

Client Confidentiality & Privilege

Melanie A. Larock & Camelia Amiri

Topics

- Duty of Confidentiality: Rule 3.3 of the *Rules of Professional Conduct*
- Solicitor-Client Privilege
- Waiver of Solicitor-Client Privilege
- Litigation Privilege
- Settlement Privilege
- Common Interest Privilege

Confidentiality

Confidential Information

3.3-1 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 c

Duty of Confidentiality vs. Legal Privilege

2] This rule [Confidentiality 3.3-1] must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge. [Ref: Rules of Professional Conduct, Commentary to Rule 3.3-1]

- Duty of Confidentiality applies to all information about a client's business or affairs accumulated during the course of the professional relationship – not just communications regarding legal advice
- Duty of Confidentiality applies even to information that is also disclosed to third-parties
- The rationale underlying Duty of Confidentiality is different than the rationale for legal privilege

Scope of the Duty

- Applies to every client without exception
- Survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client
- A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although there is no formal retainer or account
 - A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or related matter

Scope of the Duty

- A lawyer should avoid indiscreet conversations even with spouse/family about a client's affairs and should shun any gossip about such things, even though the client is not named or otherwise identified
 - Could result in prejudice to the client
 - Moreover, the respect of the listener (or anyone who overhears) for lawyers and the legal profession would probably be lessened
- The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information.

Justified or Permitted Disclosure

- **3.3-1.1** When required **by law or by order** of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.
- **3.3-3** A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an **imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.**

Justified or Permitted Disclosure

- **3.3-4** If it is alleged that a lawyer or the lawyer's associates or employees
 - (a) have committed a criminal offence involving a client's affairs;
 - (b) are civilly liable with respect to a matter involving a client's affairs;
 - (c) have committed acts of professional negligence; or
 - (d) have engaged in acts of professional misconduct or conduct unbecominga lawyer, the lawyer may disclose confidential information in order to defend against the allegations, but shall not disclose more information than is required.

Justified or Permitted Disclosure

- **3.3-5** A lawyer may disclose confidential information in order **to establish or collect the lawyer's fees**, but the lawyer shall not disclose more information than is required.
- **3.3-6** A lawyer may disclose confidential information to another lawyer to **secure legal advice about the lawyer's proposed conduct**.
- **3.3-7** A lawyer may disclose confidential information to the extent reasonably necessary to **detect and resolve conflicts of interest** arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.

Solicitor-Client Privilege

- Solicitor-client privilege is fundamental to the proper functioning of our legal system.
- It has evolved from an evidentiary principle to a principle of fundamental justice within the meaning of Section 7 of the Canadian Charter of Rights and Freedoms.

Solicitor-Client Privilege

- Allows clients to be forthcoming with counsel because communications are kept confidential.
- Promotes “*frank communications between a client and solicitor where legal advice is being sought or given, facilitating access to justice, recognizing the inherent value of personal autonomy and affirming the efficacy of the adversarial process*”.

References:

- *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241, 45 O.R. (3d) 321 (C.A.), at para. 94.
- *Blood Tribe Department of Health v. Canada (Privacy Commissioner)* (2008), 294 D.L.R. (4th) 385, [2008] 2 S.C.R. 574, at para. 9

Solicitor-Client Privilege

- It is a fundamental principle of law that the privilege belongs to the client, not to counsel, and that only the holder of the privilege can waive it.

Solicitor-Client Privilege is Not Absolute

- Despite the sacrosanct nature of solicitor-client privilege, there are exceptions to this privilege. In *R. v. McClure*, the Supreme Court of Canada stated as follows:

“Despite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances. *Jones*, supra, examined whether the privilege should be displaced in the interest of protecting the safety of the public, per Cory J. at para. 51:

Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.”

References:

- *R. v. McClure*, 2001 SCC 14 (S.C.C.) at paras 32 and 34.
- See also *Smith v. Jones*, [1999] 1 SCR 455 (S.C.C.) at para. 51.

Voluntary vs. Implied Waiver

- A **voluntary waiver** is one that is deliberate and knowing.
 - E.g. when a client voluntarily discloses or consents to the disclosure of communications between a solicitor and a client.
- An **implicit waiver** can arise by reason of positions taken by a party which implicitly require the disclosure of communications between a solicitor and a client.
 - Always requires some intent to waive the privilege, if only to a limited extent.

- Reference:
Spicer v. Spicer, 2015 ONSC 937 (Ont. S.C.J.) at paras. 9 to 11.

