

This article will decipher the differences between confidentiality and client legal privilege, and what you can expect from your lawyer.



On face value it may be hard to distinguish between a lawyer's duty of confidentiality and privilege. Both concepts aim to encourage trust between clients and lawyers to better help lawyers resolve a dispute. This is enforced as a result of the large responsibility subsumed by lawyers when they take a client's matter.

### **A. CONFIDENTIALITY**

The requirements of confidentiality between lawyers and their clients are outlined under Rule 9 of the *Australian Solicitors' Conduct Rules 2015 (NSW)*.

Rule 9 states that a solicitor must not disclose any information:

- Which is confidential to a client, AND
- Acquired by the solicitor during the client's engagement.

To any person who is not:

- A solicitor employed in the original solicitor's law practice, OR
- A barrister, or person otherwise engaged for the purposes of delivering legal services in relation to the client.

Rule 9 goes on to state the exceptional situations which permit solicitors to disclose confidential client information. These include if:

- The client consents to the information being disclosed,
- The solicitor is compelled by law (e.g. in court proceedings),
- The solicitor discloses it in a confidential setting to obtain advice on solicitor's legal or ethical obligations,
- The solicitor discloses the information to disclose the probable commission of a serious criminal offence,
- The solicitor discloses the information to prevent imminent serious physical harm to the client or another person, OR
- The information is disclosed to the insurer of the solicitor/practice.

Most information and communication passed between a lawyer and a client will be confidential. However, as highlighted above there are a number of circumstances that allow this confidentiality to be broken.



## **B. CLIENT LEGAL PRIVILEGE**

Client legal privilege, sometimes known as legal professional privilege, is a right given to a client to protect certain documents and communications from being accessed by the other party in a litigation matter. This prevents certain information from being heard in court. Privileged information cannot be heard at trial; however, there are a few circumstances in which privilege may be lost.

Client legal privilege protects any confidential communication or document shared by a client to their lawyer. Section 117 of the *Evidence Act 1995* (NSW) defines confidential communication and documents to be:

any communication or document made in such circumstances that, when it was made either party was under an express or implied obligation not to disclose its contents, regardless of whether there was an obligation of confidentiality arising under law.

To be classed as privileged, the confidential communication or documentation must have been undertaken for the purposes of providing legal advice to the client or be in relation to a litigation matter, as enforced by ss118 and 119 of the *Evidence Act 1995* (NSW).

Privileged communications do not only have to be between the client and the lawyer. Communication between the lawyer and third parties (on behalf of the client), or between the client and third parties may also justify a need for privilege.

Examples of privileged communications may be drafts of documents, such as pleadings or letters of demand, or file notes taken in preparation for the trial. Letters of advice and any communication made for the purposes of giving legal advice to the client is usually regarded as privileged information also.

Privilege can be waived by the client, usually by written communication giving their consent that the material under privilege can be heard in court. It can also be seen to be waived if the client, or solicitor, freely disclosed enough of the document/communication for the main content to be known.

As outlined in *Kang v Kwan*, a 2001 NSW Supreme Court case, whoever asserts that client legal privilege has been lost, waived or does not apply, has the burden to prove this in court.

Comasters can advise clients on Confidentiality duties and their right to Client Legal Privilege.

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