TECHNOLOGY, THIRD PARTIES, AND MAINTAINING PRIVILEGE

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I. Introduction

In legal proceedings, communication between a lawyer and client constitutes a cornerstone of trust and confidentiality. This is in large part because of broad protections afforded under the umbrella of solicitor-client privilege. The privilege, and the parallel litigation privilege, ensures that clients may freely seek legal advice without fearing disclosure of such conversations.

Generally, a privilege is an evidentiary rule that arises during litigation proceedings allowing a litigant to resist the introduction of otherwise admissible evidence.[1] But solicitor-client privilege is considerably broader and encompasses aspects of a lawyer's job that go beyond mere advice and counsel.[2] The same holds true in

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1. Janet Fuhrer, "Solicitor-Client Privilege: The State of the Law", 22nd East Region Solicitors Conference, May 2016, at p. 1.
2. *See e.g.*, *Solosky v. R.* (1979), [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 50

Canada for litigation privilege, which protects a lawyer's work from disclosure during litigation. Both privileges extend to a lawyer's work with third parties.

As legal landscapes evolve and business transactions grow increasingly dependent on technological advances, there exist changes to how third-party communications intersect with these privileges. In today's 24-hour news cycle, Tik Tok, X (formerly Twitter), and Snapchat now disseminate headlines regarding sensitive issues germane to a client's legal position. There exists a unique need for counsel and their clients to retain third parties to advise on how to best respond to these crises. The same goes for when a dispute involves new realms of technology, such as data breaches, software copyrights, and Artificial Intelligence (A.I.) Solicitor-client/litigation privilege and third-party communications produce issues that challenge traditional understandings of confidentiality in legal contexts.

This article considers the nuances of solicitor-client and litigation privileges as they extend to counsel's, or the client's, communications with third parties.[3] By examining relevant case law, ethical considerations, practical scenarios, and comparative law in other jurisdictions, we aim to unravel the complexities surrounding this aspect of the legal practice. The article also forecasts how the privilege may evolve as artificial intelligence (A.I.) becomes a pillar, rather than peripheral part, of the legal practice. Understanding such dynamics is essential for legal professionals who must navigate and balance duties of confidentiality with obligations to provide expedient, cost-effective, and effective advocacy in a technologically changing world.

C.C.C. (2d) 495 (S.C.C.) at 836 [S.C.R.] ("Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits.").

3. Canadian courts have developed their own strand of jurisprudence for communications, which based on the context of the communication, can be understood as both privileged and non-privileged. *See e.g., Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, 12 Admin. L.R. (4th) 171 (S.C.C.) at para. 20; *Bray v. York (Municipality)*, 2023 ONSC 837, 32 C.L.R. (5th) 212, 2023 A.C.W.S. 1219 (Ont. S.C.J.) at para. 14. This line of jurisprudence, while fascinating in its own right, goes beyond the scope of this article.

II. The Privilege Defined

The solicitor client privilege can be traced back to the English common law during the reign of Elizabeth I. It grew out of respect for a lawyer's "oath and honour" with a duty "to guard closely the secrets of his client."[4] Initially only providing an exemption to testimonial compulsion, the privilege expanded to include "communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not."[5] Now, "the privilege has a constitutional dimension . . . . [I]t has evolved into a principle of fundamental justice and a civil right of fundamental importance in Canadian law."[6]

The party asserting privilege during litigation must establish the evidentiary basis for the claim by ensuring: (1) the communication is between lawyer and client; (2) this communication entailed seeking or giving legal advice; and (3) the parties intended for confidentiality to cloak the communication.[7]

While broad, the solicitor-client privilege has limits. The privilege does not cloak facts, even if they are collected or compiled by a lawyer.[8] Consider *Lifelabs*, a recent case in which cyber attackers breached the security systems of LifeLabs LP, a company providing lab testing across Canada.[9] After the breach, LifeLabs hired cybersecurity and forensic consultants to investigate, remediate, and, even negotiate with the attackers who had obtained the personal health data of millions.[10] As required by regulations, LifeLabs notified pertinent privacy commissioners of the attack. Eventually, the Information and Privacy Commissioner of Ontario and the British Columbia Information and Privacy Commissioner (the "Commissioners") requested the consultants' reports, over which LifeLabs had asserted solicitor-client and litigation privilege.[11] The Commissioners disagreed with the privilege

4. *Solosky v. R.* (1979), [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 50 C.C.C. (2d) 495 (S.C.C.) at 834 [S.C.R.].
5. *Ibid.*
6. *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 125, 2021 CarswellOnt 4244 (Ont. S.C.J. [Commercial List]) at 217, leave to appeal refused 2021 ONSC 2061, 2021 CarswellOnt 4049 (Ont. Div. Ct.).
7. *Ibid* at 220 (citing *Solosky v. R.* (1979), [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 50 C.C.C. (2d) 495 (S.C.C.))
8. *LifeLabs LP v. Information and Privacy Commr. (Ontario)*, 2024 ONSC 2194, 2024 A.C.W.S. 2227, 2024 CarswellOnt 6192 (Ont. Div. Ct.) at paras. 80-84.
9. *Ibid* at paras 1-4.
10. *Ibid.*

assertion, concluding that "LifeLabs' claims of privilege over facts available from other non-privileged sources and contained in" certain disputed documents "were not substantiated."[12] On appeal, the Ontario Divisional Court agreed with the Commissioners, noting that "[f]acts that have an independent existence outside of solicitor-client privileged communications are not privileged."[13] Similarly, the Divisional Court held that the solicitor-client privilege does not encompass facts for which a client has a statutory obligation to investigate and provide to a Canadian regulator.[14]

In contrast, the dimensions of the litigation privilege go beyond communications of client and solicitor (and any respective agents), albeit its protections are lifted when litigation ends. The privilege "encompasses communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation."[15]

As Justice Perell in *Simons* put it, "[l]itigation privilege is both broader and narrower than lawyer and client privilege. Litigation privilege is broader insofar as it covers some communications not covered by lawyer and client privilege, and it is narrower insofar as it is temporally connected to the litigation and may not survive its termination."[16] While the solicitor-client privilege covers only confidential communications between client and lawyer, the litigation privilege goes beyond these limits with "communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature."[17]

When cloaked by the solicitor-client privilege, communications remain confidential beyond the span of the lawyer-client relationship regardless of whether litigation is on-going or anticipated. Litigation privilege's lifespan only applies in the context of on-going litigation.[18]

11. *Ibid* at paras. 4-7.
12. *Ibid* at para 64.
13. *Ibid* at para 80.
14. *Ibid* at para 80.
15. *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203, 45 O.R. (3d) 321 (Ont. C.A.).
16. *Simons v. Canada (Attorney General)*, 2018 ONSC 3741, 294 A.C.W.S. (3d) 319, 2018 CarswellOnt 9621 (Ont. S.C.J.) at para. 40.
17. *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203, 45 O.R. (3d) 321 (Ont. C.A.).
18. In Section VI, this article offers a comparative analysis of how American jurisprudence considers these privileges in conjunction with the use of A.I. Because of that, it is worth noting that the American version of litigation privilege–the work product privilege–is generally seen as existing during and after litigation. *See e.g.*, Fed. R. Civ. Proc. 26(b)(3)(A). In many American

Finally, the rationale for each privilege differs. Privileged solicitor-client communications allow for "full and ready" access to candid legal advice.[19] Litigation privilege stems from the needs of our common law litigation process with "a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate."[20] As Justice Doherty explained in *Chrusz*: "litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)."

