FAQs about Privilege and Confidentiality for Lawyers in Private Practice

Ethics and Professional Responsibility Committee

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THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

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The Ethics and Professional Responsibility Committee has published this document to address frequently asked questions about solicitor-client privilege and client confidentiality, with a focus on situations commonly faced by lawyers in private practice. Please refer to the rules of your governing body for the detailed rules in your jurisdiction.

1. Why is it important to distinguish between a lawyer's duty of confidentiality and the principle of solicitor-client privilege?

In casual conversations the duty of confidentiality and the protection of solicitor-client privilege may be lumped together, as both operate to protect client information from disclosure. However, their roots in law and the exceptions that apply to each concept are different. Knowing the source of the obligations will avoid ethical missteps.

Your ethical duty of confidentiality extends to all the information you learn working for your client. This duty exists no matter the source of the information or its confidential status before it became part of the solicitor-client relationship.

The basis for this ethical duty is, in Quebec, the Code of Ethics of Advocates and other legislation and, in the other provinces and territories, the law society codes of conduct. The codes also describe the exceptions to the ethical duty of confidentiality; they differ in some jurisdictions.

Your duty of confidentiality also exists in common law, stemming from the relationship between lawyer and client. The common law has not developed clear exceptions to this duty. In contrast, solicitor-client privilege only applies to communications between you and your client for the purpose of legal advice. The privilege is rooted in the common law.

In 2010, the Supreme Court of Canada stated, in the Canadian Criminal Lawyers' Association case concerning the Charter and access to information, that "the only exceptions recognized to the [solicitor-client] privilege are the narrowly guarded public safety and right to make full answer and defence exceptions."[1]

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1 *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII).

With respect to both the duty of confidentiality and solicitor-client privilege, clients may consent to the disclosure of information. In certain circumstances, they may be found to have waived confidentiality or solicitor-client privilege.[2]

2. What are the exceptions to the duty of confidentiality and solicitor-client privilege?

Public safety exception

The Supreme Court of Canada and most law society codes of conduct recognize a public safety exception which may allow or require disclosure in cases where there is some impending harm to a person.

In *Smith v. Jones,*[3] the Supreme Court held that public safety concerns set aside solicitor-client privilege when a lawyer reasonably believes that there is a clear, serious and imminent threat to public safety.[4]

Similarly, law society codes of conduct provide public safety exceptions to the ethical duty of confidentiality. The Federation of Law Societies' Model Code of Professional Conduct provides that "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."[5]

Look to your law society for the specific terms of the public safety exception as it applies to the duty of confidentiality, particularly the types of future harm covered (criminal activity, violence, serious physical harm, etc.) and the voluntary or mandatory nature of the lawyer's responsibility.

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2 Adam Dodek, "Solicitor-Client Privilege in Canada – Challenges for the 21st Century", Discussion Paper for the Canadian Bar Association, February 2011, at 21.

3 *Smith v. Jones,* [1999] 1 S.C.R. 455.

4 *Ibid*. at para. 77.

5 Federation of Law Societies of Canada Model Code of Professional Conduct, Rule 2.03(3) www.flsc.ca/_documents/ModelCode-June2012.pdf.

Innocence of the accused exception

In *R. v. McClure*,[6] the Supreme Court of Canada recognized an exception to solicitor-client privilege when the innocence of an accused is at stake. It interpreted this exception very strictly and the exception is likely to apply only in the rarest of circumstances. Information disclosed under the innocence of the accused exception cannot be used against the client whose lawyer disclosed the information.

There are no reported cases in which a McClure application has led to an order to disclose information covered by solicitor-client privilege.

Note that codes of conduct do not speak to the innocence at stake exception in the context of the duty of confidentiality. It is unclear whether the codes of conduct would prohibit disclosure in situations where the "innocence at stake" exception could apply.

Disclosure of information: fees and allegations against a lawyer

All law society codes of conduct permit a lawyer to disclose confidential information in order to establish or collect a fee or to defend oneself or one's colleagues against any allegation involving a client's affairs, be they criminal, civil, or regulatory (for example, a complaint to a law society). Whatever the situation, the lawyer must not disclose more information than the circumstances require.[7]

However, there is no comparable exception to solicitor-client privilege. As a result, while codes of conduct may permit lawyers to use information usually protected by the ethical duty of confidentiality, lawyers may remain prohibited from disclosing information covered by solicitor-client privilege. When the client is not the adverse party, solicitor-client privilege may protect information even though the codes of conduct would allow its use. When the client is the adverse party, this clash between the duty of confidentiality and solicitor-client privilege would not arise.

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6 *R. v. McClure,* [2001] S.C.R. 445.

