FAQs about Privilege and Confidentiality for In-House Counsel

Ethics and Professional Responsibility Committee and Canadian Corporate Counsel Association

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THE CANADIAN BAR ASSOCIATION
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Canadian Corporate Counsel Association
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A Checklist for In-house Counsel: Strategies to Protect Solicitor-Client Privilege

The Ethics and Professional Responsibility Committee and Canadian Corporate Counsel Association prepared answers to 22 frequently asked questions about solicitor-client privilege and client confidentiality especially for in-house counsel. Please refer to the rules of your governing body for the detailed rules in your jurisdiction.

Basic Principles

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]

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]

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

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

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.

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.

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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

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

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.

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

Common Interest

Litigation context

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 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)*.[8] 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:[9] "the courts should, for the purpose of discovery, treat all the

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

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

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

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."[10]

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."[11] 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 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.[12]

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."[13]

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.*[14], the court found that the common interest privilege takes effect "when clients with separate attorneys share otherwise

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10 *Buttes Gas, supra* FN 8, 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.

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

12 *Pitney Bowes*, *supra* FN 10, 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.

13 *Pitney Bowes, supra* FN 10, at para. 19.

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

privileged information in order to coordinate their legal activities" in the context of litigation.[15] 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.[16]

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*,[17] 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."[18] 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.

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

In 2006, the Supreme Court of Canada[19] 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

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15 *Ibid.*

16 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."

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

18 *Ibid*. at para. 12.

19 *Blank v Canada*, 2006 SCC 39.

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."[20]

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".[21] Litigation privilege is "neither absolute in scope nor permanent in duration"[22] and ceases to exist upon termination of the litigation.[23]

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.

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.[24]

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20 *Ibid*. at para. 27.

21 *Ibid*. at para. 37.

22 *Ibid.*

23 *Ibid*. at para. 28.

24 *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.

One author has concluded that more than a "vague or general apprehension of litigation" is required.[25]

In *Kennedy v. McKenzie*,[26] 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.[27]

This area of case law is evolving so it is best to check recent case developments.

Common Concerns for In-house Counsel

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

Solicitor-client privilege

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 and the duty of confidentiality does not apply. However, 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.

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] C*heck recent case developments if you have any doubts about your situation.*

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

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

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

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

Duty of Confidentiality

The current Model Code of Professional Conduct of the Federation of Law Societies requires lawyers acting for or employed by organizations to comply with "up the ladder"[29] reporting obligations. It does not permit whistle-blowing to third parties which would amount to a breach of the lawyer's ethical duty to maintain client confidentiality.

However, the American Bar Association Model Rules of Professional Conduct now includes a new exception to the requirement of confidentiality. Rule 1.6(b) was added after the corporate scandals of the late 1990s and early 2000s to permit, but not require, a lawyer to reveal information relating to the representation of a client:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services …[30]

In addition, the ABA Model Rule 1.13 (Organization as Client) permits a lawyer to reveal information about an illegal act involving the client organization, which the lawyer reasonably believes is reasonably certain to result in substantial injury to the organization, when the lawyer has been unsuccessful in having the highest organizational authority do anything about it. (See the exact language of Model Rule 1.13 for additional guidance[31]).

Although the Federation of Law Societies initially proposed a similar exception to its new Model Code of Professional Conduct and the inclusion of such an exception has

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29 Federation of Law Societies of Canada Model Code, *supra,* FN 5. Rule 2.02(8).

30 www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html

31 www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client.html

been advocated elsewhere,[32] the American approach has not been adopted in Canada. There may, however, be an obligation to withdraw in Canada where the conduct has not halted despite the lawyer's advice. This situation is addressed in Question 6: "When am I required to raise a matter "up the ladder"?

6. When am I required to raise a matter "up the ladder"?

In the aftermath of corporate scandals of the late 1990s, including Enron, the United States Congress enacted the most sweeping overhaul of corporate law since the 1930s. Section 307 of the *Sarbanes-Oxley Act* of 2002 directed the Securities and Exchange Commission (SEC) to make a rule "setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation" of an issuer.[33]

Congress specifically directed the SEC to adopt a rule requiring an attorney to report evidence of a material breach of securities law or breach of fiduciary duty, or similar violation by a company or any of its agents, to the chief legal counsel or the chief executive officer of the company. If these individuals do not appropriately respond to the evidence, Congress directed the SEC to require the attorney to report the evidence to the audit committee or other committee comprised solely of non-management directors, or to the Board of Directors.

Following the adoption of Section 307, *Sarbanes-Oxley Act*, and the consequent new rules for lawyers "appearing and practicing" before the United States Securities and Exchange Commission, the American Bar Association's Task Force on Corporate Responsibility made, in 2003, recommendations for similar changes to the ABA Model Rules of Professional Conduct. After a lengthy debate, the American Bar Association amended its Model Rules of Professional Conduct for Lawyers to reflect these changes.[34] In particular, Model Rule 1.13, Organization as Client, was changed to incorporate "up the ladder reporting" requirements: unless the lawyer reasonably believes that it is not in the best interest of the organization to do so, the lawyer is required to refer the matter to a higher authority in the organization,

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

33 *Sarbanes-Oxley Act of 2002*, 116 Stat. 745 http://www.sec.gov/about/laws/soa2002.pdf

34 See Paton, "Corporate Counsel as Corporate Conscience", *supra,* FN 32, at 543-544, 545-552; Deborah L. Rhode and Paul D. Paton, "Lawyers, Ethics and Enron," (2002) 8 Stan. J. L. Bus. Fin. 9 at 12; Clifton Barnes, "ABA, states, and SEC hash out lawyers' responsibility in corporate settings," (2003) 28(2) ABA Bar Leader, online: http://www.americanbar.org/publications/bar_leader_home/volume28/2802/corporate.html; see also Corporate Governance Policy Resolution and Report, American Bar Association Task Force on Corporate Responsibility, 2003, online: http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/119c.authcheckdam.pdf

including, if warranted by the circumstances, the highest authority that can act on behalf of the organization as determined by applicable law.[35]

The Canadian Bar Association adopted changes to the CBA Code of Professional Conduct in 2004 after more than two years of consultation, and the CBA Code was further revised in 2009. Commentary 18 of Chapter IV, Confidential Information, is titled "Whistleblowing" and includes reference to "up the ladder" reporting. It says that a lawyer in particular circumstances of proposed misconduct by an organization "should…ask that the matter be reconsidered and should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization despite any direction from anyone in the organization to the contrary." The Commentary continues: "If these measures fail, it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation."[36]

