

Use it or Lose it: Practical Examples for Dealing With Privilege

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INTRODUCTION

The failure to protect privilege can lead to the introduction of evidence into the Court record which otherwise should never have made its way there. We will review practical steps that can be taken to protect privilege and give several examples where documentation, whether privileged or not, became part of the public domain.

Privilege is like a firewall on a computer, sometimes it works but sometimes our computers get hacked into.

We try to protect our information with other tools such as anti-viruses, digital imprints, encryptions or simply by not leaving anything sensitive on our hard-disks.

Privilege is also an attempt to stop third parties from gaining sensitive or confidential information. Sometimes it works and sometimes it doesn't.

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EXAMPLE # 1

Joint Defence Agreement

Generally speaking, co-defendants may have a common interest that makes it beneficial for them to share information and any information shared would continue to be protected by solicitor-client privilege, litigation privilege, common interest privilege, joint defence privilege, settlement privilege or other applicable privileges, doctrines and immunities.

It is now recognized in Canadian law that parties sharing a common interest in the outcome of litigation may disclose privileged communications to each other without waiving the privilege. Its use is to ensure a joint defence privilege where the privileged information can be exchanged without constituting a waiver of the privilege that protects that information.

Common interest privilege will apply when the communication for which the privilege is asserted is privileged in the first place and there is actually a common interest between or amongst the parties seeking the privilege. Once there is a common interest privilege, the privilege becomes that of all the parties to whom the privileged information is disclosed.

HERE ARE SOME EXAMPLES OF CLAUSES IN A JOINT DEFENCE AGREEMENT:

WHEREAS the Parties believe and anticipate that, although there may be certain areas in which their respective Clients at present or in the future may have divergent positions, (1) there is a mutuality of interest in a common and joint defence of the Clients in regard to the Actions, and that (2) it is in their best interests to communicate and exchange information, including documents, memoranda, interview reports, expert or consultant reports, factual materials, mental impressions, litigation strategies, and other information (collectively, the "Joint Defence Information") in connection with the defence of the Actions; and

WHEREAS the Parties wish to continue to pursue their separate but common interests while avoiding any suggestion of waiver of any privilege or immunity of communications, documents, or other information protected by common interest privilege, joint defence privilege, solicitor-client privilege, litigation privilege, settlement privilege, or other applicable privileges, doctrines and immunities (collectively, the "Privileges" or, individually, "Privilege"); and

WHEREAS it is the purpose of this Agreement to ensure that past and future communications between and among Counsel are, and shall remain, confidential and are and shall continue to be, protected from disclosure to any third parties, except as set forth herein; and to ensure that any exchange and/or disclosure of Joint Defence Information does not constitute a waiver of any Privilege otherwise available...

EXAMPLE # 2

Protecting the insurer's file

Regardless of whether the insurer is a first party insurer facing a claim by the insured, a first party insurer advancing a subrogated claim, or a third party liability insurer defending an insured, there are several things that the claims examiner can do to maintain a claim for privilege. The examiner may wish to consider the following:

- Maintain a complete file, with accurate, detailed notes so that counsel assisting the insurer to maintain the privilege can assess exactly when the prospect of litigation arises.
- Specifically record the moment when the examiner considers that there is a reasonable prospect of litigation, and the reasons for it (eg. a letter from the Plaintiff, certain evidence coming to light, investigation reports made). This moment may be earlier in a third party liability claim than a first party or subrogated claim. This is useful to assist an examiner who must give evidence as to when the prospect of litigation reasonably arose, usually months or years after the fact.
- Mark documents from that point on as created for the purposes of litigation. Although this is not determinative, it is evidence of the insurer's thought process.
- Use people (assistants, outside adjusters and investigators) that you trust, who are discreet, and have some knowledge of how their actions may or may not affect a claim for privilege or even cause waiver of that privilege.
- Assume that every statement in a file may be produced in open Court, or quoted on the front page of the newspaper. Therefore, consider the consequences before writing anything in the file.

EXAMPLE # 3

Destruction of documents

Some people might think that the best protection against third parties obtaining unflattering information is to destroy information which is not helpful to your case and which you have no intent on using. This is an unwise and unacceptable practice and would raise the issue of spoliation of evidence in common law jurisdictions which are beyond the scope of this paper¹.

Spoliation of evidence is not a concept which has been integrated into Quebec Civil law. The Quebec Court of Appeal in the case of *Société nationale d'assurance v. Adiro Construction Ltée*², [1989] R.J.Q. 1803, stated that at most there may be an evidentiary problem, which might affect the weight to be given to proof. It is, therefore, very possible to have a policy of regularly destroying certain types of documents, which may not be a *faux pas* in the Province of Quebec.

