FOLEY'S LIST

DRAFTING AFFIDAVITS IN FAMILY LAW MATTERS

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1. Purpose of an affidavit

An affidavit is the evidence in chief of a witness contained in written form. Its purpose is to set out the evidence upon which each party will rely to prove his or her case.

The rules of evidence that apply to viva voce evidence also apply to affidavits. Affidavits are subject to the same range of objections as to admissibility as oral evidence. The significant difference is that the witness who has filed an affidavit of their evidence in chief may be only allowed to rely upon the contents of the affidavit as his/her evidence in chief. If material contained in the affidavit is struck out, s/he may not get the chance to give oral evidence in an admissible form and thus the witness on affidavit may be at a significant disadvantage; hence the importance of all of the material in the affidavit being admissible.

Audience

When drafting an affidavit, it is important to consider that the audience, the Judge/Federal Magistrate, is often a first-time reader of the material. The affidavit will need to be drafted clearly and logically. It needs to be accessible for a decision maker who may have come out of one trial and straight into yours with no prior knowledge of the matter. Ultimately you want the Judge to turn back to your affidavits when trying to understand the history of the matter.

Each of us has asked for an opinion from a colleague about a matter, consider what information you give to set the scene. Similar considerations should apply when drafting. You should set out basic information and consider the structure of the balance of the document.

- Should you include a section that sets out your client's understanding of the issues before the Court?
- Should you put a balance sheet in the affidavit, if so where?
- If there are issues of the use of funds post separation, should you use two balance sheets, one to set out the position as at separation and one to set out the current position and explain the issues in relation to the items?
- Should you draft the affidavit thematically or chronologically?

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There used to be a great debate about using headings, thankfully that has gone. Use them. Preferably keep headings in neutral language, or at least non-controversial. If you have a large heading about the "the Husband's wastage of funds" but the evidence below it does not establish that case; it may be a reminder to the Court of a case that was overstated. Perhaps better to have "the Husband's use of money".

Proofs of evidence are under-rated in family law. Many practitioners seem to just start drafting without really thinking about a structure. It is far better to obtain a detailed proof of evidence from a client and then sit back and consider structure and what should be included. The proof of evidence should cover a wide variety of issues, many of which you may choose not to deal with in the affidavit. It will be useful to have this as it may give clues as to cross-examination of other witnesses.

Language and form

Statements in affidavits should be in the first person; as the deponent is giving evidence of what s/he has seen, heard, tasted, smelled, felt or touched. It is amazing how many times affidavits appear which seem to be cut and pasted from different documents and therefore move from the first to the third person.

The deponent should understand the words and meaning of the affidavit; it is embarrassing when a deponent in reveals in the witness box that s/he do not understand the meaning of a particular word; or possibly worse, that s/he cannot read.

Lawyers should not assume that each witness is literate and should look for clues of literacy issues such as a client continually forgetting his/her glasses and asking for something to be read aloud.

While you want the affidavit to give the evidence of the deponent, a level of formality is also required. In general terms colloquial expressions should be avoided as often people have varied understandings of their meaning. His Honour Justice Thackray recounts in his paper to which I refer at the end, affidavits containing jokes!

Be careful in the choice of language, there are some common pitfalls such as:

- "Would" which is a description of a practice or habit that the deponent follows. It does not mean that the deponent did the thing in question.
- "Do not recall", is a lack of recollection and does not mean that the event did not happen, rather that this witness does not remember whether it did or did not. The result may be that the only evidence on the issue is that given by another witness.

- "Never" and "always". The only never to remember is NEVER use "never" or any other absolute in an affidavit. It is too easy to undermine in cross-examination.

2. Applicable rules

Evidence in Family Law proceedings is governed by:

The Family Court of Australia:

- Part XI Family Law Act (FLA)
- Chapter 15 Family Law Rules (FLR)
- Evidence Act 1995 (Cth)

The Federal Magistrates Court:

- Part XI FLA
- Part 15 Federal Magistrate Court Rules (FMCR)
- Evidence Act

The relationship between the Evidence Act and the FLA and the Rules of the two Courts is that the Evidence Act applies where it does not conflict with the provisions of the FLA.

FLR and Evidence Act confirm that evidence must be RELEVANT (see: s.56 Evidence Act; Rule 15.09 FLR)

Evidence in both FCA and FMC is to be given by Affidavit. See s.98 FLA; Rule 15.4 FMCR.

Rule 15.09(1) FLR - An Affidavit must be:
(a) confined to the facts about the issues in dispute;
(b) confined to admissible evidence;
(c) sworn by the deponent, in the presence of a witness;
(d) signed at the bottom of each page by the deponent and the witness; and
(e) filed after it is sworn.

Affidavits are very important, as the affidavit of each witness may be the only evidence upon which the client may be able to rely upon at interim proceedings and also at trial.

Rule 15.05 FLR has been amended to provide that there is no general right to file affidavits. However, you can file an affidavit without leave of the Court if the Rules so provide.

Rule 15.06 FLR provides that an affidavit filed with an Application may be relied upon in evidence only for the purpose of the application for which it was filed. Therefore you should assume that you will not be allowed to rely upon earlier affidavits in subsequent hearings. In any event, it is good practice for the Judge to have the evidence of each witness contained in one document if possible.

Annexures / books of exhibits

What documents (if any) should be attached to an affidavit? If they are to be attached, how should they be attached?

A practice has evolved of attaching numerous documents to affidavit, to prove every point. You should consider whether or not you need to attach the document. Is the matter to which the document relates contentious? Is it better for the deponent to give the evidence and then when challenged in cross-examination produce the document in re-examination? Can you just tender the documents as a bundle during the trial?

If you decide that you should attach the document, it is useful to state the effect of an annexed document in the body of the affidavit, allowing the reader to read the affidavit without having to turn back and forth to annexures. It may be helpful to put in the body of the affidavit a significant phrase or part of the document. This however can offend the hearsay and opinion rule, so it may be useful to do this when a matter is not in dispute. If the matter is in dispute, it still may be convenient to allow to reader to follow the narrative but care must be taken when describing the effect of the document and you must be prepared to have the description excised.

Rule 15.12 FLR that deals with annexures and affidavits is honoured more in the breach, particularly in relation to the consecutive numbering of pages of annexures and the thickness of annexures (2.5cm). A book of exhibits is often useful as it can sit next to the affidavit and the reader can flick through it without having to turn back and forth from annexures to the body of the affidavit. Please use those sticky tabs on all copies of the book of exhibits or annexures, so that the proceedings aren't slowed down from constant difficulties in locating documents.

