

The Archivist, the Lawyer, the Clients and their Files

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Introduction

Lawyers are most likely a paradox to historians and archivists. In many ways, history is the essence of our art and our science. In the common law, what has been done before, in the form of "precedent," must always govern what can be done now or hereafter. Why then do so few members of the legal profession have anything other than an anecdotal appreciation of legal history? My colleagues can amuse themselves by the hour telling more or less funny tales about judges and barristers, but have limited tolerance for genuine historical analysis.

And then there are the files. Are there any professionals, short of archivists themselves, who are such dedicated hoarders of paper? It is not unusual for a major commercial transaction to generate eight to ten documents, each of which may be more than fifty pages in length. Each document might go through a dozen or more recensions. Document boxes are filled and refilled with obsolete versions of the agreement. The lawyers will sometimes ask themselves what would happen if some unnoticed ambiguity in the final documents suddenly blossomed into a major law suit. Should one hope that the ambiguity might be resolved by a reference to the earlier drafts? Should one prudently preserve the earlier drafts? If one elects to preserve the earlier drafts, at what point should the file be purged? When the file is ready for purging, will one, in fact, face the dilemma that it is cheaper to keep all the paper indefinitely than to engage a relatively skilled person to winnow the chaff from the wheat? (In my experience, all of these questions are consistently answered by being ignored. Some files will be thoroughly weeded and well organized; others will be dogs' breakfasts in which virtually everything will be preserved.)

Can the archivist, the lawyer and the historian make common cause? Can the lawyer invite the archivist to assist in the appraisal and selection of documents for permanent retention? Can the historian provide the lawyer with the analysis that is so often lacking? The barrier to this happy solution of shared problems is the doctrine of solicitor-client privilege.

The Principle of Solicitor-Client Privilege

The most widely accepted definition of solicitor-client privilege comes from *Wigmore on Evidence*, a standard text concerning what may, or may not, be placed before courts in judicial proceedings. Wigmore sets the matter out very succinctly:

(1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.¹

The rule is also set out in *Cross on Evidence*:

In civil and criminal cases, confidential communications passing between a client and his legal adviser need not be given in evidence by the client, and, without the client's consent, may not be given in evidence by the legal adviser in a judicial proceeding.²

The concept of solicitor-client privilege is, in fact, quite old. The rules against a client's conversations with his solicitor being put into evidence in court go back to the sixteenth century.³ The fundamental value to be protected is articulated in various ways. Perhaps it is best seen as a mechanism for the protection of the judicial process. Only when clients are permitted to be completely frank with their legal advisers, in the confidence that their frankness can never be opened to the public or used against them, can the most complete legal advice be given and the legal process most effectively pursued.

I take the view that the principle of solicitor-client privilege is a mechanism whereby the legal and judicial process seeks to protect neither solicitors nor clients, but the process itself. What other reason could there be for the conversations between client and lawyer to be protected, but not those between patient and doctor, penitent and priest or citizen and news reporter?

The principle, as stated earlier, is articulated in a variety of ways. Client confidentiality is an ethical obligation of lawyers, a principle in the limitation of evidence to be adduced before the court, and a substantive right vested in clients. It might be useful to devote a few words to each of these aspects of the matter.

The Ethical Obligation

The ethical obligation of lawyers with regard to confidentiality is well stated in the Code of Professional Conduct published by the Canadian Bar Association. Chapter IV states the rule thus:

The lawyer has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of his client, and he should not divulge any such information unless he is expressly or impliedly authorized by his client or required by law to do so.⁴

Chapter IV goes on with a lengthy commentary on the ethical principle. Paragraph 2 of the commentary notes that the ethical obligation is the broadest statement of the rules of client confidentiality:

This ethical rule must be distinguished from the evidentiary rule of solicitor-client privilege with respect to oral or documentary communications passing between the client and his lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.⁵

The ethical rule does not focus, as the evidentiary rule does, on the question of whether or not information has been imparted to a lawyer in confidence or has been imparted as part of the solicitor-client relationship. Under the ethical rule, a lawyer must keep all client information, of whatever relevance or importance, confidential until forced or permitted to divulge it.