7 Federation of Law Societies of Canada Model Code, *supra*, Rule 2.03(4), 2.03(5), and 2.03(6).

3. What is the difference between "solicitor-client" privilege and "litigation privilege"?

In 2006, the Supreme Court of Canada[8] distinguished between solicitor-client privilege and litigation privilege. While solicitor-client privilege protects legal advice communications between a lawyer and client, litigation privilege is not restricted to communications between the lawyer and client. Justice Fish wrote that litigation privilege "contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship."[9]

As the court discusses in the *Blank v. Canada* decision, there are a number of important distinctions between the two privileges:

- Solicitor-client privilege exists any time a client seeks legal advice from a lawyer whether or not litigation is involved. Litigation privilege applies only in the context of litigation itself.
- Solicitor-client privilege is rooted in the confidential nature of the solicitor-client relationship. It protects a relationship. Litigation privilege seeks to create a zone of privacy to allow for investigation and preparation for a trial. It facilitates a process.
- Solicitor-client privilege applies only to confidential communications between client and lawyer. Litigation privilege applies to communications of a non-confidential nature between the lawyer and third parties and even includes material of a non-communicative nature.
- Solicitor-client privilege lasts forever – "once privileged, always privileged".[10] Litigation privilege is "neither absolute in scope nor permanent in duration"[11] and ceases to exist upon termination of the litigation.[12]

The question of whether a communication is protected by litigation privilege is a question of fact to be determined in the specific context in which the communication was made.

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8 *Blank v Canada*, 2006 SCC 39.

9 *Ibid*. at para. 27.

10 *Ibid*. at para. 37.

11 *Ibid*.

12 *Ibid*. at para. 28.

When does "litigation privilege" begin?

It is difficult to identify clearly the moment when litigation privilege begins. Case law has established that in order to invoke the litigation privilege generally a party must establish two facts:

1. litigation was ongoing or was reasonably contemplated at the time the communication was made
2. the dominant purpose of the communication was in respect of that litigation.[13]

One author has concluded that more than a "vague or general apprehension of litigation" is required.[14]

In *Kennedy v. McKenzie*,[15] the Ontario Superior Court held that a party asserting litigation privilege must establish that the documents were created for the dominant purpose of existing, contemplated, or anticipated litigation, and for one of these reasons:

- in answer to inquiries made by an agent for the party's solicitor, or
- at the request or suggestion of the party's solicitor, or
- for the purpose of giving them to counsel in order to obtain advice, or
- to enable counsel to prosecute or defend an action or prepare a brief.[16]

This area of case law is evolving. Check recent case developments.

4. When does a "common interest" or a "joint retainer" extend solicitor-client privilege to third parties?

Common Interest

<u>Litigation context</u>

Ordinarily, the protection of solicitor-client privilege is considered waived when a lawyer, with the client's authorization, discloses privileged information to outsiders. However, if

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13 *Keefer Laundry Ltd. v. Pellerin Milnor Corp*., 2006 BCSC 1180 (CanLII) at paras. 96-98; cited with approval in *Ross River Dena Council v. AG Canada*, 2009 YKSC4(CanLII) at para 31.

14 Gloria Geddes, "The Fragile Privilege: Establishing and Safeguarding Solicitor-Client Privilege," (1999) 47 (4) *Canadian Tax Journal* 799 at 822.

15 *Kennedy v. McKenzie*, [2005] O.J. No 2060 (S.C.).

16 *Ibid.* at para. 20, cited with approval *in R. v. Dunn,* 2012 ONSC 2748 (CanLII).

litigants have a common interest that makes it beneficial for them to share privileged information, the waiver will not be assumed.

In Canada, any privileged information shared between parties who have a "common interest" will continue to be protected by solicitor-client privilege.

The general principle was first described in the often cited case *Buttes Gas & Oil v. Hammer (#3)*.[17] In that case, Lord Denning found that the adversarial system would benefit when parties who seek a common outcome or share a common, but not necessarily identical, goal, could unify in their "selfsame interest".

When a third party has a common interest in the subject matter of a privileged communication between a litigant and the litigant's solicitor, the communication may be shared with the third party without being considered a waiver of the privilege. To qualify as a third party with a common interest, it is not necessary to establish a particular kind of relationship, as long as the relationship is one created by joint interest:[18] "the courts should, for the purpose of discovery, treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation."[19]

Commercial context

Originally, the extension of solicitor-client privilege to parties with a "common interest" was applied only in the context of litigation. It has since been expanded in Canada to apply to some commercial transactions "in the corporate family."[20] The rationale underlying the "common interest exception" in litigation is the promotion of the proper functioning of the adversarial system. In the context of commercial transactions, the philosophical underpinning is different: the parties' common interest in the successful and efficient

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17 *Buttes Gas & Oil v. Hammer*, [1980] 3 All E.R. 475 (C.A.).

18 Ronald D. Manes & Michael P. Silver, Solicitor-Client Privilege in Canadian Law, (Toronto: Butterworths, 1993) at 64.

19 *Buttes Gas, supra*, as quoted in *Pitney Bowes of Canada Ltd., v. R.*, 2003 FCT 214, [2003] 3 C.T.C. 98, 229 F.T.R. 277 at para. 12.