In the Province of Quebec, where the regular destruction of documents, without intent to harm another party, appears to be more acceptable, one must always be aware of the digital age.

We are now living in the digital age and a simple working document or photo could live on several hard-disks. Even when a document is deleted on a hard-disk it often goes to the “**purgatory file**” which is often referred as to the deleted file folder.

We recently were able to obtain blackberry text messages from a Blackberry Service provider.

In the same file, email messages had been preserved on the backup disk of an office server. Although the issue of privilege was not specifically raised, this was a wonderful example of how digital documents never seem to die.

What is also interesting is that our Blackberry and email messages tend to be short and sweet and do not necessarily give any context. Far too often, the adjuster, expert, claims examiner or lawyer do not, but should think of how what they say may be interpreted before they write.

¹ As examples of the literature dealing with spoliation of evidence, see these recent articles: Linda C. Fowler, “Spoliation: Tort Liability for Missing Evidence”, 53 La. Bar Jl. 427 (April/May 2006); and Lloyd S. van Oostenrijk, “Paper or Plastic?: Electronic Discovery and Spoliation in the Digital Age”, 42 Hous. L. Rev. 1163 (2005). And, for a Canadian perspective, see Mario R. Pietrangeli, “Spoliation: Preserving the Integrity of Your Evidence”, 19 Can. J. Ins. L. 73 (Sept. 2001).

In addition, aside from its possible evidentiary effect, there is the possibility that spoliation might constitute an independent tort and cause of action; see *Spasic v. Imperial Tobacco Ltd.*, 49 O.R. (3d) 699 (C.A. 2000), leave to appeal to S.C.C. denied at (2001), 269 N.R. 394 (note). And see *Miele (Litigation guardian of) v. Humber River Regional Hospital*, [2004] O.J. No. 831 (Sup. Ct. Master).

² [1989] R.J.Q. 1803.

What if the document somehow gets out? Is it incriminatory? Does it accurately reflect what the person sending it would like to say?

Some of the best advice when placing one's thoughts in writing are to think about the consequences of whatever will be written before preserving those thoughts in writing or digitally³.

³ For a discussion of electronic documents and how they are different, and other related issues, see the September 2005 issue of LawPRO magazine, which is also accessible at the following internet address : <<www.lawpro.ca/magazinearchives>>.

EXAMPLE # 4

Expert Working Papers

When preparing an expert report for the purpose of litigation, many documents may be created and shared during this process.

Many of these documents and working papers may not be essential to the final work and the final opinion of the expert. What if these documents, read on their own, are misleading and do not accurately reflect the findings of the expert? What happens if they get out into the Court record?

Some experts have taken a very conservative but dangerous approach to protecting their files. For example:

1. They may have a policy that draft reports are not preserved.
2. Preparatory materials and documents that are not required in order to establish the facts relied upon by the expert in his final report will not be preserved.
3. Preliminary reports which are not essential are not preserved.
4. Notes and observations which are not essential to the final report are not preserved.

In the common law provinces, all of these actions are not advisable as they risk fatally damaging an expert's credibility. Whatever documents an expert generates must be preserved, and the expert must instead understand that they may be produced, particularly at trial, and that he must, instead, be in a position to explain them. For example, either they are not ultimately inconsistent, or they were simply part of the evolution of the expert's analysis and reasoning.

This is very different from the Province of Quebec where adverse parties do not have access to the working papers, notes, draft reports and prior reports. They are protected by professional secrecy and it is only in exceptional circumstances where the expert has referred to previous documents that they may be allowed into proof.

This is an interesting example of where there can be multi-jurisdictional considerations on how an expert documents his files.

For example, if there is some litigation in Quebec and similar litigation in Ontario, it will be very important to advise the Quebec expert that he may be subject to cross-examination in Ontario at which time, more or less, his full file would be discoverable as would be the fact that he may have destroyed certain documents. Therefore, it would be important to ensure that the expert be made aware of these dangers so that he may document his file in consequence.

The Quebec Court of Appeal in the *Poulin* matter⁴ said that the adverse party may not go on a “fishing expedition”. It seems that “fishing” is far more acceptable in Ontario than in “*La Belle Province*”.

⁴ *Poulin c. Prat*, [1994] A.Q. No. 142 (Que. C.A.).

EXAMPLE # 5 A)

Prior Expert Reports

An accident occurred in Prince Edward Island, and there was a claim under a property policy.

