LEGAL PRIVILEGE AND ITS APPLICATION TO APPRAISERS

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Within the context of the litigation process, one of the most important issues for the parties to the litigation is the scope of privilege and its impact on the production of documents. This concept impacts the work of independent expert witnesses, such as appraisers who may be retained by litigants to assist and support their positions with opinion evidence. It is essential that expert witnesses understand the limitations on the confidentiality of their work and the scope of any privilege that applies to their work or reports prepared for a client involved in the legal process.

The work of an appraiser is required to be confidential in accordance with applicable professional standards governing the appraisal profession.[1] The findings and conclusions of an appraiser, including those prepared during the litigation process, are not to be disclosed to anyone unless authorized by the client or by way of a legal requirement.[2] The duty of confidentiality is a matter of professional standards/regulation. Confidentiality is often assumed to be the same as protection by way of legally recognized privilege; it is not.

The disclosure of work conducted by an appraiser as part of litigation proceedings is governed by the rules of production found in the *Rules of Civil Procedure* and the

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[1] *Canadian Uniform Standards of Professional Appraisal Practice*, the Standards Committee, Appraisal Institute of Canada, effective January 1, 2018 ("*CUSPAP Rules*") at section 5.8.

[2] *Ibid* at section 5.8.2.

common law of legal privilege.[3] The scope of protection accorded by legal privilege in accordance with these rules is narrower than that covered by the duty of confidentiality as set out in professional standards governing appraisers. Appraisal professionals should understand these differences, and the limits of the protection afforded to their work by confidentiality and privilege in the litigation process. Understanding the differences and limits of confidentiality and privilege will allow appraisers to properly inform their clients about disclosure obligations and the protection of their work product and analyses, while maintaining adherence to their governing professional standards.

This paper briefly discusses the duty of confidentiality applicable to appraisers and the fundamental differences between confidentiality and privilege. It also reviews the forms of legal privilege recognized in Canadian law and how they may apply to the work of appraisers. Finally, the paper will review how an appraiser may be impacted by relevant disclosure or production obligations applicable to the litigation process.

Confidentiality for Appraisers

Like many professionals, appraisers have a professional and ethical obligation to respect the confidentiality and sensitivity of information that is provided to them by a client, as well as the work they carry out on a client's behalf. They are required to ensure that they do not disclose their analyses, opinions or conclusions to anyone other than the client, unless instructed otherwise (and with certain limited exceptions).

The professional standards governing the appraisal profession, the "*CUSPAP Rules*", set out the confidentiality obligations of an appraiser as follows:

[3] *Rules of Civil Procedure*, RRO 1990, Reg 194.

"It is unethical for a Member […]

> 4.2.10 to disclose the results of an assignment to anyone but the client, except with the client's permission […]

5.8 Disclosure [see 4.2.10, 18.1, 18.2]

> 5.8.1 A Member pledges to uphold the confidential nature of the Member/client relationship.
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> 5.8.2 A Member must not disclose the analyses, opinions or conclusions in an assignment to anyone other than:
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> > 5.8.2.i. the client and those parties specifically authorized by the Member and client to receive such information;
> > 5.8.2.ii. third parties, when the Member is legally required to do so by due process of law (eg. the Courts or Legislation); or
> > 5.8.2.iii. an authorized Committee or Committee Member of the Institute.
>
> 5.8.3 A Member must not disclose information provided by a client on a confidential basis to anyone other than:
>
> > 5.8.3.i. those parties specifically authorized by the client to receive such data;
> > 5.8.3.ii. third parties, when the Member is required to do so by due process of law; or
> > 5.8.3.iii. an authorized Committee or Committee Member of the Institute.
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> 5.8.4 If the performance of a prior assignment is to be kept confidential, a Member must decline a new assignment on the same property, where a condition requires disclosure of any prior assignment."[4]

Further provisions emphasizing the importance of the duty of confidentiality to appraisal practice are found in the Practice Notes at sections 18.1 and 18.2 of the *CUSPAP Rules*.