20 Dodek, *supra* FN 2, at 30.

completion of a financial transaction is recognized as a benefit to them, and to the economy and society as a whole.

The mere existence of a commercial transaction is not, however, sufficient to insulate all shared solicitor-client communications. In some cases, the circumstances will suggest that there has indeed been a loss or waiver of privilege. Cases have said that a merger or other business transaction that shows a clear adverse interest between the parties is an example of a commercial transaction in which the necessary spirit of sharing for a greater common interest does not exist. On the other hand, courts have held that in many commercial transactions, the parties will want to negotiate on the footing of a shared understanding of each other's legal position and that the expectation, whether express or implied, will be that the opinions are in aid of the completion of the transaction and, in that sense, are for the benefit of all parties to it.[21]

For the "common interest exception to operate and extend solicitor-client privilege to a third party, the intention of the parties exchanging information must be clearly voluntary and in contemplation of a shared benefit."[22]

A signed agreement between the parties, outlining their common commercial interest and their intention to protect privileged communications which they will share, may serve to provide important evidence of these intentions.

Is the "common interest" privilege" exception the same in the U.S. as it is in Canada?

In the United States, the "common interest exception" to solicitor-client privilege applies only in litigation matters. In the Third Circuit Court of Appeal decision, *In re Teleglobe Communications Corp.*[23], the court found that the common interest privilege takes effect "when clients with separate attorneys share otherwise privileged information in order to

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21 *Pitney Bowes*, *supra,* FN 19, at paras. 19 and 20. As yet, however, there has been limited appellate guidance on this point. c.f. *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510 at para. 14.

22 *Pitney Bowes, supra*, FN 19, at para. 19.

23 *In re Teleglobe Communications Corp*., 493 F. 3d 345 (3d Cir. 2007).

coordinate their legal activities" in the context of litigation.[24] This is consistent with the U.S. Uniform Rule of Evidence section 502(b)(3), which requires that there be actual pending action before the common interest defence against the waiver of privilege can be utilized.[25]

As noted above, in Canada, courts have extended the "common interest exception" to some commercial transactions. A Canadian court has been willing to apply the common interest privilege in the context of a cross-border commercial transaction. In the British Columbia Supreme Court 2002 decision, *Fraser Milner Casgrain LLP v. Minister of National Revenue*,[26] the court applied the common interest exception to communications between parties in both Canada and the United States, explaining that "[i]t is the parties' common interest in the successful completion of the transaction that is the element that gives rise to the privilege. The rationale is the preservation of confidentiality."[27] The trans-border nature of these communications did not factor into the court's decision.

The "joint retainer"

Joint privilege is recognized in both Canada and the United States and refers to the situation where one lawyer represents multiple clients in a matter.

In conducting cross-border transactions, privileged communications ought to be clearly marked as such and communicated only through a jointly-retained counsel to attract the protection of "joint privilege".

Disclosure outside a joint retainer would constitute a waiver of solicitor-client privilege in the United States, so care must be taken to direct communications through protected channels.

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24 *Ibid.*

25 Uniform Rules of Evidence Act (1999), online: *www.law.upenn.edu/bll/archives/ulc/ure/evid1004.pdf*. See also *Holland v. Island Creek Corp*., 885 F. Supp 4, 6 (Dist. Ct. D.C. 1995): The common interest privilege may be asserted with respect to communications among counsel for different parties if "(1) the disclosure is made due to actual or anticipated litigation or other adversarial proceedings; (2) for the purposes of furthering a common interest; and (3) the disclosure is made in a manner not inconsistent with maintaining confidentiality against adverse parties."

26 *Fraser Milner Casgrain LLP v. Minister of National Revenue*, 2002 BCSC 1344, 6 B.C.L.R. (4th) 135.

27 *Ibid*. at para 12.

5. What do I do when there is a possibility of crime or fraud occurring?

If a client is seeking legal advice to facilitate the commission of a crime or a fraud, the information provided by the client is not covered by solicitor-client privilege. This is characterized as an exclusion not an exception, as the nature of these communications completely negates the privilege that would ordinarily attach to them. Some courts have moved to expand the exclusion for crime and fraud to apply the same reasoning to some torts. This area of the law is uncertain and controversial, and awaits clarification from appellate courts.[28] Check recent case developments if you have any doubts about your situation.

The Law Society Codes of Conduct do not recognize a crime-fraud exception to the duty of confidentiality. Where the public safety exception does not apply, it may well be that solicitor-client privilege does not exist, yet the Law Society code will prohibit voluntary disclosure.

6. How do my confidentiality obligations affect the other members of my firm?

You are required to keep confidential all information regarding the affairs of your client that you learn during the course of the retainer. This obligation survives the end of the retainer.

As well, these confidentiality obligations are imputed to other members of your firm. The Supreme Court of Canada has held that it is not only the individual lawyer but also the firm as a whole that owes the fiduciary duty of confidentiality to the client.[29]

Neither you nor the lawyers in your firm may use confidential information against a former client of the firm.

