

**A Critical Examination of the Integration of
Applicable Legal, Professional and Ethical
Standards within the Context of the Evolution of
Pre-Trial Disclosure/Production Requirements in
New Brunswick and the Impact Thereof on CA·
IFAs in an Expert Capacity**

A Research Paper in the Emerging Issues/Advanced Topics Course

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Introduction

“...In my view, the search for the truth is at the heart of the quest for justice according to law....”¹

This Research Paper will examine the legal, ethical, and professional implications arising when a CA: IFA (hereinafter referred to as “IFA”), in his/her efforts to assist the Court in its search for truth, relies upon confidential client data obtained in a previous engagement in order to support his/her expert report in a subsequent litigation matter in New Brunswick.

As an expert witness, an IFA is subject to various “legal rules”. An IFA is also subject to the professional standards codified in the Standard Practices For Investigative and Forensic Accounting Engagements² (hereinafter referred to as “Standard Practices”) as enunciated by the Alliance for Excellence in Investigative and Forensic Accounting. Finally, as a CA, an IFA is also subject to the ethical obligations imposed upon CAs under the Rules of Professional Conduct (“ROPC”) of the New Brunswick Institute of Chartered Accountants (“NBICA”).³

¹ *Davis v. MacKenzie*, 2008 NBCA 85 (CanLII) at paragraph 29

² Standard Practices for Investigation and Forensic Accounting Engagements, Canadian Institute of Chartered Accountants, Toronto (November 2006)

³ <http://www.nbica.org/english/pdf/ropc-2004.pdf>

This Research Paper is prepared against the back-drop of the facts as reported in *South West Shore Development Authority v. Ocean Produce International Ltd.*⁴

It is not my intention to critique the conduct of any person or party involved in the *Ocean Produce International Ltd.* case. Rather, with *Ocean Produce International Ltd.* as a backdrop, I propose to critically examine the position of an IFA from an integrated “standards” perspective – namely, the applicable legal standards, professional standards and ethical standards.

An IFA is not immune to the legal, ethical and professional requirements imposed upon them by the law and by their governing professional bodies. My Research Paper will focus, amongst other things, on:

- An identification of the applicable legal, ethical and professional standards, and a demonstration of how said standards are integrated;
- the manner in which compliance with said standards requires an IFA to bring an integrated approach to his/her professional practice, and,
- the ensuing results – legal and ethical - should an IFA fail to abide by said standards.

Objectives

I view this research paper as having, of necessity, both theoretical and practical applications.

⁴ 2008 NSSC 240 (CanLII)

The legal principles relative to pre-trial disclosure/production requirements have recently undergone significant evolution in New Brunswick. This evolution can be expected to continue. Thus, this research paper will attempt to codify the law relative the pre-trial disclosure requirements of an IFA. Hence, the theoretical perspective.

However, in full recognition that IFA engagements have embodied within them practical applications of the law, my comments will extend to a consideration of the manner in which the law relative to pre-trial disclosure/production must be applied by an IFA in professional practice and the implications associated therewith

My interest in this topic stems from various factors.

Firstly, my practice as a Barrister and Solicitor includes involvement with loss quantification matters, including inter-acting with IFAs, direct and cross-examination, advising senior counsel relative to experts etc. I am often involved with IFAs who are called upon to prepare expert reports relative to loss quantification. Enhancing the body of knowledge of the legal standards which govern the preparation, disclosure and admissibility into evidence of said reports will be beneficial to practising members of the bar as well as to all IFAs who are retained in an expert capacity within the context of New Brunswick litigation.

Secondly, in my role as Executive Director of the NBICA, my views are often solicited on matters related to ethics, and I am intimately involved with the NBICA's disciplinary matters which will be triggered by a breach of the ROPC.

In short, this research project provides an excellent opportunity for me to engage my training and practice from the perspective of the law as well as that of a prospective IFA within the context of New Brunswick litigation.

It is my hope that the comments herein will prove insightful to both legal practitioners as well as all IFAs. In particular, it is my hope that this paper will assist legal and IFA practitioners to gain insights into the legal and ethical "landscapes" within which they must and do participate. Finally, I hope that this paper will serve as a genesis for the establishment and the subsequent development of a fuller body of knowledge amongst IFAs in New Brunswick and across Canada.

In my opinion, the ultimate measure of the success of the within paper will be the accomplishment of the latter objective.

Documents Reviewed

The Bibliography included herein references the various statutes, law reports, judicial decisions, and literature examined during my research.

In order to enhance the understanding of the analysis and my findings, I have included herein, by way of Appendices, extracts from the various statutes, Rules of Court and ROPC which bear directly upon the subject matter under discussion.

Where applicable, the detailed findings will contain express reference to the various authorities that support the views expressed herein.

Finally, the comments expressed herein are those of the writer, and should not be regarded as being necessarily shared by any professional firm or organization with whom the writer is associated.

Summary of Detailed Findings

My research has led me to the following findings:

1. The work of an IFA expert is multi-disciplinary in nature. That is, the work of an IFA crosses over into a number of different areas – accounting, finance, psychology, the law etc.;
2. Whatever might be said relative to the other disciplines encountered by an IFA, the discipline of law is pervasive in that the law, broadly defined, will ultimately govern the conduct of an IFA and the consequences – legal, ethical and professional – flowing from said conduct;

3. While IFAs are not expected to be experts in the law, and while most IFAs are not lawyers, IFAs must become more cognizant of and understand the manner in which the law impacts IFAs;
4. The “standards” applicable to IFAs are comprised of legal standards, professional standards, and ethical standards, and said standards are fundamentally integrated;
5. The law is readily moving into an environment of “full” disclosure relative to the foundation of an IFA report;
6. There is no reason to conclude that a movement to “full” disclosure will subside any time soon;
7. Ever increasing disclosure obligations imposed on IFAs will trigger ethical and professional consequences to IFAs, with the result that the professional conduct of an IFA may result in disciplinary action by the provincial CA Institute to which an IFA belongs on the basis of the IFA being a Chartered Accountant;
8. IFAs must take, and be seen as taking, pro-active strategies so as to minimize the risk of confidential client data from a previous engagement being ordered disclosed and produced in a subsequent engagement;

9. The primary focus on these pro-active strategies must be on a “micro” level, and
10. In the absence of informed consent from a previous client, the disclosure and production of confidential client data in a subsequent engagement will most certainly trigger negative consequences to an IFA, including:
 - an angry “former” client who likely terminates any on-going professional relationship;
 - legal action against an IFA for the unauthorized disclosure of confidential client data and any losses stemming therefrom;
 - loss of professional reputation amongst one’s professional colleagues and within the greater business community, and,
 - disciplinary action against the IFA under the disciplinary regime of the IFA’s provincial CA Institute.

Finally.....The environment in which IFAs practise is complex and ever-changing, and the expectations imposed upon IFAs are, obviously, very high. It is incumbent upon IFAs to maintain vigilance in order to satisfy these ever-increasing expectations.

Detailed Findings

A learned author once wrote that “...no man is an island unto himself...”. In an analogous comparison, IFAs do not operate in a vacuum. The “law”, very broadly sated, pervades the professional activities undertaken by IFAs.

Authority for this above noted proposition is demonstrated by the fact that there are nine sections of the Standard Practices⁵ that directly or indirectly contemplate the law as a backdrop to the professional activities of IFAs, including:

- Section 100.03 (“...legal requirements that may be applicable...”);
- Section 100.20 (“...legislation relevant to the field of expertise pertaining to a specific engagement...”) and,
- Section 300.02 (c), and Section 300.05 (“...independent legal advice....”).

In addition, the November 1, 2006 message accompanying the Standard Practices specifically references the ROPC of the various provincial CA Institutes. Council Interpretation 201.1/2 imposes upon a CA an obligation to be cognizant of and to comply with any provincial legislation regulating the activities in the various service areas of a CA’s practice. Hence, there is an obvious and deep inter-relationship between the law, professional standards and ethical obligations of CAs. Given the very nature of their role as an expert, I would submit that it is incumbent upon IFAs, in particular, to be aware of such inter-relationship and to conduct their professional practice at all times with this inter-relationship in mind.

Thus, let us begin our journey relative to the subject matter of this Research Paper by gaining an understanding of the applicable legal standards.

⁵ Standard Practices, supra.

New Brunswick Legal Landscape: An Overview

The New Brunswick litigation landscape must, firstly, be considered against the backdrop of Rule 1.03(2) of the New Brunswick Rules of Court.⁶

The thrust of Rule 1.03(2) is that all of the Rules of Court must be interpreted and applied with a view to securing the just, least expensive and most expeditious determination of an action on its merits.

Beyond Rule 1.03(2), there are a number of legal provisions which should capture the attention of IFAs. No provision is more fundamental than those underlying pre-trial Discovery.