The Evidentiary Rule

As noted above, the evidentiary rules with regard to solicitor-client privilege probably represent the earliest formulation of the doctrine. The evidentiary rule is best appreciated by non-lawyers in the context of what are sometimes called "facts" and "juridical facts." (For criminal law purposes, the difference would be that between "moral guilt" and "juridical guilt.") The law has always understood that its processes might be inadequate to turn "facts" into "juridical facts." The law will live with this imperfection so long as the procedures which govern its process allow its fact-finding to be done with integrity and objectivity. If Bob tells his friend Carl that he has succeeded in defrauding someone, Carl can be forced to go to court to testify with regard to that conversation. If Bob tells his lawyer Dorothy the same story, Dorothy is beyond the reach of any judicial process by reason of the exclusion from evidence of communications between solicitors and clients.

The purely evidentiary formulation of the rules of client confidentiality has sometimes led to the conclusion that the principle was, in fact, one that protected lawyers as opposed to clients. The principle prevented the court from interfering with lawyers and their documents. The principle was, in effect, the corollary to the client's protection from self-incrimination.⁶ The evidentiary rules of solicitor-client privilege do not apply only to criminal proceedings. Similar evidentiary exclusions are fundamental to civil suits.⁷

The Substantive Right of Confidentiality

The evidentiary rules with regard to solicitor-client privilege focused primarily on civil litigation and, as noted above, could be viewed as a means of protecting lawyers and their files from the intervention of the court. Reflections on the rights of clients with regard to confidentiality have resulted in the evidentiary rule being broadened into what is now recognized as a substantive rule of confidentiality, which protects clients and, in effect, vests certain rights in clients. The substantive rule has been most recently and usefully stated by Mr. Justice Lamer, now Chief Justice Lamer, in the Supreme Court of Canada in *Descoteaux et al. v. Mierzwinski*.⁸ Justice Lamer formulated the substantive rule in the following way:

It would, I think, be useful for us to formulate this substantive rule, as the judges formally did with the rule of evidence; it could, in my view, be stated as follows:

(1) The confidentiality of communications between solicitor and client may be raised in any circumstance where such communications are likely to be disclosed without the client's consent.

(2) Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

(3) When the law gives someone the authority to do so something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it, except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

(4) Acts providing otherwise in situations under Paragraph (2) and enabling legislation referred to in Paragraph (3) must be interpreted restrictively.⁹

The substantive rule, as formulated by Mr. Justice Lamer, is still directed primarily at courts and suits in courts. The substantive rule is broader than the evidentiary rule, but still somewhat narrower than the ethical rule.

The Ownership of Documents

The ethical, evidentiary and substantive rules discussed above all govern information confidential to a client found in a client's files. Archivists would want to be aware of one further complication. Sometimes the actual documents in a client's file are, properly speaking, owned by the client. A client who brings a set of deeds and mortgages to his lawyer to review is allowing the lawyer to take custody of property which the client owns. The same would be true of surveys and expert reports for which the client has, directly or indirectly, paid. In practice the issue is, for the most part, a small one. Most documents exist in multiple copies. Many clients welcome the idea that their lawyers will maintain their legal files. The principle does, however, make one cautious about the ownership implications of a transmission of files.¹⁰

The Lawyer's Dilemma

From the lawyer's point of view, clients' information and clients' files are a thorny problem. Files are preserved while they are current as a matter of service to a client. Old files are preserved out of prudence in case some enquiry should arise which could be resolved by reference to earlier negotiations, correspondence or documents.

The rule with regard to client confidentiality does not prevent the destruction of files; it simply prevents their disclosure. The lawyer who wishes to deposit old files in an archives is unlikely to find his decision tested by reference to the evidentiary rules of confidentiality. In virtually every instance, any lawsuit which might be influenced by a forty-year-old file, would be barred by the Statue of Limitations in any event. The lawyer might face censure for failing to meet the ethical obligations of the profession, and moreover, would be impugning the substantive right to confidentiality which the client enjoyed.

