

Clients Beware: That Communication May Have Just Waived Privilege

An area of law that is often considered sacrosanct is the area of legal professional privilege, which protects from disclosure communications between a lawyer and client related to the giving or seeking of legal advice, known as solicitor-client privilege. A common misconception is that if a communication goes through the lawyer then there is absolute protection from disclosure. But this area of law is not so simple. For example, solicitor-client privilege only applies to communications between the solicitor and client related to legal advice. This privilege does not apply to business advice. This is an important distinction in the context of the use of in-house counsel, whose communications may be considered to relate to business advice. There are also other types of privilege, such as the privilege that applies to documents or communications created for or in the course of settlement negotiations (settlement privilege), as well as documents or communications created for the predominant purpose of litigation (litigation brief privilege). Litigation brief privilege can extend beyond communications between the lawyer and client and can include communications between the lawyer and third parties. Often litigation brief privilege ends once the issues in dispute have been resolved. In addition, disclosure of settlement documents can occur if the settlement itself is in dispute.

Many people also do not realize that privilege can be waived. The privilege belongs to the client and can only be waived by the client through his or her informed consent. If a client discloses legal advice received or forwards such a communication to a third party voluntarily and not inadvertently, privilege over the subject matter contained in the disclosed material will be waived unless special circumstances exist. This means that other privileged documents pertaining to the same subject matter may become produci-

ble due to the disclosure of the first communication. Privilege may be waived if the disclosure was intentional even if the waiver was not.

Two common examples where a client risks waiving privilege include:

1. where a client forwards to a third party a communication from the client's lawyer that includes privileged information, or communicates to a third party the lawyer's advice (i.e. "My lawyer said..."). A common reason that a client may do this is because he or she likes the way that the lawyer explained the issue in that communication, or because he or she thinks that communicating the lawyer's opinion to the other party during the negotiation is persuasive. The client often does this without realizing that doing so could waive privilege over everything that pertains to the subject matter contained in that communication. To protect privilege, it is advisable to have the lawyer write the communication directly to the third party to set out the client's legal position, or have the client write the communication him or herself setting out the arguments, without referencing the communication with or advice of the lawyer; or
2. where a client defends its decision or action by relying on the fact that he or she acted pursuant to legal advice. For example, where a decision or process by a local government is challenged by way of judicial review, it may be a normal response to want to defend the decision or process by stating in the defence that the local government relied on legal advice, which is likely the truth. However, such a statement could waive privilege over that legal advice. To protect privilege, it is advisable to instead defend the decision or process by relying on the reasons upon which that

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legal advice was based, rather than on the reliance on the legal advice.

It should also be noted that there is an exception to waiver of privilege, known as common interest privilege, where parties with a common goal or interest may share privileged and confidential information, without waiving privilege. An example is where co-defendants or their lawyers in litigation work cooperatively and share privileged information in relation to common defences. This can be a useful strategy to save on defence costs and to show a united front to the opposing party. In order to rely on this exception to waiver though, it is very important to communicate clearly in all such communications that the content of the communication is subject to common interest privilege.

While the law of privilege may be complex and seem academic, there is a practical side that clients should be aware of to ensure that they do not fall into the trap of unintentionally waiving privilege and risking having all legal advice on that issue becoming disclosable.

March, 2018

Adrienne Atherton

This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.



Adrienne Atherton

604.358.6648

adrienne@civiclegal.ca

Adrienne is a partner at Civic Legal LLP, a British Columbia law firm with expertise in local government law, land development, construction, procurement and complicated contract matters.

Adrienne has over 22 years of experience in litigation and over 20 years of experience in local government insurance and construction litigation in all of its variety, including for the MIABC both as outside counsel and in-house as Senior Staff Lawyer. First Nations. Adrienne frequently provides local governments with advice on insurance, risk management, liability assessment and mitigation strategies. Adrienne assists local governments from the first inkling of a potential dispute to negotiate a resolution where possible, and to guide towards a legally defensible process and position where resolution is not possible. Adrienne has represented local governments at all levels of Court in British Columbia, administrative tribunals, mediations and arbitrations.



Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide focussed legal services to municipalities, owners, builders and developers on a range of projects, from concept to completion, and beyond.

710 - 900 West Hastings Street, Vancouver, BC, V6C 1E5
604.639.3639 | www.civiclegal.ca | [@CivicLegal](https://twitter.com/CivicLegal)