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[28] For a more detailed discussion, see Dodek, *supra*, FN 2, at 11 to 14.

[29] *R. v. Neil,* [2002] 3 S.C.R. 631

Lawyer moves to a new firm

When a lawyer changes law firms, the lawyer will be assumed to be sharing confidential information about past clients with members of the new firm unless adequate screening measures are in place to show that confidential information is not being disclosed. Confidentiality requirements are the reason law firms create complex conflicts of interest machinery.

For more on this issue see the CBA Task Force on Conflicts of Interest Final Report and Toolkit[30].

7. I have been jointly retained by two clients. One client has given me some information relating to the retainer and asked that I withhold it from the other. Can I set up confidentiality screens and keep the joint retainer?

In the context of a joint retainer, you have a duty of undivided loyalty to each client and an ethical obligation to deal evenly with them. Before agreeing to a joint retainer, you should explain the concept of undivided loyalty to each client. In most jurisdictions, you are not permitted to keep information confidential from either client. You should also explain that if an unresolvable conflict arises between them, you will be forced to withdraw and will not be able to represent either one of them.

Some jurisdictions (for example, Alberta) permit a joint retainer with confidentiality screens whereas the rules in other jurisdictions (for example, Ontario and British Columbia) are categorical in prohibiting a lawyer from keeping information confidential from one client within a joint retainer. If a joint retainer with confidentiality screens is permitted, it will be essential to obtain fully informed consent in writing after each client receives independent legal advice.

30 www.cba.org/cba/groups/pdf/conflicts_finalreport.pdf

8. What use can I make of information disclosed during discovery? Can I use it in other or subsequent litigation?

Generally, you cannot use information disclosed during discovery in other or subsequent litigation. The "deemed undertaking rule", also referred to as the "implied undertaking rule", is a court-created rule that is now codified in the rules of procedure in many jurisdictions.

This rule provides that evidence compelled from a party to civil litigation during pre-trial discovery can be used by the parties only for the purpose of the litigation through which it was obtained.[31] As a general matter, such information cannot be used in other concurrent litigation against the same or a different client, nor can it be used in subsequent litigation against the same or a different client.

The deemed undertaking rule is separate from and not connected to solicitor-client privilege or the duty of confidentiality.

Exception to the deemed undertaking rule

The rules in some jurisdictions provide that the information can be used in specific circumstances, including:

- with consent
- for impeachment purposes
- by obtaining a court order
- after the information is filed as evidence with the court or referred to during a hearing (see, for example, Ontario Rule of Civil Procedure 30.1).

9. I am acting as defence counsel in criminal proceedings. What are my disclosure obligations to the prosecution?

Crown prosecutors have a duty to disclose all relevant information to the defence as a result of the Supreme Court of Canada's decision in *R. v. Stinchcombe.*[32] The failure to fulfill

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31 See *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157 at para. 1. See also *Lac d'Amiante du Quebec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743.

32 *R. v. Stinchcombe,* [1991] 3 S.C.R. 326.

this obligation may result in both court sanctions and discipline by the Law Society.[33] Defence counsel do not have an analogous obligation. Unlike the Crown, the role of defence counsel is purely adversarial.

The CBA explains the role of advocates in adversary proceedings as being "openly and necessarily partisan" and, therefore, "the lawyer is not obliged to assist an adversary or advance matters derogatory to the client's case."[34] Moreover, the solicitor-client and litigation privilege protecting communications between an accused and counsel compel the defence counsel toward silence. Only the client may decide if the privileged communications may be shared with anyone.

There are three exceptions to the general absence of a disclosure requirement for the defence:

1. An alibi should be disclosed in sufficient time to allow it to be properly investigated.[35]
2. A psychiatric defence should be disclosed in time to allow a Crown psychiatrist to examine the accused.[36]
3. Any expert opinion evidence on which defence intends to rely should be disclosed 30 days before trial.[37]

An additional exception relates to the issue of defence counsel's obligations when coming into possession of physical evidence of a crime. That is the subject of Question 11.

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33 See *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, 2002 SCC 65.

34 Canadian Bar Association, *Code of Professional Conduct*, Chapter IX, commentary 17.

35 It was described as "settled law" by the Supreme Court in *R. v. Cleghorn,* [1995] 3 S.C.R. 175 [1995] S.C.J. No. 73, 100 C.C.C. (3d) 393, that defence counsel ought to properly disclose an alibi. This proper disclosure has two components: adequacy and timeliness. Warning was given that "[f]ailure to give notice of alibi does not vitiate the defence, although it may result in a lessening of the weight that the trier of fact will accord it." (para 3)

36 In *R. v. Worth*, [1995] O.J. No. 1063, 98 C.C.C. (3d) 133 (C.A.), the Ontario Court of Appeal weighed s.7 *Charter* rights against the obligation for an accused to speak with Crown psychiatrist after the defence raises the sanity of the accused as an issue. The court determined that there is in fact an obligation to disclose this defence, and to make the accused available for examination by Crown psychiatrists.