Striking out parts of affidavits

Rule 15.13 FLR and Rule 15.29 FMCR gives the Court power to strike out affidavit material that is:

a. inadmissible, unnecessary, irrelevant, unreasonably long, scandalous or argumentative; or

b. sets out the opinion of a person who is not qualified to give it.

The Court can do this on its own motion or on the application of another party.

These provisions are under utilised. The advantages of striking out:

- it clarifies the evidence that is admissible
- it avoids unnecessary cross examination
- it avoids allowing a party to give evidence in cross-examination to otherwise support inadmissible evidence. Meaning that a party may have given evidence which is inadmissible but not struck out

> as no application has been made. It puts counsel in an invidious position as do you leave it and risk not challenging it and or do you challenge it and potentially allow the witness to give evidence of the same issue in an admissible form?

Costs implications of striking out

There are potential costs implications of material being struck out. In the FMC the party filing the affidavit must pay the costs caused by the material being struck out, unless otherwise ordered by the Court: rule 15.29(2). This reverses the onus on costs. The FLR use the word "may", giving the Court greater discretion.

The major disadvantage is that it takes time at the beginning of a trial; however, in my view the time may be well spent. It may give your client a significant strategic advantage if the other party is left without sufficient material to prove their case and is forced to seek an adjournment and in the knowledge that they may pay your client's costs thrown away.

Remedying the Affidavit in in the witness box

You should assume when drafting an Affidavit that you will not be able to remedy the evidence in the witness box. There is no guarantee that the Court will allow oral evidence-in-chief from a witness, other than correcting an inaccuracy or providing updating evidence since the filing of the affidavit. You certainly cannot guarantee that you can supplement your affidavit or that any missing facts will come out during cross-examination, which means that Counsel cannot raise those issues in re-examination. The result may be that you are left with insufficient admissible evidence to support the findings that you require to prove your client's case.

3. What is evidence?

It may seem like a silly question to ask, but most affidavits are full of many things other than actual evidence. Most if not all contain argument. As set out in *Cross on Evidence*:

> "*The testimony must be based on personal knowledge – on what the witness saw, heard, felt, touched or tasted. Testimony as to opinions or inferences or belief, may exceptionally, be permitted if the rules as to opinion evidence are satisfied, or if a contrary course would be over-pedantic*."

Commonly deponents state not only the facts but also the inferences that they say should be drawn from those facts. This is argument and should be left to counsel at trial. The danger of making the argument in the affidavit is that the facts upon which the argument is based may well be left out, leaving insufficient evidence for the Court to come to the desired finding.

What evidence do we need in the Affidavit?

We need evidence that tends to prove the facts that we need to prove our client's case. So what facts do we need to prove?

In order to know what facts you need to prove, you need to know what the law is.

- Statutes: FLA, Child Support legislation, Status of Children Act, Assisted Reproductive Treatment Act….
- Case law

Different matters will require different combinations of reliance upon statute and case law.

You need to know, not only what needs to be proven, but also who bears the onus / burden of proof and to what standard must these facts be proved?

Burden of proof

Who bears the burden of proof in the proceedings? This may not be as immediately clear as in say a tort action.

In general terms the party bearing the burden of proof is the party who seeks to establish the fact or cause of action. However, the burden of proof can change depending upon the cause of action. For example, in a contravention case, the applicant bears a burden to prove prima facie a breach of the order and then the burden turns to the respondent, who carries the onus to prove a "reasonable excuse".

You need to think carefully about each matter that you seek to prove and who carries the burden of proof and does it change during the proceedings. You also need to consider that even if you do not have the burden of proof, whether it may be desirable for your client to address allegations, even if there is little proof advanced by the other party. You should discuss these issues with counsel, as there may be a strategic advantage to letting these issues be dealt with a trial rather than in an affidavit.

Standard of proof

The standard of proof for civil proceedings is contained in s.140 Evidence Act

> *s.140(1) In a civil proceeding, the Court must find the case of a party proved if it is satisfied the case has been proved on the balance of probabilities.*

Where there are serious allegations or grave consequences arising from a finding, the Court may require "stronger evidence" before making a finding of fact.

> *s.140(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:*

(a) the nature of the cause of action or defence; and

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged.

The Full Court of Family Court has applied this test in cases of sexual abuse, where it has held that the evidence must be "*very carefully evaluated*" and "*[i]nexact proofs, indefinite testimony, or indirect inferences are insufficient to ground a finding of abuse.*" Re W (Sexual Abuse: Standard of Proof) [2004] Fam CA 768. See also Potter and Potter (2007) FLC 93-326

Stephen Odgers in "Uniform Evidence Law" 9th Ed says relevantly at [1.4.100] that considerations other than (a)-(c) may be relevant:

- The inherent unlikelihood of an occurrence of a given description having occurred. This was referred to by Dixon J in Briginshaw v Briginshaw (1936) 60 CLR 336 and effectively endorsed by the High Court in Neat Holdings Pty Lt v Karajan Holdings Pty Ltd (1992) 67 ALJR 170.

- Evidence is to be weighed according to the proof which was in the power of one party to produce and in the power of the other to contradict. [see Qantas Airways Ltd v Gama (2008) 167 FCR 537]

- Where a question involves a scientific fact, the absence of scientific opinion refuting the scientific theory advanced in support of the case of the party carrying the burden of proof can be significant.

Sources of evidence

Before drafting Affidavits, you should consider the possible sources of evidence to prove particular facts and then make a decision about which one or ones to use. You may rely upon testimony of a witness, documentary evidence or physical items such as a damaged computer or torn jumper.

When using witness testimony, you need to ensure that each witness is giving evidence about matters that are within his/her knowledge and not making a comment about an issue that s/he could not prove. The danger of the latter is that you may believe that you have covered an issue, when in fact the "evidence" upon which you propose to rely is inadmissible.

A useful strategy is to obtain a proof of evidence from the witness and consider whether there is any evidence available to corroborate the relevant points. You should cross-reference the proof with the documents in each party's disclosure. In this way you can see if your client's case matches up with the disclosure documents and secondly see if there is better evidence upon which you can rely to prove the necessary facts.

Is the evidence admissible?

Once you have a proof of evidence, you have to consider what evidence will be admissible. To do this, you have to jump through a number of hoops:

1) Is the evidence relevant?
2) Does the hearsay rule apply? Does an exception to the hearsay rule apply?
3) Does the opinion rule apply?
4) Do other exclusionary rules apply?
    a) Rule about evidence of judgment and convictions
    b) Tendency rule / coincidence rule
    c) Rule about identification evidence
5) Does a privilege apply?
    a) Without prejudice communication;
    b) Client legal privilege;
    c) Privilege against self incrimination;
6) Should the court exercise its discretion to exclude the evidence?

