EVERYTHING YOU TELL ME IS CONFIDENTIAL EXCEPT THAT WHICH I AM OBLIGED TO TELL OTHERS

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EVERYTHING YOU TELL ME IS CONFIDENTIAL EXCEPT THAT WHICH I AM OBLIGED\(^1\) TO TELL OTHERS

1. Confidentiality and its first cousin privacy are the oxygen in the mediation environment. The links to the “\textit{without prejudice}” and privilege concepts enable disclosures to be made which are then sealed from view when the mediation ends – successful or not.

2. The importance of confidentiality is emphasised in our Code of Ethics which requires that our members “\ldots\textit{should be faithful to the expectation of trust and confidentiality inherent in the process.}”\(^2\)

3. The agreement often includes a ‘\textit{confidentiality}’ provision. Typical wording for mediations may include this type of provision:

   “\textit{As the condition of my being present or participating in this mediation, I agree that I will, subject to the terms of this Agreement to Mediate and unless otherwise compelled by law, preserve total confidentiality in relation to the course of proceedings in the mediation. I include in this commitment any exchanges that may come to my knowledge, whether oral or documentary, concerning the dispute passing between any of the parties and the mediator or between any two or more of the parties during the course of the mediation.}

   \textit{This agreement does not restrict my freedom to disclose and discuss the course of proceedings and exchanges in the mediation within the organisation and legitimate field of intimacy of the party on whose behalf or at whose request I am present at the mediation. This includes the advisers and insurers of that party and is subject to requirement always that any such disclosures and discussions will only be on this same basis of confidentiality set out above.}”

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\(^1\) I have used the word “\textit{obliged}” to distinguish those cases where people choose to breach confidentiality from those where breach is compelled.

\(^2\) Arbitrators’ and Mediators’ Institute of New Zealand: 25 July 2003 ed.

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4. In the developing mediation jurisprudence the commitment to confidentiality has received strong support from the Courts. The Courts have been slow to lift the confidentiality veil\(^3\), with the exception of the Employment Court. The impact of that decision was reversed by legislation.

5. Indeed our Court of Appeal seemed somewhat bemused when the parties agreed to lift the confidentiality veil so as to enable litigation to proceed\(^4\). Now, even in the Employment Court preservation of confidentiality is given strong support. For example, the statutory confidentiality provisions of the Employment Relations Act 2000 (s148) have also been held to apply to mediations outside the Department of Labour’s Mediation Services\(^5\) and the definition of “in the process of mediation” has been extended to include the period of arranging mediation\(^6\).

6. Arguments advanced in support of maintaining confidentiality include:

   .1 avoidance of publicity,

   .2 creating an environment for frank disclosure,

   .3 a safe space outside of the litigation forum,

   .4 opening the way for stating genuine needs,

   .5 protection of the reputation of mediators by reinforcing impartiality through limiting their ability to give evidence, and,

   .6 after the event, contributing to finality by limiting the scope of any review.

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\(^3\) With the stark exception of the Employment Court in *Benchmark v Crummer*.


\(^5\) *Love v NZ Post* [2003] 2 ERNZ 172.

7. Confidentiality is at work as between the parties and in the private meetings between the mediator and an individual party.

8. The policy reasons behind supporting confidentiality include the concern to uphold the parties’ original agreement which typically includes a confidentiality provision and with the settlement agreement being full and final. If the parties commit to confidentiality it is said to be in everyone’s interests that the confidentiality is upheld. Otherwise no-one could trust the process which allows so many disputes to settle.

9. As the Court of Appeal said, once settlement is achieved:

“The Court is not available as a means of enabling parties who say – we wish we had gone about things differently and been more careful and insistent to get a second bite of the cherry”.

10. Mediation as a dispute resolution tool is now given significant statutory recognition. Currently 45 statutes legislate for a mediated process as the primary conflict resolver. Many, at least 15, have specific provisions providing for confidentiality.

11. It is not surprising therefore that our Evidence Act 2006 expressly recognises mediation privilege in section 57 of that Act. That accords privilege to oral and

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7 Hildred op cit at paras 44-46.
8 Boulle, Goldblatt & Green op cit at p360, footnote 59.
9 “57 Privilege for settlement negotiations or mediation

(1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
   (a) was intended to be confidential; and
   (b) was made in connection with an attempt to settle or mediate the dispute between the persons.