37 *Criminal Code,* R.S.C. 1985, c. C-46, s. 657.3 as cited in Alice Woolley et al., eds., *Lawyers' Ethics and Professional Regulation* (Markham: LexisNexis, 2008) 382.

10. My client wants to pay me in cash. May I accept a cash payment?

You may only accept cash payments from a client when the total is less than $7,500 on any one file. All Law Societies have recently enacted rules which prohibit lawyers from accepting $7,500 or more in cash for a single client file. That means you are prohibited from accepting multiple cash payments totaling $7,500 or more (for example eight separate cash payments of $1,000) from the same client. More particulars and certain exceptions for institutional clients appear in each Law Society's rules.

Note that paying you in cash will not mean that the client avoids a record of the transaction. You are obligated to follow certain record-keeping requirements for all clients. Law Society rules now contain very specific requirements regarding client identification, verification, and record-keeping.

Basic record-keeping requirements

All law societies now require some basic record-keeping requirements. You must obtain and verify client information and keep records on the following matters for all clients:

1. The client's full name.
2. The client's business address and business telephone number, if applicable.
3. For clients who are individuals, the client's home address and home telephone number.
4. For clients who are individuals, the client's occupation or occupations.
5. For a client organization, other than a financial institution, public body or reporting issuer, the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable, as well as the general nature of the type of business (or businesses) or activity (or activities) engaged in by the client.
6. For a client organization, the name, position, and contact information for each individual who gives instructions with respect to the matter for which you are being retained.
7. For a client acting for or representing a third party, information about the third party as set out above, as applicable.

11. I have come into possession of evidence of a crime from a client. What do I do?

Solicitor-client privilege draws a distinction between "communications" and "evidence". Physical evidence of a crime is not protected by solicitor-client privilege because it is not an oral or written communication, it is physical evidence. However, anything that a client tells you about the evidence would be covered by the privilege (so long as it is not considered a communication in furtherance of a future crime as discussed in Question 5).

Coming into possession of physical evidence of a crime is fraught with legal and ethical dangers for you. You should seek advice from your Law Society and possibly from counsel.

If you retain physical evidence of a crime, you run the risk of being charged with obstruction of justice under section 139(2) *Criminal Code*, which makes it an offence to "willfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding", or possibly with being an accessory after the fact under section 23(1) of the Criminal Code. In the leading case on this issue, the lawyer was charged with obstruction of justice: *R. v. Murray*.[38]

The court in *Murray* accepted that a lawyer may retain incriminating evidence for a reasonable time for examination and testing. Guidance on this matter is provided by Michel Proulx and David Layton in their text *Ethics and Canadian Criminal Law* (2001) where they advise:

1. There must be a legitimate reason to take the item. Possession and retention are only justified where reasonably necessary for the purposes of representation: that is, in order to prepare a defence.
2. Counsel cannot examine or test the item in a manner that alters or destroys its material characteristics.
3. Counsel must retain the item only for the time reasonably necessary to complete the examination or testing.
4. Counsel who removes incriminating physical evidence from its original location risks losing the protection of legal professional privilege. This loss of privilege

[38] *R. v. Murray*, [2000] O.J. No. 2182, 144 C.C.C. (3d) 289 (S.C.J.).

would include the facts surrounding the item's location and condition; counsel may even be required to be a witness.

In *R. v. Murray,* Justice Gravely of the Ontario Superior Court outlined three "legally justifiable options" once counsel realizes that they are improperly in possession of incriminating physical evidence:

1. Immediately turn over the evidence to the prosecution, either directly or anonymously.
2. Deposit it with the trial judge. or
3. Disclose its existence to the prosecution and prepare to do battle to retain it.

Options two and three are only available to counsel when the client has already been charged with an offence and proceedings are underway.

If you come into possession of physical evidence of a crime prior to proceedings being commenced against your client in relation to the evidence, the best course of action is for you to retain independent counsel and instruct that counsel to turn the evidence over to the Crown. The communications between you and the independent counsel will be protected by solicitor-client privilege. This procedure will also enable the communications between your client and you regarding the evidence to remain privileged and may help to avoid the scenario where you could be called as a witness against your client.

12. Can I disclose privileged information to the successor in title of a corporate client? Does it matter whether the company was taken over through a share sale or asset purchase?

The share sale is the easier case as the privilege remains with the corporation when it is sold. While control of the corporation may change, the corporation remains the client.

Where assets are purchased, the issue turns on whether the purchaser is the successor-in-title. It has long been held that solicitor-client privilege flows through to successors-in-title.[39]

[39] *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; see also *Crescent Farm (SIDCUP) Sports Ltd. Sterling Offices et al.*, [1972] 1 Ch. 553 (Eng.).

