

A question of privilege: Ontario Superior Court rules lawyers' trust ledgers are protected by solicitor-client privilege

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Solicitor-client privilege is a cornerstone of our justice system, although protections about the facts surrounding a retainer (like payments and trust ledgers) can be more difficult to understand. In *Sakab Saudi Holding Company et al. v. Saad Khalid S. Al Jabri et al.*¹, the Ontario Superior Court of Justice held that privilege applied to protect a lawyer's trust ledgers from disclosure. This protection extended even to information regarding funds held or disbursed for "non-legal" purposes. The court also considered, and declined to apply, the "crime/fraud" exception to privilege.

What you need to know

- **Lawyers' trust ledgers are presumptively privileged.** The court held that the ledgers at issue contained administrative information connected to the solicitor-client relationship, so they were presumptively protected from disclosure. Since the ledgers would reveal information about the amount and payment of legal fees, as well as when and from which firms the clients sought advice, the presumption could not be rebutted.
- **Partial disclosure not permitted.** The court refused to allow the disclosure of redacted versions of the trust ledgers that would only show the flow of funds used for "non-legal" purposes. This information would have improperly allowed amounts used and held to pay legal fees to be calculated.
- **Crime/fraud exception does not apply to civil wrongs.** Although civil fraud was alleged in this case, the court held that the crime/fraud exception to solicitor-client privilege requires a communication intended to further a criminal purpose. It does not apply when only civil wrongs are at issue.

Background: The *Sakab Saudi* litigation

The plaintiffs in this case, a group of state-funded companies, alleged that the two principal defendants perpetrated a fraud by misappropriating billions of dollars and dissipating those funds around the world. After the action was commenced, the court issued *Mareva* orders against the principal defendants, freezing their assets worldwide.

The plaintiffs brought a motion to compel the principal defendants to produce trust ledgers from any law firms showing funds sent, received, or held in trust for the defendants' benefit. The plaintiffs argued that this information was necessary to determine the nature, value and location of the defendants' assets, and to ensure they were complying with the *Mareva* orders. The defendants claimed privilege over the entirety of the trust ledgers.

Trust ledgers are presumptively privileged

The court held that the trust ledgers were presumptively protected by solicitor-client privilege, and that the plaintiffs had failed to rebut the presumption in this case.

The plaintiffs argued that the trust ledgers were not privileged because they existed independently of any solicitor-client communications and would not reveal communications made for the purpose of giving or receiving legal advice. Rather, they argued, the ledgers would simply reflect the movement of funds, like any other bank account. The plaintiffs pointed to earlier cases from the British Columbia Court of Appeal and the Ontario Superior Court of Justice, which had both concluded that documents relating to the possession of and movement of funds in a lawyer's trust account were not privileged².

The *Sakhab Saudi* court rejected the plaintiffs' arguments, observing that the Supreme Court of Canada had since confirmed that a categorical distinction between objective facts (like movement of money) and communications (like advice) was not the right approach when determining what is protected by solicitor-client privilege. The analysis does not turn on the type of document (such as a trust ledger vs. other kinds of records), but rather on what the document might reveal about the solicitor-client relationship. The trust ledgers were accounting records containing administrative information connected to the solicitor-client relationship, and they were therefore presumptively privileged.

The plaintiffs could not rebut the presumption of privilege. They failed to demonstrate (1) that there was no reasonable possibility that the disclosure they sought would, directly or indirectly, reveal confidential solicitor-client communications; or (2) that the requested information was not linked to the merits of the case and would not prejudice the defendants if disclosed. The plaintiffs argued that they were not seeking individual bills of account (which are unquestionably privileged). Instead, they were only seeking information showing the quantum of funds, the dates that funds were sent or received, and the identity of the sender or recipient. They argued that this narrow information did not relate to communications between the lawyer and client. However, the court rejected this approach. The ledgers would reveal the amounts of legal fees paid and the source of payment for those fees, which would reflect what transpired within the solicitor-client relationship and reveal what was discussed with the client regarding how those fees would be paid. The trust ledgers would also disclose the identities of law firms the defendants consulted and when they sought legal advice. All of this, the court concluded, was privileged information.

Further, the court held that the ledgers were protected in their entirety. Disclosure of redacted versions that only revealed information about funds paid to third parties for "non-legal" purposes was not permitted. The court held that this type of partial disclosure would still reveal amounts used and held for payment of legal fees, because those amounts could be easily calculated from the other information in the ledger.

Crime/fraud exception does not apply to civil wrongs

The plaintiffs argued that even if the trust ledgers would otherwise be considered privileged, privilege should not apply in this case because of the "crime/fraud" exception. Under this rule, privilege does not attach to communications between a lawyer and client where the client is seeking advice to further future unlawful conduct. The exception applies where the client seeks advice or conspires with the lawyer to commit a future crime. The plaintiffs argued that it also applied in the case of civil wrongs (in this case, the alleged civil fraud).

The court rejected the plaintiffs' argument and concluded that the crime/fraud exception did not apply. While the law had been unclear on whether the exception applied to civil wrongs, the court considered itself bound by a recent decision holding that a *criminal* purpose was nonetheless required to engage the "fraud" part of the exception³.

The plaintiffs argued the potential breach of the *Mareva* orders in this case gave rise to a possible quasi-criminal sanction (i.e., contempt of court) that was capable of engaging the crime/fraud exception. The court rejected this argument, holding that the potential violation of a court order was not sufficient wrongful conduct for the exception to apply.

Implications

Parties seeking access to information in a lawyer's trust ledger likely face an uphill battle. This is the case even if the ledger also contains information about funds used for "non-legal" purposes, unless the party can show there is no reasonable possibility it will reveal information about the solicitor-client relationship, or that it is not linked to the merits of the case and its disclosure would not prejudice the client.

Plaintiffs in civil fraud cases will likely find it difficult to use allegations of fraud to pierce privilege. A communication with a lawyer must be intended to further a criminal purpose rather than a civil wrong for the crime/fraud exception to be engaged. This may create difficulty for parties in civil cases seeking to trace allegedly misappropriated funds that appear to have flowed through a lawyer's trust account.

FOOTNOTES

To discuss these issues, please contact the author(s).

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