These privileges have similarities, too. Notably both cover counsel's communications with, and the work product of, third parties. New practices and technologies, however, test the existing boundaries around which the privileges remain intact when third parties are involved in the client-solicitor relationship.

III. The Privilege with Third Parties

The term "third parties" is an umbrella phrase often used for expert witnesses. It also includes specialized technology such as A.I., crises management teams, and public relations firms, which help lawyers craft and manage cases in a world with a 24-hour news cycle and social media. To maintain the privileges, both of which can be waived upon disclosure to certain third parties,[21] practitioners must be mindful of how courts are modifying the boundaries of privilege pertinent to third parties when applying it to new technologies and consultant roles.

a. The Privileges and Extension to Third Parties

Communications with third parties are considered privileged when they are essential to "the effective operation of the legal system."[22] As detailed in *Chrusz*, a court generally considers

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jurisdictions, however, the work product privilege may be pierced based on the challenging party meeting of several factors. *See e.g.*, Fed. R. Civ Proc. 26(b)(3); *Hickman v. Taylor*, 91 L.Ed. 451, 67 S.Ct. 385, 329 U.S. 495 (1947).

19. *Ibid.*
20. *Ibid.*
21. *See generally SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.* (2003), 46 C.C.L.I. (3d) 281, 24 C.L.R. (3d) 186, 31 C.P.C. (5th) 371 (Ont. S.C.J.) at para. 54, additional reasons (2003), 24 C.L.R. (3d) 216, 120 A.C.W.S. (3d) 572, 2003 CarswellOnt 508 (Ont. S.C.J.).
22. *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203, 45 O.R. (3d) 321 (Ont. C.A.).

application of the litigation or solicitor-client privilege for communications with third parties under two scenarios:

> (1) A third party serves as a line of communication between client and solicitor. The third party transmits information from the client to the lawyer or vice versa. It also extends to communications and circumstances where a third party employs an expert in assembling information provided by the client or in explaining that information to the solicitor.
>
> (2) A client authorizes a third party to direct or lead the solicitor for the client, or if the client authorizes the third party to seek legal advice from the solicitor for client. Then, that third party has a paramount function and "the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer."[23]

Case law demonstrates that, at a minimum, the role of a third party will determine whether their communications or work product is subject to solicitor-client, litigation, or common interest privilege. A case broadly discussing this instructive principle is *Quadrangle Group LLC, v. AG Canada*,[24] in which the Ontario Superior Court of Justice considered when, and whether, the solicitor-client privilege extended to communications between counsel and a third party. When analyzing the issue, Justice Osborne held that communications in which a party claims solicitor-client privilege must always be viewed "in light of the context surrounding the solicitor-client relationship and the relationship itself."[25] Thus, before claiming the privilege, a practitioner must contemplate the nature of the relationship; the subject matter of advice shared with, or obtained from, the expert; and, the circumstances surrounding any documents being shared with the third party.

A more granular consideration occurred in *Dente v. Delta Plus Group*.[26] In that case, the Ontario Superior Court of Justice

23. *Ibid.*
24. 2023 ONSC 7125, (*sub nom.* Quadrangle Group LLC v. Canada (Attorney General)) 170 O.R. (3d) 700, 2023 A.C.W.S. 6268 (Ont. S.C.J. [Commercial List]).
25. *Quadrangle v. AG Canada*, 2023 ONSC 7125, (*sub nom.* Quadrangle Group LLC v. Canada (Attorney General)) 170 O.R. (3d) 700, 2023 A.C.W.S. 6268 (Ont. S.C.J. [Commercial List]) at para. 57 (citing to *Canada (Information Commissioner) v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 104, 360 D.L.R. (4th) 176, 444 N.R. 268 (F.C.A.) at paras. 25-31).
26. 2023 ONSC 3376, 2023 A.C.W.S. 3610, 2023 CarswellOnt 9293 (Ont. S.C.J.), leave to appeal refused 2023 ONSC 5086, 2023 CarswellOnt 14290 (Ont. Div. Ct.).

examined whether communications between counsel and client, which were later shared to third party consultant KPMG, remained protected by privilege.[27] To reach a conclusion, Justice Braid applied a multi-factor test as initially detailed in *SNC-Lavalin Engineers & Constructors Inc*.[28]

These components, detailed below, hinge on a court's consideration of the relationship's context, the continued apparent desire for confidentiality, and whether the contested communication appeared to advance the client's interest.[29]

Six Factors Courts Consider When Determining Waiver of Solicitor-Client Privilege with Communications to Third Parties[30]

- Did the client intend the communication from the solicitor to remain confidential when copied to a third party or, alternatively, did the client intend to waive the privilege?
- Did the client intend that the third party would maintain the document as confidential in his hands?
- Was the presence of the third party, or the copying of the communication to the third party, required to advance the client's interests?
- Does the person to whom the communication is copied have a common interest with the client? If so, what is the nature of the relationship?
- Do the interests of fairness weigh towards waiver or non-waiver?
- Has the trier of fact accounted for the onus placed on the person/party asserting the privilege and the burden of proof placed on the party claiming waiver of solicitor-client privilege?

When Justice Braid evaluated the communications at issue with third-party KPMG, the court held that the solicitor-client privilege

27. *Dente et al. v. Delta Plus Group et al*., 2023 ONSC 3376, 2023 A.C.W.S. 3610, 2023 CarswellOnt 9293 (Ont. S.C.J.) at paras. 91-94, leave to appeal refused 2023 ONSC 5086, 2023 CarswellOnt 14290 (Ont. Div. Ct.).
28. (2003), 46 C.C.L.I. (3d) 281, 24 C.L.R. (3d) 186, 31 C.P.C. (5th) 371 (Ont. S.C.J.) at para. 54, additional reasons (2003), 24 C.L.R. (3d) 216, 120 A.C.W.S. (3d) 572, 2003 CarswellOnt 508 (Ont. S.C.J.).
29. *Dente et al. v. Delta Plus Group et al*., 2023 ONSC 3376, 2023 A.C.W.S. 3610, 2023 CarswellOnt 9293 (Ont. S.C.J.) at para. 94, leave to appeal refused 2023 ONSC 5086, 2023 CarswellOnt 14290 (Ont. Div. Ct.).
30. Ibid, at para 93.

had covered the correspondence between counsel, client, and KPMG. This was because the client "clearly intended that the communications" remain confidential and "these communications with KPMG were intended to advance the [Plaintiffs'] interest."[31] The *Dente* court, however, concluded that calendar invitations with KPMG–communications merely containing facts–were not privileged. This conclusion is the same as what the *LifeLabs* court concluded in 2023: mere facts are not privileged under the solicitor-client privilege regardless of whether the communication involves a third party.

