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To: Participants of "Staying One Step Ahead: Important Considerations for Corporate Counsel"

Date: October 18, 2005

Subject: Ethical Issues and Challenges for In-House Counsel

MEMORANDUM

In-house counsel face a number of ethical issues and challenges unique to their practice. In this memorandum, we discuss some of the ethical duties and obligations owed by a solicitor to his client in light of the Law Society of Upper Canada's Rules of Professional Conduct as well as recent Canadian and American decisions. In particular, this memorandum provides an overview of the principles of the duty of confidentiality, the duty of loyalty and the rule of solicitor-client privilege, specifically focusing on the challenges in-house counsel face in fulfilling these duties and obligations.

PART I: The Lawyer's Duty of Confidentiality and Loyalty

I. The Rule of Confidentiality

The lawyer's duty of confidentiality is an ethical rule that covers a wide range of communications between solicitor and client. Rule 2.03 of the Rules of Professional Conduct[1] describes the responsibility of lawyers with respect to confidential information:

> A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

A lawyer owes a duty of confidentiality to all of his clients, regardless of any differences that may arise between them. As it is a wide-ranging duty,[2] a lawyer should not even disclose having been retained[3] or even consulted by an individual.[4]

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[1] LSUC, Rules of Professional Conduct, Rule 2.03.
[2] *Ibid.*
[3] Note that some circumstances may require disclosure of the fact that the lawyer has been retained. For example, matters that are being litigated before the courts will normally involve disclosure of some information.
[4] Note that the wide-ranging nature of the duty means that the lawyer has the obligation even with respect to someone who has not retained his/her services. Therefore, the "phantom client" who calls the office for an initial consultation is still entitled to have the communications kept confidential.

II. The Underlying Principle of the Duty of Confidentiality

The duty of confidentiality encourages clients to seek legal advice[5]. Clients need to feel comfortable disclosing information and must be confident that discussions will remain confidential[6]. Further, in order for a lawyer to competently advise a client(s), the lawyer must be certain that all necessary information is disclosed. Particularly relevant in the context of in-house counsel, it has been said that:

> The policy goal behind the duty of confidentiality is to ensure that the lawyer is fully informed by the client on all relevant facts so that the lawyer can properly advise the client, including understanding any improper conduct so that the lawyer can advise the client against it or to take steps to mitigate against it.[7]

If in-house counsel is to provide legal advice to the client organization, that lawyer must be in a position to advise the client of any legal or professional concerns in relation to a proposed course of action. Therefore when approaching in-house counsel for advice, an organization's representatives will want to be sure that the lawyer is someone who can be trusted. Without the principle of confidentiality, an organization's representatives may unwittingly engage in a potentially illegal business transaction without fully understanding the legal implications, as a result of a reluctance to consult counsel for fear that confidential information may be made public.

III. Exceptions to the Rule of Confidentiality

A lawyer is permitted to disclose confidential information under certain circumstances. The Rules of Professional Conduct provide for justified or permitted disclosure:[8]

(a) When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

(b) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

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[5] R. Scott Jolliffe, Gowling Lafleur Henderson, LLP, "Trusted Advisor or Whistleblower: Lawyer's New Rules on "Up the Ladder" Reporting," at 1, available at http://www.ethicscentre.ca/html/jolliffe.doc.
[6] Gavin MacKenzie, Lawyers and Ethics: Professional Responsibility and Discipline, Toronto: Carswell, 2003, 3-2.
[7] Anna K. Fung, Q.C., CCCA 17th Annual Meeting, August 14, 2005, Vancouver, B.C. Workshop #203 – Corporate Counsel Ethics.
[8] *Supra* note 1, Rule 2.03(2)-(5).

(c) Where it is alleged that a lawyer or the lawyer's associates or employees are:

(i) guilty of a criminal offence involving a client's affairs;

(ii) civilly liable with respect to a matter involving a client's affairs; or

(iii) guilty of malpractice or misconduct,

a lawyer may disclose confidential information in order to defend against the allegations, but the lawyer shall not disclose more information than is required.

(d) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

The most common circumstance permitting disclosure of confidential information is where a client has consented to disclosure either expressly or impliedly. The Commentary to Rule 2.03 of the Rules of Professional Conduct indicates that a client's consent to disclosure may be implied under certain circumstances. For example, in order for a lawyer to work on a client's file, it may be necessary to delegate certain tasks to support staff, thereby disclosing some of the information that was provided to the lawyer. In such circumstances, it is generally a good idea that the lawyer make the fact clear to the client that others in the firm will be working on the file, and to ensure that staff members are aware of the confidential nature of the information being disclosed to them.

IV. The Duty of Loyalty

The duty of loyalty, as it pertains to the solicitor-client relationship, was considered by the Supreme Court of Canada in *R. v. Neil*[9]. In that case, the Court stated that in order for clients to have confidence in the legal system, lawyers must be:

> free from conflicting interests. Loyalty, in that sense, promotes effective representation, on which the problem-solving capability of an adversarial system rests.[10]

Loyalty, like confidentiality, is essential to the solicitor-client relationship. The Court points out that the duty of loyalty is "intertwined with the fiduciary nature of the lawyer-client relationship[11]." A lawyer is required to act in the best interests of his client and to avoid conflicts of interest, either with himself or with other clients. The lawyer is expected to be

[9] [2002] 3 S.C.R. 631.
[10] *Ibid* at para. 13.
[11] *Ibid* at para. 16.

committed to the client's cause and to demonstrate "zealous representation." In addition, the lawyer owes the client a duty of candour[12].

