Using `Privilege’ to Keep Incident Investigation Reports Confidential
Investigating accidents is a key part of a safety coordinator’s job. A primary purpose of the investigation is to determine not just what went wrong but why. Some accidents are freak occurrences; but others are the result of breakdowns in the health and safety program. Some of these breakdowns might also constitute violations of the OHS law that could get you prosecuted. For example, an amputation injury might be the direct result of failure to install a required machine guard. Once your investigation ends, you need to report to management, the JHSC and others within the company exactly what you found. After all, people need to know what the problems are so they can make corrections and ensure it doesn’t happen again.

But here’s the problem: When you prepare an internal accident report and disclose all the gory details of what your company did wrong, you expose your company and the individuals within it—including yourself—to risk of liability. There’s a chance that government investigators and prosecutors might get their hands on your report. If they do, they can cite it as evidence in their prosecution against you. As a safety coordinator, you need to be sensitive to this risk and take steps to guard against it. How? By using a legal doctrine known as “privilege” to shield the results of internal accident investigations from investigators, prosecutors and others that might use them against you in a legal proceeding. This story will show you how to do that. There’s also a Model Memo in TOOLS that you can use to ensure that internal documents are covered by the solicitor-client privilege.

Defining Our Terms

The risk of disclosure is not confined to internal accident reports. Many of the other internal records that a safety coordinator generates that might cite deficiencies in the company’s safety program, such as safety audits, inspections and risk assessments, could also be turned into evidence in your own prosecution. Although this story deals with internal accident reports, the same principles apply to these other records.

What Is Privilege?

The concept of privilege is designed to protect the confidentiality of certain communications and relationships that society considers important. For example, clients need to be able to speak freely to their lawyers when seeking legal advice. The so called solicitor-client privilege was created to protect the confidentiality of these communications.

This privilege covers workplace health and safety situations. Explanation: When accidents occur, OHS officials conduct workplace investigations after critical or serious accidents occur. In addition to looking at the accident scene, investigators can interview workers, company officials and others and demand to see records relating to the accident. This may include the results of internal accident investigations conducted by the company. But that authority to request internal reports is subject to the rights of privilege. Stated simply, you don’t have to disclose documents to an OHS investigator (or other government officials) if you can prove that those documents are “privileged.”

Thus, privilege can also be used to shield accident reports and other internal safety records. But there’s a catch: Privilege is like fine china: It’s hard to make and easy to break. Thus, it’s important for safety coordinators to understand how to establish and preserve privilege so they can protect their companies from liability.

There are 2 kinds of privileges you can use to shield accident reports. Let’s look at each one.
1. The Contemplated Litigation Privilege

The first privilege is called the “contemplated litigation privilege.” “When a company (or individual) faces a reasonable risk of being prosecuted, the would-be defendant needs to assess its risks and determine its strategy,” notes OHS lawyer Cheryl Edwards. In the context of a workplace accident, this might involve making a candid assessment of all of the things the company did wrong. “For example, the company will want to gather detailed information to assess its prospects of raising a due diligence defence. It may also amass materials that wouldn’t help its defence in court,” Edwards explains.

The “contemplated litigation” privilege enables the company to make such an assessment without having to disclose the results to government inspectors or prosecutors. “Legally, a company would be under no obligation to share that information if it was gathered in contemplation of litigation with government OHS officials,” says Edwards.

An internal accident report can be covered by the privilege if it’s prepared in anticipation of litigation, including an OHS prosecution. But not all accident reports will qualify. For the privilege to apply:

- The prospect of litigation must be the primary reason for creating the document; and
- At the time the report was created, a lawsuit must be actually underway or “reasonably contemplated.”

Practical pointer: If you think there’s a good chance that the accident will lead to an OHS prosecution (or a workers’ compensation proceeding), you can prepare the accident report as part of your litigation preparation so that the privilege applies. When is it “reasonable” to anticipate an OHS prosecution? Unfortunately, there’s no bright-line answer. But Edwards suggests certain red flags:

- The accident involves a fatality and/or serious injury;
- You see OHS investigators taking photos, statements and gathering other evidence at your workplace; and
- The OHS agency issues orders in relation to the accident.

2. The Solicitor-Client Privilege

The second kind of privilege you can use to shield accident reports is the solicitor-client (or as it’s sometimes called, “legal advice”) privilege described briefly above. Unlike the “contemplation of litigation” privilege, “solicitor-client” privilege applies only if you get your lawyer involved. This is something you might do anyway if you’re expecting to be prosecuted. So, in a sense, the two privileges merge.