The Federation of Law Societies Model Code of Professional Conduct now includes an "up the ladder" reporting requirement with essentially the same formulation and requirement as the CBA Code: "a lawyer employed or retained by an organization to act in a matter in which the lawyer knows the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally" must take steps to advise the person from whom the lawyer takes instructions and if necessary the chief executive officer" that the conduct is dishonest, fraudulent, criminal or illegal and should be stopped". If those individuals fail to act, the lawyer is required to take the situation to higher and ultimately the highest authority within the organization and, if the conduct still isn't halted despite the lawyer's advice, the lawyer is directed to take steps to withdraw from representation. The commentary provides that conduct likely to cause "substantial harm" to the organization "as opposed to genuinely trivial misconduct" triggers the requirements of the rule.[37] Note that the Model Code does not permit disclosure of privileged information when the lawyer has unsuccessfully made efforts to halt the conduct, although this is now permitted in the United States.[38]

The new Code of Conduct governing in-house counsel in Alberta (adopted on November 1, 2011), is based on the Federation's Model Code. Under Rule 2.02(11), Fraud When Client is an Organization, if the organization, despite the lawyer's advice and after the lawyer has followed the Rule's requirements for reporting "up

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35 American Bar Association, Model Rules of Professional Conduct, M.R. 1.13 (Organization as Client), online: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client.html

36 Canadian Bar Association, Model Code of Professional Conduct, Chapter IV, Commentary 18, online: http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf at pp. 22-23

37 Federation of Law Societies of Canada, Model Code of Professional Conduct, Rule 2.02(8) ["Dishonesty, Fraud when Client an Organization"] and Commentary, online: http://www.flsc.ca/_documents/ModelCode-June2012.pdf at pp. 27-28.

38 See Question 5.

the ladder", continues with or intends to pursue the unlawful conduct, the lawyer must withdraw from acting in the matter in accordance with Rule 2.07.[39]

Although the Rule speaks to withdrawing from acting "in the matter" making it theoretically possible to continue representation on non-related matters, rules on personal interest conflicts of interest such as Alberta Code Rules 2.04(9) and 2.04(10), could preclude the lawyer from continuing to act for the client. When an organization has decided to continue engaging in conduct that "is or would be fraudulent, criminal or illegal" despite the lawyer's advice "up the ladder", the lawyer's objectivity could be impaired as a result of that continued conduct to such a degree that the lawyer's ability to carry out the representation properly and competently is impaired. Further, when the organization fails to follow the lawyer's advice and proceeds in a course of unlawful conduct the lawyer might be seen as enabling or facilitating other illegal conduct if representation continues.

The ABA Model Rules, the CBA Code, and the Federation Model Code apply to any lawyer with an organization as a client. The obligations are not restricted to lawyers with corporate clients whose shares are publicly traded in either Canada or the United States. The "up the ladder" rules in both Canada and the United States therefore apply to in-house counsel for small private companies, partnerships, or other organizational forms.

7. What is "deal team" privilege?

When negotiating a transaction, corporations sometimes assemble a "deal team" comprised of individuals (not only lawyers) with specialized expertise to assist them. External "deal team" members may be included in group communications and receive legal advice on the transaction from the client corporation's legal counsel. Since communications between a lawyer and client must be kept confidential for solicitor-client privilege to apply, communicating advice to the "deal team" (third parties) would normally be considered a waiver of the privilege.

Common law has recognized exceptions to this when a third party is performing a function that is central to the existence or operation of the lawyer-client relationship. For example, when a third party accountant "is using his skill as an accountant in acting as the agent of the client to obtain legal advice".[40]

In a 2011 case[41], the Ontario Superior Court of Justice affirmed that the solicitor-client privilege extends, in appropriate circumstances, to "deal team"

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39 Law Society of Alberta, Code of Conduct, Rule 2.02(11) [Fraud When Client is an Organization], online: http://www.lawsociety.ab.ca/files/regulations/Code_New.pdf at 25-26.

40 See *Philip Services Corp. v. Ontario Securities Commission,* 2005 CanLII 30328 (ON SCDC), 77 O.R. (3d) 209; also *Susan Hosiery Ltd. v. M.N.R.* [1969] C.T.C. 353; [1969] 2 Ex. C. R. 27.

41 *Barrick Gold Corporation v. Goldcorp Inc.*, 2011 ONSC 1325 [CanLII].

communications. The court cited, with approval, these comments from the British Columbia Supreme Court:

> The nature of the interrelationship and of the dealings between [the client, the consultant, and the lawyer] are a practical reality in major commercial projects where teams of individuals with focused expertise are assembled. All functions are not performed under a single roof, and the solicitor, though retained by a single client, may be required to give advice to different members of the team who work for the client.[42]

The Ontario court held that parties should not necessarily expect "deal team" privilege to extend in every complex commercial transaction, but noting that the extension depends on the facts of each case. In this case, the defendant global mining companies had engaged outside financial advisors to assist them in negotiating a complex transaction and the financial advisors were part of a small and identifiable team that also consisted of the client's business people, and in-house and external legal and tax advisors. The plaintiff had sought production of documents circulated to the outside group on the grounds that the defendants were commercially sophisticated enterprises and did not require the expertise of these advisors for their lawyers to provide meaningful legal advice.

The judge found that "[t]he documents make clear the particular input of a relatively small number of non-lawyer individuals outside the companies, whose input was necessary and appropriate to the consideration, structuring, planning and implementation of very complex transactions in a very short timeframe." Further, the specialized advice of these other advisors was required for the "overall legal considerations" of the transaction, and that the financial advisors understood the importance of confidentiality in the deal team discussions.

Note, that while the judge "recognize[d] that the individuals considered themselves bound to confidentiality", this was "not sufficient in itself to support solicitor client privilege."

At this time, the parameters of the "deal team" privilege remain uncertain. Consider undertaking additional research and consulting with experts to determine whether "deal team" privilege applies in your particular circumstance and what protocols to implement to best protect privilege should it be available.

8. How should I respond to queries from my organization's auditor about claims and possible claims against the organization? How do the new International Financial Reporting Standards (IFRS) apply?

The auditor's report on financial statements is a statutory requirement for many corporations. In reporting on a client's financial statements, auditors must obtain

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42 *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority,* 2011 BCSC 88, (CanLII), 2011 BCSC 88 at para. 64.

sufficient audit evidence to provide a reasonable basis for an opinion. The auditing procedures for obtaining this evidence are set out in the Canadian Institute of Chartered Accountants (CICA) Handbook and include communicating with the client's lawyer who is regarded as uniquely qualified to comment on the claims and possible claims that might affect the statement. A primary concern is whether there is an implied waiver of privilege when a lawyer provides information to an auditor.

To clarify the positions of the lawyer and the auditor with respect to a client's financial statement, the CBA and CICA formulated a Joint Policy Statement on Audit Inquiries (JPS) in 1978.[43] The JPS was prepared with two major considerations of great significance to the legal profession in mind:

- As far as possible, confidentiality of solicitor-client communications and the client's privilege of secrecy must be protected, and
- The lawyer should not become involved in a joint undertaking with the auditor in the preparation and certification of the client's financial statements.