    If you pass all of these, the evidence is admissible.

Relevance – s.55 Evidence Act

To be admissible, the evidence must be relevant. It must be able to rationally affect the likelihood of the existence of a fact in issue:

> *s.55(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.*
>
> *(2) In particular, evidence is not taken to be irrelevant only because it relates only to:*
>
> *(a) the credibility of a witness; or*
>
> *(b) the admissibility of other evidence; or*
>
> *(c) a failure to adduce evidence.*

There only needs to be a minimal logical connection between the evidence and the "fact" in issue. The evidence need not render the fact in issue probable; it is enough "*if it only makes the fact in issue more*

probable or less probable than it would be without the evidence." (see Odgers Uniform Evidence Act [1.3.60])

The definition of relevance "embraces two concepts" according to the ALRC: (see Odgers Uniform Evidence Act [1.3.60])

- The logical connection between the evidence and facts; and
- The requirement that the matter on which the evidence ultimately bears is a matter in issue in the trial. Whether or not a matter is in issue is a question of law, determined by the substantive law and pleadings. It is not necessary that the parties dispute it.

Evidence can also be made provisionally relevant; meaning that it will be relevant once other evidence is accepted. Therefore, the relevance of the evidence does not actually depend upon its capacity to prove anything. The assessment of its probability to prove a matter in issue needs to be made in the context of other evidence once admitted.

Failure to adduce evidence – Jones v Dunkel

Adverse inferences may be drawn from the failure of a party to adduce particular evidence, where such evidence would have reasonably been expected. This also applies to failing to call a witness, where the failure to call is not adequately explained. This is often referred to as the principle in Jones v Dunkel, referring to the High Court case of Jones v Dunkel (1959) 101 CLR 298. A similar inference can be applied to tendering documents. (see Odgers [1.3.110])

The adverse inference that may be drawn from the failure to adduce evidence is that the evidence, if adduced, would not have assisted the party's case. The court cannot infer that the evidence would have been unfavourable to the party's case and nor can it be used to fill evidentiary gaps in the opponent's case. (see Odgers [1.3.110]) Assume that an allegation is made that the husband has mismanaged the parties' financial affairs by refusing to take accounting advice, resulting in penalties and fines for late payment of tax and he fails to call his accountant at the time. The Court can infer that the evidence of the accountant would not have been helpful, rather than the evidence would have been unfavourable. Further, if the wife cannot prove the allegations she makes by the evidence in her case, she cannot rely upon the husband's failure to call the accountant to fill the gaps in her case.

The failure to call the witness has to be not satisfactorily explained. There may be many satisfactory explanations for not calling particular witnesses on an issue. The reasonableness of not calling the witness will also depend upon the seriousness of the allegation made.

Hearsay – s.59 Evidence Act

s.59(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.

(2) Such a fact is in this referred to in this Part as an asserted fact.

(2A) For the purposes of determining under subsection (1) whether it can be reasonably supposed that the person intended to assert a particular fact by the representation, the court may have regard to the circumstances in which the representation was made.

(3) Subsection (1) does not apply to evidence of a representation contained in a certificate or other document given or made under regulations made under an Act other than this Act to the extent to which the regulations provide that the certificate or other document has evidentiary effect.

Hearsay evidence is a representation (statement / conduct) made by a person outside of the current court proceeding, where the person is not being called to give evidence and the representation is being relied upon to prove the truth of its contents.

What is a representation?

The representation can arise from something said or from conduct. (see Lee v The Queen (1998) 195 CLR 594.)

What is a previous representation?

A "previous representation is" a representation made otherwise than in the course of giving evidence in the proceedings in which evidence of the representation is sought to be adduced. It is therefore a statement made outside of the court on that occasion. It does not include statements made in earlier interlocutory hearings.

Proving the truth of the asserted fact

If the evidence of the representation is not adduced to prove the existence of a fact asserted by the representation, it is not classified as hearsay. (See Odgers "Uniform Evidence Act" for examples)

- Evidence of an oral representation that explained why later conduct occurred. Ie: A Wife giving evidence that a jewellery valuer valued her ring at $30,000. Not used to prove the value, but to explain her conduct in selling it for $32,000;

- Evidence of oral discussions and representations adduced to prove the terms of an alleged agreement;
- Evidence of threats made to a person adduced to prove that s/he was acting under duress
- Evidence of a previous representation of a witness adduced to prove consistency or inconsistency with the witness's in court testimony (and thereby bear on the credibility)
- Evidence of the medical history given by a patient to a doctor adduced to prove the basis of an opinion given by the doctor

The evidence must be relevant and admissible for that particular purpose.

Information and belief

If hearsay evidence is to be given, then the deponent must identify the source of the evidence and that source must be reasonably likely to have knowledge of the relevant fact. The deponent should state that s/he believes the representation to be true. It is also likely to be prudent to include the grounds for the belief of the statement, so as to avoid argument that the belief is based upon nothing. (see article by Peter Hannan "Use of affidavits in the Family Court" (2012) 2 Fam L Rev 72 at 78)

Exceptions to the hearsay rule

It may be that the hearsay evidence is admissible as it falls into one of the exceptions to the hearsay rule:

- Evidence for a non-hearsay purpose (s.60 Evidence Act)
- First-hand hearsay, if the maker of the representation is unavailable (s.63) or available (s.64)
- Contemporaneous statements about a person's health (s.66A)
- Business records (s.69)
- Tags and labels (s.70)
- Electronic communications (s.71)
- Aboriginal and Torres Strait Islander traditional laws and customs (s.72)
- Marriage, family history or family relationships (s.73)
- Public or general rights (s.74)
- Use of evidence in interlocutory proceedings (s.75)
- Submissions (s.81)
- Representations about employment or authority (s.87(2))

- Exceptions to the rule excluding evidence of judgments and convictions (s92(3))
- Character of an expert opinion about accused persons (ss.110,111)

Evidence of Children

- The evidence of a child would normally be inadmissible at trial under the hearsay rule. However, the FLA provides a specific exception under s.69ZV. However the exception applies to child-related proceedings: s.69ZV(1) FLA.
- The exception does not make the representation of the child admissible, rather it means that it is not inadmissible because of the hearsay rule: s.69ZV(2). It is still a matter for the Court to determine the weight (if any) to be given to the evidence: s.69ZV(3).

Impact of Division 12A FLA

Section 69ZT FLA provides that the some of the rules of evidence do not apply to proceedings which are wholly or in part under Part VII FLA (child-related proceedings). To the extent that proceedings are wholly or in part outside of Part VII, the parties must consent to Division 12A applying.

