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In this article, Vern Krishna discusses the preservation of, and constraints on, legal privilege including the distinction between a communication made to commit a fraud or crime, and a communication made in seeking advice on the defence of past crimes or fraudulent conduct, as well as the circumstances in which third-party documents are privileged.

Constraints on Legal Privilege (Vern Krishna)

Date: July 6, 2016

 [Constraints on Legal Privilege—By Vern Krishna](#)

The essential element in preserving legal privilege is that the parties intend the document to remain confidential as against outsiders. The parties may expressly state their expectations may be that the opinion is for the benefit of all parties to the transaction. The law may also imply expectations from the conduct of the parties.

No Bright Line Test

There is, however, no bright line test to determine when persons waive privilege in transaction through disclosure. Each case depends upon its own facts. For example, corporations to a potential merger or acquisition may have a common interest to complete the transaction, but may also have other interests adverse to each other. It is a question of fact whether the common interest privilege applies to disclosure in these circumstances.

Of course, the most prudent course of conduct is to clearly specify and claim the privilege at the time that the advisor prepares the document, and state the expectation of the parties to the transactions that they do not intend to waive the privilege by disclosing the opinion to common interests. All the more so in Internet and email communications, which may pass through multiple channels that third parties may intercept.

Fraud and Crimes

Since the rationale for solicitor-client privilege is to promote the administration of justice through full and frank disclosure of all relevant information between client and lawyer, it would be perverse to allow privilege to assist in the perpetration of a fraudulent or criminal act. However, there is a distinction between a communication made to commit a fraud or crime, and a communication made in seeking advice on the defence of past crimes or fraudulent conduct. As McCormick on Evidence states:

It is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is the furtherance of a future intended crime or fraud. Advice secured in aid of a legitimate defence by the client against a charge of past crimes or past misconduct, even though he is guilty, stands on a different footing and such consultations are privileged. If the privilege is to be denied on the ground of unlawful purpose, the client's guilty intention is controlling, though the attorney may have acted innocently and in good faith.

Thus, a taxpayer can lose privilege if the CRA can show that the privileged relationship exists for the purpose of perpetrating

a fraud or crime.

However, the CRA cannot expunge privilege merely by alleging fraud. The Minister must at the very least make out a *prima facie* case of fraud, and lead some evidence to support the allegation. Further, he must support the allegation with first-hand knowledge, and not rely solely on affidavit evidence based on information and belief of unspecified and ill-defined inquiries. There must be an intelligible and specific allegation of fraud supported by sufficient evidence to establish at least a *prima facie* case.

Even where the Minister establishes fraud and sets aside the privilege in respect of the communications, the client may still claim solicitor-client privilege in respect of communications between him or her and the solicitor on advice that the solicitor gives *after* the fraudulent act.

Third-Party Communications

Third-party communications, that is by a person other than the solicitor or the client, may be privileged in certain circumstances. Clearly, where a lawyer retains another lawyer to act as his or her agent, the communications of the agent lawyer are privileged. Communications by a third party acting on behalf of a client are also privileged communications if the third party is retained as the lawyer's agent. Jackett P. explained the status of third-party communications as follows:

... that no communication, statement or other material made or prepared by an accountant as such for a business man falls within the privilege *unless* it was prepared by the accountant as a result of a request by the business man's lawyer to be used in connection with litigation, existing or apprehended; and that, where an accountant is used as a representative, or one of a group of representatives, for the purpose of placing a factual situation or a problem before a lawyer to obtain legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an accountant in carrying out such task, does not make the communications that he makes, or participates in making, as such a representative, any the less communications from the principal, who is the client, to the lawyer and similarly, communications received by such a representative from a lawyer whose advice has been so sought are none the less communications from the lawyer to the client.¹

But not all third-party documents are privileged. For example, in certain circumstances, courts have considered environmental audit reports and appraisal reports not to be privileged even when prepared at the solicitor's request.²

Conclusion

The key elements to preserving legal privilege are the intention of the parties to maintain confidentiality, the good faith of the parties not to engage in fraudulent activities, and circumspect dissemination of the documents to third parties. Take care before hitting the "Reply all" button.

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Footnotes

1 *Susan Hosiery Ltd. v. M.N.R.*, [1969] C.T.C. 353 (Ex. Ct.) 69 D.T.C. 5278at 5283.

2 *Gregory v. M.N.R.*, [1992] 2 C.T.C. 250 (F.C.T.D.) 92 D.T.C. 6518.