Establishing the Solicitor-Client Privilege

Establishing the solicitor-client privilege is trickier than many think. “There’s a popular misconception among safety professionals—and even some lawyers who are not OHS experts—that all you have to do is give your lawyer a copy of the document and it will be privileged,” warns Ontario OHS consultant Yvonne O’Reilly. But just sharing the document with a lawyer or getting the lawyer involved in what is essentially a routine accident investigation doesn’t cut it. The document must be part and parcel of the confidential communication between lawyer and client for the purpose of obtaining legal advice. More precisely:

- The document must be part of a communication between you and your lawyer;
The communication must be made in confidence; and

The purpose of the communication must be to seek legal advice—even if the communication isn’t for the purpose of dealing with a specific lawsuit.

Example: An Ontario court ruled that a company’s internal environmental audit was covered by the solicitor-client privilege because it was prepared for a lawyer to review for the purpose of seeking legal advice [McCarthy Tetrault v. Ontario Ministry of the Environment]. However, the outcome would have been different if the lawyer had simply accompanied the manager on a routine internal audit. In that case, the document would not have been privileged since it wasn’t prepared for the purpose of getting a lawyer’s legal advice. In other words, just having a lawyer on hand doesn’t trigger the privilege; the document must be part and parcel of the counseling process.

The simplest way to meet the conditions of the privilege is to specifically ask the lawyer to prepare or review the accident report for the purpose of providing legal advice. Ideally, this request for advice should be in writing. There are a couple of curveballs to watch out for:

If the Lawyer Is In-House Counsel: The lawyer from whom you seek advice might be with a third party firm or an in-house counsel who works for your company. Getting the privilege to apply in the latter case might be tricky, especially if counsel isn’t just your company’s lawyer but also one of its corporate officers. For the privilege to apply, you must make it clear that you’re asking counsel to don her legal “cap” and provide advice in her capacity as your lawyer.

If You Want an Outside Consultant to Do the Accident Report: You might also ask an outside consulting or engineering firm to investigate the accident or some aspect of it, such as the adequacy of your machine guarding program. Even though the consultant isn’t a lawyer and the request for a report isn’t a request for legal advice, you can still position the report so that it’s protected by the solicitor-client privilege. How? Answer: By having your lawyer order the report and specifying that it’s part of the legal consultation. Just make sure the consultant is instructed to keep the report confidential and submit it directly to the lawyer and that when it’s distributed within the company it’s not widely circulated but kept in a file marked “privilege” (for reasons we’ll explain below).

How to Keep the Document Privileged

The fact that an accident report is prepared in anticipation of litigation and/or in response to a confidential request for legal advice makes it a privileged document. But that’s only half the battle. Remember that privilege, like fine china, breaks easily. What makes privilege so fragile is that it can be voluntarily “waived” or given up by the person who holds the privilege.

In some cases, you might want to do this deliberately. For example, Edwards says that in certain “carefully considered circumstances” she’s urged clients to waive privileged accident reports that show that the company’s safety efforts amounted to due diligence. “This can result in the avoidance of charges,” Edwards explains.

But what you don’t want to do is waive the privilege accidentally. Unfortunately, this is easy to do. The most common way is to show the privileged document to a third party or post it in the workplace for all to see. Once the confidentiality is compromised, the privilege is gone and the document is fair game for disclosure. So preserving privilege is all about taking steps to limit disclosure. Here are five things to do:
Label All Documents as Privileged: Label all of the documents “Privileged and Confidential: Prepared in Contemplation of Litigation” and/or “Privileged and Confidential: Solicitor-Client Communication.” Although it’s not a guarantee, such a label limits the risk of inadvertent disclosure.

POINTER: Stamping a document “PRIVILEGED” doesn’t make it so. A document is protected only if it meets the prerequisites of the anticipated litigation or solicitor-client privilege. The stamp, in other words, has no magic. Its function is to let people know a document is privileged so they handle it carefully and don’t inadvertently disclose it to others.

Keep Privileged Documents Segregated: Keep hard copies and electronic documents that you want to keep privileged separate from others. Consider not just separate files but separate rooms if the accident and investigation are big enough, suggests Edwards.