A number of approaches to the problem have been suggested. In some jurisdictions, there is a move towards the development of a new ethic which would permit research in files older than a specified age.¹¹ Another approach is to create legislation which abrogates doctrines of solicitor and client confidentiality in files and documents that are over a specified age, seventy-five years for example.¹²

The problem of statutory reform in this area is, however, a vexing one. The substantive right to confidentiality is enjoyed by clients. A statute that limits this right is, in some measure, akin to a law that takes away a person's property. Lawyers might easily concede that they had no interest in a 100-year-old file. Descendants of the long dead clients, however, might take a different view.

The Archivist's Delusion

One aspect of the debate which continues to spark interest is the question of whether the great mass of lawyers' files existing throughout the country is, in fact, an untapped source of significant historical value. One is, from time to time, prey to the fallacy that documents 100 years old must necessarily be interesting, if not important, while documents one year old are merely grist from the daily grind. In fact, lawyers' work over the past century would more often be dull than distinguished, and would almost always be of more personal than public interest. This point is well recognized in the guidelines for archival preservation which have been prepared by the Ontario Archives with regard to the permanent selective retention of legal records.

When I think of files which have been generated over the past few years, I would be hard pressed to think of documents not already in the public domain which would be significant. A few years ago, one of my firm's clients participated in the reconstruction of an entire block of land in downtown Toronto. The cost of the enterprise was astronomical. A great deal of what was important and historically significant in the file was generated by the City of Toronto Planning Department. These records from a third party which were neither commissioned nor directly paid for by the client, would be available to the public in the City's archives.

A second set of documents in that file concerned certain land transfers and mortgages. Once again, these documents for the most part will be registered against the land in the Registry Office. The documents and correspondence in the file which would not be found in records already in the public domain would be voluminous in content, but relatively narrow in scope. The significant parts of the transaction (negotiations among former joint venturers when a "shotgun" agreement of purchase and sale was forced on an unwilling party; negotiations with City officials concerning amenities to be supplied) were mainly oral, and did not find their way into the file except where confirming letters had been sent. Much of what can be known about the development is in the public domain already. Very little of what cannot be known until the client's file is opened (if that ever occurs) would be of long-term historical interest. I suspect this to be the case in many other instances.

If, as suggested above, there is "less than meets the eye" in many commercial law files, would historians have more luck in the personal services files? Files concerning wills, matrimonial matters and criminal law might fall within these categories. Christine Kates has cited an example of a criminal proceeding against an aboriginal woman who

had murdered her children while mentally unstable. Legal proceedings led her lawyer to take extensive interviews on her behalf with other residents of her community. The contents of these interviews could be exceptionally interesting.¹³ This case I presume to be an unusual one. In a great many criminal cases, however, little that goes on between the lawyer and the client would be of general interest or importance. The vast majority of criminal cases would probably generate very little in the way of file documents which would be of more importance than the public documents arising out of the trial of the action.

The other personal files, matrimonial and estate matters especially, would be the most sensitive of all from the client confidentiality point of view. Obviously, such files could tell researchers a great deal about the people involved; where the people were important for other reasons, insight into these most personal matters might be illuminating. At this point, the substantive and ethical issues become overwhelming. A client facing divorce will unburden him- or herself to a lawyer in a variety of ways in the complete, and well-justified confidence that the items revealed will go no further.

What would be of interest in a series of client files? I have long harboured a suspicion that the legal profession is, to a much larger extent than it would like to admit, a creature of its technology. The profession as such predates not only word processors and xerox machines, but also published legal reports, codified statutes, encyclopedias, digests, standard textbooks and legal education. The concept that the profession could and did exist without any of these accoutrements is an interesting reflection on the nature and scope of the skills which lawyers exercise. To what degree have all of the technological developments that we now enjoy (few of which, including codified statutes, are more than a century old) altered fundamentally our approach to our professional roles? Most of us have encountered the concept of "indenture" — the document copied on two ends of a sheet of parchment and cut apart in an irregular series of scallops. What scope was there for contract law when indentures were the only vehicles of agreement? What scope was there for contractual drafting when typewriters and carbon paper were the only methods of multiple reproduction? Have word processors and xerox machines (which make documents of two hundred or three hundred pages commonplace) sharpened or dulled the analytical skills of their draftsmen?