An appraiser's confidentiality obligation is tempered by the provision that their analyses, opinions or conclusions are not protected when a member is legally required to disclose

[4] *CUSPAP Rules*, *supra* note 1 at sections 4.2.10 and 5.8.

this information by "due process of law". "Due process of law" includes production requirements found in procedural codes promulgated as regulations under validly enacted legislation, as well as the common law as found in decisions of courts and other competent tribunals.[5]

Confidentiality vs Privilege

The concepts of confidentiality and privilege are often confused. This is a frequent occurrence for independent expert witnesses, such as appraisers, who are governed by professional obligations mandating a duty of confidentiality to their clients. Information that is confidential in accordance with ethical or professional obligations is not the same as information that is privileged, and it may be disclosed during the discovery process.[6]

This is reflected in the exception to an appraiser's duty of confidentiality for disclosure mandated by "due process of law".[7] The *Rules of Civil Procedure* governing most civil litigation matters in the province of Ontario are regulations promulgated pursuant to the *Courts of Justice Act*.[8] The obligations to produce documents relevant to a litigation proceeding in accordance with the *Rules of Civil Procedure* constitute "due process of law" and may abrogate the confidentiality requirements of the *CUSPAP Rules*.

A specific example of this distinction would be the production obligations found at subrule 31.06(3) of the *Rules of Civil Procedure*. This rule allows an opposing party to obtain, through the discovery process, "disclosure of the findings, opinions and

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[5] *Re Clark et al v Attorney General of Canada* (1977), 17 OR (2d) 593.
[6] *Paciorka Leaseholds Limited v Windsor (City)*, (2016) 3 LCR (2d) 315 at para 43.
[7] *CUSPAP Rules*, *supra* note 1 at section 5.8.2.ii.
[8] *Courts of Justice Act*, RSO 1990, c C-43.

conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action". Within the appraisal context, this would necessarily include an appraiser's "analyses, opinions or conclusions in an assignment" that are protected by their duty of confidentiality.[9]

Though bound by professional standards to keep such information confidential as between themselves and a client, an appraiser retained by a party to litigation would be required to disclose such information pursuant to the *Rules of Civil Procedure*. Unless it falls within the ambit of legally recognized privilege, the information must be disclosed by the appraiser to the adverse party (a third party), with or without the consent of the client. It is important to note that because subrule 31.06(3) constitutes "due process of law", it is not a breach of professional standards for an appraiser to disclose the information required under that provision of the *Rules*.

This example highlights the differences between the scope of confidentiality and the protection offered by legal privilege. It is important that appraisers be cognizant of these differences so that they are aware of what information may be privileged and what information they may be compelled to disclose in the course of the litigation process.

Legal Privilege

The distinction between legal privilege and ethical or equitable principles and duties of confidentiality was expressed in *The Law of Evidence in Canada* as follows (at 716):[10]

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[9] *CUSPAP Rules, supra* note 1 at section 5.8.2.

[10] John Sopinka, Sidney N. Lederman, Alan W. Bryant, *The Law of Evidence in Canada*, 2nd (Toronto: Butterworths, 1990).

> "Although confidentiality is the corner stone for the protection of communications within particular relationships, confidentiality alone is not sufficient to attract privilege. Confidentiality may well attract other legal and ethical rights and obligations, but it does not have its foundations in the evidentiary doctrine of privilege".

The assumption that information or opinions are privileged simply because they are delivered in confidence is incorrect. Relying on that incorrect assumption may lead to inadvertent disclosure of information damaging to a party's litigation position and should be avoided if at all possible.

The origins of the evidentiary doctrine of legal privilege lie in communications between a solicitor and client. It arose at the end of the sixteenth century and became the first category of confidential communications to be afforded a "privilege" protecting it from disclosure or production. Privilege was originally based on the notion of confidence and honour and that a solicitor, as "a man of honour would not betray a confidence, and the judges as men of honour themselves would not require him to".[11] Within the context of solicitor-client communications the privilege is held by the client and may only be waived by him or her.[12]

Privilege has evolved to include three generally accepted categories that are relevant to appraisers and which will be discussed in this analysis. Those categories are:

(1) Solicitor-client privilege;

(2) Settlement privilege; and

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[11] *D. v National Society for the Prevention of Cruelty of Children*, [1977] All ER 589 at 611 [House of Lords].

[12] Ronald D. Manes, *Solicitor/Client privilege* (February 1988), 7 Advocates' Soc J No 1, 20.

(3) Litigation privilege.[13]

Information attracting a recognized legal privilege is protected from disclosure or production that would otherwise be required by the legal process. Such protection remains unless the privilege has been waived by the party holding the privilege or the privilege expires by operation of law.

