

privilege primer: best practices for internal counsel

Recent developments in the law of privilege have created issues for internal counsel with respect to three types of legal privilege: solicitor-client privilege, common interest privilege and litigation privilege.

solicitor-client privilege

The usual definition of solicitor client privilege provides that:

Solicitor/client privilege protects from disclosure communications made in confidence between a lawyer and a client for the purpose of giving or receiving legal advice.

Three requirements of the definition give rise to unusual problems. The requirement of a lawyer, the provision of legal advice and circumstances of confidence.

who is a lawyer?

It is clear, at least in Canada, that privilege applies equally to in-house lawyers and external lawyers licensed to practice law in Canada. It is also clear that, in the case of in-house counsel, the company will be the client, and that includes all employees of the company.

There are a few considerations, though, that must be borne in mind.

What if a foreign lawyer gives advice on Canadian law - is it privileged? Or if a Canadian lawyer gives advice on foreign law - is that privileged?

Canadian cases have gone both ways on the issue. The determining factor is probably the expectation of privilege by the client – whether the expectation was reasonable in the circumstances. If a Canadian lawyer is giving advice to a

company located in Canada on an issue of foreign law (eg. where a subsidiary is located), there is a remote risk that privilege may not apply.

As a measure of prudence, one should create the necessary record to show that the communication was made in confidence, for the purpose of giving legal advice and with the expectation that it would be privileged. If the matter is important enough, one should retain foreign counsel to ensure that the privileged relationship is established.

Significant issues arise when obtaining legal advice from internal counsel at European subsidiaries. European in-house counsel do not enjoy privilege in their jurisdictions because they are not deemed sufficiently independent from their employer. In the *Akzo Nobel* case, decided in Sept 2010, the European Union Court of Justice held that:

“...both from the in house lawyer’s economic dependence and the close ties with his employer, [means] he does not enjoy a level of professional independence comparable to that of an external lawyer.”

As a result, any communications between a Canadian company and an in-house counsel in Europe are likely not to enjoy privilege or confidentiality in Europe.

It is unknown whether those communications would enjoy privilege in a Canadian setting. Most likely they would not because, in light of the *Akzo* decision, there would not be a reasonable expectation of privilege or confidentiality given that the in-house lawyer in Europe does not enjoy privilege in his or her own jurisdiction. One possible solution is to retain an external counsel to be the conduit of communications.

As noted in the above definition, privilege applies only to lawyers. It does not apply to people acting in a quasi-legal capacity, such as accountants or patent agents. In order to create privilege for communications with accountants or patent agents, they should be retained by a lawyer for the purpose of performing services that will assist the lawyer in the giving of legal advice.

Finally the issue of who the client is may also affect privilege. What if in-house counsel is asked to give advice to the Board of

Directors, particularly where there are outside directors on the Board? If the interests of the Board are aligned with the company, there should not be an issue. But if the interests diverge, then in-house counsel is in a conflict and there is arguably no lawyer-client relationship.

for the purpose of giving or receiving legal advice

While the advice of internal counsel is as privileged as the advice of external counsel, internal counsel are more likely to wear multiple hats than external counsel. In the context of government lawyers, they are more likely to perform policy functions and provide policy advice more frequently than external counsel do. This can make their activities subject to significantly closer scrutiny than those of external counsel. At the end of this bulletin is a checklist of steps internal counsel can take to maximize the likelihood that their services will capture and retain privilege. That said it would probably be mistaken to try to capture privilege for matters that are clearly not privileged. Steps of that nature would likely damage the credibility of counsel in a contested proceeding and may incline a court to give the opposing party, rather than internal counsel, the benefit of the doubt on a disputed issue of privilege.

in circumstances of confidence

As noted at the outset, confidentiality is the third requisite element for lawyer client privilege to exist. If the communication is not made in circumstances of confidence, then the communication cannot be privileged.

This means that if a third party who is not a client is present during the communication of legal advice (eg. a meeting between the lawyer, the client and someone who may have a similar interest to the client, such as a banker), circumstances of confidentiality, and therefore privilege, do not exist.

