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CIVIL LITIGATION FOR PARALEGALS: ADVANCED ISSUES—2013 UPDATE

PAPER 5.1

Privilege in Document Discovery

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PRIVILEGE IN DOCUMENT DISCOVERY

I. Introduction[1]

The purpose of this paper is to provide an overview of the law of privilege with specific emphasis on a party's document disclosure and listing obligations. The intent is to provide details of the law as it pertains specifically to the identification and listing of privileged documents as these tasks are generally completed by paralegals.

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1 For a more detailed discussion of privilege in the context of discovery, see *Discovery Practice in British Columbia* (CLEBC).

II. Privilege Generally

It is widely known that not all documents and information that relate to a matter can be used in examination for discovery or at trial. By way of example, the well-known exclusionary hearsay rule prevents hearsay evidence from being used at trial, subject to certain exceptions. When discussing "privilege" in this context, reference is made to a type of information and document that can be withheld both from the court and during discovery. However, unlike the hearsay rule which excludes relevant evidence due to its inherent unreliability, privileged documents and information are excluded to protect the privacy interests of parties and to allow them to freely and openly receive legal advice and prosecute a lawsuit.

The following is a general description of the most commonly encountered forms of privilege.

A. Legal Advice Privilege

This privilege protects communications that pass between a lawyer and a client for the purpose of giving or obtaining legal advice. It is often referred to as "solicitor-client privilege." However, in order to avoid any confusion in terminology, it is best to refer to communications between a lawyer and client for the purpose of obtaining legal advice as "legal advice privilege." As was explained in *Blank v. Canada (Minister of Justice*), [2006] 2 S.C.R. 319 (at para. 1):

> The *solicitor-client privilege* and the *litigation privilege* … often co-exist and one is sometimes mistakenly called by the other's name, but they are not coterminous in space, time of meaning.

It should be noted that the legal landscape in Canada is changing with respect to the roles of paralegals. In BC, the *Designated Paralegal Pilot Project* has been brought into force and "designated paralegals"[2] may now give legal advice directly to clients on any area of law in which they are competent. The question of whether communications between a designated paralegal and a client are protected by legal advice privilege remains to be decided by our courts.

Legal advice privilege is a virtually impenetrable class of privilege that is permanent in duration and belongs exclusively to the client. It is passionately protected by the courts and in only rare circumstances will it be eroded.[3] In order for a communication to be considered as legal advice privilege it must be:

(a) between a lawyer and a client;

(b) made in confidence; and

(c) in the course of seeking legal advice.

B. Litigation Privilege

Communications and documents produced in contemplation of litigation are protected by "litigation privilege." But, unlike legal advice privilege, litigation privilege only survives for the duration of the action.

In order for litigation privilege to attach to a document, the following must exist (*Hamalainen v. Sippola* (1992), 62 B.C.L.R. (2d) 254 (C.A.) at 261):

> (a) litigation was in reasonable prospect at the time the document was created; and

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2 As defined in the Code of Professional Conduct for BC.

3 Those circumstances are beyond the scope of this paper but include:

(a) Where public safety is at issue; and

(b) If the communication itself is criminal or the advice sought is to facilitate the commission of a crime.

> (b) the dominant purpose for the document's creation was for use in the conduct of that litigation.

Whether the "dominant purpose" of a document is for litigation is a question of fact that must be determined on a document by document basis.

C. Solicitors' Brief Privilege

This form of privilege protects a lawyer's working documents, notes, copies of documents and reports used to prepare for the litigation. Arguably, this type of privilege can be seen to fit within the realm of litigation privilege. However, the distinguishing feature for solicitor's brief privilege is that it requires some legal skill and judgment to be applied by the lawyer. For this reason, a collection of documents, for example, can be considered to be covered by solicitor's brief privilege if skill and knowledge was applied to their collection (*Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 (C.A.)).

D. Settlement Privilege

Litigious parties often engage in communications with an aim to settle an outstanding dispute and there is a public interest in fostering such discussion. If settlement discussions were otherwise open to disclosure to the court, parties could not freely and candidly pursue settlement in fear of the content of those communications being construed as admissions of liability.