Simply stated, Discovery has often been equated with a philosophy of “no trial by ambush”. However, the objectives underlying the pre-Trial Discover are much wider, and have been described as follows by Mr. Justice Ryan of the New Brunswick Court of Appeal:

The objectives just mentioned are examples of the general purpose of discovery which includes particulars, disclosure of documents, inspection of documents, admitting of documents, physical examination, production of reports, inspection of property and interrogatories. The general purpose of discovery can be summarily described as follows:

- 1. to enable the examining party to know the case he or she has to meet;**

⁶ Regulation 82-73, *Judicature Act*, Chapter J-2, R.S.N.B. (1973)

2. **to enable a party to obtain admissions which will dispense with other formal proof of your own case;**
3. **to obtain admissions which will permit you to destroy your opponent's case; and**
4. **to facilitate settlement.**⁷

Against the backdrop of pre-trial Discovery, one must also appreciate that the law distinguishes between the admissibility into evidence on an IFA report, the disclosure of an IFA's report, and the production of an IFA's report.

Admissibility into evidence simply means that the Court will receive into evidence oral testimony and/or documents that bear upon (i.e. relevant) to any issue in dispute before the Court.

As a general rule, a judicial philosophy of seeking the truth dictates that all evidence which is relevant to any issue before the Court and which is not otherwise excluded from admission into evidence on the basis of established legal principles should be admitted into evidence.

Admissibility into evidence is separate and distinct from the weight to be afforded to any oral testimony or document admitted into evidence. Weight is a measure of the impact of the evidence vis-à-vis the final decision of the Court.

⁷ *Viollette et al. v. Wandlyn Inns Ltd et al* (1995) 169 N.B.R. (2d) 374 (C.A.)

Hence, while an IFA report and the oral testimony of an IFA will, in the vast majority of cases, be admitted into evidence, the weight to be afforded to any such report and testimony lies in the discretion of the trier of the fact, namely, the trial Judge.

The term “disclosure” refers to documents which are in the possession of a party to a litigation or in the possession of an expert engaged to provide professional services in relation to litigation.

Disclosure of said documents to the opposing party before trial is an essential component of satisfying the objectives enumerated by Mr. Justice Ryan in *Viollette*, supra.

The term “production” refers to providing to the opposing party a copy of any disclosed document for purposes of review by the opposing party, opposing legal counsel or an expert engaged by the opposing party.

Disclosure and production of documents takes place before trial. The admission into evidence of documents takes place during trial, with said admission being based on the consent of the parties or a ruling from the presiding Judge.

There are several other legal standards that must be considered in the context of professional services rendered by IFAs in an expert capacity, including:

- Section 43.1 of the *Evidence Act*,⁸ which (i) precludes the disclosure and production of an “investigative report” in civil proceedings and (ii) cloaks any opinion expressed in an investigative report, regardless of the purpose underlying said report, with the aura of privilege;
- Rule 31.02⁹, which mandates (i) the disclosure of every document in the possession or control of a party to an action, regardless of whether privilege is claimed in relation to said documents, and (ii) the production of said document for inspection by the opposing party unless privilege is claimed in relation to said document;
- Rule 31.04 (4)⁹, which provides for production of all documents in the possession or control of a party to an action for which no privilege is claimed;
- Rule 31.11⁹, which provides for production of documents in the possession or control of a person who is not a party to an action;
- Rule 32.06(3)⁹, which provides for the discovery of any findings, opinions, and conclusions of an expert, and,
- Rule 52.04(4)⁹, which provides for the production of any records, documents or other materials on which an expert report is based.

As is evident, there are numerous statutory provisions that can be invoked relative to the disclosure and production of the information and documents associated with expert reports. A closer examination is necessary in order to truly understand the legal landscape in New Brunswick.

⁸ *Evidence Act*, Chapter E-11, R.S.N.B. (1973)

⁹ Regulation 82-73 under the *Judicature Act*, Chapter J-2, R.S.N.B. (1973)

New Brunswick Legal Landscape: A Detailed Review

Section 43.1 of the *Evidence Act*, Rules 31.02 and Rule 41.04(4) each reference the word “privilege”. Thus, an IFA must appreciate the meaning, purpose and scope of the concept of privilege as a fundamental component of applicable legal standards. Why?

If an IFA’s report is privileged and if said report constitutes an “investigative report”, said report may not need to be disclosed to the opposing party. If the IFA report is not an “investigative report”, said report must be disclosed to the opposing party but will be precluded from disclosure to the opposing party provided said report is privileged.

Thus, an understanding of the concept of privilege is crucial to a determination of whether an IFA’s report must be disclosed and/or produced to the opposing party.

The law recognizes two concepts of privilege, namely, solicitor-client privilege and litigation privilege. The former is a well recognized and often referenced legal concept. The latter is much less understood and, certainly, is much less referenced than the former concept of privilege.

In essence, solicitor-client privilege captures communications between a lawyer and his client. The concept was aptly described by the Supreme Court of Canada as follows:

26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The

solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.¹⁰

Solicitor-client privilege will not extend to an IFA who has been retained as an expert by a party to litigation. However, communications – written or otherwise – to or from an IFA expert and legal counsel may be shielded from disclosure to the opposing party if said communication falls under the umbrella of litigation privilege.

What is litigation privilege, and under what circumstances can an IFA expert rely upon litigation privilege to avoid disclosure of his report to the opposing party?

In *Blank*, supra, the Supreme Court of Canada described the nature and scope of litigation privilege as follows:

27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

¹⁰ *Blank v. Canada (Minister of Justice)* 2006 SCC 39 (CanLII)

- 28 **R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:**

It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-

client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

(“Claiming Privilege in the Discovery Process”, in Special Lectures of the Law Society of Upper Canada (1984), 163, at pp. 164-65).....

- 31 Though conceptually distinct, litigation privilege and legal advice privilege serve a common cause: The secure and effective administration of justice according to law. And they are complementary and not competing in their operation. But treating litigation privilege and legal advice privilege as two branches of the same tree tends to obscure the true nature of both.
- 32 Unlike the solicitor-client privilege, the litigation privilege arises and operates even in the absence of a solicitor-client relationship, and it applies indiscriminately to all litigants, whether or not they are represented by counsel: see *Alberta (Treasury Branches) v. Ghermezian* 1999 ABQB 407 (CanLII), (1999), 242 A.R. 326, 1999 ABQB 407. A self-represented litigant is no less in need of, and therefore entitled to, a “zone” or “chamber” of privacy. Another important distinction leads to the same conclusion. Confidentiality, the sine qua non of the solicitor-client privilege, is not an essential component of the litigation privilege. In preparing for trial, lawyers as a matter of course obtain information from third parties who have no need nor any expectation of confidentiality; yet the litigation privilege attaches nonetheless.
- 33 In short, the litigation privilege and the solicitor-client privilege are driven by different policy considerations and generate different legal consequences.
- 34 The purpose of the litigation privilege, I repeat, is to create a “zone of privacy” in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have “terminated”, in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

- 35 Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case “on wits borrowed from the adversary”, to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.
- 36 I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege: *Lifford*; *Chrusz*; *Big Canoe*; *Boulianne v. Flynn*, [1970] 3 O.R. 84 (H.C.J.); *Wujda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977), 15 O.R. (2d) 71 (H.C.J.); *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134 (Q.B.). See also *Sopinka*, *Lederman and Bryant*; *Paciocco and Stuesser*.
- 37 Thus, the principle “once privileged, always privileged”, so vital to the solicitor-client privilege, is foreign to the litigation privilege. The litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor permanent in duration.
- 38 As mentioned earlier, however, the privilege may retain its purpose — and, therefore, its effect — where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. In this regard, I agree with Pelletier J.A. regarding “the possibility of defining . . . litigation more broadly than the particular proceeding which gave rise to the claim” (para. 89); see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* 1988 CanLII 169 (AB C.A.), (1988), 90 A.R. 323 (C.A.).
- 39 At a minimum, it seems to me, this enlarged definition of “litigation” includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or “juridical source”). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well.
- 40 As a matter of principle, the boundaries of this extended meaning of “litigation” are limited by the purpose for which litigation privilege is granted, namely, as mentioned, “the need

for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate” (Sharpe, at p. 165). This purpose, in the context of s. 23 of the Access Act must take into account the nature of much government litigation. In the 1980s, for example, the federal government confronted litigation across Canada arising out of its urea formaldehyde insulation program. The parties were different and the specifics of each claim were different but the underlying liability issues were common across the country.

- 41 In such a situation, the advocate’s “protected area” would extend to work related to those underlying liability issues even after some but not all of the individual claims had been disposed of. There were common issues and the causes of action, in terms of the advocate’s work product, were closely related. When the claims belonging to that particular group of causes of action had all been dealt with, however, litigation privilege would have been exhausted, even if subsequent disclosure of the files would reveal aspects of government operations or general litigation strategies that the government would prefer to keep from its former adversaries or other requesters under the Access Act. Similar issues may arise in the private sector, for example in the case of a manufacturer dealing with related product liability claims. In each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process.....
- 58 The result in this case is dictated by a finding that the litigation privilege expires when the litigation ends. I wish nonetheless to add a few words regarding its birth.
- 59 The question has arisen whether the litigation privilege should attach to documents created for the substantial purpose of litigation, the dominant purpose of litigation or the sole purpose of litigation. The dominant purpose test was chosen from this spectrum by the House of Lords in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169. It has been adopted in this country as well: *Davies v. Harrington reflex*, (1980), 115 D.L.R. (3d) 347 (N.S.C.A.); *Voth Bros. Construction (1974) Ltd. v. North Vancouver School District No. 44 Board of School Trustees reflex*, (1981), 29 B.C.L.R. 114 (C.A.); *McCaig v. Trentowsky reflex*, (1983), 148 D.L.R. (3d) 724 (N.B.C.A.); *Nova, an Alberta Corporation v. Guelph Engineering Co. reflex*, (1984), 5 D.L.R. (4th) 755 (Alta. C.A.); *Ed Miller Sales*

& Rentals; Chrusz; Lifford; Mitsui; College of Physicians; Gower.