The Ontario Superior Court outlined the principle as follows: "Solicitor and client privilege belonging to a predecessor in title can be asserted by his or her successor in title. Thus, the privilege of the original owner continues to a successor in title."[40]

The courts extend the privilege to the successors because their interests are in common with the predecessor and because the communications had been made in confidence. In other words, solicitor-client privilege that is "owned" by a business owner passes to a successor-in-title to the business, and can be asserted and maintained by the subsequent owner.

13. My client has gone into bankruptcy? What information may I share with the trustees in bankruptcy?

When you are acting on behalf of a client in bankruptcy, you still owe a duty of confidentiality to that client. As a general rule, solicitor-client privilege is maintained during bankruptcy proceedings and you cannot divulge privileged information to the trustee-in-bankruptcy without your bankrupt client's consent.

Although you may not be compelled to disclose privileged communications concerning your client in bankruptcy, you may have to disclose factual information about the bankrupt's affairs that are not considered communications between you and your client for the purpose of legal advice and, as such, protected by solicitor-client privilege.

In 1984, the Ontario Supreme Court held that a lawyer may be compelled to "disclose all information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc., which do not require the disclosure of communications made to the appellant for the purpose of giving legal advice."[41]

While the *Bankruptcy and Insolvency Act* does not directly address solicitor-client privilege or its waiver, case law tells us that privilege cannot be waived by the trustee and resides solely with the bankrupt. In the leading case on the application of the privilege in bankruptcy proceedings,[42]

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40 *UPM-Kymmene Corp. v. Repap Enterprise Inc.*, [2001] O.J. No. 4220 at para. 10 (S.C.J.).

41 *Clarkson v. Chilcott*, (1984) 48 O.R. (2d) 545 (S.C.).

42 *Bre-X Minerals Ltd. (Trustee of) v. Verchere*, 2001 ABCA 255, [2002] 97 Alta L.R. (3d) 1.

the Alberta Court of Appeal found that privileged communications were a "personal right" that fell outside of the general obligation of transfer of "property" as defined in section 2 of the *Bankruptcy and Insolvency Act* and confirmed that "the personal right of privilege is not altered by the BIA."[43] There exists no obligation or special circumstance within bankruptcy proceedings that would allow anyone except the bankrupt client to waive solicitor-client privilege.

14. The parents of a minor client I am representing have requested access to information about her. May I give it to them?

The minor child is your client. You owe her the duty of confidentiality and your communications with her for the purpose of giving her legal advice are covered by solicitor-client privilege.

Any decision regarding the disclosure of information and waiver of the privilege belongs to your minor client and not to her parents or to you as her lawyer. (This assumes that the minor child is legally competent to instruct counsel. See the end of this answer for situations in which the minor child is not competent to instruct counsel.)
Even if information is not covered by solicitor-client privilege, you have an ethical obligation to avoid disclosure of any of your client's affairs, even to members of her family. The duties of confidentiality and loyalty towards a client, including a client who is a minor, ensure that the client can share information freely with you, and receive the best possible legal advice.

You should explain both solicitor-client privilege and a lawyer's duties of confidentiality and loyalty to your client. Have the conversation with your client without her parents present.

Your client may chose to share information with her parents and may authorize you to do so, but this must clearly be her choice after she understands your duties to her.

When your client's parents are paying your fees, some information about billing and fees may need to be disclosed to them for practical reasons. The financial information you will

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[43] *Ibid*. at para. 35.

need to share with her parents should be clearly outlined in the retainer agreement with the minor to avoid any misunderstandings.[44]

Child is not competent to instruct counsel: litigation

When a minor client is not competent to instruct counsel, because of age, lack of maturity, or disability, then a litigation guardian will have to be appointed for her by the court. You will take instructions from the litigation guardian.

Child is not competent to instruct counsel: non-litigation matters

For non-litigation matters, you must determine if a properly appointed guardian has been designated to deal with the child's affairs, including legal affairs. Unless there are relevant limitations on the power of that guardian, you will take instructions from the guardian.[45]

15. I am representing an elderly client whose competence to decide some matters for himself is deteriorating. His children have asked me to provide them with some information about him and to disclose confidential documents. What do I do?

Your duties of loyalty and confidentiality to your client remain the same regardless of the legal competence of your client. You cannot share confidential information with anyone, including family members, without the explicit or implicit authorization of your client or a court order or other legal authorization. As well, the duty of confidentiality survives the end of the retainer and continues indefinitely, even after the death of a client.

Should you believe that your client has developed reduced or questionable mental competency[46], you still have a duty to maintain a normal lawyer and client relationship, as far as is reasonably possible. Lawyers for clients with reduced competency have an ethical obligation to ensure that their clients' interests are not abandoned and that their confidential relationship is not compromised by unauthorized disclosure.