Implied Waiver

Two circumstances may give rise to an implicit waiver:

(1) **waiver by disclosure** – once the privileged communication has been disclosed, the privilege that attaches to it is said to be lost;

(2) **waiver by reliance** – by pleading or otherwise relying upon the privileged communication as part of a substantive position taken in the legal proceedings.

- *Leitch v. Novac*, 2017 ONSC 6888 (Ont. S.C.J.)

Reference:

Implied Waiver: Waiver by Disclosure

Privilege can be implicitly waived by voluntarily disclosing some, but not all, of the privileged information in a lawyer's file; or by otherwise relying on privileged information in a legal proceeding.

References:

- *Leitch v. Novac*, 2017 ONSC 6888 (Ont. S.C.J.)
- See also: *Mantella v. Mantella* (2008), 55 R.F.L. (6th) 72 at paras. 50 and 51 and *T.O.E. v. I.S.*, 2020 ONSC 2903 (Ont. S.C.J.) at para. 23.

Implied Waiver: Waiver by Disclosure

- For example, in *Mantella v. Mantella*, the wife produced evidence during questioning that summarized the advice provided to her by her counsel which would be advantageous to her at trial.
- Wife could not cherry pick among her privileged communications with her lawyer and produce those communications which are helpful to her and not those that are not. → former solicitor's entire file should be produced due to the waiver.

Reference:

- *Mantella v. Mantella* (2008), 55 R.F.L. (6th) 72 at paras. 46 to 51.

Waiver by Inadvertent Disclosure

In cases where the disclosure is found to be inadvertent, there is a discretion that may be properly exercised in favour of non-disclosure where the release has been found to be inadvertent.

Waiver by Inadvertent Disclosure

- In *Drake Holdings Ltd. v. Chubb Insurance Company of Canada* Court held that privilege was not waived by the plaintiff when counsel inadvertently disclosed privileged documents to the defendant. The Court found that although there may be circumstances in which recklessness may be evidence of an intention to expressly waive privilege, recklessness on its own does not amount to a waiver. .
- In *Airst v. Airst*, the husband had inadvertently delivered privileged correspondence between himself and his lawyer to a valuator jointly retained by the parties. At trial, on a *voir dire*, the court determined that, despite the disclosure of these privileged documents to a third party, privilege had not been waived.

References:

- *Airst v. Airst* (1998), 37 O.R. (3d) 654 at pp. 658-59, 21 C.P.C. (4th) 146 (Gen. Div.).
- *Drake Holdings Ltd. v. Chubb Insurance Company of Canada*, 2018 ONSC 4494
- See also: *Eizenshtein v. Eizenshtein*, 2008 CarswellOnt 3822

Waiver by Reliance

- A party will have waived solicitor-client privilege, where he or she has placed his or her state of mind at issue and given evidence that he or she received legal advice which, in part, formed the basis of that state of mind.
- An implicit waiver can also arise by reason of the positions taken by a party which implicitly require the disclosure of communications between solicitor and client.

References:

- *Spicer v. Spicer*, supra at para. 13 and 15.
- *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649 (Ont. S.C.J.) at para. 26.
- *Kennedy v. Bowen*, 2017 ONSC 3977 (Ont. S.C.J.) at para. 12.

Examples of Waiver by Reliance

- In *Debora v. Debora*, 2000 CarswellOnt 2809, the husband filed an affidavit where he relied on privileged communications and relied on allegedly inadequate legal advice and duress as basis upon which judgment should be set aside. Court found that his Affidavit constituted a waiver of solicitor-client privilege.
- In *Kennedy v. Bowen*, 2017 ONSC 3977 the Court held that the wife had put her state of mind in issue by claiming duress, undue influence, and unconscionability as a reason to set aside the parties' marriage contract.
- In *Guttmann v. Halpern*, 2011 ONSC 7158, plaintiff brought action against former solicitor, alleging solicitor negligence but also breach of fiduciary duty and conflict of interest. In deciding privilege must be waived in relation to former solicitor's file, Court commented as follows:
 - "... the court and the parties need to know what Mr. Halpern did in order to determine if Mr. Halpern breached his duties. To permit him to hide behind an alleged solicitor/client privilege with Craig smacks of unfairness to the plaintiff in this action. Fairness and justice require that I find that the privilege be waived to the extent necessary to allow for a determination of what Mr. Halpern did for Craig (and/or his matrimonial counsel) and/or what Mr. Halpern discussed with Craig (and/or his matrimonial counsel) in the context of Aviva and Craig's matrimonial proceedings and Craig's discretionary trust."

