Protecting Privilege:
Special Topics for In-house Lawyers

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Overview

• This presentation focuses on legal and practical issues of privilege, including:
  • Sharing privileged information with third parties such as auditors, insurers and co-defendants
  • Multi-Jurisdictional contexts
  • Strategies for protecting privilege during internal investigations
  • Maintaining privilege in the context of transactions
Duty of Confidentiality vs. Privilege

• All lawyers have a duty of confidentiality to their clients as set out in the Rules of Professional Conduct (Rule 2.03(1))

  2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

• Privilege is *different* from the duty of confidentiality – it protects certain information from disclosure which may otherwise be required to be produced to others

• The purpose of privilege is to allow frank and honest communications between clients and counsel
Solicitor-Client Privilege – Key Concepts

• Solicitor-Client Privilege protects from disclosure confidential communications between lawyer and client made in furtherance of providing legal advice

• Solicitor-Client Privilege is now regarded as a quasi-constitutional right - Canadian courts afford a high degree of protection to Solicitor-Client and other evidentiary privileges
Solicitor-Client Privilege – Key Concepts

• In Canada, communications involving *in-house* counsel that are in furtherance of providing legal advice to their corporate employers are afforded the same protection as communications involving *external* counsel
  
  • **Issue**: Who is your client? The corporation, *not* the individuals who work for it. Also consider which legal entity you represent.
  
  • Consider when employees, directors or related entities require separate representation.
  
  • Educate non-lawyers about privilege, may not attach to communications with counsel from related companies.
Solicitor-Client Privilege – Key Concepts

• There must be an expectation on the part of the client that the communication will be confidential. Privilege can be waived by conduct which is not consistent with an expectation of confidentiality.
  
  • **Issue:** – how are privileged communications disseminated within the company?
  
  • **Practice Points:** - Consider whether dissemination of advice to a recipient is necessary.
  
  • Consider the medium of communication and the risks associated with email.
  
  • Consider how confidentiality is maintained after the communication is complete.
Solicitor-Client Privilege – Key Concepts

• Only advice and communications in furtherance of the provision of legal advice are protected – business advice is not privileged
  
  • Issue: It can be difficult to distinguish business and legal advice, especially when lawyers perform multiple functions within an organization – i.e. membership on Board of Directors, Corporate Secretary, Privacy Officer, Compliance Officer
  
  • Practice Point: Consider which role you are providing the advice in and whether privilege attaches to that role

Consider drafting legal advice separately from business advice or clearly stating when legal advice is being given in a document with mixed content (i.e. clearly delineating legal advice given at a Board meeting)
Solicitor-Client Privilege – Key Concepts

• Solicitor-Client Privilege is broader than communications which expressly seek or convey legal advice. Communications which keep a lawyer updated on an ongoing situation will generally also be protected—referred to as “communications in furtherance” of legal advice.

• Solicitor-Client Privilege can also apply to communications between non-legal personnel in an organization if they are made in furtherance of providing legal advice – i.e. communications between non-legal employees that repeat legal advice.

Practice Points: Labelling a non-privileged document as “privileged” won’t change its status. However, carefully labelling privileged documents will help you to quickly identify them if litigation arises. It may also help you to demonstrate to a court that they are privileged.

Expressly state you are seeking information in furtherance of legal advice when asking non-lawyers for information.

Educate non-lawyers about how to communicate with you in furtherance of obtaining legal advice.
Strategic Issues for In-House Counsel
Multi-Jurisdictional Contexts

- Do not assume that foreign jurisdictions will approach Solicitor-Client Privilege the same way we do in Canada

Examples:
- The European High Court’s decision in Akzo Nobel Chemicals—Solicitor-Client Privilege was not recognized when in-house counsel was involved in communications. The role of external and internal counsel was found to be “fundamentally different” in light of in-house counsel’s dependence on their employer.
- US Congressional Investigations following the financial crisis have also resulted in the disclosure of legal advice from in-house counsel. Congress has taken the position that common law privileges recognized by US courts do not apply.
- The possibility that privileges recognized in Canada will not receive the same protections in foreign jurisdictions is very real - involvement of external counsel in foreign jurisdictions may be necessary both to protect privilege and to advise on complex evidentiary issues when there is a potential for foreign investigations or proceedings.
Litigation Privilege – Key Concepts

• Litigation Privilege applies to communications or documents created for the dominant purpose of pursuing or defending litigation, existing or reasonably contemplated.

