



Solicitors trying to do the best for their clients may get struck off if they mislead the Court

In-house solicitors need and want to do the best for their internal clients. But this can conflict with their duties to the court in a dispute or prosecution. What happens if a solicitor obtains potentially damaging privileged information but is asked to present a positive case for their internal client in court? If they give misleading evidence – the answer is they may be struck off.

Alastair Brett was formerly legal manager at Times Newspapers Ltd. The Leveson inquiry considered Mr Brett's actions in connection with a 2009 story in The Times which revealed the author of an anonymous blog entitled 'Nightjack', chronicling the life of a police officer. The article was based on information gained by a reporter hacking the email account of the police officer who wrote the blog. The journalist involved went to Brett before the story's publication and admitted to the hacking. Brett advised him to work back and see if the author's identity could be pieced together using publically available information.

Brett, subsequently, had to arrange witness statements in the legal action brought by the police officer. In those statements there was no mention of the hacking and Brett's communications with the officer's lawyers also denied the hacking. He consequently allowed the court to believe that the officer's identity had been uncovered by legitimate means. This was exposed by the Leveson inquiry and the SRA referred Mr Brett to the Solicitors Disciplinary Tribunal (SDT). The SDT found that he had breached the Solicitors' Code of Conduct, having knowingly allowed the court to be misled (rule 11.01), and having failed to act with integrity (rule 1.02).

The SDT suspended Brett for 6 months and ordered him to pay costs of £30,000.

Brett v The Solicitors Regulation Authority [2014] EWHC 2974 (Admin)

Brett appealed on the basis that the SDT had not had proper regard for the legal privilege attached to the information he had received from the journalist. All Brett's knowledge had come from privileged communications with his client – in such circumstances how could he pass that on to the court?

On appeal, although the High Court agreed that Brett believed that revealing his client's admission to the court was incompatible with

his duty to that client, it ruled that he did have other options. Caught between his duty to the court and his duty to the journalist, Brett should not have misled the court; rather, he should have sought the journalist's consent to waive the privilege. Alternatively he should have corrected any misleading impression given by the witness statement, making it clear that the process it showed was only a way in which the identity of 'Nightjack' could be discovered rather than a definitive account of what actually occurred. If he could not obtain the waiver of privilege then he should either have taken the position that he was not prepared to tell the court how the author's identity was discovered or declined to act for the journalist.

While the court concluded that Brett had not 'knowingly allowed the court to be misled', it did find that he had still breached rule 11.01 by recklessly allowing the court to have been misled, and by extension had failed to act with integrity in accordance with rule 1.02.

Conclusions

This situation can be difficult for an in-house lawyer, especially taking into account the obligation to act in the best interests of each client. It is difficult to imagine a situation where a client's case is helped by declining to provide evidence on an important element of that case. Generally, when lawyers are caught between a legal privilege duty to a client and a duty not to mislead the court, they are faced with a choice between obtaining a waiver of privilege from the client or by declining to act for them further. Either way that can be a difficult position.

Contacts

Tim Davies and Tim Pope are members of Burgess Salmon's regulatory team.



Tim Pope
Legal Director
+44(0)117 939 2230
tim.pope@burgess-salmon.com



Tim Davies
Trainee Solicitor
+44(0)117 307 6992
tim.davies@burgess-salmon.com