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PART 3 – CONFIDENTIALITY AND PRIVILEGE

I Confidentiality

Equitable duty - 'obligation of conscience arising from how information was communicated or obtained'

Rationales for the duty of confidentiality

1. Effective functioning of the adversarial system - encourages full and frank disclosure
2. Promotes public faith in lawyers and the legal system
3. Client counselling/law compliance - clients will consult before engaging in unlawful conduct

r 9 ASCR: Confidentiality

- 9.1 A solicitor must not disclose any information which is confidential to a client to anyone UNLESS:
- 9.1.1/9.1.2 A solicitor/barrister/entity who is an employee of the same law practice or is providing legal services in relation to the client
- 9.2 Exceptions for disclosure
- 9.2.1 client expressly or impliedly consents
- 9.2.2 compelled by law
- 9.2.3 obtaining advice for legal or ethical obligations
- 9.2.4 probable commission of a serious criminal offence
- 9.2.5 preventing imminent physical harm to the client or another person (Bar Rules r82)
- 9.2.6 insurer of the solicitor or law practice

r 144 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW): Confidentiality

- A barrister must not disclose confidential information concerning any person a duty is owed UNLESS
- (a) information is obtained by another person who is not bound by the duty of confidentiality and does not give the information confidentially to the barrister
- (b) person has consented to the disclosure of confidential information generally or specifically

National Standards Committee v Shand [2019] NZLCDT

Facts	• Ex-client made false critical comments to the media about Mr Shand's poor conduct in representing him • Mr Shand responded to the media and gave negative published comments about his ex-client e.g., his ex-client would not cooperate about settlement • Ex-client reported him to the National Standards Committee • Mr Shand argued that his client had waived privilege as he went to the media
Judgement	Court found rules do not permit the disclosure of confidential information to the public
Held	Mr Shand breached r 9 ASCR and engaged in unsatisfactory conduct

Consequences for breach of confidentiality

- Embarrassment to the client
- Loss of Future Clients - bad reputation as untrustworthy lawyer
- Client can take action
 - Breach of contract
 - Injunction - disqualifies you from acting for your client
 - Negligence - compensatory for client
 - Complaint to OLSC - fine and reprimand for the lawyer

Legal Services Commissioner v Tampoe [2009]

Facts	• Schapelle Corby - convicted in Indonesia for drug smuggling • Mr Tampoe spoke to Mercedes Corby (sister) while representing in Indonesia • Mercedes Corby (agent) provided the lawyer with instructions about past criminal convictions within the Corby family - intended to be confidential • Mr Tampoe disclosed the information and commented saying Mercedes had lied to him on a television interview 'Sunday'
Held	Mr Tampoe breached his duty of confidentiality - struck off the role

Victorian Legal Services Board v Gobbo [2020] VSC

Facts	Gobbo was a police informant while acting as a defence barrister and disclosed confidential information about her clients to the police
Judgement	• Duty to avoid conflicts between client interests and your own interests is fundamental • Gobbo was found of professional misconduct - struck off the role

AB v CD; EF v CD [2018] VSC

Facts	• Gobbo (EF) asked for public interest immunity - name to be Lawyer X • Victorian Police argued risk of death to EF would be certain
Judgement	VSC found a competing and more powerful public interest in favour of disclosure - to maintain public confidence in the integrity of the criminal justice system

II Professional Privilege

Privilege

- Is a subset of confidentiality
 - Only communication for the dominant purpose of advice or litigation privileged
- Is stronger than confidentiality
 - Use privilege to resist disclosing information/producing documents to a third party
 - Privileged information is protected from all forms of compulsory disclosure unless expressly ousted by statute
- Privilege is sourced in public policy and is a common law doctrine - Evidence Act
- NB: Confidentiality is sourced in contract and is an equitable doctrine - Conduct Rules

Baker vs Campbell (1953)

- Privilege and confidentiality are owned by the client
- Privilege rests on wider public policy grounds directed at fostering trust and candour in a lawyer-client relationship - not the contractual, equitable or professional obligation owed
- Privilege is in conflict with the principle that all evidence should be available for presentation in court

III What is Privilege?

O'Reilly v Commission of the State Bank of Victoria (1983)

Privileged communications are those confidential communications between a lawyer and client made for the purpose of advice or for use in existing or anticipated litigation

Evidence Act 1995 s 118 (Advice Privilege)

Evidence is not to be adduced (on objection of the client) if it would result in the disclosure of:
confidential communication between (a) client and the lawyer (b) 2 or more lawyers acting for the client (c) contents of a confidential document prepared by the client, lawyer or another person for the dominant purpose of the lawyer/s to provide legal advice to the client

NB: 'Legal advice': incl. expounding of law and professional advice as 'what may prudently and sensibly be done in the legal context'

Evidence Act 1995 s 119 (Litigation Privilege)

Evidence is not to be adduced (on objection of the client) if it would result in the disclosure of:
(a) confidential communication between the client and another person (b) or the contents of a confidential prepared for the dominant purpose of the client being provided legal services relating to an (incl. pending/anticipated) Australian or overseas proceeding (incl. Proceeding before the court) in which the client is/may/was/might have been a party

