

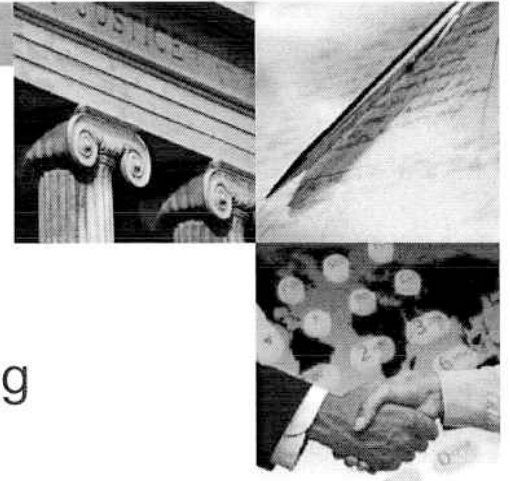
## **Investigations:**

### **Tips for Investigators and the People who Retain Them**

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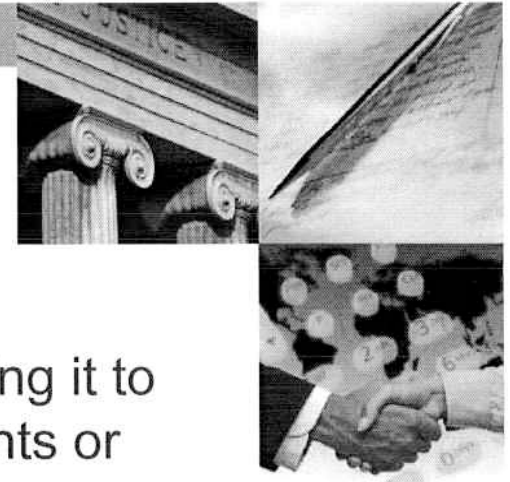
## Privilege – Why Should You Care?

- Privilege can protect your investigation reports from being produced to regulators or in court and other hearings.
- **This = Control Over Information**



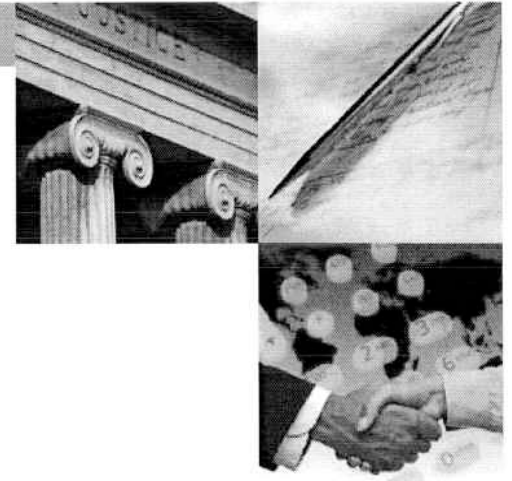
## What is Privilege?

- Privilege is the legal construct that allows a party asserting it to resist legal pressure to disclose the contents of documents or communications.
- The most commonly relied upon forms of privilege are:
  - solicitor-client privilege; and
  - litigation privilege.



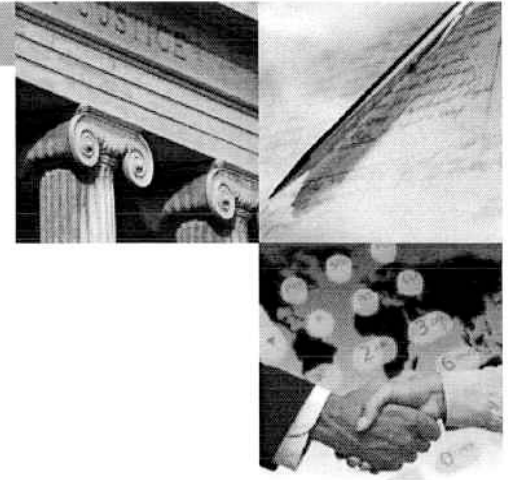
# Solicitor-Client Privilege

- Applies to:
  - a communication between a solicitor and client;
  - which entails the seeking or giving of legal advice; and
  - which is intended by the parties to be confidential.