The above requirements constitute the various aspects of the duty of loyalty. They exist because:

> A solicitor must be able to provide his client with complete and undivided loyalty, dedication, full disclosure, and good faith, all of which may be jeopardized if more than one interest is represented.[13]

V. The Application of the the Duty of Confidentiality and the Duty of Loyalty to In-House Counsel

In-house counsel owe the same duties of loyalty and confidentiality to their client as other lawyers. Issues of loyalty and confidentiality affect in-house counsel most frequently in situations that give rise to potential incidents of whistleblowing.

Rule 2.02(1.1) of the Rules of Professional Conduct provides that where a lawyer's client is an organization:

> **(1.1)** Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization.

This Rule, in conjunction with a lawyer's duty of loyalty and confidentiality, demonstrates that counsel must ensure that the best interests of the organization (i.e the client) are represented at all times. That is, the lawyer's fiduciary duty is owed to the organizational entity and not to the officers, directors, and employees who constitute the human face of the organization and provide instructions.

Problems can arise for in-house counsel in circumstances where the representatives of the organization instruct their lawyer to act in conflict with the interests of the organization. An example of this arises in situations of "moonlighting." That is, where a lawyer engages in private practice while working as in-house counsel for the organization.[14]. An employee of the organization may request that in-house counsel represent him personally on a matter that is unrelated to the organization for which the employee works. Conflicts of interest may arise, in addition to the fact that time spent on the individual employee's matter is time

[12] *Ibid.* at para. 19.
[13] *Ramrakha v. Zinner* (1994), 157 A.R. 279 (C.A.), at 73.
[14] *Supra* note 7 at 4.

spent away from the employer organization. Some of the major concerns of in-house counsel in such circumstances include the following[15]:

(a) **Insurance Concerns:** Lawyers need to be certain that their professional insurance covers any work done in private practice;

(b) **Duties of Loyalty to Employer:** Lawyers must consider whether the duty of loyalty owed to the main employer would be breached by engaging in private practice;

(c) **Competence[16]:** Lawyers should ensure that they are able to competently perform the duties required of them by the main employer, in addition to any work that is involved in any additional employment relationships; and

(d) **Conflicts of Interest:** Lawyers must consider their obligations under Rule 2.04 of the Rules of Professional Conduct. Lawyers need to be certain that there are no conflicts of interest between any of the parties represented.

Although in-house counsel could obtain the consent of the employer to engage in private practice, potential problems may still arise and may not be covered by the agreement between the two parties. For example, although the organization may permit in-house counsel to engage in private practice on the side, issues with respect to the lawyer's competence and ability to devote sufficient time to the work of the employer may still arise. Further, agreement between in-house counsel and the organization will not likely address any future unforeseeable conflicts that may arise as the lawyer takes on more private clients.

However, more serious issues arise where representatives of the organization have instructed the lawyer to conduct an illegal, dishonest or fraudulent act, or have advised the lawyer of a course of action being considered, that the lawyer knows to be illegal. In these circumstances, it is important to remember that the lawyer's duty of loyalty is owed to the organization and not to its representatives. Illegal conduct committed by the organization in the past or intended to be committed in the future, is not in the best interests of the organization and the lawyer, therefore, has a fiduciary duty to the organization to report such activity up-the-ladder.[17]The lawyer's duties in these circumstances will be discussed in greater detail in the following paragraphs.

[15] *Supra* note 7 at 5.
[16] Note that Rule 2.01 (2) of the Rules of Professional Conduct require that a lawyer perform any legal services undertaken on a client's behalf to the standard of a competent lawyer, as defined by the Rules to include (among various others) the ability to perform all functions conscientiously, diligently, and in a timely and cost-effective manner.
[17] *Ibid* note 1 at rule 2.02(5.1).

On the other hand, the duties of loyalty and confidentiality owed to the employer organization prohibit the lawyer from disclosing knowledge of illegal conduct occurring within the organization to anyone outside of the organization[18].

Rules 2.02 (5.1) and (5.2) of the Rules of Professional Conduct provide for "up-the-ladder" reporting in circumstances where dishonesty, fraud, crime or illegal conduct is occurring or has occurred within the organization:

> **(5.1)** When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall
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> (a) advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal,
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> (b) if necessary because the person from whom the lawyer takes instructions refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal,
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> (c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct would be dishonest, fraudulent, criminal, or illegal, and
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> (d) if the organization, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 2.09.
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> **(5.2)** When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization has acted or is acting dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in

[18] *Supra* note 1, Commentary to Rule 2.03(3).

> addition to his or her obligations under subrule (5), the lawyer for the organization shall
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> (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped,
>
> (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer, or the chief executive officer refuses to cause the wrongful conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, and
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> (c) if the organization, despite the lawyer's advice, continues with the wrongful conduct, withdraw from acting in the matter in accordance with rule 2.09.