Several decisions mirror *Dente's* reasoning, adopting a flexible and fact-specific approach when evaluating whether solicitor-client or litigation privilege applies to communications with solicitors, or clients, and third parties. For example, Justice Glustein in *Wintercorn v. Global Learning Group Inc.*,[32] explained: "Courts have ... extended solicitor-client privilege to third parties who are part of a team working hand-in-hand with counsel as part of counsel's mandate to provide legal advice".[33] In *Barrick Gold Corporation v. Goldcorp Inc.*,[34] Justice Campbell held that limitations on the privilege's extension to third parties cease to exist when the party's function is central "to the existence or operation of the client-solicitor relationship," and in that case, the privilege should cover any communications which are in furtherance of that function, and which [otherwise] meet the criteria for client-solicitor privilege." Justice Campbell also noted that,

> [t]he nature of the interrelationship and of the dealings between [the client, the consultant and the lawyer] are a practical reality in major commercial projects where teams of individuals with focused expertise are assembled. All functions are not performed under a single roof, and the solicitor, though retained by a single client, may be required to give advice to different members of the team who work for the client.[35]

Dente, *Wintercorn*, and *Barrick Gold* demonstrate that when counsel seeks to extend the solicitor-client or litigation privilege to

31. *Ibid.* at para 94.
32. 2022 ONSC 4576, 2022 A.C.W.S. 5972, 2022 CarswellOnt 11237 (Ont. S.C.J.), leave to appeal refused 2023 ONSC 199, 2023 CarswellOnt 312 (Ont. Div. Ct.).
33. *Ibid.* at para 150.
34. 2011 ONSC 1325, 207 A.C.W.S. (3d) 49, 2011 CarswellOnt 7453 (Ont. S.C.J. [Commercial List]).
35. *Ibid.* at para 19 (quoting *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88, 102 L.C.R. 162, 197 A.C.W.S. (3d) 369 (B.C. S.C.) at para. 64).

communications with third parties, these entities must be working in tandem with counsel to advance the client's legal strategy. Third parties cannot merely be performing a function which a lawyer is otherwise too busy to perform.

b. The Privileges and Expert Witnesses

Litigators are accustomed to considering communications with third parties within the context of experts retained to opine on a host of specialized areas, such as damage calculations or medical conditions. Some courts have delineated how different types of experts are treated at, or before, trial. This in turn impacts the degree to which the solicitor-client or litigation privileges are extended to such experts.

One example is found in *Westerhoff v. Gee (Estate)*,[36] where the Court of Appeal for Ontario differentiated "litigation experts" from "participant experts" and "non-party experts" when considering the scope of rule 53.03 of the *Ontario Rules of Civil Procedure*.[37] Rule 53.03 establishes requirements for a party's introduction of expert evidence at trial.

Westerhoff is helpful for practitioners who seek to understand the extent to which solicitor-client or litigation privilege extends to communications with consultants, which may fall into one of the first two expert classifications. While *Westerhoff* involved a consideration of Ontario's civil procedure rules, other provincial courts have relied upon its holding,[38] and the rule at issue mirrors those used in other jurisdictions.[39] Thus, *Westerhoff's* holding serves as an example of the prism through which courts will consider a party's interactions with a consultant and whether communications with that consultant are privileged.

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36. 2015 ONCA 206, 384 D.L.R. (4th) 343, 47 C.C.L.I. (5th) 246 (Ont. C.A.), additional reasons 2015 ONCA 456, 2015 CarswellOnt 9294 (Ont. C.A.), leave to appeal refused *Baker v. McCallum*, 2015 CarswellOnt 16499, 2015 CarswellOnt 16500 (S.C.C.), leave to appeal refused 2015 CarswellOnt 16501, 2015 CarswellOnt 16502 (S.C.C.).
37. Rules of Civil Procedure R.R.O. 1990, Reg. 194, rule 53.03.
38. *Wynward Insurance Group v. Smith Building and Development Ltd.*, 2023 SKCA 57, 483 D.L.R. (4th) 51, 33 C.C.L.I. (6th) 189 (Sask. C.A.); *M.M. v. B.M.*, 2023 MBKB 9, 2023 A.C.W.S. 4688, 2023 CarswellMan 8 (Man. K.B.).
39. *See e.g.*, Supreme Court Civil Rules, R. R. 11-6; Nova Scotia Rules of Civil Procedure, Rule 55.

1) Litigation Expert

Litigation experts hired by a party are intended to serve as witnesses offering testimony as experts during the trial. They must adhere to disclosure rules, which include submitting an expert report or meeting requirements applicable to testifying experts under civil rules of procedure such as Rule 53.03(2.1) of the *Ontario Rules of Civil Procedure*.

A consultant engaged specifically to provide an expert opinion would indisputably fall into this category, as they commit to assisting the court with written submissions. Consequently, nearly all materials the consultant relied upon in preparing an expert report would not be shielded by litigation privilege due to various exceptions outlined in Rule 53.03(2.1). The analysis performed under cases such as *Dente* are inapplicable for these witnesses as their objective is to aid the fact finder's understanding of complicated information or to offer an opinion that reaches a conclusion pivotal to a case's outcome.

2) Participant Expert

Participant experts constitute witnesses offering testimony based on their observations or involvement in the underlying events.[40] A consultant who served one of the parties involved in litigation during relevant periods (instead of being hired specifically in response to the litigation's commencement) fall into this category. Depending on the nature of the evidence provided, the communication may or may not be protected by privilege.

For example, if communications with counsel influenced a participant witness' observations or involvement, such communications may be covered by solicitor-client privilege. Alternatively, when a party and a consultant share a common interest in a transaction, and during the transaction or a series of events, the consultant becomes aware of or participates in communications between the party and their counsel. In this case, such communications would be covered by common-interest privilege.

40. *Westerhof v. Gee Estate*, 2015 ONCA 206, 384 D.L.R. (4th) 343, 47 C.C.L.I. (5th) 246 (Ont. C.A.) at paras. 60-63, additional reasons 2015 ONCA 456, 2015 CarswellOnt 9294 (Ont. C.A.), leave to appeal refused *Baker v. McCallum*, 2015 CarswellOnt 16499, 2015 CarswellOnt 16500 (S.C.C.), leave to appeal refused 2015 CarswellOnt 16501, 2015 CarswellOnt 16502 (S.C.C.).

c. Privilege Outside the Expert Realm

As any litigator knows, numerous third parties are relied upon for investigation, information, advice, or insight into complicated realms accompanying high-stakes litigation, such as crises management or public relations consultants. Such parties do not fall within the definition of "expert" (at least as defined by civil procedural rules). Case law shows that the solicitor-client privilege extends to these individuals (or companies).[41] The extent to which the privileges exist with such third parties is changing due to new fluid technology. We discuss these transformations below.

IV. The Privilege, New Practices, and Consultants

Whatever realm of law a practitioner litigates in, one thing is certain, messaging about your case is now a more public and constant requirement. It requires a 24-hour, 7-day a week vigilance thanks to cable news stations, X, Tik Tok, and a host of legal news publications. Consider highly publicized trials where reporters–Wi-Fi permitting–provide live dispatches from the courtroom for constant on-line feeds. Or social media posts providing adults with news and information due to algorithms that determine one's news preference. Evolving technology means that if your case draws public attention you need to understand how to quickly manage and disseminate a message. But in talking about your case–whether it is you as a lawyer or as a third party–are you endangering the solicitor-client or litigation privilege? What about if your client does so? Case law on this is evolving.