(2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

(3) This section does not apply to—
   (a) the terms of an agreement settling the dispute; or

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documentary evidence given, if intended to be confidential, and made in connection with an attempt to mediate the dispute. Of course the settlement agreement itself is excluded. The privilege can only be waived by all persons who have the privilege (s65) or by a Judge disallowing the privilege (s67). The Judge can also waive confidentiality protection under that Act (s 69).

12. The grounds for a Judge disallowing privilege are interesting. The Judge must be satisfied that there is a prima facie case that the communication was made or received for a dishonest purpose or to enable a person to plan or commit an offence. A Judge may also disallow the privilege where evidence of the communication is necessary to run a defence. These are quite limited grounds.

13. The grounds, particularly the latter one, hint at an underlying tension between a number of separate interests. In fact there are a surprising number of interests competing with confidentiality. They may include:

1. The interests of the parties to the agreement,

2. The interests of one of those parties in subsequent litigation,

3. The interests of a third party in potential or actual litigation,

4. The interests of a party who may be at risk of harm, physical and or psychological at the hands of another or from themselves,

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(b) evidence necessary to prove the existence of such an agreement in a proceeding in which the conclusion of such an agreement is in issue; or

(c) the use in a proceeding, solely for the purposes of an award of costs, of a written offer that—

(i) is expressly stated to be without prejudice except as to costs; and

(ii) relates to an issue in the proceeding.”

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10 Evidence Act 2006 s57.

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The interests of the public in maintaining the administration of justice, including prevention of crime and ensuring that criminals are brought to justice,

The interests of the public in seeing that justice is done\textsuperscript{11}.

14. The value of preserving confidentiality is also given recognition in s 69 of the Evidence Act 2006. This provision states:

\textbf{“69 Overriding discretion as to confidential information”}

\begin{enumerate}
\item A direction under this section is a direction that any 1 or more of the following not be disclosed in a proceeding:
\begin{enumerate}
\item a confidential communication:
\item any confidential information:
\item any information that would or might reveal a confidential source of information.
\end{enumerate}
\item A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
\begin{enumerate}
\item preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
\item preventing harm to—
\end{enumerate}
\end{enumerate}

\textsuperscript{11} \textit{TVNZ Limited v Langley Productions Limited} [2000] 2 NZLR 250.
(i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or

(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or

(c) maintaining activities that contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the Judge must have regard to—

(a) the likely extent of harm that may result from the disclosure of the communication or information; and

(b) the nature of the communication or information and its likely importance in the proceeding; and

(c) the nature of the proceeding; and

(d) the availability or possible availability of other means of obtaining evidence of the communication or information; and

(e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and

(f) the sensitivity of the evidence, having regard to—

(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
(ii) the extent to which the information has already been disclosed to other persons; and

(g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.

(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged."

15. A person who believes that he or she had confidentiality protection either by nature of the relationship e.g. through contract, or through operation of statute such as the Privacy Act, may call in aid the section to exclude the confidential information from evidence. The Judge is required to consider a list of items which seek to balance individual and public interest in determining whether or not to give the information or even the source of that information, protection from disclosure.

16. At present no guidelines are offered by the Institute so as to guide mediators through the labyrinth of contractual obligations, ethical duties and public and legal responsibilities including those under the Privacy Act 1993 and the Health Information Privacy Code 1994.

17. Yet as family relationships become more exposed to mediation and restorative justice processes in criminal law are advanced the risk of conflict between confidentiality and other interests increases.
18. This paper deliberately uses the word “obliged” in its heading “Everything is confidential except that which I am obliged to tell others”. The obligation may arise under statute or through application of the common law. If imposed it will defeat the expectation of at least one party who held the belief that the information was confidential.

Cases

19. At issue is not just the question of ethical responsibility and duty, but also legal responsibility and duty. One inevitably impinges on the other.

20. Over a decade ago Roger Chapman in his article “The Role of Lawyers in Mediation”\(^\text{12}\) stated:

“It is thought that the mediator’s duty of confidentiality may be similar in scope to that of a lawyer; for example, a mediator may be entitled – and indeed possibly obliged – to disclose credible information that a serious crime is likely to be committed or that a child has been sexually abused. Again, however, the true position is still the subject of debate.”

21. We do not need to await a “mediation” case to guide us around this issue. Rather we can take note of the already developing case law and take that as a sufficient indicator of what our duties and obligations may be as mediators and what our professional bodies might consider doing to give guidance to practitioners.

