legal principle (the iniquity exception) encompasses not only crime, but also broader situations of fraud, dishonesty, bad faith or sharp practice. A recent example in which the court has summarised the law involved a director preferring their own interests over the interests of the company under a cloak of secrecy.[1]

    11.2. The solicitor need not 'form an opinion' that a crime or other iniquity 'will occur.' A prima facie case is all that is legally required. That's a lower standard than the balance of probabilities, and far lower than forming an opinion that something 'will' occur.

12. We cannot identify the legal basis for the guidance that the solicitor **must clearly identify a proposed victim** before the exception can be engaged. For example, if the client is engaged in a dubious investment scheme yet to be implemented, the iniquity exception may be engaged even if the precise identity of the victims is unclear.

13. Purely future wrongdoing is likely to be a narrow set of cases. **The more important case of ongoing wrongdoing is not addressed in the guidance**. This is particularly relevant in commercial work.

[1] Barrowfen Properties v Patel [2020] EWHC 2536 (Ch) is a recent example which conveniently summarises important aspects of the relevant law.

14. The iniquity exception applies ‘whether or not the solicitor is aware of the wrongful purpose or is **unwittingly used** as an instrument of fraud.’ This is not discussed by the guidance. Merely stopping acting upon discovering a fraud is not necessarily the end of the matter for the solicitor.

15. More generally, there is an absence of **realistic commercial examples**.

    15.1. This is likely to give the impression that the issue does not really arise in commercial work, and is more something for criminal defence lawyers.

    15.2. Notably, tensions arise when there are differences between the interests of individuals instructing lawyers on behalf of an organisational client, and the interests of the client itself. The recent RICs case is a notable example, which shows how confidentiality issues often also engage conflict of interest issues, but there are many others.[2]

    15.3. This is one reason why **guidance on confidential information should** also **engage with the issue of how to deal with reporting up (and out)** of evidence of future, ongoing, and past wrongdoing that becomes apparent in the organisation.

    15.4. The phone theft example used in the guidance is basic and confined to criminal defence practice.

    15.5. The guidance should consider and use other, more commercial examples - these could be gathered in collaboration with practitioners.

16. The guidance is confusing on the **centrality of confidentiality** to the law of privilege, and does not adequately address privilege and its waiver.

    16.1. For instance it is said that the **question of whether information is “privileged or merely confidential” may come first**.[3] This may give the wrong impression. Confidentiality is always the first question. If there is no confidentiality, there is no legal professional privilege.

    16.2. Confused guidance leads to confused thinking, and poor decision-making. In our view, many in-house lawyers will not have a grasp of the boundaries of their role and the practicalities to be engaged when facing ethical pressure where confidentiality issues may be engaged, leading them to think all matters and details that come across their desks are subject to privilege, when this is not in fact correct. These confusions also inhibit how information

[2] The Levitt Report: Independence Frayed, https://lawyerwatch.wordpress.com/2021/09/11/the-levitt-report-independence-frayed/ One of us has experience of discussing the Alistair Brett case with many practitioners, and how Brett deals with confidential information from the journalist (of the journalist’s own criminal behaviour). A significant number of those lawyers would have benefited from clear guidance on such matters.

[3] “If you are considering whether to disclose information your first question may be whether it is privileged or simply confidential.”

is passed within organisations, sometimes inappropriately shielding decision-makers from or delaying the delivery of bad news.[4]

16.3. Similarly, the guidance seems to us to be wrong or likely to mislead in suggesting, without proper qualification, that, "Disclosure of information is only allowed where the client consents to it or it is permitted by law. Before approaching a client for consent, you should consider whether disclosure is necessary to proceed with a specific matter." This only applies to disclosure of **confidential** information. Disclosure of wrongdoing, where there is no obligation of confidence, does not require consent.

17. **Public interest disclosures** need to be more carefully addressed. Public interest is highly fact specific, and an area where lawyers would naturally tread with a great deal of caution. The law on the **public interest defence** (going beyond the iniquity exception) as it applies to lawyers' obligations of confidentiality is not well developed, but better guidance on its application in realistic commercial situations would help significantly, not least by increasing discussion about lawyers' public interest duties at a time when these are under the spotlight. The SRA has an opportunity to lead on helping define fair and proper standards for the legal community, to which the courts could also have proper regard.[5]

18. The guidance is unbalanced on **data protection** and likely to chill disclosure, in that it states that this area of law may restrict disclosure but failing to address the ways through (e.g. legitimate interest). Whilst the guidance should acknowledge that it is not the SRA that regulates data protection and its guidance cannot extend, adjust or interpret data protection laws, a clear understanding of how the SRA's guidance and the guidance on data protection align and are in tension is necessary for this to be useful and legally accurate guidance to the SRA's regulated community.

