



**Canadian Nurses  
Protective Society**

**infoLAW<sup>®</sup>**

**Privilege**

During legal proceedings nurses may be protected from giving evidence in certain circumstances. In this *infoLAW*, the Canadian Nurses Protective Society (CNPS) reviews one legal exception to the requirement to provide evidence. This exception is called privilege.

### What is privilege?

Privilege is a special legal rule arising from rules of evidence, the common law and specific legislation that exempts witnesses from answering certain questions or producing certain documents during legal proceedings.<sup>1</sup>

At common law, the courts apply a common law test on a case by case basis to determine if privilege exists. To meet this test there must be evidence that: the communications originate in confidence that they will not be disclosed; confidentiality must be essential to the relationship; the relationship ought to be fostered; and the injury that would arise to the relationship by disclosure must be greater than the benefit gained for the correct disposal of litigation.<sup>2</sup> These criteria have been applied in a number of recent cases involving patient records compiled by psychologists and therapists, hospital committee records for physicians' credentials and privileges, and a nursing audit committee report.<sup>3</sup>

### What kind of information is privileged?

Communications for the purposes of legal advice between a nurse and lawyer are usually protected by solicitor-client privilege. This privilege is not always absolute. The courts have set this privilege aside in some cases where public safety is at risk. Recently, solicitor-client privilege was set aside in a criminal case where the accused gave details of his plans to rape and murder prostitutes to a psychiatrist retained by the accused's lawyer to prepare a pre-sentencing report.<sup>4</sup>

Communications between you and your lawyer made in contemplation of litigation, and documents prepared for the dominant purpose of use in litigation, are protected by litigation privilege. This includes personal notes prepared by you at your lawyer's request to assist in preparing for or defending litigation. In some jurisdictions, quality assurance activities and information are also protected by legislation.<sup>5</sup>

### What kind of information is not privileged?

Information failing to meet the common law test for establishing privilege and information not protected by specific legislation will not be privileged. For example, clinical records, policies and procedures, minutes of meetings, letters, memos and personal notes prepared by you after an incident are not usually protected by privilege. If your personal notes are prepared at the request of legal counsel, however, the notes will be privileged.

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**More than  
liability  
protection**

Whether privilege attaches to Unusual Incident Reports and statements given to insurance adjusters is a contentious issue. In these cases, unless protective legislation exists, privilege is determined on a case-by-case basis by applying the common law test. Incident Reports that are not protected by legislation and are used for purposes in addition to litigation are not privileged. Statements to insurance adjusters are not privileged if they are gathered before litigation is contemplated.<sup>6</sup>

## Why is privilege an issue for nurses?

Because you can prejudice your own future legal defense by compiling documents containing damaging information that could be used against you in legal proceedings, understanding the general principles of privilege is essential. This knowledge will guide you when you complete Unusual Incident Reports, statements for insurance adjusters and personal notes following an incident. Remember that documents not protected by privilege should contain only factual and objective information while documents protected by privilege may include additional subjective information, opinions or beliefs.

You should be aware that even in situations where privilege exists, you can inadvertently lose it by your conduct. For example, if privileged information is shared with persons outside the relationship of solicitor and client, privilege may be lost.<sup>7</sup> Privilege may also be intentionally waived by producing a privileged document as evidence when it assists in your defense.

## Summary

It is important to understand privilege to avoid prejudicing yourself in future litigation. CNPS is available to discuss liability issues related to privilege and other areas of your nursing practice. If you have questions please call CNPS at 1-800-267-3390.

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1. N. J. Inions, *Privilege and Quality Assurance: The Issues for Canadian Hospitals* (Ottawa: Canadian Hospital Association Press, 1990), p. 61.
  2. J. Wigmore, *Evidence in Trials at Common Law*, revised by J.T. McNaughton, Vol. 8 (Boston: Little Brown, 1961), para. 2285.
  3. E. Picard and G. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3rd ed. (Toronto: Carswell, 1996), p. 413.
  4. *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.).
  5. L. Rosovsky, F. Rosovsky, *Canadian Health Information*, 2nd ed. (Toronto: Butterworths, 1992), pp. 64-68. *Alberta Evidence Act*, R.S.A. 1980, c. A-21, s. 9; Enacted as the *Quality Assurance Activity Statutes Amendment Act*, 1999. This statute only protects specific and defined committees. Committees to review the practice and conduct of members under health professional legislation are not covered.
  6. *General Accident Assurance Co. v. Chrusz*, [1999] 45 O.R. (3d) 321 (Ont. C.A.).
  7. *Re YBM Magnex International Inc.*, (October 15, 1999), Calgary 9801-16691, Paperny J. (Alta. Q.B.).

N.B. In this document, the feminine pronoun includes the masculine and vice versa.

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