\(^{12}\) [1996] NZLJ 186 at 189

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Some Cases

*Vitaly Tarasoff v The Regents of the University of California* 17Cal.3d 425: Westlaw 551 P.2d 334

22. On 27 October 1969 a young woman, Tatiana Tarasoff was killed by Prosenjit Poddar. It transpired that some two months prior to this killing the Campus Police had cause to detain Mr Poddar. It seems he was examined by a psychologist who decided that he should be committed. Two doctors, both psychiatrists at a local hospital, concurred with the psychologist’s decision. But the Chief of the Department of Psychiatry countermanded the psychologist’s decision and directed that staff take no action to confine Mr Poddar. In the discussion with the psychologist Mr Poddar confided his intention to kill Tatiana Tarasoff once she returned from her holiday in Brazil. Tatiana and Prosenjit apparently had some relationship and Prosenjit lived in a flat together with Tatiana’s brother and nearby.

23. The plaintiffs, being Tatiana’s parents alleged a failure on the part of the psychologist and the police to warn Tatiana or them of the impending danger and of course of the failure to confine Prosenjit Poddar. The case came before the Supreme Court of California. The Court concluded that when a psychotherapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the intended victim against the danger.

24. The discharge of the duty, depending on the nature of the case, may call for the therapist to warn the intended victim or others likely to apprise the victim of the danger, to notify the police or to take whatever other steps are reasonably necessary under the circumstances.13

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13 Op cit p431.

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25. The court explored when relationships may support an affirmative duty for the benefit of third persons. For example, a hospital must exercise reasonable care to control the behaviour of a patient which may endanger other persons. A doctor must also warn a patient if the patient’s condition or medication renders conduct such as driving a car, dangerous to others.\textsuperscript{14} Dealing with the balancing of interests the Court observed:

“We realize that the open and confidential character or psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats. Such disclosures could seriously disrupt the patient’s relationship with his therapist and the persons threatened. To the contrary, the therapist’s obligations to his patient require that be not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discretely and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger. (See Fleming & Maximov The Patient or His Victim: The Therapist’s Dilemma (1974) 62 Cal.L.REV.1025,1065-1066.)”

26. The Court continued:

“The revelation of a communication under the above circumstances is not a breach of trust or a violation of medical ethics as stated in the Principles of Medical Ethics of the American Medical Association... ‘A physician may not reveal the confidence entrusted to him in the course of medical attendance...unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.’ We conclude that the public policy favoring protection of the confidential character of the patient-

\textsuperscript{14} Op cit p436.

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psychotherapist communications must yield to the extent to which the
disclosure is essential to avert danger to others. The protective
privilege ends where the public peril begins.”

27. “Tarasoff” has found its way into New Zealand law.

R v William Langdon Matthews

28. Mr Matthews is a paedophile and suffers from bipolar affective disorder. He was
subject to a compulsory treatment order under the Mental Health (Compulsory
Assessment) Act 1992. He had been discharged from the psychiatric ward at
Rotorua Hospital but attended on the day in question as an outpatient. He saw a
doctor, Francis Matete. During the consultation he disclosed to Dr Matete that he
had had sexual contact with a minor, a young boy, a relative of the person at
whose house he was staying. He said what he had done was an offence and he was
distressed by it and needed help.

29. Dr Matete decided he needed to involve the police based on the information
disclosed. He thought there was a child at risk. So he told the accused that it was
the accused that needed protection and the best way to get that protection was to
have the police involved. The accused seemed to accept this and apparently said
something to the effect that he was relieved this was now going to be out in the
open. The doctor believed he had consent to call the police. The accused was lucid
in his communication and his mood stable.

15 Op cit pp441-442.
30. Dr Matete rang the Rotorua Police Station. He said he wanted to report a crime and it involved a minor. Twenty minutes later a detective arrived. After a brief discussion the accused agreed to accompany the detective to the Police Station. He was cautioned and the interview was videoed. During the course of the videoed interview Matthews made admissions capable of supporting three charges in respect of the child. He also made admissions of a similar kind relating to two other boys over the past fourteen years. At the end of the interview the accused was arrested and charged. He was then committed for trial on charges arising out of his admissions. Before the Court of Appeal, and pretrial it was argued that the accused’s confession was inadmissible – because of involvement of Dr Matete and in any event the admission should be excluded on grounds of fairness. The first part of the argument relied on a provision in the old Evidence Amendment Act (1980) No.2 (EAA) preventing a registered medical practitioner from disclosing in criminal proceedings protected communications made by a patient. The Court dismissed this section as irrelevant on the particular facts. For the second ground of fairness it was argued that the statement was “tainted” because the police only approached the accused as a result of the so called “inappropriate phone call from Dr Matete to the police.” For this part of the argument reliance was placed on the Health Information Privacy Code 1994. The Court accepted that Dr Matete’s employer was a Health Agency and that what the accused had told Dr Matete was “health information” as defined in the Code. The Court referred to the fact that a ground for disclosure is where the disclosure is authorised by the individual concerned. The Court found Dr Matete believed he had that authority. But the Court further considered that even if authority had not been given the doctor’s actions were justified under rule 11(2)(d) of the Health Information Privacy Code.