Similarly, A.I. use is transforming legal practices. This computer science now plays a major role in discovery, trials, and investigations, acting as an extension of a litigator seeking third-party assistance. Whether predicting document coding for discovery, drafting agreements, analyzing data, or researching case law, A.I. systems are integral to modern legal processes. The privilege comes into play with this technology, too, albeit this area of the law is in its infancy and less developed than case law considering the intersection of the privilege and lawyers' use of public relations or media consultants.

41. *Simons v. Canada (Attorney General)*, 2018 ONSC 3741, 294 A.C.W.S. (3d) 319, 2018 CarswellOnt 9621 (Ont. S.C.J.) at para. 39. ("A significant feature of the litigation privilege is that it will cover communications between a lawyer and a consultant, investigator, or expert hired to provide information, advice or evidence for the litigation.")

We examine how courts have evaluated the privilege in realms where technology is shifting, and new issues arise daily because of the law's interface with the internet.

V. Crises Management and Public Relations Agents

In today's high-stakes legal environment, lawyers increasingly turn to public relations advisors or crisis management firms to navigate the complex juncture of a client's case, the law, and the public's perception. Such specialized professionals offer support in managing the media narrative, crafting a strategic communication plan, or mitigating reputational damage during high-profile cases or crises. By leveraging the expertise of these third parties, lawyers can communicate a client's message across various mediums, reduce the risk of misinformation, and maintain a positive public image. Retaining a PR firm or media consultant also frees up time dedicated to crisis management, so lawyers can focus on litigation proceedings. This type of collaboration helps preserve the integrity of the legal process (lawyers can practice law, not draft news releases), aids in managing client expectations, and enhance overall case strategy. But there are limits to which this collaboration can be used while maintaining legal privileges.

a. Canadian Legal Considerations of Crisis Counsellors and Privilege

Canadian jurisprudence examines whether the privilege applies based on the specific facts of each case. Based on our research, three significant published opinions appear to exist, each from different provinces in Canada, discussing this special relationship and the privilege. We discuss them as they bear import for practitioners.[42]

In *Mi'kmaw Family and Children's Services v. Sipekne'katik*,[43] Justice Chipman writing for the Nova Scotia Supreme Court, opined on whether documents produced by a public relations firm (National) retained by Mi'kmaw Family and Children's Services ("MCFS") were shielded by solicitor-client and/or litigation privilege. The correspondences between MCFS and National were solely related to the present litigation, always featured MFCS'

42. A fourth decision, *Kaymar Rehabilitation Inc. v. Champlain Community Care Access Centre*, 2013 ONSC 1754, 226 A.C.W.S. (3d) 977, 2013 CarswellOnt 3530 (Ont. S.C.J.) relied upon similar tests used in the other decisions discussed in this article.

43. 2022 NSSC 313, 2022 CarswellNS 747 (N.S. S.C.), affirmed 2023 NSCA 44, 2023 A.C.W.S. 2665, 2023 CarswellNS 496 (N.S. C.A.)

external legal counsel, and did not reference any other business or legal interest of MFCS.[44]

After considering these facts, Justice Chipman established the following principle: communications of public relations officials with parties and their counsel are not in and of themselves privileged.[45] Instead, such communications may attract privilege "if they are part of a communication that is privileged."[46] To determine whether something is part of a communication that is privileged, the court must ask whether the "communications are in furtherance of a function essential to the solicitor-client relationship, *or* the legal advice provided by the solicitor."[47] After spelling out the legal framework, Justice Chipman applied the stated principles to the facts before them, concluding that National's role was restricted to "receiving and considering communications and then providing their own public relations advice,"[48] consequently disentitling their correspondences with MFCS from solicitor-client and/or litigation privilege.

A similar analysis is found in *Greater Vancouver Water District v. Bilfinger Berger*[49], in which the court considered whether the privilege shielded from discovery the documents created by, or in the hands of, a PR firm that the Defendants/Counterclaim Plaintiffs had retained.[50] The documents bore relevance to the construction lawsuit because:

> The project was a large public project and the parties presumably knew there could be some publicity and political pressure in relation to their disputes. To the extent that any of them were strategizing with public relations people, this could be fodder to assist in challenging the reality of the positions each was taking with the other; it could also provide insight as to what was really going on internally at the time when the parties were positioning with each other. The public relations documents are therefore relevant for discovery purposes.[51]

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44. *Mi'kmaw Family and Children's Services v. Sipekne'katik*, 2022 NSSC 313, 2022 CarswellNS 747 (N.S. S.C.) at para. 10, affirmed 2023 NSCA 44, 2023 A.C.W.S. 2665, 2023 CarswellNS 496 (N.S. C.A.) [*"Mi'kmaw Family and Children's Services*"].
45. *Mi'kmaw Family and Children's Services* at para. 110.
46. *Mi'kmaw Family and Children's Services* at para. 110.
47. *Mi'kmaw Family and Children's Services* at para. 110.
48. *Mi'kmaw Family and Children's Services* at para. 113.
49. 2015 BCSC 532, 44 C.L.R. (4th) 115, 252 A.C.W.S. (3d) 672 (B.C. S.C.)
50. 2015 BCSC 532, 44 C.L.R. (4th) 115, 252 A.C.W.S. (3d) 672 (B.C. S.C.) at para. 1.
51. *Ibid.* at para 18.

After Justice Griffin made this relevancy determination, he considered the work and advice of the PR firm, NPR, using the existing framework of the solicitor-client privilege. He treated the issue as a question of mixed law and fact that looked at "all of the circumstances", not just the "client or lawyer's description" of that role.[52]

Based on the documents' descriptions and the involvement of the PR firm, the court concluded that the firm's provision of "strategic public relations advice was not a critical or fundamental aspect of the solicitor-client relationship. Additionally, NPR was neither representing the client nor merely acting as a conduit for solicitor-client information."[53] Because the role of the PR firm was merely "incidental to the seeking and obtaining of legal advice" the privilege did not attach.[54] As Justice Griffin noted about the third party at issue:

> NPR was a public relations firm, not an engineering firm. It was not a translator of German language documents into English language documents. It is hard to accept at face value that NPR's services were necessary to "channel" or "explain" [the client's] information to the lawyers, to enable the lawyers and [the client] to understand and communicate with each other.[55]

Another case involving the privilege's limits and media consultants is *The Catalyst Capital Group Inc. v. West Face Capital, Inc.*,[56] a decision that examined how language "can be weaponized"[57] and "all about the trouble that talking – both the written and spoken word – can create."[58] The crux of this decision centered on accusations that the plaintiff/counterclaim defendant had directed a PR firm to "conduct a smear campaign" against the defendant/counterclaim plaintiff and his business. Both parties agreed the documents at issue bore relevance to the defamation claims, but the party holding the documents, Catalyst, had asserted privilege over them.[59]

52. *Ibid.* at para 29.
53. *Ibid.* at para 37.
54. *Ibid.* at paras. 39–40.
55. *Ibid.* at para 31.
56. 2021 ONSC 125, 2021 CarswellOnt 4244 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2021 ONSC 2061, 2021 CarswellOnt 4049 (Ont. Div. Ct.)
57. *Ibid.* at para 2.
58. *Ibid.* at para 3.
59. *Ibid.* at para 6.