Similarly, discussions in public places – restaurants, airplanes, GO trains - may also breach confidence and therefore are antithetical to the existence of privilege.

This also means that, if there is broad dissemination within a corporation there is no privilege because it is inconsistent with confidentiality. See for example the *Leigh Instruments* case: the

court found that certain documents signed by in-house counsel were not protected because they were widely disseminated within the bank, and the bank could not demonstrate that the recipients of the documents treated them confidentially.

The bottom line is that distribution of documents containing legal advice to people who are not directly concerned with the issue covered by the advice undercuts the notion of confidence and therefore undercuts privilege.

waiver of privilege

Waiver can happen in two ways: waiver by disclosure and waiver by reliance.

a) disclosure

Simply put, disclosure of legal advice (or the substance of the advice) to others waives privilege.

Waiver must be deliberate and knowing. Courts will generally protect inadvertent disclosures. Waiver must be by someone who has authority to waive: only the client can waive, not the lawyer or a third party.

What if the client is a large organization? Can any employee waive the privilege? Generally speaking no. The court will examine whether the employee had the requisite authority to waive. In *Nova Scotia Dept Transportation v. Peach* (2011) NSCA), for example the Court went through an analysis of whether privilege could only be waived by an order in council of the ministry, but ultimately concluded that the author of the email had authority to waive privilege because he was a management level employee, he was acting within his sphere of authority and within his territorial jurisdiction when he communicated with Peach, and he evinced an intention to waive privilege.

This reinforces the point made earlier about making sure you limit circulation of privileged documents only to those with a need to know, and to ensure they do not distribute the document to any other person.

What about sending information to auditors?

In *Phillips v. OSC*, the Ontario Divisional Court ruled that because s.153 of the OBCA compels disclosure of documents by a company to its auditor, there is only a limited waiver when the company discloses legal opinions to the auditor – the waiver is only for the purpose of allowing the auditor to use the information for the purpose of the audit. For the same reason, the auditor did not have the authority of the company to waive privilege over the documents

Another common issue that arises is minutes of Board meetings – one must be careful to ensure that Board minutes do not refer to the substance of legal advice that may be discussed during the meeting. Minutes are often producible in litigation and regulatory matters; and if that happens there will be a waiver of the privileged content reflected in the minutes. Therefore, while minutes can refer to the *fact* that legal advice was discussed during the meeting, they should not refer to the *substance* of the advice.

b) implied waiver

Putting legal advice at issue in a pleading or letter may amount to a waiver of privilege. A common scenario arises where a client sues a lawyer for negligence – that opens the door for the lawyer to plead and rely on the privileged advice that was actually given.

Putting one's state of mind at issue may also lead to waiver of privilege. For example, the allegation that a plaintiff relied on a certain representation may allow the party opposite in interest to test whether the plaintiff had received legal advice about its ability to rely on that representation.

c) summary

The important thing to remember about waiver is that, once there has been waiver in one legal proceeding it amounts to a waiver of privilege for all purposes: i.e. waiver for all legal proceedings, even proceedings in a different jurisdiction.

Also, partial disclosure may lead to more broadly compelled disclosure if the partial disclosure is misleading. In other words, the waiver applies to the entire subject matter relating to that communication.

common interest privilege

Common interest privilege allows parties to share privileged information between themselves without waiving privilege. It is available to parties who share a commonality of interest in an issue. It emerged from the desire and need for co-defendants to litigation to share information whether those co-defendants were represented by the same counsel or were separately represented.

In Canada it is now relatively clear that common interest privilege extends to both litigation and commercial transactions although in the United States, the consensus view would still limit it to litigation.

The biggest risk with common interest privilege appears to be the default position of the common law in the absence of any agreement. In such cases a court will determine whether the privilege exists and whether it has terminated because of an explicit or implicit divergence of interest. If the privilege has terminated, all privileged information becomes discoverable in the absence of an agreement between the parties.

This default position is especially risky within a corporate family where lawyers of one company will often provide legal advice to other companies within the group. This may create few issues while the group stays together but can create significant issues if one of the entities is spun off. In those circumstances, the privilege that the parent and the subsidiary thought they enjoyed may be lost. Corporate families can avoid this risk with common interest privilege agreements, either in the form of a single omnibus agreement to cover general services as well matter specific agreements for more sensitive issues.