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16 R v Matthews CA 370/03: 8 March 2004 at para 22.
31. Under that rule, disclosure of information is justified if it is necessary to prevent or lessen a serious and imminent threat to public safety or to the life or health of another individual. The fact was that the accused was living in a house with a young male already abused by the accused. The accused was clearly worried that the abuse would continue. The Court found that the threat to the minor and to other young males in the community “was both serious and imminent.” Finally, when rejecting the “common law” duty to preserve confidentiality of communications made by a patient to his or her medical adviser, the Court first acknowledged the fact that the obligation existed. But it also stated that the duty of confidence has never been absolute and relied upon ‘Tarasoff’ for that proposition. Dr Matete himself had given evidence that “in deciding what he should do after the accused made the disclosure to him, he had fully reviewed the circumstances within ‘Tarasoff’ principles”.

*R v Edward John Gulliver* Court of Appeal 9 June 2005 CA 51/05

32. Wellington has a STOP programme, a programme designed to treat sexual offenders. While taking part in this programme the accused made certain admissions. Before the Court of Appeal he tried to stop these admissions going forward to trial relying on section 33 of the old Evidence Amendment Act (2 1980) (EAA). In the High Court the Judge concluded that the counsellor was not acting on behalf of a medical practitioner or clinical psychologist giving treatment but had a separate independent relationship with the applicant as a client subject to contractual terms of the written agreement.

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18 Op cit para 26: The laws of New Zealand “Medical Practitioners” at paragraph 21.
19 Para 26. Finally, the Court declined to explore the extent of the equitable duty of confidence because if a medical practitioner complies with the 1994 code the Courts will not impose a higher duty through equity. Footnote 27.
33. There was no “protected communication” within the meaning of s 33 of the EAA because the applicant did not make the disclosures in the belief that they were necessary to enable the counsellor “to examine, treat or act for the patient.” Under the circumstances the High Court Judge concluded that he should not exercise discretion to excuse the counsellor from disclosing in evidence details of the communication or information given to him by the accused.

The Facts

34. On 5 June 1996 and in the afternoon a young girl’s mother sent the girl into the living room of their Wanganui home to watch television. The mother then went into the back yard for some twenty minutes. When she returned the young girl was gone. Her disappearance was reported to the police. She was fortuitously discovered in a distressed state on the riverbank of the Wanganui River by passersby who heard her cries. Medical examination could not confirm whether she had been sexually assaulted. No arrest was made. There was insufficient evidence of identity.

35. In late 2004 information became available that the applicant had made disclosures to a STOP counsellor, which identified the applicant as the offender. The disclosures made provided detail which fitted the actual circumstances of 5 June 1996 and which only the offender could have known. Following the disclosures the accused was apprehended and charged.

36. At the time of these events the accused was aged 52. Between 1985 and 1999 he had 15 admissions for psychiatric treatment. In 1987 he had attempted to abduct a seven year old girl. He later admitted a desire to sexually violate and then kill his victim. In January 1993 he was symptom free and off medication.

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37. He was in Lake Alice from 1997 to 1999. When it closed he was transferred to the Wellington Forensic Services of Capital Coast Health. There he was diagnosed as suffering from a schizo-affective illness, a bipolar mood disorder. The psychiatrists were in conflict over whether or not his behaviours were related to his illness.

38. The accused ultimately entered into an arrangement with Wellington STOP, an organisation independent of Government agencies, designed to reduce reoffending and sexual abuse. Part of the counselling process is to encourage acknowledgement of sexual offending so as to develop insight, express remorse and remove any risk of repetition. The crucial counselling session at which disclosures were made occurred in 2001. They provide a detailed account of the abduction, sexual violation and attempt to kill the young girl by drowning her in the Wanganui river. The STOP counsellor was alarmed by the disclosures and sought advice from his superiors. The accused said he wished to make a statement to the police and was encouraged to do so by the counsellor. Representation and advice were obtained. He was assessed as being fit to plead as well as fit to instruct counsel. But by January 2002 the applicant began to claim having no memory of the events he had disclosed.