• Litigation Privilege protects a party’s work product created in preparation for litigation in an adversarial justice system – creates a “zone of privacy” for a litigant to build a case.
  • Issue: Often, in an in-house context, communications might be created for a variety of purposes including to defend potential litigation. This would include documents created for internal risk management, insurance reporting, human resources management, compliance reviews and client relations.

• How can you know if the “dominant purpose” test is satisfied?
Litigation Privilege — Key Concepts For In-house Counsel

- No requirement that legal advice be involved in the protected communications, only that the *dominant purpose* for the communications be in respect of litigation.

- Many documents that are subject to Litigation Privilege will also be subject to Solicitor-Client Privilege. However, Litigation Privilege can apply to documents not typically protected by Solicitor-Client privilege — *i.e.* investigative reports prepared by non-lawyers.

- No requirement of confidentiality as between lawyer and client — Litigation Privilege also applies to discussions with third parties such as witnesses.

  - Issue — Litigation Privilege can operate to protect documents created by anyone in the corporation (or third party experts, consultants) so long as they were created for the dominant purpose of litigation.
Litigation Privilege – Key Concepts

• Litigation Privilege recognized not just by courts but also by regulatory tribunals
• The privilege ends when the proceeding (or similar proceeding) ends

• Issue: A number of related legal proceedings may be active in or around the same time – i.e. a class action and a regulatory investigation. Litigation Privilege can operate to protect communications created for one proceeding that are relevant in another.
Internal Investigations & Privilege

• In some circumstances, documents or communications created in the course of internal investigations will be protected by Solicitor-Client Privilege, Litigation Privilege or both

• **Solicitor-Client Privilege** will apply if there is a sufficient nexus between the internal investigation and the provision of legal advice. To support a claim that communications from an internal investigation are solicitor-client privileged:
  • the direction to perform the investigation should come from counsel
  • in-house counsel should be actively involved, consider engaging outside counsel to conduct or direct the investigation when privilege concerns are heightened
  • involvement of other persons in the investigative process should be formally documented as assistance in providing legal advice
  • all documents created during the investigation should be marked privileged and kept separate
  • in-house counsel should reference the results of the investigation in the resulting legal advice
  • the purpose of the investigation (legal advice or to prepare for litigation) should be made clear and expressed to those involved
  • those involved should be instructed to keep their participation confidential and results should be given limited circulation
Internal Investigations & Privilege

• **Litigation Privilege** will apply when it can be established that the investigation was performed for the *dominant purpose* of actual or contemplated litigation

• Keep in mind that a broader range of communications may be protected when Litigation Privilege may be asserted

• Whether Solicitor-Client or Litigation Privilege is asserted, the distinction between “underlying facts” and privileged communications is important

• Generally speaking the **facts** uncovered in an investigation are not privileged but the **document** that records them may be privileged.
Practice Points – Privilege in Internal Investigations

- Careful consideration should be given to design, conduct, timing and purpose of an internal investigation to ensure applicable privileges apply.
- Questions to consider:
  - How concerned are you that the results of the investigation and related communications be protected by privilege?
  - What policies are in place with respect to the type of investigation planned? Consider whether any policies should be implemented.
  - When should the investigation be launched – is litigation reasonably contemplated at that time?
  - What is the purpose of the investigation? How should it be expressed in documentation or to those involved in the investigation to protect privilege?
  - What form should the results of the investigation take?
  - How will counsel make use of the results of the investigation?
  - Weigh the pros and cons of different investigators – for example what would be the practical impact on the investigation of having non-legal personnel, in-house counsel or external counsel perform the investigation?
  - Does the investigator need any expertise to assist in the investigation?
Solicitor-Client Privilege - Third Party Involvement

• The involvement of a third party in legal communications has the potential to negate any applicable Solicitor-Client Privilege (which requires that communications be confidential as between lawyer and client)

• However, Canadian law recognises certain exceptions:
  • Common Interest Privilege
  • Limited Waiver
  • The “Necessary” Third Party
Common Interest Privilege

• Technically not a type of privilege – rather a waiver doctrine
• Protects an underlying privileged communication when that communication is shared with a third party who has a *common interest* in the matter that is the subject of the privileged communication
• The concept has long been recognised in litigation contexts to protect litigation privilege where co-defendants share advice, strategy, etc.
Joint Defence Agreements

