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The Forensic Accountant's Guide to the Law of Privilege: What To Do When a Fraudster Claims Privilege

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"Because forensic accountants have experience working in an environment in which regulators, courts, and others scrutinize their work, they understand the need to properly document and substantiate their work and findings. In addition, the forensic accountant is familiar with the concepts of attorney-client privilege and the attorney work-product doctrine and makes sure to consider these issues during any investigation." [1]

About the Editor

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Introduction

How Privilege Affects Your Practice

Understanding the law of privilege is a prerequisite to doing a thorough and proper investigation. Investigators must constantly remind themselves that litigation is not the end of their investigation, as important evidence may be garnered through the court process itself. Every investigator must be constantly acquiring and collating evidence as it presents itself during the course of the litigation. The purpose of this reference guide is to review the reasons why claims to privilege are not available to fraudsters who attempt to use it to conceal their misdeeds. In the course of this exploration, we will also show why your legal team might want to sue co-conspirators as a means of acquiring evidence, and how you should protect yourself from a fraudster who seeks to attack the investigator's claims to privilege in an effort to gain access to your pre-trial work product. Put briefly, an advanced knowledge of the law of privilege is a critical part of the forensic accountant's investigative skill set whenever a fraud investigation is undertaken.

Using a hypothetical example to show how learning more about privilege can assist any forensic investigation, let us say that you believe Yellow.com Pages Co. (Yellow), A, B, C, and D have conspired to send mass mailings to businesses in the name of YELLOW business PAGES with a Walking Fingers LOGO that appear to be invoices for an advertisement in an effort to dupe the recipient into paying Yellow for money they in fact do owe to Yellow Pages Group Co. Individuals B, C, and D insist that they were only acting as lenders or employees of Yellow. Yellow's sole director and shareholder, A, says he bought Yellow after the invoice for the advertisement had been sent, and, as far as he knows, it was a legitimate solicitation to an internet listing that Yellow will set up for those who respond to its "advertisement."

The incorporation documents show that Yellow was a shell company, with a lawyer as the first incorporator of the company, and A became the registered sole director of Yellow only five months later. However, you, or the lawyer helping you with the investigation, are able to procure:

1. a reporting letter from Yellow's lawyer to the company, to the attention of A at his home address, about Ontario's law prohibiting the use of a name that is likely to deceive, and that, notwithstanding his advice that the name is deceptively close to Yellow Pages, he was instructed to proceed;
2. a letter from another lawyer to 12345678 Ont. Limited confirming that this lawyer has received a direction from Yellow, signed by A, to pay all the proceeds from the "invoices" to 12345678 Ont. Ltd.; confirming that he had arranged with a law firm in the Cayman Islands to receive those funds in trust for the numbered company; and a trust statement showing money he received from Yellow and paid to the Cayman Island law firm in trust for 12345678 Ont. Limited;
3. a letter from the Cayman Island law firm containing a direction to pay out the proceeds of 12345678 Ont. Ltd.'s trust account in 25% shares to A, B, C, and D's personal accounts in the Cayman Islands; and
4. the corporate minute book for Yellow, showing that the shares of the company pledged to 12345678 Ont. Ltd.

Together, these documents allow you to make your case about an intentional scheme by A, B, C, and D to defraud the public, and to trace the funds into their accounts in the Cayman Islands. Without these documents, you could not make your case. The lawyers involved cannot prevent you from acquiring any of the documents in question, although they would surely assert otherwise; it is your knowledge of the law of privilege that allows you to obtain all of the documents in question and to make your case.[2]

This reference guide will explore the following concepts about the law of privilege that will assist in fraud investigations:

1. Most legal privileges involve communications between lawyer and client, and not communications between priest and penitent, doctor and patient, or journalist and informant.
2. Privilege only covers communications in furtherance of obtaining legal advice and does not cover every confidential communication between a lawyer and client.[3]
3. A document that was not privileged is not protected by privilege simply because it comes into the possession

of a lawyer.[4] This includes corporate minute books, and other books and records, and contracts[5] or expert reports.[6] Such documents may be covered by litigation privilege only if they were prepared for the dominant purpose of litigation.[7]

4. Because solicitor-client privilege only protects legal advice, the contracts or other documents in a lawyer's file are unlikely to be covered by privilege.[8] Transactions are acts, not communications, and are therefore not covered by privilege. All documents and communications in relation to transactions are not covered by privilege without the element of legal advice attaching.[9] This includes funds moving in and out of a lawyer's trust account.[10] Producing non-privileged information may require editing privileged communications from documents and allowing production of the document itself. Therefore, lawyers may be required to produce their files and give evidence with respect to transactions that they are involved in. That is, evidence as to the facts, not to the advice.[11]
5. Some admissions made by subjects in the context of settlement discussions are not privileged. For example, admissions that one intends to fraudulently convey assets, or that one is insolvent and may declare bankruptcy if settlement terms are not agreed to, may be admissible.
6. There is no privilege where a client seeks assistance which facilitates a crime, fraud, or other intentionally wrongful act, either in its commission or in preventing its discovery.[12]
7. If a client asks his lawyer for advice about a past act that was wrongful, it is covered by privilege. However, if the wrongful act is continuing, such as in the case of a pattern of fraud, it may not be covered by privilege as the advice may be assisting in the continuation of the wrongful act by preventing its detection, or otherwise facilitating its continuance.[13]
8. The client's lack of knowledge that the act is wrongful does not mean privilege applies.[14] The lawyer's lack of knowledge that his client intends to use his advice for wrongful purposes is also irrelevant; privilege will still not protect the advice.[15]
9. While a mere allegation of fraud or wrongful conduct is not sufficient to displace privilege, *prima facie* evidence of such wrongful conduct will be sufficient to displace privilege prior to trial.[16]
10. Two or more clients may be entitled to claim privilege against third parties in connection with advice given by a common lawyer, but they cannot claim privilege between themselves with respect to that advice. It may be that appointing a receiver over the affairs of one of the joint clients may gain one access to otherwise privileged information.[17]
11. Privilege may be waived either expressly, or by implication, such as where otherwise privileged information is disclosed to third parties. Examples of implied waiver would be by putting the law of privilege in issue in litigation – "my lawyer told me it was okay" – or by disclosing part of a privileged communication, which thereby waives privilege with respect to all discussions with a lawyer over the same subject matter.[18] Waiver includes acts of a public nature such as the filing of pleadings or public statements in court or elsewhere that reference legal advice, or that suggest that the subject had an honest or innocent state of mind.[19]
12. While the law of privilege is far from certain, the concept of selective waiver of privilege to the government for the purpose of favourable treatment during a prosecution (or any other purpose) may be considered waiver of privilege for all purposes, regardless of whether confidentiality is promised or not, if the waiver was voluntary.[20] At common law, disclosure to non-governmental third parties is certainly considered waiver, whether there is a confidentiality clause present in a disclosure agreement or not.

Every time you are retained as an expert, you must be alive to all of the potential minefields and opportunities caused by claims of privilege. **If you understand privilege, you not only understand how to protect your investigation from the prying eyes of the fraudster, you also understand that claims to privilege are not barriers to a proper fraud investigation. Only the forensic investigator's perception of privilege has acted as a limit to a proper fraud investigation, and it is time to overcome this misperception.**

A properly planned fraud investigation can overcome any impediment posed by a claim to privilege by our understanding the nature of the law of privilege and why it does not prevent an investigator's access to the relevant evidence. To see why this is the case, it is necessary to understand the general default rule of admissibility of relevant evidence before potentially relevant claims to privilege can be identified

Discovery of Evidence

"For nothing is hidden that will not be disclosed, nor is anything secret that will not become known and come to light."

– Luke 8:17

Forensic accountants should proceed on the basis that all relevant evidence should be made available to the court hearing their matter, until you get a considered legal opinion to the contrary or a court determines otherwise. Too often, privileges are assumed to prevent otherwise relevant evidence from being admitted. That is a dangerous, and self-limiting, assumption. A few years ago, some corporate general counsel may have been surprised by the author's view that admissions that they made in the context of settlement negotiations, such as the admission that their employer's debt has rendered their corporation incapable of paying its creditors in full, are admissible in court.

This negotiating ploy is frequently used in the belief that "settlement privilege" applies. It doesn't. Nor does the threat of fraudulently conveying assets to defeat a judgment if the plaintiff does not settle apply. Understanding that these types of statements are admissible in a court of law, and are not privileged communications despite being said in the context of "without prejudice" communications,[21] gives your clients important evidence that most investigators assume is unavailable for use at a hearing.

Understanding the rules of evidence is a critical part of the forensic accountants' skill set. Some in the forensic accounting community also seem surprised by my comments in *The Law of Fraud and the Forensic Investigator*[22] – that forensic accountants may be improperly evaluating their cases by failing to use illegally obtained evidence in civil cases. I have pointed out on a number of occasions that any illegally obtained evidence they obtain is not rendered inadmissible in civil proceedings (and in most criminal proceedings) simply because of the manner it which it was procured.[23] These comments were designed to draw to the investigators' attention the misunderstood premises and parameters of the rules of evidence.

It is also important to understand the court rules regarding the discovery of evidence during the course of the legal proceedings themselves. In particular, **it is critical to understand that the commencement of litigation is a second stage of your investigation and not the end of it: the forensic accountant must take advantage of the discovery process to obtain an order for the production of documents or answers to questions on examination for discovery that bear any semblance of relevancy to the investigation.**[24]

As the only limits to your obtaining potentially relevant evidence for your investigation are the limits determined by the law of privilege, it is obviously of vital, strategic importance that you understand what these limits are, and in what circumstances they do not apply.

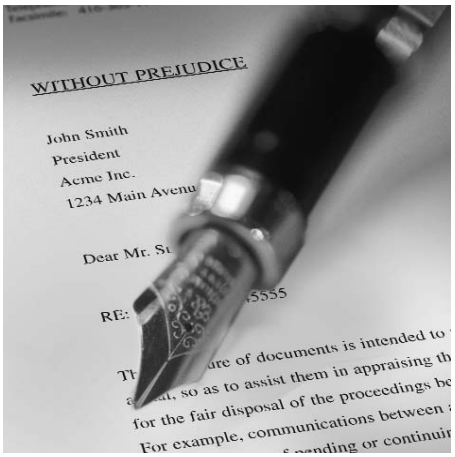
When it comes to a trial, the general rule is that all relevant evidence is admissible, and indeed its existence has to be disclosed prior to trial in a civil proceeding.[25] When it comes to a court motion or application, even hearsay evidence is admissible.[26] **Put shortly, if you want to rely on evidence, chances are the court does as well.** The rules of evidence are based on three fundamental principles: (1) relevance, (2) reliability, and (3) privilege. The first two principles support the idea that a trial is a search for the truth. The last principle supports the idea that the search for the truth is not the highest democratic value, and that certain policy objectives supersede it.

It follows that these three principles of the law of evidence, taken together, will require a sound public policy to hide the truth before a claim to privilege will be allowed to prevail. Courts are loathe to suppress important, relevant evidence that might prevent a just resolution at trial. As the British Columbia Court of Appeal once noted:

> "…solicitor-client privilege is the oldest of the privileges for confidential information…privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete...It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."[27]

You cannot assume that a particular privilege prevents admission of potentially relevant evidence. Even lawyers may overestimate the parameters of a privilege, absent careful research. Therefore, the forensic accountant, as a critical member of the forensic team, needs to have a working knowledge of privilege to properly conduct any investigation, and, in particular, a fraud investigation where many claims to privilege do not apply.

Types of Privilege



Most of our commonly held beliefs about privilege are wrong. There are no class privileges to protect communications between doctor-patient, priest-penitent, or journalist-source, for example.[28] While there are a number of esoteric class privileges that may possibly arise in certain very specific circumstances that are beyond the scope of this guide,[29] and there is also a special public interest privilege that may also arise in a particular situation, called the "Wigmore Privilege," for our purposes there are only three classes of privilege that should be of immediate concern to the forensic accountant.[30] These are settlement privilege, solicitor-client privilege, and litigation privilege.

Settlement Privilege

The first claim of privilege is that of "settlement privilege." Parties are not allowed to introduce evidence of settlement discussions at trial.

This "without prejudice" rule is a rule of evidence. Where it applies, it operates to prevent a party from citing evidence of negotiations genuinely aimed at settlement between him and his adversary. The privilege attaches to the communications between parties to a dispute that have, as their object, the resolution of an ongoing dispute.

It is not necessary for documents or discussions to be headed "without prejudice" in order to engage the principle. That title only indicates an intention on the part of the sender that the communication be interpreted as part of a dialogue with a view to the compromise of a dispute. Privilege arises irrespective of the presence, or absence, of the "without prejudice" heading. The heading does not make the communication privileged if it was not made on a privileged occasion.

Privilege is not engaged where there is no dispute between the parties. Thus, for example, no privilege is attached to discussions of the terms on which an employee might leave employment where no dispute had yet arisen.[31] Nor is it engaged where no attempt at compromise or settlement is part of the communication, as for example, in a demand letter.[32] On most occasions, the forensic accountant can simply ignore the "without prejudice" comment on the top of correspondence, as counsel and clients alike often misuse this term.[33]

Unlawful communications, and certain statements made against one's interest, may not be protected by settlement privilege. For instance, a statement is not protected where the discussion contains a form of fraud, or a threat of fraud. As an example, where a defendant had said that if the plaintiffs brought the action to trial, he would perjure himself, bribe witnesses to perjure themselves, and would leave Canada if the plaintiffs obtained judgment against him, with a view to extracting a favorable settlement, the statement would not be privileged and could be used to impugn that person's belief in his case at trial, and prove intent in any fraudulent conveyance proceeding.[34]

Any unlawful communications or impropriety cannot be concealed by settlement privilege. Another example would be a threat to allege cause for dismissal when none exists, in order to extract a release from an employee who was being dismissed.[35] Settlement privilege does not cover any form of "unambiguous impropriety," meaning that any comment made on an otherwise privileged occasion may become admissible if it goes beyond the bounds of a *bona fide* position to compromise a dispute.[36] Privilege cannot protect wrongful acts, including threats, or other forms of verbal or written misconduct.

Privilege cannot be used as a means to deceive the courts as to the facts by excluding evidence which would either show a claim to be fraudulent, or which would repel a charge of fraud. For example, a fraudster cannot allege he was never aware of something, and then use a claim to settlement privilege to prevent someone from showing that the fraudster was indeed made aware of the fact in issue during the course of settlement discussions.

In the insurance context, without prejudice discussions with a tortfeasor may be admissible to prevent an insured from asserting a false claim against the insurer.[37] The purpose of the privilege is not to protect dishonest dealing, and there is no policy reason for excluding what one party puts forward in its own interest and to the prejudice of the other. The purpose of

the privilege is to encourage honest attempts at settlement and to protect parties from having admissions and concessions held against them. It cannot be the case that an admission that a false affidavit had been sworn during a "without prejudice" communication would be protected by the privilege associated with any honest attempt at settlement.[38]

Some admissions against interest, or other forms of evidence, are not privileged at common law simply because they were produced in the course of settlement discussions. Thus, for example, an admission that one is insolvent as part of an attempt to induce a creditor to take less than what she is owed, is not a privileged communication.[39] Moreover, terms of a completed settlement are not privileged *vis-à-vis* the other party to the communication, or *vis-à-vis* third parties in many instances, and terms of settlement agreements promising confidentiality regarding their terms are likewise not effective in most jurisdictions to prevent access to otherwise relevant information contained in such settlements.[40]

Contractual provisions of confidentiality in settlement agreements are normally not a bar to acquiring relevant evidence.[41] Parties cannot use confidentiality agreements to protect relevant evidence from investigation by non-parties to the contract.[42] Because attempts by litigants to use contractual provisions as an excuse not to produce otherwise relevant evidence usually fail, fraudsters are more likely to rely on solicitor-client privilege, and it is for that reason that we turn to that subject.

Understanding Legal Professional Privilege (LPP)

The Reasons for the Rule

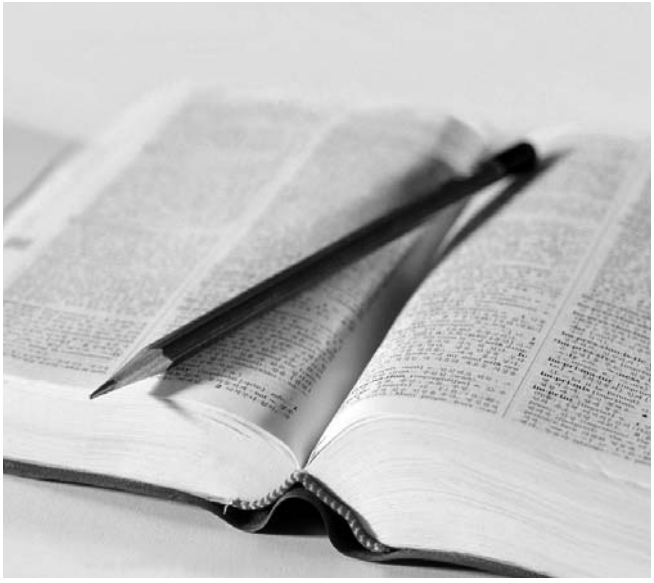
"No man can apply any rule intelligently until he understands when to disregard it – until he understands that when the reason for the rule ceases, the rule itself fails."

– George Schultz[43]

Canadians call it solicitor-client privilege, and Americans call it attorney-client privilege. The generic term of "legal professional privilege" (LPP) is commonly used even though it is misleading. A privilege is an advantage granted to a particular person, class, or group,[44] whereas LPP is a right enjoyed by everyone. Therefore, it is not a privilege at all. Secondly, it is not a right belonging to a "legal professional"; it is a right belonging exclusively to a client.[45] As a client's right, it must be juxtaposed against a corresponding duty on the part of the client to tell the truth, the whole truth, and nothing but the truth in a court of law, "*to expose the truth in all its nakedness…this is all seen to be in the interests of justice.*"[46]

What is the justification for LPP in a system of justice that depends on introducing as much relevant evidence so that the truth can come out?

The answer is that the trial is not the be-all and end-all of the justice system. It is thought more important that lawful behaviour be encouraged by allowing people to confidentially consult with a legal professional so they can determine the legal limits of their behaviour before they act, without fear that the very act of consulting a lawyer will be used against them.



It is thought far more disruptive of society if citizens feel compelled to act without the benefit of legal advice, for fear that disclosure will be used against them, rather than allowing citizens to be proactive and have full and candid discussions about the limits of lawful behaviour before they act at all. Therefore, LPP is designed to protect after-the-fact admissions against interest by the suspect, which otherwise might not be made at all without LPP. This is the only type of otherwise relevant evidence that you may be precluded from acquiring during your fraud investigation because of LPP.

After an unlawful act has allegedly been committed, it is also thought more important that the accused and the accuser get the benefit of full and unfettered legal advice about the ensuing litigation, without fear that any fact admissions against interest that they might make would be used against them.