A To Establish Legal Professional Privilege

- 1) Communications must be made in the context of the relationship of the client and the lawyer
 - Court determines whether the person is a client or are communications between lawyers or clients and third parties for the purpose of advice or litigation
- 2) Communications must be made for the dominant purpose of enabling the client to obtain legal advice or actual/contemplated litigation
- 3) Communications must be confidential in nature - recipient should understand this obligation

Dominant purpose

- Transition from a sole purpose test to a dominant purpose test
- Purpose needs to exist at the time the documents are created or communications took place
- Documents used later for another purpose can still remain privileged
- Burden to prove the document or communication was used for the dominant purpose lies on the party claiming privilege
- *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999)

Evidence Act 1995 s123: Criminal proceedings

Removes the privilege and allows a criminal defendant to adduce the evidence unless it is evidence of:
(a)(b) confidential communication/confidential document made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person

Glencore International v Commissioner of Taxation [2019] HCA	
Facts	- Documents were stored in a law firm electronic file system - hacked and stolen - Documents (Paradise Papers) concerned offshore taxation arrangements of many high profile companies/individuals - Glencore (client) documents ended up in the tax office (public domain) - Documents were privileged - dominant purpose of advice - Glencore brought proceedings in the HCA to seek an injunction and order for them to be returned - sought on the basis of professional privilege
Issue	HC asked could privilege be a sword? Are there any other remedies that might be available e.g., injunction? NB: Injunction stops documents being used for a particular purpose rather than privilege
Judgement	- Injunction is an equitable remedy (confidentiality basis) - Glencore did not argue confidentiality and asked that privilege should also entail a legal right to stop the ATO from using the documents - cannot change the law
Held	Once privileged communications have been disclosed only equity may protect their use and hence action failed

B Limitations of Privilege

- Does not rest on any contractual duty - client cannot extend the area covered by privilege by contract
- It does not extend to protect communications directed against the public interest e.g., communications for further fraud are excluded from privilege

Evidence Act 1995 s 125: Loss of client legal privilege: misconduct

Does not prevent the adducing of a communication made or document prepared by a lawyer or client

- (a) in furtherance of the commission of fraud or an offence or the commission of an act that renders a person liable to civil penalty
- (b) in furtherance of a deliberate abuse of power

NB: If a client admits and tells you they have been charged with fraud - it would likely be covered by privilege

C Abrogation of Privilege

- Privilege will not apply when it is abrogated or ousted by express words in a statute
- Presumption that the Parliament does not intend to operate to impair an existing substantive right or interfere with the basic common law doctrine unless there are express words

Attorney General (NT) v Maurice (1986)

- Privilege can only be waived by the client expressly or by implication - occurs when a person has used the privileged material in a way that would be unfair for them to assert privilege
- Waiver occurs when there is 'inconsistency between the conduct of the client and the maintenance of the confidentiality' (inconsistency test)
 - o Filing or service of the documents - full waiver
 - o Mere reference will not form the basis of a waiver
 - o Client lodges a complaint about a lawyer - waived privilege and confidentiality

r 31 ASCR: Inadvertent disclosure

31.1 A solicitor to whom material known or suspected to be confidential is disclosed by another solicitor/person and is aware it was inadvertent must not use the material and must:

31.1.1 return, destroy or delete the immediately

31.1.2 notify the other solicitor/person of the disclosure and prevent inappropriate misuse

31.2 A solicitor who reads the confidential information before becoming aware of its status must:

31.2.1 notify the opposing solicitor/person
31.2.2 stop reading the material despite client instruction to do so
NB: Will not carry the same consequences of a waiver if produced in error and action is taken to restore

Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd (2012)

Facts	- A number of privilege documents were listed as non-privileged and produced on a compact disc in error - Opposition inspected these documents - 3 months a demand was made for the documents to be returned and not used
Issue	If a reasonable solicitor had received the documents would they have realised the documents had been disclosed by an obvious mistake?
Judgement	Yes - equity is suffice to impose obligation on the solicitor to return the documents
Held	Order for an injunction

D Settlement Privilege

Public policy that the law should encourage the settlement of disputes outside of a contested hearing

- Cost order (indemnity principle)
- Winning party will have to pay the financial consequences of refusing a favourable offer of settlement - document is a Calderbank letter marked 'without prejudice save as to costs'
 - Any correspondence made of the purpose of achieving settlement are excluded from admissibility into evidence
- Evidence Act 1995 s 131 - communication or a document (delivered or not) in connection with an attempt to negotiate a settlement of a dispute

Field v Commissioner for Railways for New South Wales (1957)

Facts	- Mr Field injured himself when he fell from a railway carriage - sued for damages - In their negotiation - railway lawyers sent Mr Field a Caulderbank letter asking him to attend a medical examination and discussed settlement - Mr Field was examined by a doctor and disclosed he hopped off the train while it was moving
Issue	Were those comments he made to the doctor privileged?
Judge ment	- Comments were not part of negotiation - medical opinion for leverage 'Without prejudice' is not concerned with the objective facts that may be ascertained during negotiations but with the use of negotiations

Elements of communications aimed at settlement

- Litigious dispute contemplated between parties
- Communication with the express or implied intention it would not be disclosed to the court
- Purpose of negotiation must be to try to effect settlement