Implied Waiver : *Laliberte v. Monteith*

- Parties signed MOS + Separation Agreement dated April 8, 2014. During negotiations, Husband represented that value of his business interests were \$7 -8 Million and that his income was between \$435K and \$840K.
- In February 2015, Wife discovers that Husband was negotiating the sale of two of his business interests known as Green Turtle Americas Ltd. and Filamat Composites Inc. (“Green Turtle”) for \$30.7 million during the negotiations of the MOS + Separation Agreement.
- Negotiations relating to the sale of Green Turtle commenced in October of 2013 and letter of intent was signed December 2013, before Separation Agreement was entered into.
- Wife commenced Application to move to set aside Separation Agreement due to Husband’s misrepresentations.

Implied Waiver : *Laliberte v. Monteith*

The Husband's Pleading provided:

7. There is no basis to set aside the Separation Agreement. It incorporates the terms of the Minutes which were a complete and final resolution of the issues between the parties, signed by both parties and witnessed. **The parties both had independent legal advice**, they exchanged financial disclosure to each other's satisfaction, and **there was no material misrepresentation by Scott**. Wendy's Application should be dismissed with costs.

26. At all times, **the parties had independent legal advice**. Scott from Harold Niman and Wendy from Stephen M. Grant and Megan Edminston as stated in paragraph 14.14 of the Separation Agreement. The Separation Agreement further provides that the parties: (i) **Understood their respective rights and obligations under the Agreement and its nature and consequences**; (ii) Acknowledged that the Agreement is fair and reasonable; (iii) Acknowledged that they were not under any undue influence or duress; and (iv) Acknowledged that both signed the Agreement voluntarily.

39. Scott specifically denies the allegations contained in Wendy's Application at paragraphs 26-30.

Implied Waiver : *Laliberte v. Monteith*

- During his Questioning, the Husband made admissions, including:
 - At all material times he relied on the advice provided to him by his former solicitor, which included information regarding his disclosure obligations;
 - he intentionally did not disclose anything about the Green Turtle transaction to the Wife prior to signing the Separation Agreement;
 - he understood that when there was a material change in his financial circumstances, he had an obligation to provide disclosure of that change;
 - he understood that he had an obligation to provide full, complete, and accurate financial disclosure;
 - the Green Turtle transaction represented a significant change in his financial circumstances.

Implied Waiver : *Laliberte v. Monteith*

- Court found that the husband placed his state of mind, and the legal advice which framed the state of mind, at issue both in his pleadings and during cross-examination.
- Court found that the husband's pleadings went beyond denying that the representations were false or that there was no reliance by the Applicant.
- Likewise, the Court found that in the event that the Husband's pleading alone was not sufficient to find that he waived solicitor-client privilege, the admissions made by him during Questioning supported a waiver of solicitor-client privilege.

Litigation Privilege

- protects communications and documents among lawyers, their clients and third parties where the dominant purpose of the communication is to prepare for litigation
- As stated by the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, at para. 27, the object of litigation privilege “is to ensure the efficacy of the adversarial process”, and “to achieve this purpose, parties to litigation... must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.”

Litigation Privilege vs. Solicitor-Client Privilege

- The purpose of solicitor-client privilege is to protect a *relationship*, while that of litigation privilege is to ensure the efficacy of the adversarial *process*;
- Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends;
- Litigation privilege applies to unrepresented parties;
- Litigation privilege applies to non-confidential documents;
- Litigation privilege is not directed at communications between solicitors and clients. It contemplates communications between a lawyer and third parties or unrepresented parties and third parties.

Litigation Privilege

- Recognized as Class Privilege by SCC in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52
- “This means that any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. As a result, the onus is not on a party asserting litigation privilege to prove on a case-by-case basis that the privilege should apply in light of the facts of the case and the “public interests” that are at issue.”

Test for Litigation Privilege

1. there must have been a reasonable prospect of litigation at the time the documents were prepared. There must be evidence that litigation was more than speculative, although it does not have to be a certainty; and
2. the dominant purpose for which the documents were created must be to obtain legal advice, or to assist in the conduct of anticipated litigation.

Continuation of Litigation Privilege in Related Proceeding

- As stated by the Supreme Court of Canada in *Blank*:
- [34] [Litigation privilege] cannot be said to have been "terminated" in any meaningful sense of that term, where litigants or related parties remain locked in to what is essentially the same legal combat.
- [39] At a minimum, it seems to me that this enlarged definition of "litigation" includes separate proceedings that involve the same or related parties and arises from the same or a related cause of action (or "judicial source"). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.

Exceptions to Litigation Privilege

- As stated in *Blank*, at para. 37, “litigation privilege, unlike solicitor-client privilege, is neither absolute in scope nor permanent in duration.”

