

Business & Careers

Solicitor-client privilege, and its absence



Vern Krishna
Tax Views

Amendments to the *Income Tax Act* will require tax and other advisors to report certain avoidance transactions to the Canada Revenue Agency if they derive tax benefits from the transactions. There is a special exemption for lawyers who provide client advice subject to privilege.

Solicitor-client privilege is a rule of fundamental justice that allows people to obtain legal advice from their lawyers in confidence. A person cannot properly obtain legal advice if he or she does not enjoy the sanctity of communications—untrammelled by any apprehension of disclosure—with the legal advisor. Thus, privilege derives from the lawyer's duty of confidence and the client's right of privacy.

The law presumes a solicitor-client privilege to exist in communication between a lawyer and his or her client. The onus is on the person who wishes to dislodge the privilege to show that it no longer applies in the particular circumstances. However, a person can lose solicitor-client privilege by waiving it or disclosing the privileged document to third parties. For example, disclosure of privileged documents to an accountant may result in loss of the solicitor-client privilege.

Whether a person loses privilege

depends upon the particular circumstances, the expectations of the parties and the nature of the disclosure. The *Income Tax Act*, for example, recognizes a lesser form of privilege for taxpayers. The statute specifically denies privilege for a lawyer's accounting records, including supporting vouchers and cheques.

This seemingly innocent exclusion of records is in fact very broad because it includes accounts, agreements, books, charts, tables, diagrams, invoices, letters, memoranda, statements, "and any other thing containing information." The only restriction is that the record must pertain to "accounting."

Thus, lawyers are squeezed between their professional conduct rules, which require them to justify their accounts, and their obligation to protect their clients' confidentiality. They need to justify their accounts, but, by doing so, they can disclose information in their accounting records that waives or discloses the privilege to the detriment of their clients. For example, a docket entry that a lawyer spent 40 hours reviewing various transactions to determine if payments to foreign officials constituted bribes would be a red flag to a Canada Revenue Agency auditor that he might wish to audit further into the matter.

Solicitor-client privilege extends to all documents that litigants prepare and share with other persons who, while not parties to the litigation, have interests in common with each other. For example, suppose that owners of two adjoining houses complain of a nuisance that affects them equally. Both of the owners may take legal advice and exchange relevant documents.

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If only one of the owners sues in a subsequent action in the nuisance claim, the law considers both persons as if they were partners in a single firm and each can claim the privilege in aid of litigation.

The law recognizes another kind of privilege—the common interest in the successful completion of commercial transactions. Common interest privilege in commercial transactions promotes a common understanding of legal aspects of the transaction that, once understood, will facilitate the

completion of the transaction. This form of privilege rests on the economic and social values inherent in fostering commercial transactions where business people and corporations share legal advice.

For example, in the purchase and sale of a business, the vendor may develop a legal opinion and show it to the purchaser, who may choose to act upon it. Despite the sharing of the opinion between the parties, the document retains its privilege because its purpose was to promote the common interest of the parties to the transaction. As such, the parties do not automatically waive solicitor-client privilege.

Parties to multilateral commercial transactions sometimes obtain legal opinions that they share with other persons with common interests in facilitating the transaction. For example, a lawyer acting for a purchaser of property may, with consent, disclose the opinion to the seller so that both sides can understand the tax implications of the transaction. In a subsequent audit, the CRA may demand to see all documents, including the legal opinion, relating to the particular transaction on the premise that the purchaser's disclosure waived his solicitor-client privilege.

The issue with common interest legal documents is not whether the legal opinion is privileged, but whether, by sharing the opinion with a person who has a common interest, the parties lose that privilege. The privilege remains intact if the persons who share the opinion have common interests. Obviously, the party with legal privilege loses it if he or she

shares the opinion with parties with adverse interests.

The essential element in preserving 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.

There is, however, no bright line test to determine when persons waive privilege in a common interest 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 also have other interests that are 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. This is particularly important with e-mail communications, which may pass through multiple channels and that third parties may intercept. Take care before you hit the "reply all" button.

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Content management: Be sure to close potential security hole

Continued from page 21

that you can install on your hosting company's servers. Many hosts also offer "one-click" WordPress installs. Johannesen uses them when they're available, but she has reservations. "When you do the one-click install, it means that the host knows about it," she explains. "That's not a bad thing but some hosts force WordPress updates on you if you don't do them yourself."

Information technology experts tend to let other people experience updates or new products so they can avoid the often-costly "bleeding edge" but many one-click install customers can't take such precautions. That fact doesn't sit well with Johannesen. "Most people don't know what to do if something goes

wrong with an update," she says.

Updates help protect sites from malicious hackers. That said, site owners and developers can go beyond regular updates to keep sites secure.

Matthews doesn't like certain WordPress structures that make sites easier for hackers to exploit. For instance, each site's login directory (the url you type to sign in to the "back end" where you can administer the site) typically reads (Siteurl.com)/wp-admin" or "/wp-login." Matthews recommends changing this when WordPress is first installed.

Databases like those in WordPress contain tables, each of which has a name. In WordPress, each table's default name starts with "wp-" so changing the names of these tables closes

a potential security hole.

Kosa asked the developer for his firm's site about this matter. The developer replied that it would not be a good idea on an established site like dww.com. "Such changes could bring down the entire site if not performed absolutely correctly and comprehensively," the developer wrote.

Site owners typically keep the default "superuser" name "admin." This name is one-half of the login details needed to access the site. Knowing the user name, hackers can throw an unlimited number of password attempts at a site to gain access.

Matthews recommends site owners thwart these dictionary or "brute-force" attacks using the Limit Login Attempts plugin (<http://wordpress.org/plugins/>

limit-login-attempts/) and an .htaccess password.

"It's a quick, simple fix to change that superuser name," Matthews adds. "You can get rid of the 'admin' name too."

Using forms on websites to collect client information may seem to make sense, but not to Kosa. "We do not use our website to collect any confidential information," he says, noting that he would not want client information stored on the site.

Matthews mentions another option: to have the site e-mail form information to the firm, keeping none of that information on the site itself, using a plug-in like Contact Form 7 (<http://wordpress.org/plugins/contact-form-7/>). "You can qualify the caller, push an enquiry to the

right person," he says.

Matthews recommends firms register their sites with Google Webmaster Tools. "It's free, and it warns firms if any malware or intrusions are taking place," he explains. "Sometimes these compromises aren't visible to the average user, and are only displayed to Google."

Toronto lawyer Omar Ha-Redeye, who runs about a dozen sites using WordPress including his eponymous site and the one for his firm, Fleet Street Law, trusts both the WordPress community and the software's security protocols. Besides, he notes, "other platforms are no less vulnerable to attack."

Looking for tips on how to improve a WordPress site? Watch for the next article in this series.