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44 Canadian Bar Association, Code of Professional Conduct 2009, chapter IV, http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf

45 For additional information on children as clients, see Practice Advisory, Guidelines for Representing Children, Law Society of Alberta, www.lawsociety.ab.ca/lawyers/practice_advisors/practice_ethics/practice_advice_representing_children.aspx

46 Ed Montigny, Notes on Capacity to Instruct Counsel, ARCH Disability Law Centre, February 15, 2011, www.archdisabilitylaw.ca/?q=notes-capacity-instruct-counsel-0

When you reasonably believe that your client's impairment may have eroded the legal capacity to give instructions or enter into binding legal agreements, you should take steps to have a lawfully authorized representative appointed, such as a guardian, litigation guardian, or guardian *ad litem*. This representative may be a family member. If these steps are necessary, you must not disclose more information than is required.

16. I have received a request to disclose information pertaining to a former client's will and power of attorney. How do I respond? May I charge the former client's estate for the time spent reviewing notes to answer the request?

Your duty of confidentiality protects all information about current and former clients. The death of a former client does not alter this duty of confidentiality which persists after the end of the retainer and survives the client's death. Any information that you obtain during the lawyer-client relationship may not be disclosed unless by judicial order; there are, however, some nuances in the wills context.

Because a will is not a solicitor-client communication and therefore not protected by privilege, the information contained in the will is not privileged. Nevertheless, the instructions relating to the drafting of the will are privileged communications.[47] So, any communication surrounding the creation of the will or the choice of executor, power of attorney or trustee, for example, is privileged. The privilege may only be waived by the client and not by the lawyer (even after the client's death).

Waiver of privilege exceptions

In cases involving wills and estates, however, the rules governing a waiver of privileged information have been relaxed. To understand and give effect to the testator's intentions or to determine the existence of a will, the courts have accepted the disclosure of privileged communications.[48]

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47 Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) 181.

48 *Ibid.*

In *Geffen v. Goodman Estate,*[49] the Supreme Court of Canada extended the privilege to the deceased's heirs and successors in title and allowed the disclosure of privileged communications to them. The Court's rationale was that it was in the interest of justice to determine the intentions of the deceased. In cases where there is confusion regarding the appropriate distribution of an estate, "there is no privilege to waive until the true intentions of the settlor are ascertained, which in turn requires the testimony of the solicitor to be received."[50]

In these limited circumstances you may disclose confidential and privileged information while maintaining your duty of loyalty to your client.

Fees to former client's estate

The billing arrangements for work that a lawyer may have to do for the estate of a deceased client is often outlined in the retainer agreement with the former client. It usually envisages billing the estate.

When you receive the initial request from the former client's estate, you should confirm that you will be charging for your time in responding to the request. The appropriate fee level is governed by the various law societies, all of which require that fees be fair and reasonable under the circumstances.

17. I have been retained as counsel to a special committee of directors of a corporation. I have been given access to corporate documents and am working closely with in-house counsel acting for the corporation. What do I do if there are adverse (or potentially adverse) interests or if adverse interests develop in the course of the matter?

The best practice is to clarify, in writing, at the outset of the retainer who is retaining you:

- the directors personally
- the corporation, or
- the directors personally and the corporation jointly.

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49 See *Geffen v. Goodman Estate*, FN 39.

50 *Ibid.* at para. 66.

You need to be certain of the identity of your client at the outset or you are vulnerable to an after-the-fact examination with a possible unfortunate result.

An approach to determining "who is the client?" is set out in *Boreta v. Primrose Drilling Ventures Ltd.* The Alberta Court of Queen's Bench assessed the relationship between outside counsel and other corporate members based on both objective and subjective criteria. The Court asked when a "reasonable person in the position of [the corporation] with knowledge of all the facts would reasonably form the belief that [outside counsel] was acting for [the corporation]."[51] The court also probed the conduct of the parties involved, drawing inference from "...all of the circumstances through an examination on the evidence of the conduct of the parties and the documents..."[52]

Even with written confirmation from the directors and the corporation as to the identity of your client(s), there are likely to be privilege and conflicts issues to navigate.

Assuming that you are retained by the directors personally and not by the corporation, when the corporation shares information with you this could be considered a waiver of their confidentiality or solicitor-client privilege protections. However, Canadian courts have shown a willingness to recognize a "common interest exception" to the rule of waiver which would likely apply in this case.[53] (See Question 4)

If an adverse interest arises between the corporation and the directors, any information shared by one party with the other would likely have lost its privileged status and could be introduced in court proceedings as between the parties. It might still be protected with respect to third parties.

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51 *Boreta v. Primrose Drilling Ventures Ltd.,* [2010] A.J. No. 641 at para. 56 (Q.B.).

52 *Ibid.* at para. 57.

53 See *Fraser Milner Casgrain LLP v. Minister of National Revenue*, *supra,* FN 26.

18. My client fired me. She is now alleging that I forced her into a settlement when I was her counsel. She is not suing me. She is involved in enforcement proceedings with respect to the settlement. The lawyer opposing my former client wants me to give evidence about the advice I gave her and the instructions I received leading up to the settlement. May I answer these questions?

