

Workplace Confidential:

How to maintain privilege over workplace investigations

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Agenda

- Types of Privilege in Workplace Investigations
- Privilege and the Role of External Counsel in Workplace Investigations
- Lawyer, Client, a 3rd Party and Privilege
- Takeaways

Types of Privilege in Workplace Investigations

1. Legal Advice Privilege
2. Litigation Privilege

Legal Advice Privilege and its Scope

Three criteria need to be satisfied before legal advice privilege will be found:

1. The communication must be between a solicitor and client
2. The communication must be made in confidence
3. The communication must be made in the course of seeking legal advice

Litigation Privilege and its Scope

- Two part test to determine whether litigation privilege applies to a document:

(1): Was litigation in reasonable prospect at the time it was created; and

(2): If so, what was the dominant purpose for its creation

- What does “dominant purpose” mean?

Privilege and the Role of External Counsel in Workplace Investigations

- *Durham Regional Police Association* (2015, Ontario Labour Arbitration)
 - Employer retains external lawyer to investigation harassment complaint pursuant to employment policy
 - Employer claims legal advice and litigation privilege over report
 - Legal Advice Privilege: No
 - Retainer did not make reference to legal advice being provided by lawyer/investigator to client
 - Lawyer/investigator found only to be providing recommendations, NOT advice on the implications of those recommendations
 - Employer consulted with Union on selection of lawyer/investigator
 - Litigation Privilege: No
 - No evidence on the record suggesting that litigation was pending at the time of the creation of the document
 - On the facts of the case, the dominant purpose could not be litigation because it was required under a workplace policy

Privilege and the Role of External Counsel in Workplace Investigations

- *Gower v. Tolko Manitoba Inc.* (2001, Manitoba Court of Appeal)
 - Employer retains external lawyer to investigate allegation of sexual harassment. Following receipt of report, employer fires employee
 - Legal Advice Privilege: Yes
 - Retainer made reference to the provision of legal advice:
 - *“The Investigator will conduct an investigation as counsel on behalf of the Employer for the purpose of providing a fact finding report and giving legal advice based on the findings in the report.”*
 - *“The Investigator will prepare a report for the Area Manager stating her findings of fact and her conclusions as to whether the findings of fact constitute sexual harassment and a breach of the Employer’s harassment policy and will provide legal advice based on those findings of fact and conclusions.”*
 - Report contained recommendations based on the facts that lawyer gathered and provided advice with respect to the legal implications of those recommendations

Privilege and the Role of External Counsel in Workplace Investigations

- *Howard v. London (City)* (2015, Ontario Superior Court of Justice)
 - Employer retains external lawyer to investigate death of resident of long-term care facility who left the facility and attempted to cross the street
 - Employee in charge of facility was advised that investigation was for “human resource purposes” and would be “low key” and was copied on emails related to retaining external lawyer
 - Employee interviewed several times and inquired whether she needed counsel.
 - Employee subsequently fired for cause
 - Legal Advice Privilege: Yes, but waived
 - Terms of Reference made reference to “privileged recommendations” and required lawyer to answer whether City conformed to regulatory standards which necessarily required legal analysis
 - Fairness required the outcome that the privilege be waived (Upjohn-like warning?)

Lawyer, Client, a 3rd Party and Privilege

- Not every communication by a third party with a lawyer which facilitates or assists in giving or receiving legal advice is protected by legal advice privilege
- There are certain instances where legal advice privilege can extend to communications that pass between a lawyer and a third party:
 - Third party is acting as conduit between the lawyer and client (functional test)
- If the function of the third party is essential to the existence of the lawyer-client relationship, then privilege should extend to cover any communications that are in furtherance of that function and meet the other criteria of legal advice privilege

Lawyer, Client, a 3rd Party and Privilege

- *If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected*

Lawyer, Client, a 3rd Party and Privilege

- No Privilege Over Counsel Communication with 3rd Party
 - *Wheeler v. Le Marchant* (1881, England Court of Appeal)
 - Client instructs solicitor to retain surveyor to obtain information about specific property and prepare report for the solicitors. Communications were not privileged, the surveyors were not employed as agent to communicate with the solicitors to obtain legal advice
 - *Lifford Wine Agencies Ltd. v. Ontario* (2005, Ontario Court of Appeal)
 - LCBO retains external counsel to conduct workplace investigation. Counsel retains investigator to conduct workplace interviews. Transcripts of workplace interviews and report prepared by investigator not privileged
 - *Weinmann Electric Ltd. v. Niagara Falls Bridge Commission* (2013, Ontario Superior Court of Justice)
 - Client instructs external counsel to retain 3rd party to investigate allegation of corruption at the client. 3rd party gathers information from bidders (outside sources) and provides it to counsel so that client can be advised. No privilege

Lawyer, Client, a 3rd Party and Privilege

- Legal Advice Privilege over Counsel Communications with 3rd Party
 - *Susan Hoisery Ltd. v. MNR* (1989, Can. Ex. Ct.)
 - Client instructs 3rd party accountants to meet with solicitors and convey information regarding business affairs of client. Privilege attaches as accountants were acting as “translators” of client’s business information
 - *Bank of Montreal v. Tortora* (2010, British Columbia Supreme Court)
 - Bank outsources all HR functions to 3rd party consultant including terminations. Communications between counsel and 3rd party regarding termination of defendant subject to privilege
 - *Camp Development Corp. v. South Coast Greater Vancouver Transportation Company* (2011, British Columbia Supreme Court)
 - Transportation Authority retains 3rd party consultant to provide it with land acquisition services and external counsel provides legal advice to consultant with respect to the acquisition services provided by the consultant. Communications between counsel and 3rd party consultant are privileged

Takeaways

- Legal Advice Privilege and Litigation Privilege require the satisfaction of different conditions
- Label applicable documents as “Privileged and Confidential” / “Prepared in the Contemplation of Litigation”
- Include terms in the retainer which refer to the collection of facts and the provision of legal advice based on those facts (*Gower*)
- Understand the implication of a client’s policy mandating an investigation on litigation privilege
- Consider both litigation privilege and legal advice privilege when working with 3rd parties. Legal Advice Privilege will only be available where 3rd party is essential to the lawyer-client relationship

Thank you

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