To answer the question of whether the privilege protected the documents, Justice Boswell considered the dominant purpose of the communications. Many had "nothing to do with the litigation"[60] and it was clear that the media aspects of the PR campaign waged were not part of "an overall litigation strategy."[61] Thus, no privilege attached. Just because "a substantial element" of the communications involved an otherwise privileged investigation into co-conspirators was insufficient to allow for the litigation privilege to attach.[62]

The cases discussed above demonstrate that as legal professionals increasingly collaborate with public relations or crisis management experts, understanding the nuances of litigation privilege is essential. These specialists play a crucial role in managing the on-line media narratives and shaping public perception. Canadian jurisprudence highlights that the privilege's applicability hinges on whether the involvement of third-party experts is integral to the process of obtaining legal advice. While PR and crisis management professionals can significantly enhance legal strategies, careful consideration is needed to ensure that communications with these teams fall within the privilege's scope.

b. U.S. Legal Considerations of Crisis Counsellors and Privilege

American courts have also provided a wealth of judicial commentary on whether, and to what extent, rules of privilege apply to communications between client, counsel, and third-party crisis management and public relations agents. Unlike the current Canadian landscape, which while far from comprehensive shows a consensus in approaches taken by respective courts, U.S. case law reveals a divide in approach to this question. The common thread binding many U.S decisions on the issue is that privilege – whether attorney-client or work product – can, depending on facts, be applicable to certain communications between counsel and third-party parties such as crisis management or public relations agents.

The general contemporary premise regarding communications to third parties and privilege is seen as established in the oft-cited decision of *United States v. Kovel*.[63] In that decision, the Second Circuit established three factors that courts should consider when

60. *Ibid.* at 316.
61. *Id.* at para 317.
62. *Id.* at paras. 320–21.
63. 296 F.2d 918 (10th Cir., 1961).

determining whether a communication between counsel and a third-party should be protected by privilege. First, whether the third-party assisted the attorney in providing legal advice.[64] Second, whether the third-party served as a "translator" for a complex subject matter, such as interpreting complex accounting concepts.[65] And finally, whether the lawyer directed the actions of the third-party.[66]

From the *Kovel* framework, jurisprudence has emerged discussing when privilege cloaks communications between counsel and third parties, and whether communications with third party public relations managers or crises consultants fall under the *Kovel* privilege umbrella.[67]

Many American courts have concluded that a public relations firm's advice must be indispensable to counsel's ability to provide legal advice to attract a privilege protection.[68] A recent example of this is in *Resolute Forest Products, Inc. v. Greenpeace International*.[69] In that case, the district court concluded that a PR firm's communications must be essential, or necessary, for counsel's provision of legal advice to the client for the attorney-client privilege to cloak the communications.[70] The *Resolute Forest Products* court also considered whether the contested communications fell under the federal common law work product privilege. The court noted that for this privilege, under the federal common law standards, public relations work:

> .... is generally treated as business strategy, rather than a legal one, and is not protected as work product. Because the protection arises only for materials prepared in anticipation of litigation, it is not enough to show merely that the material was prepared at the behest of a lawyer or was provided to a lawyer, and the work product doctrine does not extend to public relations activities even if they bear on the litigation strategy because the purpose of the rule is to provide a zone of privacy for

64. *Ibid.* at 921–23.
65. *Ibid.*
66. *Ibid.*
67. When considering American caselaw discussing attorney-client or work product privilege and third parties one must note whether the court is applying state-law standards or federal common law standards. There are instances where an American federal court may weigh a privilege question and, due to diversity litigation (a lawsuit involving a question of state law with parties based in two separate jurisdiction), is considering privilege under a state's law, not federal common law standards.
68. *See e.g., In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F.Supp.2d 321 (S.D. N.Y., 2003); *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D. N.Y., 2000).
69. No. 17-CV-02824, 2022 WL 885368 (N.D. Cal., 2022).
70. *Ibid.* at *2–*3.

> strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally. Nor is an attorney's own work subject to protection if the work is intended for public relations or other business purposes rather than litigation.[71]

Thus, communications concerning legal advice and legal strategy only would be protected. But communications that were "part of a media or public relations strategy" would constitute "business strategy" and lack the privilege's protection.[72]

American federal courts have employed the "functional equivalent" test when evaluating whether communications with PR firms are cloaked by privilege. Under this test, the privilege is extended to communications with a third party if that party "is acting as the functional equivalent of an employee" of the law firm.[73] For example, in *Copper Market*, the trial court held as privileged communications made by and to a PR agent for the defendant.[74] The court reached that conclusion because a Japanese company had retained a Western crises consultant in anticipation of a federal investigation and litigation.[75] The company lacked the capacity to manage press relations on its own and consultants acted as the Asian company's agent and spokesman when dealing with Western, English-speaking media. The *Copper Market* court saw "no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice."[76]

When considering whether a PR firm or crises consultant is the same as a company employee under the functional equivalent standard, American courts may consider:

> 1) whether consultants were incorporated in the staff to perform a corporate function, which is necessary in the context of actual or anticipated litigation; (2) possessed information needed by attorneys in rendering legal advice; (3) possessed authority to make decisions on behalf of the company; and (4) were hired because the company lacked sufficient internal resources and/or adequate prior experience within the consultant's field.[77]

71. *Ibid.* at *4 (internal citations and quotations omitted).
72. *Ibid.*
73. *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D. N.Y., 2001) at 218-20.
74. *Ibid.* at 219–20.
75. *Ibid.* at 215.
76. *Ibid.* at 219.

Under the functional equivalent test, if a consultant acts for a corporate entity and possesses the information needed by lawyers in rendering legal advice, then the privilege may attach. [78]

American law sheds light into the direction in which Canadian jurisprudence may evolve, as the practice of using crisis management or public relation firms becomes more frequent. Some consensuses can be gleaned from existing Canadian case law, but this is more a product of the jurisprudence being sparsely populated, rather than a reflection of the courts' directional course.

VI. A.I.

It is easy to think of A.I. as a technological instrument helping lawyers work faster, more efficiently, and with less expense to the client. Yet a more appropriate consideration of A.I. is as a third-party to the solicitor-client relationship. A.I. is accessible to a practitioner through a cloud-based or computer-specific software program offered by a service provider. Most notable of which are Meta Platforms Inc., Google LLC, and OpenAI Global LLC. Lawyers either pay a fee to use the program (similar to a discovery vendor) or agree to licensing terms before program use (think ChatGPT). And A.I., just like consultants, take different forms, have different uses, and play a variety of different roles in a legal context. A.I. also has its own verbiage and definitions. Because we rely upon these terms in our consideration of the privilege, we have included a table defining these words, which are not commonplace in the litigation lexicon.

Notable A.I. Terms Defined	
TERM	**DEFINITION**
Large Language Model[79]	Large language models (LLM) are large deep learning models that are pre-trained on vast amounts of data. The underlying **transformer** is a set of neural networks that consist of an encoder and a decoder with **self-attention** capabilities. The encoder and decoder extract meanings from a sequence of text and understand the relationships between words and phrases in it.