Section 69ZT does not abolish the rules of evidence entirely but rather excludes the application of the rules in Chapter 2 of the Evidence Act regarding:

- Part 2.1 divisions 3, 4 and 5 relating to evidence in chief, cross-examination and re-examination;
- Parts 2.2 and 2.3 regarding the use of documents and other evidence including demonstrations, experiments and inspections;
- Parts 3.2 to 3.8 which deal with:
    - Hearsay
    - Opinion evidence
    - Admissions
    - Evidence of judgments and convictions
    - Tendency and coincidence
    - Credibility

- Character

However, pursuant to s.69ZT(2) FLA the Court may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act not applying because of subsection (1).

Section 69ZT(3) FLA provides the Court may also decide to apply one or more of the provisions of the Evidence Act to an issue in the proceedings if:

- The circumstances are exceptional; and
- The court has taken into account (in addition to any other matter the court thinks relevant):
  - The importance of the evidence in the proceedings; and
  - The nature of the subject matter of the proceedings; and
  - The probative value of the evidence; and
  - The powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.

Therefore in cases where there are serious allegations the Court may (but is not obliged to) apply the rules of evidence, which would otherwise not apply. See Maluka v Maluka (2011) 45 FamLR 129 where the Court was being asked to terminate the child's relationship with a parent and considered the proceedings exceptional.

Lawyers should still try as much as possible to ensure that evidence even in child related proceedings comply with the provisions of the Evidence Act. That is, if evidence is available, which will be admissible under the provisions of the Evidence Act that evidence should be given. Evidence that is admissible under the provision of the Evidence Act is arguably the best evidence. You cannot know whether the Judge will consider the circumstances are exceptional.

There are a number of dangers in relying upon evidence that would otherwise be inadmissible;

- the Court has a discretion as to what weight (if any) to give evidence that is only admissible in children's proceedings as a result of this provision. You may not know what weight will be attached to it until it is too late to call other evidence. Counsel will need to be vigilant in seeking rulings under s.136 Evidence Act; and
- practitioners can become lazy and not concern themselves with the rules of evidence and draft affidavits in matters other than children's proceedings that don't comply with the Evidence Act.

His Honour Justice Cronin addressed the latter issue in the decision of North and North [2010] FamCA 306 at paragraph 40 onwards:

"A third matter related to the vagueness of the wife's affidavit about issues of family violence and again, when challenged in cross-examination, she was defensive saying that the information was in her affidavits. It clearly was not and the best she could do was point to broad generalisations that were unparticularised. Her attempts to expand on the factual issues created a dilemma because none of that had been put to the husband when he was cross-examined. Again, my concern related to the advisers rather than the wife because lawyers have the responsibility not of simply repeating the story given by a client but rather to lead admissible evidence. Whilst Division 12A of the Family Law Act 1975 (Cth) ("the Act") has relaxed the technical aspects of the presentation and testing of evidence, ss 55 and 56 of the Evidence Act 1995 (Cth) still require evidence to be relevant to the extent if accepted, it could rationally affect the assessment of the probability of the existence of a fact in issue. In this case, there was a significant dispute about family violence. Broad generalisations which have no particulars are not only unhelpful, they are inadmissible.

Family violence in this community is acknowledged as a serious problem. This Court recognizes the dilemma and treats family violence seriously. It creates a power imbalance and fear. It causes enormous psychological and emotional problems for children. The Act requires courts to look at the inter-relationship of family violence and parenting responsibility when making parenting orders. For the courts to treat family violence seriously, so must the parties and more importantly, their advisers. There has been media commentary about victims of family violence being frightened to raise such issues for fear of being disbelieved and facing mandatory costs orders. That may be happening but it is not readily apparent. What is abundantly clear is that details of serious incidents are brushed aside for expediency sake to give broad generalizations. In this case, that is what occurred and I accept the wife's puzzlement when asked why she had not put many things in her affidavit. It is important that courts be given precise details where they are known not only so that a determination can be made about the extent of the family violence but also the veracity of witnesses. To the extent that witnesses may be put off by professionals warning them about raising contested facts, the legislature needs to revisit s 117AB."

Rulings on evidence

Section 136 Evidence Act provides that the Court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might be unfairly prejudicial to a party or be misleading or confusing. You may want to limit the purpose for which the evidence can be used. For example, establishing a witness's state of mind rather than the truth of the assertion.

The situation is the same with division 12A. Just because division 12A applies to the proceedings does not mean that you should not make objections to the admission of evidence. Section 69ZT(2) provides that the Court "may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act not applying because of s.69ZT(1).

The Full Court addressed the issue of judges identifying the use which is to be made of contentious evidence in Khalil & Tahir-Ahmadi (2012) FLC 93-506 where the father and the ICL argued that s.67ZT should not apply because the circumstances were exceptional. The trial judge ruled against them on this point at the commencement of the trial. The lawyers for the father and the ICL were unsure of how thee contentious evidence was to be used. On appeal, the Full Court dismissed the appeal but held that it would have been preferable for Her Honour to have clearly indicated the use to which the contentious evidence would be put and the weight, if any, she proposed to attach to it.

Objections may well force your opponent to give concessions about the use of particular evidence and force the Court to focus its mind upon the legitimate purpose to which such evidence may be put.

Opinion

The rules of evidence dealing with opinion evidence are exclusory rules. Section 76 Evidence Act excludes the evidence of an opinion that is being used to "*prove the existence of a fact about the existence of which the opinion was expressed*".

Examples:

- Darren was violent towards me throughout our marriage; often ridiculing me and on occasions becoming physically abusive.
- Jenny operated her business successfully for the last 3 years prior to separation and is now asserting that she is unable to support herself from her earnings.

The deponent is ultimately seeking that the Court makes a finding of fact about these matters; however there are no underlying facts upon which the opinion is based.

It may feel cumbersome to continually set out the facts without the conclusion that the deponent has drawn from them. In the first case, the deponent could say:

- Darren was violent towards me during our marriage, in particular:
    - On 25 June 2011 Darren slapped me across the face with his hand while we were arguing;

- Darren pinned me to the kitchen wall by holding my shoulders against the wall with his hands on at least 6 occasions in the last 2 years;
- In about January 2012 Darren threw a plate at me during an argument; I ducked and the plate smashed against the wall behind my head;….

The idea being that while the conclusion that the deponent draws from the conduct is there, (and it is clear the conclusion that the deponent wants the Court to draw), the facts upon which the opinion is based are clearly set out. This also operates as a good checklist to ensure that there are sufficient facts upon which such an opinion can be based.

With respect to the second example, you have to question what evidence this witness could give about the matter. There should be documentary evidence showing the income and profit of the business that can be tendered. Perhaps this witness can give evidence of lifestyle including monies spent by Jenny from her business earnings or representations that Jenny made to or in this witness's hearing about the success or profitability of the business.