Keep Copies to a Minimum: Limit the number of copies of privileged documents to the minimum necessary. The more copies floating around, the less control you have over where they end up. Make sure that the people to whom you give copies return or destroy the document after reviewing it. Since electronic documents are harder to destroy, try to limit distribution to paper copies.

Don’t Disclose Document to JHSC: OHS laws of some provinces may require employers to disclose the results of internal accident reports to the Joint Health and Safety Committee or representative as a “report concerning safety.” This is fine for accident reports you don’t want to keep privileged. But disclosing a privileged report waives its privileged status.

What to Do: “While there’s no clear on this matter, we generally recommend that a company not disclose privileged reports to the JHSC as a ‘report concerning safety,’” advises Edwards. “The right of privilege is so established and important,” she explains, “that it most likely trumps the disclosure requirements contained in the OHS statutes.” You might, she adds, consider sharing some of the findings of the report verbally and on a limited basis to ensure that hazard information is communicated. “Just be aware that this is risky and that a creative prosecutor might try to argue that even this limited disclosure to JHSC members constitutes waiver of the privilege.”

Limit Disclosure to Need-to-Know: In limited cases, it is possible to disclose privileged information to third parties without waiving the privilege. For example, a lawyer can show a privileged accident report to an outside auditor or expert if the lawyer needs the report to give legal advice to the company. The communication between lawyer and consultant thus becomes an extension of the solicitor-client privilege. The third party shouldn’t necessarily get a copy of the entire document—only the portions needed to prepare the assessment. There should also be a written agreement:

- Stating the purposes of the disclosure;
- Specifying that the third person can use the information only for those purposes;
- Banning the third person from disclosing the information to others; and
- Requiring the third person to destroy or return the information after the assessment.

Conclusion

As a safety coordinator, you have to walk the tightrope. One part of your job is to assess risks and let the company know exactly what it’s doing wrong; the other part of your job is
to protect the company and the individuals within it against liability. These tasks sound contradictory. And to the extent that your accident reports become prosecution evidence, they are.

The key then is to keep prosecutors and OHS investigators from getting access to these materials. You must be able to shield the sensitive documents you create and that flow through your office. Of course, if you withhold a requested document from an investigator, you could be guilty of obstructing an investigation. But this is not the case if the document is privileged. Keeping accident reports and other internal records privileged is therefore crucial. But it’s not simple. Hopefully, this story will help you master the intricacies of privilege and thereby maximize your effectiveness as a safety coordinator.

**When Can You Use ‘Privilege’ to Avoid Disclosing Investigatory Reports?**

When a safety incident occurs, you'll investigate it and memorialize your findings and recommendations in a report. OHS, environmental and other government officials looking into the incident may want to see your internal report to determine whether to charge your company or, if they’ve already decided to lay charges, for evidence to use in their prosecution. But if the report is “privileged,” you won’t have to disclose it—even if an official asks for it. An investigatory report can be protected from disclosure by either the solicitor-client or litigation privilege. Here are two cases in which courts had to decide whether a report was privileged. (For a more detailed discussion on incident reports and privilege, see Insider, Aug. 2006, p. 1.)

**Report is Privileged**

**FACTS**

Ontario Ministry of Labour (MOL) investigators got a search warrant and seized a report on a safety incident that occurred at a utility company. The company claimed the report was protected by solicitor-client privilege and that the MOL couldn’t use it at all against the company.

**DECISION**

The Ontario Court of Justice ruled that the report was privileged and wouldn’t allow the MOL to use it against the company.

**EXPLANATION**

The company’s assistant general counsel asked workers to prepare a report on the incident so he could provide legal advice to his client—that is, the company. The report indicated that it had been prepared for the assistant general counsel for the purpose of providing legal advice. And the evidence supported the conclusion that the report had, in fact, been prepared for that purpose. The report was also marked, “Privileged and Confidential.”

*Hydro-One Network Services Inc. v. Ontario (MOL), [2002] O.J. No. 4370, Nov. 8, 2002*

**Report isn’t Privileged**

**FACTS**

An elderly customer slipped and fell in a grocery store, suffering minor injuries to his hand, knee and foot. Later that day, a store executive told a worker to prepare a report on the incident as per company policy. That report was then given to the store’s claims administrator. Several weeks later, the customer sued the store for damages and asked the court to order it to give him the incident report. The store refused, arguing that the report was protected by litigation privilege.