77. *In re Bristol-Myers Squibb Secs. Litig.*, No. 00-1990 (SRC), 2003 WL 25962198, *3 (D. N.J., 2003).
78. *In re Grand Jury Subpoenas Dated January 20, 1998*, 995 F.Supp. 332 (E.D.N.Y., 1998) at 340.
79. "What are Large Language Models?" (accessed on 23 July 2024), online (article) https://aws.amazon.com/what-is/large-language-model/

Notable A.I. Terms Defined	
Predictive Coding[80]	Also referred to as technology-assisted review (TAR) or computer-assisted review (CAR), predictive coding technology relies on deep learning models (generally LLMs) to find responsive electronically stored information (ESI) documents during a legal case's review phase using **seed set data.**
Seed Sets[81]	A seed set is a sample of documents pulled from the entire group of documents that needs to be reviewed. Seed sets are relied upon by predictive coding technologies as input data to train the deep learning model being utilized.
Application Programming Interface[82]	An application program interface (API) is a set of rules or protocols that enables software applications to communicate with each other to exchange data, features, and functionality.

As of this article's publishing, Canada's courts have not yet considered how the privileges intersect with the use of A.I. technologies in communications between solicitors and clients or in documents prepared for litigation. Decisions involving consideration of generative A.I. have hinged on a consideration of A.I.'s broad powers in conducting research[83] or assisting in e-discovery,[84] or instances where practitioners have relied on A.I.-generated phantom cases in factums.[85] The use of A.I. in the legal practice, in general, is at its infancy and caselaw is too.

Where we can garner insights into how courts may rule in the future when it comes to A.I. and privileges stems largely from examining jurisprudence that involves predictive coding and e-discovery disputes. But even within this realm of cases there exists limited Canadian jurisprudence on the matter. A more robust body

80. "How to make the e-discovery process more efficient with predictive coding" (Last accessed July 23, 2024), online (article) https://legal.thomsonreuters.-com/en/insights/articles/how-predictive-coding-makes-e-discovery-more-efficient
81. *Ibid.*
82. Michael Goodwin, "What is an API?" (Last accessed April 9, 2024), online (article) https://www.ibm.com/topics/api.
83. *Drummond v. The Cadillac Fairview Corp. Ltd.*, 2018 ONSC 5350, 296 A.C.W.S. (3d) 256, 2018 CarswellOnt 15158 (Ont. S.C.J.) at para. 10.
84. *Bennett v. Bennett Environmental Inc.*, 2016 ONSC 503, 263 A.C.W.S. (3d) 90, 2016 CarswellOnt 670 (Ont. S.C.J. [Commercial List]).
85. *Zhang v. Chen*, 2024 BCSC 285, 2024 A.C.W.S. 742, 2024 CarswellBC 462 (B.C. S.C.).

of caselaw on the issue exists in the United States, which allows for third-party discovery, creating more disputes about e-discovery and the privilege, and consequently more opportunities for the courts to weigh in. We look abroad for insights that may advise lawyers on how best to use A.I. and maintain the privilege.

a. Existing Canadian Rules on A.I. in the Legal Practice

In the past two years, with the launch of ChatGPT by OpenAI, Gemini by Google, Meta AI, and other proprietary A.I. technologies, lawyers have seen generative A.I. integrated into the practice of law in new and unexpected ways. In response, the Canadian Judicial Council ("CJC"), Federal Courts of Canada, and most of the country's Law Societies have issued Practice Guidelines on the use of A.I. by legal professionals. Although these Guidelines do not directly address solicitor-client or litigation privilege, many of their principles indirectly address issues related to privileges through broader recommendations. For example, in October of 2024, the CJC provided guidelines for jurists, counsel, and anyone else who may have business before His Majesty's courts with respect to the use of A.I. They require that:

I. Any and all uses of A.I. in His Majesty's courts must respect the independence of the judiciary, including the use of A.I. as a dispute resolution mechanism.

II. Judges, should they rely on A.I., must ensure such use is consistent with the core values of the court and judicial ethics.

III. Any incorporation of A.I. into the judicial process must be consistent with applicable laws governing privacy, intellectual property, and criminal activity.

IV. Any and all uses of A.I. must be subject to the strictest information security standards, with particular emphasis placed on the hazards that come with the use of external, third-party A.I. software.

V. Where Canadian courts use A.I. in case management, alternative dispute resolution, or other internal and/or public-facing matters, all those involved must ensure such use is explainable. Which is to say, A.I. *itself*, if called

upon, should be able to provide clear, understandable explanations for its output.

VI. Canadian courts must regularly track and record the impact of using A.I. in its judicial processes.

VI. Canadian courts must provide education, training, and user support to those who use its a.i. systems

Practitioners should notice the CJC's guidelines with respect to the necessity for uses of A.I. in His Majesty's courts to comply with existing privacy and intellectual property laws, for it to be subject to the strictest information security standards when external, third-party software is involved, and for counsel to be attentive to whether the use of A.I. in instances of ADR has met the requirement of explainability.

The table below summarizes A.I. principles provided by various Canadian law societies:

Law Society	**Guidelines**
Alberta	In late 2023, the Law Society of Alberta issued a guide titled "*The Generative AI Playbook–How Lawyers Can Safely Take Advantage of the Opportunities Offered by Generative AI*"The guidance highlights associated risks with the use of GenAI, including confidentiality and security, fraud and cybercrime, knowledge cutoff, hallucinations, bias, and copyright infringement.
British Columbia	On November 20, 2023, the Law Society of British Columbia "*Guidance on Professional Responsibility and Generative AI*". The paper outlines professional responsibility considerations for lawyers to consider when using GenAI, including confidentiality, plagiarism and copyright, fraud and deep fakes, and bias.
Manitoba	In April of 2024, the Law Society of Manitoba released "*Generative Artificial Intelligence–Guidelines for Use in the Practice of Law*," to guide lawyers relying on GenAI to ensure they remain in full compliance with their professional responsibilities.
Newfoundland & Labrador	The Law Society of Newfoundland & Labrador recently issued "*Artificial Intelligence in Your Practice*". This notice reminds lawyers that their professional responsibilities do not change when using AI. The notice also advises to ensure lawyers understand the limitations of AI before using it and reviewing work created by AI to confirm it is complete, accurate, and relevant.

Law Society	Guidelines
Nova Scotia	The Nova Scotia Barrister's Society authored "*Artificial Intelligence in the Practice of Law–What is AI and can I or should I use it in my practice*". The article reminds lawyers to be vigilant when using generative AI and canvasses some of the risks of using the technology.
Ontario	In April of 2024, the Law Society of Ontario issued this white paper: "*Licensee use of generative artificial intelligence*".The white paper helps licensees navigate the use of generative AI to ensure full compliance with their professional responsibilities.
Saskatchewan	In February 2024, the Law Society of Saskatchewan published "*Guidelines for the Use of Generative Artificial Intelligence in the Practice of Law*". The guidance is designed to help lawyers use generative AI in a manner consistent with professional obligations and assist legal workplaces develop appropriate internal.

b. A.I., Predictive Coding, and Privilege

Canadian courts have explicitly acknowledged that A.I. is a pivotal part of the modern litigation process. For example, in *Drummond v. The Cadillac Fairview Group Ltd.,* Justice Perell, writing for the Ontario Superior Court of Justice, stated that "computer-assisted legal research is a necessity for the contemporary practice of law" and that "advances in artificial intelligence are to be anticipated and to be encouraged".[86] There are two specific forms of A.I. technology essential to the litigation process that intersect with the privileges. The first is predictive coding, the second is generative A.I.