Exceptions to the opinion rule

There are two major exceptions to the opinion rule:

(a) s.79 opinions based upon specialised knowledge; and

(b) s.78 non-expert opinions which are based on what a witness saw, heard or otherwise perceived about a matter or event;

Expert evidence – s.79 Evidence Act; Dvn 15.5.1 FLR; Rule 15.07 FMCR

The Evidence Act provides that the expert opinion has to be "wholly or substantially based on specialised knowledge" to be admissible. The deponent has to establish three mandatory requirements, that s/he:

(a) has specialised knowledge;

(b) that specialised knowledge is based on the person's training, study or experience; and

(c) the opinion is wholly or substantially based on that specialised knowledge.

Rule 15.43 FLR picks up the requirement for specialised knowledge. You should read division 1.5.5.5 regarding the expert witness's duties and rights.

Rule 15.07 Federal Magistrates' Court Rules refers to the Federal Court practice direction for expert witnesses to the effect that the expert witness: (there are further directions which are not included)

- has a duty to assist the Court on matters relevant to the expert's area of expertise;
- is not an advocate for a party;
- has an overriding duty to the Court and not to the person retaining him/her;

This again picks up the requirement for specialised knowledge and importantly emphasises the fact that the expert is not an advocate for a party.

Many expert reports presented in the Courts rely upon the observations of the expert and assumed facts, often information provided by one or both of the parties. These facts must be able to be proven and therefore evidence of those facts must be admissible. For example in the case of a Family Report, some of the facts will be the observations of the report writer and evidence will be given about those observations in the report itself. In the case of a financial expert, conclusions may be based upon financial statements and taxation returns. The parties themselves may give information upon which the expert relies to form his/her opinion.

A common way to attack an expert report is to undermine the factual basis upon which the expert opinion is based and therefor undermine the foundations of the report. This may involve successfully challenging the truth of the information provided by a witness, undermining the accuracy of the financial statements provided or adducing other evidence that should have been considered and would have influenced the expert opinion. See the case of Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 where at para 85, Heydon JA said of expert evidence:

> "*In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of `specialized knowledge'; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be `wholly or substantially based on the witness's expert knowledge'; so far as the opinion is based on facts `observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on `assumed' or `accepted' facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of `specialized knowledge' in which the witness is expert by reason of `training, study or experience', and on which the opinion is `wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or*

substantially on the expert's specialized knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight."

Lay opinions – s.78

The opinion rule will not apply if:

- the opinion is based on what the person saw, heard or otherwise perceived about a matter or event; and
- the evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event.

This is in effect where the evidence is not to prove the truth of the opinion but rather to assist with understanding the deponent's perception that may in turn make the deponent's subsequent behaviour more understandable.

- *When I returned home after my holiday in Europe I found that Jason had cut off my access to most of our accounts to prevent me from having access to our money and taken our financial information so that he could withhold information from me. While on the internet banking site I found that I still had access to the business account and I transferred $50,000 from that account into my personal account to protect it from Jason.*

This evidence is admissible not to prove the opinion that Jason was preventing the deponent from having access to funds and trying to conceal financial information, but rather to show the deponent's state of mind when s/he transferred the $50,000. This in turn explains why s/he took the action that she did in removing $50,000 from the business account. The deponent may wish to give such evidence to avoid criticism for having taken these funds. Jason may have shut down the accounts and cancelled the credit card because his wallet had been stolen and he had various pin numbers and account numbers in there. Our deponent cannot possibly give evidence about what was in Jason's mind, as s/he is not a mind-reader.

When drafting an affidavit that involves an opinion, it is important to consider the purpose of the opinion. If you wanted to prove the conclusion, the deponent needed to have set out the underlying facts upon which the opinion was based ie:

Jason's and my filing cabinet in which we held all of our financial information including bank statements, tax returns and BAS statements was empty. There was no sign of any break-in to the house. When I went to pay for groceries at the supermarket that afternoon my credit card was declined. I went to the automatic teller machine to get cash but was unable to access the joint account. I had spoken to Jason that morning and he told me that he was "sick of my spending".

I went home and went into online banking and found that I no longer had the ability to view our joint accounts.

You also have to be careful when a deponent is giving evidence as to whether his/her evidence is about his/her observations or trying to give evidence about the state of mind of another. For example,

- *He raised his voice in anger* – imputes a state of mind to the speaker;
- *His voice sounded angry* or *he spoke in an angry tone* – does not impute a state of mind but states an observation and therefore should be admissible under s.78.

Privileges - Part 3.10 Evidence Act

Privileges allow parties to proceedings or witnesses to refuse to disclose certain confidential (and privileged) communications and documents.

Under s.132 Evidence Act, if it appears to the Court that a witness or a party may have grounds for making an objection under Part 3.10 (privileges) then the Court must satisfy itself that the witness or party is aware of that provision.

Client legal privilege

Client legal privilege is the client's right to maintain confidentiality in communications, both oral and in writing. The Evidence Act covers situations where evidence is adduced at trial and the common law covers pre-trial situations, except as otherwise covered by statute and rules of the Court.

A confidential communication is one in which at the time that the communication was made either the person who made it or the person to whom it was made "was under an express or implied obligation not to disclose its contents, whether or not this obligation arises under law." S.117 Evidence Act

A lawyer covers an Australian lawyer, an Australian registered foreign lawyer or a lawyer of another country who is registered or a natural person of another country who is permitted to engage in legal practice in that country.

s.118 Evidence Act - Legal Advice

If the client objects to the evidence being adduced in Court, evidence cannot be adduced if it would result in the disclosure of a confidential communication between the client and the lawyer (or b/n two or more

lawyers acting for the client) that was made for the "dominant purpose" of the lawyer providing legal advice to the client. This applies to documents produced for the dominant purpose.

s.119 Evidence Act – Litigation

This provision is similar to the provision for legal advice, save that the communication / document must have been prepared/made for the dominant purpose of a client being provided with "professional legal services" relating to a proceeding (Australian/overseas, actual, pending or anticipated) in which the client is, may be, might have been a party.

The privilege doesn't apply to a lawyer acting in a non-legal capacity. It does not apply to administrative or accounting services.

Note that the client, or the lawyer acting on behalf of the client must take the objection. The term "dominant purpose" picking up the judgement of Barwick CJ in Grant v Downs (1976) 135 CLR 674 at 678. The party claiming the privilege bears the burden of proof.

Waiver of privilege – s.122 Evidence Act

This is a complex area of law with many implications. I have sought to summarise some of the principles that are most likely to arise.