The main difference between the two provisions is that the latter subsection requires the lawyer to immediately advise *both* the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, concurrently.

If the lawyer has reached the top and the matter has still not been addressed, the lawyer is required to withdraw from acting in the matter, in accordance with Rule 2.09(7) of the Rules of Professional Conduct, which provides:

> **(1)** A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances;

and:

> **(7)** Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if:
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> (a) discharged by the client;

> (b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions;
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> (c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another;
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> (d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules:
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> (d.1) the lawyer is required to do so pursuant to subrules 2.02 (5.1) or (5.2) (dishonesty, fraud etc. when client an organization), or
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> (e) the lawyer is not competent to handle the matter.

It should be noted that in many circumstances where a lawyer reports misconduct up-the-ladder, but does not receive a response to his concerns, withdrawal from that particular matter may not be enough. In many cases, the lawyer no longer has the confidence of the organization to continue to act on the matter. In such cases, the lawyer may choose to withdraw completely from the organization – particularly in situations where it is clear to the lawyer that continued involvement will lead to a breach of professional responsibility.

Proposed amendments to the *Criminal Code* provide that:

> 425.1 (1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,
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> (a) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or

> (b) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.

However, since rules of professional responsibility prohibit a lawyer from disclosing information about the organization outside of the organization, the above sections are not particularly relevant in this context.

It should also be noted that not every incident will require up-the-ladder reporting. "Trivial misconduct or conduct that is not likely to result in any serious harm to the organization or others need not necessarily be reported[19]." However, it has been established that "misconduct of publicly traded organizations is likely to have serious consequences to the public at large[20]", and as such requires up-the-ladder reporting.

Finally, Rule 2.02(5) of the Rules of Professional Conduct prohibits a lawyer from knowingly assisting or encouraging a client to act dishonestly, fraudulently, criminally, or illegally, or to instruct the client on how to violate the law and avoid punishment.

The Commentary to Rule 2.02(5) adds:

> A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client. A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activity such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.
>
> Before accepting a retainer or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer, including verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a

[19] *Supra* note 7 at 4.
[20] *Ibid*.

> complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

The current wording of this Commentary was the result of several amendments made by the Law Society of Upper Canada in response to the federal government's enactment of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTA). This legislation originally required that lawyers (along with financial institutions and various financial intermediaries) report large cash transactions and international electronic funds transfers of $10,000 or more, determine the identity of clients, keep certain records and establish programs for internal compliance. The various law societies were concerned that this legislation would interfere with solicitor-client confidentiality and other professional responsibilities, and as a result, the Federation of Law Societies and the Law Society of British Columbia (and other law societies) challenged the constitutionality of the legislation. Interim relief was eventually granted to lawyers nationwide. In 2003, the federal government repealed the challenged provisions and advised that it would implement a new procedure for lawyers. But this has not occurred as yet.

The Rules of Professional Conduct, provide for a balance between maintaining a lawyer's professional responsibilities to their clients and protecting the public interest. In this way, a healthy solicitor-client relationship is promoted and the legal profession is able to function efficiently.

PART II: The Rule of Solicitor-Client Privilege

One of the major ethical issues and challenges faced by in-house counsel is the confusing and potentially risky application of solicitor-client privilege to their practice. To ensure that confidential communications between in-house counsel and their clients are protected, it is important to fully understand the intricacies of the application of the rule of privilege, particularly in the context of in-house counsel. In this section, we provide an overview of the common law rule of solicitor-client privilege. Specifically, we focus on the common issues and difficulties that arise in its application to in-house counsel.

I. Policy Behind the Rule of Solicitor-Client Privilege

The rule of solicitor-client privilege ('the Rule') is fundamental to the justice system in Canada. Once classified as a rule of evidence, the Supreme Court of Canada has elevated the Rule to a "fundamental civil and legal right".[21] Clients seeking advice must be able to speak freely to their lawyers and to know that whatever they say will not be divulged without their consent. The Rule allows lawyers to properly advise their client to further the administration of justice, ensure the observance of the law and ultimately serve the interest of the public. [22]

[21] *Solosky v. R.* (1980), 105 D.L.R.(3d) 745 at 760.
[22] *Upjohn Co. v. United States*, 449 U.S. 383 at 389

II. Requirements for the Application of Solicitor-Client Privilege

In order for solicitor-client privilege to apply, the following requirements must be met:[23]

(a) The communication is between counsel and client;

(b) The communication is for the purpose of seeking or giving legal advice; and

(c) The communication is intended to be confidential.

Generally, solicitor-client privilege will apply as long as the communication falls within the ordinary scope of the professional relationship. Once the privilege is established, it is broad and encompassing. As stated in *Descoteaux v. Mierzwinski*[24], privilege attaches to all communications made within the solicitor-client relationship which arises as soon as the potential client steps into the door and even before a formal retainer is signed.