60 I see no reason to depart from the dominant purpose test. Though it provides narrower protection than would a substantial purpose test, the dominant purpose standard appears to me consistent with the notion that the litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor-client privilege. The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure. As Royer has noted, it is hardly surprising that modern legislation and case law

[translation] which increasingly attenuate the purely accusatory and adversarial nature of the civil trial, tend to limit the scope of this privilege [that is, the litigation privilege]. [p. 869]

Or, as Carthy J.A. stated in Chrusz:

The modern trend is in the direction of complete discovery and there is no apparent reason to inhibit that trend so long as counsel is left with sufficient flexibility to adequately serve the litigation client. [p. 331]

The decision of the Supreme Court of Canada in *Blank*, supra., was adopted by the New Brunswick Court of Appeal in *Turnbull-Burnight v. CIBC World Markets Inc., Oland and Spencer*.¹¹

The onus of proof relative to a claim of privilege is on the party seeking to advance the claim. In *Turnbull-Burnight*, supra., the Court of Appeal affirmed the critical need to properly adduce affidavit evidence to support a claim of litigation privilege, with said affidavit evidence being full, complete and substantive. Merely

¹¹ 2007 NBCA 43 (CanLII)

advancing a claim of litigation privilege, in and of itself, will be insufficient to maintain a claim of litigation privilege. The Court of Appeal stated that:

[19] Like the court in Duchêne, this Court has commented on the sufficiency of affidavit evidence that is necessary to assert a privilege. In Ouellet (Janel) Design Inc. v. Desbiens reflex, (1998), 207 N.B.R. (2d) 128, [1998] N.B.J. No. 513 (QL), Ryan, J. stated at para. 9:

The onus of proving the protective mantle of privilege is on Mr. Desbiens' insurer. The party who asserts privilege must prove it. The evidence in support of the claim for privilege is wanting. The affidavits, instead of bolstering the claim, are bare and merely assert the privilege. Asserting the claim for privilege is, of course, essential but the mere assertion does not fulfill the test for substance without giving up any privilege content. The two affidavits in support of the claim for privilege from disclosure are deficient. One is by the claims manager of Mr. Desbiens' insurance company and the other is by the claims manager of a company of adjusters hired by the insurance company. The affidavits are mirror images and therefore add nothing original one to the other. Each deponent asserts that the fire potentially involved arson and "from the outset the entire investigation and adjusting of this claim was conducted in contemplation of litigation."

[25] The question is whether the notes that Ms. Turnbull-Burnight prepared at the request of her brother, to provide a chronology, were for the dominant purpose of litigation or to respond to the CIBC World Markets Inc. letter. I am of the view that the motion judge was not at liberty to disregard the assertion by Ms. Turnbull-Burnight that she prepared those notes for the purposes of litigation. There is no evidence that the notes were prepared to respond to a letter from Mr. Bowering. In her affidavit Ms. Turnbull-Burnight refutes the notion that she added (in pencil as an afterthought) to her notes "or Dear Mr. [Bowering]?" so that the notes could be sent to CIBC World Markets Inc. She was not cross-examined on her affidavit. There was no contradicting evidence. Finally, Mr. Turnbull stated in his affidavit that he had advised Ms. Turnbull-Burnight that this information was necessary to obtain legal counsel in order that she could pursue her claim against the investment advisor. On what basis could the motion judge conclude that Ms. Turnbull-Burnight prepared the chronology

for something other than the dominant purpose of litigation? In my view the evidence is not flimsy, it is full and uncontradicted.¹²

The remainder of this paper will be grounded upon the premise that an IFA report and all supporting documents in relation thereto are not captured within solicitor-client privilege. Rather, the underlying premise is that said report and supporting documents, if privileged at all, are only privileged by virtue of litigation privilege.

Against the above noted backdrop, the prevailing question is.....What IFA reports are subject to litigation privilege, and under what circumstances?

The *Evidence Act* does not define the phrase “investigative report”.

Given the definition of “Investigative and forensic accounting engagements” as prescribed in the Standard Practices, particularly those components thereof related to “investigative skills” and “investigative mindset”, and considering that the Standard Practices states that “An investigative mindset is also necessary for all IFA engagements”¹³ (Emphasis added), an understanding of what constitutes an “investigative report” is crucial in order to determine whether an expert is afforded the protection afforded by Section 43.1 of the *Evidence Act*.

The New Brunswick Court of Appeal wrote as follows at paragraph 11 of a recent decision:

¹² *Turnbull-Burnight*, supra.

¹³ Standard Practices, supra., Section 100.14

“Section 43.1 of the Evidence Act, R.S.N.B. 1973, c. E-11, provides that an “investigative report” prepared for the dominant purpose of being submitted to a solicitor for advice with respect to, or use in, contemplated or pending litigation is privileged from disclosure and production in civil proceedings. It also states that, regardless of the purpose for which an investigative report was prepared, any part thereof in which an opinion is expressed is privileged. Some general observations on the scope of s. 43.1 may be timely. The expression “investigative report” is free of ambiguity: it is an account of the results of an investigation. Accordingly, a witness’ statement, by itself, cannot amount to an “investigative report”, although, in the right circumstances, it might form part of such a report and thereby be covered by the statutory privilege.....”¹⁴

Seely, supra., is the most recent decision of the New Brunswick Court of Appeal wherein the term “investigative report” has been considered by the Court. It is unfortunate that the Court did not amplify upon the meaning to be afforded the phrase “investigative report”.

Based on the definition of “investigative report” as referenced by the Court of Appeal in *Seely*, supra., it might reasonably be argued that every report produced by an IFA is, by its very nature and given the above noted references from the Standard Practices, an “investigative report” as contemplated by Section 43.1 of the *Evidence Act* and is, as such, privileged from disclosure and production in civil proceedings.

However, in order to enjoy the shield of Section 43.1 of the *Evidence Act*, a report must be an “investigative report” and must have been prepared for the dominant purpose of litigation.

¹⁴ *Seely v. Cormier* 2009 NBCA 3 (CanLII)

Does an IFA report, of necessity, constitute an “investigative report” within the context of Section 43.1 of the *Evidence Act*? I would submit that the answer to this question is not as easily determined as might be implied from the words of Mr. Chief Justice Drapeau in *Seely*, supra.

It would appear that the author of the report in question in *Seely*, supra., was a private investigator. Leaving aside the question of the particular engagements undertaken by said private investigator, I would submit that the nature of said engagement would readily fall within the term “investigative and forensic accounting engagements” as defined in the Standard Practices¹⁵

Therefore, I would submit that a report flowing from a “pure” IFA engagement wherein the IFA reports on the outcome of an investigation falls within the scope of the term “investigative report” as contemplated by Section 43.1 of the *Evidence Act*.

What is the status, relative to Section 43.1 of the *Evidence Act*, of a loss quantification report undertaken by an IFA?

IFAs and DIFA students fully appreciate the differences between an investigation engagement and a loss quantification engagement undertaken by IFAs.

¹⁵ Standard Practices, supra., Section 100.08

There are also separate and distinct modules within the DIFA programme relative to these areas of IFA activities. As such, one might very well ask.....Is a loss quantification report an “investigative report” within the meaning of Section 43.1 of the *Evidence Act*?

At first glance, one might be tempted to argue, on the basis of the above noted reasons, that a loss quantification report is not an investigative report. However, one must bear in mind the following provisions of the Standard Practices:

- professional accounting skills, which are central to a loss quantification report, are one of the three essential elements of an “investigative and forensics accounting engagements”¹⁶
- According to the IFA Alliance, investigative skills extend to loss quantification engagements¹⁷;
- an investigative mindset is necessary for all IFA engagements¹⁸, and
- the Standard Practices should be applied to all IFA engagements.¹⁹

Thus, on the basis of the above, I would submit that a loss quantification report prepared by an IFA should fall within the term “investigative report” as contemplated by Section 43.1 of the *Evidence Act*. A determinative answer to this question must await a decision from a New Brunswick Court. However, the Standard Practices do afford a sound basis for advancing the proposition that a loss quantification report should enjoy the benefits afforded by Section 43.1 of the *Evidence Act* on the premise that a loss

¹⁶ Standard Practices, supra., Section 100.08

¹⁷ Standard Practices, supra., Section 100.13

¹⁸ Standard Practices, supra., Section 100.14

¹⁹ Standard Practices, supra., Section 100.17

quantification report does constitute an “investigative report” within the context of Section 43.1 of the *Evidence Act*.

Notwithstanding the protection against disclosure afforded to an investigative report provided by Section 43.1 of the *Evidence Act*, one must consider other provisions of the Rules of Court to ascertain the status of an investigative report relative to disclosure and/or production.