There has been little judicial consideration of the legal effect of a lawyer's response to an audit inquiry letter. In a 1985 decision, a Master held that the audit response letter was not privileged having been disclosed to a third party auditor, but that the audit response was not necessarily a waiver of privilege in respect of the subject matter of the letter.[44] More recently, the Ontario Divisional Court considered a related issue, holding that the doctrine of limited waiver applied where there was compelled disclosure to an auditor, such as pursuant to section 153 of the *Ontario Business Corporations Act*. The doctrine of limited waiver means that privilege is not lost simply because of a required disclosure to a third party.[45]

A limited waiver does not apply to a voluntary audit, only to a compelled disclosure. It may be a question of statutory interpretation to determine whether or not an audit response is mandated by legislation. Further, disclosing more than is mandated could be problematic.

In light of the introduction of new International Financial Reporting Standards (IFRS), the CBA and Auditing and Assurance Standards Board (AASB) are working together to adapt the 1978 JPS. When fully adopted, IFRS will affect the JPS in two ways. First, different accounting frameworks will be available for entities to use depending on whether they are publicly accountable enterprises, private enterprises, not-for-profit organizations, or governments. Second, the reporting standard for contingencies will change.

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43 Canadian Bar Association and the Canadian Institute of Chartered Accountants, Joint Policy Statement on Audit Inquiries, 1978, Online: http://www.cba.org/CBA/EPIIgram/oct2001/cicahb6560.pdf.

44 *Biomedical Information Corp. v. Pearce et al.* (1985), 49 O.R. (2d) 92.

45 *Philip Services Corp. v. Ontario Securities Commission* (2005), 77 O.R. (3d) 209. See also *Interprovincial Pipe Line v. M.N.R.*, [1996] 1 F.C. 367 at paras. 16-18.

While waiting for the IFRS to be fully adopted, the CBA/AASB task team issued an Interim Guidance[46] in August 2010, setting out how to deal with audit inquiries under IFRS. The Interim Guidance applies only to financial statements prepared in accordance with IFRS and to the limited circumstances described under Scope and Purpose in the Interim Guidance. In all other circumstances, communications with law firms continue to be covered by the JPS in its current form.

Inquiry letters to law firms and responses from law firms should continue to reference the JPS and indicate whether or not the Interim Guideline applies.

The CBA will post updates on the IFRS and updated JPS discussions at www.cba.org/CBA/jointpolicystatement/main/default.aspx.

In-house counsel with Multiple Roles

9. I serve as both in-house counsel and my organization's designated Privacy Officer. How can I protect privileged information in answer to a request from the Office of the Information and Privacy Commissioner?

Information and privacy matters are governed by statute so the first step is to check the statutory regime in the jurisdiction governing the request. There are differences between provinces, and between provincial and federal legislation.

In Ontario, for example, the relevant Act provides that a privacy officer may refuse to disclose a record that is subject to solicitor-client privilege or "that was prepared by or for Crown counsel for use in giving legal advice or in contemplation or for use in litigation."[47] The exact parameters of this exemption are not clear. In one case, access to photographs of a crime scene were requested for a subsequent civil suit. The Information Commissioner said that litigation privilege no longer applied, but the courts disagreed, finding that the wording of the statute superseded common law and the photographs continued to be privileged even after the criminal action had been concluded.[48] In a subsequent Practice Direction, the Ontario Information and Privacy Commissioner wrote that "the Act's legislated right of access, subject only to specifically identified exemptions, means that any kind of privilege or confidentiality that may exist at common law only applies to a request under the Act if it is embodied in an exemption."[49]

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46 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

47 *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31, as amended, s. 19.

48 *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) at 172-173.

49 Office of the Information and Privacy Commissioner of Ontario, Practice Direction #5, PO-2405 at 8.

The Supreme Court of Canada held in 2008 that the statutory authority granted to the Privacy Commissioner of Canada under the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) did not give the Commissioner the power to access privileged documents.[50] The statutory language in PIPEDA is very broad, granting the Commissioner the power to order the production of "any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record."[51] The Supreme Court held that in order to compel the production of solicitor-client communications, explicit statutory authorization was required.

Consult the legislation in your jurisdiction and seek guidance to determine whether the statutory scheme that applies to the information being requested provides an explicit exemption in the circumstances.

Information disclosure not necessarily a waiver of privilege

In its first Practice Direction, the Ontario Information and Privacy Commissioner (IPC) wrote: "If legal advice is contained in a particular record, an institution may be concerned that by providing the record to the IPC it may be waiving solicitor-client privilege. This is not the case. The Act provides the Commissioner with authority to obtain and examine a record, despite any legal privilege, and institutions do not waive solicitor-client privilege by sending records of this nature to the IPC. The same reasoning applies where the confidentiality provisions contained in other statutes are at issue."[52]

There is authority from cases involving statutes other than information and privacy statutes holding that when the statute compels disclosure, privilege is not considered to have been waived.[53]

Look first to the applicable statute when asked by an Information and Privacy Commissioner for information that you consider confidential or privileged. Seek guidance regarding your particular situation, if necessary.

10. I serve as both my organization's general counsel and its corporate secretary. How does solicitor-client privilege apply when I am responding to requests from the Board of Directors?

Basic corporate secretary responsibilities include organizing board meetings, preparing and ensuring distribution of pre-board meeting materials, keeping

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50 *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 S.C.R. 574; see also the discussion in Dodek, *supra* FN 2, at 137.

51 *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s.12.1.

52 Office of the Information and Privacy Commissioner of Ontario, Practice Direction #1, August 2000, at para. 6.

53 See *Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1.F.C. 367; *Philip Services Corp. v. Ontario Securities Commission*, 2005 CanLII 30328 (ON SCDC).

minutes, maintaining corporate records, and submitting necessary filings. In many organizations, the corporate secretary is also an important part of the corporation's management team. Beyond being a custodian of records or note-taker, the corporate secretary may be a repository of organizational history and culture, a bridge between management and independent directors, and a front-line player in responding to regulators, investors, and other stakeholders.[54] Often, the corporate secretary brings knowledge and specialized expertise that provides an important resource to the board and to the organization as a whole.

The office of corporate secretary is not, however, defined by statute in Canada There is no statutory requirement under either the *Canada Business Corporations Act* or the *Ontario Business Corporations Act*, by way of example, to have a corporate secretary, though both statutes include "secretary" in the definition of "officer" to whom the board of directors may, under its general powers, delegate management responsibilities.

The corporate secretary function may or may not carry that title, may or may not be combined with the role of general counsel, and may or may not be occupied by a lawyer. Increasingly, however, organizations are recruiting lawyers for the role though they may not be functioning solely – or at all – in a legal capacity. Privilege does not extend to advice regarding purely business matters even if that advice is obtained from legal counsel.[55] As Supreme Court Justice Major noted in a 2004 case, "[o]wing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered."[56]

Complicating the issue is legislation in several provinces that defines the "practice of law" to include some parts of the role of corporate secretary. When the Saskatchewan Court of Queen's Bench considered this issue in Potash Corp. of Saskatchewan Inc. v. Barton[57], it, held that "when corporate counsel works in some other capacity, such as an executive or board secretary, information is not acquired in the course of solicitor/client relationship and no privilege attaches."