Conclusion

We do not, as yet, have an answer to the conundrum of solicitor-client privilege. In the last analysis, the problem lies not with historians, archivists, and lawyers, all of whom could probably agree on a regime for depositing permanently valuable files in the appropriate archives; the problem lies rather with clients, in some cases long dead, whose rights cannot be negotiated away and with regard to whom it is difficult to legislate any general abrogation of the right of confidentiality.

Perhaps the best hope for a resolution to the problem lies in the development of a new ethic which will leave questions of access to client's files properly within the judgement of lawyers responsible for the client. A "seventy-five-year rule," for example, would allow some degree of research and disclosure while permitting anything that the client, or descendants of the client, might find unsettling to remain clothed in confidentiality.

Notes

- 1 J. Wigmore, *Evidence* (J. McNaughton, ed., 1961) para. 2292. Wigmore is cited in both the U.S. and the Commonwealth on this point. His definition of "solicitor and client privilege" is adopted in Dawson, Tucker, and Whyte, "The Attorney Client Privilege," *University of Richmond Law Review* 19 (1985), p. 559.
- 2 *Cross on Evidence* (5th ed., 1979), p. 282.
- 3 Manes, "Solicitor/Client Privilege," *The Advocates Society Journal* (February 1988), p. 20.
- 4 Canadian Bar Association, *Code of Professional Conduct* (1974), p. 12.
- 5 *Ibid.*
- 6 *Supra*, note 4, p. 21.
- 7 It is the evidentiary rule which gives rise to the most complex problems in the jurisprudence with regard to solicitor-client privilege. At what point does a client waive his or her privilege so that his other evidence can be adduced in court? The questions with regard to limitations on privilege and waiver of privilege are beyond the scope of this paper. For an interesting discussion of these matters in the context of civil law, see Manes, *Supra*, footnote 4. For discussion of the context of criminal law, see Bates, "Legal Profession Privilege: The State of the Game in the Commonwealth," *Criminal Law Quarterly* 26 (1984), p. 414.
- 8 *Descoteaux et al v. Mierzwinski* [1982], 1 S.C.R. 860. In this case the court follows with approval its own earlier decision in *Solosky v. The Queen* [1980] 1 S.C.R. 821.
- 9 *Ibid.*, p. 875.
- 10 See general, Bennett and Zava, "Confidentiality," Canadian Bar Association - Ontario (Seminar Proceedings), *Solicitor-Client Relationships* (1987).
- 11 Christine Kates, "The Osgoode Society: Preservation of Legal Records," *The Law Society Gazette* (1987), p. 58.
At p. 62, the author reports the following:
In England, the Law Society encourages lawyers to contact the British Records Association to ensure preservation of historically important records. Prior to disposition, solicitors are encouraged to review files and seek waivers if the client is still living. There is, however, an assumption that where the file is at least 100 years old, there is little or no need for concern regarding privacy or privilege.
- 12 See, for example, *The Legal Profession Act*, Statutes of British Columbia, 36 Elizabeth II, Chap. 25. Section 25 of this Act permits the ventures of the Law Society of British Columbia to make rules which would:
Provide for the deposit by a member or former member [of the Law Society of British Columbia], in an Archives Library or Records Management Office in Canada, of records in his possession, and the rules may provide for
 (i) the time after which the records may be deposited,
 (ii) the restrictions or limitations on public access which he may attach on depositing them, and
 (iii) circumstances under which he will not be liable for disclosure of confidential or privileged information arising out of the deposit.
In fact, no rules have been made pursuant to this statute. As far as we can determine, no jurisdiction in Canada has established any such rule.
- 13 Kates, "The Osgoode Society," pp. 59-60, note 12.