The Rules of Court are given the aura of a legislative enactment by virtue of Section 76 of the *Judicature Act*²⁰. Thus, even though Section 43.1 of the *Evidence Act* may be advanced as a basis of protection against disclosure, the nature and scope of any such protection against disclosure of an IFA report must be assessed against the backdrop of the Rules of Court.

In *Seely*, supra, the NB Court of Appeal, effectively, pulled the rug out from any argument that an IFA could look to Section 43.1 of the *Evidence Act* as a shield against disclosure. At paragraph 11 of *Seely*, supra., the Court wrote as follows:

“...Moreover, Rule 31.02(1) trumps s. 43.1 with respect to disclosure (see s. 76 of the Judicature Act, R.S.N.B. 1973, c. J-2). Rule 31.02(1) prescribes that “[e]very document which relates to a matter in issue in an action and which is or has been in the possession or control of a party or which the party believes to be in the possession, custody or control of some person not a party, shall be disclosed as provided in this rule, whether or not privilege is claimed in respect of that document [Emphasis added].”....²¹

²⁰ *Judicature Act*, Chapter J-2, R.S.N.B. (1973)

²¹ *Seely*, supra.

In arriving at this conclusion relative to the relationship between Section 43.1 of the *Evidence Act* and Rule 31.02(1) relative to an investigative report, the Court of Appeal relied upon Rule 31.03(3).

Rule 31.03(3) references “...the necessity of making full disclosure of all relevant documents...” The Court interpreted this necessity to make full disclosure of all relevant documents as being paramount to the shield against disclosure afforded by Section 43.1 of the *Evidence Act*. The Court stated that:

“.....Full disclosure of all relevant documents is required (see Rule 31.03(6)). It follows that all relevant investigative reports must be disclosed in accordance with Rule 31.02. Of course, their production may be denied by virtue of a properly claimed and established privilege.”²²

In arriving at this conclusion, the Court drew a clear distinction between disclosure v. production of documents. Thus, an IFA report, even if shielded from production to the opposing party by virtue of Section 43.1 of the *Evidence Act*, must be disclosed to the opposing party by virtue of Rule 31.03.

Rule 32.06(3) provides for the discovery of any findings, opinions and conclusions of an expert. However, the party being examined need not produce to the opposing party any information relative to the findings, opinions and conclusions of said expert provided (i) the latter were made by the expert in contemplation of litigation and for no other purpose and ii) the party engaging the expert undertakes not to call the expert

²² *Seely*. supra.

as a witness at trial. This shield from production is, in essence, grounded upon the premise of litigation privilege.

The Court has interpreted Rule 32.06(3) as providing only for the disclosure of expert findings, opinions and conclusions, and not for the production of documents from an expert, regardless of whether the said expert report is privileged.

In its decision in *Paul v. Reilly*²³, the Court of Appeal, at paragraphs 27 and 28, followed the jurisprudence from Ontario in concluding as follows:

[27] **While some of the New Brunswick procedural rules that are in the mix here and the corresponding Ontario rules may be formulated somewhat differently, the overall procedural schemes are similar in material respects, so that Ontario jurisprudence on point is of some assistance in resolving the interpretative issue raised by the present appeal. Rules 31.06(3) (“Scope of Examination”) and 53.03 (“Expert Witnesses”) of the Ontario Rules of Civil Procedure correspond (in object, if not in precise wording) to our Rules 32.06(3) and 52.01. The jurisprudence out of Ontario unanimously endorses the view that Rule 31.06(3) “requires disclosure of certain information (but not the production of the report) at examination for discovery” [Emphasis added]: Holmsted and Watson, Ontario Civil Procedure, Vol. 3 (Toronto: Carswell, 2006) at 30-118. The authors go on to make the following pertinent observations at page 31-106:**

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).

²³ *Paul v. Reilly* 2006 NBCA 84 (CanLII)

[28] That, in my view, is precisely the state of the law in this Province. It follows that Rule 32.06(3) of our Rules of Court does not entitle the appellants to production of any privileged expert’s report in the possession or control of the respondent....”

What, one might ask, constitutes “...findings, opinions and conclusions...” of an expert?

The New Brunswick Court of Appeal in *Reilly*, supra., endorsed a view that Rule 32.06(3) must be given a broad definition and wide application. The Court adopted the position of the Appellant “....that Rule 32.06(3) must be liberally construed with a view to securing the just, least expensive and most expeditious determination of the action on its merits: Rule 1.03(2).....”²⁴

According to the New Brunswick Court of Appeal, Rule 32.06(3) is not restricted to any findings, opinions and conclusions of an expert that have been reduced to writing. In addition, Rule 32.06(3) will capture any answer provided by a party’s legal counsel relative to any findings, opinions and conclusions of an expert.

In *Reilly*, supra., the Court wrote as follows:

[17] First, the findings, opinions and conclusions targeted by Rule 32.06(3) include those that have not been committed to paper. Obviously, the practical difficulties to which the appellants allude are far more problematic where the party being examined cannot count on a written record of the findings, opinions and conclusions of his or her expert. It follows that the practical difficulties marshaled by the appellants do nothing to buttress their interpretative position.

²⁴ *Reilly*, supra., paragraph 20

[18] **Second, it must be remembered that, with the consent of the examining party, counsel may answer on behalf of his client, the party being examined, any question pertaining to an expert's findings, opinions and conclusions. In those circumstances, counsel's answer is deemed to be the answer of the party being examined, absent an appropriate and timely repudiation, contradiction or qualification.**²⁵

In addition, the New Brunswick Court of Appeal, in *Davis*, supra., expanded upon the liberal application of Rule 32.06(3) as enunciated in *Reilly*, supra., by writing as follows:

Documentary discovery, not oral discovery, is at issue. I have no doubt that the data in counsel's instructing letters are discoverable under Rule 32.06(3), which entitles a party to obtain informational discovery of any relevant "findings", opinions and conclusions of an expert consulted by the party being examined or his solicitor. In my view, the data in counsel's instructing letters constitute "findings". That is the case under Ontario's *Rules of Civil Procedure* (see Rule 31.06(3) and *Conceicao Farms Inc.. v. Zeneca Corp.* 2006CanLII 31976 (ON C.A.), (2006), 83 O.R. (3d) 792 (C.A.), [2006] O.J. No. 3716 (QL)) and I discern nothing in our *Rules of Court* that would persuasively argue in favor of the contrary view.²⁶

Finally, there several provisions of the New Brunswick Rules of Court that provide for the disclosure of documents through Production Orders.

Pursuant to Rule 52.01, a party that intends to call an expert to give evidence at trial must serve upon every other party a copy of the expert's report as soon as practicable. Once an expert report has been served on opposing party, the Court, pursuant

²⁵ *Reilly*, supra., paras. 17 and 18

²⁶ *Davis*, supra., para. 25

to Rule 52.01(4), may issue an order compelling the production of any records, documents or other materials on which the expert report is based.

Rule 52.01(4) has been described before the New Brunswick Court of Appeal as being unique, in that “...no other Canadian jurisdiction’s procedural rules feature a provision akin to Rule 52.01(4)...Recall that it allows the Court to order production of “any records, documents or other materials” on which the expert’s report is based...”²⁷

The rationale underlying Rule 52.01(4) was by Justice Grant in *Spencer v. Quadco Equipment Inc.* The Court stated that:

[48] In addition, Rule 52.01(4) permits the Court to order that records, documents or other materials on which an expert’s report is based be produced for inspection and copying. This is only fair as the conclusions reached by an expert are always based on those records, documents and other materials as well as assumptions. Where those are not available for inspection then the other parties cannot adequately, in my opinion, prepare for trial, cross-examine the expert or have the expert’s conclusions vetted by their own expert.

[49] The result is one which makes it impossible, in my view, for a fair trial of this case to proceed. The prejudice to the defendants and the third parties cannot be remedied by photographs. Nor can it be remedied by further discovery that will more likely than not raise issues about prior difficulties with the same discarded switch which could only be properly canvassed if the switch were available for inspection and which will only further underline the prejudice to the defendants and third parties.

[50] The prejudice which results from the destruction of the master disconnect switch in this case varies from extreme for the third party, Cole Hersee, who can’t even tell if they are the manufacturer of the switch, to severe for Timbco who must base its third party claims on

²⁷ *Davis*, supra., at paras. 30 and 31

speculation. Moreover, all four moving parties are deprived of the right to have their experts, or even one other expert, examine the equipment which is the single most important piece of evidence in this litigation and make an independent assessment as to the threshold issue in the litigation, viz, causation.

[51] The third parties submit that since the claim against them is based solely on the allegation that the master disconnect switch malfunctioned, the appropriate remedy in respect to their motions is dismissal. However, if I were to dismiss only the third party claims that would serve to increase the prejudice to the defendants who would then be left to defend the plaintiff's claim deprived of both the key piece of evidence and the right to pursue the very parties who may be liable to indemnify for them for all or part of their losses in the action.

