DRAFT REPORTS:

When are they **appropriate?** What are your **obligations?**

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Have you ever had a client or a lawyer ask you to prepare a draft report? Did it later come back and haunt you? Was it misused? Do you need to keep the various iterations of your draft?

Before continuing to read this article, I suggest that you retrieve the last draft report you sent to a lawyer or client by email or letter. Have you achieved 100% compliance with best practice requirements of the Appraisal Institute of Canada (AIC)?

In this article, I will cover the issues of your obligation to keep drafts, your obligation to produce drafts, and what your standards require when agreeing to produce a draft report for review by a lawyer or client.

If a lawyer is involved, it is prudent to have the retainer letter with your client confirm that the report is prepared for litigation purposes (litigation privilege) or is covered by solicitor client privilege. This will have an impact on what needs to be disclosed and produced from your file, if the matter goes to a hearing.

Moore v. *Getahun*, 2015 ONCA 55, is considered a leading case in this area of law. There may be province-specific court rules or tribunal rules which modify the general rules. In that case, the Ontario Court of Appeal described litigation privilege as follows:

> Litigation privilege protects communications with a third party, where the dominant purpose of the communication is to prepare for litigation. *(paragraph 68)* The object of litigation privilege "is to ensure the efficacy of the adversarial process," and "to achieve this purpose, parties to litigation… must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure."

GENERAL RULE THAT DRAFT REPORTS, NOTES NEED NOT BE DISCLOSED

Under the protection of litigation privilege, the draft reports, notes and records of any consultations between experts and counsel need not be disclosed. *(paragraph 70).*

Allowing an open-ended inquiry into the differences between a final report and an earlier draft would unduly interfere with the orderly preparation of a party's case and would run the risk of needlessly prolonging proceedings. *(paragraph 71).*

It is my view that you do not need to save and print various work product leading to a draft report distributed to a lawyer or client. You may have worked on the assignment at various times and may have added information as it became available. It is important to keep on your file all relevant information on which you relied in preparing your report. An authorized third party[1] should be able to go to your file and find all information needed to prepare the report, including any notes of conversations with third parties giving information with respect to the comparables used by you.

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EXCEPTION TO NON-DISCLOSURE RULE

Where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity, the court can order disclosure of such discussions. (*Moore* v. *Getahun*, 2015 ONCA 55, *paragraph 77*)

An example of a case where disclosure was ordered is *Ebrahim* v. *Continental Precious Minerals Inc.*, 2012 ONSC 1123 (CanLII), 2012 ONSC 1123 (S.C.), (*paragraphs 63-75*). The court ordered disclosure of draft reports and affidavits after an expert witness testified that he did not draft the report or affidavit containing his expert opinion and admitted that his firm had an ongoing commercial relationship with the party calling him.

(Note: I intend to deal with the parameters of a lawyer's involvement in the critique of a draft report in a separate article.)

The *Ebrahim* case is an extreme one. Obviously, you should be drafting your own reports.

PRODUCING THE LETTER OF ENGAGEMENT

Parties should reasonably expect that the letter of engagement (*CUSPAP practice note 16.10.5*) may be required to be produced. The letter of engagement sets out the scope of your assignment. More often than not, it will be important to understand what you were asked to do. What was the effective date? Were there any assumptions or limiting conditions? What was the definition of value that you were required to use? *Nikolakakos* v *Hoque*, 2015 ONSC 4738 (CanLII) is an example of a case where the letter of engagement was required to be produced.

My recommendation is to include an expert declaration as part of the letter of engagement, if the matter is likely going to a hearing. *(Note: More will be said of Expert Declarations and your duty to the tribunal in a subsequent article.)* More often than not, the opposing party will think he or she will be scoring big in getting the letter of engagement and will have ammunition for cross-examination. Imagine his or her surprise upon seeing that, in the letter of engagement, you have, amongst other things, "agreed to provide such additional assistance as the court may reasonably require, to determine a matter in issue," and that you have acknowledged that "the duty to the court prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged." The letter goes in and any attempt to attack your credibility is seriously compromised.