The overlapping of the corporate secretary and general counsel roles can easily create confusion with the result that information being provided or received may not be

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54 See Paul D. Paton, "Working on the High Wire," *Lawyers' Weekly In-House Counsel Magazine*, Spring 2012, at 8-13, online: http://www.lawyersweekly-digital.com/lawyersweekly/ic2012spring#pg8; also the discussion of the corporate secretarial function in Carol Hansell, What Directors Need to Know (Toronto: Carswell, 2003).

55 See, for example, the discussion in *R. v. Shirose*, (1999), 133 C.C.C. (3d) 257 at 288-91 (S.C.C.); also *R. v. Campbell*, [1999] 1 S.C.R. 565 at 602; Robert Patzelt, Q.C., "Solicitor & Client Privilege, A brief perspective from in-house counsel", April 2011, online: http://www.cba.org/cba/newsletters/pdf/solicitor-client.pdf.

56 *Pritchard v. Ontario (Human Rights Commission),* [2004] 1 S.C.R. 809 at 818.

57 *Potash Corp. of Saskatchewan Inc. v. Barton,* 219 D.L.R. (4th) 513.

considered privileged. Accordingly, the key question is in which role you are acting when responding to requests from the board or preparing information for its consideration.

When a general counsel, or in-house counsel, is playing an executive role that is not a legal role, it should be assumed that privilege will not apply. The analysis in Potash Corp. provides important guidance.

11. I work in the legal department but I am asked for other kinds of advice. How should an in-house counsel or a government lawyer differentiate between legal advice and business or policy advice when those functions are frequently interwoven?

Given the complexities in this area and the importance of context, it is difficult to provide specific guidance.

Advice that is clearly business advice is not protected. Advice "as to what should be done in the relevant legal context"[58] is protected. However, there may not always be a clear delineation between "business advice" and "what should be done in the relevant legal context." At the margins (where the characterization of the advice could go either way), Canadian courts appear to be prepared to find that solicitor-client privilege applies[59] and to protect privilege in cases of "intertwining legal advice with business advice."[60]

For government lawyers, the situation is potentially more difficult. As a 2011 discussion paper prepared for the Canadian Bar Association noted, "[t]he distinction between legal and policy advice provided by public sector lawyers is a challenging one… [i]n the public sector, it is difficult to draw a line between what is considered policy and legal advice, as they are often intertwined to the same degree that business and legal advice are in the private sector."[61]

Government operations and policy may create different pressures on privilege than exist in the private sector. Government lawyers need to be especially attuned to the nature of the advice being given and the specific context in which it is being offered to protect solicitor-client privilege.

Please refer to the A Checklist for In-house Counsel, Strategies to Protect Solicitor-Client Privilege.

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58 *Samson Indian Band v. Canada*, (1995) 125 D.L.R. (4th) 294.

59 *Reid v. British Columbia (Egg Marketing Board),* 2006 BCSC 346 at paras. 13-14.

60 *Perimeter Transportation Ltd. v. Vancouver International Airport Authority*, 2007 BCSC 1120 at paras. 3, 5.

61 Dodek, *supra*, FN 2, at 33-34.

12. I am the VP Business Development in my organization and am sometimes asked for legal advice. Is my legal advice privileged? Does the answer change if I am employed in government?

Whenever legal and business functions are combined, there is a risk that the advice that the lawyer gives might be seen as non-legal and therefore that privilege will not attach. In *R. v. Campbell*,[62] the Supreme Court of Canada held that whether a lawyer works as in-house counsel or external counsel does not affect the creation or the character of solicitor-client privilege. In either context, only advice given by lawyers within a solicitor-client relationship is protected.

In a 2004 decision, *Pritchard v. Ontario (Human Rights Commission)*, the Supreme Court of Canada reaffirmed the highly context-specific evaluation required to determine whether privilege attaches to an in-house lawyer's advice:

> "Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered."[63]

The basic answer doesn't change when the lawyer is employed in government. As the Federal Court of Appeal held in *Telus Communications Inc. v. Canada (Attorney General)*, "[s]ince in-house and government lawyers are often employed in multiple capacities it is important to bear in mind that only communications in their capacities as lawyers can be privileged. Communications for other purposes, such as the giving of business or policy advice, does not fall within the umbrella of privilege. Whether a particular communication is covered by privilege in this context has to be assessed on a case by case basis." [64]

When a lawyer has a dual legal/business role and works outside the legal department, there is a greater risk that the advice might be seen as non-legal. The inadvertent waiver of privilege is also a risk if the advice is not kept strictly confidential. The fact that the lawyer bears a different title and is outside the legal department is not of itself determinative, though it may be important in a contextual assessment. In a 1999 case where a lawyer was "not hired specifically to provide legal advice" but was "qualified to do so and she considered it to be part of her duties", the Alberta Court of Queen's Bench held that she was not employed "as a lawyer per se" and her communications were not protected by privilege.[65]

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62 *R. v. Campbell*, *supra,* FN 55, at para 50, citing *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.).

63 *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809 at 818, citing Campbell, *supra,* FN 55, at para 50.

64 *Telus Communications Inc. v. Canada (Attorney General),* 2004 FCA 380 at para. 10.

65 *Husky Oil Operations Ltd. et al. v. MacKimmie Matthews et al*. (1999), 241 A.R. 115 (Alta. Q.B.).

There is "almost no distinction" between government lawyers and corporate counsel on this issue[66], though the organizational environment for government lawyers is different from the private sector. As Supreme Court Justice Binnie noted in *R. v. Campbell*: "While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected."[67]

Please refer to the A Checklist for In-house Counsel, Strategies to Protect Solicitor-Client Privilege for strategies to protect solicitor-client privilege for those times when you are clearly working as a legal advisor.

13. I act as internal counsel to a parent company and one of its subsidiaries. I have received information about the parent's plans that I have been asked to withhold from the management of the subsidiary. Can I do this?

This important and complex question requires consideration of a number of issues, including joint retainers, conflicts of interest, fiduciary duties in the corporate context, the duty of candour, and the assessment of "who is the client?" in the organizational context. While a definitive answer is not possible out of context, the following general guidance may be helpful.

Are the parent and the subsidiary two separate clients? With respect to confidential information, Rule 2.04(5) of the Federation of Law Societies of Canada Model Code of Professional Conduct provides that before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that the lawyer has been asked to act for both or all of them. No information that the lawyer receives in connection with the matter from one client can be treated as confidential so far as any of the others is concerned. If a conflict develops that cannot be resolved, the lawyer may not be able to act for both or all of them and may have to withdraw completely.