[52] Because of the ripple effect this would have, it is my opinion that an equitable disposition of this matter is to make an order precluding Mr. Spencer and/or Timbco from calling Mr. Gunn as an expert witness at trial or using the Gunn report or any other expert or report which is based on an inspection of the master disconnect switch at trial and I so order. Pursuant to Rule 27.09 I further order that the report of Arthur Gunn be struck from Mr. Spencer's affidavit of documents on the ground that it is likely to prejudice the fair trial of this action.²⁸

The decision of the Court in *Spencer*, supra., was elaborated on by the New Brunswick Court of Appeal in *Stone v. Sharp*,²⁹ a decision wherein the Court of Appeal enumerated a "foundational document" theory as the basis for a production order under Rule 52.01(4). The Court ruled that:

[36] Rule 52.01(4), unlike Rules 31.04(4) and 31.11, makes no reference to "possession or control". Rule 52.01(4) provides that where, as here, an expert's signed report has been served on the opposite parties the Court may, on motion, order the production of "any records, documents or other materials on which the report is based". In avoiding any reference to the concepts of possession and

²⁸ *Spencer v. Quadco Equipment Inc.* 2005 NBQB 2 (CanLII)

²⁹ *Stone v. Sharp* 2008 55 (CanLII)

control, the drafters of Rule 52.01(4) made a conscious choice: if the party intending to call an expert witness at trial is unable to comply with a production order under Rule 52.01(4), he or she may suffer the consequences, which may include the exclusion of that expert's report and testimony (see *Spencer v. Quadco Equipment Inc. et al.* 2005 NBQB 2 (CanLII), (2005), 286 N.B.R. (2d) 314, [2005] N.B.J. No. 5 (QL), 2005 NBQB 2 (per Grant J.). Needless to say, courts are duty-bound to consider the interests of all parties in rendering justice according to law and, where a party's inability to produce court-ordered foundational documents significantly hobbles another's ability to challenge the opinions of the expert concerned, one would expect the court to give due consideration to evidential exclusion.³⁰

Rule 52.01(4) is not limited expressly to documents that are in the possession or control of a party to an action, as was enumerated by the Court in *Stone*, supra. Nevertheless, the New Brunswick Court of Appeal in *Davis*, supra., limited the production order to the party who engaged an expert and chose not to extend the production order to the expert who had been retained.

In giving its interpretation to the scope of an Order under Rule 52.01(4) in *Davis*, supra, the New Brunswick Court of Appeal elaborated upon its understanding of the phrase "on which the expert's report is based", and in particular, the meaning to be ascribed to the word "based".

In *Davis*, supra., the Court adopted a broad and liberal construction of the Rules of Court in concluding that:

[33] It is now well-settled that statutory interpretation "cannot be founded on the wording of the legislation alone" and that "the words of an Act are to be read in their entire context and in their

³⁰ *Stone*, supra.

grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (see *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 (QL), at para 21). Rule 1.03(1) prescribes that, unless a contrary intention appears, the Interpretation Act, R.S.N.B. 1973, c. I-13 applies to the Rules of Court. Section 17 of the Interpretation Act provides as follows:

<p>17 Every Act and regulation and every provision thereof shall be deemed remedial, and shall receive such fair, large and liberal construction and interpretation as best ensures the attainment of the object of the Act, regulation or provision.</p>	<p>17 Toute loi, tout règlement et toute disposition de ceux-ci sont réputés réparateurs et doivent faire l'objet de l'interprétation large, juste et libérale, la plus propre à assurer la réalisation de leurs objets.</p>
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Perhaps even more importantly, the word “based” stands to be interpreted in accordance with the dictates of Rule 1.03(2). Thus, it must be “liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits.....”

[36] In my view, ascribing a narrow meaning to the word “based” found in Rule 52.01(4) would be inconsonant with its drafters’ intention and the object of the legislative changes adopted in June of 1982. Furthermore, it would not be in synch with the object and scheme of the Rules of Court as a whole.

[37] As noted, Rule 1.03(2) calls for a liberal construction of each and every procedural rule, the objective being to secure the just, least expensive and most expeditious determination of every proceeding on its merits. It is unarguably in society’s best interest that all relevant evidence be available to the trial court, which, after all, is charged with ascertaining the truth, the central objective of judicial fact-finding. Pointless games of documentary “hide and seek” have no place in Rules-compliant litigation, which requires the fullest disclosure and production possible.....”³¹

Against this backdrop, the Court clearly and forcefully enunciated a “foundational” doctrine as the underpinning to Rule 52.01(4). That is, the Court ruled that:

³¹ *Davis*, supra.

[38] In my view, the interpretation principles articulated in Re Rizzo, s. 17 of the Interpretation Act and Rule 1.03(2) combine to compel the conclusion that Rule 52.01(4) covers all records, documents or other materials that had some bearing on the contents of the expert’s report. Each of those things is a foundational element since its influence is reflected in the finished product. [Emphasis added]

[39] Thus any instructing letter - whether or not it features assumptions of fact and/or law – from counsel to an expert whose report has been served pursuant to Rule 52.01(1) is caught by Rule 52.01(4). That is so because the court can safely assume the author has taken account of any such letter in preparing his or her report. To cut to the chase, a medical report that responds to a letter from counsel has taken it into account for the purposes of Rule 52.01(4) and its production should be automatic once Rule 52.01(1) is engaged.....”

Rule 31.04(4) authorizes the Court to issue a production order against a party to the action, provide certain conditions are satisfied. In a recent decision, the NB Court of Appeal stated that:

[23] Rule 31.04(4) invests the court with jurisdiction to make a production order against a party. Its key features are: (1) the making of a production order is discretionary; (2) the court may make the order “at any time”; (3) the order may target documents generally, or a particular document; (4) the document must be in the possession or control of a party; and (5) there must be no claim of privilege over the document.....”³²

It would appear that the Court approved of a proposition whereby “possession” in Rule 31.04(4) means within the physical possession and custody of a party to an action. The Court endorsed the following view:

[26]I distill general support for that approach from Roberts v. Legere, where Miller, J. made the following observations on a closely related point at paras. 2-5:

³² *Stone*, supra.

There appears to be a growing tendency for solicitors to demand and to undertake the production of documents and information which are not within the normal custody and control of the parties or their solicitors.

In my opinion, it is improper for a solicitor to demand an undertaking to produce documents such as medical or tax records not in the possession of the parties. It is equally wrong for a solicitor to acquiesce in such a demand. The best that can be done is to require an undertaking to request the production of such documents in the possession of those not a party to the action.

It is unreasonable to demand of a party the production of documents not in his possession or control - it is worse when the Court is asked to impose sanctions such as a dismissal when such an undertaking is not fulfilled.³³

Relative to documents under the “control” of a party to an action, the Court of Appeal adopted a *de jure* approach to the question of whether a party has “control” of a document, including a document in the possession of a 3rd party. The Court ruled that:

“[24] A document is in a party’s “control” if he or she has an enforceable right to its production for inspection (see *Reilly v. Paul* 2006 NBCA 84 (CanLII), (2006), 305 N.B.R. (2d) 146, [2006] N.B.J. No. 380 (QL), 2006 NBCA 84, para. 41). In *McInerney v. MacDonald*, 1992 CanLII 57 (S.C.C.), [1992] 2 S.C.R. 138, [1992] S.C.J. No. 57 (QL), the Court held that a patient is entitled, upon request, to inspect and copy “all information in the patient’s medical file, which the physician considered in administering advice or treatment” (para. 39)...”

In the final analysis, the Court arrived at the conclusion that any debate as to whether a party to an action has control over a document in the possession of a 3rd party

³³ *Stone*, supra.

should be resolved by the party seeking a production order against the 3rd party under Rule 31.11.

Rule 31.11(1) and (4) authorize the Court to issue a production order against a non-party. However, the exercise of said authority is conditional. The Court of Appeal has ruled that:

“...[39] Rules 31.11(1) and (4) articulate four criteria for the issuance of a production order directed at a non-party: (1) the document in question must be in the possession or control of the non-party; (2) the document must not be privileged; (3) the document must relate to a material issue in the action; and (4) it would be inequitable to require the applicant to proceed to trial without having discovery of the document.³⁴

In considering these 4 criteria, the Court of Appeal adopted a view that supports a sense of fairness as well as the right of opposing party to make a full answer and defence to all issues related to liability and/or quantum of damages. The Court ruled that:

[40] No privilege is claimed over Dr. Mills’ raw data records, clinical notes and testing documentation and those documents, unarguably, relate to material issues in the action. It should go without saying that those issues include: the existence of a causal link between, on the one hand, the accident and, on the other, Mr. Stone’s alleged injuries; and the severity of any documented accident-related problems.

[41] Moreover, there is no doubt that it would be inequitable to require the respondents to proceed to trial without having discovery of Dr. Mills’ raw data records, clinical notes and testing documentation. In that regard, I can do no better than reiterate what was said in *Fougère et al. v. Clements et al.* 2007 NBCA 4 (CanLII),

³⁴ *Davis*, supra.

(2007), 311 N.B.R. (2d) 368, [2007] N.B.J. No. 18 (QL), 2007 NBCA 4, at para. 40:

As a general rule, in personal injury actions, all non-privileged documents that bear upon the material issues must be voluntarily produced at the earliest reasonable opportunity. The notes of all treating caregivers, whether labeled as “chart” notes, “progress” notes, “file” notes or “clinical” notes, are almost invariably critical in determining issues such as causality and the seriousness of the compensable injuries. Courts should not easily accept the view that it would be fair to force the defendant to proceed to trial without the benefit of discovery of those notes.