39. By this time the police had become aware of the confessions made to the STOP counsellor but they were unaware of the name of the person who had made the confession. The STOP counsellor told the accused that the counsellor might be replying to the Police request for details. Again Gulliver was given the opportunity to make a voluntary disclosure to the police. He declined to do so. As with ‘McKenzie’ reliance was placed on sections 33 and 35 of the EAA.21 The Court of Appeal noted that STOP clients are all required to sign a confidentiality agreement. The agreement records that Wellington STOP undertakes to take all reasonable steps to keep all information from clients confidential and to abide by

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21 R v Gulliver CA 51/05 9 June 2005 at paras 27-28 for the provisions of ss 33 and 35.
the provisions of the Privacy Act 1993 but it states specific limitations of confidentiality. These include:

“Information disclosed provides reasonable grounds for Wellington STOP to conclude that there is a risk to someone’s personal safety, e.g. threats of suicide, threats of violence...

Wellington STOP has reasonable grounds to believe that there is a risk of further abuse. In determining reasonable grounds matters such as living circumstances, risky behaviour and any failure to abide by safety guidelines will be taken into account.”

40. Mr Gulliver had signed the confidentiality agreement. The Court of Appeal considered that section 33 related to “a very narrow range of professionals: medical practitioners and clinical psychologists–” and that it was unwilling to extend the meaning to include protections beyond that.22 As for s 35 of the EAA the Court first held that there was a “special relationship” between the counsellor and Mr Gulliver. The Court then observed:

“It then becomes a question of balancing by the Court in considering whether in this case the public interest in having the evidence disclosed is outweighed by the public interest in the preservation of the confidences between the applicant and Mr Bradburn and the encouragement of free communication between such persons.”23

41. The Court relied on an earlier case, R v Lory (Ruling 8) [1997] 1 NZLR 44, where Hammond J noted that while it is recognised that the general relationship between a counsellor and client can be adversely affected by a breach of confidence, the Court queried whether there was empirical evidence that therapy or counselling would be imperilled if patients knew that therapists have a duty to reveal for instance, their plans of violence, and identified limitations that should be imposed

22 Op cit paras 49-50.
on confidentiality in counselling relationships when disclosures are often a “cry for help”. 24

42. The Court observed that s 35 of the EAA (now see s 69 of Evidence Act 2006) vests in the Court a discretion “which requires the Court to weigh two important competing interests: the public interest in having the evidence in issue disclosed to the Court, and the public in the interest in the preservation of confidences between persons in a special relationship. The section provides guidance as to the matters to which the Court should have regard.” 25

43. The Court also referred to the High Court Judge seeking to weigh competing interests. The High Court Judge considered that the likely effect of the disclosure on the applicant would be “profound” as it would make his conviction probable. But he considered the effect of the disclosure on “any other person”, being in this case the child victim and her family who had lived for eight years with the torment of not knowing the identity of the child’s kidnapper and killer, and feeling unquestionably a sense of grave injustice that a man could commit such a crime and escape apprehension. 26 The Court agreed with the High Court Judge that the evidence ought to be available for trial. It relied on ‘Lory’ at paragraphs 50-51 where the Court observed:

“Of course confidentiality counts. But it must be weighed against other claims such as matters of restitution and social justice.” 27

44. The Court concluded that public interest required the evidence to be given at trial.

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23 Op cit para 56.
24 Op cit para 67.
26 Op cit para 78.
27 Op cit para 80.

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45. The Courts are inevitably dealing with the more extreme end of conflict issues – and these cases are no exception. The most recent case applying s69 of the Evidence Act 2006 is a judgment of DCJ Harrop in *The Queen v A*, 31 July 2009, *unreported*, District Court Blenheim Registry. The judgment is useful touchstone for working through the elements s69(3) and the exercise of judicial discretion to release some but not all of the information subject to confidentiality.

Confidentiality in Civil Cases

46. Sometimes confidentiality and its waiver become issues in civil jurisdiction. Two cases illustrate the point.

*ANZ National Bank Limited v The Commissioner of Inland Revenue* *Unreported High Court 15 April 2008 CIV 2005-485-1037.*

47. In this case Inland Revenue sought discovery against the bank in the context of a tax case. The bank sought to invoke s 69 (2)(b) and (c) of the Evidence Act 2006 – which gives the Court an overriding discretion to order nondisclosure of confidential communications, if the public interest in disclosure is outweighed by the countervailing interest in:

“(b) Preventing harm to a relationship of confidence; or

(c) Maintaining activities that contribute to or rely on the free flow of information.”