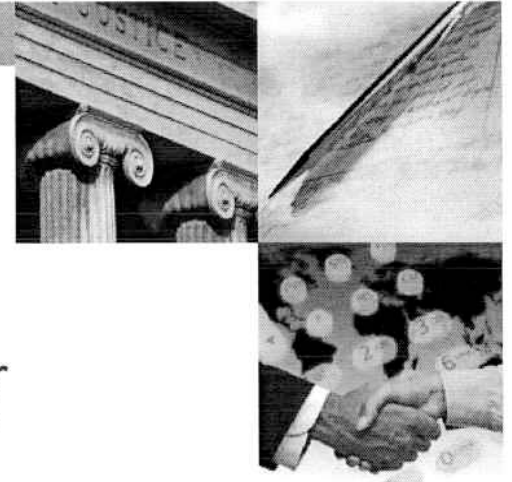
## Solicitor-Client Privilege - Rationale

- Protects the solicitor-client relationship
- Purpose is to protect a key requirement of our legal system – namely free and frank communication between a client and counsel.



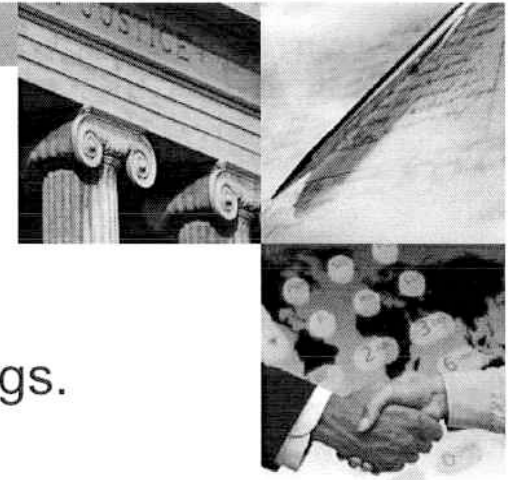
## Litigation Privilege

- Litigation privilege applies in situations where material or communications have been created for the “DOMINANT PURPOSE” of actual or anticipated litigation.



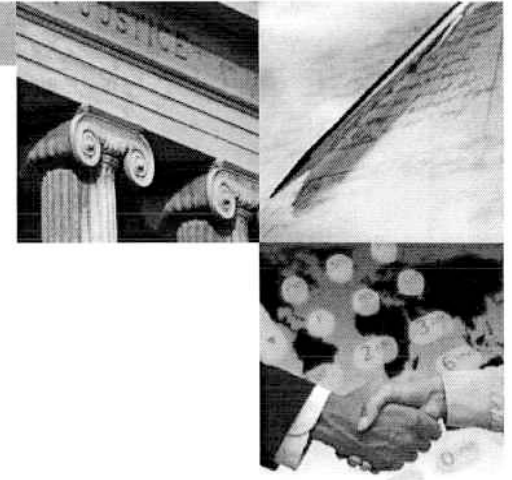
## Litigation Privilege - Rationale

- Protects the process of preparing for trial or other hearings.
- Offers protection over materials created in the course of the investigation of, and preparation for trial.



## Tips for Preserving Privilege

- Don't assume it exists.
- Don't take it for granted.
- Give thought to your processes to see whether your privilege claim is supportable.