Solicitor-Client Privilege

Solicitor-client privilege protects communications passing between a lawyer and client when the communication is in confidence and for the purpose of obtaining legal advice. The definitive statement of solicitor-client privilege was set out by J. H. Wigmore, and adopted by the Supreme Court, as follows:

> (1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived".[14]

The privilege has been recognized as a principle of fundamental justice attracting constitutional protection, and which of supreme importance in our legal system.[15] As stated in *Guelph* v. *Super Blue Box Recycling Corp.*,[16] (at para 76):

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[13] There are other forms of recognized privilege, such as spousal communications, the privilege against self-incrimination, and confidential informer privilege (among others). They are not relevant to this paper and will not be further elaborated upon. More information can be found on this topic in the *Law of Evidence in Canada*, *supra* note 10.

[14] J.H. Wigmore, *Evidence in Trials at Common Law,* McNaughton Rev., vol 8 (Boston: Little, Brown, 1961), at 554. Adopted by Supreme Court of Canada in *Solosky v Canada*, [1980] 1 S.C.R. 821.

[15] *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, [2002] 3 SCR 209 at para 16.

[16] *Guelph v Super Blue Box Recycling Corp.*, [2004] CarswellOnt 4488 (ONSC).

> The functional purpose of solicitor-client privilege goes to the very heart of the administration of the legal system. All persons, whether natural, corporate, or governmental, must have access to expert legal counsel without fear that this recourse may be used to their detriment: *Smith* v. *Jones* at S.C.R. 474-475; *Fosty* at S.C.R. 289. Solicitor-client privilege is a "fundamental civil and legal right" (*Solosky*, at S.C.R. 839) and is "fundamental to the justice system in Canada" (*R.* v. *McClure*, [2001] 1 S.C.R. 445 (S.C.C.), per Major J.)".

The protection afforded by legal privilege is not unlimited and will not protect documents or information simply because it is present in the file of a solicitor. In order to attract the protection of privilege the documents must meet the requirements set out above; inclusion in a solicitor's file is not a determinative, nor even particularly relevant, consideration in the analysis.[17] Similarly, communications do not attract the protection of privilege simply because counsel may be copied on them.[18] The analysis of whether privilege will apply is a substantive one and will depend on the contents of the particular records at issue, not the mere presence or inclusion of counsel. Expert witnesses assembling information, or communicating, for the purposes of litigation must be mindful of these limitations on solicitor-client privilege.

Solicitor-client privilege exists forever unless waived by the client. Waiver of the privilege may be express, but can also be implicit. Implicit waiver takes place by way of "reliance" on privileged communications (for example in a pleading) or by disclosure of privileged communications in the productions of a party or descriptions of the substance of such communications during examinations.[19] Once the privilege is waived, that waiver applies to the entirety of the subject matter of the communications. A party is not

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[17] *General Accident Assurance Co. v Chrusz* (1999), 45 O.R. (3d) 321 (ONCA) at para 38.
[18] *Humberplex v TransCanada Pipelines*, 2011 ONSC 4815 at para 46.
[19] *TTC Insurance v MVD Law*, 2018 ONSC 2611 at paras 34-36.

permitted to "cherry pick" privileged communications, disclosing what is helpful and claiming privilege over the remainder.[20]

Despite the potential for implicit waivers of privilege, in normal circumstances, Courts are prepared to excuse "slips" resulting in inadvertent disclosure where the disclosing party did not intend to waive privilege and the disclosure was a mistake made without appreciating the effect of disclosure.[21] Appraisers should be careful not to include potentially privileged information in any disclosed work product in order to avoid issues of a potential "waiver" of privilege.

Solicitor-client privilege may extend beyond the lawyer and the client to include third parties where the third party's function is "essential or integral to the maintenance or operation of the solicitor-client relationship for legal advice".[22] This can include experts, such as appraisers, where they are acting as a "messenger, translator and amanuensis" to "assemble information provided by the client and to explain it to the lawyer".[23] It will typically not apply when an expert is acting in an independent capacity and preparing an independent opinion.[24]

Although there may be certain instances when an appraiser is acting as a "translator" or messenger in conveying or interpreting information, appraisers often perform these tasks within the context of their own analysis. Where the task they are carrying out is also for the benefit of the appraiser's analysis solicitor-client privilege will not protect the

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[20] *Slansky v Canada (Attorney General),* 2013 FCA 199 at para 261.
[21] *TTC Insurance, supra* note 19 at para 37.
[22] *XCG Consultants Inc v ABB Inc,* 2014 ONSC 1111 at para 46.
[23] *Ibid* at para 47.
[24] *The Law of Evidence in Canada, supra* note 10 at 743.

communication. Caution should be exercised in assuming that a communication passing between the client, through the appraiser to a solicitor, or vice versa, will be protected by solicitor-client privilege.