Despite its importance, the Rule is not absolute. Case law has carved out the following principled exceptions:[25]

(a) Constitutional exception: a claim of privilege which would otherwise impair an accused's ability to make a full answer and defence will in certain circumstances require disclosure despite one's right to privilege.[26]

(b) Criminal/fraud exception: communications will not be privileged where they are in themselves criminal or they are made with the purpose of obtaining legal advice to facilitate the commission of a crime.[27]

(c) Public safety exception: communications will not be privileged where to honour the privilege would put the safety of the public at risk. In circumstances where it can be demonstrated that there is an imminent risk of serious bodily harm or death to an identifiable person or group, the privilege will be set aside.[28]

III. The Duty of Confidentiality as Distinct from the Rule of Privilege

Though the distinction between solicitor-client privilege and the lawyer's duty of confidentiality is often blurred, it is important to understand that privilege and confidentiality stem from two different principles. Whereas the duty of confidentiality is an ethical rule of

[23] *Pritchard v. Ontario (HRC)* 2004 SCC 31 at para.15.
[24] [1982] 1 S.C.R. 860
[25] Ken B. Mills, "Privilege and In-House Counsel" (2003) 41 Alta. L. Rev. para. 3 (QL).
[26] *R. v. Stinchcombe,* [1991] 3 S.C.R.326 at 340.
[27] *Supra* note 25 at para.3.
[28] *Smith v. Jones,* [1999] 1 S.C.R. 455 at para 19.

professional conduct, the rule of solicitor-client privilege developed as an evidentiary rule, with the purpose of preventing a lawyer from being compelled to produce client related evidence. This distinction is stated in the Commentary to Rule 2.03 of the Rules of Professional Conduct[29]:

> This rule (of confidentiality) must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer.

The Commentary also states that the ethical duty of confidentiality is wider than the evidentiary rule of solicitor-client privilege for the following reasons:[30]

(a) The rule of confidentiality requires lawyers to maintain all information with respect to the client in confidence, whereas the privilege merely prevents the introduction of confidential information into evidence.

(b) The rule of confidentiality applies not only to confidential communications between clients and lawyers that are exchanged for the purpose of obtaining legal advice, but to all information concerning the clients' affairs acquired from any source during the course of the professional relationship.

(c) The rule of confidentiality applies even though others may share the lawyer's knowledge. In contrast, privilege applies to the communication itself, and does not bar the production of evidence pertaining to the facts communicated if obtained from another source. Privilege is also often lost where other parties are present during the communication.

IV. Waivers of Privilege

Solicitor-client privilege is the right of the client and not of the solicitor.[31] Generally, only the client may waive the privilege. However, case law demonstrates that privilege may be waived by the client's agent[32] or in specific instances, by someone other than the solicitor or client. For example, where an organization elects to answer through a particular employee, any waiver made will likely bind the organization.[33]

Waiver of privilege is established when it is shown the possessor of privilege:[34]

[29] *Supra* note 1 rule 2.03
[30] *Supra* note 7 at p.3-3.
[31] J. Sopinka, S.N. Lederman & A.W. Bryant, The Law of Evidence in Canada, 2d ed. (Toronto: Butterworths, 1999) at 756 [Sopinka], citing *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353.
[32] *Syncrude Canada Ltd. V. Canadian Bechtel Ltd.* (1992), 10 C.P.C. (3d) 388 (Alta. C.A.).
[33] R.D. Manes & M.P. Silver, Solicitor-client privilege in Canadian Law (Toronto: Butterworths, 1993) at 206
[34] *Hartford Accident and Indemnity Company v. Maritime Life Assurance Company,* (1996) 9 C.P.C. 4th.cited in para. 105 of *National Bank Financial Ltd. V. Potter* [2005] N.S.J. No.186.

(a) Knows of the existence of the privilege

(b) Demonstrates a clear intention to forego the privilege.

From the case law it appears that there are two main instances where the solicitor-client privilege can be waived:

1. Express waiver

Express waiver of privilege occurs where the client voluntarily discloses confidential communications with his or her solicitor.[35] For example, in *Smith v. Smith*[36], the client was held to expressly waive solicitor-client privilege where he filed an affidavit which set out the substance of the confidential solicitor-client communications.

2. Unintentional waiver

Unintentional waiver has been divided into two categories:

(a) Implied waiver

Generally, waiver is held to be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege.[37] While waiver of privilege normally requires knowledge of the privilege and voluntary intention to waive that privilege, it may occur in the absence of an intention to waive, where fairness and consistency require, such as in a case where a party has taken a position which would make it inconsistent to maintain the privilege. In *R. v. Campbell*[38], the R.C.M.P. put in issue its belief in the legality of a reverse sting operation and asserted its reliance upon advice from Department of Justice lawyers to support its position. The Supreme Court of Canada held that the R.C.M.P. had waived the right to privilege of the contents of the advice which was relied upon. Similarly, if a client denies that he or she gave instructions to his lawyer to settle a debt, the other party who is seeking to enforce the settlement has the right to examine the lawyer on what was said between the lawyer and the client.[39]

(b) Inadvertent disclosure of privileged communications

Disclosure of privileged communications may sometimes be completely accidental without any intention to waive, express or implied. Recent Canadian cases have chosen not to adopt the traditional principle in *Calcraft v. Guest,*[40] that

[35] *Supra* note 33 at 189.
[36] [1958] O.W.N. 135 (H.C.J)
[37] *Supra* note 33 at 191.
[38] [1999] S.C. J. No.16.
[39] *Newman v. Newman* (1979), 8 C.P.C. 229 (Ont. H.C.J.).
[40] [1898] 1 Q.B. 759

mere loss of confidentiality either by accident or by design results in a waiver of privilege. With the liberal production and exchange of large quantities of documents today between counsel, accidental disclosure is bound to occur. A judge should have the discretion to determine whether in each circumstance, the privilege has been waived.[41] According to Sopinka, factors to be taken into account should include whether the error is excusable, whether an immediate attempt has been made to retrieve the information and whether preservation of the privilege in circumstances will cause unfairness to the opponent.