**DECISION**
The Yukon Territory Supreme Court ruled that the report wasn’t privileged and ordered the store to disclose it.

EXPLANATION

To be protected by litigation privilege, litigation must be a reasonable prospect when the report’s created and use in litigation must be the dominant purpose for its creation. In this case, the report was completed on the day of the incident as a matter of company policy and not because of the incident’s facts or a specific belief that a lawsuit was likely. In fact, the customer didn’t file his lawsuit until weeks later. And although the store claimed that the incident report was predominantly created for use in litigation, the court concluded that its real primary purpose was to determine the cause of the incident and that any expected use in defending the store in a legal action was secondary.


ON Court: Government Use of Privileged Incident Report Requires Dismissal of Charges

Investigating safety incidents is a key part of a safety coordinator’s job. Once your investigation ends, you must report your findings to management and others within the company so they can take appropriate steps to ensure that a similar incident doesn’t happen in the future. However, your internal incident report may reveal things that your company did wrong, such as breakdowns in the OHS program or deficiencies in worker training, which could be safety violations. The last thing you want is for government investigators and prosecutors to get their hands on your report and use it as evidence in a prosecution against the company. By using a legal doctrine known as “privilege,” you may be able to shield internal incident investigation reports from investigators and prosecutors. A recent Ontario case not only confirms that incident investigation reports can be protected by privilege but also notes that if the prosecution should happen to get a hold of a privileged report, it won’t be able to use the report.

THE CASE

What Happened: A worker was seriously injured in a fall. The company consulted attorneys, who advised the company to form a team to investigate the incident and produce a report on it to be used by the attorneys to give the company legal advice. The company formed a team consisting of members of management and union workers. The team investigated the incident, interviewed witnesses and drafted a report of its findings marked “confidential.” All team members reviewed the draft and then returned it, except for one worker. A government inspector asked for a copy of the report but was told it was privileged. The MOL charged the company with several safety violations. The inspector met with the worker member of the investigation team, who gave him the draft investigation report he still had. The company learned that the prosecution had the investigation report and asked the court to dismiss the charges against it, arguing that the prosecution’s possession and use of this privileged report had violated its right to a fair trial.

What the Court Decided: The Ontario Court of Appeal dismissed the charges.

How the Court Justified the Decision: The court found that the report was privileged and contained information that could be used to the “disadvantage and prejudice” of the company. The inspector knew that the company considered the report privileged and so he wasn’t justified in taking the report when offered it by the worker. The issue: Did the prosecution’s possession of this privileged report prejudice the company? The court
concluded that when the government comes into possession of a privileged defence document, prejudice to the defence is presumed but may be rebutted.

In this case, the government’s possession of the privileged report prejudiced the company. It would be difficult, if not impossible, for a witness who read the report to erase its contents from his memory. Likewise, it would be difficult, if not impossible, for the court to determine the effect the report may have had on a witness’ testimony or the prosecution’s strategy, explained the court. The prosecution didn’t take any steps to limit access to the report and planned to use the report at trial. In fact, it didn’t provide any evidence that it hadn’t used the report in preparing the case for trial or evidence to rebut the presumption of prejudice to the company. As a result, the company’s right to a fair trial was violated. Thus, the appropriate remedy was dismissal of the charges against the company, concluded the court [(R. v. Bruce Power Inc., [2009] O.J. No. 3016, July 17, 2009)].

ANALYSIS

Let’s be clear about one thing: When the prosecution gets possession of a privileged document, the remedy will not always be the dismissal of charges against the company. Dismissal is an extreme remedy and only used as a last resort, noted the court in Bruce Power. But it’s equally clear that if the document is, in fact, privileged, rest assured that the court will likely—at a minimum—bar the prosecution from using that document against the company. Lesson: It’s in your company’s best interests to ensure that sensitive documents, such as those related to the investigation of a safety incident, are protected by privilege whenever possible.

Want to learn more about incident investigations and using privilege to protect related documents? Attend the OHS Compliance Summit 2009 on Oct. 14 and 15 and listen to Cheryl Edwards, Partner, Heenan & Blakie, and former Crown Prosecutor, tell you how to:

- Appropriately report an incident to authorities without incriminating yourself and your company;
- Use “privilege” to avoid having to disclose sensitive safety documents to government officials; and
- Respond to OHS officials requests for documents, interviews and other materials during inspections and investigations.