

PRIVILEGE AND LITIGATION QUIZ

General counsel constantly walk a tightrope when it comes to their role as legal versus business adviser.

When is an in-house lawyer's advice protected by privilege and when is it not? Test your knowledge in this quiz provided by David Wingfield and Marie-Andrée Vermette of WeirFoulds LLP.



1 You are in-house counsel at a company that thinks it may have committed a serious regulatory offence. You are asked to investigate the situation. Can your report to management be subject to disclosure in civil, criminal, or regulatory decisions?

2 Your company and one of your company's suppliers are being sued. Can you share privileged information with your supplier's lawyers without waiving privilege?

3 Your company is involved in litigation and you hire an expert for the purposes of preparing for the trial. The expert circulates a draft report on which you commented before the final report was sent to the other side. Are the draft reports and the comments you made on them open to disclosure before trial?

4 You are in-house counsel and have advised the president of your company on the desirability of getting out of a long-term contractual agreement early and how to do so. Is that advice privileged?

5 You are the CEO of a Canadian public company with a subsidiary in the United States and your company's shares are trading on both Canadian and American stock markets. Your company is being investigated for insider trading in Canada and the U.S. Are privileges you have in Canada effective to prevent use of the privileged information in the U.S.?

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A N S W E R S

1 PROBABLY. Your report to management could be protected by litigation privilege if it was created for the dominant purpose of litigation, actual or contemplated. However, if the report was created for another purpose, such as determining whether wrongdoing occurred and whether disciplinary actions would be appropriate, then litigation privilege would not attach. But any part of the report containing legal advice would be protected by solicitor-client privilege.

2 YES. Such information will be protected by common interest privilege, which is a subset of litigation privilege. Common-interest privilege arises when two or more persons have a common interest in litigation and exchange information for the dominant purpose of informing each other of the facts or issues involved in that litigation. Co-defendants now frequently enter into common-interest privilege agreements, which, in addition to including a guarantee of confidentiality, typically set out the relationship between the parties, and their obligations both during and after the litigation, and in the event the parties become adverse in interest.

3 PROBABLY NOT. The preferred view as the law currently stands is that drafts are protected from pre-trial disclosure by litigation privilege. However, if the expert is going to be called as a witness at the trial, the expert's findings, opinions and conclusions are discoverable, as well as the foundational information for such findings, opinions and conclusions, and the instructions upon which the expert proceeded. This rule gives the opposite party the right to obtain discovery of this information, but not the right to obtain the production of privileged documents. In other words, this rule is about fact disclosure, not documentary production. Note, however, that this area of law has become rather fluid and some judges are

becoming increasingly inclined to order greater pre-trial disclosure with respect to expert witnesses.

4 Whether or not solicitor-client privilege attaches to this advice **depends on the nature of the advice.** In other words, were you giving legal or business advice? Not everything done by in-house counsel is protected by solicitor-client privilege, and no solicitor-client privilege attaches to advice on purely business matters. If your advice related to the desirability of getting out of the contractual agreement from a business point of view, then such advice is probably not privileged. However, there is a better chance that advice as to how to terminate a contractual agreement would be seen as being legal advice and, consequently, protected by solicitor-client privilege.

5 The scope of solicitor-client privilege and litigation privilege in Canada and the U.S. is **similar, although not identical.** The protection given to these privileges in Canada is broader in some respects, and narrower in other respects. However, "co-operation guidelines" adopted by U.S. bodies often make it difficult for corporations to assert many privileges that would serve to limit the corporation's exposure to criminal and civil liability. Although this trend is more pronounced in the U.S., it is also present to a lesser extent in Canada.

YOUR RANKING?

Well, that depends on the situation you found yourself in when giving the advice. Give yourself a gold star for taking the time to bone up on such a sensitive and important issue and getting this far in your career without tripping over the potholes.