The scope of this privilege was set out in *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.) (at para. 18):

> [18]…the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a blanket, prima facie, common law, or "class" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> [19] In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.

The test for settlement privilege is described as:

> (a) a litigious dispute must be in existence or within contemplation;
>
> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
>
> (c) the purpose of the communication must be to attempt to effect settlement.
>
> (J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 3rd Ed (Toronto: Buttersworths, 2009) at para 14.322)

To be a litigious dispute, there must be litigation either commenced or contemplated (*Blue Line Hockey Acquisition Co v. Orca Bay Hockey Ltd Partnership*, [2007] B.C.J. No. 279 at para. 104).

It has also been argued that the second requirement is not necessary given that an intention for non-disclosure can be often inferred from the document (*Wong v. Transamerica Life Canada*, 2013 BCSC 1768). In any event, this can be simplier with the use of a "without prejudice" label. However, merely marking a

document as "without prejudice" will not be sufficient on its own to invoke the privilege, nor is it a necessary condition.

Settlement privilege belongs to both parties. This is so even if one of the parties does not respond to the communication. As a result, settlement privilege cannot be expressly waived by only one party.

E. Other

The above recognized forms of privilege are not a closed list. It is always open to a party to assert, and the court to determine, whether specific circumstances warrant protection under the umbrella of "privilege." In such case-by-case situations, a court will apply what is known as the "Wigmore criteria" to assess whether a particular document is privileged. The criteria are:

> (a) the communications must originate in a confidence that they will not be disclosed;
>
> (b) this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
>
> (c) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and
>
> (d) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
>
> (A. Bryant, S. Lederman and M. Fuerst, *The Law of Evidence in Canada*, 3rd Ed (Toronto: Buttersworths, 2009) at para 14.16)

A full discussion of the Wigmore criteria is beyond the scope of this paper. However, it is worth addressing in the context of paralegal-client communications, briefly touched on above. Given the uncertainty of whether or not designated paralegal-client communications would be covered by legal advice privilege, this is a critical determination to be made.

A similar issue was before the court in Ontario in *Chancey v. Dharmadi* (2007), 86 O.R. (3d) 612 (SCJ – M). In that case, Master Dash determined that communications between an unlicensed paralegal and his client for the purpose of obtaining and giving legal advice met the Wigmore criteria and were privileged. Master Dash held that the facts did not establish a class privilege (such as legal advice privilege) because in that case the paralegal was not part of an identifiable group as he was not licensed by the Law Society of Upper Canada. The master then went on to comment in *obiter* (at para. 39):

> [39] In my view, there is no principled reason why a class privilege should not be extended to paralegal-client communications; however, it must be restricted to communications with an identifiable group, namely paralegals licensed by the Law Society. Since the paralegal with whom the defendant communicated was not a licensed paralegal, no class privilege can be said to apply. No declaration should be made at this time, on the facts of this case, with respect to the existence of a class privilege over paralegal-client communications …

III. Identifying Privileged Documents

A. Ethical Considerations—Lists of Documents

It is often the case that a paralegal, junior associate or articled student will be reviewing, organizing and listing documents for a litigation matter. Likely the documents were collected and delivered by the client in response to a general request for "all of the documents" that relate to the action. It is not surprising that clients will interpret this request as one for "all of the documents that clearly help your case." The situation becomes even more difficult when acting for an insurer and obtaining documents from an insured that has very little vested financial interest in the litigation.

For these reasons, there is an important ethical obligation on lawyers to ensure that their client has listed all producible documents. Paralegals need to be aware of this ethical obligation if they are performing the review and listing of documents. The determination of relevance, materiality and privilege should never be left to the client. It is arguably a breach of this ethical obligation if clients are allowed to make these decisions. As famously stated by Lord Wright in *Myers v. Elman*, [1940] A.C. 283 (HL) (at 280):

> … A client cannot be expected to realize the whole scope of [the obligation to disclose documents] without the aid and advice of his solicitor, who, therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order [of discovery] is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case …

Therefore, it is good practice for a paralegal or junior lawyer to not only review and list the documents produced by a client, but to also consider the scope of the documents produced and identify any gaps or deficiencies. To do this, knowledge of the client's business is necessary to know the types of documents that would be generated and what questions ought to be asked of the client to ensure full and proper disclosure.