The cost of this promise of privacy was thought to be nominal, while the benefit quite high in terms of the promotion of lawful behaviour and the equitable resolution of disputes with the assistance of fully informed legal counsel. **The nominal cost of privacy is a reflection of the belief that without the promise of LPP, candid discussions with legal counsel would not take place at all, and therefore legal proceedings are not being robbed of evidence that would otherwise be available to it.**[47]

Because LPP does not deprive you of relevant real, documentary or testimonial evidence except irrelevant before-the-fact legal advice that did not lead to illegal conduct and after-the-fact admissions made to legal counsel in most cases, you should not consider it an impediment to your investigation.

LPP promotes after-the-fact candor with legal counsel for the proper administration of justice. There is, however, a second justification for LPP, which derives from the general duty of confidentiality the law imposes on a lawyer. As one text puts it, "*the basis of the early rule was the oath and honour of the solicitor, as a professional man and a gentleman, to keep his client's secret …the client benefited from it only incidentally.*"[48]

The combination of the public benefits of protecting client communications with a lawyer and the private duty of a lawyer to the client has resulted in the Supreme Court of Canada elevating solicitor-client privilege to a "fundamental civil and legal right."[49] However, even a fundamental civil right has its limits.

The Limits of LPP

Given the rationale for LPP, it is hardly surprising that the "almost absolute"[50] right to LPP, as a right of "fundamental importance,"[51] is limited in scope to protection of professional communications between a solicitor and client of a confidential matter for the purpose of obtaining legal advice.[52]

Every communication claiming LPP must therefore be (1) between a lawyer and client, (2) for the purpose of obtaining or giving legal advice in a professional capacity, and (3) in the context of a confidential communication.[53] The case law puts various glosses on and nuances in applying these core requirements that define who is a lawyer and who is a client for the purpose of LPP, the parameters of legal advice given in a professional capacity, and what is a confidential communication in any particular context. In addition, since a client (and only a client) can waive LPP, what constitutes a waiver has also been the subject of its own body of case law throughout the Commonwealth. We will now examine each of these subjects in turn.

A Legal Advisor for the Purpose of LPP

Although the law in Europe is not clear on the point,[54] there is no doubt that in Canada and the United States that in-house counsel can give legal advice that will be protected by LPP. The problem of privilege usually arises where counsel also acts as a director or officer of the corporation, and whether the advice in question was legal or business advice. Privilege cannot be claimed with respect to matters that would be within the ordinary purview of a director, officer, or employee. In these types of cases, the court asks itself whether the advice given required the advisor to have a law licence in order to lawfully give the advice in question, and indeed whether the lawyer was approached for the advice because of this.[55]

Legal professional privilege includes not only a lawyer licensed to give legal advice within the jurisdiction covered by the licence, but also the articling students, law clerks, and secretaries the lawyer employs. Their communication must be to the client, which also is broadly defined to include the client's employees and agents as well.[56] Until 2008, it was equally clear that legal advice from a non-lawyer was not protected by privilege, so that advice on patents, tax, or other legal subjects, given by patent agents, accountants, and others to their clients, was not considered LPP-protected.[57] There is a grey area: was the advice given on business, patents or other issues, which is not legal advice, or by a lawyer while his licence was suspended, or given on foreign law, for which he was not licensed? Is this legal advice, strictly speaking?[58]

With the new legislation in Ontario allowing paralegals to give legal advice under the governance of the Law Society of Upper Canada,[59] the question of legal professional privilege covering paralegals who are not employed by a lawyer or a law firm will arise more often. It appears that they will be covered by LPP.[60]

The Ambit of LPP

Forensic accountants who challenge the legal professional privilege of their suspect should be prepared that the suspect will likely retaliate and challenge any claim to privilege over their report. It is therefore important to be aware that your retainer by a lawyer does not mean that all your communications with that lawyer are covered by LPP.

During the civil litigation process, parties are entitled to the opposing party's knowledge of the evidence, whether that knowledge was obtained through their lawyer, or any third party through the instrumentality of a lawyer.[61] Such facts may include who is the real owner of the shares of a corporation that are purportedly held "in trust" by a lawyer, or what funds flow through the lawyer's trust account, if that information is relevant to the facts of the case.[62]

LPP governs an investigation undertaken to for the purpose of giving legal advice; it does not cover all investigations in which lawyers may play a lead role. The leading case that demonstrates the argument the fraudster would use is set out in *Prosperine* v. *Ottawa-Carleton (RMOC) et al.*[63]

In this case, the plaintiffs alleged that the defendants improperly launched a police investigation against them in October 1992, claiming that the plaintiffs owned a company that had perpetrated a fraud against the defendant municipal government. The plaintiffs went on to allege that there was never any reasonable basis for any such belief, and that it was actuated primarily by negligence, abuse of process, and malice on the part of the defendant RMOC. The plaintiffs also alleged

that the RMOC defamed the plaintiffs by advising an intended purchaser of the shares of the company that a police investigation was underway, and that the plaintiffs would be charged with fraud. As a result, the purchaser cancelled the share purchase transaction on March 29, 1993.

During the court discovery process, the plaintiffs requested production of a "draft" report dated October 7, 1992 prepared by Peat Marwick Thorne (PMT) for the RMOC. PMT's authority to prepare the report was contained in a contract entered by the RMOC and PMT on June 18, 1992. The first paragraph of the contract states: "*WHEREAS the Regional Solicitor of the Client [RMOC] requires the Consultant [PMT] to conduct an investigation concerning allegations of activities which constitute fraud or conflict of interest between Regional employees and suppliers in order to quantify the financial loss incurred by the Corporation, and in so doing to identify specific improvements that should be made to the related tendering, contract administration and monitoring processes to prevent the opportunity for fraudulent activity.*"

The court found that while the communications between PMT and the in-house legal counsel at the RMOC no doubt assisted the legal counsel in giving legal advice to the RMOC in regard to such matters as how the RMOC should deal with certain of its employees, and how it should deal with the plaintiffs, PMT did not act as a simple channel of communication between the RMOC and its legal department. It did not simply take information provided to it by RMOC employees or from RMOC records and put that into a format which could be understood by the RMOC legal department or be of use to the RMOC legal department.

PMT was not acting simply as a messenger, conduit, or translator between RMOC staff and the RMOC legal department, and it did more than just assemble information provided by RMOC staff and explain it to the RMOC legal department. It was therefore performing an investigative function for the RMOC. The court ruled that because PMT was authorized to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client and was in turn instructed on how to conduct its investigation by the solicitor, its function was not essential to the maintenance or operation of the client-solicitor relationship and should not be protected by LPP. PMT was not the RMOC's agent to seek legal advice or to instruct legal counsel on behalf of the RMOC or to transmit any legal advice to the RMOC. The fact that the contract was actually arranged and signed by the RMOC legal department with PMT does not alter the true nature of the relationship and make it more likely to attract solicitor-client privilege.

LPP cannot be raised to protect communications during the investigation, evaluation, assessment, and decision stages of an investigation. LPP can only protect the legal opinion of the solicitor on which the client acted. Just as an insurer may not protect investigative information that it has gathered behind the cloak of solicitor-client privilege simply by the expedient of placing control of the claim investigation in the hands of its lawyer, so too, the use of in-house counsel to retain PMT to do an investigation did not render the PMT investigation LPP-privileged in the court's estimation. **Communications arising out of an investigation are not subject to solicitor-client privilege simply because the investigation was under the control of legal counsel.**[64]

LPP applies in circumstances where a third party can be described as a channel of communication between the solicitor and client. Where, however, an adjuster, expert or other third party did not have the authority to seek legal advice or to give instructions on legal matters on behalf of the client, her authority did not reach inside the client-solicitor relationship. Rather, the function may be to educate the solicitor as to the circumstances by way of an investigation, so that the client could receive the benefit of better informed advice from its lawyer and could then instruct the latter as to the legal steps to be taken on its behalf. The client's investigation, and the resulting investigator's correspondence and communications will likely not be covered by LPP.[65] Litigation privilege will be discussed elsewhere.

Legal Advice and the Crime-Fraud Exception to LPP

Obtaining legal advice in relation to a criminal offence having been committed, in order to obtain proper representation at trial, is privileged. LPP protects after-the-fact admissions against interest so that the subject can obtain proper legal advice in advance of trial. Obtaining legal advice before, or during, the commission of an offence in order to facilitate the commission of that offence, or prevent its detection, is not privileged.

This is called the "crime-fraud exception to LPP." To determine whether the advice was given before or after the commission of the offence, one has to know the date when the potentially privileged communications with a lawyer took place. For that reason, the date on which potentially LPP advice was given is not privileged information, as the court needs that information to make a proper determination as to whether LPP might apply.[66]

As described in previous sections, legal advice is protected because it facilitates the administration of justice. It would also bring the honour of the legal profession into disrepute if lawyers could be compelled to betray their client's confidences as a general practice. However, the honour of the profession would come into disrepute if a lawyer became the unknowing dupe by a client who used legal advice to plan a crime, or engaged a lawyer as an accessory before the fact in criminal activity. As a result, the courts from the outset have found that "*no secrecy [is] due to the client in crimes*"[67] because criminal activity is outside the professional relationship of solicitor-client.

The purpose of legal advice is not to facilitate wrongdoing. Accordingly, any such advice is not considered within the ambit of LPP. This principle has come to be known as the "crime-fraud exception to LPP." In order for LPP to apply, "*there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist.*"[68]

One court put the matter bluntly when it said that any client who used his lawyer as a "tool" rather than as an advisor was "*not entitled to any protection whatsoever*"[69] because the lawyer was not giving "professional advice" in these circumstances.[70] No privilege exists "*because the contriving of a fraud is no part of his duty as solicitor; and I think it can do either by [sic] that it is part of the duty of a solicitor to advise his client as to the means of evading this law.*"[71] LPP does not apply because "*no Court can permit it to be said that the conniving of a fraud can form part of the professional occupation of an attorney or solicitor.*"[72]

The origins of the crime-fraud exception to LPP tell us something about the types of communications that may or may not be protected in future cases and allow us to understand what forms of illegal conduct are covered by the rule. Clearly, lawyers deal with advice in all areas of the law, the breach of which would not be considered dishonourable, would cast the crime-fraud exception to LPP too expansively, and would undermine LPP as a functioning concept. However:

> "Where there is anything of an underhanded nature or approaching to [sic] fraud in commercial matters where should be the veriest [sic] good faith, the whole transaction should be ripped up [sic] and disclosed in all its nakedness to the light of the court."[73]

This statement presages the modern foundation of the crime-fraud exception to LPP, namely, whether the application of LPP is "*sufficiently iniquitous for public policy to require that communications between [the client] and his solicitor…be discoverable.*"[74]

What a court must decide is whether the acts in question are sufficiently "iniquitous" or lacking in moral rectitude to overcome the public policy grounds for invoking LPP. Were the communications in issue for the purpose of facilitating the administration of justice, or were they an attempt by the client to bring the law and the administration of justice into disrepute by using LPP to facilitate illegal behavior?

Like the line between art and pornography, the line between savoury and iniquitous communications are in the eye of the beholder. Where any particular judge might draw the line is hard to predict, because in any given case, the court weighs the competing public policy considerations on which LPP is founded against the gravity of the charge of fraud or dishonesty being made in the particular case before it.[75] While LPP is considered a class privilege applying to all lawyer-client communications in which advice is tendered, whether the privilege applies at all must first be determined on a case-by-case basis where fraud or dishonest behaviour is an issue.

Intentional Wrongdoing

As noted, when deciding such cases, the courts have traditionally been mindful not to cast a net too broadly as it would *"endanger the whole basis of legal professional privilege. It is clear that the parties must be at liberty to take advice on their contractual obligations and liabilities in tort and what liabilities they will incur whether in contract or tort without thereby in every case losing professional privilege.*"[76] As a result, the crime-fraud exception to LPP has traditionally been thought to cover only fraud, deceit, criminal conspiracy, and fraudulent conveyances or preferences, but not disreputable or unethical practices *per se*.[77] Where there is sufficient evidence of sufficiently offensive conduct, no claim of privilege will apply.[78] **Ultimately, the courts are weighing the various public policy concerns,** in the guise of interpreting precedent, **when they make the determination of whether the misconduct is sufficiently grave, and the evidence in support of the allegation of misconduct is sufficient cogent, to conclude that the evidence should be admitted in the face of a claim of privilege.**[79]

As an example of the public policy in favour of deterring the use of the cloak of privilege by those engaged in improper

conduct, courts have sometimes drifted far from the "honour of the profession" underpinning of the crime-fraud exception to LPP to conclude that LPP does not apply in cases where neither the lawyer nor the client were aware of the illegality of the activity being planned. For example, LPP did not apply where the police sought the advice of a prosecutor in connection with a police sting operation that was later to be found illegal. All of the discussions between legal counsel and the police regarding the planning and execution of the sting were ruled admissible.[80]

For the crime-fraud exception to LPP to apply, the crime in question may be any crime, so that in the *Bernardo* case, evidence in support of a charge of obstruction of justice against Bernardo's lawyer for recovering and failing to disclose inculpatory videotapes was sufficient to prevent LPP from protecting the lawyer from prosecution, even though the lawyer learned of the existence and location of the tapes as a result of solicitor-client communications.[81]

The *Criminal Code*[82] is a treasure trove of possible criminal charges that may arise during an investigation of fraud, the planning and commission of which is criminal conduct:

- paying or receiving a secret commission, reward, or advantage;
- wilfully interfering with boundary lines or markers;
- wilfully breaking a contract with the effect of exposing property to injury or cutting off access to light, power, gas, or water;
- intentionally breaching a trust obligation;
- bouncing a cheque;
- obtaining a loan or a discount on a loan or other benefit by false pretence;
- fraudulently registering or tampering with documents of title or other legal documents;
- wilfully misusing credit card information;
- falsifying financial statements, minute books, or books and records;
- for an insolvent person, failing to keep proper books and records;
- commissioning an affidavit without lawful authority or swearing a false affidavit or using pretended affidavit; and
- fraudulently conveying property or providing misleading receipts.

Even if these examples do not apply to your particular investigation, fraud and fraudulent misrepresentation are criminal offences[83] to which the crime-fraud exception to LPP applies.

The crime-fraud exception to LPP has recently been expanded to determine that a client who uses legal advice to perpetrate any form of intentional wrongdoing cannot later claim LPP in relation to those communications. In *Dublin* v. *Montessori Jewish Day School of Toronto* (*Dublin*) the plaintiffs sought to rely on an e-mail with its counsel as admissions that the defendant was intentionally taking aggressive positions with one of its students for the purpose of inflicting mental distress and thereby intimidating the infant plaintiff with a view to driving him out of the defendant school.

Justice Perell agreed that the crime-fraud exception to LPP applied in these circumstances, and therefore the e-mail was not covered by LPP. Justice Perell found that advice that assisted in perpetrating, or concealing, crimes and torts should not fall within LPP. His Honour went on to cite case law which found that communications involving the tort of abuse of process, breach of regulatory statutes, breach of contract, breach of fiduciary duty, and breach of confidence all may be considered "iniquitous" for the purpose of the crime-fraud exception to LPP.[84] Also supporting his conclusion were *obiter* remarks by Justice Binnie in *R.* v. *Campbell*,[85] **where the crime-fraud exception to LPP was rephrased as applying to crimes or torts.**[86]

Justice Perell acknowledges that his conclusion may be contentious,[87] and the decision is presently under appeal to the Divisional Court. The judge granting leave to appeal agreed,

noting that "Given the sanctity of solicitor-client privilege, the expansion of the exception for furtherance of crime to tortious acts of the kind alleged in the Statement of Claim may go too far."[88] Nevertheless, Justice Perell's decision was followed in a case involving similar tort claims,[89] and is in keeping with cases in which LPP was held not to apply where there was *prima facie* evidence of abuse of process, breaches of regulatory statutes, and other breaches of duty.[90]

The courts have always required strong *prima facie* proof that legal advice was sought in relation to "iniquitous" behavior before the court will invoke the crime-fraud exception to LPP.[91]

What kind of proof is required? Again, it seems to depend on the facts of the particular case and, therefore, the discretion of the particular judge,[92] recognizing that the best evidence is in the hands of the other party.[93] While it is true that once the standard of proof for fraud is made out, the solicitor's entire file must be produced,[94] this should not be of too much concern given that LPP only covers legal advice in the first place and not other communications, documents, or other forms of evidence simply because it makes its way into the lawyer's file. Moreover, the advice must still meet the test of relevance before it must be produced.[95]

Confidential Communications

Confidentiality and LPP

As noted, legal professional privilege may be invoked with respect to confidential communications between a lawyer and a client for the purpose of providing legal advice[96] and not all confidential communications *per se*.[97] Under Rule 2.03 of the Ontario Rules of Professional Conduct, a lawyer is obliged to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of the client. It follows that a lawyer cannot divulge any such information without the client's permission, except as required by law. This obligation is not the same as LPP. When we analyze what this means, we see that LPP applies only if:

> ***"(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion or law, or (ii) legal services, or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed, and (b) not waived by the client."***[98]

Confidential communications with a client requires an examination of (1) what "confidential" means, and (2) who the client receiving the advice is.

What Does Confidential Mean?

Legal professional privilege (LPP) depends on confidential communications. The presence of persons acting as the agents of the lawyer, or of the client, does not make the communications any less confidential as long as they only serve as conduits for the transmission of legal advice, or assist one of the other parties to understand the communications being transmitted. LPP requires that the legal advice be given in circumstances where it is transmitted in a confidential fashion, and it is intended to remain confidential between the law firm and its agents, and the client and its agents.

Because confidentiality is lost where a third party is present during the communications, an investigator should determine if any third parties attended allegedly privileged meetings. If there was a guarantor of a debt present when the corporation was signing a lending agreement, or if there was a trustee-in-bankruptcy present while a corporation was getting insolvency advice, the presence of those parties may negate any finding that LPP would apply to the lawyer's meeting with the client, as the meeting was not confidential.[99]

In an age of e-communications, confidentiality is becoming an important issue. Where the employer has announced a policy to an employee that (1) the employee has no privacy rights to her e-mail communications at work and the employer has a right to access such communications, and that (2) the employer monitors e-mails, a court may find that there is no LPP because, in substance, "the employer [is] looking over your shoulder each time you send an e-mail." Indeed, a policy of banning personal e-mails and giving notice of enforcement of the policy may, in itself, be sufficient to prohibit an employee from claiming LPP with respect to legal advice received at work.[100]

Who is the Client?

Corporate Groups and Joint Clients

It is well established that corporations may be clients for the purpose of legal professional privilege.[101] However, where there is more than one shareholder receiving advice, or more than one shareholder in a corporation, or even more than one corporation receiving the advice, the rules surrounding LPP become more complicated.

