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Privilege – A Primer for In-House Counsel

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Types of privilege

- Solicitor & client privilege
- Settlement privilege
- Litigation privilege
- Joint defence or common
- Interest privilege

Solicitor & client privilege

Overview

- Between lawyer and client, for the purpose of giving or receiving legal advice, and the communication is intended to be confidential.
- Rationale: to ensure that a lawyer is able to obtain all the information required from his or her client, to enable him or her to properly advise the client, and to foster candor and confidentiality between parties in specified situations where necessary for the administration of justice.
- Extends to in-house counsel: the employer is the client.

Solicitor & client privilege

Attributes of solicitor-client privilege

- Privilege belongs to the client.
- Once established, solicitor-client privilege is considerably broad and all-encompassing.
- Includes “the chain of exchanges or communications and not just the culmination of the lawyer’s product or opinion”.
- Third party communications with a solicitor may not waive privilege in circumstances where the third party serves as a channel of communication between the client and solicitor.

Solicitor & client privilege

Solicitor-client privilege and the in-house lawyer

- In-house lawyers wear many hats: they give legal advice, business advice, and policy direction.
- Their status as a lawyer does not cloak all advice and communications with privilege. Only legal advice will be protected, as assessed by reviewing:
 - Nature of the relationship;
 - Subject matter of advice; and
 - Circumstances under which it is sought and rendered.

Solicitor & client privilege

Best practices

- Mark documents as “Privileged and Confidential – Do Not Copy or Transmit”
- Separate out legal and policy/business advice into separate documents where possible.
- Frame opinions to address legal issues rather than policy or business issues.
- Limit circulation of legal advice.
- Create separate files for legal advice and general business advice.

Settlement privilege

- Class privilege, presumptively applies where legal test is met.
- Privilege belongs to both parties; cannot be waived unilaterally.
- Communications will be protected where:
 - 1) A litigious dispute exists or is contemplated;
 - 2) Parties undertake negotiations in an attempt to settle the dispute;
 - 3) It is express or implied that the negotiations will not be divulged to the court in the event that negotiations fail.

Purpose of settlement privilege

- Settlement privilege is based on the “understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed.”
- Settlement privilege is intended to encourage settlement, and therefore it “allows the parties to exchange correspondence with a view to resolving their disputes without fear that their comments will be held against them at a later date.”

Settlement privilege – Practice points

- Merely applying the label “without prejudice” is insufficient to protect communications or discussions that do not meet the legal test for settlement privilege.
- Conversely, failing to apply “without prejudice” to communications that meet the legal test will still afford communications the protection of settlement privilege.
- Not every communication sent during a time the parties are involved in settlement discussions is within the protection of settlement privilege.

Litigation privilege

Purpose and attributes

- Object is to “ensure the efficacy of the adversarial process. To achieve this process, parties must be left to prepare their competing positions within a ‘zone of privacy’, without adversarial interference.”
- Test is “dominant purpose” for the statements/documents at the time they were made for use in contemplation of actual or pending litigation.
- A record is not protected by litigation privilege simply because litigation was one of several purposes for which the record was made.
- Applies in the absence of a solicitor-client relationship, and therefore protects unrepresented litigants and communications between clients and third parties.

Litigation privilege

Limits

- Not indefinite, the privilege expires at the end of the litigation. There are several cases where it may extend beyond:
 1. Not terminated where “litigants or related parties remain locked in what is essentially the same legal combat.”
 2. Includes “separate proceedings that involve the same or related parties and arise from the same or a related cause of action.”

Common interest privilege

- Parties with a common underlying interest can share otherwise-privileged material that relates to such common interest, without it being deemed a waiver of privilege.
- Typical scenarios:
 - Co-defendants to litigation who share legal advice or strategy otherwise covered by solicitor-client privilege.
 - Co-defendants to litigation who share investigative reports or other material prepared for the main purpose of litigation, otherwise covered by litigation privilege.

Common interest privilege

- It is prudent to agree by contract that the disclosure does not constitute a waiver. Use a joint defence agreement or common interest privilege agreement.

Challenges to protecting privilege during the COVID-19 pandemic

- The biggest challenges arise from handlers of privileged information working on more electronic devices from more places while attending to more tasks.
- Senders and receivers of privileged information have more distractions going on than ever before during their “working day”. “Please do not disturb me while I am at work” no longer has any meaning.
- Is there such a thing as “Out of Office” anymore? “Away From My Virtual Office” falls apart when you respond!