B. Specific Issues in Identifying Privileged Documents

1. Legal Advice Privilege

It is usually not difficult to identify documents that fall under this category. However, an interesting situation arises in the case of in-house counsel. Legal advice privilege applies equally to in-house counsel as it does to lawyers in private practice (*Pritchard v. Ontario (Human Rights Commission*), [2004] S.C.R. 809 at para. 19). Unlike lawyers in private practice, in-house counsel can have additional responsibilities. They can provide business advice, sit on boards of directors, and draft company policies. It is only when in-house counsel is acting as a legal advisor that legal advice privilege may apply (*Pritchard*, para. 20).

When confronted with documents that appear to be between a client's in-house counsel and the corporation, each document needs to be closely inspected to determine whether the subject matter of the communication was legal in nature and if the in-house lawyer was being engaged in his or her role as counsel.

2. Litigation Privilege

Identifying documents covered by litigation privilege can be difficult. This is because the two part test (reasonable contemplation of litigation/dominant purpose of the document) includes both subjective and objective factors. The reviewer must first be familiar with the case basics and timeline of the loss, the authors of the documents including their roles and responsibilities, and when counsel was appointed. This information is critical knowledge in order to be able to identify a document as potentially covered by litigation privilege.

The first phase of the test is often easy to discern. Litigation is said to be in reasonable prospect if:

> … a reasonable person, possessed with all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without [litigation].
>
> (*Hamalainen v. Sippola* (1992), 62 B.C.L.R. (2d) 254 (C.A.) at 261)

The second phase is more involved. To make the initial assessment of the dominant purpose for a document's creation, the reviewer can make reference to what has been described as the two stages of a dispute: (1) the adjusting stage; and (2) the litigation stage. Only documents and communications made in the latter can be covered by the privilege. However, it is wise to not slavishly adhere to such distinctions as they may not apply to every scenario.

This was been described in *Hamalainen* (at 262):

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry [to discover the cause of the accident on which it is based] will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

Persons reviewing documents for privilege cannot come to a conclusion of a document's purpose for creation on their own. In order to fully assess a claim for litigation privilege, the author of the document or the person on whose authority the author created the document, should be consulted. This is important as it is that person who will ultimately be providing evidence to support the claim for litigation privilege should it be challenged.

IV. Listing Privileged Documents

A. Obligation Generally

Every party to an action must produce a list of documents within 35 days of the close of the pleading period (Rule 7-1(1)). This mandatory obligation includes privileged documents as set out in Rule 7-1(6) & (7):

> **Claim for privilege**
>
> (6) If it is claimed that a document is privileged from production, the claim must be made in the list of documents with a statement of the grounds of the privilege.
>
> **Nature of privileged documents to be described**
>
> (7) The nature of any document for which privilege from production is claimed must be described in a manner that, without revealing information that is privileged, will enable other parties to assess the validity of the claim of privilege.

In order to comply with a party's obligation under the Rules, when the claim for privilege is not legal advice privilege, a more detailed description must be provided to facilitate challenge to the claim of privilege (*Stone v. Ellerman*, 2009 BCCA 294 at para. 27). In most cases of litigation privilege, this will require listing the date, author and subject matter of the document.

More generic descriptions are only permissible when dealing with legal advice privilege in order to protect the "sanctity" of the privilege (*Bajic v. Friesen*, 2006 BCSC 1290 – Master).

Finally, each document over which privilege is claimed ought to be separately listed and the individual grounds of privilege separately stated.

B. Boilerplate Descriptions

Although Rule 7-1 is quite clear on the standard required when preparing a list of documents, many parties continue to rely on generic descriptions in their list of documents to encompass all privileged documents. In *Stone v. Ellerman*, the plaintiff attempted to make use of a pain journal under the generic description of "Notes and documents, correspondence, minutes of evidence, memoranda being the work product of plaintiff's legal advisors."