This modern approach to inadvertent disclosure appears to have been consistently adopted by Canadian courts. In *Royal Bank of Canada v. Lee*[42], it was held that there was no loss of privilege because the disclosure was entirely accidental. Similarly, in the recent case of *National Bank Financial Ltd. v. Potter*[43] it was implied that some form of intention was required to waive privilege,

> "…even in the case of inadvertent loss of possession the Courts do not consider loss of possession as a result of the actions of the holders of the privilege to be demonstrative of a clear intention to forego privilege."

Ultimately, Canadian courts will generally favour upholding privilege over production of the documents.[44]

(c) Inadvertent disclosure in the United States

In contrast, there does not appear to be a consistent approach to the treatment of inadvertent disclosure in the United States. U.S. cases have adopted the following three approaches to the treatment of inadvertent disclosure:[45]:

A. A traditional view where mistaken disclosure of privileged material to the opponent constitutes waiver.[46]

B. An approach where privilege will only be held to be waived where there is evidence of the client's intention to waive privilege.[47]

[41] *Supra* note 31 at 764.
[42] (1992), 127 A.R. 236 (C.A.).
[43] [2005] N.S.J. No.186 at para.103.
[44] Supra note 25 at para. 36.
[45] John K. Villa, "Inadvertent Disclosure of Privileged Material: What is the Effect on the Privilege and the Duty of Receiving Counsel?" *ACC Docket* 22, no. 9 (October 2004): 108-115
[46] *FDIC v. Singh* 140 F.R.D. 252
[47] *Berg Electronics Inc. v. Molex Inc.* 875 F. Supp. 261, 263 (D. Del.1995).

C. An intermediate approach which focuses on the reasonableness of the precautions taken to preserve the confidentiality of communications. Several factors considered include:[48]

I. Reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document productions

II. The number of inadvertent disclosures

III. Extent of the disclosure

IV. Any delay and measure taken to rectify the disclosures

V. Whether the overriding interests of justice would or would not be served by relieving a party of its error

(d) Inadvertent disclosure in the U.S. and in-house counsel: The case of *Jasmine Networks v. Marvell Semi Conductor Inc.*

While different jurisdictions in the U.S. have adopted different approaches to waiver and inadvertent disclosure, there is one recent case notable for the controversy it has caused in the United States and in Canada in relation to the issue of inadvertent disclosure and in-house counsel. In the case of *Jasmine Networks v. Marvell Semi Conductor Inc*[49], a voicemail system kept recording after Mr. Gloss, in-house counsel and vice-president of corporate affairs for Marvell, Marvell's in-house patent attorney and its vice-president of engineering thought they had hung up the phone. The voicemail recorded their discussion on plans to steal Jasmine's trade secrets, hire away key employees and speculation on who might go to jail if they got caught. The issue presented to the Court of Appeal was whether the recorded conversation was protected by solicitor-client privilege.

According to the *Evidence Code s.912, subdivision A* of California, privilege may be waived in one of two ways: 1) By the privilege holder making an uncoerced disclosure of the information or 2) By the holder intentionally consenting to disclosure by a third party.

While Jasmine and Marvell both agreed any waiver must result from uncoerced disclosure, Marvell argued that the disclosure must also be

[48] *Amgen Inc. V. Hoechst Marion Roussel Inc.* 190 F.R.D. 287, 291.
[49] [2004] Cal App. LEXIS *476*

intentional. The Court of Appeal held in favour of Jasmine stating, "the weight of authority supports the conclusion that intent to disclose is not required in order for the holder to waive privilege through uncoerced disclosure."[50]

The Court of Appeal agreed with the longstanding principle that lawyers generally do not have the right to waive their client's privilege without their consent. The case at hand presented unique circumstances because of Mr.Gloss' dual role as in-house counsel and vice president. The Court held that Marvell had inadvertently waived privilege because Mr. Gloss was not only acting as in-house counsel but also as vice president of Marvell during the recorded discussion.

The implication of the *Jasmine* decision is that it makes it difficult for general counsel who are also senior executives to assert privilege in cases of inadvertent disclosure. However, subsequent to the Court of Appeal decision, the case was reviewed by the Supreme Court of California and depublished. Therefore, the decision is of no force as a precedent. In response to the Court of Appeal decision, the California legislature drafted Bill 1133 (Harman), proposing to change the state's law on evidence to make it clear that privilege can only be waived intentionally.

While there has not been any case in Canada where general counsel's dual role has called privilege into question, it is unlikely that a Canadian Court would rule the same way given the recent decisions in *Royal Bank* and *National Bank Financial*.

