

A Primer on Privilege

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There has been a lot of talk about solicitor-client privilege in the last while. A lot of that discourse has focused on whether solicitor-client privilege limits the ability of former Justice Minister Jody Wilson-Raybould to speak freely about conversations she had with the Prime Minister and other senior officials.



Solicitor-client privilege is a complicated and often misunderstood legal concept and this seems like a really good time to explain the basics. The principle is a simple one: anything a client tells their lawyer in connection with the client's legal representation is confidential and legally protected (disclosure cannot be compelled). The rationale is that a client must be able to tell their lawyer everything about their case: the good, the bad and yes, the ugly. Without the client feeling free to speak frankly, their lawyer is unable to effectively represent them. I can tell you from my own experience that when clients are not forthright it generally undermines effective representation. Imagine the fun of building your case around a set of facts and being surprised to discover when push comes to shove that there were a few key facts that your client decided to hold back.

One of the often misunderstood things about solicitor-client privilege is that it does not belong to the lawyer. It belongs to the client. A lawyer cannot waive it, only a client can. You may have noted some people are calling on the Prime Minister to waive solicitor-client privilege. That's because waiver would have to come from him (the client) and not Ms Wilson-Raybould (the lawyer).

Sometimes a lawyer can infer a waiver but those situations are pretty rare. I was once consulted about a case where a client had told his lawyer that he believed someone was out to kill him and explained who and why. Sadly that is exactly what happened. The lawyer wondered if he could disclose the details to the police. Since the client was dead, he could not waive the privilege but, in that case, I advised the lawyer that he could reasonably infer that his client would consent to breaching solicitor-client privilege to help catch his murderer.

It is important to note that it is only communications between a lawyer and a client that are the subject of solicitor-client privilege. A lawyer must keep all client information confidential, but the special protections given to solicitor-client communication do not attach to anything but communication between the two of them. Other communications, for example with witnesses, do not have the same protection. It is also important to remember that the communication must be in connection to legal representation. If a client tells you of cheating at golf, you might want to keep it to yourself, but it is generally not a privileged

communication!

While the courts have been vigorous in upholding solicitor-client privilege in almost every case where it has been considered, there are some exceptions where that privilege will not apply. The most interesting one is the “public safety” exception. If there is a clear and serious risk to public safety (think of the client who calls and says she is about to go and set a school on fire), the lawyer is free to breach privilege to the extent necessary for public protection. In fact, in some cases the lawyer must breach privilege (where the lawyer has a reasonable belief that there is an imminent risk of serious bodily harm or death to an identifiable person or group).

The term “privilege” in law is used for other related but quite different principles (just to make it even more confusing). For example, the term “settlement privilege” is used to reflect the principle that all communications a lawyer has in attempting to settle a case are “without prejudice” and cannot be used against their client. It is intended to encourage settlement and prohibits disclosure of, for example, offers to settle.

The diminished role as legal adviser is especially true in the criminal justice system. Decisions about prosecutions are made by independent prosecutors and not by politicians. In fact, in the federal system they have gone to great pains to establish an independent prosecution service led by a Director of Public Prosecutions. To be clear, in law the Attorney General can direct prosecution decisions, but in practice they rarely do. In a previous life, I was the head of Manitoba’s prosecution branch and even though we prosecuted many high profile and controversial cases, I can honestly say that I never once received a word of instruction or experienced a single attempt to influence a prosecution decision from the Attorney General.

This becomes important because remember that solicitor-client privilege only applies where the communication was in regard to legal representation. If the discussions that took place between the Prime Minister or others and Ms Wilson-Raybould were political in nature and not about her legal representation, then solicitor-client privilege may not apply.

One final point about solicitor-client privilege: if you share privileged information, it can lose its protection. This may explain why communications around the SNC-Lavalin matter seem carefully crafted. It is a fast moving story and by the time you read this we may know a whole lot more about it than I did when I wrote this article. The one thing that won’t change is the commitment our courts have shown to protecting solicitor-client privilege as a fundamental part of Canada’s justice system.

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