In the context of a business or other close relationship where two or more people are the clients, the parameters of LPP are particularly important because, unlike many other forms of privilege, it does not apply only in the context of judicial or quasi-judicial proceedings as a matter of procedure; it applies in all contexts to prevent disclosure as a matter of law.[102] The law recognizes that it is critically important to protect LPP in a world where corporate matters are increasingly under scrutiny from all sectors of society.[103]

The general law on the subject of LPP in the context of a business group is set out in a case decided recently by the Third Circuit of the United States Court of Appeals in *Re Teleglobe Communications Corp.* (BCE).[104] The case is important to Canadians because the court found that there was no material difference between Canadian and American law with respect to the LPP issues involved.[105]

The facts of the case are important to the result. Bell Canada Enterprises (BCE) owned Teleglobe. Teleglobe, in turn, owned American subsidiaries (the debtors). The debtors were later sold by Teleglobe, and the purchasers of the debtors later decided to sue Teleglobe and BCE. According to the debtors' allegations, BCE directed Teleglobe to invest in a fibre optic network development program called Globesystem. BCE pledged financial support of the project.

Teleglobe directed the debtors to borrow heavily to finance the Globesystem project. Later, in 2000, BCE secretly started Project X, a plan to abandon Globesystem in order to avoid further losses in that project. Globesystem was abandoned in 2001, causing the debtors to seek bankruptcy protection when BCE's funding to Teleglobe was cut off and its investment in Globesystem had to be written off. The debtors have sued BCE for breach of contract, breach of fiduciary duty, and negligent and fraudulent misrepresentation for cutting off their funding to Teleglobe after the debtors relied on Teleglobe's promise of funding to incur substantial debt to fund Globesystem.

In the course of the dispute, BCE claimed privilege in connection with various documents attached to the alleged Project X and the secret decision to discontinue funding of Teleglobe. A special Master appointed to examine the issue ordered BCE to produce all documents in issue because (a) while outside legal counsel had provided legal advice solely to BCE, their advice was not confidential and had been shared with in-house lawyers for BCE, who were also representing Teleglobe as "joint clients"; and (b) for the other documents that fell within advice given to BCE and Teleglobe jointly, the joint privilege that both companies enjoyed did not apply to the debtors who, as subsidiaries of Teleglobe, were entitled to share in that advice as a matter of law. The appellate court disagreed and, in the course of its decision, noted the following:

1. Communication between counsel and client is not, in itself, a protected communication. It is only where, as a matter of policy, courts deem that LPP should apply to legal advice because it promotes compliance with the law and in the administration of justice.
2. If the debtors wanted to rely on the crime-fraud exception to LPP to require disclosure of the subject documents, they had to proffer cogent evidence to show that fraudulent conduct has taken place, and LPP should therefore not be applied. They did not proffer such evidence, so the crime-fraud exception to LPP did not apply.[106]
3. A client may, in fact, be a co-client or joint client for the purpose of applying the confidentiality rule. Two or more persons may jointly retain a lawyer in a matter in which their interests coincide rather than conflict. When co-clients and their lawyers communicate with each other, LPP applies, and can only be waived with the consent of all joint clients. However, joint-client LPP only protects communications from parties outside the joint representations. When former co-clients sue one another, the LPP communications made

in the joint representation are discoverable, in most circumstances. In this case, BCE and Teleglobe were the joint clients, and they were entitled to claim LPP against the debtors, but not against each other. The debtors were not joint clients simply because they were members of the same corporate group.

4. Communications must be made confidentially to qualify for LPP, meaning if persons other than the lawyer, their client, or respective employees or agent are present, LPP does not attach. As a corollary, if the client shared the communication with third parties, in whole or in part, the LPP is lost or "waived." LPP belongs to the client, not the lawyers, and the client can signal its intention to waive LPP by failing to keep the communication secret. Partial disclosure may also waive LPP, as the courts want to discourage selective disclosure on a matter of policy because such disclosure is likely to be misleading, and thereby unfairly hampers the truth-seeking process. Therefore, courts carefully police LPP to ensure one party does not selectively disclose otherwise privileged communications to avoid potential unfairness by a person who might use LPP as a litigation weapon.[107] The evidence did not support the conclusion that BCE and Teleglobe waived privilege because of partial disclosure of privileged information to the debtors.
5. Because LPP is the client's privilege, not the lawyer's, the lawyer's improper or inadvertent disclosure does not waive privilege. While the policy of co-client privilege is to encourage openness and cooperation between joint clients in matter of common interest, the lawyer cannot waive the privilege by improperly acting for one of the joint clients to the detriment of the other. It is only when the clients understand that their interests are divergent and conflicting can one co-client claim privilege over communications with the lawyer to the exclusion of the other client. In other words, the co-clients must understand that the joint retainer has terminated and the lawyer is acting solely as the lawyer for one of the joint clients.

In this case, BCE did not own the LPP as the owner of the corporate group. BCE and Teleglobe were joint clients that had retained common counsel. The fact that their legal counsel continued to act after their interests diverged, and improperly shared documents with in-house counsel representing BCE, Teleglobe and the debtors, did not waive privilege.

So too, it does not waive privilege to share LPP information with corporate directors or officers of BCE who are also directors and officers of the corporate group. However, in spin-off, sale, and insolvency situations, clients who persist in using the same in-house counsel to handle the transaction, after they realize their interests conflict, will waive privilege. In this case, the only finding of fact was that BCE and Teleglobe were joint clients and there was no finding that the debtors were part of the joint representation. The case was therefore remanded back to the special Master to make a determination on this issue[108] because without the debtors being part of the joint retainer, the claim for LPP would prevent disclosure to the debtors on the subject litigation.

The Court of Appeal rejected the policy choice made by this lower court and the special Master that the need for disclosure outweighed the need for LPP and that BCE was having it both ways by assigning their legal counsel to their subsidiary, Teleglobe, while at the same time instructing them to act in BCE's best interest alone. The lower court relied on *Mirant*,[109] where the court had endorsed disclosure in these circumstances, despite LPP, on pure policy grounds, stating that in a *bankruptcy case, the need for investigation is far more acute than is any concern for attorney-client communications…[Those] acting as fiduciaries for the benefit of their creditors, are pursuing an investigation which is important not only to those who may have lost money as a result of Debtors' demise. It is critical that both those who purchased Mirant's (and its subsidiaries') securities and the public have confidence that potential liability of TSC…has been thoroughly explored….it is essential to the integrity of the [bankruptcy] process that no stone be left unturned in ensuring satisfactory completion of Debtor's investigation.*"

This case demonstrates that members of a corporate group are often joint clients, who cannot claim LPP against each other. Fraudsters often employ dummy "shell corporations" to do their bidding. As joint clients cannot claim LPP against each other, obtaining a paper judgment against the shell corporation and then having a private or court-appointed receiver[110] take over the shell corporation and demand access to all LPP documents exchanged between the fraudster, as a principal of the dummy corporation, and the dummy corporation's solicitor, is a possible course of action. However, we first have to understand LPP in the context of insolvency law in a more general context.

Receivers and Trustees in Bankruptcy

A leading text suggests that a receiver appointed over an insolvent person's interest steps into that person's shoes and has the ability to waive LPP as part of its powers to manage and operate the affairs of that person, unless the court order appointing the receiver says otherwise, or unless the receiver is acting under an Order issued in Ontario, in which case the receiver cannot waive privilege if to do so is inconsistent with the insolvent's interests.[111]

Under the law of Ontario, but not of other provinces, the suggestion that a receiver may have a conflict of interest that may preclude a right to waive LPP only reflects the fact that the law in this area is in a state of flux. Even in the law of Ontario there is case law suggesting that the receiver may waive privilege regardless of the interests of the insolvent.[112]

Under the *Bankruptcy and Insolvency Act*,[113] the trustee in bankruptcy takes possession of the bankrupt's exigible assets, sells them, and distributes the proceeds to the creditors. In the process, the trustee reviews the conduct of the bankrupt with a view to challenging fraudulent preferences. As part of this process, the trustee has an obligation to take possession of all the bankrupt's books and records, including those in the hands of the bankrupt's lawyer or accountant.[114] Where those books and record are incomplete, the trustee has the right to examine under oath any person who might reasonably be expected to have knowledge of the bankrupt's financial affairs, including a lawyer or an accountant, and to require them to produce their file of the bankrupt's records, or to obtain a warrant to enter and seize such records. However, the powers to access the bankrupt's books and records do not ordinarily give the trustee the right to waive the bankrupt's right to LPP.[115] The rights which arise out of the confidentiality of the information disclosed by a client to his solicitor is a right private to that client and may not be assigned to a third party, through bankruptcy or otherwise.[116]

Where, however, the bankrupt is a corporation, Justice Farley has suggested that a court may allow a trustee to waive privilege. This is because although an individual bankrupt might face criminal or civil penalties outside the bankrupt and therefore still require LPP after declaring bankruptcy, a bankrupt corporation has no life outside the bankruptcy itself.[117] Whether this finding survives the *Bre-X* decision from Alberta,[118] or can be reconciled with it in Ontario, is an open question. Whether a trustee can waive LPP leads us to an examination of what constitutes confidentiality and waiver.

Confidentiality and Waiver

Confidentiality is a matter of intention. Was the legal advice treated as confidential by the client, or was it freely shared? In the corporate context, freely sharing the information within the corporation may demonstrate an intention not to keep it confidential.[119] On the other hand, certain commercial transactions may require the sharing of legal advice between the transacting parties in order for the transaction to be consummated without the sharing of that advice still being protected by LPP from parties who did not share the common interest in the transaction closing.[120] Where legal advice is given in the presence of third parties, it is not confidential and no LPP applies. Where LPP originally applied but the seal of confidentiality was broken by the client at a later time, the client is said to have waived LPP.

Waiver and Forfeiture of LPP

For legal professional privilege to apply, it is important to analyze whether (1) the communication was confidential for the purpose of giving legal advice, or was it intended for another purpose;[121] (2) outsiders were present during the communication, or the communication was later released to those outside the solicitor-client relationship such that LPP would not apply; (3) the person seeking the information is a joint client or a beneficiary/shareholder who may have a fiduciary right to disclosure of the information;[122] or (4) LPP has been waived such that any outsider may be entitled to it in the context of a judicial proceeding.

The starting point for understanding waiver is the proposition that it is up to the client to refuse to produce documents that are covered by the privilege, or to answer questions about privileged matters. Therefore, the client can elect not to claim LPP. Once a privileged document is disclosed, the privilege itself is lost, and once a privileged document is disclosed, the question is one of admissibility, and not privilege.[123]

Waiver of the solicitor-client privilege may be express or implied. Express waiver occurs when the client voluntarily

discloses confidential communications with his or her solicitor. Thus, in the course of an interview, a subject may often waive privilege by making references to discussions with legal counsel.

Generally, waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. This usually involves voluntary disclosure to third parties outside the solicitor-client relationship of parts of privileged communication, where fairness dictates that the full communication be released so that the partial disclosure is not misleading or unfair.

An accidental, inadvertent, or unauthorized parting with a document will not usually give rise to waiver as it is not intentional. For the same reason, waiver does not flow from a loss of custody resulting from fraud, theft, or other misconduct, as it is not voluntary. Who constitutes a "third party" for the purpose of waiver is also difficult to discern. Parties allied against a common adversary in litigation may share privileged documents without waiver ensuing because the court does not find this a release to a third party under **"common interest privilege."**[124] **This privilege is similar to joint-client privilege, except that the parties sharing the privilege may have retained separate counsel.**

Waiver is often an issue in fraud examinations when the subject purports to establish his *bona fides* by taking the position that his conduct was in accordance with legal advice he had received, or that the transaction was completed by his lawyer and therefore he assumed it was lawful. Therefore, the suspect argues, any misconduct was accidental, and not intentional or malicious.

Where a litigant suggests he had an innocent or ignorant state of mind, the law declares that he cannot in fairness be permitted to use privilege to prevent his opponent from exploring the state of his knowledge further.[125] To say a client may not waive LPP in this context is a misleading statement. If a lawyer or a client inadvertently discloses an LPP communication in the sense of an accidental transmission, LPP will not be waived and a protective order will be issued preventing it from being admitted into court, if LPP would otherwise have applied, because waiver ordinarily requires a conscious decision to do something (however, this does not make any secondary evidence unearthed as a result of the inadvertent disclosure inadmissible – there is no "fruit of the poisoned tree" logic to preclude evidence procured as a result of otherwise inadmissible evidence to make the derivative evidence inadmissible in civil cases).[126] If a litigant has in his possession copies of documents to which legal professional privilege attaches, he may nevertheless use such copies as secondary evidence in his litigation.[127]

A client can waive LPP without realizing what he has done. As one recent article in a legal publication noted:

> "**…clients do…from time to time, waive privilege without a full appreciation of the significance of their action… a client should be warned not intentionally to forward e-mails from counsel because that most assuredly will cause a loss of privilege. Because it is so easy to forward on e-mails clients sometimes will send on 'what my lawyer said' to others leading to a loss of privilege. Some American cases have also suggested that privilege can be lost if a legal opinion is part of a 'string' e-mail that is not otherwise privileged…**client should also be cautioned not to 'bounce' legal e-mails around their offices too much."[128]

Thus, an express waiver only requires an intention to publish otherwise privileged information beyond the solicitor-client relationship; it does not require a full appreciation of the implications of this publication.

The most common implied waiver or forfeiture is where the client puts his state of mind in issue, such that he has introduced the legal advice he obtained into the litigation. Statements about *bona fides* or lawful intentions are obvious examples.

The case law establishes the principle that solicitor-client communications are put in issue in the following circumstances: (1) where the party gives evidence of a privileged communication; (2) where a party submits a pleading like a statement of claim or a statement of defence that cannot be tried in the absence of evidence of the legal advice which the party received; or (3) where the client puts the state of its mind in issue, or the state of its legal knowledge as a result of a communication with its solicitor.

For the second branch of this principle to apply, the party pleading and the party receiving the legal advice must be one and the same.[129] For the third branch, the party pleading may allege that it relied on another party for the legality of certain

actions, in which case the legal advice that the pleading party had becomes relevant.

Less obvious are cases where negligent or fraudulent misrepresentations are part of the allegations. In *Lloyds Bank Canada* v. *Canada Life Assurance Co.*,[130] the defendants maintained that because the plaintiff bank had pleaded that it had been induced by the defendant's representations about its legal capacity to make the loan to advance money, it was entitled to all of the plaintiff bank's knowledge of the relevant la and therefore the legal advice it had received with respect to the defendants' capacity to make commitments such as those contained in the comfort letters.

By pleading negligent misrepresentation in these circumstances, the plaintiff had to disclose whether it obtained legal advice before authorizing a loan, and what that advice was, because if the plaintiff had a legal opinion from its own lawyer stating that the defendant had the capacity to make the commitment, then the plaintiff did not rely on any representation to that effect, it relied on its own lawyer's opinion. LPP was therefore waived.

In fraud cases, subjects often waive privilege by putting their state of mind in issue by alleging that they relied on the victim, or some third party, in the conduct of their affairs.

In *Allarcom Ltd.* v. *Canwest Broadcasting Corp.*,[131] the plaintiff successfully contended that because the defendant had put its state of mind in issue by pleading that it had relied on the plaintiff's conduct to its detriment, the defendant was prevented from raising the barrier of LPP to prevent the plaintiff from showing that the defendant had its own legal advice and opinions, which effectively negated any allegation of reliance on the plaintiff's conduct. Because the defendant had raised a subject that required the court to determine whether the defendant had relied on the advice of the plaintiff, or on the defendant's own legal counsel, the defendant had forfeited its claim to LPP.

Where a fraudster tries to allege that he relied on someone else to justify his actions, or cross-claim against another, he may be forfeiting LPP in the process. By putting his own state of mind in issue and alleging his own *bona fides* or wrongdoing on the part of others, the fraudster may forfeit his own claim to LPP whether he intended to do so or not.[132] *Clients who allege they relied on a fraudster's representations may be waiving privilege, just as fraudsters who allege that they did not understand the terms of an agreement, or were trying to act lawfully may be waiving (or forfeiting) privilege by putting their own state of mind and knowledge of the law in issue.*[133]

The courts have held that where there is voluntary waiver of part of a record, waiver of the rest of the record may be implied, where fairness requires this. Thus, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require it. Since waiver connotes a conscious decision to release one's rights, the idea of implied or selective waiver is a misnomer, and really should be called "forfeiture of privilege." Whatever it is called, where a client has been selective in his waiver of LPP, with the danger that such incomplete disclosure may create a false or misleading impression, a court would deem it appropriate to find that privilege had been waived over "all other relevant documents dealing with the very same particular subject matter" as had been selectively disclosed by the client.[134]

The focus in cases of selective waiver of privilege, either in different proceedings or in the case of individual communications, is the idea of fairness. Is the client using voluntary disclosure as a tactical tool to gain favour with the government or other third party in one proceeding, while using it as a shield in another and thereby leveraging privilege to maximum advantage? Is the client selectively disclosing communications over a particular subject matter and gaining a tactical advantage by creating a misleading impression? Is the client making a mockery of justice as a result? Thus, implied waiver may be like the crime-fraud exception to LPP, an example of where an abuse of the right to privilege leads to its forfeiture, where the overall purpose of privilege as an instrument to facilitate the administration of justice is being undermined rather than advanced.[135]

One of the "live" issues in the law is whether a client's disclosure of LPP information for the purpose of cooperating with a government investigation, and perhaps obtaining a lesser penalty as a result, is a voluntary waiver of LPP. The release of otherwise privileged information to the police or prosecution in exchange for a promise of confidentiality is likely to waive the privilege and make it relevant information, and thereby accessible to the investigator. "*Under the traditional understanding of waiver, where the subject of an investigation waives privilege to the government, the privilege no longer applies as against third parties.*"[136] This may be an overstatement.[137] However, the law generally does not recognize "selective waiver,"[138] so that waiver for one purpose is waiver for all purposes.[139] Thus, for example, a waiver of LPP may occur because of the release of otherwise privileged information, such as an forensic accountant's report produced to legal counsel if that otherwise privileged report is given to the corporation's

audit firm or to the auditor general's office in the case of a government department.[140] However, the law in that area is in a state of flux.[141] A confidentiality provision seeking to protect a selective waiver is not going to bind outside third parties,[142] so that in the absence of judicial recognition of selective waiver (e.g. in the case of disclosure of LPP to the auditor or to the government), forensic investigations should not be deterred from pursuing LPP that appears to have been disclosed to any third party for any reason.[143]

The LPP Rules in Brief

The rules governing legal professional privilege are difficult to summarize. However, for the sake of ease of reference we can say that, except as otherwise provided by constitution, statute, or rules of procedure, no person has a privilege to (1) refuse to be a witness, (2) refuse to disclose any matter, (3) refuse to produce any object or writing, or (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

The governing criteria for admissibility are relevance and reliability. The general rule with respect to LPP is that a client[144] has a privilege to refuse to disclose, and to prevent any other person from disclosing, (1) confidential communications[145] (2) made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative[146] and his lawyer[147] or his lawyer's representative, or (b) between two or more clients and a common lawyer, or (c) between two or more clients each separately represented but with a common interest in ongoing litigation.