• JDAs are entered into between co-defendants or potential co-defendants with common interests in the outcome of litigation (or potential litigation)
• Cannot create a privilege. A JDA’s function is to establish the evidentiary basis for Common Interest Privilege (i.e. to show no intention to waive)
• Differing views on the desirability of JDAs; falling out of favour in US
• A benefit is that they can be used to establish rules for return of privileged information if parties’ interests diverge or when litigation ends
• Can restrict use that the other party makes of the information shared (i.e. that it cannot be used against the party who provided it)
Common Interest Privilege

• Canadian Courts are now willing to extend the application of Common Interest Privilege beyond the litigation context

• Corporate Context - courts have accepted that parties who share legal advice in furtherance of completing a corporate transaction do not waive the Solicitor-Client Privilege in that advice

Example: a legal opinion is provided to PurchaserCo. by VendorCo.’s counsel regarding a regulatory matter at issue in the transaction – the opinion remains privileged in the circumstances because there is a common interest in “getting the deal done”
Common Interest Privilege

• Common Interest Privilege in the context of a transaction does not operate merely to protect the sharing of pre-existing legal advice - it can cover Solicitor-Client Privileged communications generated while the parties work in collaboration towards a common business goal.

Example - *Barrick v. Goldcorp* (February 2011)

- Xstrata and New Gold both indirectly held shares in a Chilean mining company.
- Barrick made an offer for Xstrata’s share, triggering New Gold’s right of first refusal.
- Goldcorp financed New Gold’s exercise of its right of first refusal and then acquired the Xstrata share from New Gold.
- Goldcorp and New Gold worked together to ensure their arrangement was “onside” certain legal requirements.
- Barrick subsequently sued New Gold and Goldcorp claiming the arrangement between them was illegal.
- In the lawsuit certain communications between counsel for both Goldcorp and New Gold which discussed: 1) the structure of the agreement between their clients; 2) public disclosure of the transaction; and 3) appropriate communications with Barrick and Xstrata - were found to be protected by common interest privilege because they related to the common goal of getting the deal done legally.
Voluntary and Limited Waiver

• Parties have the option of waiving privilege over their communications

• Voluntary waiver presents issues:
  1) typically cannot waive privilege in respect of some third parties but not others; and
  2) a waiver over some communications often means a waiver over all privileged communications dealing with the same subject matter

• In certain circumstances, however, a party can share privileged information with a third party and not waive privilege in that communication vis-à-vis the world at large
Limited Waiver

• This situation arises when a company is legally compelled to share privileged information – for example with its auditors for the purposes of the statutory audit process.

• Canadian courts have reasoned that corporations are required under various corporate statutes to subject themselves to audits and to co-operate with their auditors. Accordingly, compliance with legal requirements does not constitute an intention to waive privilege against the world at large.

• The disclosure of privileged communications from a corporation to its insurers is also generally understood to be protected by limited waiver.

• Caution: these principles may not apply in other jurisdictions. Be alert to the applicable legal principles in the jurisdiction where investigations or proceedings might be initiated which demand disclosure.

• Practice Point: If providing privileged documents under the limited waiver doctrine, it is recommended that a cover letter be drafted stating (1) the statutory provision under which the document is being provided and (2) that there is no intention to waive the privilege associated with the document.
“Necessary” Third Parties in Solicitor-Client Privileged Communications

• Canadian Courts have recognised that Solicitor-Client Privilege extends to legal communications involving third parties where:
  1) The third party stands in the shoes of the client (i.e. in an agency relationship)
  2) The third party acts as a channel or “translator” of information or communications between a party and their lawyer
  3) Where the third party’s role is “essential” to the existence or operation of the solicitor-client relationship

  Example: An expert is required to explain information to the lawyer that the lawyer might not otherwise have the expertise to understand – i.e. complex accounting, tax or scientific information

• Communications with a third party in which that third party merely gathers information for the lawyer without contributing expertise or commentary is less likely to be considered Solicitor-Client Privilege
“Necessary” Third Parties in Solicitor-Client Privilege - The Deal Team