Confidentiality is central to the existence and maintenance of the privilege. So waiver of the privilege can occur when a party who is entitled to claim privilege acts (through act or omission) inconsistently with the maintenance of the privilege. A party will be taken to have acted inconsistently with objecting to adducing the evidence if s/he has:

(a) knowingly and voluntarily disclosed the substance of the evidence to another person; or

(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

(s.122(3) Evidence Act)

The knowingly and voluntarily reference does not include a reference to a disclosure by a lawyer who was acting on behalf of a party at the time of making the disclosure, unless the lawyer was authorised to make the disclosure. (s.122(4) Evidence Act)

Section 122(5) Evidence Act sets out some limitations with respect to a party be taken to have acted inconsistently with the maintenance of the privilege. In summary they are if the disclosure was made:

- In the course of making a confidential communication or a confidential document;
- As a result of duress or deception;

- Under compulsion of law;
- To another person if the disclosure concerns a matter in relation to which the same lawyer was providing or is to provide professional legal services to both the client and the other person;
- To a person with whom the client had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated proceeding.

Implied waiver may occur during the course of litigation if a party gives evidence that makes it "unfair" or "misleading" for the other parties to not have access to the whole of the privileged communication. This may arise where a party put the confidential communication directly in issue by attributing his/her state of mind to the privileged communication. For example, a party says that s/he took particular action as a result of legal advice received, such as relocating interstate without advising the other party or a party's mental state at the time of executing final property orders in a s.79A application. (see Full Court in Stamp v Stamp (2007) FLC 93-314.

The High Court in Mann v Carnell [1999] HCA 66 held that the issue is the inconsistency between the conduct of the client and the maintenance of the confidentiality that affects the waiver of privilege. It is not an overall principle of "fairness" which is at large, but rather the fairness of the inconsistency of the conduct and the maintenance of the privilege. The mere raising of the issue of a party's state of mind is not sufficient to waive the privilege. In Stamp v Stamp, their Honours Justices May and Boland said at paragraph 55, citing with approval the case of DSE (Holdings) Pty Ltd v Intertan Inc (2003) 127 FCR 499.

At paragraph 117 of *DSE (Holdings)* (supra) reference was made to a case heard by a Master in Western Australia (*BP Australia Ltd* v *Stallwood* [2000] WASC 75). Allsop J, we think correctly, said that the propositions set out by the Master were too widely stated, and referred to the decision of Wheeler J in *Commonwealth of Australia* v *Temwood Holdings Pty Ltd* (2002) WASC 107 at paragraph 10 where her Honour said:

> "10. …On the other hand, a party may necessarily put its state of mind in issue in the proceedings by, for example, pleading reliance upon some representation or other or by seeking rectification of the contract for mistake; or a state of mind may be put in issue by some evidentiary assertion which is clearly relevant to the issues between the parties. In these latter types of cases, fairness clearly requires the waiver of the privilege in relation to legal advice which may have contributed to that state of mind. It is to be noted, however, that it is the conduct of the party who possesses the privilege which is capable of waiving it. It is not apparently open to another party to litigation to force waiver of a party's legal professional privilege by making assertions about, or seeking to put in issue, the party's state of mind."

You should be very careful putting a client's state of mind in issue in an affidavit. If you wish to do so, ensure that you have read the file (including any part belonging to a previous solicitor/firm) and understand that there may be a risk that such advice may be admitted into evidence.

An example of putting the client's state of mind in issue is:

"I went to the police station and reported the matter to police on the advice of my lawyer."

"My solicitor told me that I could move interstate with my daughter as there was no order stopping me from doing so."

The Court has a wide discretion as to what constitutes fairness in the context of the inconsistency. In the case of Stamp v Stamp, evidence "*showing the interaction between the wife and her solicitors*" was admissible. Therefore, the instructions that the wife gave to the solicitor and the advice given by the solicitor were held to be admissible.

Privilege against self-incrimination

Section 128 Evidence Act

Pursuant to s.128(1) Evidence Act, a witness may object to giving particular evidence or evidence on a particular matter on the ground that the evidence may tend to prove that the witness:

(a) has committed an offence against or arising under Australian law or the law of a foreign country; or

(b) is liable to a civil penalty.

The Court has to determine whether there are reasonable grounds for objection: s.128(2) Evidence Act.

Section 128(3) provides that if the Court is satisfied that there are reasonable grounds then the Court is to inform the witness about:

(a) that the witness need not give the evidence unless required by the Court to do so;

(b) that the court will give a certificate under s.128 if:

(i) the witness willingly gives the evidence without being required to do so under ss.(4); or

(ii) the witness gives the evidence after being required to do so under ss.(4); and

(c) the effect of the certificate.

The Court can issue a certificate under s.128 so that the evidence that the witness gives and evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given the evidence, cannot be used against them. This does not apply in relation to criminal proceedings in relation to the falsity of the evidence. S.128(7) Evidence Act.

The Full Court has stated that the Court can give a certificate in relation to the giving of evidence in chief. See Ferrall and McTaggart (trustees of the Sapphire Trust) & Ors v Blyton (2000) FLC 93-054.

However, in Cornwall v The Queen (2007) 231 CLR 260, their Honour's Gleeson CJ, Gummow, Heydon and Crennan JJ said relevantly at paragraphs 110 onwards:

> *110. Thirdly, if the accused had objected to counsel's question in the sense of not wanting to answer it, or not wanting it to be asked, the issue probably would have been sorted out before the accused entered the witness box, or the accused could have reacted in such a way as to cause counsel to withdraw the question. The fact that the thirty-fifth question, and all the later questions in chief about the Diez-Lawrence conversations, were asked supports the conclusion that the accused wanted to give evidence about them and instructed counsel to structure events so that he could do so with a measure of impunity.* □□
>
> 111. *This characterisation raises a question whether s 128(1), and hence s 128 as a whole, applies where a witness sets out to adduce in chief evidence revealing the commission of criminal offences other than the one charged. A criminal defendant might wish to present an alibi, the full details of which would reveal the commission of another crime. A civil defendant might wish to prove the extent of past earnings, being earnings derived from criminal conduct. This raises a question whether witnesses who are eager to reveal some criminal conduct in chief, because it is thought the sting will be removed under sympathetic handling from their own counsel or for some other reason, are to be treated in the same way as witnesses who, after objection based on genuine reluctance, give evidence in cross-examination about some crime connected with the facts about which evidence is given in chief.* □□
>
> 112. *The view that the accused's claim of privilege in all the circumstances answered the requirements of s 128(1) has difficulties. It strains the word "objects" in s 128(1). It also strains the word "require" in s 128(5) - for how can it be said that a defendant-witness is being "required" to give some evidence when his counsel has laid the ground for manoeuvres to ensure that the defendant-witness's desire to give the evidence is fulfilled? And it does not fit well with the history of s 128(8). For one thing, s 1(e) of the 1898 Act and its Australian equivalents provided that an accused person called pursuant to the legislation could be "asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged"[100], which implies that the protection of the accused's position in chief or in re-examination was a matter between the witness's counsel and the witness. For another thing, the Australian Law Reform Commission, in summarising the pre-s 128(8) law, assumed that s 1(e) and its Australian equivalents were to be construed as applying to questions in cross-examination only [101].*

The principle in Cornwall v The Queen may not apply in Family Law proceedings, due to the parties' obligations of disclosure in these proceedings.