There is no legal professional privilege in the following situations:

1. *Furtherance of crime of fraud.* Where the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.
2. *Acts not legal advice.* Where the evidence being sought is "real" evidence and evidence of facts, business or other advice, rather than legal advice.[148]
3. *Document attested by a lawyer.* Where the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness.
4. *Waiver or forfeiture.* Where the client discloses the communication, he no longer holds it confidential and LPP no longer applies. Disclosure of part of the communication forfeits LPP with respect to the balance of the subject matter of that communication in order to avoid partial disclosure being misleading.
5. *Joint clients.* Joint clients cannot claim LPP with respect to communications relevant to a matter of common interest between or among two or more clients, if the communication was made by any of them to a lawyer retained or consulted in common.

As fraud investigators, you have to be aware of the limits to LPP during the interviewing process so that you may take advantage of opportunities for evidence gathering in circumstances where the suspect believes privilege applies, but you know better. Fraudsters are clever, but they may still waive or forfeit privilege by what they say or do prior to litigation commencing. However, evidence gathering does not stop when the litigation commences. We therefore now turn to evidence gathered during the litigation process itself.

Litigation Privilege

Litigation privilege refers to the client's ability to withhold from disclosure oral and written communications between either herself or third parties and the lawyer retained by her, or documents created by, on or behalf of, her or her client if the communications have come into existence (a) in contemplation of litigation, and (b) for the dominant purpose of giving advice in connection with the conduct of that litigation.[149]

It follows that an internal investigation may very well not be covered by privilege, and therefore witness statements that are readily given by employees to the employer may be accessible to you for the purposes of your investigation.[150] Litigation privilege is most aptly described as the ability to protect analysis not facts, and the fruits of the mind of the investigator and not the fruits of his feet or spade.[151] That is why Americans call it "work product privilege." Any fact that would be otherwise discoverable in a civil proceeding is no less discoverable because of litigation privilege in virtually every instance.[152]

An investigator's file may have important evidence or leads concerning where such evidence may be found. Therefore, it may be important to determine when litigation was contemplated, and when the investigator's dominant purpose for conducting the investigation was preparing for anticipated litigation.

There are several actions or events that the court views as indicative of a reasonable prospect of litigation. The following list of triggers is not exhaustive, nor is any one more important than the others. Any or all of the following are capable of moving documents out of an adjuster's "investigation file," and into his or her "litigation file": (1) an adjuster denies a claim due to a policy breach; (2) the insurer's retainer of an expert to show that a fire loss was caused by a faulty electrical system; or (3) a plaintiff threatens to commence an action against the insurer or applying for mediation or arbitration.[153] Therefore, anything acquired by an investigator before such triggering events may be made available to the forensic accountant, including conversations between lawyers and experts that took place before a triggering event.[154]

Litigation privilege applies to communications rather than the facts communicated. Thus, anything that occurs after litigation is imminent is not, *per se*, privileged. It used to be that litigants could take remedial measures, or otherwise take steps to avoid further damage being suffered, without fear that this would be taken into evidence as proof that they were contributorily negligent or partially responsible for the loss that was suffered. Now, those acts may be admissible.

Sandhu v. *Wellington Place Apartments*[155] provides a useful analysis of when evidence of subsequent repair will be allowed in a tort claim. In this case, a defective window (and many others in the apartment building) were fixed for a negligible cost. Evidence of this remediation was allowed at trial and made the subject of an appeal. The Court of Appeal ruled that it was admissible as to whether the defendant had fallen below the duty of care.

While contributory negligence is not a defence to fraud,[156] it is now a defence to breach of contract,[157] and negligent misrepresentation,[158] with the result that a company that amends its internal controls or audit procedures as a result of a finding of wrongdoing can no longer protect itself from having evidence of its subsequent remediation of its deficient procedures from being disclosed during the discovery process and being admissible against it at trial in many instances. Thus, in a fraud-related case in which allegations of negligence against an auditor or other party are made, new evidence is being produced right up to trial.

It is also important to note that while the communication of a witness's evidence to a lawyer may be privileged, either in the form of a witness statement or an oral conversation, the witness's evidence is not. The witness may be compelled to testify by the opposing party: "In the time-honoured aphorism, 'there is no property in a witness.'"[159] Material facts cannot be concealed from the court by the device of litigation privilege. It follows that evidence uncovered by the opposing expert cannot be protected by litigation privilege, even though her communication of that evidence may be protected.[160] Litigation privilege covers the expert's "work product," meaning, what the expert did with the underlying phenomena and primary evidence to make sense of it – the expert's "findings." Findings lead to opinions which lead to conclusions. It follows that simple translations of documents are not "work product," and therefore are not covered by the work product privilege. If the untranslated documents are producible, so too, the translations are producible.[161]

Expert opinions are based on assumptions and findings. There is no waiver of privileged information in the possession of an expert witness before trial unless the expert considered the information in making his or her findings. Findings are foundational facts or observations on which the expert's opinions are based. A court will require a disclosure of all otherwise privileged communications if they inform one of the expert's findings. Once the expert is called to testify, there is no distinction between privileged documents reviewed but not relied on by the expert. If the expert has reviewed the documents, they will, in all likelihood, have to be produced.[162]

In Ontario, Rule 31.06(3) of the Ontario Rules of Civil Procedure states:

> "(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,
>
> (a) the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and
>
> (b) the party being examined undertakes not to call the expert as a witness at the trial."

Rule 31.06(3) requires disclosure of not only the expert's opinion, but also the facts on which the opinion is based and the instructions on which the expert proceeded. In addition, it includes the foundational information of the expert's final opinion.[163]

The Ontario Court of Appeal, in the leading case of *Conceicao Farms Inc.* v. *Zeneca Corp.*[164] cites text authority for the proposition that "Rule 31.06(3) is concerned with fact disclosure, not with documentary production. If prepared in contemplation of litigation an expert's report is privileged and the report itself (*i.e.*, the document) remains technically privileged, notwithstanding Rule 31.06(3). However, in practice the parties often waive this privilege and deliver or exchange expert's reports in lieu of, or in fulfillment of their obligations under Rule 31.06(3)."

In other words, the evidence disclosed in an expert's report must be disclosed on discovery, even though the expert's report itself need not be, and to ease the process of discovery, the parties often waive privilege to the document itself. However, what must be disclosed if the expert is to be called clearly encompasses not only the expert's opinion but also the facts on which the opinion is based, the instructions on which the expert proceeded, and the expert's name and address.

How far beyond this the right to obtain foundational information is a matter of some debate. However, findings, opinions, and conclusions must be disclosed on discovery whether expressed orally or in writing, and whether they are characterized as preliminary or final.[165] Draft reports may represent preliminary findings, opinions, and conclusions of the expert and therefore fall within the scope of Rule 31.06(3), as the opposing party ought to be able to explore with an expert whether he or she changed her views from draft to draft and, if so, why. It is all part of testing the expert's conclusions. Disclosure of all versions of reports also enables counsel and the court to assess whether the instructions and information provided affected the objectivity and reliability of the expert's opinion. Experts who destroy draft reports may be personally liable in tort for spoliation in Ontario, and thus may not only be obliged to testify as to what was destroyed, but they also may be personally liable for the destruction of these reports.[166]

The case of *Arbesman* v. *Meighen Demers*[167] provides a classic example of how this process works. The plaintiff's expert report had been produced to the defendant. The report stated that, in preparing the report, the expert had relied on various discussions he had had with the plaintiff. When the defendant requested details of these discussions, the plaintiff prepared a summary of the discussions and provided a copy of this summary to the defendant. Later, the plaintiff also produced the expert's notes of the various conversations with the plaintiff, although substantial portions of these notes had been edited out. On the motion, the plaintiff's solicitor filed an affidavit advising that the "exclusions are based on the advice of the Kroll Linquist Avey (KLA) representatives, which advice I verily believe to be true, that these references do not set out any information or data provided by either the plaintiff or Robert Lee, (an accountant) which has been relied on by the KLA representatives in the KLA 2002 report." The defendant objected to the fact that there had been any editing of the notes and demanded production of the unedited version.

The court in this case found that "findings" in Rule 31.06(3), in the context of an expert report that is a valuation report, must be interpreted to mean the information and data obtained by the expert, whether contained in documents or obtained through interviews, on the basis of which conclusions are drawn and an opinion formed. With respect to the notes and memoranda to be produced, such notes and memoranda should include only factual information and data obtained through the interviews and to the extent that the notes and memoranda contain any expressions of opinion or views of the

persons interviewed, such expressions of opinion or views may be edited out from the notes or memoranda produced. All factual information and data obtained, whether or not this information and data was accepted or relied on, would, however, constitute findings and would have to be produced.

It is the function of an expert to sift through and consider all of the factual information and data provided before formulating an opinion. The expert may well decide not to use some of the information and data received, but the decision not to use or rely on that information or data is as much a part of the findings of the expert as the factual information and data that has been made a part of the report. All of the factual information and data received by the expert is considered by the expert and, in that sense, the decision to reject or not rely on that data or information is, a finding for purposes of the Rule. Why an expert has rejected or determined not to use certain data received can be as central to an opinion as the facts or data relied on and incorporated into the report. Only those portions of the memoranda and handwritten notes containing expressions of opinion or views are to be expunged as litigation-privileged.

It is difficult for a lawyer to tell if the opposing side has properly claimed any privilege, but particularly litigation privilege, over an investigation. Lawyers do not know the standard operating procedure for all the professions they come into contact with. **Lawyers need your help. The forensic accountant's focus cannot be just on her own conduct. It must also be on the conduct of her opposing expert.** Your expertise may be required to discern how the opposing expert has not fully disclosed the findings on which their opinions

are based, or how those findings should have changed, based on differing states of the evidence.

The opposing expert's success may mean your failure if they had better information on which to base their opinion than you did. You have to ensure you check claims to privilege to ensure a level playing field. In modern day litigation, often the most crucial aspect of expert opinion is the reasons given by the expert for his conclusions. The expert must establish that his reasons are the correct ones because they rest on the more credible foundation, and so the context of every expert opinion is establishing the reliability of the assumptions underlying his opinion and being prepared to counteract the opposing expert's opinion at trial. Thus, the foundations of all the testifying experts must be fully disclosed as part of the civil discovery process and because the quality of your report requires you to have at least as much information available to you as is available to the opposing expert, **you have to be a key participant in challenging any claims to privilege so that you have access to all of the documents, calculations, field notes, raw data, and records made and used by the opposing expert in preparing her report.**[168]

In my text, *The Law of Fraud and the Forensic Investigator*, I discuss at length litigation privilege and the ability to compel the opposing expert to give evidence.[169] **Suffice it to say that expert witnesses must consider themselves an integral part of any litigation strategy, and it is up to the experts as to whether they want to be a passive participant in that strategy. The expert should consider the discovery process an important extension of their investigation, and participate in it to ensure that they have access to all relevant evidence so that their final report is both accurate and complete, and they are not "blind-sided" at trial.**

To do that, experts have to understand to limits of the privilege that may cover their communications with the client, counsel, and third parties, as well as the extent to which they have access to the opposing party's case in advance of trial.

Any of the recognized exceptions to LPP also apply to litigation privilege, where the materials involve communications that are in themselves criminal or that are made with a view to obtaining legal advice to facilitate the commission of a crime or other intentional wrongdoing.[170] Because litigation privilege only applies to investigations conducted for the dominant purpose of litigation, using the crime-fraud exception to LPP is only likely to be an issue where the allegation is that there is an ongoing fraud or other form of intentional wrongdoing that has persisted after litigation was anticipated.

Litigation privilege may not be able to conceal internal investigations of such misconduct, depending on whether the

misconduct was employee fraud (in which case, litigation may apply as there are public policy reasons to encourage corporations to investigate and eradicate internal wrongdoing without prejudicing their position in litigation)[171] or management fraud (in which case, it appears that the defendant is using the privilege to cloak continuing evidence of its wrongdoing).[172]

A claim of litigation privilege can be attacked on the basis of waiver. However, waiver of litigation privilege involves different considerations than waiver of solicitor-client privilege does. The purpose of litigation privilege is to protect tactics and strategy against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. A disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, is allowed without waiver of the privilege. Therefore, although a mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of LPP, it generally does not suffice, in itself, to constitute a waiver of litigation privilege. However, disclosure of the subject matter to the opposing party, either at discovery, at trial or otherwise, is likely to constitute a waiver.

Take, as a practical example, where an expert makes a casual reference to an insurance adjuster's initial accident report in her own report, draft or otherwise. Perhaps the reference is in a bibliography, or in a "documents received" reference in the report itself. The court may be inclined to review the adjuster's report and be inclined to conclude that litigation privilege was impliedly waived over that adjuster's report by its disclosure to the expert.[173] Disclosure of expert's reports between experts is likely to be a waiver of litigation privilege, either because it has been disclosed outside the parameters of what was required for the lawyer to give legal advice in the litigation, or because the opinion itself may constitute a finding as far as the receiving expert is concerned. Indeed, if it was not relevant to the receiving expert's findings, why was it shared with her?

In *Trigon Insurance Co.* v. *United States of America*,[174] the defendant had retained a firm called "Analysis Group/Economics" (AGE) to perform litigation consulting services to assist in defending against Trigon's action to recover federal income taxes and interest assessed and collected by the defendant in prior years. In addition, certain "academic affiliates" of AGE had been designated as testifying experts for the United States. The plaintiff asked for the defendant to produce its experts' draft reports after the United States waived litigation privilege by serving the experts' final reports. The court held that service over the final reports waived privilege over the subject matter of the reports, including the previous draft reports, in accordance with the American Federal Rules of Civil Procedure. However, by the time of Trigon's request, many of the draft reports had been deleted as a result of AGE's document retention policy – and the document retention policies of the individual practices of the testifying experts – which did not call for the retention of expert's draft reports. Judge Payne took notice of AGE's expertise in litigation consulting and held it to a high standard:

> "AGE holds itself out to have expertise in litigation consulting. AGE is the agent of the United States in arranging for the expert testimony to be given in their action on behalf of the United States. As such, AGE is charged with knowing that materials reviewed by a testifying expert must be preserved and eventually produced to the opposing party. The document retention policies of AGE do not trump the Federal Rules of Civil Procedure or requests by opposing counsel, even if the requests primarily are informal. Moreover, AGE's execution of a document retention policy that is at odds with the rules governing the conduct of litigation does not protect the United States from a finding of intentional destruction.
>
> In this case, documents and communications were willfully and intentionally destroyed by the United States' not-testifying experts. The documents destroyed should have been produced, and would have been admissible at trial for cross-examination and [for the purpose of determining the ambit of the expertise of the witness]."

Because there was no privilege with respect to experts' draft reports exchanged between the experts and consultants and other third parties working for counsel for the United States, and these were required to have been retained and produced to counsel for Trigon Insurance, the judge directed computer-

forensics personnel from a Big Four forensic accounting firm to search the network files and hard disks of the experts and consultants for the United States to recover the draft reports that had been exchanged to and from the experts. The judge also allowed Trigon to recover the $180,000 cost of this computer forensics work from the defendant.

This case is likely to be followed in Canada, and stands as a clarion call to forensic accountants, both in connection with their own practices, and as a beacon, lighting the path to the pursuit of privileged documents over which privilege may have been waived before they were destroyed.[175] **Because your challenge to a fraudster's privilege is likely to result in a retaliatory challenge to your litigation privilege, you have to carefully consider any practice about destroying communications outside your firm such that a party may doubt your independence and whether you are acting as the "alter ego" of the client or its lawyer.**

Releasing draft reports outside your firm only waives privilege with respect to the subject matter of that report. A party may seek earlier, draft reports to the extent that production of earlier drafts of the expert reports have a semblance of relevancy if they are not covered by privilege. A waiver of privilege only covers the same subject matter as the final report relied on at trial. An opinion in an earlier report not addressed in the final report is not waived by the final report.[176]

Only when an expert is to testify at trial is a party entitled to obtain a copy of all of the documents that were used to prepare the report. This is necessary so that the counsel cross-examining the expert can, with respect to the report filed, fully assess the facts and issues of the expert's reasoning in regard to the report filed, as well as the expert's intellectual process. Moreover, experts will be bound to make available to the opposing party all of the documents in their possession relied on to prepare their report.

While experts are able to develop their opinions and formulate their findings without fearing that third parties could at any time come and capture ideas and words that they wrote down at a time when they were still in the process of analyzing and reasoning and had not formed a final opinion on an issue, the fact remains that when the expert exposes an opinion, however tentative, outside the confines of their firm, the opposing party is entitled to examine the expert on all of the elements relied on in preparing the report. The court will then have to assess the objectivity and the soundness of the expertise produced, and form its own opinion on whether the expert was influenced by forces outside their firm in forming their final opinion.

Professions are both science and art. The courts are always concerned that experts could misunderstand their role as experts and think that they are there to serve the interests of the party calling them as witnesses, and that the experts have let themselves be influenced by the remarks of counsel who retain their services or that they agree to change their findings or assessments at the request of counsel. The courts require disclosure of the relevant information to allow a skilful cross-examination to expose these shortcomings, and the opposing expert is the eyes and ears of opposing counsel to discern the subtle differences between draft and final reports that may be the result of such outside influences.[177]

The principles of waiver and forfeiture apply equally to LPP. One odd application of the principle applies to witness statements that are sworn or affirmed. By taking a public oath, there may be a waiver of confidentiality and thus any privilege to the statement (depending on the law of your province).[178]

As a final note, there is also, arguably, a very narrow exception to litigation privilege under Canadian law. It is similar to the "innocence at stake" and "public safety" exceptions to legal professional privilege. Those exceptions stand for the proposition that the law will not allow an innocent person to go to jail, or a terrorist to blow up a building, simply because the information would otherwise be covered by LPP. Similarly, a court will not allow litigation privilege to be applied if ***"the party challenging the litigation privilege [can] demonstrate that the materials being sought are relevant to the proof of an issue important to the outcome of the case and that there is no reasonable alternative form of evidence that can serve the same purpose."***[179] In other words, where the underlying evidence in a privileged report has been destroyed, a court may order disclosure of that report as the best, and indeed the only, evidence available to it.

It is important to distinguish between this very rare exception which overcomes litigation privilege because essential fact evidence has been destroyed and the crime-fraud exception to LPP.

The crime-fraud exception to LPP applies where there is *prima facie* proof of intentional misdoing, preventing an adjuster's or expert's file from becoming a black hole from which evidence of the client's misconduct can never be exposed to the light of day, just as a lawyer's file is not a den of iniquity. The party seeking disclosure may be granted access to them on a *prima facie* showing of actionable misconduct by the other party both in cases of LPP and litigation privilege.[180]

Because litigation privilege rises and expires with a particular claim, a finding of the privilege in civil litigation does not mean it applies to criminal proceedings as well.[181]

The Implied Undertaking Rule and Privilege

It is critical to remember that the litigation process is a fundamental part of your investigation. The discovery rules are there to expedite the litigation by (1) identifying and narrowing issues; (2) disclosing evidence with a semblance of relevancy; (3) preserving evidence for trial; (4) expediting trial preparation by committing parties or witnesses to particular versions of facts; and (5) encouraging settlement by (a) educating the parties as to the strengths and weaknesses of their respective cases, (b) exposing doubtful claims or defenses, and (c) providing information for informed case evaluation.