Settlement Privilege

A second category of recognized legal privilege applies to communications made in furtherance of settlement. This is typically known as "settlement privilege". The policy underlying settlement privilege is to encourage parties to resolve their private disputes without recourse to litigation and to encourage full, frank and uninhibited discussions by the parties to a dispute in order to resolve the matter.[25]

Courts have recognized the existence of settlement privilege when the following conditions are present:

(1) A litigious dispute must be in existence or within contemplation;

(2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

(3) The purpose of the communication must be to attempt to effect a settlement.[26]

Settlement privilege protects not only communications and negotiations made in furtherance of a settlement, but also the details of a successful settlement.[27] It protects negotiations that are both successful and unsuccessful.

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[25] *Sable Offshore Energy Inc. v Ameron International Corp.*, [2013] 2 SCR 623 at para 2.
[26] *Costello v Calgary* (1997), 152 D.L.R. (4th) 453 at 487.
[27] *Sable Offshore Energy, supra* note 25 at para 17.

Parties often label correspondence with the phrase “without prejudice”, implying that the communications are made for the purposes of settlement and are therefore privileged.[28] Such a label is not determinative and is of limited assistance in determining whether the communication at issue is in fact subject to privilege. The determination of whether a document is privileged is a substantive one that focuses on whether the communication was made with the intent of furthering settlement of the action.[29] Documents not labelled “without prejudice”, but which possess such an intent, will be subject to settlement privilege. Similarly, those documents that are labelled “without prejudice” but which are not made with the intent of settling the action, will not be protected by settlement privilege.

Understanding the substantive analysis underlying the application of settlement privilege is important for expert witnesses. Simply labelling a document as “without prejudice” will not itself protect the document from production. A reviewing court will instead look to the substance of the document in determining whether it meets the requirements for the application of settlement privilege.

Settlement privilege is a class privilege. This means that all communications within the context of negotiating settlement are presumptively privileged; the burden is on the party seeking production to rebut that presumption.[30] Like all classes of legal privilege, there are exceptions to settlement privilege where documents that would otherwise be privileged are nonetheless producible. Such exceptions will arise where a competing

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[28] *Peel Condominium Corp. No. 199 v Ontario New Home Warranties Plan* (1988), 30 C.P.C. (2d) 118 at para. 32.
[29] *Sable Offshore, supra* note 25 at para 14.
[30] *Ibid*.

public interest outweighs the public interest in encouraging settlement, where "the justice of the case requires it".[31] Some examples of an exception to settlement privilege include: (1) the communication is unlawful; (2) the communication is prejudicial to the recipient; (3) a determination must be made as to whether an actual settlement took place; (4) a limitation period is at issue; or (5) a determination with respect to a claim for costs of an action must be made.[32]

There are circumstances where an expert opinion will be used to further a settlement and will be shared with the opposing party for that purpose. In that case the expert opinion or report is part of the communication in furtherance of settlement and should attract settlement privilege. The opinion or report will be subject to the same test as other communications made in furtherance of settlement in order to determine whether it is privileged.

The issue of settlement privilege applying to appraisal reports was addressed at length by the Ontario Municipal Board in *Gadzala v Toronto and Region Conservation Authority*.[33] The case concerned an expropriation proceeding in which the expropriating authority (Respondent) claimed settlement privilege over two appraisal reports provided to the Claimants in the course of negotiations for the purchase of their land. The land was later expropriated by the Respondent. The Claimants argued that the two appraisal reports were prepared for the purpose of negotiating a real estate transaction prior to the expropriation and therefore were not made in contemplation of a litigious dispute. It was their position that settlement privilege did not apply to the reports, as a result.

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[31] *Sable Offshore, supra* note 25 at para 12.
[32] *The Law of Evidence in Canada, supra* note 10 at 815 to 818.
[33] *Gadzala v Toronto and Region Conservation Authority*, [2001] OMBD No 1152.