48. The bank wanted to hold back advice given to it by its accountant.

49. The Court concluded that section 69 relates to what may or may not be disclosed “in a proceeding” and considered that this did not encompass discovery although it did include production for inspection and adducing in evidence at the hearing.

50. The High Court rejected the confidentiality claim on a number of grounds including that it would not be a proper exercise of the Court’s discretion under s 69 of the Evidence Act to direct that the accountants’ advice as a class should be kept confidential.

51. It noted that there had been no proper evidential foundation for asserting confidentiality for individual documents and nor had there been compliance with the obligations under the High Court Rules which provide for the management of confidentiality claims in respect of documents.\(^{29}\)

*Avowal Administrative Attorneys Limited v J B Lloyd Chartered Accountants and others*

52. In this case it was the Commissioner of Inland Revenue who put before the Court certain categories of confidential information and asked the Court to rule on whether the information should be admitted or excluded as evidence, and in the event that it be admitted, how it should be handled. The conflict was again between private and public interests. It included:

1. the due administration of the tax regime,

2. the protection of the privacy of citizens, and,

3. the observance of due process of the court including the principle of natural justice that a person affected by any public sector conduct is informed of the basis on which that conduct is said to be authorised.

\(^{29}\) Para 29.
53. The starting point for the Court was recognition of public interest in confidentiality and its maintenance. The management of the confidentiality issues resulted in the somewhat unusual course of one category of materials being dealt with on an “ex parte basis in the absence of counsel for the applicant”. While another category of material would be made available for viewing by senior counsel for the opposing parties but could not be seen by any of the junior counsel.

Compelling Breach by Statute

54. Whatever confidentiality understandings may exist, on some occasions statutes will intervene to compel a breach. The broad “greater good” principle is the usual driver for this. The most serious intervention is found in the Serious Fraud Office Act 1990. Section 23 of that Act states:

“(1) The Director may require any person who claims to have a duty of confidentiality to his or her client or customer (including, without limiting the generality of the foregoing, any person carrying on the business of banking)—

(a) To comply with any requirement imposed under Part 1 or Part 2 of this Act; and

(b) In particular, but without limiting the generality of the foregoing, to answer questions, supply information, and produce documents relating to any person whose affairs are being investigated under this Act,—

31 Op cit para 17.
and sections 5, 6, 9, and 10 of this Act shall apply in all respects to any such person, and to the registers, records, accounts, books, or papers of any such person in so far as the Director has reason to believe that they may be relevant to the investigation.

(2) This section shall apply subject to section 24 of this Act, but notwithstanding any other enactment or rule of law or equity.”

55. Parts 1 and 2 of the Serious Fraud Office Act deal with the powers of that office, including powers to search, seize and to secure warrants for that purpose. Whether or not one would describe parties to a mediation as “clients” or “customers”, one way or the other it is not difficult to imagine an argument being mounted that section 23 applies to a mediator. If the mediator has destroyed his or her notes and any documents which came to the mediator, that does not free the mediator of all obligations. That is because section 23(1)(b) requires, indeed compels, the person subject to that provision to answer questions and supply information relating to any person whose affairs are being investigated under the Act.

56. Note that even legal professional privilege is put under siege by virtue of section 24 of that Act.

57. Much lower down in the scale are the confidentiality provisions of the Employment Relations Act 2000 and the Weathertight Homes Resolution Services Act 2006 as amended.

58. Both of these Acts have a provision, and in identical terms which states:

“Nothing in this section –

(b) prevents the gathering of information by the Department for research or educational purposes so long as the parties and the specific matters in issue between them are not identifiable;

or
(c) prevents the disclosure by any person employed or engaged
by the chief executive to any other person employed or
engaged by the chief executive of matters that need to be
disclosed for the purposes of giving effect to this Act.”

59. There are a number of interesting things to note around these provisions. The first
is that no one knows who it is who will come to look at the “information” supplied by the Department for the research. All they know is that it is a person who must be employed or engaged by the Department and for that purpose will be subject to the confidentiality requirements imposed under the same confidentiality section of the relevant Act. But if, for example, the research is being conducted by a private company engaged by the chief executive; albeit subject to the confidentiality provision – the force of the confidentiality is diluted by the number of people involved, the fact that they are outside the Department and will never be identified to the parties.