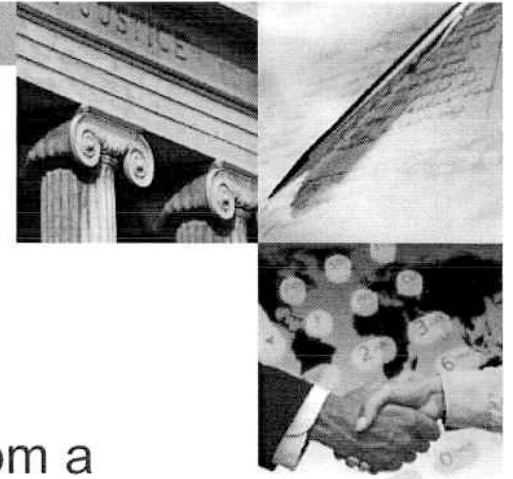
## Notes and Drafts from Investigations

- The law says that notes and drafts may be compellable in legal proceedings.
- This can be a concern if notes and drafts:
  - contain errors and inaccurate observations
  - reflect sensitive or unwanted comments
  - refer to confidential policies or strategy

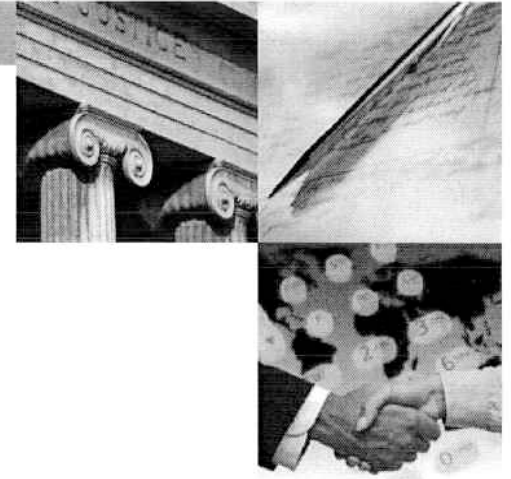


## Bottom-line on Notes and Drafts

- Be aware of what goes into your notes and drafts.
- Think about how you propose to treat these materials from a record keeping perspective.
- Follow the process you adopt consistently.



# The Importance of Defining the Scope of Work – And Staying Within It



## The Cardinal Rule

- Assume that any of your work may end up being produced:
  - To senior management and directors,
  - To regulators,
  - To adverse parties in civil or criminal litigation,
  - To the public at large.
- Work and write with this in mind.

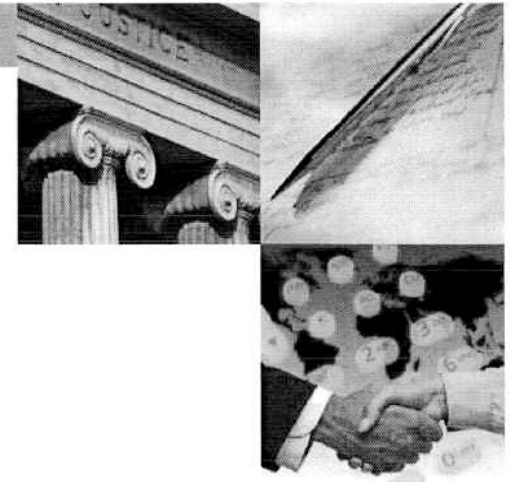
# The Importance of Defining the Scope of Work – And Staying Within It



Tip #1 – Define the scope of the work at the outset – and stay within it!

- Ensures that the work that is needed gets done.
- Avoids wasted time and money on unnecessary work.
- Prevents the creation of documents – especially reports – containing facts and/or opinions that were not requested.
  - These unrequested – and potentially harmful – facts and opinions may end up having to be produced, or
  - The documents containing them may have to be produced in redacted form - which may raise suspicions and damage the credibility of the work that is being produced.