The expert's participation in the discovery process is critical to allowing the client to fully exploit her right to discovery of the opposing party. It is therefore important for you to identify where the opposing party is trying to improperly claim litigation privilege. Experts have no litigation privilege where they are eyewitnesses to material events in a case, or a party to an action, as opposed to being hired in anticipation of litigation, and experts hired to assist in preparation for trial are treated differently depending on whether they will be called to testify at trial. **Forensic accountants have to understand the court rules limiting their use of the evidence acquired during the litigation process, because acquiring evidence during the discovery process is a critical part of your investigation. As a result, you must understand the "implied undertaking."**

Comments about LPP set out the common law principles. Those principles may be amended by statute or regulation. While Rules of Civil Procedure are a regulation, they do not amend any of the common law principles governing LPP. They do, however, codify the "implied undertaking," a concept which is different from privilege but which is still relevant to our subject.

In the introduction to this guide, it was noted that evidence that may be ruled inadmissible in a criminal proceeding because it was illegally obtained will, in all likelihood, be admissible in a civil proceeding.[182] One should not conclude from this comment that evidence acquired during the course of a civil proceeding is admissible in subsequent civil, or criminal, proceedings as a matter of course. **Rule 30.1 of the Ontario Rules of Civil Procedure, "the implied undertaking rule," ordinarily forecloses the use of evidence acquired from the other party during the course of the proceeding for other proceedings, subject to a wide variety of exceptions. The root of the implied undertaking is a protection (akin to a privilege) that insulates evidence that a party is compelled to produce in pre-trial oral and documentary discovery from use other than for the purpose of that litigation.**

The Rules of Civil Procedure require the production of relevant, and potentially damning, evidence that is not protected by privilege, even if it would result in self-incrimination.[183] The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the implied undertaking recognizes that the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by the Rules solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. The general idea is that whatever is disclosed in the discovery room stays in the discovery room, unless eventually revealed in the courtroom or disclosed by judicial order.

In *Livent Inc.* v. *Drabinsky*,[184] the court held that a non-party to the implied undertaking could in unusual circumstances apply to have the undertaking varied, but that relief in such cases would rarely be granted. **As a general rule, a party seeking to use the discovery evidence other than in the proceedings in which it is produced must obtain the permission of the disclosing party or leave of the court.** Evidence relating to a crime vary from mere suspicion to blatant admissions, from peripheral clues to direct evidence, from minor offences to the most heinous. There are also many shades and variations in between these extremes. This difficulty is compounded by the fact that parties to civil litigation are often quick to see the supposed criminality in what their opponents are up to, or at least to appreciate the tactical advantage that threats to go to the police might achieve, and to pose questions to the examinee to lay the basis for such an approach. The discovery rules were not intended to constitute civil litigants as private attorneys general. However, the implied undertaking was not intended to suppress evidence of criminal behaviour that is contrary to the public interest either.[185]

On such an application to waive the implied undertaking to allow civil discovery evidence of criminal behaviour to be used in other proceedings, the court will be able to weigh against the examinee's privacy interest the seriousness of the offence alleged, the "evidence" or admissions said to be

revealed in the discovery process, the use to which the applicant or police may put this material, whether there is evidence of malice or spite on the part of the moving party, and such other factors as appear to the court to be relevant to the exercise of its discretion. This will include recognition of the potential adverse effects if the protection of the implied undertaking is withdrawn.

The analogy to the crime-fraud exception to LPP is not exact. Adoption of the implied undertaking to facilitate full disclosure on discovery even by fraudsters is the very essence of its purpose. As a matter of procedure, the courts recognize that requiring a motion to the court to waive the application of the implied undertaking may give the perpetrator of the crime notification of the proposed disclosure, and afford the opportunity to destroy or hide evidence or otherwise conceal his or her involvement in the alleged crime. This concern is largely remedied by permitting the party wishing to be relieved of the implied obligation of confidentiality to apply to the court without notice to the accused (*ex parte*). It would be up to the motions judge to determine whether the circumstances justify proceeding *ex parte*, or whether the deponent and other parties to the proceeding should be notified of the application.[186]

If you, as an investigator, face a problem covered by the implied undertaking rule, legal counsel will likely be able to address it in a fashion similar to any problem caused by a claim by LPP, and get a court order to address it that is similar to one that might have been obtained if LPP was being claimed.[187]

The Legal Professional Privilege Checklist

The phrasing of the general principles of LPP so as to represent all their essentials, but only essentials, and to group them in natural sequence is a matter of some difficulty. Nevertheless, the following checklist may be helpful:

For LPP:

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 where the protection is waived by the client, either expressly or by implication, such as where the client uses legal advice to suggest his actions were *bona fide* or otherwise uses to justify his actions to third parties; or
9. unless an exception such as the crime-fraud exception to LPP applies. A party seeking to have the court deny LPP privilege on the basis of an allegation of intentional wrongdoing must establish not only the allegation of a fraud and evidence that the documents which that party seeks to have disclosed are relevant to the determination of that issue, but also the evidence from which it can be said that the allegation of fraud has some foundation in fact so that the court can say the allegation is honestly made and that it is in the interests of justice that all relevant material, including that which is subject to the privilege, is disclosed in order that the allegations can be effectively and correctly disposed of in the litigation. The crime-fraud exception to LPP is now being expanded beyond fraud, deceit, or breach of the *Criminal Code* to include any form of intentional wrongdoing. When legal advice was sought not for the purpose of furthering fraudulent conduct, but rather contains information which could be reasonably anticipated to throw light on the question of whether or not the client has committed the alleged fraudulent act or not, the exception may still apply. For example, where the defendant sought advice from its solicitors about the legal effect of a transaction, and thereafter misrepresented the legal effect of those agreements in order to induce the plaintiff debtor to acknowledge its insolvency and consent to the appointment of a receiver by the defendant creditor, or otherwise act to the plaintiff's prejudice, the communications between the solicitors and the defendant would simply constitute evidence of the prior knowledge of the defendant from their solicitors' opinion of the legal effect of the loan agreements, at the time they made their statements to the officials of the plaintiff, turning a potential claim of innocent or negligent misrepresentation into one of fraud. In such circumstances, the crime-fraud exception to LPP may be invoked to defeat a claim to LPP.[188]
10. Litigation privilege is not LPP, but a separate ground of privilege. It does not protect fact evidence from disclosure, it only protects the calculations, mental processes, and work product of the expert and the lawyer during the course of litigation if the dominant purpose of that work product was for the purpose of the client obtaining legal advice for impending and anticipated litigation. It lasts only as long as the litigation, and is also subject to the crime-fraud exception to LPP as well as others.

The Importance of Suing Personally

"There are two imperatives driving the investigating or prosecuting attorneys [to prosecute lower level employees]: One is that the prosecutor wants to put the squeeze on someone who can talk, and certainly people at a lower level are valuable in being able to talk about their superiors. The second is that prosecutors want to avoid the defence [of executives] that the people who did this are at the lower level, and we had no knowledge of it. By indicting everybody, the prosecutors not only give themselves the opportunities to have a lower-level witness, but they take away one of the defense arguments."[189]

In the United States, lawyers lead police investigations. Therefore the tactical importance of prosecuting minor participants in misconduct for evidentiary purposes is part of the prosecution playbook. **In Canada, lawyers often receive the file after the investigation has been completed, thereby requiring the investigator to take a more active role in determining who should be sued or prosecuted for evidentiary purposes.** I have written extensively on the tactical importance of suing those who participate in wrongdoing. The New Brunswick Court of Appeal has confirmed that suing employees and agents personally for those wrongs in which they participate because of tactical considerations is not improper:

"David Debenham [has noted that as] a further tactical matter, adding adjusters as parties gives insureds the expanded rights of discovery that our American colleagues already enjoy. *It therefore gives insured*'s counsel an opportunity to pit those who actually committed the bad faith conduct against those who orchestrated it behind the scenes, **as the ADGA doctrine holds those who actually participate in wrongful conduct jointly and severally liable along with those who directed it. Those who perpetrated the acts of bad faith give evidence that they relied on orders, instructions or tacit policies from superiors as a means of deflecting their personal responsibility. Such evidence supports a sizable claim for punitive damages for systemic bad faith.** Superiors in turn allege that subordinates acted on their own, supporting personal claims against the adjusters or other employees actually perpetrating the bad faith. More often still, the potential for this conflict in the evidence results in a proper settlement of the claim.

Discovery of the evidence of the insurer's employees as parties to the litigation gives the insured's lawyer an opportunity to discover the kind [of] systemic bad faith that can lead to sizable punitive damages. While using a bad faith allegation against an insurer to obtain documentation from other insureds' claims (which are necessary to show systemic bad faith based on similar fact evidence) is problematic, a court is more likely to grant some latitude in investigating how a particular adjuster handles files. Such an investigation may show systemic bad faith, or condonation of bad faith, by the particular adjuster. The former is more likely to be viewed as a fishing expedition by the court and disallowed, while the latter is a more surgical approach that is more likely to meet the test of relevance in the context of a party's discovery rights. In other words, simply pleading bad faith against an insurer is ordinarily not likely to lead to the kind of evidence that will build a case for company-wide systemic bad faith claims handling that will result in an enormous punitive damage award. **Pleading systemic bad faith by a particular adjuster can, however, lead to a more localized discovery of that adjuster's files, and this may eventually build itself into a department-wide, or even corporation-wide, bad faith claim as the adjuster attempts to explain his conduct by implicating his superiors or by exposing informal or unwritten corporate policies.**

While suing the innocent simply for discovery purposes is justifiably sanctioned by an award of solicitor-client costs against the perpetrator of this discovery abuse, no such sanction protects wrongdoers because they are aiding and abetting in a corporate wrongdoing."[190] [emphasis added]

Fraud has a higher onus of proof than other intentional torts. Given the lower threshold counsel may decide to plead other torts in lieu of fraud, at least unless the defendant shows its hand through the discovery process. Whether fraud is pleaded or not, those who participate in fraud or other

intentional wrongdoings, either as active participants or by instructing, counselling, aiding, or abetting the wrongdoing, may be held jointly and severally liable with their principal or corporate employer. Fraud, and a conspiracy to commit fraud, is particularly hard to prove, and has harsh cost consequences if the evidence does not meet the high onus of proof, including proof of intention.[191] The tort of conspiracy is not like a number of other torts.

The tort of conspiracy deals with two or more persons' state of mind. Quite often this will come down to proving the conspiracy by eliminating all other possibilities, and in that way leaving conspiracy as the only logical inference. The plaintiff, on whom the onus rests, can only prove the conspiracy partly by proving the various circumstances surrounding the transaction and partly by showing what the state of the mind of the alleged conspirators was at the time.[192] Accordingly, the forensic accountant who has concerns about onus of proof, and about an inability to meet the *prima facie* case of fraud standard to engage the crime-fraud exception to LPP, may want to consider consulting counsel about other causes of action against co-conspirators in an effort to secure their evidence on discovery as to whether the fraudster has waived privilege by communicating otherwise privileged information to them.

I wrote *Executive Liability and the Law*[193] as a text to show when, where, and how to do this. **For the forensic accountant faced with telling counsel that the level of evidence has not met the onerous burden of proof required to prove civil fraud, the intermediate step of suing known participants to acquire their evidence through the civil discovery process before going after the "ringleaders" with allegations of fraud is often overlooked as an important tactical consideration. It creates more opportunity for discovery and evidence. In many fraud cases, the fraudster hides behind "shell" corporations. Documentary discovery of employees of shell companies and their documentation are important pieces of the puzzle. Where the fraudsters' pawns are personally involved, and therefore can be sued personally, the threat of a personal lawsuit is a significant countervailing pressure to uncooperative witnesses who could be an invaluable source of information or evidence. As a result, it is incumbent on every forensic investigator to become familiar with this area of the law, and understand the ADGA doctrine as an important weapon in the fight to uncover the evidence necessary to confirm or dispel suspicions of wrongdoing.**[194] **Acting in tandem with legal counsel as a "fraud advisor,"**[195] **the forensic accountant who is knowledgeable in the vagaries of the law of fraud, intentional torts, and the rules of evidence, is a critical member of the legal team. A complex case may require two firms of forensic accountants, one firm to advise the lawyer and client on strategy and evidence gathering, and the other to act as an impartial expert witness.**

Suing personally for intentional wrongdoing works hand in glove with the expanding crime-fraud exception to LPP. It also has other applications. Let's take as an example the value-added benefit of suing personally in the context of privilege. Let's consider "spousal privilege" as an example.

Husband and wife use a shell company as a vehicle for wrongdoing. The lawyer is doubtful about being able to prove fraud but sues the shell company and the husband. Only the wife has assets.

Husband lies on discovery, and he is not obliged to give evidence against his wife because of s.11 of the *Evidence Act*,[196] which states that "a person is not compellable to disclose any communication made to the person by his or her spouse during the marriage." Now if you uncover evidence that the wife was involved in tortious conduct that might not amount to fraud, the lawyer can add the wife as a party to the lawsuit. Now she has to give evidence on examinations for discovery and at trial, and she can be held personally liable along with the shell corporation and her insolvent husband. In the course of her evidence, she may provide leads sufficient to prove the husband's fraud so the claim against him survives bankruptcy, and in any event the claim against her is collectable because she has the family assets in her name. If she wants to settle, she can waive spousal privilege and give evidence against her husband.[197]

So what kind of intentional tort might come into play? That is for you as a forensic accountant to recognize because you must not only follow the evidence, but also be aware of the wide panoply of causes of action that might relate to the evidence you uncover. You have to know what might be involved, as legal counsel, crown, or plaintiffs take the case you neatly bundle for them – they are not going to lead you by the hand. Indeed, if you are acting as an advisor to the legal team, you have to be able to recognize causes of action ahead of most counsel who are not as familiar as you are. In our example of spousal privilege, the wife may not have been involved in the fraud, but she may be liable for the intentional tort of spoliation.

Spoliation is defined as "the intentional destruction, mutilation, alteration or concealment of evidence" according to Black's

law dictionary. For several years, Canadian courts, unlike several American jurisdictions, refused to recognize a separate and complete tort of spoliation for which damages could be awarded. The situation in Ontario, and only in Ontario, changed with *Spasic* v. *Imperial Tobacco Limited*[198] and *Robb* v. *St. Josephs Health Care Centre*,[199] which established that there is independent tort in such cases where (1) there is pending or probable litigation, (2) the spoliator knows of pending or probable litigation; (3) and therefore intentionally destroys evidence designed to disrupt the victim's case, (4) and, as a result, the victim's case is disrupted, (5) causing damage to the victim as a result.

Suing for this oft-overlooked tort gives the forensic accountant an opportunity to investigate the missing links in the paths of evidence, and look past privilege claims based on the crime-fraud exception to LPP as set forth in the *Dublin* case to the extent that future courts rely on it.

Another often used example is the tort of conspiracy, which applies whenever two persons, corporate or individual, including employer and employee, husband and wife, knowingly commit wrongful acts in concert with each other.[200] Personal liability, even where it is combined with claims against several persons, entitles the claimant in a civil case to oral and documentary discovery from each defendant, and full recovery from every wrongdoing regardless of their proportionally blameworthiness or participation in the wrongful acts.[201]

In cases involving a private investigation firm retained by an employer to investigate criminal wrongdoing by an employee, it is possible that the employee may sue the investigator for trespass, invasion of privacy, and negligence, thus providing the employee with an important source of evidence for trial.[202]

Forensic Investigation and Privilege

Properly understood, legal professional privilege imposes no impediment to the forensic investigator. Is a lawyer's advice relevant to proving or disproving fraud? If so, has the client waived privilege by partial disclosure of that advice? Do you have to go to a lawyer and his files later on in the investigation, or is there a need to access them early on? Why? Why can you not acquire information from third parties and the subject? Be mindful that partial disclosure of privileged information to third parties by the subject may constitute a waiver of the balance of otherwise LPP communications. Review all statements made by any party to the litigation about the lawsuit in question.

Corporations, directors, and in-house legal counsel often refer to the fact that legal advice has been taken in relation to a particular issue or dispute. Obtain a legal opinion as to whether such a reference may have forfeited a claim to LPP over that advice. A common practice has been to state that advice exists, without saying what that advice is, followed by a comment that the company or directors hold a particular opinion – for example, that an action against the company will not succeed. It is not uncommon for parties to refer to the existence of legal advice in media releases, annual reports, and notices to stakeholders such as: "The corporation's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiff's claim will not succeed."[203]

Deploying the substance or effect of legal advice for public relations or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege, and has been found to amount to a waiver of privilege. Even the practice of referring to legal advice to justify one's position prior to litigation may result in LPP being waived. Therefore, the forensic accountant must look carefully at letters exchanged with the opposing party or its counsel before the lawsuit has been commenced for comments suggesting that a litigant has spoken to legal counsel and believes it has acted properly, or that it has acted in accordance with the legal advice it received and therefore it believes any claim against it would be unsuccessful.

Using legal advice as an instrument in public relations or as a tool to forestall litigation or increase one's bargaining position is inimical to the purpose of LPP – in these circumstances, a court may view a claim of LPP to shield disclosure of that legal advice as unfair, and imply that the client has waived any right to LPP where the disclosure of legal advice was intended to convey a message about the conduct of the client for the purpose of fortifying a position the client wanted to take publicly, or with an outside party. Implicit in the reference to external legal advice is that it supports the position taken by the client, and as the gist or conclusion of the external legal advice had thus been disclosed, any legal privilege in that advice had been waived. Therefore, the forensic accountant's investigation of a waiver of LPP must start with a search for any communication where the existence of legal advice is referred to in order to emphasize and promote the strength and substance of a case, or to justify particular actions, which may lead to a finding of a waiver of privilege.[204]

You will also want to search the accountant's files thoroughly, to see if a lawyer's letter in response to an auditor's query about contingent liabilities might not have waived privilege.[205] Lawyers' letters in the accountant's possession as a result of the auditor's standard inquiry about contingent liabilities may also not be covered by litigation privilege.[206] Counsel's responses to an auditor's request for information about allegations of illegal activity, internal investigations, environmental assessments, tax positions and the like may also have waived LPP.[207]

When interviewing the subject, be aware of any express or implied waiver to you or to other non-privileged persons, including authorities or the employer. Disclosure made to

internal investigators to the auditors may also waive any privilege.[208] Any pleading, or other statement of the subject which purports to use legal advice to establish a defence, is an implied waiver. Normally, the subject believes anything his lawyer has is protected so there is no need to rush to get to the lawyer's file. When you do get to the lawyer's file, you can first obtain the transactional documents, which are artifacts or "acts," and are not advice and therefore not covered by LPP. The bulk of the correspondence file is also not protected by LPP, as anything sent to anyone other than the client is a waiver of any privilege.