V. The Application of the Rule of Privilege to In-House Counsel

The English Court of Appeal in *Alfred Crompton Amusement Machines v. Customs and Excise Commissioners (No.2*[51]*)*, described the role of in-house counsel as follows:

> "Many barristers and solicitors are employed as legal advisers, full time, by a single employer… They are regarded by the law as, in every respect in the same position as those who practice on their own account…. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges. I speak, of course of the communications in the capacity of legal adviser."

This statement has been repeated and affirmed numerous times by Canadian Courts.[52] As such, it is clear that Canadian Courts hold that in-house counsel are governed by

[50] *Ibid* at p.4.
[51] [1972] 2 all E.R. 353 (C.A)

the same rules as outside counsel. However, in practice, unique problems are encountered by in-house counsel in the application of these rules. In this section of the paper, I summarize some of common issues and difficulties that arise in the application of the rule of privilege to in house counsel.

1. The Client is the Corporation

It is important to determine who the client is in order to understand when communications are privileged and by whom privilege can be waived. Where a lawyer is employed in-house, it is the organization that is the client and not the employees or officers of the organization. This distinction is highlighted under rule 2.02(1.1) of the Law Society of Upper Canada's Rules of Professional Conduct:[53]

> "Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, when a lawyer is employed by an organization including a corporation, in exercising his or her duties and in providing professional services, the lawyer shall act for the organization."

A lawyer acting for an organization must remember that an organizational client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization will give instructions through its officers, directors or employees, the lawyer must ensure that it is the interests of the organization that are served.[54] The distinction between an organization and its officers and shareholders raises significant potential conflict of interest issues that in-house counsel must be wary of.[55]

In-house counsel of a parent corporation often also have the responsibility for advising wholly owned subsidiaries. Most Canadian courts have extended the definition of a client corporation to include the corporation's subsidiaries, affording them the same privilege and confidentiality protections as the parent. In *Mutual Life Assurance Co. of Canada v. Deputy Attorney General of Canada,*[56] Saunders J. concluded that it was not in line with the purpose behind privilege to treat wholly owned subsidiaries as independent third parties because they are separate legal entities.

Another question that has arisen in the context of the client as an organization is how to determine which individuals in the organization have the right to speak for the organization for the purposes of determining whose communications are protected by solicitor-client privilege. While Canadian courts have not had to address this issue, academics and

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[52] See *R v. Campbell, [1999*] 1 S.C.R. 565*, Canary v. Vested EstatesLtd,* [1930] W.W.R. 996, at 997-998.
[53] *Supra* note 1 at. rule 2.02(1.1)
[54]*Supra* note 1 at Commentary under rule 2.02(1.1)
[55] Mahmud Jamal ,"In-House Counsel and Solicitor-Client Privilege" (Ontario Bar Association, May 2004)
[56] *Mutual life assurance co. of Canada v. Deputy Attorney General of Canada (1988*) 28 C.P.C. (2d) 101 at p. 103 *(ont. H.C.J.*) per Saunders J.

experts have often turned to the leading American case of *Upjohn v. United States* for guidance.[57]

In *Upjohn,* a pharmaceutical corporation was subject to an internal investigation into "questionable payments" made to secure government contracts abroad. General counsel of Upjohn sent a questionnaire to all foreign and general area managers seeking information concerning the payments. Internal Revenue Services demanded production of the questionnaires to investigate the tax consequences of the transaction. Upjohn refused claiming attorney client privilege. In adopting the 'control group' test[58], the Sixth Court of Appeals held that the communications between the general managers and in-house counsel were not subject to attorney client privilege.[59]

The Supreme Court of the United States reversed the Court of Appeal decision. According to Rehnquist J., the control group test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." While the Supreme Court did not articulate a specific test for identifying when privilege should apply to employees of a corporation, some of the factors the Supreme Court examined in coming to its decision to grant privilege in this case were the confidentiality of the questionnaires, the fact that the communications concerned matters within the scope of the employees' corporate duties and the fact that employees were aware that they were being questioned in order for the corporation to obtain legal advice.[60]

In Canada, the *Upjohn* decision has been viewed favourably. There has been broad protection for confidential communications emanating from an employee, regardless of position in the organizational hierarchy, provided the objective of the communication is to obtain legal advice and the statement is made within the scope of the employee's duties. The issue has been treated by Canadian courts as one coming under the agency theory of privilege; that is any employee can be engaged by the corporate client to pass on information to the solicitors for the purpose of receiving legal advice [61]

2. The Distinction between Legal and Business Advice

Solicitor-client privilege applies only to legal advice and not advice on purely business matters even when provided by a lawyer.[62] Due to the fact that in-house counsel often have both legal and non-legal responsibilities, each situation must be assessed on a case by case basis to determine if it is protected by solicitor-client privilege.[63] While Lord Denning did state in *Alfred Crompton Amusement Machines Ltd.* that the rule of solicitor-client privilege applies

[57] *Upjohn Co. v. United States* 1981 U.S. *LEXIS* 56.
[58] Definition of control group test: Only communications between employees who are in a position to control or direct corporate actions and a lawyer will be protected by privilege.
[59] *Supra* note 57 at 1.
[60] *Supra* note 57 at 5.
[61] *Supra* note 31 at 744.
[62] *supra* note 55 at 5.
[63] *Supra* note 55 at 5.

equally to in-house counsel, he immediately added that only communications made in the capacity of legal advisor are privileged and not work done in any other capacity. He warned that "in house counsel must be scrupulous to make the distinction."