Exceptions to Litigation Privilege

- The same recognized exceptions to solicitor-client privilege are also applicable to litigation privilege
- Exceptions:
 - Public Safety
 - The innocence of the accused
 - Communications of a fraudulent or criminal nature
 - Abuse of process or blameworthy conduct
 - Can be limited by statute, but only if the provision uses clear, explicit and unequivocal language
 - Not closed

Improper Conduct Exception

- As stated by the Supreme Court of Canada in *Blank v. Canada*:

44 The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. **It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day.**

45 Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed.

Moore v. Getahun, 2015 ONCA 55

- Under the protection of litigation privilege, draft reports, notes and records of any consultations between experts and counsel, even where the party intends to call the expert as a witness need not be disclosed.
- Litigation privilege attaching to expert reports is qualified, and disclosure may be required in certain situations.

Exceptions to Litigation Privilege

- Two Qualifications set out in *Moore v. Getahun*:
 - 1) The Rules and the foundational information for the opinion
 - 2) Improper conduct: Litigation privilege yields where required to meet the ends of justice and cannot be used to shield improper conduct.

Improper Conduct Exception

- Absent a factual foundation to support a “reasonable suspicion that counsel improperly influenced the expert”, a party should not be allowed to demand production of draft reports or notes of interactions between counsel and an expert witness.

Improper Conduct Exception

- In *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 125:

“The “Blank exception” appears to have application beyond instances of strictly *actionable* misconduct. As Sharpe J.A. described the exception in Moore v. Getahun, 2015 ONCA 55, at para. 77, “the ends of justice do not permit litigation privilege to be used to shield *improper* conduct.” [...]

Moore is, in my view, significant for three reasons. First, it extends the Blank exception to improper conduct beyond that which is actionable. Second, it makes it evident that the misconduct in issue is not limited to the conduct of the client. Third, it permits compelled production where an opposing party establishes “reasonable grounds to suspect” improper conduct, which is arguably a lower threshold than a “*prima facie* showing”.

First Qualification in *Moore*

- Delivery of an expert's report does not, in itself, constitute an intention to call that expert at trial. It is the decision to call the expert at trial, not the delivery of the report, that triggers the obligation to disclose the foundational information.
- See *Edwards v. McCarthy*, 2019 ONSC 3925
- *Smith v. Jarnell*, 2020 ONSC 6433

Settlement Privilege

- Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute.
- *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37
- *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35

Purpose of Settlement Privilege

- “This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: “In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming.”

Settlement Privilege

- Class privilege - This means that there is a prima facie presumption of inadmissibility of evidence that meets the criteria for settlement privilege unless one of the narrow exceptions to the privilege applies.

Test for Settlement Privilege

- 1) A litigious dispute must be in existence or within contemplation;
- 2) The communication must be made with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed; and
- 3) The purpose of the communication must be to attempt to effect a settlement.

Settlement Privilege

- 1. Applies to both written and oral communications
- 2. Substance takes priority over form - “without prejudice”
- 3. Applies also to criminal and regulatory matters
- 4. Settlement agreements themselves are privileged – regardless of whether a settlement is reached
- 5. The privilege belongs to both parties and cannot be waived unilaterally by either party

Exceptions to Settlement Privilege

- Involves a balancing exercise, assessing whether the public interest in recognizing an exception outweighs the strong public interest in promoting settlement by protecting the confidentiality of settlement negotiations.

Exceptions to Settlement Privilege

- (a) to prevent double recovery
- (b) where the communications are unlawful, such as threats, fraud, undue influence or misrepresentation
- (c) where there is a dispute as to the existence of a settlement agreement or a disagreement about its terms
- (d) to examine the "settlement posture of the parties" for the purpose of costs
- (e) "when the justice of the case requires it"

Proof of Settlement Exception

- Settlement discussions may be admissible to prove that a binding agreement was reached, what the terms of settlement were or the interpretation of the settlement agreement
- The rule is consistent with the goal of promoting settlements.

Common Interest Privilege

- Common interest privilege is not a “stand-alone privilege”: it extends an existing privilege to the receiving party. The communication must be otherwise privileged for common interest privilege to apply.
- It is “strongly implanted in Canadian law and around the common-law world”

Common Interest Privilege

- Permits the sharing of privileged information without a loss of privilege
- “[S]olicitor-client privilege is not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions.” *Iggillis Holdings v. Canada* (MNR), 2018 FCA 51

Common Interest Privilege

- The common interest does not need to exist at the time the document is created; so long as the common interest exists at the time the document is disclosed, common interest privilege may be invoked.

THANK YOU

THOMSON ROGERS

LAWYERS



TF: 1.888.223.0448 T: 416.868.3100 www.thomsonrogers.com