Whenever these matters arise, you should advise your clients to seek criminal law advice and consideration should be given as to whether to or how to give evidence about the matter of concern. It may be that the issue can be put in a way that does not expose the client to any liability. It may be that the matter is so minor that the client prefers to give evidence about it and run the gauntlet. It may be that the matter is of concern and the client is at risk, and at the same time the client has to at least acknowledge the issue or otherwise risk that s/he looks like s/he is trying to conceal a relevant matter.

When drafting an affidavit it may be useful to say something like:

> *"I am willing to give evidence in relation to X after the obtaining of a Certificate under s.128 Evidence Act."*
>
> "*I am not willing to give evidence in answer to the allegations made against me by X about xx (or referred to in paragraphs XX of the Affidavit of X dated dd/mm/yyyy) without my first obtaining a Certificate under s.128 Evidence Act*."

This acknowledges that the client is aware that s/he should give the evidence / answer the allegations and is not simply ignoring them. It also shows that the witness intends to claim the privilege.

It will be useful for you to take a proof of evidence from the client on the evidence that the client proposes to give viva voce after obtaining the certificate and provide it to your Counsel.

Settlement negotiations – s.131 Evidence Act

A party cannot adduce evidence of:

(a) a communication that is made between persons in dispute or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or

(b) a document that has been prepared in connection with an attempt to negotiate a settlement of a dispute, whether delivered or not.

Known as "*without prejudice*" communications.

An important thing to remember is that having the words "without prejudice" on a letter does not make its contents privileged and nor does the absence of those words mean that it is not privileged. The important question is whether it was a document prepared "*in connection with an attempt to negotiate a settlement of a dispute*." Note that does not mean the whole of the dispute but can be one part of it.

Exceptions:

There are eleven exceptions to the rule which include if the parties consent to the evidence being tendered, the substance of it has been disclosed with express or implied consent, or the document included a statement to the effect that it was not to be treated confidentially.

Traps:

Two subsections allow the admission of evidence of the communication into evidence to contradict earlier evidence that has been admitted, if:

(e) the evidence tends to contradict or qualify evidence that has already been admitted about the course of an attempt to settle the dispute; or

(g) the evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contract or to qualify that evidence;

These exceptions can be used at trial to great effect. Assume that there has been an earlier offer by a party during the course of the proceedings that contradicts or differs significantly from their stated position at trial. This could relate to the first party's capacity to borrow funds, perhaps from family or other sources. The offer may reveal a significant borrowing capacity that is then denied at trial. If Counsel asks questions about the borrowing capacity during cross-examination, s/he may be able to tender the letter to avoid the court being "mislead" about the matter.

How you deal with this is to carefully consider any offers made prior to drafting your client's material and be alive to any contradiction between the offers and their stated position. There may be a good reason for their change of mind, which you may wish to address in the affidavit or alternatively be ready to address in re-examination.

Best interests of the child

There are also exceptions in children's proceedings where the best interests of the child are the paramount consideration. See the Full Court in Hutchings v Clarke (1993) FLC 92-373 where the Court held:

> *"[T]he court must give priority to considerations of the welfare of the child in a situation where non-disclosure of the relevant evidence 'might have the result that the child remained in conditions detrimental to his or her welfare' ... This balancing of interests can only be performed on a case by case basis."*

Statements and admissions made during mediation, counselling and Family Dispute conferences

Section 10D FLA addresses the issue of confidentiality of communications in "family counselling". It provides that a family counsellor must not disclose a communication while the family counsellor is conducting family counselling unless the disclosure is required or authorised by this section.

The family counsellor must disclose the communication if s/he reasonably believes that the disclosure is necessary for the purpose of complying with a law of the Commonwealth, State or Territory: s.10D(2) an example being mandatory reporting of child abuse.

The family counsellor has a discretion to disclose the communication if:

- s.10D(3) - consent to the disclosure is given by:
    - the person who made the communication is 18 or over – that person; or
    - if the person made the communication is a child under 18:
        - each person who has parental responsibility for the child; or
        - a court.
- s.10D(4) - the counsellor reasonably believes that the disclosure is necessary for the purpose of:
    - protecting a child from the risk of harm (physical or psychological); or
    - preventing or lessening a serious and imminent threat to the life or health of a person; or
    - reporting the commission, or preventing the likely commission, of an offence involving violence or threat of violence to a person; or
    - preventing or lessening a serious and imminent threat to the properety of a person; or
    - reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property or a person or threat of damage to property of a person; or
    - assisting the Independent Children's Lawyer to properly represent a child's interests.

Just because the communication is disclosed, does not make it "admissible". See s.10D(6) FLA.

s.10E(1) FLA deals with admissibility of communications in Court or proceedings.

This section provides that communications made to family counsellors (and a person to whom the family counsellor refers a person for medical or other professional consultation) are not admissible. Section 10E(2) sets out the exceptions:

- an admission made by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or
- a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse

unless, in the opinion of the Court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

Who are the elusive family counsellors?

Section 10C(1) defines family counsellors relevantly as:

(a) a person who is accredited as a family counsellor under the Accreditation Rules; or

(b) a person who is authorised to act on behalf of an organisation designated by the Minister for the purposes of this paragraph; or

(c) a person who has been authorised by the CEO of the Family Court or Federal Circuit Court or State Family Court to act as a family counsellor.

The organisations that are designated by the Minister are the ones that receive Commonwealth Government Funding. They are found on the Attorney General's website www.ag.gov.au under Family Relationship Services.

The impact of this is that a person may identify himself or herself as providing "family counselling" but may not be a "family counsellor" for the purposes of the FLA. What is discussed with the counsellor / psychologist in this circumstance is not confidential and may be admissible in Court. This may be quite a surprise to the client.

Conversations

When a deponent gives evidence of a conversation, s/he should give evidence of when the conversation took place, where and who was present. There is a rule of practice under common law that evidence of conversations should be given in direct speech rather than the gist of a conversation. This practice is not followed uniformly across Australia.