If Mr. Stone has suffered, as Dr. Mills and Dr. Hayes suggest in their reports, a relatively significant traumatic brain injury, the respondents’ financial exposure may be dramatic indeed and they have the right to make full answer and defence to the underlying claims.³⁵

A substantial number of judicial authorities and statutory provisions have been referenced herein. At the risk of “legal information” overload, one would be remiss if one failed to reference the ultimate legal standard that bears upon the IFA expert in the context of litigation. I refer to the principles enunciated in the *Ikarian Reefer* decision.³⁶

There are, in my opinion, two principles enunciated in the *Ikarian Reefer* decision that have particular application to the subject matter of the within paper, namely:

- An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion, and,

³⁵ *Stone*, supra.

³⁶ *National Justice Companies Naviera SA v. Prudential Assurance Co Ltd* [1993] 2 Lloyd’s Rep 68 (Q.B.D.(Comm. Ct.))

- Where an expert refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

Conclusions re: Applicable Legal Standards?

The analysis described above demonstrates that the “legal landscape” relative to the professional services rendered by IFAs is complicated. There are any number of legal standards that might be called upon by an astute opposing legal counsel to compel an IFA to disclose and produce for inspection all information, documents or other materials that “bear upon”, directly or indirectly, the content of an IFA’s report. Included within the scope of said disclosure is any confidential client data from a previous engagement that has any degree of “foundational relevance” to an IFA’s report in a subsequent engagement. There is now no doubt that the “law” is clearly and quickly evolving towards “full” disclosure relative to all information that lies at the basis of an IFA’s report. Recent decisions of the New Brunswick Courts at both the trial level and appellate level leave no room for confusion in this regard.

Standard Practices as Applicable Standards

Against the back-drop of the above noted legal landscape, what, one might ask, is the position of an IFA in light of the Standard Practices?

In my opinion, the Standard Practices contemplate IFAs being subject to the various legal standards as noted above. However, the Standard Practices are, relatively speaking, silent relative to providing any meaningful insights to IFAs relative to applicable legal standards.

The cover note to the Standard Practices states:

“The primary purpose of these Standard Practices is to protect the public by ensuring consistency with a minimum standard of practice to be met by all Chartered Accountants in the performance of IFA engagements....³⁷

Concerns relative to protecting the public appear to have superseded any attempt of providing meaningful guidance/insights etc to practitioners relative to applicable legal standards.

The absence of any meaningful guidance relative to applicable legal standards is noteworthy when one considers that many provisions of the Standard Practices expressly contemplate adherence to applicable legal standards, including:

- IFA practitioners should perform all IFA engagements in accordance withlegal requirements that may be applicable;³⁸
- “Investigative skills” requirean understanding of the context within which the engagement is to be conducted (for example, the Tribunal process, laws....);³⁹
- “Investigative skills” requirean understanding that information collected and the work performed, including the work and

³⁷ Standard Practices, supra.

³⁸ Standard Practices, supra., Section 100.04

³⁹ Standard Practices, supra., Section 100.10(a)

information of others, may become subject to disclosure and be tendered as evidence;⁴⁰ [Emphasis added]

- These IFA standard practices are not intended to supersede any standards, rules or legislation relevant to the field of expertise pertaining to a specific IFA engagement, and IFA practitioners should refer to these standards , rules or legislation to support their work;⁴¹
- IFA practitioners should not accept an IFA engagement if they expect to be unable to complete the engagement for any reason or if there are any known constraints that would prevent the completion of the engagement in accordance with professional standards and regulatory and legal requirements,⁴² and,
- Each IFA engagement is unique; accordingly, the planning for each engagement should be customized and evolve as the engagement progresses, requiring the repeated application of professional judgementobtaining sufficient understanding of the context within which the engagement is to be conducted (for example, any Tribunal process, laws, regulations...relevant to the engagement).⁴³

In my opinion, an IFA expert engaged in a litigation matter cannot satisfy the obligations imposed via the Standard Practices without a thorough understanding of the legal landscape relative to the pre-trial disclosure and production of information and documents. Indeed, it is my position that said legal standards are an integral aspect of Tribunal proceedings.⁴⁴ Section 600.02(b) of the Standard Practices states that:

“When assessing the nature of the report to be provided, IFA practitioners should consider thestandard practices applicable

⁴⁰ Standard Practices, supra., Section 100.10(f)

⁴¹ Standard Practices, supra., Section 100.20

⁴² Standard Practices, supra., Section 200.06

⁴³ Standard Practices, supra., Section 300.02(c)

⁴⁴ “Tribunal” is defined to include any trier of fact including, without limitation, a judge...or other person having by law or consent of the parties the authority to hear, receive and examine evidence or to conduct any alternative dispute resolution process.

for the IFA engagement including, where appropriate, Tribunal proceedings...”

This provision references the Standard Practices as including, where appropriate, the proceedings before a Court of law. Said proceedings must be viewed as including the applicable legal standards relative to the pre-trial disclosure and production of information and documents since the latter are integral to proceedings before a Court within context of civil litigation.

IFAs are subject to not only the applicable legal standards and professional standards as incorporated within the Standard Practices. IFAs are also responsible to adhere to the ROPC of the provincial CA Institute in which the said IFA is a member. The scope of this obligation is very wide when one considers that most IFAs in Canada are also CAs.

Section 100.15 of the Standard Practices states that:

At its boundaries, a skills-based definition for IFA engagements will likely overlap with definitions for other disciplines, such as assurance, information technology, business valuation, corporate finance, tax, private investigation and insolvency and restructuring. To the extent that such engagements include components that meet the definition of IFA engagements, such components would become IFA engagements and the individuals performing such components must follow these IFA standard practices as well as any professional standards that may apply.

In effect, Section 100.15 equates the Standard Practices to “professional standards”. The latter term is not defined within the Standard Practices. However, I

would submit that the term “professional standards” should be given a broad interpretation, and must be interpreted such so as to include all applicable ROPC as enunciated by provincial CA Institutes.

IFA engagements are not included, currently, within the phrase “The practice of public accounting” as found in the enabling legislation and by-laws of many provincial CA Institutes. The enabling statute and by-laws of the NBICA do not define the practice of public accounting as including an IFA Engagement. Notwithstanding same, I would submit that any IFA that is a CA is not immune to the ROPC when conducting an IFA engagement.

Rule 206 of the ROPC⁴⁵ has recently been broadened to delete the previous limitation thereof to the practice of public accounting. As a result, every CA must adhere to professional standards in their professional engagements, even if said engagements are not included in the definition of the phrase “the practice of public accounting”. Thus, a New Brunswick based IFA cannot rely upon the definition of the phrase “the practice of public accounting” in an attempt to escape the obligation to adhere to the ROPC in their capacity as an IFA.

In addition, I would submit that the phrase “professional standards” within the context of Rule 206 includes the Standard Practices. I would also submit that said reference to “professional standards” in Section 100.15 of the Standard Practices also includes the ROPC.

⁴⁵ ROPC, footnote #3, supra.

A thorough review reveals that there are several ROPC and Council Interpretations (“CI”) thereto that bear directly upon IFAs in the context of disclosure and protection of client information, including:

- Rule 201.2 – Good Reputation of Profession and CI 201.1/2 CI 201.1/3
- Rule 207 – Unauthorized Benefits
- Rule 208 – Client Confidentiality – 208.1(c) 208.2(b) and CI 208.1(1)(2)(3)
- Rule 210 – Conflict of Interest and CI 210.2, CI 210(1), CI 210(4), and CI 210(5)(1)(2)

Council Interpretation 201.1/3 expressly imposes upon a CA an ethical obligation to be “... cognizant of and comply with the provisions of any legislative requirement pertaining to the member's activities”. CI 201.1/3 specifically references a “member not engaged in public practice”.

CI 201.1/2 imposes a similar obligation on a member engaged in “public practice”. CI 201 does not define the term “public practice”. Presumably, this phrase is broad enough to extend beyond the phrase “the practice of public accounting” to include an IFA practice. Similarly the phrases “legislative requirements” and “provincial legislation” are, I submit, sufficiently broad so as to encompass the *Judicature Act* and the *Rules of Court*.

Thus, implicitly, Rule 201.1 imposes an ethical duty upon an IFA to be cognizant of and abide by the disclosure and production provisions of the *Rules of Court*.

Rule 207 – Unauthorized Benefits – precludes an IFA, in any transaction including a client, from holding, receiving, bargaining for, becoming entitled to, directly or indirectly, any fee, remuneration or benefits for personal advantage or for the advantage of a third party, without the client's knowledge and consent. [**Emphasis Added**]

Interwoven with Rule 207 is Rule 208 – Confidentiality of Client Information.

CI 208.1 explicitly recognizes that “... a duty of confidentiality to a client and from a client does not expire with time. As confidential information becomes dated, the duty may be of less practical concern to a client, but the duty continues”.