The requirement to be scrupulous in distinguishing between legal advice and business advice has been raised to the level of an ethical duty in Ontario as demonstrated by the commentary to rule 2.01, the rule on lawyer competence in the Law Society's Rules of Professional Conduct:[64]

> "In addition to opinions on legal questions, the lawyer may be asked for…advice on non legal matters such as the business, policy or social implications involved in the question or the course the client should choose. In many instances the lawyer's experience…on non legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice."

3. Internal Investigations, Minutes of Board Meetings and Internal Memos: Typical Situations Encountered by In-House Counsel.

(a) Internal Investigations

One of the typical situations encountered by in-house counsel is a request by the client organization to conduct internal investigations into potential civil or criminal claims involving the organization or its employees. These investigations can be protected from disclosure to third parties by solicitor-client privilege if conducted properly. Courts have ruled both ways on whether such investigations are covered by solicitor-client privilege. The determining factor appears to be whether there is a sufficient evidentiary connection established between the investigation and the seeking or obtaining of legal advice.[65]

In *Hydro-One Network Services Inc. v. Ontario (Ministry of Labour),*[66] the Court had to decide whether a report prepared by an employee at the request of in-house counsel to investigate into the causes of an accident were privileged. The Court found that the documents were privileged because they were intended to be confidential and because the purpose of the report was to enable in-house counsel to provide legal advice. In contrast, in *Prosperine v. Ottawa-Carleton (Regional Municipality)*[67] the Court held there was no solicitor-client privilege. The Corporation sought privilege over a report prepared by an outside consultant. The report had been commissioned by a municipality to investigate into a potential fraud committed by a contractor to the municipality. The municipality claimed that the report was privileged because

[64] *Supra* note 1. Commentary to Rule 2.01 "Competence".
[65] *Supra* note 55 at 7.
[66] [2002] O.J. No.4370 (O.C.J.)
[67] [2002] O.J. No. 3316 (Sup. Ct)

the consultant had been hired by in-house counsel. The Court rejected the claim for privilege because the contract between the municipality and consultant did not indicate that the purpose of the investigation was to facilitate the giving of legal advice. Rather the purpose of the report was to quantify the financial loss incurred and to identify improvements in the future.[68]

College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)[69] demonstrates that it is not always clear when a court will find an investigation privileged. In this case, in-house counsel for the B.C. College of Physicians obtained expert opinions to assist the College in assessing a complaint against a physician. While the Court of Appeal agreed that the lawyer was acting in her capacity as a lawyer with the objective of giving legal advice when she obtained the experts' opinions, the Court held that the reports were nevertheless not privileged. While third party communications may be privileged where the third party is performing a function on the client's behalf, serving as a channel of communication between the client and the solicitor, the Court found that in this case, the experts were retained merely to provide opinions concerning the medical basis for the complaint. While these opinions were essential to the legal problem confronting the College, the Court held that the experts' services were incidental to the seeking and obtaining of legal advice.[70]

(b) Minutes of Board Meetings

The legal advice provided by in-house counsel to the board of directors of an organization is privileged. Therefore the minutes of the board meetings containing such advice or the portion of the minutes recording that advice will be protected by solicitor-client privilege. As stated in *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research,*[71]

> "with respect to minutes of meetings, I would be of the view that the privilege only relates to that part which specifically involves the legal advice and secondly that the function of the meeting was reasonably necessary to deal with the aspect of developing or digesting the legal advice."

(c) Internal Memos

Internal memos containing legal advice from in-house counsel to the client are generally considered to be covered by solicitor-client privilege.[72] Nevertheless, in-house counsel must still remain vigilant as to how the memos are circulated within the organization. Indiscriminate circulation can result in loss of privilege[73] For example, in *Toronto-Dominion Bank v. Leigh Instruments Ltd.*[74], the Court held that no privilege applied to a memo issued by a

[68] *Supra* note 55 at 8.
[69] [2002] B.C.J. No. 2779 (B.C.C.A.)
[70] *Supra* note 55 at 10.
[71] [1995] O.J. No. 1867 at para. 23 (Ont. Gen. Div.) per Farley J.
[72] *Supra* note 55 at. 9.
[73] *Supra* note 55 at 9.
[74] (1997), 32 O.R. (3d) 575 (Ont. Gen. Div.).

bank's general counsel to all of its branches discussing the risks associated with comfort letters. The bank's general counsel also held executive offices in the bank and it was unclear from the evidence whether he was acting in his capacity as general counsel or as an officer of the bank in sending the memo. Other factors that led to the Court's decision included the fact that the memo was a discussion of corporate policy rather than legal advice, the memo was labelled as a 'head office circular' instead of a memo from the legal department and most importantly, there was no intention to keep the memo confidential as it was widely circulated to every branch and department, with no stamp of confidentiality on the cover page.[75]

4. The Provision of Advice to Clients Outside the Jurisdiction

In-house counsel are sometimes asked to provide legal advice in jurisdictions where they are not called to the bar. A typical example of this would be where a corporation has wholly owned subsidiaries outside the jurisdiction whose legal affairs are referred to the parent corporation's in-house counsel. Case law is conflicting on the issue of whether solicitor-client privilege applies to such communications.[76] Traditionally, it was held that privilege was confined to consultation with lawyers qualified to practice in the local forum. However, the weight of authority suggests Canadian courts are moving away from that approach. As stated by Sopinka, et al. in the *Law of Evidence in Canada,*[77]