Good practices operating from a virtual office

- Keep physical files at the office as much as possible.
- During videoconferencing or telephone calls, confirm whether anyone else besides client is on the conference or call.
- When screen sharing documents, plan in advance. Have all of the documents in one place rather than searching for documents on a desktop for all to see.

The pitfalls of email threads

Email threads may contain privileged information not noticed by the sender if a current email is separated by several non-privileged email exchanges within the same thread.

It is best to start a fresh email when sending an email containing privileged information.

Working with experts

A practice has developed of holding preparation sessions with experts over Zoom or a similar platform and to have discussions rather than conveying information to the expert via email. This has as much to do with the expert's whereabouts when receiving information than anything else.

Many professionals with laptops and tablets are sharing a desktop computer with family members. Emails sent from a lawyer to an expert who, in turn, forwards that email to a desktop computer used by others is fraught with problems.

Working with witnesses

A practice has also developed of holding preparation sessions with witnesses over Zoom or a similar platform and to have discussions rather than conveying information to the witness exclusively via email. This has as much to do with the witness' whereabouts when receiving information than anything else.

Witnesses with laptops and tablets often forward emails sent to these devices to a desktop computer shared with family members. This is also fraught with problems.

In cases where witnesses work for the same firm care must be taken to ensure each witness does not share information intended only for one of the witnesses lest an adverse party complain about tailoring evidence.

Protecting privilege during virtual hearings

Resist the urge to use all of the conveniences offered by the virtual platforms

A practice has developed of not using the chat function on Zoom for any communications other than communicating with the information technology assistant to prevent the inadvertent disclosure of a privileged communication where a sender intends to send a private email to a client or colleague but instead sends the message to “everyone”.

When Zooming from a boardroom, all privileged documents and information derived from privileged documents (i.e. whiteboards, flip charts) should be removed lest a fixed camera be errantly bumped providing an adverse party with a 360 degree view of the boardroom.

‘You are not on mute!’

“Was I using my outdoor voice?”

Extra care now needs to be taken as the Zoom mics pick up even quiet discussions. In any Zoom involving more than one person, one person should control the mic.

The device in use in many firms will have a bright red square light up when the room is on mute and a bright blue square light up when the room is on mic. This is far more trustworthy than hitting a space bar on a laptop or using a wireless mouse to activate the mute switch looking at a giant monitor or projection screen.

Privileged documents physically left behind in a public space

“What am I missing?”

Cell phones left behind generally lock after a minute or so but documents don't have a lock. Coffee shops, airport lounges, Uber vehicles, limos, taxi cabs top the list of places where documents get left behind. More often than not, the person who has left documents behind in a coffee shop or airport lounge will double back and retrieve what they left behind. But what if the person has boarded a plane or the Uber vehicle, limo or taxi cab has left? It is easy to call the Uber driver back given the information regarding the Uber driver is provided to the user before the pick up. What about cabs covering the downtown core?

Obligations resulting from inadvertent disclosure of privileged information

“There but for the grace of God go I”

A lawyer who has inadvertently disclosed a privileged email can generally repair the potential damage if the errant email was noticed right away. Where the error is not noticed quickly, the lawyer is obliged to advise the client and to notify LawPro.

Surprisingly, touch wood, there has not been an increase in LawPro claims since the COVID 19 pandemic broke arising out of the inadvertent disclosure of privileged information.

Protecting privilege within a large organization

- Limit the circulation of privileged emails to only those individuals who need to know.
- Consider putting “do not forward” on emails.
- Limit access to privileged documents to those people who need to know.

Protecting privilege while fulfilling different roles

Wearing more than one hat

It is not uncommon for a lawyer to wear different hats while fulfilling different roles. A lawyer acting as internal counsel may use the same email address while directing legal work to external counsel, the same email for internal legal work but a different email while fulfilling other functions. This is a sound practice. Where a single email is used, it is prudent to start a fresh email and clearly communicate to the recipient in what capacity the sender is acting.

A lawyer in private practice may serve as a secretary to a Board of Directors but use his or her law firm email. Great care must be taken in these circumstances.

Waiver of privilege

“Careful what you click for!”

On occasion the disclosure of what otherwise would be privileged information is done intentionally. The danger is this could be the “thin slice of the wedge” leading an adversary to claim that privilege has been waived resulting in a request for all privileged information / documentation.

The best practice is to include a reservation of rights caveat alerting the reader that privilege is not waived by the limited disclosure of privileged information.

Thank you



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