BUSINESS LAW

Time to clear up misconceptions on privilege

DAVID DEBENHAM

When a forensic accountant comes armed with a summons or a court order seeking production of documents, corporate counsel forms the first line of defence, with the battleground being the law of privilege.

While the law varies between jurisdictions, there are several misconceptions about privilege that need clarification.

Legal advice given by patent agents or accountants is not protected by privilege, nor is business or strategic advice given by a business lawyer. Only the provision of legal services or legal advice between a lawyer and client in a confidential setting can qualify for privilege.

The presence of "outsiders" such as auditors, extraneous employees or directors of subsidiary corporations may destroy privilege. Privilege may also be forfeited inadvertently by a client referring to legal advice in an e-mail chain, in a press release or in response to a demand letter. Business lawyers who mix business with legal advice at a meeting invite such advertent waiver of privilege.

A common misconception is that internal investigations conducted by corporate counsel must be privileged. But solicitor-client privilege does not act to protect communications to counsel during the investigation, assessment and decision stages of an investigation – it only protects the legal opinion of the solicitor that arises from that investigation.

Business lawyers often confuse their obligation to keep their client's business affairs confidential with their client's right to claim privilege. A document that was not privileged initially, or which is not per se a legal document, does not become privileged simply because it comes into the possession of a lawyer.

Transactions are acts, not privileged communications. Transactional documents are not covered by privilege unless they contain legal advice. This includes moving funds in and out of a lawyer's trust account. Therefore, business lawyers may be required to produce their files and give evidence with respect to transactions they are involved in – evidence as to the facts, not as to their advice.

Business lawyers often try to claim client poverty in "without prejudice" settlement discussions. They should take note that admissions of client insolvency or the possibility of bankruptcy if settlement terms are not agreed to may be admissible in bankruptcy proceedings.

Settlement privilege is also not engaged where there is no dispute between the parties. For example, no privilege attaches to discussions of the terms on which an employee might leave employment where no dispute has yet arisen. Nor is privilege engaged where no attempt at compromise or settlement is part of the communication, such as a demand letter. On most occasions, the forensic accountant can simply ignore the use of the term "without prejudice," as counsel and clients alike often misuse this term.

There is also no privilege where a client seeks a business lawyer's assistance to either commit a wrongful act or to prevent its discovery. Therefore, otherwise privileged communications may not remain so if a prima facie case can be made that legal services were used to facilitate a fraud or other intentional tort.

While most counsel are aware that joint clients cannot claim privilege between themselves, they overlook the possibility that one of the joint clients may have a receiver appointed over its affairs, and the receiver (acting for an outsider to the joint relationship) may ask for other privileged communications in the lawyer's file. Another tactic counsel employ is to sue one of the joint clients as a conspirator in order to encourage his or her cooperation in sharing what otherwise would have been a privileged communication.

Many counsel forget that disclosure of otherwise privileged documents to secure a favourable plea from government prosecutors or as part of an exchange of documents with a private party bound by a confidentiality agreement may waive any ability to claim privilege to those documents against other parties.

Finally, and perhaps most importantly, the law of privilege is usually considered a procedural rule that depends on the *lex fori.* This means that cross-border transactions allow forensic accountants the opportunity to forum shop for a jurisdiction with a narrow view of privilege, in a world where the law of privilege varies widely between provinces and countries.

What does all this mean to the business lawyer? Sometimes, corporate counsel may have given their client false assurances of privilege that can damage the client, and result in a claim against the lawyer. Or corporate counsel may become a primary witness against their own client.

The bottom line is that every business lawyer must become an expert on the law of privilege before a forensic accountant comes knocking on the door and provides an education that lasts a lifetime. ■

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Corporate evolution results in shareholder power gains

EDWARD WAITZER

> "Corporate boards [are] voluntarily ceding tremendous de facto power to shareholders...

In addition to the considerable pressures created by the current financial sector crisis, a number of forces are working to dramatically democratize corporate governance.

The first factor is that corporate boards are voluntarily ceding tremendous de facto power to shareholders (and, in turn, minority shareholders are taking their franchise more seriously than in the past). An overwhelming number of companies have voluntarily adopted some form of majority vote requirement (for example, preventing a director, even if running unopposed, from serving over the objection of a majority of the shareholder base).

This trend has extended to controlled corporations in Canada. Director elections now have significant meaning and consequences. According to Riskmetrics Group Inc., during the most recent U.S. proxy season, 20 directors at 15 companies received more than 50 percent opposition, while more than two dozen others came sufficiently close to failure that they would have lost had brokerage firms been prohibited from voting client shares without instructions (as has been proposed by the New York Stock Exchange).

A similar trend may be underway with respect to "say on pay" proposals, which, no doubt, will be fuelled by public (and political) outcry as we face the fall out of the current "greed cycle."

Other initiatives will further empower shareholders, assuming they gain traction. For example, the International Roundtable on Executive Remuneration and Director Engagement (a working group of large institutional investors) is about to settle on a draft "independent director candidate questionnaire." If implemented, it would have major shareholders seeking information from board nominating committees as to the criteria used in selecting new director nominees and from the nominees themselves as to their independence and attitudes to corporate governance and shareholder rights.

The questionnaire will also ask boards for the opportunity to meet directly with candidates (and, presumably, with the board's nominating committee). Such an initiative is likely to further "raise the bar" in terms of shareholder engagement in governance processes.

A second significant factor influencing the democratization of corporate governance is the continuing impact of communications technology. The technological infrastructure for comprehensive, customized, real time, virtually costless dissemination of corporate information (including proxy materials) to investors enabling the exercise of their franchise has been in place for some time, but the pieces haven't been linked. Regulators (in the U.S., at least) are now proactively connecting them.

For instance, the SEC has facilitated the reduction of the costs associated with shareholder communications by leveraging technology and allowing investors to choose how they wish to receive material. Examples include e-mail delivery, house-holding and consolidation

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