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Inadvertent disclosure and improper use of privileged communications

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In our digital world, virtually everyone has made the mistake of hitting send on an email or text that they wish they could take back either because of the content or to whom they sent it.

During the cross-examination of *Infowars* host Alex Jones in the Sandy Hook defamation lawsuit, counsel for the plaintiffs put to him that "12 days ago your attorneys messed up and sent me an entire digital copy of your entire cell phone with every text message you've sent for the past two years, and when informed did not take any steps to identify it as privileged or protect it in any way." Counsel then put evidence retrieved from the phone to Mr. Jones to show that he lied under oath in a pre-trial discovery or deposition when he stated that he did not have any text messages about Sandy Hook. Mr. Jones had been ordered to turn over any text messages and emails about Sandy Hook.

While this drama played out in a Texas courtroom in August 2022 (of course live-streamed on Youtube), the circumstances raise issues that are relevant to parties and counsel in Ontario and elsewhere in Canada. To mix metaphors the question is: are inadvertently sent communications (by lawyers or otherwise) the proverbial 'horse out of the barn' or can that genie be stuffed back into the evidentiary bottle?

In Canada, solicitor-client privilege protects the confidential relationship between lawyers and their clients and arises where three conditions are satisfied: (1) the communication over which privilege is asserted must be a communication between lawyer and client; (2) which entails the seeking or giving of legal advice; and (3) which is intended to be confidential by the parties: *Solosky v. The Queen*, 1979 CanLII 9 (SCC).

The right to solicitor-client privilege is one of the law's most cherished instances of protecting rights of privacy and confidentiality. In the words of Ontario Superior Court of Justice P.

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Perell, "in Canada, solicitor and client privilege is regarded as having quasi-constitutional importance to the administration of justice. It is a substantive rule of law and a sacrosanct fundamental principle of justice": *Glegg v. Glass*, 2019 ONSC 6623 (CanLII), at para 8, aff'd 2020 ONCA 833 (CanLII).

The reality of lawyer-client privilege is that it is absolutely essential to the functioning of the justice system. Privilege allows the client to speak openly with their lawyer in order to obtain legal advice and not place their lawyer on a need to know basis determined by the client. Like other relationships such as a doctor-patient relationship, this is critical to the lawyer being able to do their job. If a patient is afraid that their doctor will divulge their most private and intimate issues they will invariably hold back information which is critical to a physician's ability to diagnose a problem and appropriately treat it. Similarly, lawyers cannot properly advise a client unless they know all the facts – even the embarrassing ones. Without privilege the proper administration of justice is impossible.

Inadvertent production of a privileged document does not necessarily waive privilege. Although privilege can be waived, this does not generally occur by reason of an inadvertent slip that counsel moves to correct as soon as they become aware of it: *Canadian National Railway Company v. Holmes*, 2022 ONSC 1682 (CanLII), at para 50.

In Ontario, Rule 7.2-10 of the *Rules of Professional Conduct* requires lawyers who receives a document that they know or reasonably ought to know was inadvertently sent to them to promptly notify the sender. The commentary to the rule goes on to state as follows:

> Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or legal practitioners acting for them. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to notify the sender promptly in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of this rule, as is the question of whether the privileged status of a document has been lost.

As noted in the rule's commentary, whether privilege has been lost as a result of providing the communication to the other side is a matter of law. Ontario courts are generally quite protective of *inadvertent* disclosure of privileged communications and will order the return of documents and prohibit their use as evidence at trial.

Rule 7.2-10 does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. As a matter of prudence, receipt of such communications should be promptly disclosed to the other side and then erased or (permanently) destroyed. The onus is on the recipient to advise the other side not on the sending party. Obviously, if material is sent inadvertently, the sender may not even be aware of the transmission.

A party who fails to disclose receipt of privileged documents or obtains copies of privileged communications to the other side may face severe consequences.

In *White v. 123627 Canada Inc.*, 2014 ONSC

2682 (CanLII) (leave to appeal denied, 2014 ONSC 6234 (CanLII), the court likened the inadvertent disclosure of a privileged document by one side of a legal dispute to the other to the transmission of an infection: "the more quickly it is contained, the easier it may be to eradicate its harmful effect". In that case, counsel for the defendants inadvertently sent plaintiffs' counsel a copy of a transcribed interview between their client and an adjuster which was protected by litigation privilege. Plaintiffs' counsel did not disclose receipt of the transcript until he used it to confront a defence witness during discovery with an alleged inconsistency between his evidence and the privileged interview transcript. In order to protect the integrity of the legal system, the court determined that there was no alternative but to "isolate" the affected party by removing the plaintiffs' law firm from the record.

In *Autosurvey Inc. v. Prevost*, 2005 CanLII 36255 (ON SC), privileged communications were improperly accessed by the plaintiff and their counsel who then failed to promptly notify the defendants or take other steps to isolate and destroy the privileged communications obtained by their client. As a result, the action was permanently stayed at the pleadings stage.

As a practical matter, however, even if privileged communications are immediately destroyed and receipt thereof is disclosed, it is impossible to erase the contents of privileged communications from the minds of anyone who has read them. Parties must therefore take careful consideration while preparing affidavits of documents and other productions that will be provided to adverse parties. This is particularly difficult in the age of paperless production where vast amounts of material are delivered at literally the click of a button.

In the Alex Jones case, it is not yet clear what was actually contained in the two years' worth of text messages, and whether there were in fact any privileged communications contained therein. Certainly there would be vast amounts of irrelevant but potentially intensely private communications that were inadvertently disclosed to the opposite side. Mr. Jones was required to have disclosed at least the relevant non-privileged communications contained in the phone and failed to do so prior to trial. However, if the phone contains any lawyer-client communications then privilege may have been lost.

Although no objection was made while Mr. Jones' was being cross-examined, Mr. Jones' counsel filed an emergency motion after closing arguments seeking a mistrial on the basis that counsel for the plaintiffs had improperly viewed the contents of the cell phone after being advised of the inadvertent disclosure and asked to return or destroy the files. In response, plaintiffs' counsel argued that privilege had not been asserted by Mr. Jones' counsel over the text messages within ten days of the inadvertent disclosure as required by Texas law. The trial judge refused the request for a mistrial but directed the parties to comply with the court's protective order to identify confidential documents. At the time of writing, it remains to be seen whether this will result in grounds for appeal.

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