Your first examination of the file should have evidence of express and implied waivers in hand. After getting the file, re-examine whether some new waivers have been discovered in the lawyer's file. After all of this disclosure, if there is *prima facie* evidence of fraud or other wrongful acts and there is more evidence you need that is otherwise being refused to you under a claim of LPP, you can get obtain a Court order for its disclosure under the crime-fraud exception to LPP. If you have not got a *prima facie* case by this stage, trying to get access to LPP information smacks of being a fishing expedition, and is properly castigated as an infringement of the suspect's fundamental rights. Such a fishing expedition is a "red flag" of a poorly planned and prosecuted forensic audit.

Putting LPP to Work for You – A Typical Example

The following is a hypothetical situation with fictitious names to demonstrate how LLP can be creatively employed with a typical fact situation.

David Peng worked for Globatech Engineering (Gtech) for 12 years as the partner in charge of R & D in Mississauga. Peng has left and joined a competing company which is now called Pengtech Inc., which has hired several Gtech employees from the Mississauga R & D division. Pengtech was originally incorporated by Larry Smith, Curley Jones, and Moe Joe as 123456789 Inc., but was renamed Pengtech Inc. when Peng joined the company and it opened its doors for business.

Gtech says that Peng and the others began taking Gtech's goodwill and its confidential information about technology, clients, and suppliers while still employed by Gtech, as well as diverting A/R payments from clients to fund Peng's new venture. You are hired by Gtech to put a value on the confidential information taken, prove the amount of the A/R diverted to Peng that he had written off as uncollectable, and calculate the value of the unlawful gain to Peng and Pengtech Inc. resulting from their allegedly unlawful use of its confidential information.

Peng says that his former partners were planning on dissolving the partnership and reforming a new partnership without him. He alleges he was being forced out in favour of Sid Successor, who Peng believed was being groomed as his successor by his partners because Sid would work for a lot less money than Peng would. Peng says that he developed the technology himself and that Pengtech's patent applications demonstrate that they, and not Gtech, own the confidential information in question.

Bob Peng is David's brother. He recently became a licenced patent agent, and is handling Pengtech's patent application. He is not a party to the litigation and refuses to produce his file. Gtech will not get a chance to oppose Pengtech's patent application until a patent has been issued by the patent office sometime after the trial of this proceeding.

You are retained by Gtech. In the course of your engagement, you find many contingencies relating to Gtech's claim for damages, if Gtech can only claim restitution of those profits Peng and Pengtech has wrongfully gained from their wrongful conduct. The problem is that Pengtech produces very little in the way of business records, and Peng professes ignorance of business matters.

Peng hired Barry Bean-Counter away from Gtech. Barry was a bookkeeper in one of Gtech's other divisions. Barry looks after the business affairs of Pengtech while Peng deals with the technical needs of the clients as well as hiring the suppliers. Peng testifies that he has produced all of Barry's books and records for the business, and he has relayed all of Barry's evidence on the profits of Pengtech. They show the new startup is operating at a loss, as startups often do. Where do you go from here?

First, you ask for the patent agent's entire file. He is not a lawyer and anything in his file, including advice, is not covered by LPP.[209] It's Pengtech's property and they have to produce it under the Rules of Civil Procedure, as their patent agent's file is within their power to control. You then get your data recovery people to go through Peng's and Barry's work computers with Gtech. You also find out that Peng and Barry went to the same high school and are lifelong Leafs fans. They have seasons tickets together at the Air Canada Centre, along with some of their other friends from Jarvis Collegiate – Larry, Curley, and Moe.

Larry, Curley, and Moe used to work for Gtech's competitors before setting up Pengtech Inc. You uncover the fact that Larry, Curley, and Moe had been sending the patent agent, Barry, and Peng e-mails about renting commercial space, meeting with clients and suppliers of Gtech, and asking various questions of both Barry and Peng about how they think they should set up their company and patent the practical applications of the technology that Peng has been working on for the past several years at Gtech.

You also learn from the patent agent's file that Larry, Curley, and Moe have retained a lawyer to set up Pengtech Inc. to hold that patent. The e-mail traffic also suggests that this cabal has other lawyers and accountants involved in the set-up of the new business before Peng left Gtech.

Barry continued to keep tabs on what Gtech was doing about Peng's leaving, sending Peng e-mails about what he thought Gtech was doing in response to Pengtech's compe-

tition. Barry eventually left his junior position at Gtech on giving the obligatory two weeks' notice. This is important new information that Gtech's lawyer was not aware of. Step 2 is meeting with Gtech's lawyer to discuss her approach to the litigation and the status of your findings to date.

In your meeting with Gtech's legal counsel, you report on the problems associated with the damage claim. You point out that you are aware that the case law supports the proposition that a junior employee who assists a more senior one in a breach of a fiduciary duty to the senior employee's employer will also be personally liable for the senior employee's breach of duty.[210] Therefore, Barry may be a possible defendant who can give evidence on discovery and who can flesh out the exact nature of the conspiracy. You may also ask Gtech's legal counsel about the ADGA doctrine, and where Larry, Curley, and Moe should be sued personally for inducing Peng to breach his fiduciary duty to Gtech. That too, would give you an additional source of testimony and documents, provided that Gtech's legal counsel thought that these personal claims were viable.[211]

Originally retained to help with damages, you are now giving value-added assistance on liability. To the extent Barry is sued, and has to give his evidence about *pro forma* business plans and expected profits of the new venture, Barry's evidence on discovery assists you as well. Now we come to legal professional privilege, step 3.

In your initial plan, you have done data recovery which has allowed you to uncover evidence of lawyers being hired before Peng and Barry left Gtech. Who was the lawyer's client? Did the presence of Barry, Larry, Curley, or Moe in the communications mean that they were not privileged because non-clients were not present? Do personal documents addressed to non-clients, or signed at the same time, suggest that non-clients were present at key meetings such that any advice given at these meetings were not privileged?[212] If they were all clients, does this not cement evidence of their conspiracy? Does the presence or involvement of the accountant in the communications link likewise preclude a claim of LPP?[213] What does the accountant's file evidence about the conspiracy or business plans of the group?[214] What about the note in Pengtech's financial statements that make a reference to a contingent liability as a result of potential litigation with Gtech? What about obtaining the solicitor's response to the audit enquiry letter?[215]

You also want Pengtech's minute books and their corporate counsel's file. From that, you learn that their corporate solicitor is holding Pengtech shares in trust. You want corporate counsel to testify regarding who the beneficiary of those shares is, and when the trust was established, as these are facts, not advice, and therefore are not covered by LPP.[216] When you find out that Peng was a beneficial shareholder in Pengtech shares from the date of incorporation of the company while he was still a partner of Gtech, you believe you have *prima facie* evidence of wrongdoing on Peng's part in relation to the allegations of breach of fiduciary duty to all claims by Gtech sufficient to LPP to be overcome by the crime-fraud exception to LPP because breach of fiduciary duty is, in law, "equitable fraud."[217]

With all of the evidence from the lawyer's trust account and all of the participants' trust accounts, as well as the advice of the patent agent and legal counsel on how Pengtech was set up to avoid the appearance of Peng breaching his obligations to Gtech, you have assisted counsel in not only determining how much money the individual participants made as a result of their new enterprise, and thus the amount of profits they should disgorge to Gtech, but you have also obtained a complete picture of what happened so that you have a complete report on both liability and damages to report at trial, thus expanding your service to the client, representing true value-added service.

But what if you are retained by Peng? He wants his value in the Gtech partnership valued so he can get compensation for his share of the partnership business he was forced to abandon because his partners were pushing him out in favour of Sid Successor. He has a copy of all of Gtech's financial statements, but they don't put any value on the goodwill of the partnership. They also don't reflect the "perks of partnership" that his partner at Gtech, Mel Marketing, was taking out of the partnership in the form of money and money's worth that he enjoyed for allegedly "shmoozing" the clientele, but which Peng believes were used to keep this partner's girlfriend in the lifestyle to which she had become accustomed. Peng believes that if there has been any wrongful profiting, it is Mel's use of partnership assets for his personal use, and he wants you to get to the bottom of this as part of his counterclaim against Gtech and Mel.

Peng's defence is that he owned the technology and brought it with him to Gtech and never relinquished title to it when the partnership was formed. He met with the Gtech's lawyers when the partnership was formed, and he is sure that when he and his lawyers met at the lawyer's office the notes of that meeting reflect that understanding. Moreover, Peng is convinced that his partners were getting legal advice from Gtech's lawyers behind his back and that the lawyers had already helped his partners organize the dissolution of the

partnership and the reorganization of Gtech's R & D division under Sid's control. He merely their pre-empted their efforts to divert Gtech's business to their new partnership by forming his own company. Peng insists that there is evidence in Gtech lawyers' files. Peng also believes that the company's auditors have done an internal review that exonerates him from the allegations of misappropriation of A/R.

As part of a value-added approach to Peng, you not only use your business valuation and tracing skills, you also suggest that the partners' use of the Gtech lawyers to to plan the dissolution of the partnership, push Peng out, and take Gtech's business for their own partnership that would exclude Peng was its own form of "equitable fraud" or breach of fiduciary duty against Gtech for which the partners could not claim LPP under the crime-fraud exception to LPP.[218]

If Peng's lawyer thought that there was not sufficient *prima facie* proof of such equitable fraud, you would also point out that because Peng was a partner at all times before he left, and had never given notice of Gtech that there was any adversity in interest between Gtech and himself, he was a joint client with his other Gtech partners and therefore was entitled to see Gtech's entire file, legal advice and all, because their file belonged to him as much as to his other partners.

All information about the plans to dissolve the partnership and fire him would have to be disclosed because Gtech could not claim LPP against him for any matter that arose prior to the breakup of their relationship. The legal advice given to Gtech was as much his property as it was his partners',[219] just as would be the case if Gtech were a corporation and Peng were one of its shareholders. Gtech cannot claim LPP over any file in which there might be evidence that the partners agreed that Peng owned the intellectual property in question because he owned the Gtech lawyer's file just as much as his former partners did.[220] In addition, the auditor's investigation is not covered by litigation privilege as it was not undertaken with the dominant purpose of the subject litigation. You ask the lawyer whether the claims to privilege can be attacked so you can broaden the evidence that you might consider as part of your investigation.

This example shows that while you as a forensic accountant may not be able to give the client a legal opinion on how to pursue litigation directly, as a forensic advisor you can make a valuable contribution in providing legal counsel with expert insight on the future direction of the litigation by drawing in these potentially fruitful avenues and in the process acquiring the evidence you need to complete an expert's report.

However, once you cross the line from being impartial expert to an advisor to counsel, you are likely to have crossed the line prohibiting an expert from being an advocate. An advocate argues the position and cause of the party in an effort intended to promote the interests of the party and to persuade the judge to rule in favour of that party.

An expert does not argue for or against a party. Rather, the expert is guided by, and only by, his or her particular discipline whether or not the conclusions suggested by that discipline advance the cause of the party who retained the expert. The court legitimately expects that the opinion of an expert will be influenced only by the presented facts and the application of expertise to those facts. An expert is, in every sense, independent.[221]

Forensic Accountants need a larger role than just being expert witnesses. Because privilege is a matter of a public policy choice between the importance of disclosure to a proper adjudication of the merits versus the importance of allowing clients to get confidential legal advice, it should come as no surprise that the extent that a court will recognize privilege varies from jurisdiction to jurisdiction. Because privilege has traditionally been thought of a rule of evidence and procedure, courts and academics alike have opined that the law of privilege of the forum in which the adjudication is held is the one that is to be applied.[222] In other words, a case to be tried in Ontario will have the Ontario law of privilege apply. Where there are multiple parties who may come from two or more jurisdictions,[223] "forum shopping" to sue in a jurisdiction with broader disclosure and discovery rules may be an important consideration depending on the facts of any particular case. Therefore, **your obligation to maximize your access to all relevant evidence may require you to recommend a particular forum because you require access to information that may be privileged in one jurisdiction, but not in another. Because a client's choice of a lawyer may be contingent on their choice of a forum in which to sue, your role as a fraud advisor may require you to give some input on which forum is the better one for evidence gathering purposes.**

As a result, you may turn a retainer as an expert witness into one as a forensic advisor, with a colleague from another firm acting as the impartial expert. In fact, this practice should become the rule, rather than the exception, with the result that **two forensic accountants to every commercial litigation lawyer on the larger files will become commonplace.**

Conclusion

"They will have no lawyers among them as a sort of people whose profession it is to disguise matters"

– Sir Thomas More

Despite Sir Thomas More's description, it is not the professional obligation of lawyers to assist fraudsters to "disguise matters." In fact, the honour of the profession prevents the lawyer's oath of confidentiality from being used as a muzzle to prevent the detection and prosecution of fraudsters. Forensic accountants must consider themselves an integral part of any litigation strategy, and not simply a passive participant. The forensic accountant leads the investigation, and therefore must play a key role in the discovery process leading to trial, as this process is an important extension of the investigation itself. Forensic accountants therefore must actively participate in any claims to privilege and be prepared to encourage counsel to explore challenging any such claims to ensure that the investigation has access to all relevant evidence before testimony is given at the final hearing, or before any final report is submitted. To do that, experts have to understand to limits of the privilege that may cover their communications with the client, counsel, and third parties, as well as the extent to which they have access to the opposing party's case in advance of trial.

The courts view legal professional privilege as a fundamental civil and legal right.[224] They also treat civil proceedings as a fundamental search for truth.[225] The common thread is that both principles are critical to the proper administration of justice and, where there is sufficient evidence to suggest that LPP is being used to further a fraud or other wrongdoing, the courts will order disclosure to avoid subversion of justice by a claim to LPP. **It is the forensic accountant's task as an investigator to acquire sufficient, appropriate evidence or that a waiver of privilege had occurred, or that an intentionally wrongful act had been facilitated by legal advice, before attacking any claim to LPP in a court of law.**[226]

Claims to privilege have often acted as a glass ceiling, limiting the parameters of a forensic accountant's investigation. Fraudsters not only believe that using a lawyer to further their scams not only adds a patina of respectability to a transaction, they also believe that a claim to privilege will allow them to cloak evidence of their wrongdoing from your investigation.

As soon as privilege is claimed, the investigation comes to a halt, the lawyers are called in, and the investigation either comes to a standstill or is forced to veer off into another direction until the claim for privilege is either adjudicated or conceded. If privilege is part of the fraudster's toolbox, then preparing and prosecuting an investigation in anticipation of such a tactic must be a fundamental part of the fraud investigator's skill set. For that reason, every fraud investigator must have a ready response when a fraudster claims privilege. This paper provides you with the information you need to do so in virtually every situation you may face. However, there are other reasons to explore privilege.

Fraudsters are not the only ones who claim privilege. Any investigator is liable to run into a claim to privilege. As a result, every forensic accountant must understand privilege, and the rights and obligations associated with it, to address issues of privilege as they might arise during the course of an investigation. Therefore, the title of this paper might have more properly been, "When a Subject of an Investigation Claims Privilege." However, even that does not exhaust the breadth of our topic.

Forensic accountants frequently have to communicate with lawyers, and want to claim privilege over their draft reports, working papers, and other various and sundry documents. We also explored the area of "litigation privilege," because an attack on the subject's claim to privilege is likely to be met with a retaliatory attack on your claim to privilege. Forewarned is

forearmed. You have to understand the limits to privilege to understand how you should be conducting your forensic investigation. Yet this is not the most important reason to understand privilege.

Forensic accountants can no longer be satisfied with being independent and impartial, expert witnesses isolated from the litigation process itself. Litigation has become too complex, and the collection and collation of evidence requires forensic accountants to be an integral member of the litigation team itself. Just as lawyers must have an accounting background to understand your evidence, so too you must have a significant amount of knowledge about the procedural and substantive law in which you operate**.**

A basic knowledge of the law at an undergraduate level is not a sufficient working knowledge of your particular legal environment. Your evidence will be the centrepiece of the litigation process and you must have a breadth of knowledge of the law governing the forensic process commensurate with your importance in it.

The client's lawyer may be the coach, but you are the star player, and as the star player you must have the entire playbook at your disposal. The law of privilege is a fundamental part of that playbook. Expert consultants have to be able to discern what the opposing side may be concealing

through claims to privilege that your client may be entitled to, and the expert witness has to be aware of the proper protocols for preserving privileges that ultimately belong to the client. **Knowledge of the law of privilege is rapidly becoming a matter of professional competency for the forensic accountant.**

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9 *Stevens*, [1988] 4 F.C. 89 at para. 26 (C.A.); *The Plant* (1993), 13 G.B.R. (4th) 235 (Ont. S.C.).

10 *The Lawyers* (1996), 43 C.B.R. (3d) 207 (Ont. S.C.).

11 *OSC* v. *Greymac* (1983), 146 D.L.R. (3d) 73 (ONt. Div. Ct.); *Ls PEI* v. *PEI* (1994), 123 Nfld. & P.E.I. R 217 (P.E.I. T.D.), *Signcorp Int'l* v. *Cairns Holmes* (1988) 24 C.P.C. (2d) 1 (Sask Q.: B.); *Kranz* v. *Canada* [1999] 4 C.T.C.93 (BCSC); *Global Petroleum Corp.* v. *CBI Industries* (1988) 172 D.L.R. (4th) 689, at 695 (NSCA).

12 *Purcell* v. *D.A. of Suffolk Cty* 676 NE (2d) 436 (Mass., 1997).

13 Lerman, L., Ethical Problems in the Practice of Law (2005).

14 American Law Institute (third), *Restatement of the Law Coverage for Lawyers*, s. 82(c) ("Restatement").

15 Id.

16 *Re. Martin Marietta Corp.* 856 F2d 619 at 622–623 (4th Cir., 1988); *Re. Columbia* v. *HCA Healthcare* 293 F3d 289 at 291 (6th Cir., 2002); *Bank of America* v. *Terra Nova Insurance Co.,* 212 F.R.D. 166 at 167 (5D NY, 2002); *U.S.* v. *MIT* 129 F 3d 681 at 687 (1st Cir, 1997); other privileges such as the ignore privilege in *Slatyvich* v. *Baker*, [1974] S.C.R. might apply.

17 Restatement, s. 75(c).

18 Restatement, ss. 83(2) and 79(8).

19 *Foster Whaler*, [2004] 1 S.C.R. 456 at para. 38.

20 *Cineplex Odeon Corp.* v. *M.N.R.,* (1994), 114 D.L.R. (4th) 141; *PIPS* v. *Canada* [1995] 3 F.C. 643.

21 D. Debenham, "Can You Keep A Secret?"15#3 Canadian Corporate Counsel 1, at 41 (Nov-Dec, 2005); *Re Daintry* [1893] 2 Q.B. 116; *Greenwood* v. *Fitts* (1961) 29 D.L.R. (2d) 260 (BCCA); *Unilever* v. *Proctor and Gamble* [2000] 1 WLR 2436, at 2444 (C.A.); *Dora* v. *Simper The Times* (C.A., May 26, 1999).