> Many years ago, the Ontario Court of Appeal held that the lawyer must be competent to practise in the jurisdiction the law of which is relevant to the issues in question. In *United States v. Mammoth Oil Co.*[78], it was held that, in circumstances where an American citizen consulted a Canadian lawyer on American law, no privilege attached to the communication, as a Canadian lawyer was not qualified to practise in the United States. This decision could create problems for a corporate counsel, particularly where the corporation is a multi-national or carries on business in more than one province. If, for example, a problem arises outside Ontario but the corporate counsel who is a member of the Ontario Bar only, is consulted at the corporation's head office in Toronto, should that communication not be privileged? More recent authority suggests that the protection should not be so limited and that, as long as one of the parties to the communication is a lawyer, though perhaps not called to the bar of the jurisdiction in which the issue arises, then the umbrella of privilege should cover the communication. At the very least, it could be said that such a consultation is preparatory to the foreign lawyer providing information or instructions to a

[75] *Supra* note 55 at 9.
[76] see *Re United States of America v. Mammoth Oil Co.* (1925), 56 O.L.R. 635 (C.A), *Lawrence v. Campbell, Hartz Canada Inc. v. Colgate-Palmolive co.* (1988), 27 C.P.C. (2d) 152 (Ont. H.C.).
[77] *Supra* note 31 at 741.
[78] (1925) 56 O.L.R. 635 (C.A.)

lawyer who is in fact licensed to practise in the relevant jurisdiction.

In-house counsel should also be particularly careful in dealing with foreign subsidiaries in the European Community ('EC'). Due to the fact that in-house lawyers in many member states are employees under those countries' laws, and thus are not subject to rules of professional ethics and discipline, the EC law generally does not extend solicitor-client privilege to in-house lawyers. As a result, communications from in-house counsel in Canada that may be privileged here, may not necessarily be privileged under EC law.[79]

5. Litigation Privilege and In-House Counsel

Litigation privilege protects documents and materials created for the dominant purpose of preparing for litigation.[80] While in-house counsel are entitled to claim litigation privilege,[81]difficulties may arise in its application. For example, where damaging internal memoranda are circulated within an organization before in-house counsel is notified, discussing a possible dispute, it may not be clear whether litigation privilege can be claimed. The weight of authority supports the view that litigation privilege can still be claimed, provided that litigation was in "reasonable prospect".[82] The following considerations and authorities support this view:

(a) Several courts have held that privilege may be claimed over documents as being made in contemplation of litigation even before a lawyer has been retained at the time the documents were prepared.[83]

(b) Documents may be prepared in contemplation of litigation, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated, even though the party preparing the document intended to settle the matter if possible without resort to a solicitor at all[84].

(c) Numerous cases have supported the approach of claiming privilege over all documents prepared after an event on a certain date that gives reality to the prospect of litigation. After this date, the party is viewed as preparing to meet anticipated litigation.[85]

(d) In the absence of evidence to the contrary from the party opposing the claim of privilege, the claim of privilege should be sustained.[86]

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[79] *Supra* note 55 at 10.
[80] *General Accident v. Chrusz* (1999), 45 O.R. (3d) 321.
[81] *Ibid.*
[82] *Supra* note 55 at 11.
[83] *Rush v.Phoenix Assurance Company of Canada* (1983), 40 C.P.C. 185 at para. 14 (H.C.J.), *R v. Westmoreland* (1984), 48 O.R. (2d) 377 (H.C.J.)
[84] *Gillespie Grain Company Grain Insurance & Guarantee Company v. Wacowich,* [1932] 1 W.W.R. 916 at 919.
[85] See for example, *Romaniuk v. Prudential Insurance Co. of America* [2000] O.J. No. 1527 at para. 20.
[86] *Watt v. Baycrest Hospital,* [1991] O.J. No.1107 at p.2.

6. Tips for In-House Counsel on How to Create and Preserve Privilege[87]

(a) Mark documents as "privileged and confidential", and "prepared for in-house counsel for the purpose of providing legal advice" and/or "prepared for in-house counsel for the purpose of preparing for litigation".

(b) Use legal department letterhead rather than general corporate letterhead for legal advice.

(c) Sign letters and memoranda containing legal advice as legal counsel.

(d) Maintain a confidential file of materials over which privilege is to be claimed. Label these files accordingly

(e) Where possible, limit circulation of legal advice within the organization. Where this is not possible or desirable, ensure recipients understand the importance of keeping advice confidential, such as by marking the documents appropriately as suggested above.

(f) When retaining outside experts, counsel should prepare a retainer letter specifically confirming that the expert is retained for the purpose of assisting counsel in providing legal advice and/or to prepare for litigation. Ensure that the expert marks his or her report accordingly and directs the report to counsel's attention.

(g) Be aware that communicating with foreign counterparts may (depending on the jurisdiction) result in loss of privilege if proceedings are commenced in the foreign jurisdiction.

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[87] *Supra* note 55 at 13.

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