

Members Quarterly

Winter 2014 Edition

Feature

Legal Privilege: What Management and HR Professionals Should Know

Be careful about the documents you prepare

In a wrongful dismissal action, parties are required under the Rules of Civil Procedure to exchange all documents in their possession, power or control that are “relevant to the issues raised in the pleadings”. This is called “document discovery”.

Sometimes clients don't want to produce all documents (emails, letters, memos, etc.) because the content is damaging to their case. Unfortunately, both parties to an action are required by law to produce those documents even if they are harmful. The only exception to this requirement is where the documents are covered by “privilege”. If a document is privileged, you don't have to produce it. So when is a document privileged? The three main privileges that arise in a wrongful dismissal action are solicitor-client privilege, litigation privilege and settlement privilege.

Solicitor-Client Privilege

Solicitor-client privilege protects the contents of communications that pass between a lawyer and a client for the purpose of giving or receiving legal advice. This form of privilege ranks highest among all of the privileges and is aimed at protecting the lawyer-client relationship by allowing the client to make full disclosure of private information without fear of it being disclosed.

There are three requirements for solicitor-client privilege: 1) the communication must be with a lawyer acting in their professional capacity; 2) the communication must be for the purpose of giving legal advice; and 3) the communication must be intended to be confidential by the parties.

For the most part solicitor-client privilege is relatively easy to establish. However, issues may arise regarding the third requirement (confidentiality) as solicitor-client privilege can be lost where the communication is not kept confidential. When this occurs, the client is considered to have waived solicitor-client privilege. Where waiver is found, those documents/communications previously protected by solicitor-client privilege are producible. The waiver of solicitor-client privilege requires the client's informed consent. However, consent can be implied. For example, waiver can be found where a defendant attempts to defend a claim by stating that they acted in reliance of legal advice.

Solicitor-client privilege extends to communications before the lawyer was retained and even if the lawyer is never retained. Once established, solicitor-client privilege can last forever, even after the death of the client. Solicitor-client privilege can be overridden only in the rarest of circumstances. The principal exception to solicitor-client privilege is where the communication is intended to further a criminal purpose (i.e. advice on how to get away with a crime not yet committed).



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Litigation Privilege

Litigation privilege does not protect the solicitor-client relationship, but rather the process of litigation itself. Litigation privilege creates a “zone of privacy” for the gathering of information to prepare for litigation. Two conditions must be met in order to establish litigation privilege: 1) the communication must be made with existing or contemplated litigation in mind; and 2) the communication must be made for the “dominant purpose” of litigation. In order to meet these requirements, the litigation must be in reasonable contemplation, but the action need not be commenced.

Unlike solicitor-client privilege, the communication does not need to be with a lawyer and does not have the same requirement of confidentiality. For example, litigation privilege will arise where an employer fires an employee for fraud and subsequently hires an expert to investigate and prepare a report regarding the employee’s conduct. In this instance, the report that is prepared by the expert will be protected by litigation privilege.

Litigation privilege ends when the litigation ends. However, litigation privilege may continue if related proceedings are also in reasonable contemplation. In order for the litigation privilege to continue, the related proceeding should involve the same or related parties and arise from the same or related cause of action.

Settlement Privilege

Settlement privilege protects the disclosure of communications made for the purpose of effecting any settlement. This privilege is premised on the assumption that settlement of disputes is more likely if the parties are able to speak freely about the issues without any concern that concessions made during settlement discussions will later be used against them. This privilege protects all discussions related to settlement of issues and disputes in the litigation.

There are three requirements in order to establish settlement privilege: 1) a litigious dispute must be in existence or in contemplation; 2) 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 3) the purpose of the communication must be to attempt to effect a settlement.

Unlike solicitor-client privilege, settlement privilege is a jointly held privilege. Therefore, it cannot be waived without the consent of both parties. However, similar to solicitor-client privilege, it may be waived by implication. For example, if a party refers to settlement communications in a court document, that party cannot later claim those settlement communications are privileged when the opposing party attempts to use the communications.

Privilege is a complicated area of law. It is important for management and human resources professionals to have a basic understanding of privilege because you are on the front lines of workplace incidents that can result in wrongful dismissal actions. The take-home message is this: unless you are communicating with your lawyer, gathering information for an action or trying to settle a dispute, you should assume that any document you create will be produced to the other side in a wrongful dismissal action.

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