Common terms of common interest privilege agreements include the following:

- A recitation of facts establishing common interest
- An assertion of common interest
- A broad definition of common interest materials
- A statement that there is no obligation to share materials

- An acknowledgement that sharing materials does not amount to waiver of privilege
- An obligation to surrender shared materials on termination
- A statement that confidentiality and privilege survive termination
- A statement that no solicitor client relationship is created by virtue of the common interest.

In addition, in a true joint retainer, especially within a corporate family you may wish to include a stipulation that neither party can waive privilege even for communications between itself and counsel. This may, for example, help prevent a situation where after a spin off, the acquirer of a subsidiary tries to use advice that the subsidiary received from internal counsel at the parent to its own advantage.

litigation privilege

The most significant change in Canada involves the change from the substantial purpose test to the dominant purpose test. Under the former, a document was privileged if it was created for the substantial purpose of reasonably contemplated litigation. That meant that if a document was created for several purposes, one of which was litigation, the document was privileged.

Under the dominant purpose test, the document is privileged only if it was created for the dominant purpose of reasonably contemplated litigation. In other words, if the document was created for several purposes, only one of which is litigation, it is not privileged.

For internal counsel, this change has its most significant impact on investigations. The shift to the dominant purpose test means that many investigations will no longer be subject to litigation privilege where they were before.

Parties can protect against this risk by assigning the investigation to an internal or external lawyer and by defining the inquiry as a legal issue which will attract solicitor/client privilege.

When internal counsel is conducting an investigation, consider a formal “retainer letter” or memorandum of instruction with statements to the effect that:

1. The lawyer is conducting an investigation as counsel for the purpose of providing legal advice based on the report;
2. The investigator's notes and report will be protected by solicitor-client privilege and that the investigator will treat them accordingly. The investigator will tell all witnesses that he or she is conducting an investigation as legal counsel;
3. All information given to the investigator will be treated in strict confidence and revealed only to those who need to know; and
4. The investigator will prepare a report stating his or her findings as well as a conclusion and analysis of the legal issue at hand.

One significant difference between solicitor client privilege and litigation privilege is that the former is permanent while the latter ends with the litigation. In other words, information your client has as a result of a prior action, is discoverable in subsequent litigation. For purposes of determining the end of litigation, however, Courts have applied an expanded definition of “litigation” to include other actions with issues common to the first action. As a result, for example, litigation privilege about a product liability issue would not end with the first case but would extend to all cases which raise a similar issue.

The fact that litigation privilege ends at the conclusion of litigation can also provide an offensive tool against government. It has, for example, allowed for the production of information about past litigation under Freedom of Information legislation.

capturing & maintaining privilege

Internal counsel can take a number of simple mechanical steps that will enhance their ability to capture and preserve privilege. These include the following:

1. Maintain a record of who drafts a document.

2. Where a lawyer has both legal and policy/business capacities, ensure that documents providing legal advice are signed with reference only to his or her legal capacity.
3. Ensure that documents bear a heading that reads something like "Confidential Legal Advice - Do Not Copy or Transmit."
4. Frame the discussion in terms of a legal issue rather than a policy/business issue. For example, a memo which begins "The legal department has been asked to assess the legal risks of comfort letters" is preferable to "This memo sets out the department's policies on comfort letters" or "This memo considers whether the department should accept comfort letters."
5. Where possible, separate legal and policy/business advice into separate documents.
6. Where possible, limit circulation of legal advice within the corporation. Where that is not possible or desirable, ensure that the recipients understand the importance of keeping the advice confidential, at a minimum, by marking the documents as such.
7. Maintain a distribution list of document recipients.
8. Do not attach legal advice to "public records".
9. To the extent possible employees should segregate legal documents from policy/business documents, and mark them as "confidential files".
10. Use legal department letterhead rather than general letterhead.
11. Be aware that communicating with foreign counterparts may result in a loss of privilege if proceedings are commenced in the foreign jurisdiction.

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[a cautionary note](#)

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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