

LAWYER X AND THE IMPORTANCE OF MAINTAINING SOLICITOR CLIENT CONFIDENTIALITY

The High Court has delivered a salutary reminder to lawyers about the importance of maintaining lawyer/client confidentiality.

In the decision of ***AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58*** the High Court considered a matter where a lawyer, known as Informant 3838 and "EF", who represented a large number of clients accused of very serious criminal matters, provided confidential information received from those clients to the Police which led to a number of investigations, charges and convictions.

The High Court was appalled by the behaviour of the lawyer and the police who received the information stating:

"Actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging EF to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system"

The lawyer has declined to enter the witness protection program notwithstanding the real danger to herself and her children. The lawyer claims that she does not trust the police to keep her whereabouts secret and therefore sees little benefit in going into witness protection and enduring the restrictive life that would entail.

Maintaining client confidentiality is essential not only to the lawyer/client relationship but to the integrity of the justice system itself. The High Court made it clear that the importance of this relationship trumps even the potential safety of the lawyer and her family stating:

"The public interest in preserving EF's anonymity must be subordinated to the integrity of the criminal justice system.
To say so is not to overlook that, on the evidence before the courts below and now before this Court, EF and her children will be at grave risk of harm unless EF agrees to enter into the witness protection program. Nor is it to ignore that, thus far, EF has declined to do so, taking the view that Victoria Police cannot be trusted to maintain confidentiality and apparently that she would prefer to wear the risk than subject herself and her children to the limitations and burdens that witness protection would surely entail. It is further not without significance that Victoria Police may bear a large measure of responsibility for putting EF in the position in which she now finds herself by encouraging her to inform against her

clients as she did. But large though those considerations may be, they do not detract from the conclusion that it is essential in the public interest for the information to be disclosed.

Generally speaking, it is of the utmost importance that assurances of anonymity of the kind that were given to EF are honoured. If they were not, informers could not be protected and persons would be unwilling to provide information to the police which may assist in the prosecution of offenders. That is why police informer anonymity is ordinarily protected by public interest immunity. But where, as here, the agency of police informer has been so abused as to corrupt the criminal justice system, there arises a greater public interest in disclosure to which the public interest in informer anonymity must yield. If EF chooses to expose herself to consequent risk by declining to enter into the witness protection program, she will be bound by the consequences. If she chooses to expose her children to similar risks, the State is empowered to take action to protect them from harm.”

Obviously this is an extreme case but lawyers need to remember that even an unintentional waiver of legal profession privilege can have disastrous consequences for the client who has entrusted the lawyer with the sensitive information they have shared.

The Andrews Government has announced a Royal Commission into the matter that may result in the overturning of many convictions for very serious crimes. The full ramifications of this lawyers behaviour are yet to play out.

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