22 Debenham, D. *The Law of Fraud and the Forensic Investigator* 119–121 (Carswell, 2006).

23 "it matters not how you get it if you steal it even, it would be admissible in evidence," *R.* v. *Leatham* (1861) 8 Cox CC 498, at 501, app'd *Helliwell* v. *Piggott-Sims* [1980] FSR 356 at 357. There is an exception in criminal law if the person was acting as an agent of the crown and the admissibility of that evidence brought the evidence into disrepute under the *Charter of Rights*, see D. Debenham, "Fraud Investigations and Illegally Obtained Evidence" 3 #1 *Commercial Lit. Rev* 18 (Feb, 2005). Cf. D. Debenham, "The Evidence is In" 7# 5 *Report on Fraud* 10 (March, 2005); *P.(D.)* v. *Wagg,* (2002), 61 O.R. (3d) 746 (Div'l Ct) at para 70–7. It follows that evidence obtained by a lawyer through the instrumentality of a private investigator contrary to the Rules of Professional Conduct is also admissible, see *Cowles* v. *Balac* (2006) 83 O.R. (3d) 660 (C.A.)

24 *FCMI Financial Corporation and Fez Financial Corporation* v. *Curtis International Ltd*, 2003 CanLII 23179 (ON S.C.).

25 Under the Ontario Rules of Civil Procedure, a party is required to produce any document within its possession, or within its power or control to legally require another to produce, and where the court is satisfied by any evidence that such a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may (a) order cross-examination on the affidavit of documents; (b) order service of a further and better affidavit of documents; (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege."

26 Rule 39.01 (4),(5) of the Ontario Rules of Civil Procedure.

27 *Pax Management Ltd. et al.* v. *Canadian Imperial Bank of Commerce et al.* (1987), 14 B.C.L.R. (2d) 257, at 262 (C.A.).

28 Although exceptions may be made on a case-by-case basis, called the "Wigmore Privilege." See *National Post* v. *Canada*, (2004) 69 O.R. (3d) 427, at para 60.

29 such as crown privilege or spousal privilege.

30 The Wigmore Privilege was recognized in Canada in *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254 where (1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

31 *Brunel University* v. *Yaseghiak & Anor* [2007] EWCA Civ 82.

32 *Norwich Union* v. *Waller* (1984) 270 E.G. 42.

33 *Bradley & Bingley plc* v. *Rachid* [2006] UKHL 37 at para 86.

34 *Greenwood* v. *Fitts* [1961] 29 DLR (2d) 260; Merrill Lynch, *Pierce Fenner & Smith Inc* v. *Raffa* [2001] 1 LPR 31.

35 *Franklin* v. *B.C. Bldg. Corp.* [2000], B.C.J. 447, at para 15 (Can LII)

36 *Savings & Investment Bank Ltd (in liquidation)* v. *Fincken* [2004]1 WLR 667; *Brunel University* v. *Yaseghiak* [2007] EWCA Civ 482.

37 Vaver, D. "'Without Prejudice' Communications – Their Admissibility and Effect" (1974) 9. U.B.C. Law Rev. 85, at 152–3 (1974).

38 *Berry* v. *Cypost et al.* (2003), 21 B.C.L.R. (4th) 186.

39 *Rush & Tompkins Ltd* [1987] ADRL.R. 12/21 at para 24; *Re Daintry exp Holt* [1893] 2 Q.B. 116; *Davis* v. *Nyland* (1974) 10 S.A.S.R. 76, at 91; J.*A. McBeath Nom. Pty Ltd.* v. *Jenkins Dev.* [1992] 2 Qd 121 (Aus S.C.). There are Rules in Ontario preventing use of such evidence if it was obtained at a mandatory mediation, see Rule 24.1 of the Ontario Rules of Civil Procedure. Also note Rule 31.1 in relation to using evidence obtained in one proceeding in a subsequent proceeding.

40 Dodd, C. "Third Party Discovery of Confidential Settlement Agreements" 1#1, *Commercial Litigation Review* 19 (2003).

41 *Derco Ind.* v. *A.R. Grimwood Ltd* [1985] 2 WWR 137 and *Lorne Stewart Ltd.* v. *William Sindall PLC* (1987) 35 Build L R 109 are examples of cases where third parties obtaining disclosure of "without prejudice" material.

42 See also *Dos Santos* v. *Sun Life Assurance of Canada* (2005) 249 D.L.R. (4th) 416 (B.C.C.A.)

43 Schultz, G., Condemnation Appraisal Handbook (1949).

44 Allen, R. (ed), The New Penguin English Dictionary 1109 (2000).

45 *Waugh* v. *British Railways Board*, [1080] AC 521 at 531 (H.C.).

46 Manes, R., Solicitor-Client Privilege in Canadian Law, at 1 (1993).

47 Manes, R., Solicitor-Client Privilege in Canadian Law, at 2 (1993).

48 Sopinka, J., *The Law of Evidence in Canada* 635–636 (1992).

49 *Solosky* v. *Canada* (1980), 105 D.L.R. (3d) 745 (S.C.C.); *Giffen* v. *Goodman Estate* (1981), 81 D.L.R. (4th) 211 at 232 (S.C.C.); *Wilder* v. *O.S.C.* (2001), 53 O.R. (3d) 519 (Sup. Ct.).

50 *R.* v. *McClure*, [2001] 1 S.C.R. 445 at para. 38.

51 *R.* v. *McClure*, [2001] 1 S.C.R. 445 at para. 32.

52 *Gardner* v. *Irwin* (1978) 4 Ex. 49 at 51 (C.A.), first applied in *Canada Clerque* v. *McKay* (1902), 3 O.L.R. 498 (Div. Ct.); See: *Solosky* v. *Canada* (1980), 105 D.L.R. (3d) 745 at 755–757 (S.C.C.).

53 e.g., *Re Vancouver Police Board*, [2001] CanLII 21563 (BCIPC); *Re. AG Ontario*, [2002] CanLII 46396 (OWIPC).

54 *Akzo Nobel Chemicals Ltd et al.* v. *Comm. of E.C.* [2007] All E.R. 97. See also Pendell, G. "No Legal Professional Privilege For In-House Lawyers In EU Competition Cases," www.acc.com/public/attyclientpriv/cmsakzo.pdf (21 September 2007)

55 *Roseland Farms* v. *Canada* {1990}FCJ 730 (T.D.); *U.S.* v. *Willis*, 565 F. Supp. 1186, at 1190 (1983)

56 Sopinka, J., The Law of Evidence in Canada 650 (1992).

57 Thanki, B., *The Law of Privilege* 21–23 (2006); *Naujokat* v. *Braatushesky*, [1942] 2 D.L.R. 721 (Sask. C.A.); *Gould* (1983), 46 NR 433 (F.C.A.); *Whirlpool Corp.* v. *Camco Inc.*, [1977] CanLII 4991 (F.C. T.D.); *Goodman* v. *Carr*, [1968] 2 O.R. 814 (H.C.).

58 *Re. Confederation Treasury Service*, [1997] O. J. No. 3598; *Polylok Corp.* (1983), 74 C.P.R. (2d) 34 (F.C. T.D.); *Northwest Meltech Services*, [1996] B.C.J. No. 1915; *US* v. *Mammoth Oil Co.* (1925), 2 D.L.R. 966 (Ont. C.A.); *Proctor & Gamble Co.* (1980), 48 C.P.R. (2d) 93 (F.C. T.D.).

59 *Access to Justice Act*, 2006, S.O. 2006, c. 21.

60 *Chancey* v. *Dharmadi ("Chancey")*,[2007] CanLII 28332 (Ont. S.C.).

61 *Allen* v. *West Point Pepperall Inc*, 848 F Supp. 423, 428 (1994)

62 *Lukas* v. *Lawson* (1993) 13 O.R. (3d) 447 (Ont. Master); *Bank of Montreal* v. *Quality Feeds Alta. Ltd.* [1993] CanLII 1199 (B.C.S.C.)

63 (2002), 37 C.B.R. (4th) 135 (Ont. S.C) aff'd (2003) 18 C.B.R. (5th) 26 (Div'l Ct).

64 *Royal Bank of Canada* v. *Société Générale (Canada),* [2005] CanLII 36727, at para 10 (ON S.C.); *Soverieign General Ins. Co.* v. *Tahar Ind.*, [2002] 3 W.W.R. 340, at para 24.

65 *M.N.R.* v. *Weldon Parent* [2006] 2 C.T.C. 177.

66 *Blue Line Hockey Acquisition* [2007] BCJ 179 (S.C.).

67 *Cutts* v. *Pickering*, [1671] 21 E.R. 730 (Ch.D.).

68 *R.* v. *Cox and Railton* (1884), 14 Q.B. 153 at 168.

69 *Reynell* v. *Sprye* (846), 50 E.R. 501 at 503 (C.A.).

70 The honour of the legal profession was specifically cited in *Russell* v. *Jackson* (1851) 68 E.R. 558.

71 (1851) 68 E.R. 558 at 560.

72 (1884), 14 Q.B. 153 at 168.

73 *Williams* [1895] 2 Ch. 751 at 755.

74 *Barclay's Bank* v. *Eustice et al.*, [1995] 1 W.L.R. 1238 at 1252 (H.C.) cf *Buttes Gas and Oil* v. *Homer (No. 3)*, [1981] Q.B. 223 at 246 (C.A.); *Unilever Plc.* v. *Proctor & Gamble Co.*, [1999] EWHC Patents 250 at para. 30 (Ch. D.).

75 *Derby R's Ltd.* v. *Weldon*, [1940] 1 W.W.R. 1156 at 1173 (Q.B.).

76 *Crescent Farm (Sidneys) Sports Ltd.* v. *Sterling Offices Ltd.,* [1972] Ch 553 at 565.

77 *Crescent Farm (Sidneys) Sports Ltd.* v. *Sterling Offices Ltd.,* [1972] Ch 553; *Fidelity-Phoenix* v. *Hamilton*, 340 S.W. 2d 218 (1960); C. v. C., [2006] E.W.H.C. 336 (H.C.); *Barclay's Bank* v. *Eustice et al.*, [1995] 1 W.L.R. 1238 at 1249 (H.C.).

78 *Kuwait Airways Corp.* v. *Iraq Airways Co.*, [2005] E.W.C.H. 286.

79 *The David Agmershenebali,* [2001] C.C.C. 942 at 947 "The essence of the principle is that there are three interacting lines of public policy. First, there is the principle that in the interests of justice, documentary evidence in the hand of one party relevant to a matter in issue should be disclosed in full to the other party. Second, there is the principle that documents directed to the obtaining and provision of legal advice and the obtaining and provision of evidence which may be used at the trial should be treated as confidential and therefore privileged. Thirdly, there is the public policy of discouraging conduct amounting to the commission of crime or fraud or attempts to pervert the court of justice or otherwise intrinsically contrary to public policy. What the party resisting disclosure is not entitled to do is to deploy the second principle for the purposes of concealing conduct against which the third principle is directed. In a sufficiently clear case, the public policy underlying the second principle must yield to that underlying the third principle.

80 *R.* v. *Campbell*, [1997] 115 C.C.C. (3d) 310 (Ont. C.A.) aff'd [1991] 1 S.C.R. 565; *Francis* v. *Francis Ltd.*, [1958] 3 All E.R. 755 at 800 (C.A.).

81 *R.* v. *Murray* [2000] OJ 685.

82 R.S.C. 1985, c. C-46, as amended.

83 R.S.C. 1985, c. C-46, as amended, ss. 426, 121, 123, 442, 336, s. 362(4), 340, 385, 386, s. 342(3), 362(1)(c), 397, 398, 402, 118, 131, 132, 133, 134, 138, 385, 386, 287, 288, 289, 390, 391, 392, s. 380.

84 Compare the reference to "civil wrongs" in *Re. Safeway Ltd.* (1972), 26 D.L.R. (3d) 745 at 746 with *Davis* v. *American Home Assurance Co.* (2002), 217 D.L.R. (4th) 157 (Ont. Div. Ct.).

85 [1999] 1 S.C.R. 565.

86 [1999] 1 S.C.R. 565 at paras. 13, 14, and 15.

87 (2007) 85 O.R. (3d) 511 at 522 (S.C.).

88 [2007] O.J. 5230.

89 Gtech Engineering Ltd. v. Cloutier [2008] O.J. 304.

90 Goldman, Sachs & Co. v. Sessions [1999] B.C.J. 2815 cited in Reid v. British Columbia (Egg Marketing Board), 2006 BCSC 346 (CanLII).

91 for an extended discussion, see "Future Crime or Tort – Exception to Communications Privilege" 77 Harv. LR 730 at 736–739 (1964) and Jeb, J., "Overcoming Attorney-Client Privilege" *Defence Counsel Journal* 42 (April 2003).

92 *R.* v. *Cox and Railton* (1884), 14 Q.B. 153; *O'Rourke* v. *Darishira*, [1920] A.C. 581, at 623 and 622 (H.L.).

93 *Derby R's Ltd.* v. *Weldon*, [1940] 1 W.W.R. 1156, at 1173 (Q.B.).

94 *Silverman* v. *Morresi* (1982), 28 C.P.C. 239 (Master).

95 *Signcorp Investments* (1988), 63 Sask. R. 224 at 228–229 (Q.B.).

96 cf Section 68 of the Restatement (Third) of the Law Governing Lawyers (3rd ed., 2003).

97 *Jefferson County* v. *LFG* 460 F 3d 697 (Com cir, 2006).

98 Couch, *On Insurance*, s. 250:12, citing *United States* v. *United Shoe Machinery Corp*., 89 F. Supp. 537 (D. Mass. 1950).

99 *London Trust & Savings Co.* v. *Corbett*; *Apple & Spice* [2001] CanLII 28112 (Ont. S.C.)

100 *Scott* v. *Beth Israel Med. Ctr.* [2007] WL 3053351; Lexis 7114; *In re Asia Global Crossing* 322 B.R. 247 (SDNY, 2005); *Mario Indust of Virginia Inc.* v. *Cook* [204] Lexis 82 (Va, Cir.) affd (2007) 650 S.E. 2d 682 (Va. Sup. Ct.).

101 *Upjohn* v. *United States*, 329 U.S. 495 (1947).

102 *R.* v. *Special Commissioners*, [2002] UKHL 21 at 29; *Derby R's Ltd.* v. *Weldon*, [1940] 1 W.W.R. 1156 at 1173 (Q.B.); *B.* v. *Duckland and District Law Society*, [2002] UKPC 38 at para. 54.

103 Three Rivers District Counsel v. Bank of England, [2004] UKHL 48, at para. 34.

104 [2007] WL 2034156; www.ca3.uscourts.gov/opinarch/062915p.pdf (3rd Cir., 2007).

105 [2007] WL 2034156 at 23; www.ca3.uscourts.gov/opinarch/062915p.pdf (3rd Cir., 2007).

106 [2007] WL 2034156 at 28; www.ca3.uscourts.gov/opinarch/062915p.pdf (3rd Cir., 2007).

107 [2007] WL 2034156 at 29–30; www.ca3.uscourts.gov/opinarch/062915p.pdf (3rd Cir., 2007).

108 [2007] WL 2034156 at 77 and 78; www.ca3.uscourts.gov/opinarch/062915p.pdf (3rd Cir., 2007).

109 326 B.R. 646, at 654–655 (Bank Tax, 2005).

110 *Courts of Justice Act,* R.S.O. 1990, c. 43, s. 101 or Rule 60.02(1)(d).

111 Manes, R., Solicitor-Client Privilege in Canada 70–71 (1993).

112 *Re Ravelston Corp. Ltd* [2007] 29 C.B.R. (5th) 1 (Ont. S.C.), for example, the conflict of interest ground was not even raised as a defence to a claim of waiver by the receiver. Presumably if it was a defence at law, it would have mooted the other defences.

113 R.S.C. 1985 c. B03, as amended.

114 BIA, ss. 16(3), (4), and (5).

115 *Re. Bre-X Minerals Ltd.* (2001), 29 C.B.R. (4th) 1 (Alta. C.A.); *Clarkson Co.* v. *Chilcott* (1984), 53 C.B.R. (N.S.) 251 (Ont. C.A.).

116 Lalonde, L., "The Bankrupt's Right to Solicitor-Client Privilege," *Annual Reviews of Insolvency Law* 673 at 735 (2006) translating *Re. Denery*, [1995] R.J.O. 1863 at para. 84.

117 *Re. Canadian Tridons International Ltd.* (1998), 3 C.B.R. (4th) 231 (Ont. S.C.).

118 *Bre-X Minerals Ltd. (Trustee of)* v. *Verchere*, (2001), 293 A.R. 73 (C.A.).

119 *TD Bank* v. *Leigh Instruments* (1997) 32 OR. (3d) 575 (S.C.).

120 *Pitney-Bowes* v. *Canada* [2003] 225 D.L.R. (4th) 747, at 753–4 (FCTD).

121 Such as the preparation of documents that were to be filed with the government, see *In re Grand Jury Proceedings* 33 F. 3d 342 (4th Cir, 1994); *U.S.* v. *Doe* 748 F 2d 871 (4th Cir, 1984).

122 See Salzberg, A. "Corporate Attorney-Client Privilege in Shareholder Litigation" 12 *Hofstra L. Rev.* 817, at 846 (1984).

123 *Istil Group Inc. et al.* v. *Zahoor et al.*, [2003] EWHC 165 (Ch).

124 *Paul* v. *Reilly,* (2006), 305 N.B.R. (2d) 146.

125 *S. & K. Processors Ltd.* v. *Campbell Ave. Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.).

126 *R.* v. *Warickshall* (1783) 168 E.R. 234; at 235 *A & Ords.* v. *Home Department* [2006] 1 All ER 575, at para 16, 48, 87–87 (H.L.), *Goddard* v. *Nationwide Building Society*, [1986] 3 All E.R. 264, at 270 (C.A.). While a document that was once covered by LPP remains so unless waived by the client, and a court may enforce LPP by issuing an injunction to protect LPP information that was stolen from the client, this does not mean that otherwise relevant evidence cannot be used by the party into whose hands it has fallen. "The rule of evidence as explained in *Calcraft* v. *Guest* [1898] 1 QB 759 (C.A.) allowing such evidence to be admissible amounts to this, that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may produce a copy as secondary evidence although that copy has been obtained by improper means, and even, it may be, by criminal means…" *Lord Ashburton* v. *Pape* [1913] 2 Ch 469, at 473.

127 *Goddard* v. *Nationwide Building Society* [1987] 1 QB 670, at 682–3.

128 Morton, J. "Email, Confidentiality and Solicitor-Client Privilege," *OBA Briefly Speaking* 18 (March, 2008).

129 *HongKong Bank of Canada* v. *Legion Credit Union*, (1991), 61 B.C.L.R. (2d) 108 (S.C.).