60. In fact the parties will probably never know that others have reviewed the “confidential” information.

61. One must contrast this potential ease of dissemination of confidential information with the protections provided by the Evidence Act 2006 s69. You will recall that sets a high threshold for a Judge to work through before deciding whether or not confidential information can be used or released. Remember the seven point list set out in s69(3) and further enhanced by s69(4) which allows the Judge to have regard to any other matters that the Judge considers relevant in addition to the seven matters listed. (s69(3)). Finally, the Judge in determining whether or not a communication or information can be disclosed can set terms limiting or restricting information and its use so as to still provide significant layers of confidentiality protection.

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32 Employment Relations Act 2000 s148(6)(b)and (c); Weathertight Homes Resolution Services Act 2006 s84(6)(b) and (c).

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Looking forward

62. While the *Tarasoff* case happened far away from here the impact of it is clearly part of our law. Furthermore, as private mediation and family law become more closely entwined the prospect of a *Tarasoff* type event being raised in a mediation seems to me to be inevitable. It is a question of “when” rather than “if”.

63. The ethical and practical impositions on the practitioner are considerable – especially where the certainties of risk to be weighed by the practitioner are uncertain. The practitioner needs to consider:

.1 the risks and consequences for the party relying on confidentiality when making the disclosure – only to find it is breached,

.2 the risks and consequences for the party or third party at risk in the event of non-disclosure,

.3 the balancing of public interest including considering the s69(3) provisions of the Evidence Act 2006,

.4 ethical obligations and the consequences of a breach, and,

.5 then standing back and again weighing the broad public interest and party obligations in the context of ethical obligations.

64. It must be remembered that unlike a Judge who can impose conditions limiting information release (s69(5)) so as to moderate the impact of a confidentiality breach, the mediator has no such power. There will either be a breach or not, and probably there will be consequences either way.\textsuperscript{33} For this reason one cannot just embrace the case application of s69 of the Evidence Act 2006 as the sole arbiter for the correct approach. For the mediator deprived of control of consequences once a breach is made, even if initially on a limited basis, the breach or not
decision making may need to assume total breach consequences when weighing the interests.

Codes of Ethics

65. Mediator practitioners can have a realistic expectation of help and guidance from our Institute – to be available before the crunch time arrives and not afterwards, when the practitioner is exposed to complaint and resulting disciplinary processes.

66. Our Code of Ethics is sparse. It establishes an ethical principle – and stated in the form of an obligation but gives no commentary beyond that. Paragraph six of our code states: “a member should be faithful to the expectation of trust and confidentiality inherent in the process.” No gloss or comment beyond this simple statement of principle is available to guide the practitioner. The LEADR Ethical Standards make a modest advance on this in stating:

“subject to the requirements of the law a mediator must maintain the confidentiality required by the parties.”

33 For an example of the exercise of judicial discretion under s69 of the Evidence Act 2006 limiting information release see the unreported judgment of DCJ Harrop in The Queen v A 31 July 2009.

34 The LEADR “confidentiality” statement is accompanied by comments. But these comments do not address the issue discussed in this paper. They state as follows:

“Comments
(a) As the parties’ expectations regarding confidentiality are important, the mediator should discuss those expectations with the parties and endeavour to meet them.
(b) The parties’ expectations of confidentiality depend on the circumstances of the mediation and any agreements they, and any other persons present at the mediation, and the mediator may make.
(c) A mediator should not disclose any matter that a party requires to be kept confidential (including information about how the parties acted in the mediation process, the merits of the case, or settlement offers) unless:
   (i) the mediator is given permission to do so by all persons in attendance at the mediation with an interest in the preservation of the confidence; or
   (ii) the mediator is required by law to do so.
(d) The parties and the mediator may make rules with respect to confidentiality.
(e) If the mediator intends to hold private sessions with a party, the mediator should before such sessions discuss with the parties the confidentiality attaching to them.
(f) Any reporting which requires a subjective judgment by the mediator of the conduct of the parties is likely to destroy the integrity of the mediation process.
(g) Under appropriate circumstances, researchers may be permitted to obtain access to statistical data.
(h) With the permission of all of the parties, researchers may be permitted access to individual case files, to observe mediations, and to interview participants.
67. Contrast this with two other codes of ethics. The first is that taken from the New Zealand Medical Association. Their Code begins with a preliminary statement, much of which could apply to our Institute mediation members given the way its members are expected to function. It then introduces 12 Principles. One of these principles states:

“All medical practitioners, including those who may not be engaged directly in clinical practice, will acknowledge and accept the following Principles of Ethical Behaviour:

5. Protect the patient’s private information throughout his/her lifetime and following death unless there are overriding considerations in terms of public interest or patient safety.”