While in certain circumstances a conflict between two clients might be waived by the clients, a lawyer nonetheless has a duty of good faith to both clients and must serve both faithfully and honestly, believing that he or she can fulfill mandates to both clients without inhibition.

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66 *Patzelt*, *supra*, FN 55, at 6.

67 *R. v. Campbell*, *supra,* FN 55, at para. 50.

Is this situation a joint retainer? The CBA Model Code, Chapter V, Comment 8, states: "If a contentious issue arises between clients on a joint retainer, the lawyer, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of the Rule if the lawyer attempted to advise them on the contentious issue. In such circumstances the lawyer should ordinarily refer the clients to other lawyers. However, if the issue is one that involves little or no legal advice, for example, a business rather than a legal question in a proposed business transaction, and the clients are sophisticated, they may be permitted to settle the issue by direct negotiation in which the lawyer does not participate…"

Are the parent and subsidiary one, unitary client? The commentary to the term "client" in the definitions section of the Federation Model Code provides that "[w]hen an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing". The commentary continues: "For greater clarity, a client does not include a near-client, such as an affiliated entity… unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established." You will also want to consider the fiduciary duties owed by the directors of the corporation. The Supreme Court of Canada considered this question in two recent cases.[68] [69]

The CBA Model Code of Professional Conduct is more explicit, specifically providing that "The term client does not extend to persons involved in, associated with, or related to a client such as: (i) parent companies, subsidiaries or other entities associated or affiliated with a client, or directors, shareholders [or] employees of a client".

What is the nature of the parent company's plans? For example: Is this a share sale involving the subsidiary? In 2004, the Ontario Court of Appeal held that "[o]rdinarily a lawyer should not act on both sides of a transaction where the interests of one client potentially conflict with the interests of the other. If there are some simple or routine transactions where a lawyer can act for both parties, the share sale is not one of them." In a transaction of such magnitude, simply by acting for both sides the lawyer put himself into a "hopeless conflict of interest" and severely compromised representation of one of the parties. Merely by acting on the share sale, the lawyer was in breach of the fiduciary duty to one side.

The 2007 decision of the United States Court of Appeals for the Third Circuit, *In re Teleglobe Communications Corp.*,[70] while not binding in Canada, may also provide useful guidance in considering whether and how a parent company may assert privilege against its subsidiaries in certain circumstances, and whether advice given to a parent company remains privileged when the interests of corporate affiliates

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68 *Peoples Department Stores Inc. (Trustee of) v. Wise,* [2004] 3 S.C.R. 461.

69 *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560.

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

are divergent. The decision also identifies steps that corporate counsel may take to protect privilege in such circumstances.[71]

14. The Board of Directors has established a Special Committee and has asked me to assist in retaining external counsel for it. How do I avoid conflict problems? What should I do if there are adverse (or potentially adverse) interests between us?

The best practice is to clarify at the outset of the retainer who is retaining the external counsel: the directors personally; the corporation; or the directors personally and the corporation jointly.

From the outset, external and in-house counsel will need to be clear on the identity of the client and to clarify from whom each of them will be taking instructions. Otherwise, they run the risk of an after-the-fact examination which could result in findings of having violated code of conduct provisions regarding conflicts of interest.

An approach to determining "who is the client?" is set out in *Boreta v. Primrose Drilling Ventures Ltd*.[72] 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 the facts would reasonably form the belief that [outside counsel] was acting for [the corporation].[73] 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…"[74]

Even when written communications, acknowledged by the directors and the corporation, clearly identify the client of external counsel, there may be complex privilege and conflicts issues to navigate.

When external counsel is retained by the directors personally and not by the corporation and the corporation shares information with external counsel the corporation could be considered to have waived confidentiality or solicitor-client privilege.

However, Canadian courts have shown a "common interest exception" to the rule of waiver which could apply in this situation.[75] Should an adverse interest arise

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71 See Wendy Matheson, David Outerbridge and Laura Day, "Preserving Privilege in a Corporate Group: Lessons from *In re Teleglobe Communications Corp*." paper prepared for the Ontario Bar Association conference, "Privilege, Confidentiality and Conflicts of Interest: Traversing Tricky Terrain," October 23, 2008, online: http://www.torys.com/Publications/Documents/Publication%20PDFs/AR2008-68.pdf.

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

73 *Ibid*. at para. 56.

74 *Ibid*. at para. 57.

75 See *Fraser Milner Casgrain LLP v. Minister of National Revenue*, *supra*, FN 17.

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 between the parties. The information might still be protected with respect to third parties. (See Question 3 more information on the "common interest exception".)

15. Are my communications with the in-house counsel of my company's European subsidiary privileged?

The answer depends on the country in which privilege is being claimed and the context of the communication. If the country is part of the European Union, there is a strong risk that the communications will not be treated as privileged.

In its 2010 decision in *Akzo Nobel*[76], the European Court of Justice reconfirmed prior decisions that held that "legal professional privilege" did not apply to communications with in-house lawyers in competition law investigations conducted by the European Commission under EU law. In particular, the court focused on the in-house lawyer's "economic dependence" and "close ties" with the employer to find that in-house counsel "does not enjoy a level of professional independence comparable to that of an external lawyer." Despite the fact that an in-house lawyer is enrolled with a bar or law society and has professional ethical obligations which flow as a result, the in-house counsel "occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence."[77]

The impact of the decision is the subject of continuing debate.[78] An Association of Corporate Counsel Member Briefing stated that in "concrete terms… the overwhelming majority of potential legal privilege cases or incidents will not be affected by the Akzo ruling at all", and that the decision "has limited legal effect outside EU competition law investigations conducted by the EC". However, while the case started as a competition investigation, language in the judgment signals that the same result may be applied beyond the narrow confines of competition law and perhaps to other European Union regulations and institutions. The decision creates a direct conflict with privilege that might otherwise be accorded at a national level to in-house counsel (in England, for example). Further, the European Advocate General's opinion in the case, though not binding, took the position that privilege does not extend to external counsel who are not admitted to the bar of an EU member state.[79]

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76 *Akzo Nobel Chemicals Limited and Ackros Chemicals Limited v. Commission of the European Communities*, Case C-550/07P, Court of Justice of the European Union, 14 September 2010, online: http://www.acc.com/advocacy/upload/Akzo-decision-ECJ-14Sept2010.pdf.

77 *Ibid*.

78 Paul D. Paton, "The Future of Privilege", *Lawyers' Weekly In-House Counsel*, Summer 2011, at 8-9.

79 Opinion of Advocate General Kokott, delivered on 29 April 2010, Case C-550/07P, online: http://www.acc.com/advocacy/upload/AG-Opinion-AKZO-042910.pdf.