Solicitor-client privilege and the duty of confidentiality survive the end of the lawyer-client relationship. The client may waive the privilege or the duty in an expressed or implied way. The test to establish that a client has waived the protection of the privilege or the duty of confidentiality is strict.

The client, as "owner" of the privilege, must:

1. know of the existence of the privilege, and
2. demonstrate a clear intent to forego the privilege.[54]

It is up to the court to determine if a voluntary and intentional waiver has occurred.

The courts prefer not to interfere with privilege and are reluctant to assume that a waiver is implied. However, the courts have recognized that a waiver may occur for fairness reasons. If the lawyer opposing your former client wants you to give evidence, you must have a valid waiver of solicitor-client privilege and the duty of confidentiality from your former client. Ask opposing counsel to secure a written waiver from your former client through your former client's new counsel. If opposing counsel obtains a written waiver from your former client, you may give evidence.

In the absence of a written waiver from your former client, you should advise opposing counsel that a court order authorizing your evidence on the ground of waiver by your former client will be necessary. Only then will you be freed from your duties of confidentiality and privilege and be able to answer questions regarding the advice you gave and instructions you received leading up to the settlement.

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[54] Ronald D. Manes & Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) 187.

19. How can I preserve solicitor-client privilege when communicating with my client using electronic media?

Lawyers should use encryption when transmitting all confidential communications electronically (e-mail and documents).

The use of the standard "privileged and confidential" disclaimer at the top or bottom of a lawyer's e-mail does not make the contents of the e-mail any more "privileged and confidential" than placing those words at the top of a letter. Critical to determining both privilege and confidentiality are the contents of the communication and to whom it is sent.

You should avoid blind copying a client on e-mail communications with opposing counsel. It is all too easy for the client to press "Reply All" and send a confidential response to the opposing lawyer.

The CBA's *Guidelines for Practising Ethically with New Information Technologies*[55] set out best practices for using new technologies.

55 www.cba.org/cba/activities/pdf/guidelines-eng.pdf

20. Additional Resources

Canadian Bar Association, *Guidelines for Practicing Ethically with New Information Technologies*. www.cba.org/CBA/activities/pdf/guidelines-eng.pdf

CBA Task Force on Conflicts of Interest, *Conflicts of Interest: Final Report, Recommendations and Toolkit.* www.cba.org/CBA/groups/pdf/conflicts_finalreport.pdf.

Adam M. Dodek, Gen. Ed., *Canadian Legal Practice: A Guide for the 21st Century*, looseleaf ed. (Toronto: LexisNexis, 2009), c. 8 (Accepting Instructions, by Dalton W. McGrath), paras. 8.62-8.69, 8.74.

Adam Dodek, "Solicitor-Client Privilege in Canada – Challenges for the 21st Century," Discussion Paper for the Canadian Bar Association, February 2011

Interim Guidance (Assurance and Related Services Guidance AuG-46), August 2010, online: www.cba.org/CBA/jointpolicystatement/PDF/AuG-46%20Communications%20with%20Law%20Firms%20English.pdf

LawPRO, LAWPRO Magazine, *Social Media: Pitfalls to Avoid*, www.practicepro.ca/LAWPROMag/SocialMediaPitfalls.pdf

LawPRO, *PracticePro*, Technology Articles. www.practicepro.ca/technology/default.asp

Law Society of Upper Canada, *Knowledge Tree* http://rc.lsuc.on.ca/jsp/kt/loadKnowledgeTreePage.do

Louise Lalonde, "The Bankrupt's Right to Solicitor-Client Privilege: An Unbreakable Cone of Silence or Has the Last Word Been Said?" (2006) Annual Review of Insolvency Law 563.

Michel Proulx & David Layton. *Ethics and Canadian Criminal Law* (Toronto: Irwin Law 2001), pp. 503-523.

Wendy Matheson, David Outerbridge, and Laura Day, "Preserving Privilege in a Corporate Group: Lessons from *In re Teleglobe Communications Corp.*", paper presented for OBA conference *Privilege, Confidentiality and Conflict of Interest: Traversing Tricky Terrain*, October 23, 2008. www.torys.com/Publications/Documents/Publication%20PDFs/AR2008-68.pdf

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Paul D. Paton, "Corporate Counsel as Corporate Conscience: Ethics and Integrity in the Post-Enron Era," (2005) 84 Canadian Bar Review 534.

Bob Tarantino, *Pleased to Meet You: The New "Know Your Client" Regime*, Canadian Bar Association PracticeLink, www.cba.org/cba/practicelink/cs/kyc.aspx

Alice Woolley et al, eds., *Lawyers' Ethics and Professional Regulation* (Markham ON: LexisNexis, 2008), pp. 381-394.

Jacob Ziegel, "The Trustee's Right to Waive the Solicitor-Client Privilege in Corporate Bankruptcies", (2008) 47 Canadian Business Law Journal, 1.