To implement the first form, predictive coding, a deep learning model requires seed sets to train itself to identify which documents are and are not relevant in the universe of files provided during the litigation process. These seed sets can be assembled in two different ways: random or judgmental sampling. Random sampling utilizes a statistical method where there is an equal chance for any document in the database to be chosen for inclusion into the sample set. In contrast, with judgmental sampling, counsel, after reviewing the facts of the case and identifying the relevant legal issues, uses their

86. 2018 ONSC 5350, 296 A.C.W.S. (3d) 256, 2018 CarswellOnt 15158 (Ont. S.C.J.) at para. 10 (emphasis added); *see also Bennett v. Bennett Environmental Inc*., 2016 ONSC 503, 263 A.C.W.S. (3d) 90, 2016 CarswellOnt 670 (Ont. S.C.J. [Commercial List]) and *The Commissioner of Competition v. Live Nation Entertainment Inc. et al*., 2018 CACT 17.

independent legal judgement to select the sample themselves, which is then fed back into the A.I. This set (the seed set) is then used by the A.I. for training purposes.

When counsel inputs the documents into a discovery platform, they are using their independent legal judgement to train predictive A.I. technology. Thus, it is reasonable to describe this process as a communication between a solicitor and a third-party (the A.I. service provider). One that, while not confidential, may involve confidential communications within the documents. It is also reasonable to describe the solicitor's review of the documentation to determine this seed set as part of the investigation and preparation of the case for trial. Finally, the seed sample itself can also reasonably be described as material of a non-communicative nature, being relied upon to facilitate the e-discovery process. Lawyers must therefore be alive to the ways in which the use of A.I. driven e-discovery tools can attract privileged protection to documents and work products that would otherwise be open for disclosure during the litigation process. Documents that may reveal sensitive information about legal strategy.

With this discovery methodology that existing Canadian jurisprudence provides strongly suggestive, albeit implicit, direction. An example: in *Blank v. Canada (Minister of Justice)*,[87] Justice Fish writing for the Supreme Court of Canada, noted: "Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate...".[88] Such holdings allow for the reasonable conclusion that creating such seed sets for use in predictive coding would constitute privileged conduct.

The second form of A.I. technology used by lawyers intersecting with the privileges is generative A.I.-based legal software. These programs are provided either through a licensing agreement that permits a subscriber exclusive, guarded access to it via an API, or on a free, open-sourced, and unguarded basis. They harness deep learning models to create legal documents, summarize existing drafts, and perform legal analysis. When relying on such programs, lawyers must invariably transmit, or store, privileged information in the program. It is at this juncture that issues related to privileges emerge.

87. 2006 SCC 39, (*sub nom.* Blank v. Canada (Minister of Justice)) [2006] 2 S.C.R. 319, 270 D.L.R. (4th) 257 (S.C.C.).

88. *Blank v. Canada (Department of Justice)*, 2006 SCC 39, (*sub nom.* Blank v. Canada (Minister of Justice)) [2006] 2 S.C.R. 319, 270 D.L.R. (4th) 257 (S.C.C.) at para. 27 (internal citations and quotations omitted).

In *Chrusz,* Chief Justice Doherty describes two important principles undergirding solicitor-client privilege. The first is that the privilege can be extended to communications "by or to a third party acting as a messenger, translator and amanuensis, and includes a third party employing an expert to assemble information provided by the client and to explain it to the lawyer".[89] The second is that if a third-party's retainer extends to a function that is "that is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications that are in furtherance of that function and that meet the criteria for client-solicitor privilege".[90]

Taking these two principles into account and applying them to the two forms of A.I. technology discussed above, certain insights develop.

One can conceive of A.I. as a third-party expert employed by the lawyer to assemble information provided by the lawyer and then, through summarization or further analysis, explaining it to the lawyer. This would, of course, require a determination from the courts that the A.I. in question qualifies as an 'expert' for the purpose of this rule. While information input into the program may not have been protected by privilege, the work product generated by the third-party expert (A.I.) could be captured under its umbrella.

Another way to think about A.I. is its ability to perform tasks at a low cost, expedient manner, which is an essential part of the relationship between client and lawyer. But this characterization is and will continue to be a point of contestation requiring explicit guidance from the courts. It is clear, at the very least, that where a third-party acts more generally for a solicitor, independent of the client's specific matter, it will result in a waiver of privilege given the non-essential function of the third party.

The crucial takeaway is that the transmission and storage of information in a generative A.I. software can morph otherwise non-privileged communications into privileged ones, which may, without the proper safeguards in place, lead to unintentional waivers to the detriment of a client. Along the same lines, it may also constitute waiver of already privileged communications that are then relied upon in generating its output.

To preclude such a possibility, the suggested approach from U.S. scholars is to generate separate, individuated agreements with third-party A.I. software, which provides its services through an API for

89. *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203, 45 O.R. (3d) 321 (Ont. C.A.) at p. 5.

90. *Ibid.*

each specific legal matter the software is being used for. This would directly involve the third party in the solicitor-client relationship, satisfying a requirement from *Chrusz:* that the third-party be able to act on legal advice on behalf of the client.[91] It would also exclude anyone outside of the solicitor-client relationship, especially when open-sourced, cloud-based programs are being employed, from having access to the (potentially) privileged work product.

c. A.I., U.S. Law and Privilege Considerations

American courts have dealt more extensively with how specific A.I. technologies intersect with the privileges. Perhaps this is because American litigation, compared with Canadian litigation, has a more robust discovery process freely allowing for third-party discovery. Due to that, a larger variety of factual scenarios can arise.

U.S. legal decisions have, on more explicit terms, provided guidance about the how the privilege may interaction with seed sets and technology-assisted review used during e-discovery. In *Sporck v. Peil*, the U.S. Court of Appeals for the Third Circuit considered whether work product attached to documents selected and compiled by counsel for use with a witness in preparation for his deposition.[92] While mechanically different than modern-day counsel feeding documents to a computer to teach a machine what constitutes relevant information, the logic behind educating a witness about pertinent issues with relevant documents is similar.

Under the federal common law work product doctrine, the *Sporck* court concluded that "selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly protected category of opinion work product."[93] In fact, by curating documents to prepare a witness for cross examination, "counsel could not help but reveal important aspects of his understanding of the case. Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research."[94]

One sees parallels between lawyers educating a witness about a case and teaching software about what a program should deem relevant discovery. But, have courts applied this logic when considering discovery disputes involving seed sets? The answer appears to be yes.[95]

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91. *Chrusz* at p. 50.
92. 759 F.2d 312 (3d Cir., 1985) at 313-315.
93. *Ibid.* at 316.
94. *Ibid.*

For example, the U.S. District Court for the Northern District of Indiana weighed whether a party's request to have opposing counsel disclose a seed set used in producing documents for e-discovery was subject to disclosure obligations.[96] The *Biomet* court denied the request, finding that seed sets were not subject to discovery for two reasons. First, compliance with the request would require production of irrelevant and privileged documents used to train the coding algorithm.[97] Second, the plaintiff's request would amount to a discovery within discovery, which is to say, a request not about "whether a document exists or where it is, but rather how Biomet used certain documents before disclosing them".[98]

Note that *Biomet* decision not to include the seed sets within the ambit of disclosure is **not** the same as finding that litigation privilege protected the seed sets. That precise issue was not before the *Biomet* court. Yet when *Biomet* is read in tandem with other federal cases where courts have concluded that "methodological decisions reveal work product"[99] – which could include *inter alia* seed set assemble, and the seed sets themselves – there is a strong suggestion that seed sets may attract privilege protections.[100]

Our interpretation of U.S. jurisprudence overlaps with our discussion about how Canadian courts may opine on the same question. Independent legal judgement exercised by counsel, whether part of an investigation or as a methodological decision, would likely be shielded by work product privilege even if the fruits of counsel's decisions were (later) shared with A.I. as part of the litigation process.