For practical purposes, then, all communications between Canadian in-house counsel and offices and subsidiaries in European Union member countries are potentially at risk of not being protected by solicitor-client privilege. The *Akzo* decision could drive company management to ensure that any communications with in-house lawyers about EU competition law are oral, not written.

In-house counsel, in Canada, need to be aware that their conversations with European counterparts for certain purposes may not be privileged in Europe. There is a possibility that privilege claims over inter-company communications may be challenged in Canadian courts: a key question is whether a communication with in-house lawyers can take place with a "reasonable expectation of confidentiality" when such communications are subject to seizure by the European Commission.

16. The CEO has asked me, as in-house counsel, to investigate a call from an employee to our organization's "ethics hotline". How can I maintain privilege over my notes and all of the records of the investigation?

Careful handling of an internal investigation is critical to maintain privilege and to ensure that in-house counsel does not inadvertently become a witness.

At the 2011 CCCA Annual Meeting, a panel discussion suggested that in order to properly determine in-house counsel's role, key questions need to be answered at the beginning of an investigation:

- What are the goals of the investigation?
- Who should carry out the investigation?
- When should the investigation be conducted?
- Who is the client of counsel doing the investigation?
- Should the investigation respond to one allegation only or be expanded to be more broad/ inclusive?
- How will the investigation be recorded and reported?[80]

The May 2012 decision of the Ontario Superior Court of Justice in *R. v. Dunn*[81] provides a useful review of some of the issues that might arise. The decision confirmed that notes taken by lawyers in the course of an internal investigation were protected from disclosure because they were created for the dominant purpose of existing, contemplated, or anticipated litigation. However, while the

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80 See Kelley McKinnon, Gowlings, "Investigation Strategy"; Heidi Schedler, Nova Scotia Securities Commission, "Government & Internal Investigations: A To-Do List,"; and Antoinette Bozac, VP, HR & Legal Affairs and General Counsel, Canada Lands Company, "Regulatory & Internal Investigations – Fraud Investigation Structure and Execution: Checklists and Case Samples,"; PowerPoint presentation slides, Canadian Corporate Counsel Association 2011 Annual Conference, August 15, 2011.

81 *R. v. Dunn*, [2012] ONSC 2748.

notes were protected from disclosure, the court held that a lawyer may nevertheless be compelled to testify about what occurred at a meeting attended on behalf of a client if third parties were also present, even if those third parties were also lawyers. The court also confirmed that a transcript of interviews may be admissible into evidence as it would not reflect a lawyer's work in anticipation of litigation.

The case concerned an investigation and review undertaken by the audit committee on behalf of a corporation, including interviews of executives later accused of defrauding the public and the company. The executives were represented by external lawyers at some of the interviews. The court accepted evidence from the external lawyers that their notes were not just a transcript of the meetings but instead were a blend of what they saw and heard together with what they thought was important. One of the interviewers was a former U.S. Securities and Exchange Commission prosecutor, and the lawyers gave evidence that they were concerned about possible regulatory and civil litigation. As a result, the court accepted that the notes were created for the dominant purpose of litigation and to enable the lawyers to defend the executives against possible proceedings.[82] But, while the notes were protected from disclosure because of litigation privilege, the content of the interviews that they recorded was not; the lawyers could be compelled to testify at trial because third party representatives had been present. The court noted that had the interviews been transcribed, the transcript would have been admissible into evidence. Although communications between lawyers and clients may benefit from the protection of litigation privilege, disclosure of the underlying facts by those who communicated with the lawyer are not protected if they are otherwise discoverable and relevant.

In the United States, the leading decision in this area remains *Upjohn Co. v. United States*.[83] That case concerned an internal investigation by the company into "questionable payments" made by the company's foreign subsidiaries, likely in violation of U.S. law. When special agents from the U.S. Internal Revenue Service sought "all files relative to the investigation", including notes or memorandums of interviews conducted with company employees as part of the internal investigation, the company declined to produce the documents on the grounds that they were protected from disclosure by attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The Supreme Court of the United States confirmed that privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[84]

Particular care must be taken if there is a possibility that U.S. authorities might seek disclosure of the notes and records. Consider retaining both U.S. and Canadian counsel to assist in such a situation.

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82 Andrew Bernstein and Andrew Finkelstein, "Litigation Privilege and Internal Investigations", Torys on Litigation and Dispute Resolution, L&DR 2012-5, May 11, 2012.

83 *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

84 *Ibid*. at para. 395.

Personal and Corporate Transitions

17. My client has fired me. I have received a request from a regulatory body regarding the work I did for the organization. What can I say?

Normally, solicitor-client privilege and the duty of confidentiality survive the end of the lawyer-client relationship. Rule 2.03 of the Federation of Law Societies of Canada Model Rule of Professional Conduct requires a lawyer "at all times" to "hold in strict confidence all information concerning the business and affairs of a client in the course of a professional relationship". A lawyer must not divulge that information unless:

- expressly or impliedly authorized by the client to do so
- required by law or a court to do so
- required to deliver the information to the Law Society; or
- unless otherwise permitted to do so under the rule.

Unless what you are being asked to divulge falls under one of these exceptions, you have a duty not to say anything about the work you did for the organization.

A client, or former client, may waive the privilege or the duty in an expressed or implied way. The test to establish that a client has waived protection of the privilege or the duty of confidentiality is strict. The client, as the "owner" of the privilege, must:

i) know of the existence of the privilege, and

ii) demonstrate a clear intent to forego the privilege.[85]

Should a client challenge your interpretation of events, it will be up to the court to determine if a voluntary and intentional waiver has occurred. Courts prefer not to interfere with privilege and are reluctant to assume that a waiver is implied.

As a practical matter, securing a written waiver from the organization may be difficult in circumstances where you have been terminated. Seeking a court order authorizing your disclosure may therefore be necessary in order to permit you to respond to the regulatory body's request.

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

18. My company has been taken over by new owners. I remain employed as the company's in-house counsel. Can I disclose privileged information to the new owners? 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.[86]

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."[87]

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.

19. My company has gone into bankruptcy. What information may I share with the trustees in bankruptcy, the purchasers of the company, or successors-in-title?

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

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86 *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.).

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

whereabouts of his property, etc., which do not require the disclosure of communications made to the appellant for the purpose of giving legal advice."[88]

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,[89] 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."[90] There exists no obligation or special circumstance within bankruptcy proceedings that would allow anyone except the bankrupt client to waive solicitor-client privilege.

When your bankrupt client's business is purchased, you still have a duty to maintain the confidentiality of all your client's documents and communications, whether privileged or not, even after the documents were disclosed by your client during the purchase transaction. You must receive explicit instructions from your client before you share privileged communications.

Day-to-day Office Practices

20. My organization has moved into premises configured for "open offices" and "hoteling" – employees have no permanent office but use available space when they come in. Do in-house lawyers need closed offices in order to maintain privilege?