Direct speech can be cumbersome and so lawyers need to exercise their judgement as to which conversations are so important that they should be included. A common practice is for deponents to give evidence of the effect of the conversation, often stating, "Jason said words to the effect….". This is not evidence of the conversation but rather evidence of the impact of the statement or conversation upon the deponent. That may also be relevant; however, if the conversation is important then it should be included and the deponent should give his/her best recollection of the words used. If the deponent cannot recall the exact words, then qualify the evidence to ensure that it is clear which words are recollected and which are not. It is important to be as precise as possible if the conversation is likely to be an issue that will be the subject of cross-examination.

Audio recordings and recordings generally

In Victoria the Surveillance Devices Act 1999 replaced the Listening Devices Act. The Surveillance Devices Act itself states that it is not intended to limit a discretion that a Court has to admit or exclude evidence in any proceeding: s.5A. The Act deals with the surveillance or recording and then the use to be made of such recordings. The legislation varies from State to State and so care must be taken to determine where the recording took place.

There are two potential areas of restriction. The first is recording and the second is publication.

In the case of recording it is important to know who used the device and whether that person was a party to the conversation. If the person doing to recording is not a party to the conversation, then the consent of each party to the conversation must be obtained.

Section 6. Regulation of installation, use and maintenance of listening devices.

(1) Subject to subsection (2), a person must not knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party, without the express or implied consent of each party to the conversation.

Section 3 of the Act defines:

"private conversation" means a conversation carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be heard only by themselves, but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it may be overheard by someone else;

A conversation may therefore no longer be private if it is in a public space or a place that is visible and audible to the public.

"listening device" means any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation, but does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment and permit that person to hear only sounds ordinarily audible to the human ear

A listening device would therefore include a mobile phone, tape recorder, Dictaphone.

Section 7. Regulation of installation, use and maintenance of optical surveillance devices

(1) Subject to subsection (2), a person must not knowingly install, use or maintain an optical surveillance device to record visually or observe a private activity to which the person is not a party, without the express or implied consent of each party to the activity.

"optical surveillance device" means any device capable of being used to record visually or observe an activity, but does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment; participating jurisdiction means a jurisdiction in which a corresponding law is in force.

An optical surveillance device therefore clearly includes a camera or mobile phone that can take pictures or video.

"private activity" means an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves, but does not include-

(a) an activity carried on outside a building; or

(b) an activity carried on in any circumstances in which the parties to it ought reasonably to expect that it may be observed by someone else;

The second issue is once a client has a recording, what can he or she do with it?

11. Prohibition on communication or publication of private conversations or activities

(1) Subject to subsection (2), a person must not knowingly communicate or publish a record or report of a private conversation or private activity that has been made as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device.

(2) Subsection (1) does not apply-

(a) to a communication or publication made with the express or implied consent of each party to the private conversation or private activity; or

(b) to a communication or publication that is no more than is reasonably necessary-

(i) in the public interest; or

(ii) for the protection of the lawful interests of the person making it; or

(d) to a communication or publication in the course of legal proceedings or disciplinary proceedings; or

…..

A party may argue that they have only made the recording to protect their lawful interests. See Justice Le Poer Trench in Latham & Latham [2008] FamCA 877 where His Honour allowed in 11 hours of taped conversations between the wife and the children, the children and the husband and the husband and the children. The husband submitted that the conversations painted the mother as a seriously bad child abuser. At paragraph 28 His Honour said:

> *The proceedings are children's proceedings and therefore evidence of the parenting capacity and the nature of the relationships between the parents and the children are important matters in the determination and are matters which the Family Law Act requires to be considered by the Court in the determination of any children's matter. The impropriety demonstrated by the husband in the obtaining of the evidence is, in my view, not gross. The recordings were made in the confines of a family. Whatever is evidenced by the recordings is not said to have been contrived or manufactured by the husband. It seems to be accepted that the recordings were made in the process of the ordinary function of this family. I find that the impropriety or contravention by the husband in making the recordings was a deliberate act and I accept that if the recordings do corroborate some of the matters referred to in the husband's affidavit material it is highly unlikely that the husband would have been able to obtain the recordings with the knowledge or permission of the wife.*

Telephone conversations

In relation to telephone conversations, the Telecommunications (Interception and Access) Act 1979 (Cth) applies. Under this act telecommunications not to be intercepted

s.7(1) A person shall not:

(a) intercept;

(b) authorize, suffer or permit another person to intercept; or

(c) do any act or thing that will enable him or her or another person to intercept;

a communication passing over a telecommunications system.

Interception of a communication is defined by section 6 of the Act:

s.6(1) For the purposes of this Act, but subject to this section, interception of a communication passing over a telecommunications system consists of listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication.[1]

The communication will fall outside the definition of s.6 if the person making the communication was told that it was being recorded. See Molloy & McAdam [2008] FMCAfam 739 where the mother told the father that she was recording the phone conversation. His Honour Federal Magistrate Kemp (as he then was) held:

> *If Whilst section 77 of Telecommunications (Interception and Access) Act 1979 makes intercepted material inadmissible except as provided in that section, the material to be intercepted must come within the definition of section 6 and if effected, with the knowledge of the person making the communication, would appear to stand outside that definition and accordingly, would not be inadmissible.*

Evidence improperly obtained

Section 138 Evidence Act directs that evidence which is obtained improperly or in contravention of Australian law, or in consequence of an impropriety or a contravention of Australian law is not to be admitted unless "*the desirability of admitting evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*."

If the evidence was obtained in contravention of Australian law, you will be asking for a certificate against incrimination before giving evidence about how it was obtained.

Conclusion

In practice cases are usually won in evidence-in-chief and not with the dazzle of a cross-examiner. Solicitors need to have a good understanding of the rules of evidence and ensure that the evidence that is required to prove the case is in the affidavit and put in an admissible form.

[1] There are various exceptions relating largely to telecommunications personnel and police.

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Useful resources:

Steven Odgers "Uniform Evidence Law" 9th Edition, Thomson Reuters

Peter Hannan "Use of affidavits in the Family Court" (2012) 2 Fam L Rev 72

The Honourable Justice Thackray "Family Law Affidavits" (2012) 2 Fam L Rev 65

Penelope Giles, Barrister, Francis Burt Chambers, Perth "Touching the Void: Division 12A and the Rules of Evidence"

Penelope Giles, Barrister, Francis Burt Chambers, Perth "Evidence: What Evidence?" Paper Delivered.

TD North, SC "Evidence in Family Law Proceedings". LIV Paper 2012

Sally Sheppard, Clayton Utz "Establishing and Maintaining Legal Professional Privilege" Television Education Network February 2012.

CCH Master Family Law Guide 2012.