## The Importance of Defining the Scope of Work – And Staying Within It



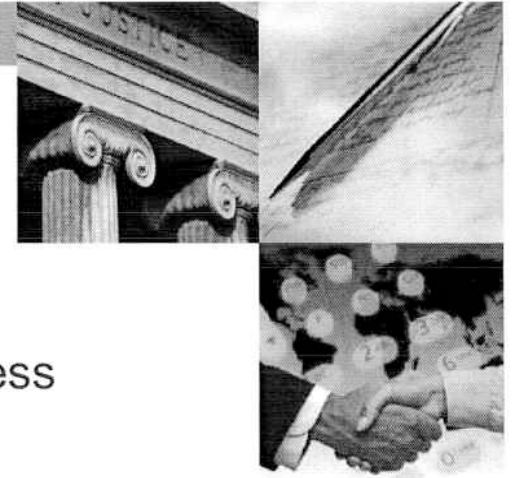
Tip #2 – If you think:

- the scope is wrong, or
- you see a potential problem outside the scope,

Stop work and contact the person to whom you report to discuss the situation.

- The scope may end up being changed, or not.
- If there is a problem outside the scope, you may end up working on both problems, but as separate mandates.
- By keeping the mandates separate, reporting and production issues are kept clear and simple.

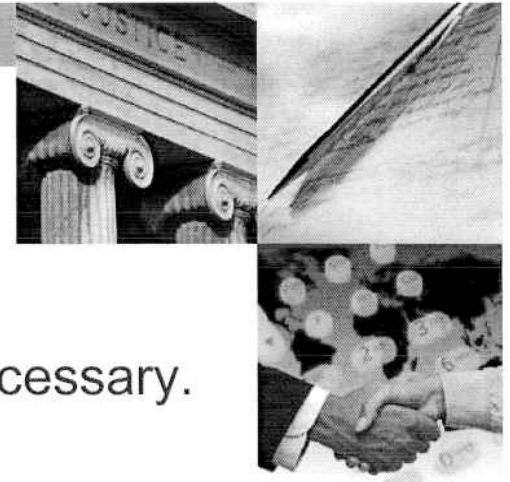
# The Importance of Defining the Scope of Work – And Staying Within It



Tip #3 – Don't include opinions in your work – even notes, unless specifically sought.

- The Dragnet Rule- “Just the facts”.
  - If you are only asked for facts, only deliver facts.
- Opinions are more dangerous than facts.
- Opinions are based on facts. If the facts are incomplete or wrong, then the opinion may be wrong.
- But, opinions tend to have staying power, even if they are wrong. They have great potential prejudice.
- If you are asked to give an opinion, be as careful and as conservative as possible.
- If you don't have enough information to give an opinion, don't give one.

## The Importance of Defining the Scope of Work – And Staying Within It



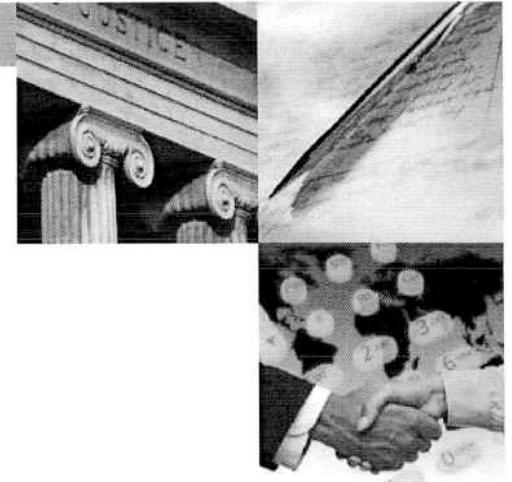
Tip #4 – Don't include anything in your work that is not necessary.

- Only include in your notes and reports the facts and, if requested opinion, on the specific issues.
- Do not include unnecessary background or details.
  - It is not necessary.
  - It makes reports too long.
  - It greatly and unnecessarily increases the risk of errors or misstatements that could prejudice the case or the client.

## The Importance of Defining the Scope of Work – And Staying Within It

Tip #5 – Be as scrupulously accurate as possible.

- Goes without saying.
  
- Do not:
  - Guess
  - Speculate
  - Fill in any gaps.