The Court of Appeal held that the pain journal was not adequately described because the boilerplate had nothing in it that would allow the other party to "assess the validity of the claim of privilege" (Rule 7-1(7)).

C. Redactions

Quite often parties produce lists of documents that contain redactions on no other grounds but lack of relevance. The annotation in the list of documents is stated as "[redacted for relevance]." This is improper. If a document is listed in Part 1 of a list of documents, it is producible in its entirety, even if only part of it might prove or disprove a material fact. (*0878357 BC Ltd v. Tse*, 2012 BCSC 516 at para. 27).

Only in very exceptional circumstances will redaction be permitted, and only where the redacted information is clearly irrelevant (*North American Trust Co v. Mercer International Inc.* (1999), 71 B.C.L.R. (3d) 72). The proper procedure is to make a note setting out that the listed document contains portions that are redacted that are clearly irrelevant and that there is a good reason for their removal. Examples are commercially sensitive information and embarrassing information that may cause harm and serve no purpose in resolving the issues.

Redactions for privilege are acceptable provided that the object of Rule 7-1 is met as far as listed descriptions. The recommended procedure would be to list the document twice, once in Part 1 and again in Part 3.

D. Risks of Improperly Listing and Describing

The Rules contain a number of tools that may be used by the court when faced with a party that fails in its document discovery obligations. As it pertains to the listing of privileged documents, Rule 7-1(21) is most critical:

> **Party may not use document**
>
> (21) Unless the court otherwise orders, if a party fails to make discovery of or produce for inspection or copying a document as required by this rule, the party may not put the document in evidence in the proceeding or use it for the purpose of examination or cross-examination.

This was the result in *Stone v. Ellerman*. The plaintiff wished to use the pain journal for the purpose of refreshing her memory; this was allowed by the trial judge. After trial, the defendant appealed and alleged that the trial was flawed as the plaintiff was allowed to refer to the pain journal which was only listed in the sense that it was said to be part of the generic categories of privilege. The Court of Appeal ordered a new trial.

In *Dykeman v. Porohowski*, 2010 BCCA 36, the Court of Appeal ordered a new trial in a matter where the defendant used certain internet postings for the purpose of cross-examining the plaintiff. They were listed very generally as part of the defendant's solicitor's brief. The Court of Appeal found that the descriptions were insufficient.

Given the risk of not being able to make use of any privileged document that is improperly listed, care must be taken when drafting lists of documents. Descriptions for all non-legal advice privilege documents should be scrutinized to determine if they comply with the law as set out above.

It is worth noting that there may be some circumstances where documents used at trial do not need to be listed at all. This may be the case for documents used by a party to challenge the credibility of an expert as that is not a "matter in question in the action" (as used in old Rule 26). This was the result in *Beazley v. Suzuki Motor Corporation*, 2010 BCSC 613 where the Court held that the old Rule 26 did not require the listing of documents used to impugn an expert's credibility.

This strategy should be fully considered prior to use and with the following caveat. The old Rule 26 did not require a party to list "all other documents to which the party intends to refer to at trial." Arguably, the *Beazly* situation would not apply under Rule 7-1, but there have been no decided cases on this point.

V. Loss and Waiver of Privilege

The privileged status of a document can be lost (or "waived") resulting in disclosure of that document to the other parties and the court. Often this can be intentional and as part of a lawyer's trial strategy. Any person

that is responsible for drafting an affidavit, pleading or list of documents needs to be aware of the circumstances in which privilege can be waived.

Waiver of privilege is a topic that can easily occupy its own paper. For further discussion on the topic, please see (A. Bryant, S. Lederman and M. Fuerst, *The Law of Evidence in Canada*, 3rd Ed (Toronto: Buttersworths, 2009) at chapter 14)

A. Accidental Disclosure

1. Result

Voluntary disclosure of a privileged document to a third party can lead to a loss of privilege. However, accidental disclosure does not automatically lead to the same result. This is due to the fact that the realities of the practice of law have changed with electronic document storage and disclosure. The volume of documents being disclosed in even small cases can be significant and accidental disclosure of privileged documents is bound to occur from time to time.