I would submit that an IFA who is called upon in a litigation proceeding to disclose confidential client data relative to previous engagement, for the very purpose of obtaining a legal advantage of a current client vis-à-vis the opposing party, would be in breach of Rule 207 unless the previous client has the full knowledge of the intended disclosure and gives an informed consent to the IFA relative to said disclosure.

Furthermore, in making said disclosure vis-à-vis the confidential data of the previous client in a litigation setting, it must be recognized that the IFA has received a fee

for professional services rendered in preparing his report and testifying as an expert witness in the current litigation. Said fee, it is submitted, falls within the parameters of the phrase "... any fee, remuneration or benefit for the personal advantage ..." of the IFA as contemplated by Rule 207.

Rule 207 does not contain any proviso which would exempt a violation thereof on the basis of a duty to comply with lawful authority such as an Order from the Court. Nor is there any CI to Rule 207 which might excuse, even on an administrative ruling basis, a breach of Rule 207 on the basis of compliance with lawful authority.

Rule 207 has very broad application – any transaction, directly or indirectly, personal advantage or the advantage of a third party. It also imposes an affirmative and mandatory obligation (i.e. use of words "shall not") to avoid any unauthorized benefit.

Thus, in my opinion, an IFA would be in violation of Rule 207 in a circumstance where such IFA is required, pursuant to the Rules of Court, to disclose confidential information pertinent to a previous client in a litigation matter involving a subsequent client. There cannot be a mere "technical" violation of Rule 207, since Rule 207 imposes an absolute obligation upon an IFA. Nor is there a defence of compliance with lawful authority. The only defence contemplated by Rule 207 is, I submit, the informed consent by the previous client, and presumably, on a prospective rather than retroactive basis. (i.e. prior to the disclosure of the confidential information)

Without a doubt, the two ROPC that pose the most significant challenge to an IFA in the context of adhering to applicable legal and professional standards are Rule 208 – Confidentiality of Information and Rule 210 – Conflicts of Interest.

It is readily acknowledged that disclosure or production of confidential client information pursuant to an Order of the Court will, in the vast majority of cases, constitute a valid and full defence to any allegation that one or more ROPC have been violated. It is an underlying premise of the ROPC that CAs, in any professional activity, will abide by the law, generally stated. This underlying premise is recognized in the Forward to the ROPC wherein the Forward refers to an obligation of all CAs to act with integrity. There is also a recognition that all CAs are liable in law.

In addition to underlying these broad underlying themes acknowledged in the Forward to the ROPC, Rule 208.7(c) expressly recognizes a duty to disclose confidential information concerning the affairs of a client or former client when disclosure is required by order of lawful authority. Indeed, one might speculate that the Order of the Court sought in *Ocean Produce*, supra., was precisely intended to provide a defence to an allegation of a breach of Rule 207, 208 or 210, in whole or in part. The possibility of having to obtain such a production/disclosure Order merely serves to underscore the need for IFAs to appreciate the manner in which and the extent to which the legal obligation to produce/disclose confidential client information may very well conflict with the ethical obligation imposed by the ROPC.

Let us first examine in detail Rule 208.

Rule 208 distinguishes between the “disclosure” of confidential client information (i.e. Rule 208.1) and the “use” of confidential client information (i.e. Rule 208.2). The defence of an Order of lawful authority does not extend to the “use” of confidential client information, based on a strict literal reading of Rule 208.2.

Rule 208.2(b) also precludes the “use” of confidential client information for the advantage of a third party. There is no proviso therein that limits the application of Rule 208.2(b) to the advantage sought to be gained by a third party vis-à-vis a client. An advantage sought to be gained by a third party vis-à-vis an opposing party is caught by Rule 208.2. An advantage sought to be gained by a third party relative to a client is precluded by Rule 208.2(c).

The use of the words “disclose” and “use” implies that it is possible, within the context of Rule 208, to “use” confidential client information without “disclosing” same. I would submit that it is not possible within the context of Rule 208 to “disclose” information without having “used” such information for some purpose. In other words, a “disclosure” of information, by its very nature, constitutes a “use” of said information.

There is an obvious deficiency between Rule 208 and the philosophy of full disclosure endorsed by the N.B. Court of Appeal on the basis of foundational doctrine enumerated by the N.B. Court of Appeal in *Davis*, supra. Any use of previous

confidential client information, however remote to the issues in litigation, for the advantage of a third party must now be disclosed if said information had some bearing on the contents of an IFA report. A Court Order compelling the disclosure and production thereof will serve as a defence to an allegation of a violation of Rule 208.1. However, such a Court Order will not excuse an unauthorized use of such information. It is the unauthorized use of information that lies at the heart of an allegation that Rule 208.2 has been violated.

It must be recognized that an IFA cannot stand behind the concept of litigation privilege unless the party that retains the IFA undertakes that the IFA will not testify in an expert capacity at trial. Unless such an undertaking is provided at the Discovery stage, any findings, opinions and conclusions of an expert must be disclosed pursuant to Rule 32.06, regardless of whether a report has been produced (i.e. provided) to the opposing party.

CI 208.1(1) recognizes the distinction between the duty to maintain the confidentiality of client information and the legal concept of privilege. Stated briefly, IFAs do not enjoy the benefit of litigation privilege in the vast majority of cases in which they are retained for the purpose of testifying as an expert. Thus, in said cases, the IFA should expect that all information used that has a bearing on his report may be subject to a disclosure and/or production order even if said information was obtained or compiled in relation to a previous client. If said information was utilized, in any manner, directly or indirectly, in arriving at the findings, opinions or conclusions in the expert's report, said

information will be ordered disclosed in the litigation proceedings. In these circumstances, an IFA cannot stand behind the cloak of client confidentiality in an attempt to avoid disclosure and/or production of confidential information relative to a previous client.

Closely related to Rule 208 – Confidentiality of Information – is Rule 210 – Conflict of Interest. Section 5 of the CI to Rule 210 clearly recognizes the interrelationship between the duty to maintain the confidentiality of client information and the duty to advance the interests of a client. Such a conflict is characterized in the CI as a “legal conflict”.

Rule 210 applies to any engagement to provide professional services and not just these services rendered in the context of the practice of public accounting. Section 4 of the CI expressly references Forensic Accounting and Litigation Support Services. According to the CI, the IFA is subject to “... the expectation that the member will respect the firm's obligations to its client by not acting against them. ...”

Rule 210 exposes the IFA to an objective reasonable observer test relative to any potential conflict of interest vis-à-vis a client. A determination as to the existence of a conflict of interest is not to be reached based on a subjective assessment of the IFA.

Rule 210, unlike Rule 208, does not extend to a former client or a proposed client. Rule 210 appears to be limited in its application to an existing client of an IFA.

Interestingly, CI 210(c) expressly brings proposed clients under the umbrella of conflict of interests.

Rule 210 extends beyond the IFA *per se* to include a circumstance in which the IFA "... has placed any other person in a position where any of their interests conflicts with the interest of a client..." Thus, an IFA must be cognizant of the possibility of putting any other person, even a person not a member of the IFA's firm, in a conflict of interest vis-à-vis a client of the IFA.

Rule 210 also captures an IFA who finds himself/herself in a position where their duty owed to one client creates a professional or legal conflict with the duty owed by the IFA to another client.

Section 5 of the CI to Rule 208 defines a "professional conflict" to include any scenario whereby any activity of an IFA would undermine the good reputation of the CA profession and its ability to serve the public interest. In short, a "professional conflict" constitutes any activity that might breach Rule 201.1 of the ROPC.

CI Rule 210 specifically references "Public Practice Objectivity Issues" as a circumstance within conflicts of interest might arise. The CI refers specifically to the objectivity requirement of all CAs who provide assurance (Rule 204.1) and/or insolvency services (Rule 204.7).

Interestingly, the CI fails to mention the potential application of Rule 204.8, Disclosure of Impaired Independence.

It is a fundamental principle, as enunciated in the *Ikarian Reefer* decision⁴⁶, that any expert engaged in litigation must remain independent, in fact and in appearance, from the opposing parties. An expert should not be, and should not be seen to be, an advocate for either party. This overriding obligation is captured in the Standard Practices.⁴⁷

Rule 204.8 imposes on CAs who carry on the practice of public accounting, outside the context of assurance or insolvency agreements, the obligation to preserve the appearance of independence and objectivity. Thus, in any jurisdiction in which IFA engagements are captured by the phrase “the practice of public accounting”, an IFA is subject to the independence requirements of Rule 204.8, and by necessary extension, to the obligation's imposed by Rule 210 relative to conflict of interest. In my opinion, these obligations are imposed on any such IFA despite the fact that the CI to Rule 210 explicitly references only assurance and insolvency services.

CI to Rule 210 identifies a number of conflict management techniques that might be available to an IFA to manage conflict of interests.

I would submit that no conflict management technique, save and except the informed consent of a client, can provide any defence to an IFA who is compelled to

⁴⁶ *National Justice Companies Naviera SA*, supra.

⁴⁷ Standard Practices, supra., Section 700.02 (a) and (c)

disclose and produce any confidential information relative to a previous client that forms the foundation – however small – of his report relative to a subsequent client. I would also submit that such informed consent of a previous client is likely not going to be forthcoming if the judicial direction to disclose confidential information of the previous client arises before said client is asked to provide his/her informed consent.