The Board found that negotiations were already underway between the Claimant and the Respondent at the time the reports were prepared. Communications between the Claimant and the Respondent were structured in a way that contemplated a settlement of a potential expropriation and not solely a real estate negotiation.[34] The Board concluded that the appraisal reports were protected by settlement privilege and therefore could not to be disclosed in the context of the proceedings.

In addition to the common law elements of settlement privilege, the *Rules of Civil Procedure* deem all communications at a mediation session to be "without prejudice settlement discussions" attracting settlement privilege.[35] An expert report served solely as part of a party's communications at mediation would likely be protected by settlement privilege under this provision. In order to maintain settlement privilege over such an expert report, it must be prepared for the primary or exclusive purpose of bringing about a resolution to a matter. That intention should be made clear, in writing, at the time the report is served. An appraiser may also wish to include the purpose for which the report is prepared in the text of the report. This may be one of the circumstances where it would be of assistance to label the report "without prejudice".

Litigation Privilege

Litigation privilege protects documents and communications whose dominant purpose is preparation for litigation; typical examples include the lawyer's file and oral or written communications between a lawyer and third party such as experts or other witnesses.[36]

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[34] *Gadzala, supra* note 33 at paras 16-21.
[35] Rules 24.1.14 of the *Rules of Civil Procedure*, *supra* note 3.
[36] *Lizotte v Aviva Insurance Company of Canada*, [2016] 2 SCR 521 at para 19.

Litigation privilege is distinct from solicitor-client privilege, though the two share a common purpose: the "secure and effective administration of justice according to law".[37] This distinct, but interrelated, relationship has been described as follows:

> "It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
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> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of case for trial by the adversarial advocate. In other words, 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)".[38]

The policy rationale for litigation privilege has recently been emphasized by the Supreme Court of Canada as:

> "[A] lawyer's preparation of his or her case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file

[37] *Lizotte, supra* note 36 at para 16.

[38] R.J. Sharpe, "Claiming Privilege in the Discovery Process" in *Law in Transition: Evidence*, LSUC Special Lectures (Toronto: De Boo, 1984) at 163, recently cited by the Supreme Court of Canada in *Blank v Canada (Dept. of Justice)* (2006), 270 D.L.R. (4th) 280 (S.C.C.).

> and presented to the court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not give rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system" [emphasis in original].[39]

Unlike solicitor-client privilege, litigation privilege is "neither absolute in scope or permanent in duration". It applies only to those documents whose "dominant purpose" is litigation and lapses when the litigation ends.[40]

Litigation privilege has also been referred to as "work product privilege" because it represents the entire work product a lawyer assembles in a brief, which constitutes the lawyer's labour and the sum total of their knowledge, research and skill.[41] When an expert report is prepared at the instance of counsel for use in litigation, it too attracts litigation privilege.[42]

The litigation privilege that applies to expert reports is waived once the report is filed with the Court or tribunal that will determine the litigation before it.[43] At that time adverse parties are entitled to see not only the expert report but also all relevant and material working documents that were created in support of the report.[44] The application of litigation privilege to an expert report is also waived by operation of the *Rules of Civil Procedure*, mentioned above and which will be discussed in further detail below.

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[39] *Lizotte, supra* note 36 at para 20, citing *Susan Hosiery Ltd v Minister of National Revenue*, [1969] 2 ExCR 27 at pages 33-34.
[40] *Lizotte, supra* note 36 at para 22-23.
[41] *Flinn v McFarland* (2002), 30 C.P.C. (5th) 183 (NSSC).
[42] *Deloitte & Touche LLP v Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee)*, 2008 ABCA 162 at para 93.
[43] *Ibid* at para 93.
[44] *Ibid*.

Disclosure of Experts' Findings and Reports under the *Rules of Civil Procedure*

The extent to which an expert opinion and the underlying facts and findings are to be divulged prior to trial as part of the litigation process is set out in the *Rules of Civil Procedure*. As discussed earlier in this paper, subrule 31.06(3) governs the extent to which an adverse party may examine the expert evidence obtained on behalf of the examined party. It allows the adverse party to obtain production of the "findings, opinions and conclusions" of the examined party's expert as part of the out-of-court examination conducted during "Examination for Discovery". The rule applies only during the discovery stage and not throughout the entire life of the proceeding.[45]

The application of subrule 31.06(3) and the scope of discovery relating to an expert opinion is subject to the definition of the words "findings, opinions and conclusions" found in the rule. The scope of those terms was set out by Mr. Justice Lofchik in *Turner (Litigation Guardian of) v Dyck*:

> "The scope of *"findings, opinions and conclusions"* in rule 31.06 is broad and includes information and data obtained by the expert, contained in documents or obtained through interviews on the basis of which conclusions are drawn and opinions are formed. The information and data can include research, documents, calculations and factual data and the words *"findings, opinions and conclusions"* are broad enough to include the field notes, raw data and records made and used by the expert in preparing his or her report to the extent that factual underpinnings in support of the opinions or conclusions are not set out in the report. To the extent that the opinions and conclusions in the report are based upon information communicated by counsel to the experts, even though the result of research and the work product of counsel, the provision of such information to the experts and the reliance upon same by the experts in coming to their opinions and conclusions waives any privilege which may attach to such information".[46]

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[45] *Conceicao Farms Inc. v Zeneca Corp.* (2006), 272 D.L.R. (4th) 545 (ONCA) at 550.
[46] *Turner (Litigation Guardian of)* v. *Dyck*, [2002] O.J. No. 4775 (ONSC) at para 16.

The Ontario Court of Appeal has more recently clarified the scope of producible information with respect to an expert's report as being the "material relating to [the] formulation of the expressed opinion".[47] Subrule 31.06(3) does not compel an expert to produce their actual report during the discovery stage, but only the findings, opinions and conclusions underlying the report.[48] As a practical matter, however, the report itself will often be produced to discharge the obligations set out in Rule 31.06(3).[49] This may prove problematic if the production of the report occurs early in the proceedings, given the implied waiver of litigation privilege accompanying that production.

In order to avoid such problems subrule 31.06(3) allows a party to avoid immediately complying with the rule at discovery in the event that the party is not yet certain whether they will rely on the expert report. Subrule 31.06(3) requires production of the required information from an expert unless "the party being examined undertakes not to call the expert as a witness at the trial". This requirement is not intended to force a litigant to make an "election" relating to whether they will use an expert at trial or not and permits them to defer any such "election" until a reasonable period of time before trial.[50] The Ontario Superior Court has summarized the application of subrule 31.06(3) during the discovery process as follows:

> "From my review of Rule 31.06(3) and the cases cited by counsel I conclude:
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> 1. At discovery, a party must answer whether or not they have engaged an expert.
>
> 2. A party can be asked if they have received any preliminary findings, opinions or conclusions, even oral ones.

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[47] *Moore v Getahun*, 2015 ONCA 55 at para 75.

[48] *Turner (Litigation Guardian of) v Dyck*, *supra* note 46 at para. 13.

[49] *Conceicao Farms Inc.*, *supra* note 45 at 549.

[50] *Hosh (Litigation Guardian of) v Black*, [2003] CarswellOnt. 2283 at para. 18.

> 3. These findings, opinions or conclusions must be disclosed unless the party undertakes not to call that expert at trial.
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> 4. At discovery, a party can be put to their election to not call their expert at trial and they can maintain any privilege over any report so long as that election is made.
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> 5. Counsel can decline to answer the question on their undertaking to advise the examining party of their election within a reasonable period of time; generally in advance of the settlement conference.
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> 6. In the absence of such an undertaking, the Court can require a party to answer the question or set a time limit for the election. This is a necessary adjunct to the Court's power to set a date for the delivery of an expert's report in advance of the time periods prescribed by Rule 53.03".[51]

The timeline for delivery of an expert report that will be relied upon at trial, and the contents of such a report, are set out at rule 53.03 of the *Rules of Civil Procedure*. That rule reads as follows:

> "53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
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> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
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> (2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:
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> 1. The expert's name, address and area of expertise.
> 2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
> 3. The instructions provided to the expert in relation to the proceeding.
> 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
> 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
> 6. The expert's reasons for his or her opinion, including,

[51] *Hosh*, *supra* note 50 at para 23.

> i. a description of the factual assumptions on which the opinion is based,
> ii. a description of any research conducted by the expert that led him or her to form the opinion, and
> iii. a list of every document, if any, relied on by the expert in forming the opinion.
>
> 7. An acknowledgement of expert's duty (Form 53) signed by the expert.
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> Schedule for Service of Reports
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> (2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1) and (2), unless the court orders otherwise.