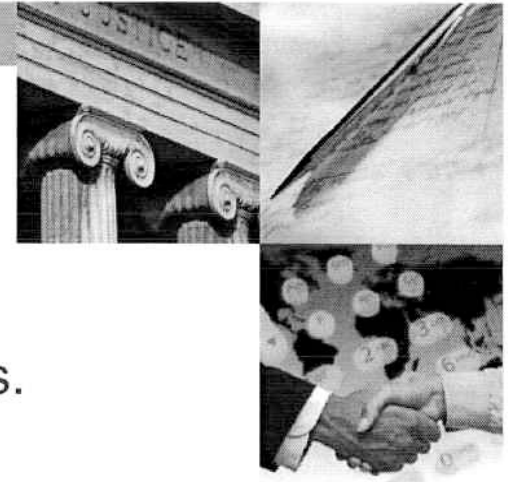




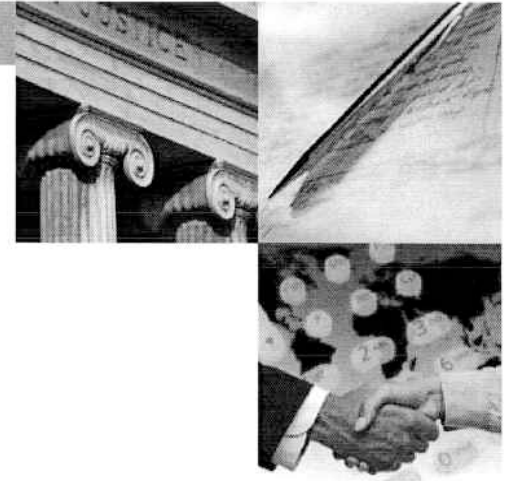
## The Importance of Defining the Scope of Work – And Staying Within It

Tip #6 – Choose every word carefully – even in your notes.

- Do not use colourful or inflammatory language.
- The more bland the better.
- Use plain and simple language.
- Avoid technical jargon, except when necessary.



# Privacy Issues in an Investigation

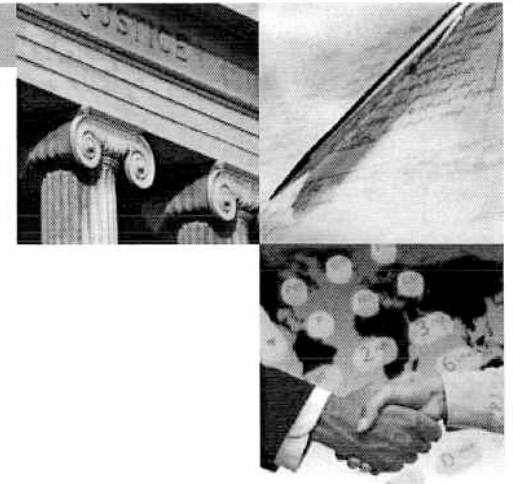


Lessons learned from Hewlett-Packard:

- Know your investigator.
- Know the information-gathering techniques used by your investigator.
- Ensure your investigator's information-gathering techniques are lawful.

## Privacy Issues in an Investigation

- Data Brokers
- Information is usually obtained in one of three ways:
  - Pretexting – one pretends to be the account holder and gains access to the records by fooling a customer service representative.
  - Accessing online records by cracking online account administration tools.
  - Company insiders. Information is obtained by employees and is sold.



## The Use of Subcontractors and Outside Services



Three key factors:

- Your organization must have trust in the investigators that it hires.
- There must be initial and on-going discussions regarding expectations relating to investigation procedures.
- Retainer agreement should contain key provisions:
  - At a minimum: “Subcontractor agrees that it will abide by all laws and will only use fair and lawful means to obtain information”.
- Large investigations: consider expressly requiring that investigators comply with PIPEDA.

## The Use of Subcontractors and Outside Services

- Your organization may not be insulated by virtue of retaining subcontractors/outside services.
- Subcontractors/outside services are agents.
- Your organization could be liable for breach of privacy laws by subcontractors/outside services.
- Your organization could suffer reputational harm by virtue of any breach on the part of a subcontractor/outside investigator.