It appears that U.S. courts have not yet provided guidance on instances in which non-privileged information input into a third-party A.I. software gains privileged protection from the resulting

95. Much of the modern-day debate in U.S. federal courts about predictive coding and technology-assisted review are governed by additional aspects of discovery such as the tenants of proportionality and transparency. Those issues are beyond this article's scope.

96. *In re: Biomet M2a Magnum Hip Implant Products Liability Litigation*, No. 3:12-MD-2391, 2013 WL 6405156 (N.D. Ind., Div. South Bend, 2013).

97. *Ibid.* at *2.

98. *InIn re: Biomet M2a Magnum Hip Implant Products Liability Litigation*, No. 3:12-MD-2391, 2013 WL 6405156 (N.D. Ind., Div. South Bend, 2013) at *2.

99. *Progressive Casualty Ins. Co. v. Delaney*, No. 2:11-CV-0678, 2014 WL 12785311 (D. Nev., 2014).

100. *See e.g.*, *Winfield v. City of New York*, 2017 WL 5664852 (S.D. N.Y., 2017) at *11-12 (finding that details of a producing party's predictive coding process were attorney work product, but court then required the party to produce a sample of documents the process designated as nonresponsive given that evidence showed the training process had flaws).

output, by virtue of the A.I.'s role as a third-party expert in the solicitor-client relationship.

This article has relied on existing principles of law to predict where Canadian courts may land on this question. But the absence of judicial commentary in the U.S. courts suggests that jurists have yet to fully grapple with the idea of A.I. as a distinct party in legal relationships, rather than a service relied on or an instrument to aid in the litigation process. As A.I. technology grows in sophistication, allowing for performance of more complex tasks with greater autonomy, such judicial recognition will become increasingly difficult to withhold.

ChatGPT, Gemini by Google, Meta AI, and Gork by X all – at present – rely on information fed to it by the user to train its Learning Language Model (LLM) unless the user accesses the A.I. through an Application Programming Interface (API). The latter method involves third-party software sending HTTP requests to an A.I. database for a circumscribed purpose. This would be based on a user agreement the attorney (on behalf of the client) would review and agree to before utilizing the third-party software. An agreement that presumably makes clear the precise parameters under which the service provider may access the input information. This closed-circuit process could, in theory, preclude third-party access to the input information and limit access to the service provider themselves. Lawyers should familiarize themselves with this type of agreement and whether it is in place before conferring with any specific third-party A.I. software.

Lawyers must exercise caution when transmitting information from a generative A.I. in providing legal services. Specifically, counsel should ensure that the nature of the relationship between themselves, the client, and the third-party A.I. software provider does not lead to a waiver of any privileged communications inputted into the program or lead to inadvertent disclosure of output that became subject to privileged protections in the process.

Where an API is not resorted to however, privileged communications may be accessed by third parties, monitored by the software itself, and may even affix a right to the A.I. service provider for retention of the documents. All of which would constitute a waiver of the protections afforded to such communications, potentially prejudicing the client's legal position. It may also foreclose an opportunity for the attorney to structure the relationship in such a way that it ensures the third-party A.I. software provider becomes ingrained in the attorney-client

relationship, affording protections of privilege to any output the program provides back to the attorney.

VII. Conclusion

This article explores how emerging technologies impact the legal practice and reshape the role of third parties in litigation. Now more than ever, internet virality is a hazard in litigation. As news dissemination is decentralized, the impetus for hiring professionalized agencies dedicated to controlling the narrative has sharpened. Lawyers are nestled within this web of relationships as clients hire PR firms, crisis managers, and strategists to manage fallout from a legal dispute. Similarly, the role of A.I. as a third-party product or service relied upon by practitioners is maturing as its technological capabilities rapidly evolve in the digital age. Lawyers must remain alert to the ways in which A.I. will impact their relationships with their clients, their colleagues, and the public at large. It is equally important that lawyers understand how this new technology changes professional and legal obligations, as A.I. becomes an integral part of the litigation process. Maintaining the privileges is one of those obligations.

Our examination of articles and caselaw in Canada and the U.S. reveals that a lawyer must proceed with caution when communicating with third parties if that lawyer seeks to maintain the solicitor-client or litigation privilege. Lawyers must understand that:

- Canadian courts consider a lawyer's communications with third parties as privileged when the information exchange is essential to "the effective operation of the legal system."[101]
- When Canadian courts weigh whether communications with a third-party maintain privilege, they consider several factors, which include questions such as:
    - Whether the client intended the communication from the solicitor to remain confidential when shared with a third party?
    - Was the presence of the third party, or copying of third party on the written communication, required or essential to advance the client's interests?

101. *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 241, 38 C.P.C. (4th) 203, 45 O.R. (3d) 321 (Ont. C.A.).

  - What common interest, if any, exists between the client and the third party? What's the nature of the relationship or interest?

- Canadian courts impose a flexible evaluation of whether communications with a crises consultant or PR agent are privileged. A primary consideration is whether the PR agent is central to the lawyer's provision of legal advice and counsel to the client. If not, then the communication will likely lack the protections of the solicitor-client privilege.
- If the role of a PR firm is "incidental to the seeking and obtaining of legal advice"[102] it is unlikely that privilege will attach to the communications with PR agents or crises consultants. This holds true in Canada and the U.S.
- American jurisprudence provides another avenue for asserting privilege arguments with the functional equivalent test. Under this test, if a crises counselor or PR agent acts in a role that essentially is the same as the client's own employee–performing necessary corporate functions, possessing information needed by lawyers for legal advice, and have authority to act for the company–then that third party's communications may be privilege.
- Generative A.I., which lawyers use in everything from discovery software to legal form production, poses another complication with preservation of the solicitor-client or litigation privilege. This is because a lawyer's communications with A.I. is, at its essence, a third-party communication.
- Canadian and American jurisprudence is in its infancy on the intersection of generative A.I. and a lawyer's use of it. While Canadian courts have acknowledged that A.I. is an important part of modern-day litigation few, if any, courts have weighed in on substantive legal questions involving a lawyer's use of generative A.I. or predictive coding. The same goes for many law societies, which now provide for some regulation of generative A.I. and a lawyer's use of it.
- American caselaw considering seed sets and predictive coding–a means of using A.I. to educate discovery software about your case–provides early insights into how courts may consider the question of privilege when a

102. *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 532, 44 C.L.R. (4th) 115, 252 A.C.W.S. (3d) 672 (B.C. S.C.) at paras. 39-40.

> lawyer relies on generative A.I. in a case. What the case law appears to suggest is that if revealing how a lawyer used generative A.I. would expose a lawyer's strategy or thought patterns on a case, that work product may be privileged.

As A.I.'s technological capabilities evolve, and information highways expand and multiply, so will the role of these novel third parties in litigation. This article seeks to ignite a broader conversation about how to navigate these shifting terrains, balancing the need to embrace disruptive technologies while safeguarding principles integral to lawyer-client confidentialities.