When I get draft expert reports, all too often there are a number of best practices that are not necessarily followed. On occasion, there appears to be a lax, laissez faire attitude with, at best, partial application of the best practice, albeit non-compulsory, requirements in *CUSPAP*. Sometimes, there also appears to be the attitude "here is a draft" sent by email, without any thought being put into the general content requirements in the *Canadian Uniform Standards of Professional Appraisal Practice* (*CUSPAP*).

Do you have *CUSPAP* handy and use it as a checklist before sending that draft to a client? Using checklists or at least having a standard precedent format to work from is, in my view, an essential part of being able to manage the risk that comes with agreeing to distribute a draft to the lawyer or your client.

IF A DRAFT REPORT IS PREPARED AND SENT TO A CLIENT, IT MUST COMPLY WITH *CUSPAP*

A draft report is considered a report under *CUSPAP* and must comply with its requirements. Under *CUSPAP*, a report is defined as "Any communication, written or oral, of a professional service that is transmitted to the client as a result of an assignment." Note 3 to the definition of 'Report' indicates that "Report types may include form reports, concise short narrative reports or, comprehensive and detailed reports in complete **or draft formats.**"

The rational is sound for imposing *CUSPAP* requirements with respect to the content in draft reports. Remember, appraisers can come to different conclusions based on the same information. Independent experts can disagree on value conclusions. However, if your draft report is sent to a lawyer or client missing a critical step or piece of information that is not a matter of judgment, it may result in you having to report yourself to your insurer or, worse yet, result in a complaint of professional misconduct. Your work product should not be sent to a client unless it meets certain minimum standards. Doing otherwise is like walking into a liability minefield. You will be filling your closet with potential liability problems that can blow up at any time – especially in the context of deflating markets.

BEST PRACTICE FOR DRAFTS PREPARED AND SENT BY YOU TO A LAWYER OR CLIENT

What follows are *CUSPAP* suggested best practices when preparing and distributing draft reports:

Limiting condition

16.10.7.i: Include a limiting condition with wording regarding the report being valid only with an original signature, thus

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suggesting that an unsigned report is not a valid report. [see 2.60, 16.29.2.ii]

Engagement letter outlining scope of what you will do with respect to draft reports
16.10.7.ii: Include a letter of engagement with the assignment outlining the terms of the assignment (i.e., number and frequency of draft reports, invoicing schedule, terms of the draft and its distribution, etc.)

Draft watermark on <u>each</u> page
16.10.7.iii: Insert a DRAFT watermark across every page or in the header.

Header or footer with date and version
16.10.7.iv: Insert a header or footer with the date and the version of the draft (e.g., Draft #X effective Month/Day/Year) on every page to indicate to any user, intended or potential, that the report is a draft but also to identify the draft version in case there are subsequent ones.

Is a transmittal letter required? What do you include in the letter?
16.10.7.v: Include a transmittal letter with every draft report outlining the terms of reference and the client's instructions to provide a draft report and for what purpose – the same should be noted in the scope of work of each draft report.

What should you insert at the value and signature parts of the report?
16.10.7.vi: Wherever the value and signature should appear (i.e., conclusion, certification page), a draft notation should be inserted to alert any reader of the report's draft status.

16.10.7.vii: Note: Inserting 'draft' on signature lines will help prevent fraud and a third party affixing a signature that is not the Member's original signature.

SUMMARY OF CHANGES

While it is not necessarily common, it may be appropriate in certain circumstances to outline a summary of changes made to the final report. The client may have brought to your attention additional comparables or information that led to an evolution to your thought process and conclusions. It is best to seek clarification from legal counsel as to whether a summary of changes is required or desirable in the particular circumstances of your assignment.

16.10.7.viii: In the final report, the Member should include a summary of changes from the last draft to the final report, if appropriate.

DO YOU NEED A RELIANCE LETTER? WHAT MUST IT OUTLINE?

16.10.7.ix: Reliance letters to third parties must outline the terms of reference of the draft and the limitations.

In the next article to be published in an upcoming issue of *Canadian Property Valuation*, I intend to cover the issue of your duties to the client and to the court/tribunal. For example, does your duty to the court take priority over your duty to the client? Is it recommended that you have more than one retainer letter to deal with your assignment(s)?

END NOTE

[1] Authorize by consent from your client or through the courts.