The authors of *The Law of Evidence in Canada* suggest that it should be open to a court to determine whether in the circumstances, privilege has been waived. The "[f]actors to be taken into account should include whether the error is excusable, whether an immediate attempt has been made to retrieve the information, and whether preservation of the privilege in the circumstances will cause unfairness to the opponent" (para. 14.152).

2. Ethical Obligations

All lawyers have an ethical obligation with respect to accidental disclosure of a privileged document. Rule 7.2-10 of the *BC Code of Conduct* states:

> **Inadvertent communications**
>
> 7.2-10 A lawyer who has access to or comes into possession of a document that the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, must:
>
> (a) in the case of a paper document, return it unread and uncopied to the party to whom it belongs,
>
> (b) in the case of an electronic document, delete it unread and uncopied and advise the party to whom it belongs that that was done, or
>
> (c) if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it or delete it, uncopied, to the party to whom it belongs, advising that party:
>
> (i) of the extent to which the lawyer is aware of the contents, and
>
> (ii) what use the lawyer intends to make of the contents of the document.

All paralegals should be aware of this obligation. In the course of reviewing another party's documents, if a document that is clearly privileged appears to have been accidentally disclosed, then the steps above must be followed.

B. Waiver

1. Generally

Privilege can be waived expressly or by implication. The test has been stated as:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces and

> intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require.
>
> (*S&K Processors Ltd v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.) at 220)

There are many specific examples of cases where parties have been said to have waived privilege. The following is a brief and non-exhaustive summary.

2. Examples

Disclosure of Part: Disclosing part of a document or giving evidence of its existence by way of affidavit or at examination for discovery can lead to waiver of the entirety of the document. In some instances lawyer's notes regarding that privileged document can also be waived (*S&K Processors Ltd v. Campbell Ave Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (S.C.)).

Pleadings: A party's pleading that raises the issue of the legal advice it received or that puts its state of mind at issue can result in a waiver of privilege over the legal advice received. This can also occur if reference is made in an affidavit to legal advice received (*Olson v. Association of Naturopathic Physicians of British Columbia*, [1999] B.C.J. No. 1362 (S.C.)).

Voluntary Disclosure: Delivering a privileged document voluntarily to a third party can be a waiver unless there is evidence of a lack of intention to waive (*Gemex Developments Corp v. CH2M Gore & Storrie Ltd*, [1999] B.C.J. No. 1327 (S.C.)).

Solicitor's Affidavit: A solicitor swearing an affidavit risks waiving privilege over his or her file if the evidence given is about matters at issue in the claim (*Greater Vancouver (Sewerage and Drainage District) v. Canadian National Railway Company*, 2012 BCSC 1929 (Master)).

Taking Sworn Witness Evidence: If a party does not intend to use it as primary evidence, for example in chambers, then it is improper to take sworn evidence from a witness. Doing so not only waives privilege over that sworn evidence, drafts, notes, and working papers, but is also arguably unethical on behalf of the lawyer taking that evidence (*Birch v. Brenner*, 2013 BCSC 1862).

Settlement Privilege: Although this belongs to both parties, it can be waived by implication by only one of the parties and those communications used by the other (*Mackenzie v. Brooks*, 1999 BCCA 623).

VI. Challenging Claims of Privilege

Assuming that the impugned document has been properly listed, with sufficient descriptive information, a party wishing to challenge the claim of privilege will do so by bringing an application under Rule 7-1(17):

> **Order to produce document**
>
> (17) The court may order the production of a document for inspection and copying by any party or by the court at a time and place and in the manner it considers appropriate.

On such an application, it is up to the party asserting the privilege to establish it. This will likely require an affidavit from the author of the document that deposes to the basis for the document's production. It is important to note that just because the author deposes that the "dominant purpose" of the creation of the document was for litigation, is not conclusive. This is especially so if the evidence does not address other possible uses for the document (*Kropp v. Swaneset Bay Golf Courses Ltd.*, [1997] B.C.J. No. 1458 (QL) (S.C.)).