68. Having stated the Principles the medical profession’s Code of Ethics then offers a series of recommendations. I refer to three of these.

“14. Doctors should keep in confidence the information derived from a patient, or from a colleague regarding a patient, and divulge it only with the permission of the patient or in those unusual circumstances where it is clearly in the patient’s best interests or there is an overriding public good, including the risk of serious harm to another person. If there is any doubt, doctors should seek guidance from colleagues or an appropriate ethics committee.”(Emphasis added).”

“17. When it is necessary to divulge confidential patient information without patient consent this must be done only to the proper authorities and a record kept of when reporting occurred and its significance.”

(i) A mediator should render anonymous all identifying information. When materials emanating from a mediation are used for research, supervision, or training purposes, the mediator should remove all identifying information from them.”

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“20. Doctors should be aware of statutory provisions and the codes of the Privacy Commissioner, the Human Right’s Commissioner and the Health and Disability Commissioner, and the requirements of the Medical Council of New Zealand.”

69. These recommendations can only be viewed as helpful guidance for those in the medical profession struggling to make decisions about use of confidential information.

70. The second code of ethics worthy of consideration is the Code of Ethics for Psychologists dated 2002. The Code declares itself to be “For Psychologists Working in Aotearoa/New Zealand, 2002.” The document is a 17 page work and includes a comprehensive index. It begins with a preamble and a discussion about the purposes of the Code. It declares the purposes to be:

“1. To unify the practices of the profession.

2. To guide psychologists in ethical decision-making.

3. To present a set of guidelines that might be available to the public in order to inform them of the professional ethics of the profession (for this purpose the summary version of the Code should be used).”

71. The Code then sets out a series of Principles. Under each of these principles, value statements, practice implications and comments are provided.

72. The First Principle is “respect for the dignity of Persons and Peoples.” Under this Principle is the Value Statement:

“1.6 Privacy and Confidentiality:

Psychologists recognise and promote persons’ and peoples’ rights to privacy. They also recognise that there is a duty to disclose to appropriate people real threats to the safety of individuals and the public.”

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Under the heading “Practice Implications” a note records:

“1.6.10: Psychologists recognise that there are certain exceptions and/or limitations to non-disclosure of personal information and particular circumstances where there is a duty to disclose. These are:

(a) Diminished capacity...

(c) Urgent need: Where a situation arises when it is impossible or impracticable to seek consent to disclosure in time to prevent harm or injury to the person, persons, family, whanau or community group.

(d) Legal requirements: Where a psychologist is compelled by law to disclose information given by a client or research participant.

(e) Client or public safety: Where a psychologist believes that non-disclosure may endanger a client, research participant or another person but is denied permission to disclose, the psychologist exercises professional judgement in deciding whether to breach confidentiality or not.”

The Comment against this practice implication records that: “Psychologists should consult with senior colleagues before making their decision. Ultimately, they must be able to justify the decision made.”

73. The additional comment encouraging consultation is a useful guide for this Institute and it is linked with a reality check that the decision made must be justifiable. The decision made may be to breach or not to breach confidentiality. Either way, it must be justifiable in the face of something going wrong.
74. Practitioners should not have to carry the heavy burden of such decision making on their own. If the Institute accepts that sound practice will require consultation with senior colleagues before a confidentiality breach decision is made, then it would be helpful to establish at least a list of names of senior practitioners who would be willing to be contacted for the purpose of working through the issues leading to a decision.

75. In relation to management of confidentially breach I favour the approach set out in the psychologist’s Code of Ethics.

76. Interestingly in the Code for medical practitioners there is some expectation that the decision can be made in an unrushed way, hence the reference to seeking guidance from “an appropriate ethics committee.”

77. One thing is clear, that whatever the outcome of the decision making, and whichever way the risks have been balanced, the mediator will be in a strong position when the day of accountability arrives. They must not only have followed the procedure but they must also have taken the advice.

Conclusion

78. Many mediators will get though their professional careers without having to confront a Tarasoff type fact situation. But for the few who draw the short straw, unequivocal Institute guidance and direction will provide a mantel of protection – but no guarantees!

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