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Just between you and me

Solicitor-client privilege is important to consider before sharing emails about employees with others

| BY CAROL CHAN |

YOU RECEIVE an email from your company's lawyer with advice about how to handle a difficult situation with an employee. A few of your colleagues have been assisting you with the situation and this advice would help the group decide how to proceed. However, before you forward the email to your colleagues, have you considered the impact of doing so on solicitor-client privilege?

LIABILITY

Solicitor-client privilege is a very important but often misunderstood concept. Communication covered by solicitor-client privilege is protected from disclosure to any person that does not "own" the privilege — including other parties, courts, arbitrators or administrative bodies such as the Labour Relations Board, Human Rights Tribunal or Ministry of Labour. This protection is central to the legal process, because it encourages clients to speak openly with their lawyers without fear their conversations will be made public. So important is solicitor-client privilege, the Supreme Court of Canada has declared it a fundamental civil and legal right.

When solicitor-client privilege applies

So, when does solicitor-client privilege apply? Unlike litigation privilege, which protects documents created for the primary purpose of litigation, solicitor-client privilege protects confidential communications between a lawyer and client. However, solicitor-client privilege does not apply to every such communication. For a communication to be protected by solicitor-client privilege, the following four requirements must be satisfied:

•The communication must be between a lawyer and his client.

•The communication must be connected to obtaining legal advice, as opposed to business or non-legal advice.

•The communication must be confidential.

•There must have been no waiver of confidentiality.

Let's return to the email scenario introduced above. The first question to ask is whether the communication is between a lawyer and client. Merely copying a lawyer on the communication will not be enough to bring that communication within the purview of solicitor-client privilege. The exception is when you and your lawyer have agreed the lawyer will be copied on all relevant communication for the purpose of receiving legal advice during the course of a mandate.

The second question is whether the communication pertains to obtaining or providing legal advice. This includes information provided by the client to the lawyer. Communications unrelated to legal advice, such as business advice, are generally not protected by solicitor-client privilege.

The third issue to consider is whether the communication is confidential. To satisfy this requirement, the parties need to demonstrate an intention to maintain confidentiality. This intention is potentially undermined if numerous people are forwarded or copied on a communication.

The exception to the third issue is if the other individuals can be considered reasonably necessary to protect the client's interests and understand they are expected to maintain confidentiality. For example, an employee's direct supervisor, human resources manager and company president could all be involved in making a termination decision. Their inclusion in a communication is therefore reasonably necessary to protect the employer's interests. The same might apply to the inclusion of an accountant or tax adviser.

The final issue to consider is whether solicitor-client privilege has been waived by the client. Waiver may occur voluntarily or involuntarily. Voluntary waiver may occur if, for example, a party relies on all or part of a privileged communication as a component of a claim or defence. In that case, the party has willingly put the privileged communication into the public domain and, as such, is deemed to have waived the privilege.

Involuntary waiver may occur where an electronic communication is accidentally sent to an individual who ought not to have received that correspondence. In that case, an adjudicator will consider, on a case-by-case basis, if the accidental disclosure should render the communication no longer privileged. Factors that will affect the adjudicator's decision include: How the information was disclosed; whether the error is excusable; when the disclosure was discovered; whether an immediate attempt was made to retrieve the information; the number and nature of third parties who became aware of the communication; whether preserving privilege would create actual or perceived unfairness to the opposing party; and the actual or perceived impact of preserving privilege on the court, tribunal or arbitration.

Tips for employers

Given the importance of solicitor-client privilege, and the growing prevalence of electronic correspondence, the following recommendations may help in maintaining solicitor-client privilege over appropriate electronic exchanges:

•**Limit the number of recipients.** Send to, copy or forward electronic correspondence only to individuals who are rea-

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Employee's initial intent wasn't to resign: Board

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respond and the union contacted the health authority again on Nov. 24, demanding a resolution to the matter. The program manager of Ouellette's department became aware of Ouellette's change of mind, but felt Ouellette should have contacted her to rescind the resignation rather than go to her union and accusing her supervisor of pushing her to resign. Another month passed and on Dec. 23, the health authority advised the union it was "not prepared to allow Ms. Ouellette to rescind her resignation at this time." It also referred Ouellette to its staffing contacts for information on other positions if she was interested in "exploring other employment opportunities" with the health authority.

After the health authority's response, Ouellette's gall bladder flare-ups became more frequent and she was hospitalized for a month. Her gall bladder was removed and she was cleared to resume work on March 29, 2010. The union filed a grievance against the health authority, claiming Ouellette was pushed into resigning and it refused to rescind the resignation. However, the supervisor denied making any improper comments that would induce guilt in Ouellette and push her towards resigning.

The board indicated that for a resignation to be in effect, it must be voluntary from both a subjective intention to quit as well as from an objective perspective consistent with terminating employment. In this case, the union agreed Ouellette resigned from an objective perspective, but the subjective intent was absent.

The board found Ouellette's account of the conversation that took place on Oct 29, 2009, was more accurate, since her only purpose in making the call was to make arrangement for her return to work the following week after an illness. Since she came away from that conversation thinking about resignation — which she then discussed with her doctor and union representative — it was likely the supervisor said something that made her change her mind, said the board.

"What was said must have been quite significant and dramatic, as it caused a long-term employee, who had no problems at work, to do an abrupt turn and make up her mind to resign and not even show up to work on Nov. 2, 2009, to talk about this," said the board.

The board also noted once Ouellette submitted her resignation, her supervisor moved quickly to finish things up rather than take it to the program manager, which didn't give Ouellette any "wiggle room" to change her mind. In addition, the health authority didn't immediately post for a replacement and a year later still hadn't filled the position, which was inconsistent with the supervisor's claim that co-workers and clients were left hanging by Ouellette's absences.

The board found Ouellette was pressured into resigning and her supervisor took advantage of her vulnerability by giving her a "guilt trip" about her disability-related absences. Then, when it was obvious that she had felt pressured and had changed her mind after a short time, the health authority refused to continue the employment relationship, said the board. The health authority was ordered to reinstate Ouellette with no loss in seniority and compensation for pay and benefits lost after Nov. 10, 2009.

"When the employer decided it would not permit (Ouellette) to rescind her resignation it effectively terminated the employment relationship without just cause," said the board.

For more information see:

•*Saskatoon Regional Health Authority v. H.S.A.S.*, 2011 CarswellSask 284 (Sask. Arb. Bd.).

Take proper precautions for confidential information

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sonably necessary to advance the employer's interests.

•Ensure recipients of electronic correspondence containing privileged communication clearly understand the information is and must remain confidential. State this clearly at the top of the communication — for example "Privileged and Confidential – Solicitor and Client Communication." This statement will not automatically render the contents of the communication privileged — if the other criteria are not present — but it may provide evidence of the party's intentions to keep the contents confidential.

•Ensure recipients understand and appreciate the risk associated with forwarding the communication to others not necessary to protect the employer's interests or intended to be a part of the privileged communication. State this clearly on the communication together with a directive the communication must not be forwarded.

•Before hitting the 'send' button, double-check the recipients are the correct individuals.

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