Issues of coverage were raised by the Insurer eventually leading to a denial of coverage under the policy.

An adjuster was acting on behalf of the Insured and a separate adjuster on behalf of the Insurer. During one of their meetings, the adjuster for the Insurer shows his engineering report, which was used to deny coverage, to the other adjuster, “off the record”. He did not allow him to keep a copy.

The Insured’s adjuster wrote down the date of the report.

Several years later, the Insurer sued the Insured in the Province of Quebec. The Insurer’s lawyers reviewed the file and asked the engineer to address certain matters, which were not completely addressed in his prior report. When the report was finalized, it was produced into the court record. When the Insured’s lawyers showed the report to their adjuster, it became apparent that this was not the same report that he had seen. The Insured applied to the court to obtain the original report and the Insurer contested on the basis of privilege. The court held that the moment the report was shown to the other party “off the record”, all privilege was lost and it therefore was produced into the court record.

How could this be avoided? Firstly, be aware of waiving privilege. Secondly, it may not be advisable to have reports, draft or otherwise, sitting around in anybody’s file be it a lawyer, the adjuster, the engineer or the insurance company, unless the intention is to produce them, or it is recognized that they must be kept but may or may not be producible and, therefore, should be carefully handled.

Maybe the best protection is to assume that every report, statement or document in a file could be eventually produced into court. Just as it is often recommended to us by computer experts not to leave sensitive information on our hard-disk, caution should be exercised when requesting or authorizing the creation of reports.

As discussed in example 4 of this paper, the Province of Quebec is a jurisdiction where professional secrecy appears to play a much more important role. The rule is that prior reports are normally not producible unless privilege has been lost. In the Quebec Court of Appeal case of *Poulin*, previously referred to, the Court of Appeal did allow the production of a previous report based on the fact that the final report actually referred to the expert’s previous reports. It was based on this sentence that the Court of Appeal obliged the doctor to produce these reports.

EXAMPLE # 5 B)

Prior Expert Reports

Several years ago, I was involved in a law suit by an owner of a building against a tenant alleging that the tenant had caused the fire. During the cross-examination of the tenant's expert, I asked the question "when did you first receive your mandate in this matter?" He responded "**from the tenant ... I first received my mandate on ____.**"

The date he gave was months after the fire. When asked if that was the first time he went to the premises, he responded: no, he had been there the day after the fire. With further questioning, it turned out that he had been hired by a different tenant and had prepared a report for the other tenant who was not involved in the law suit. He had it in his file at Court and was asked to produce it. The report had a different conclusion then the report that had been filed into the Court record for the trial.

He attempted to explain away the different conclusions by the fact that he obtained further information afterwards. However, his credibility had been significantly challenged.

EXAMPLE # 6

Written statement taken during litigation

We were recently hired by a lawyer acting on behalf of a Quebec defendant in an automobile accident in the United-States. He mandated us to obtain a statement of the facts from the defendant driver. He wanted all of the facts and nothing but the whole facts.

However, we were told not to have him sign a statement and not to allow him to write out a written statement. He advised us that in the particular State where the action was instituted any written statement taken by a party's attorney during litigation is not privileged. This he said was not the case in other States.

He asked us to interview the person and write down our version of our understanding of the facts and our appreciation of the credibility of the witness. This we sent to him and this we were told is privileged.

The moral of the story is that we are dealing more and more with inter-jurisdictional matters and the law is not necessarily identical in all jurisdictions.

The law of privilege constantly evolves and the evolution can be different from jurisdiction to jurisdiction.

Also, what is seemingly privileged today may not be so tomorrow.

EXAMPLE #7

Photographs

An adjuster arrives on the scene to investigate a fire. He has been hired by the insurer of an electrician who had been working on the premises at the time of the loss.

With his new digital camera he takes 252 photographs.

Two years later, during a discovery, the adjuster is asked to produce all of the photographs that he took on the premises during his investigation. He produces all 252 photographs.

Suddenly, the plaintiff's attorney says - *I'm very much interested in photograph no. 13. I notice that this photograph shows the electrician's equipment, workplace and ... isn't that a half-empty bottle of Jack Daniels in the corner?*

- *Did you investigate to see if anyone was drinking while working?* (objection/help)

Investigators, whether they are engineers or adjusters, should always understand that the photographs that they take are usually producible into the court record whether they are flattering or unflattering. The investigator should always bear in mind that he could be making proof for the plaintiff just as much as for the defendant when he takes photographs and sometimes when he takes statements.