As in-house lawyers have their offices within the premises of their corporate client, presumably the people outside their offices are all employees of the client. If so, there is no requirement for a closed door office, assuming that, within the corporation's offices, there is an expectation and appreciation of privacy. However, dissemination of privileged information beyond a need-to-know basis increases the risk of unauthorized disclosure as well as claims that privilege had been waived.

Lawyers often can be heard having conversations in public places, such as a coffee shop or airplane, on topics that they no doubt would like to have covered by solicitor-client privilege. Under the standard rules of waiver, such conversations would not be considered confidential and are therefore not privileged. They are similar to counsel speaking openly to a client in the corridor outside of court with many people around.

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

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

90 *Ibid*. at para. 35.

The Barreau du Québec has enacted a rule which requires advocates to use a consulting room for meetings with clients or holding conversations that are subject to professional secrecy. This room must be closed and designed in a way that prevents others outside the room from hearing the conversations taking place inside.[91] The Law Society of British Columbia has responded to similar concerns about the need to secure client information and files from third-party access by those with whom the lawyer shares offices by publishing a summary of an anonymous 2012 conduct review.[92]

21. I am a lawyer in the in-house legal department of my organization. Management is seeking to reduce costs and is proposing to outsource to a third-party provider recordkeeping of all electronic communications, including my documents and emails. What steps should I take to ensure that privilege is protected?

The CBA's document "Guidelines for Practising Ethically with New Information Technologies" (September 2008)[93] provides information to supplement the CBA Code of Professional Conduct. The Guidelines highlight best practices when using an information technology, with emphasis on the need to preserve the security of information and to maintain client confidentiality and privacy. While technologies change rapidly, lawyers' fundamental legal and ethical obligations remain the overall guide for determining whether and how to implement new technologies in practice.

Both the Federation of Law Societies Model Code of Professional Conduct and the CBA Code of Professional Conduct articulate the duty of a lawyer to hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship, and the duty not to disclose any such information except as expressly or impliedly authorized by the client, required by law, or otherwise provided for under the Rules.

These principles apply to all forms of communication, including electronic communication using new information technologies. Lawyers must display the same care and concern for confidential matters regardless of the information technology being used. In addition, in many Canadian jurisdictions, civil procedure rules, and court rules with respect to document retention and discovery define "document" and "record" to include information in both paper and electronic formats.

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91 Barreau du Québec, Regulation respecting accounting and standards of professional practice of advocates, Professional Code (R.S.Q. c. C-26, ss. 89 and 91), Division II, 5, online: http://www.barreau.qc.ca/pdf/avis/reglement-comptabilite_en.pdf

92 LSBC Conduct Review No. 3 Fall 2012; www.lawsociety.bc.ca/page.cfm?cid=2573#content.

93 Guidelines for Practising Ethically with New Information Technologies", (September 2008) www.cba.org/cba/activities/pdf/guidelines-eng.pdf

Law Society regulations do not, as yet, dictate the form or medium in which a lawyer must store client communications or other materials related to a client file. A Law Society of Upper Canada "Practice Tips" document, "Using Technology in Your Practice"[94] notes that when communications are being stored in an electronic format, care should be taken to "select a method that ensures the trustworthiness, readability and accessibility of the information for the applicable retention period." In addition, precautions should be taken to ensure security of confidential information, to strictly restrict access, and to minimize the impact of practice interruptions and technological obsolescence.

Developments in technology, the law, and regulation support the use of encryption to protect all confidential information. Federal, provincial, and international laws regarding data security and privacy may also mandate particular steps to protect confidential material.

With "cloud computing" replacing on- and off-site physical storage of computer information, the situation is becoming more complicated. Many third-party providers are located outside Canada, in jurisdictions where respect for the privilege and confidentiality of records may not be the same as in Canada.[95]

There are too many variables to be able to provide specific guidance here on protecting privilege when record-keeping is being outsourced. Consider the following questions when working to ensure that privilege is maintained:

- *What risks does a particular information technology pose for inadvertent disclosure or interception?*
- *What risks are associated with the particular third-party provider being selected? Can continued access, technological compatibility, security, and encryption (where appropriate or necessary) be assured?*
- *What issues arise from the different laws or governing regimes in the jurisdiction where the third-party provider is located?*

22. My organization plans to retain an expert to advise it on an important corporate matter in anticipation of litigation. How do I ensure that the expert's report is privileged?

Normally, communications between an expert and instructing counsel and the expert's initial working notes will be privileged when created for the dominant

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94 "Using Technology in Your Practice", Law Society of Upper Canada, July 6, 2012. http://rc.lsuc.on.ca/jsp/kt/loadKnowledgeTreeQuestionPage.do?levelId=15&sublevelId=29

95 The "Report of the Cloud Computing Working Group" to the Law Society of British Columbia is a useful resource on these issues. http://www.lawsociety.bc.ca/docs/publications/reports/CloudComputing_2012.pdf

purpose of use in litigation.[96] However, in *Kennedy v. McKenzie*,[97] 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
- 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.

It is therefore important to ensure that instructions to the expert come directly from counsel. It may be appropriate to retain external counsel for the specific purpose of providing guidance and instruction to the expert for the purpose of litigation.

Another issue to consider is whether it is anticipated that the expert report will be used as evidence at trial. It is a mistake to assume that preliminary drafts and information from counsel will be protected from disclosure by litigation privilege or solicitor-client privilege, when the expert's final report is relied upon at trial and the expert is called as a witness.[98] Trends in the case law suggest that the most prudent course is to assume that all communications with experts will be disclosed (in substance if not the documents themselves) should the expert be called to testify. This is especially the case where a statutory exception provides for disclosure of any information considered by the expert in reaching his or her final opinion.[99]

In Ontario, for example, Rule 31.06(3) of the Rules of Civil Procedure, requires that unless i) the materials were prepared in contemplation of litigation and for no other purpose, and ii) the party being examined undertakes not to call the expert as a witness, then a party is entitled on an examination for discovery to "discovery of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address."[100] There is continuing debate over what exactly constitutes the "findings, opinions and conclusions" of an expert and to what extent

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96 *Chernetz v. Eagle Copters Ltd*., 2005 ABQB 712, 385 A.R. 238, 28 C.P.C. (6th) 175 (Alta. Q.B.); see also *General Accident v. Chrusz*, 1999 CanLII 7320 (ON CA); 45 O.R. (3d) 321 (C.A.).

97 *Kennedy v. McKenzie*, [2005] O.J. No 2060 (S.C.) at para. 20, cited with approval *in R. v. Dunn,* 2012 ONSC 2748 (CanLII).

98 See Lana Finney and Sarah Robicheau, "The Broadening Disclosure Obligations for Expert Witnesses," 22(1) Environews [Ontario Bar Association – Environmental Law Section] March 2012; also Paul D. Paton, "Waiver of Privilege and Preliminary Drafts of Expert Reports," 3(2) *Commercial Litigation* 130 (1996); William G. Horton and Michael Mercer, "Expert Witness Evidence in Civil Cases," 29 Advocates Quarterly 153 (2004) [revised edition July 2007].