An expert will not be permitted to testify on other fields not mentioned in their report, as a result of rule 53.03.[52] Administrative tribunals have the ability to make their own rules governing the advance disclosure of expert reports.[53] Certain administrative bodies, such as the Local Planning Appeal Tribunal (previously the Ontario Municipal Board) in expropriation matters, incorporate the rules governing the exchange of expert reports from *Rules of Civil Procedure* into their own procedure.[54]

It is apparent that the broad scope of discovery is applicable as well to the production and disclosure obligations governing expert witnesses, such as appraisers. These production obligations may arise even at early stages of the litigation. Though they are abrogated somewhat by the bounds of litigation privilege, expert witnesses must be aware of these obligations from the time they are retained in order to ensure that their client is not prejudiced by the disclosure or production of otherwise confidential information.

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[52] *Rolley v MacDonnell*, 2018 ONSC 163 at para 9.

[53] *Statutory Powers and Procedures Act*, RSO 1990, c. S-22 at paragraph 5.4(1)(c).

[54] *Rules of Practice and Procedure* of the Local Planning Appeal Tribunal, section 1.04. This extends the time for the advance service of expert reports beyond that provided for in Section 28(1) of the *Expropriations Act.* The timeline for delivery of expert reports is often further modified by way of a procedural order governing the litigation that is made on consent of the parties or by order of the Board.

Scope of Producible Documents from an Expert's File

The delivery of an expert report to the opposing party in litigation proceedings engages the "implied waiver" of litigation privilege over that report, as set out above. Disclosure of an expert report to another expert alone, and not the adverse party or their counsel, will not typically constitute a waiver of litigation privilege.[55] As with solicitor-client privilege, if the disclosure of such a report to the opposing party is inadvertent and a genuine intention remains to preserve privilege over the report, the Court may relieve a party of the waiver.[56]

The scope of litigation privilege and the documents that are required to be produced by an expert in accordance with common law production obligations, and those set out in the *Rules of Civil Procedure*, has recently been a matter of controversy in the Courts. Certain judges in the Ontario Superior Court (and elsewhere) have questioned the wisdom of extending litigation privilege to the preparation of expert reports.[57] This controversy has arisen as a result of the growing importance of expert evidence to the resolution of litigation proceedings and a concern in the Courts of ensuring the independence and objectivity of expert witnesses engaged by litigants.[58]

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[55] *Browne (Litigation Guardian Of) v Lavery*, (2002) 58 OR (3d) 49 (ONSC) at paras. 16 and 17.

[56] *Windsor* (City) *v MFP Financial Services Ltd*., [2004] CarswellOnt 4990 at para. 14. In this case one of the lawyers for the Plaintiff had inadvertently provided an expert report to a lawyer who was no longer part of the Plaintiff's legal team and was now working for a law firm involved in the proceeding as an adverse party. The Court of Appeal was satisfied that the disclosure of the report was an error and a genuine intention remained to preserve privilege over the report. It therefore held that privilege had not been waived.

[57] See for example *Browne, supra* note 55 at paras 65-71 and *Aviaco International Leasing Inc. v Boeing Canada Inc.*, 2002 CanLII 21293 (ONSC) at para 16.

[58] *Moore, supra* note 47 at paras 33-35.

As a result of this controversy there had been an increasing trend in favour of production of nearly the entirety of an expert witness' file, including communications with counsel and draft reports.[59] This trend was problematic both for members of the bar and professionals engaged as expert witnesses. Of greatest concern was the production of communications between counsel and expert witnesses, as well as preliminary drafts of expert reports that may have been exchanged between counsel and the experts. The problems with such an approach were identified as being:

> "[C]ontrary to existing doctrine and would inhibit careful preparation. Such a rule would discourage the participants from reducing preliminary or tentative views to writing, a necessary step in the development of a sound and thorough opinion. Compelling production of all drafts, good and bad, would discourage parties from engaging experts to provide careful and dispassionate opinions and would instead encourage partisan and unbalanced reports. Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings".[60]

Much of the controversy surrounding this topic was resolved by the Ontario Court of Appeal in the 2015 decision *Moore v Getahun* (for which an application for leave to appeal to the Supreme Court of Canada was dismissed). In that case the Court confirmed that there is no obligation currently imposed by the law that requires the routine production of draft expert reports in the litigation process.[61] There is likewise no obligation to produce communications between counsel and an expert related to the preparation of the expert's report. The implied waiver of litigation privilege occasioned

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[59] See for example *Browne, supra* note 55 and *Aviaco, supra* note 57.
[60] *Moore, supra* note 47 at para 71.
[61] *Ibid* at para 72.

by the formal delivery of an expert report does not typically extend to these aspects of an expert's file.