130 (1991), 47 C.P.C. (2d) 157 (Ont. Ct., Gen. Div.).

131 (1987), 19 B.C.L.R. (2d) 167 (S.C.).

132 *Rogers* v. *Bank of Montreal* [1985] 4 W.W.R. 508 (C.A.); *Telitcher* [2006] OJ 3415.

133 *Sedco Int'l,* 683 F2d 1201, at 1206 (1982); *Sax* v. *Sax,* 136 F.R.D. 542, at 544 (1991), *U.S.* v. *Bilzerian* 926 F 2d 1285 (1985)

134 *Ottawa (City) (Re)*, 2004 CanLII 56308 (ON I.P.C.); (see *Walsh* v. *Smith* (1999), 180 N.S.R. (2d) 173).

135 Marcus, R. "The Perils of Privilege" 84 *Mich. L. Rev* 1605, at 1608 (1986).

136 Burns, J., "Selective Waiver in the Era of Privilege Uncertainty," *U.C. Davis Bus. L.J.* 14 (2007); *W.R. Grace & Co.* v. *Pullman* 446 F Supp 771, at 775–6 (1976) suggests that any attempt to disclose is a waiver, even where the disclosure is accompanied with a contractual provision claiming the right to claim privilege in the future. The court found such a clause a "legal nullity."

137 In England the idea of "selective waiver" has found favour in relation to disclosure to the government. In the United States, where "selective waiver" has been most adjudicated the most often, the case law has not entirely foreclosed the possibility of the doctrine being applied, see Epstein, E. *The Attorney-Client Privilege and the Work Product Privilege* 77–79 (1989); In Canada, cases like *Anderson Exploration Ltd* [1998] 10 W.W.R. 633, at para 28–30 suggest that selective waiver may be gaining favour in Canadian courts.

138 *Westinghouse Electric Corp.* v. *Rep. of Philippines* 951 F 2d 1414, at 1425 (3rd Cir, 1991); *U.S.* v. *M.I.T.* 129 F 3d 681 (1st Cir, 1997); *Permian Corp.* v. *U.S.* 665 F 2d 1214 (D.C. Cir, 1981).

139 *Frind* v. *Sheppard* [1940] O.W.N. 135 (H.C.), *Western Assurance Co.* v. *Canada Life* (1987) 63 O.R. (2d) 276, at 277.

140 *PIPS* v. *Canada* [1995] 3 F.C. 643 (T.D.).

141 *Philip Services Corp.* v. *Ontario Securities Commission,* (2005), 77 O.R. (3d) 209 (Div'l Ct.) suggests selective waiver may be part of the law of Ontario for example. Compare to *Biomedical Info. Corp* v. *Pearce* (1985) 49 O.R. (2d) 92, at 95 and *Cineplex Odeon Corp* v. *M.N.R.* (1994) 114 D.L.R.141, at 150 (Ont. H.C.): "*It appears from the practice in the United States outlined in an article "Lawyers' Responses to Audit Inquiries and the Attorney-Client Privilege," Arthur B. Hooker, in (1980), 35 Bus. Law. 1021, that auditors will often request privileged documents from clients or their attorneys in the course of the audit. To the extent that these disclosures are necessary to permit the independent auditor to fullfill his obligations the client will be required to waive the privilege."*

142 *Hartford Fire Ins. Co.* v. *Guide Corp* 206 F.R.D. 249 (S.D. Ind. 2001).

143 *Westinghouse Electric Corp.* v. *Rep. of Philippines* 951 F 2d 1414, at 1425 (3rd Cir, 1991); *In re Columbia* 293 F 3d 289 (6th Cir, 2002); *Qwest Comm. Int'l* 450 F 3d 1179 (10th Cir, 2006).

144 A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him. American State Rules governing LPP define "a client." See for see for example http://www.court.state.nd.us/court/rules/evidence/rule502.htm; http://www.leg.state.or.us/05orlaws/sess0300.dir/0358ses.htm; http://www.utcourts.gov/resources/rules/ure/0504.htm; and http://www.nh.gov.judiciary/rules/evid/evid-502.htm

145 A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. American State Rules governing LPP define "a client." See for see for example http://www.court.state.nd.us/court/rules/evidence/rule502.htm; http://www.leg.state.or.us/05orlaws/sess0300.dir/0358ses.htm; http://www.utcourts.gov/resources/rules/ure/0504.htm; and http://www.nh.gov.judiciary/rules/evid/evid-502.htm

146 A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client. American State Rules governing LPP define "a client." See for see for example http://www.court.state.nd.us/court/rules/evidence/rule502.htm; http://www.leg.state.or.us/05orlaws/sess0300.dir/0358ses.htm; http://www.utcourts.gov/resources/rules/ure/0504.htm; and http://www.nh.gov.judiciary/rules/evid/evid-502.htm

147 A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in the jurisdiction. It may include paralegals depending on the law of the particular jurisdiction. American State Rules governing LPP define "a client." See for see for example http://www.court.state.nd.us/court/rules/evidence/rule502.htm; http://www.leg.state.or.us/05orlaws/sess0300.dir/0358ses.htm; http://www.utcourts.gov/resources/rules/ure/0504.htm; and http://www.nh.gov.judiciary/rules/evid/evid-502.htm

148 i.e. not every statement made by a client in the presence of his solicitor is privileged. To be privileged, it must be a communication to the solicitor relating to the seeking or giving of legal advice. That does not mean that the communication must be in the form of a direct question to the solicitor expressly calling for a legal opinion. The client may reflect out loud about a number of matters in connection with the legal matter in issue and his "musings"may still be privileged if it can reasonably be said that they were in connection with obtaining legal advice. But if it appears that the client's statements were not intended to be considered by the lawyer in giving legal advice they would not meet the test of solicitor-client privilege. If the client is a corporate entity, then the discussions of its directors amongst themselves may be privileged if they relate to the matter of legal advice. It may not be an easy matter in any particular circumstance to determine whether a statement made by a client in the presence of the solicitor surrounding a discussion concerning legal advice or the implications of a particular course of action cease to relate to the matter of obtaining legal advice. In such a case, statements made in the presence of his solicitor will likely be decided in favour of the privilege. *Mcintosh Estates Ltd.* v. *Surrey (City of)*, 1996 CanLII 2631 (BC S.C.).

149 Thanki, B, *The Law of Privilege* 120 (2006).

150 See e.g. *Compton* v. *Safeway Inc.* 169 P. 3d 135 (Col. 2007).

151 *R.* v. *Stewart* (1997) OJ 924, at para 33.

152 *Susan Hosiery* v. *Canada* [1969] C.T.c. 353, at para. 11.

153 Sathiyapalan v. Citadel General Insurance Company, [2004] O.J. No. 364, at para. 4; YMCA v. 331783 Ontario Ltd., [2001] O.J. No. 4027, at para. 13; Garratt v. CGU Insurance Co. of Canada, [2003] O.J. No. 3441 (S.C.J.).

154 *Apple & Spice Fruit & Vegetables Wholesale* (1997) Inc., Re, 2001 CanLII 28112 (ON S.C.).

155 *Treaty Group* v. *Drake Int'l* (2005), 15 B.L.R. (4th) 83 (Ont. S.C) aff'd (2007), 86 O.R. (3d) 366 (C.A.).

156 Debenham, D., The Law of Fraud and the Forensic Investigator 13 (Carswell, 2006).

157 *Treaty Group Inc. (c.o.b. Leather Treaty)* v. *Drake International Inc.* (2005), 15 B.L.R. (4th) 83 (S.C.J.) aff'd (2007), 86 O.R. (3d) 366 (C.A.).

158 RE L [1997] AC 16, at 34.

159 *AVCO Financial Services Realty Ltd.* v. *Norman* (2003), 64 O.R. (3d) 239 (C.A.)

160 *Delcaster Inv.* v. *Vail Assoc.* 108 F.R.D. 405 (D. Col., 1985).

161 *Arie* v. *Schrieber*, 2008 CanLII 26677 (ON S.C.). One presumes that if the translator added or subtracted from the original to the extent necessary to acquire a copyright, then it would be covered by work product privilege. See http://www.copyright.gov/circ/circ14.html

162 *Byers (Litigation Guardian of)* v. *Pentex Print Master Industries Inc.*, [2001] O.J. No. 3287 at para. 15.

163 *Conceicao Farms Inc.* v. *Zeneca Corp.*, 272 D.L.R. (4th) 545, at para 14 (Ont. C.A.).

164 Id.

165 *Cheaney* v. *Peel Memorial Hospital* (1990) 73 O.R. (2d) 794 (Master).

166 Spoliation is defined as "the intentional destruction, mutilation, alteration or concealment of evidence" per Black's law dictionary. Only Ontario appears to recognize this as a possible tort, see *Spasic* v. *Imperial Tobacco Limited* (2000), 49 O.R. (3d) 699; rev'g (1998) 42 O.R. (3d) 391 (Ont. Gen. Div.) and *Robb Estate* v. *Canadian Red Cross Society* (2001), 152 O.A.C. 60 (C.A) leave to appeal denied [2002] S.C.C.A. No. 44. This is an emerging tort where, in its intentional form at least, the following elements must be present to establish this tort: (a) the existence of pending or probable litigation, (b) knowledge by the spoliator that litigation is pending or probable, (c) intentional destruction of evidence designed to disrupt the victim's case, (d) disruption of the case, and (e) damages proximately caused by the evidence destruction.

167 2003 CanLII 40972 (ON S.C.).

168 *Telephoto Technologies Inc.*, v. *Manitoba Jockey Club Inc., et al.*, [2007] MBQB 207.

169 The Law of Fraud and the Forensic Investigator, 100–105 (Carswell, 2006).

170 *Kuwait Airways Corp.* v. *Iragi Airways* [2005] 1 W.L.R. 2734 (C.A.).

171 *In re Int'l Sys.* v. 693 F 2d 1235, at 1243 (5th Cir, 1982).

172 *In re John Doe Corp.* 675 F 2d 482, at 491–2 (2nd Cir., 1982).

173 *Bazinet* v. *Davidson*, 2007 CanLII 38936 (ON S.C.).

174 204 F.R.D. 277 (5th Cir. 2001).

175 Compare with *University of Pittsburgh* v. *Townsend, et al.* 2007 WL 1002317 (E.D. Tenn.).

176 *Lewis* v. *Cantertrot Investments et al.*, 2008 CanLII 8602 (ON S.C.); *Delcaster* v. *Vail Assoc.* 108 FRS 405, at 408–9) D. Col., 1985); Hickman 329 US at 511.

177 *Montreauil* v. *CH.R.C. Montreuil c. Forces canadiennes* [2007] TCDP 17 (CanLII).

178 *Esso Resources Ltd.* v. *Stearns Catalytic Ltd.* (1991) 80 Alta.L.R. 264 (C.A); Contra *Home Depot* v. *Ladner Downs* (2003) 22 B.C.L.R. (4th) 348 (S.C.).

179 *Kennedy* v. *McKenzie* [2005] CanLII 18295, at para 46 (ON S.C.). Cf. *General Accident Assurance Company* v. *Chrusz*, (1999), 45 O.R. (3d) 321 (C.A.). The Americans have codified the rule to apply it to where litigation privilege would have applied to protect an opinion of an expert, except only one expert has access to the evidence before it was substantially altered or destroyed, as in *Delcaster Inc.* v. *Vail Assoc.* 108 F.R.D. 405 (D. Col..1985). The extent of whether an Ontario court would go so far in the face of the wording of Rule 31.06 (3) if that expert were not called at trial is unknown – it may be that one has to call that expert as part of one's own case and take one's chances, See *The Law of Fraud and the Forensic Investigator* 103 (2006).

180 *Mamaca* v. *Coseco Insurance Company,* 2007 CanLII 54963 (ON S.C.).

181 *R.* v. *Bidzonski* [2007] MJ 223 (Q.B.).

182 *R.* v. *Wray* [1971] SCR 272 discusses the general principles that confirm the admissibility of illegally obtained evidence.

183 *Consolidated NBS Inc.* (1994) 111 D.L.R. (4th) 656, at 659 (Ont. Div'l Ct.).

184 (2001), 53 O.R. (3d) 126, at 130 (Ont. S.C.J.).

185 *Doucette (Litigation Guardian of)* v. *Wee Watch Day Care Systems Inc.* 2008 SCC 8.

186 For a fuller discussion see *Doucette (Litigation Guardian of)* v. *Wee Watch Day Care Systems Inc.* 2008 SCC 8.

187 Shred-Teck Corp. v. Viveen [2006] O.J. 4893 (S.C.J.) (Sup. Ct.)

188 *Mcintosh Estates Ltd.* v. *Surrey (City of)*, 1996 CanLII 2631, at para 20–23, 31 (BC S.C.).

189 E. Sherman, "Mining New Depths" 50 Corporate Secretary 28 (Feb, 2008) quoting James Sanders of McDermott, Will & Emery.

190 *Walsh* v. *Nicholls et al.* (2004), 241 D.L.R. (4th) 643, at para 39 (N.B.C.A.).

191 Although not invariably so, see *Paz* v. *Harduoin* (1996), 138 D.L.R. (4th) 292 (B.C.C.A).

192 *Martin* v. *Lawrin*, 2006 ABQB 148, hhh at para 21.

193 Debenham, D., *Executive Liability and the Law* (Carswell, 2006).

194 See also Stanley, D. "Don't Take It Personally," 14#12 Kansas Employment Law Letter (March, 2008); Kay, D. "Ann E. Employee v. YOU," Employment Source Newsletter (2005).

195 Debenham, D., "Becoming the Fraud Advisors We Were Meant to Be" 22#5 *Fraud Magazine* 20 (Sept., Oct., 2008)

196 R.S.O. 1990, c. E.23.

197 *Whyte* v. *Armstrong*, 1990 CanLII 1079 (BC S.C.).

198 (2000), 49 O.R. (3d) 699; rev'g (1998) 42 O.R. (3d) 391 (Ont. Gen. Div.).

199 (2001), 152 O.A.C. 60 (C.A.); rev'g in part [2000] O.T.C. 23 (S.C.J.); rev'g in part (1998) 64 O.T.C. 161 (Gen.Div.); leave to appeal denied [2002] S.C.C.A. No. 44.

200 Fridman, G, *The Law of Torts in Canada* 767 (2d ed, 2002).

201 this is called in *solidum* liability – see Fridman, G, *The Law of Torts in Canada* 892 (2d ed, 2002).

202 *Correia* v. *Canac Kitchens*, [2008] ONCA 506; *Drabinsky* v. *KPMG* (1999), 43 O.R. (3d) 153; *Somwar* v. *McDonalds Canada Inc.* 79 O.R. (3d) 172 (Ont. S.C.)

203 *Switchcorp Pty Ltd & Ors* v. *Multimedia Limited*, [2005] VSC 425

204 Johnson, G. "The Danger of Referring to Legal Advice…" The Freehills Newsletter (December, 2007) http://www.freehills.com.au/print/publications_7114.html

205 *Cuther* v. *G. I. Dupont De Nemours & Co.* 1998 WL 2017926 at 3 (5D FH., 1998); *Pfizer Inc.* 1993 WL 56W25 at 6 (5D NY, 1993); *Interprovincial Pipelines* v. *M.N.R.*, [1996] 1 F.C. 367 (T.D.)

206 *US* v. *Gulf Oil Corp.* 760 F 2d 292 at 296–297 (1985); *US* v. *El Paso Corp.* 682 F 2d 530 at 843–844 (5th Cir., 1982); *Independent Petrochemical Corp.* 117 F.R.D. 292 at 298 (D.C., 1987).

207 J. Allen, "Repelling Assaults on Privilege" Vol 9 #4, TortSource 3 (Summer 2007).

208 *Medinol Ltd.* v. *Boston Suethe Croup*, 214 F.R.D. 113 at 115 (5th D., N.Y., 2002).

209 *Mosley* v. *Victoria Rubber Co.* [1886] SS L.T. 482

210 *Alberts* v. *Mountjoy* (1977), 79 D.L.R. (3d) 108 at 119–20.

211 *1175777 Ontario Limited* v. *Magna International Inc.,* (2001), 200 D.L.R. (4th) 521 (ON C.A.). For an extended discussion, see Debenham, D., *Executive Liability & the Law* (Carswell, 2006).

212 *London Trust & Savings Corp* v. *Corbett* [1994] 24 C.P.C. (3d) 226

213 *Apple & Spice* [2001] CanLII 28112 (Ont. S.C.).

214 *Re Goodman & Carr* [1968] 68 DTC 5288 (Ont. S.C.).

215 Ivankovich, I "A Question of Privilege" 23 C.B.L.J 201, at 222 (1994).

216 *Re OSC and Greymac* (1983) 4 O.R. (2d) 328, at 337,3 40 (Div'l Ct).

217 *Northwest Mettech Corp.* v. *Metcon Services Ltd.* (1997), 78 C.P.R. (3d) 86 (B.C.S.C.); *Bayerische* v. *Rieder,* 2003 BCSC 1031 (CanLII). For a general discussion, see Debenham, D., *The Law of Fraud and the Forensic Investigator* (Carswell, 2006).

218 *Moffat* v. *Wetstein* (1996), 29 O.R. (3d) 371, 135 D.L.R. (4th) 298 (Gen. Div.).

219 *Coopers & Lybrand* v. *Dockrill*, (1994), 111 D.L.R. (4th) 62 (NSSA).

220 *Gourant* v. *Edison Gower Bell Company* (1888) 57 L.J. ChD 498, at 499–500; *The Shed People Pty Ltd* v. *Turner & Other*s [2000] SASC 196. But see *FCMI Financial Corporation* v. *Curtis International Ltd* 2003 CanLII 23179 (ON S.C.)

221 *Loblaws Inc.* v. *United Dominion Industries Limited*, *[*2007] 265 Nfld. & P.E.I.R. 204. For an extended discussion, see Debenham, D., *The Law of Fraud and the Forensic Investigator* (Carswell, 2006).

222 *Dicey & Morris, The Conflict of Laws* s. 7-014 (13th ed, 2000); Gibbens, R. "Solicitor-Client Privilege in Canadian Law" 72 Can. B. Rev. 411 fn 8 (1993); Re Duncan [1968] P 306, at 311 (U.K.).

223 Or particular legislation is in play that restricts a privilege, see Krishna, v. "The Doctrine of Legal Privilege in Tax Law is Under Assault," 28#6 *The Lawyers Weekly* 21 9June 21, 2008). For a general discussion of cross-border investigation and prosecution, see Debenham, D. "From the Revenue Rule to the Rule of The Revenuer," 56 *Canadian Tax Journal* 1, (2008-forthcoming).

224 *Goodman Estates* v. *Giffen*, [1991] 2 S.C.R. 353 at para. 57.

225 *US* v. *Nixon* 418 US 683 (1974).

226 see Debenham, D., *The Law of Fraud and the Forensic Investigator* (Carswell, 2006).

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