99 *Conceicao Farms Inc. v. Zeneca Corp*., (2006) 82 O.R. (3d) 229, 2006 CanLII 25345 (.C.A.) at paras 37-43, overturned on other grounds in *Conceicao Farms Inc. v. Zeneca Corp*., (2006) 83 O.R. (3d) 792, 2006 CanLII 31976 (C.A.).

100 Rules of Civil Procedure, Rule 31.06(3), R.R.O. 1990 (made under the *Courts of Justice Act*, R.S.O. 1990, c. C4)

production of an expert's report will trigger the production of other documents.[101] But in a 2006 decision, the Ontario Court of Appeal held that the production obligations under Rule 31.06(3) extend to any information considered by the expert in reaching his or her final opinion.[102]

The following kinds of documents have been held to fall under the disclosure obligations of the Rule in Ontario:

- factual information and data relied upon by the expert (such as calculations, field notes, or information obtained in interviews)
- information communicated by counsel to the expert upon which the expert then relies in preparing the report
- preliminary drafts, and
- any report of another author used and considered by the expert in the case.[103]

The emphasis in the cases is on ensuring appropriate disclosure of all facts relevant to the formulation of the expert's opinion.

Please refer to the A Checklist for In-house Counsel, Strategies to Protect Solicitor-Client Privilege.

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101 Horton and Mercer, *supra,* FN 98, at 14: "It is important to note that Rule 31.06 only operates to protect from disclosure "knowledge, opinion and belief" of a party which constitute "findings, opinions and conclusions" of the expert. All other "knowledge, opinion and belief of a party will, subject to the *Rules*, be discoverable."

102 *Conceicao Farms Inc*., *supra*, FN 99.

103 Finney and Robicheau, *supra*, FN 98, at 2

A Checklist for In-house Counsel
Strategies to Protect Solicitor-Client Privilege[104]

Best practices

Be clear when you are working in your lawyer role.

- Be clear when you are acting as legal counsel and not in another capacity, such as managing operations, conducting investigations, etc. Communicate your role to personnel involved to limit any misunderstandings concerning the applicability of privilege.

- Identify that you are acting in your legal counsel role as soon as you receive an assignment or request for action on a matter.

- Note your role on documents, when possible.

- Use different letterhead, an explicit e-mail signature line, etc. when you are acting as legal counsel.

- Use outside counsel if you have concerns about keeping roles separate in a specific situation.

Put in place appropriate corporate policies.

- Develop organizational systems (internal procedures) that maintain clear distinctions between operational functions and the legal department, with the legal department having responsibility for all matters that have a legal implication.

- Require communications to counsel to be in writing especially when it is a request for legal advice on a specific issue.

- Consider putting in place a referral process with requests for legal advice always made through the same point of contact.

- Make sure people with legal training who have operational responsibilities avoid giving legal advice at any time. Legal opinions should come from legal counsel in the legal department.

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104 This checklist is based on material prepared by Robert Patzelt, Q.C., "Solicitor & Client Privilege, A brief perspective from in-house counsel," April 2011, 7 – 10, www.cba.org/cba/newsletters/pdf/solicitor-client.pdf

- Set up a system to communicate, regularly and frequently, the importance of clearly marking files as "confidential", "privileged", etc. and keeping those files separate from management, operational, and other non-legal files.

Establish good communications practices.

- Reply to a request for legal advice noting the legal advice requested, asking for any information you require, setting out the steps that you are likely to follow to provide legal advice, and explaining the steps for the client to follow to protect privilege.

- Mark documents with the appropriate notations such as "privileged", "confidential", or "prepared at the request of legal counsel for the purpose of providing legal advice".

- Ensure communications demonstrate the use and application of legal skill and provide advice.

- Identify that the purpose of the communication is with respect to legal advice. When requesting information from others, especially employees, be sure to state that the information is needed so that you can provide the corporation with legal advice.

Have everyone follow the office procedures.

- Have everyone in the organization, including you, separate legal files from other files especially those of a management, operational, or non-legal nature.

- Store legal files securely (locked cabinet, password-required, encrypted, etc.) and limit access to them.

- Make sure legal files include only those documents that are relevant to the legal issue and show that counsel has exercised legal knowledge and skill.

Act on concerns about the loss of privilege.

- Advise appropriate personnel of the possibility that privilege may not in place to avoid their assuming that communications with you are protected when:
    - you have concerns with respect to the necessary separation between your legal duties and your other organizational functions, or
    - your instructions on strategies to protect privilege have not been followed or are impractical to put in place in a particular situation.

Strategies to avoid a waiver of privilege

- Keep all documents confidential that are received from counsel or sent to counsel whether external or internal. Restrict their circulation.

- Limit communications with third parties. Be extra cautious with documents going to people who may not be reasonably characterized as an employee or agent of legal counsel or the organization.

- Use non-disclosure agreements with third parties and agents and include a non-waiver of privilege clause.

- Review regulatory filing requirements to identify when filings may be on a confidential basis. File on a confidential basis whenever possible.

- Assert privilege clearly and as early as practicable, where possible.

- With respect to litigation or potential litigation:

    - Exercise great caution before introducing organizational knowledge or understanding of the law ("state of mind") into pleadings. This may create an implied waiver.

    - Ensure witnesses understand the implications of referring to a privileged document in their testimony at discovery, hearings, court, etc.

- In search and seizure circumstances, assert privilege at the very outset and require the items to be sealed pending a determination of the claim of privilege.

Strategies to avoid the denial of privilege on the grounds that communications were not kept confidential

- Keep communications and documents that you feel you may need to impress with privilege restricted by:

    - Locking or securing them so that access is restricted.

    - Limiting access only to people who truly need access to them.

    - Noting on the documents and elsewhere that the material is not to be copied, circulated, or disclosed.

- Protect the organization from the unauthorized or inadvertent communication of documents to third parties, especially by e-mail or other similar technologies. Consider password protection, secure transmissions systems, encryption, verification of recipient address information, use of audit trails, etc.

Strategies to avoid the denial of litigation privilege (communications not made "for the dominant purpose of preparing for existing or expected litigation")

- State, on the face of the documents, the purpose of information gathering, including interviews, when it is being done for the purpose of preparing for litigation. Use a number of means to indicate this, (an introductory paragraph, for example) not just a rubber stamp.
- Separate information gathered by subject matter and label the files appropriately, including noting that the material is for the purpose of preparing for litigation.
- Differentiate between ordinary internal reports and investigative reports completed for (possible) litigation.
- Avoid including in investigative reports being prepared for (possible) litigation information that may have been obtained for other organizational purposes.
- Consider using outside legal counsel for investigations. Privilege seems to be less vigorously attacked due to the presumption that they are truly acting in a professional capacity.