There are, however, exceptions to this general rule. It is self-evident that it would be wrong for counsel, or another participant in litigation, to interfere with an expert's duty of independence and objectivity.[62] At the same time litigation privilege should not be used as a way to hide a party's improper conduct. Courts retain a supervisory role to ensure the independence and impartiality of expert witnesses is maintained. Where a party can demonstrate a factual foundation supporting a reasonable suspicion that counsel improperly influenced an expert or their opinion, draft reports and details of communications with counsel will be producible.[63] That factual foundation must consist of something more than simply evidence of communication between counsel and an expert in the course of preparing an expert report.

The information that will be producible in accordance with the *Rules of Civil Procedure*, and to which the implied waiver of litigation privilege arising from the delivery of an expert report applies in the ordinary course of litigation, is the "foundational information" of the expert report.[64] That foundational information is typically limited to the material related to the formulation of the opinion expressed by the expert witness.

The categories of foundational information that will be producible upon delivery of an expert's report to be relied on at trial are not closed. It has nevertheless been considered at length by the courts and has been held to include:

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[62] *Moore*, *supra* note 47 at para 77.
[63] *Ibid* at para 78.
[64] *Ibid* at para 75.

- the instructing letter from a party to the expert engaged on their behalf, and any further instructing letters requesting the preparation of subsequent reports in the same proceeding;[65]
- documents read by the expert and facts that were disclosed to the expert;[66]
- notes, raw data and records of the expert;[67]
- the books and journals researched by the expert in formulating their opinion;[68] and
- other expert reports referred to and/or relied upon in preparation of the expert report at issue.[69]

Appraisers who have been retained to give evidence on behalf of a party involved in litigation must understand and comply with these obligations to produce information required by the Courts. Upon election by a party to call the appraiser at a trial or hearing, and particularly upon formal delivery of their report, the appraiser will be required to produce the foundational information for their report. Appraisers should keep detailed records of the information relied upon in formulating their report in order to ensure compliance with these obligations. They should also ensure that their independence is maintained during any co-operation with counsel as part of the process of finalizing their report, in order to avoid any suggestion of impropriety that would give rise to an even broader waiver of documents protected by privilege.

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[65] *Nikolakakos v Hoque*, 2015 ONSC 4738 at paras 25-26.
[66] *Aherne v Chang*, 2011 ONSC 3846 at para 85.
[67] *Award Developments (Ontario) Ltd. v Novoco Enterprises Ltd. (in Trust)*, 1992 CanLII 7587 (ONSC) at page 5.
[68] *Allen v Oulahen*, (1992) 10 OR (3d) 613 (ONSC) at page 8.
[69] *2060619 Ontaro Inc. v Durham (Regional Municipality)*, 2015 CanLII 43687 (ONLPAT) at paras 11-12.

Conclusion

Appraisers should understand the rules of legal privilege and how these rules interact with their ethical obligations of confidentiality to clients, as well as the obligations to produce and disclose documents when involved in the litigation process.

When preparing an appraisal analysis outside of the litigation process, appraisers can assume that their work will be held in confidence unless the client authorizes its release to a third party. When preparing an appraisal report in the litigation process, however, the appraiser should understand what information (if any) that they are provided, as well as their analysis, conclusions and report, may attract legal privilege. The governing privilege will be waived once their appraisal report or analysis is relied on in litigation. At that time much of their file will no longer be privileged and becomes producible in the ordinary course of the litigation process.

This waiver will apply to the "foundational information" relied upon by an appraiser in formulating their expert opinion. Appraisers should err on the side of caution and govern their affairs in contemplation of the possibility that significant portions of their file may end up being produced in the litigation. Three precautions that are advisable in light of this reality are:

(a) Clearly advising clients of the potential production obligations relating to their appraisal file at the outset of the engagement so they are aware of the potential production of file documents and the consequent limits on the appraiser's duty of confidentiality to the client;

(b) Avoiding requests for, acceptance of, and most particularly reliance on, documents or communications that may be prejudicial or embarrassing to the appraiser's analysis if produced and revealed; and

(c) Attempt to maintain clear and complete records of observations, notes, communications and documents so that the contents of a file, if produced, will be revealed in its proper context and properly present the fairness of the appraisal analysis.

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