• Companies often assemble “deal teams” to negotiate a transaction
• The deal team may include external advisors with highly specialised knowledge or skill—such as tax accountants and financial advisors
• External deal team members may be involved in discussions with external or internal counsel respecting matters in the transaction
• *Are these communications covered by Solicitor-Client Privilege?*
• Answer – *they can be* - but it depends on the role of the external advisor and the nature of the communications involved
• Where the specialised knowledge of the external advisors in discussions with counsel is necessary for the receipt of legal advice then privilege is likely to apply
Solicitor-Client Privilege and Deal Team Discussions

- **Barrick v. Goldcorp**
  - New Gold and Goldcorp each employed external financial advisors on the deal teams they assembled to negotiate and structure the transaction to obtain a share of a mine from Xstrata.
  - Deal team members – external and internal - were privy to communications in which counsel provided, or was asked for, legal advice.
  - Certain external deal team members also provided advice and direction to counsel directly – in some cases without the client present.
  - In the subsequent lawsuit regarding the legality of the New Gold – Goldcorp arrangement, the plaintiff, Barrick, sought production of all deal team communications involving the provision of legal advice that also included external financial advisors.
  - Barrick’s position was that the presence of external financial advisors in solicitor-client communications negated any privilege in them.
  - Further, external financial advisors did not have any specialised expertise that the client or client’s counsel lacked to make their involvement “necessary” in solicitor-client communications.
  - Court disagreed – while the court indicated there is no such thing as “deal team” privilege *per se* - it noted that the interrelationship between external advisors, clients and counsel is a modern business reality – in the *Barrick* case it was clear that the input of the financial advisors was necessary for counsel to provide legal advice to the client.
Practice Points – Protecting Privilege When Third Parties Are Involved

• In transactions, ensure that any confidentiality agreement entered into by parties indicate that there is no intention to waive privilege through the exchange of privileged information made in furtherance of closing the deal

• Label all email and correspondence sharing legal advice with another party to the deal as being subject to Common Interest Privilege

• If there is a requirement to produce privileged information to auditors, insurers, etc. you should document your intentions by way of a “limited waiver” letter

• Engagement letters with auditors can also address limited waiver of privileged information

• Engagements with external advisors on deal teams should be reduced to writing, include confidentiality provisions and a statement that the external advisors’ specialised knowledge and input is necessary in order for counsel to provide legal advice
Practice Points – The Importance of Education

• A thorough understanding of privilege by in-house counsel is clearly an important part of in-house counsel’s role.

• However, it is also crucial that non-lawyers in key positions understand the nature of privilege so that:
  • They involve legal counsel early on issues to benefit from privilege.
  • They do not unintentionally waive privilege.

• Recommended that in-house counsel educate key stakeholders in the basics of privilege and remove the common myths held regarding privilege.
COMMON MYTHS BELIEVED BY NON-LAWYERS

• Labeling a Communication as “Privileged” protects it from disclosure.
  • The requirements must be met in order for privilege to attach.
• Copying a Lawyer makes the Communication Privileged.
  • The communication must be seeking legal advice.
• All Communications with a Lawyer are Privileged.
  • Business advice is not covered.
• Communications with a Client’s Lawyer are Privileged.
  • A client’s lawyer is a third party.
• Forwarding a Privileged document to others in the organization will not affect the privilege.
  • If the document is distributed beyond lawyer and client, privilege can be waived
Quick Tips and Traps for Non-Lawyers when dealing with issues

• DO:
  • Stick to the facts
  • Engage in-house counsel in the discussions early
  • Draft as though the document will be produced
  • Even if there is privilege, be careful with language
  • Discuss issues orally

• DO NOT:
  • Make Early Conclusions about Responsibility
  • Editorialize
  • Guess What the Other Side is Thinking
  • Read into Agreements
  • Create and Broadly Circulate “Summaries of Issues”
  • Answer Questions Flippantly
Conclusions

• Privileges can provide an organization with a “zone of privacy” to seek and obtain confidential legal advice or to prepare for contemplated litigation.

• The strength of a claim for privilege will depend on the factual circumstances and fall along a spectrum.

• Claims of privilege can be strengthened through conscientious practice and by raising awareness of privilege concerns amongst non-lawyers in an organization.

• However, if challenged, claims of privilege are ultimately subject to a determination by a court. Often the document over which privilege is claimed will be reviewed by a motions judge who will evaluate the strength of the privilege claim and consider the competing arguments of the party seeking disclosure.

• As lawyers we must always be careful of what we say to or about our clients (including how, where and to whom we say it). Be aware of where privilege starts and ends.
Please ask questions
Thank you

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