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ALERT
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Imagine that one of your employees makes a complaint of sexual harassment against a colleague. You retain an external investigator as a third-party to complete an investigation into the complaint. In fact, you make sure that the investigator is also a lawyer because you want to make sure that the investigation is done properly. Nonetheless, after the investigation, the employee initiates a human rights complaint and the investigator is called to testify as a witness in the hearing. You recognize that evidence relating to the complaint will come out at the human rights hearing. However, you do not understand why the investigator has been called as a witness and are concerned that this may raise concerns with the investigation process. You wonder if there is any way to object on the basis that the investigator's testimony is subject to solicitor-client privilege. After all, you hired a lawyer for a reason, right?

Investigator + Lawyer = Privilege?

Is there any way to guarantee that the testimony of the investigator lawyer and his or her findings are protected by solicitor-client privilege? What preemptive steps can be taken, if any, to shield an investigator-lawyer from having to produce their documents or deliver testimony in court?

Solicitor-client privilege is a well-established legal principle. It applies to communications between a lawyer and their client *for the purpose of legal advice*.

This issue was addressed in a recent Human Rights Tribunal of Ontario decision, *De Francesca v. Centric Investigation Services Inc.*, 2017 HRTO 798 (CanLII). Here, the adjudicator rejected the argument that communications from this investigation were subject to solicitor-client privilege for the following reasons:

Bill 132: One year later

Webcast September 14 12 noon EDT

Bill 132, which amended Ontario's *Occupational Health and Safety Act*, will be a year old on September 8, 2017.

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Investigator + Lawyer = Privilege?

- The employer, Centric Investigation Services, did not provide any evidence to establish that a solicitor-client relationship existed;
- No evidence was presented to show that one of the purposes of the investigation was to provide legal advice;
- The sole piece of documentary evidence provided to the tribunal was a letter from the investigator to the employee, stating that she was "appointed as an independent investigator to conduct an investigation into allegations of sexual harassment". In fact, specifying that she was an "independent investigator" lent further support to the argument that the investigator was not acting as counsel for the employer; and
- Communications from an investigation are not subject to privilege "simply because the investigator is also a lawyer."

Similarly, in *North Bay General Hospital v. Ontario Nurses' Association*, 2011 CanLII 68580 (ON LA), the arbitrator made clear that despite the fact that the investigator was also a lawyer, the investigator was not retained to act as a lawyer, but to investigate findings of fact. The arbitrator saw no reason "to attach solicitor and client privilege to a relationship which is not that of solicitor-client just because one of the parties happens to be a lawyer."

The idea that there needs to be something more to an investigation beyond fact-finding is supported in other cases such as *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11 (CanLII) and *Slansky v. Canada (Attorney General)*, 2013 FCA 1992. An investigator lawyer must also be rendering legal advice to the client as to what should be done with the findings.

Beyond the employer's failure to show that the investigator in *De Francesca* was retained to provide legal advice, the adjudicator in this case noted the lack of any written documentation (such as a retainer agreement) to show the scope of the investigation. There was no mention of a retainer between the employer (client) and the investigator.

A written retainer agreement clearly sets out the terms of engagement with a client to avoid any misunderstanding between

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a lawyer and their client. It can include the following information: scope of services, key steps, manner and frequency of communication, expected time of completion, limits to the representation, fees and disbursements. It is important to note however that written references to privilege cannot guarantee immunity from production, as discussed in a recent RT blog post on maintaining privilege over investigation reports.

When hiring investigator lawyers, consider the following takeaways from the *De Francesca* case:

- Hiring an investigator who is also a lawyer does not automatically mean that communications with the investigator are protected by solicitor-client privilege.
- Be clear on the investigator's mandate and scope of services when they are retained. Is it solely fact-finding, which would not necessarily be covered under solicitor-client privilege? Or does it also include legal advice, such as making recommendations and/or providing the legal implications of these recommendations?
- Ensure that a retainer letter is in place. A retainer letter can provide strong evidence of the purpose of an investigation.
- Does the document establish a solicitor-client relationship? Does the retainer clearly state that legal advice will be provided? Is there reference to solicitor/client privilege?
- If legal advice is being sought, consider specifying in the retainer that the investigator's notes, fact-finding report and legal advice will be protected by solicitor/client privilege.
- Use of the words "third party" or "independent" to describe the investigator may not support the existence of a solicitor-client relationship.

There may be times when it makes sense to try and establish a solicitor-client relationship with an external investigator, and the tips above will help you do this effectively. However, in other cases where this is not what you require, recognize that the process your investigator follows may be open to scrutiny. In such cases, you may wish to take extra precautions to ensure that you can be confident in the work done by the investigator, such as checking references or reviewing in detail the process that the investigator intends to follow. Natalie Jacyk

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