19. The guidance refers to **mitigating** a breach of confidence:

> "Notwithstanding the above, if there is a breach of your duty of confidentiality, that may be mitigated if you have disclosed confidential information to the extent that you believe it necessary to prevent your client, or a third party, from committing a criminal act that you believe, on reasonable grounds, is likely to result in serious bodily harm."

While the principle of mitigation exists, the example does not involve a breach of duty of confidentiality. Knowledge of an intended crime likely to result in serious bodily harm is a straightforward example of where the iniquity exception applies.

This is one of several places where we think the guidance misstates the law and may inhibit disclosure, by effectively leading the reader to conclude that, in such a

[4] The Swift Review in the Post Office scandal is an example emerging recently. Swift X: An overview, the Legality Illusion https://richardmoorhead.substack.com/p/swift-x-an-overview. We suspect that the Court of Appeal's decision twenty years ago in Three Rivers (No. 5) may have caused some confusion there, but now that the relevant point has been clarified in recent appellate decisions, this would be a good opportunity to spell out that reporting to the board does not prejudice privilege.
[5] See Toulson and Phipps on Confidentiality in relation to public interest exceptions to confidentiality (para 5-165).

situation (i) they will have no duty to disclose, (ii) they will have no right to disclose, (iii) implicitly, they won’t be able to claim on their insurance (because it will be a deliberate wrongful act), and (iv) there is only the small consolation that there may be some mitigation of damage if sued. That is close to advising people not to disclose in such a case and, as such, is unhelpful.

20. There are a number of occasions when the guidance emphasises the **balances** to be struck only in one direction or with the tests where disclosure may be considered set higher than the law seems to (see para 13 above for example). An example is:

> “In considering any disclosure you should have in mind the absolute nature of legal professional privilege and the fundamental nature of the duty of confidentiality. You should remember that the circumstances in which confidentiality can be overridden are rare.”

Framing it in this way is likely to lead to cognitive bias rather than objective consideration. When such occasions arise they deserve serious thought and properly informative guidance. We do not think solicitors operate with a hair-trigger pushing them towards disclosure, quite the reverse. A more balanced approach, properly exploring how to respond when faced with prima facie wrongdoing, how and when to report up, and what to do beyond that if necessary, needs to be taken.

21. The guidance mostly refers to disclosure being permitted, though on occasion acknowledges that disclosures are **required**.

21.1. It is desirable for the guidance to address specific circumstances in which disclosure up (and sometimes out e.g. to a regulator or other authority) is or may be required.

21.2. A related topic to address is the risks to lawyers should they continue to help a client with work which is part of a fraud or iniquity.

21.3. Otherwise, the impression can be taken from the guidance that disclosure is all downside/risk for the lawyer and that non-disclosure is ‘safe’.

21.4. Professional discourse on this topic could then usefully follow.

22. There is no mention of **whistleblower protections**, which will be relevant to lawyers working on matters involving iniquity. We know that lawyer whistleblowers feel particularly vulnerable and we would like to see the SRA taking active and positive steps to address their vulnerabilities, acknowledging also that often a lawyer whistleblower need not become a whistleblower at all if the correct processes and support are in place.

23. We appreciate that these suggestions involve adding material to the existing guidance. We think that it could also benefit from some **general editorial and design work** in structuring and articulating its points across more effectively.

Concluding Thoughts

24. Improved communication on the subject of confidentiality and privilege, to promote fair and proper standards, would be of real help for

    24.1. The rule of law and society.

    24.2. Those who suffer from wrongdoing and non-disclosure.

    24.3. Lawyer's clients generally.

    24.4. Lawyers themselves, and those who work for or with them. They face sometimes acute ethical pressure in situations of known wrongdoing, and significant risk to their health and careers.

    If it is useful for the SRA to have our engagement in helping produce the guidance, we stand ready to help.

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