Consequences to IFAs re: Breach of ROPC

Rule 201.1, Rule 204.1, Rule 204.8, Rule 207, Rule 208 and Rule 210 each contain the words “shall not”. These ROPC impose upon a CA an absolute duty to refrain from any conduct which violates one or more of these ROPC. In this sense, these ROPC are akin to an absolute liability offence, in that the intention or motivation of the IFA in engaging in the said conduct is irrelevant to a determination of whether the ROPC have been breached.

In short, an inadvertent or “technical” breach to these ROPC will nonetheless expose an IFA to disciplinary action by his/her PICA. And while an Order of the Court directing disclosure of confidential client information may absolve an IFA from disciplinary sanction, there still remains the risk of loss represented by the termination of a client relationship and, possibly, a tarnishing of one's professional reputation amongst one's colleagues and within the greater business community.

Therefore, ... What strategies might be undertaken by an IFA to minimize the possibility of being compelled by the Court to disclose confidential client information on a subsequent litigation matter? I reference the word “minimize” as opposed to avoid, since the latter suggests a scenario that might never be readily accomplished. And how does one apply a cost-benefit approach to any such strategy of minimization?

On a macro level, I would suggest the following:

- (1) The Standard Practices must be enlarged upon, explicitly, so as to enhance the need for IFAs to become knowledgeable of the law relative to a philosophy of “full disclosure”. Superficial references within the Standard Practices, as previously enumerated within this paper, do not suffice as a means of ensuring that IFAs fully appreciate what they need to know about this subject matter, and,
- (2) Two modules of the 10 Module Program leading to the DIFA focus on the law and legal processes and procedures. A critical evaluation of these two modules should be undertaken, immediately, with a view to ensuring that matters of substantive law are afforded, relatively speaking, little weight or coverage. Rather, the focus must be on those legal matters that will impact directly upon the professional activities of IFAs. In other words, to the fullest extent possible, I would suggest, respectfully, that one should leave the matters of substantive law to the lawyers and focus the time and attention of future IFAs on those areas of the law, as referenced herein, that will directly and fundamentally impact IFAs. Particular emphasis in this regard must be devoted to a continuing monitoring of the evolution of the law relative to pre-trial disclosure and production of documents relative to IFA engagements.

On a micro level, I would suggest the following strategies:

- (1) Do not rely upon any data from a previous engagement unless such data is (a) already in the public domain or (b) non-confidential vis-à-vis the previous client;
- (2) Adopt a formal risk minimization strategy before embarking upon any IFA engagement. Such a strategy should include a critical

review of all aspects of the engagement from the perspective of a non-client approval of confidential data from previous engagements;

- (3) Within the firm, establish policies and procedures whereby prior engagements in the same business sector as the current engagement are itemized. Such a self-identification system must include the names of all staff employed on each engagement. To the fullest extent possible, assign staff to the current engagement with no involvement with these previous engagements so as to minimize the possibility of cross-pollination of confidential client information. At a minimum, minimize the number of staff who have access to confidential client data;
- (4) In all circumstances in which confidential client information from a prior engagement is to be relied upon as a basis for the current engagement, obtain the written, informed consent of the previous client before using or disclosing such confidential client data. If such consent is withheld by the previous client, obtain independent legal and ethical advice before proceeding with the current engagement. If the current engagement cannot be completed without a reliance upon the confidential information from a prior engagement, and the prior client is unable or unwilling for any reason to give informed consent to the reliance upon such information, the IFA should refuse to accept the current engagement. Alternatively, the IFA should consider withdrawing from the current engagement, as contemplated by the Standard Practices⁴⁸;
- (5) Include in the Letter of Engagement for each IFA engagement an express provision whereby the IFA personally and unconditionally undertakes not to rely in the current engagement upon any confidential client information obtained in a previous engagement. In addition, the IFA expert report should contain an unqualified statement that the IFA did not, directly or indirectly, rely in the current engagement upon any confidential client information obtained in a previous engagement;
- (6) An IFA should, to the fullest extent possible, strive to never rely, directly or indirectly in fact or appearance, upon confidential client information from a previous engagement in preparing an IFA report in a current engagement;
- (7) In accordance with Section 200.06 of the Standard Practices, the IFA, before accepting an engagement, should expressly consider

⁴⁸ Standard Practices, supra., Section 200.07

whether the engagement can be completed without relying upon confidential client information obtained in a prior engagement, thereby identifying any constraint that would prevent the completion of the engagement in accordance with legal, ethical and professional standards;

- (8) All of the above referenced techniques should be extended to all assistants, agents or subcontractors to whom any portion of an IFA engagement is delegated, as contemplated by Section 300.06 of the Standard Practices, and,
- (9) In addition to a consideration of Section 200, 300 and 400 of the Standard Practices, an IFA should consider the ROPC expressly referenced herein at all stages of an IFA engagement, but particularly before agreeing to undertake an IFA engagement and ensure that the terms and conditions of every IFA engagement are considered, before accepting the engagement, from the perspective of the legal, professional and ethical standards addressed in the with paper.

Conclusions

IFAs will continue to operate, of necessity, in a world of evolving and conflicting “laws” - legal, professional and ethical in nature. In addition to client demands, business pressures, and partner expectations, the professional life of an IFA in the context of litigation proceedings is made more challenging by virtue of the evolution in the law relative to pre-trial disclosure and production of documents.

IFAs cannot be passive to these evolutions in judicial trends. To be passive in today’s legal environment is to run the very real risk of nasty surprises relative to the scope and nature of disclosure of information and/or documents that form the basis of an IFA’s report.

I have attempted to highlight the numerous statutory provisions that might be invoked in an attempt to compel an IFA, in the context of current litigation, to disclose and/or produce confidential client information from a previous engagement, with the resulting professional and ethical consequences flowing therefrom. The prospect of such unexpected disclosures is real, and, I would submit, is only limited by the skill and the imagination of opposing legal counsel to fashion arguments in support of disclosure and production. The potential means to be undertaken in the search for truth are endless!

IFAs must become much more cognizant of the legal landscape against which they operate. From this perspective, IFAs must rely, to a significant extent, upon legal counsel to guide and assist them. However, reliance upon legal counsel, while necessary and inevitable to some extent, is not an excuse for an IFA failing to appreciate the nature and consequences of a reliance, inadvertent or otherwise, upon confidential client information in a previous engagement. And reliance upon legal counsel can never substitute for the IFA's failure to properly consider his/her ethical and professional obligations as an IFA and as a CA.

I trust the within Research Paper has helped, in some small measure, to enhance one's understanding and knowledge of the applicable standards and the integration thereof in the context of an IFA expert in litigation proceedings. While the context of this paper has been set against a New Brunswick legal landscape, I am confident that the comments herein are equally applicable to the legal standards of all common law jurisdictions in Canada. I am very confident that the comments herein are equally

applicable to the professional and ethical standards across all jurisdictions within Canada, given the commonality of said standards of the Canadian CA profession.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ____ day of June 2009 at the City of Saint John, New Brunswick.

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20. *Judicature Act*, Chapter J-2, R.S.N.B. (1973)
21. New Brunswick Rules of Court
22. Regulation 82-73, under the *Judicature Act*, Chapter J-2, R.S.N.B. (1973)

Schedule “A”

***Judicature Act*, Chapter J-2, R.S.N.B. (1973)**

1.1 Where a conflict exists between the terms used or procedures prescribed in this Act and those used or prescribed in the Rules of Court, this Act shall be construed to be consistent with the Rules of Court.

76 The Rules of Court form part of this Act, and have the force and effect of a legislative enactment.

R.S., c.120, s.76; 1983, c.43, s.2.

Rules of Court of New Brunswick

RULE 1 CITATION, APPLICATION AND INTERPRETATION

1.01 Citation

- (1) These rules may be cited as the Rules of Court.
- (2) Rules may be divided into subrules, paragraphs, clauses and subclauses and reference may be made to each as follows
 - (a) Rule 7 refers to the entire rule;
 - (b) Rule 7.01 refers to subrule .01 of Rule 7;
 - (c) Rule 7.01(1) refers to paragraph (1) of Rule 7.01;
 - (d) Rule 7.01(1)(a) refers to clause (a) of Rule 7.01(1); and
 - (e) Rule 7.01(1)(a)(i) refers to subclause (i) of Rule 7.01(1)(a). 2007-17

1.02 Application

These rules apply to all proceedings in the Court of Queen's Bench and the Court of Appeal unless some other procedure is provided under an Act.

1.03 Interpretation

- (1) Except where a contrary intention appears, the *Interpretation Act* and the interpretation section of the *Judicature Act* apply to these rules.
- (2) These rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits.
- (3) The arrangement of these rules and their title headings are primarily intended for convenience, but may be used to assist in their interpretation.

31.02 Scope of Documentary Discovery

Disclosure

- (1) Every document which relates to a matter in issue in an action and which is or has been in the possession or control of a party or which the party believes to be in the possession, custody or control of some person not a party, shall be disclosed as provided in this rule, whether or not privilege is claimed in respect of that document.

Production for Inspection

(2) Every document which relates to a matter in issue in an action and which is in the possession or control of a party to the action, shall be produced for inspection if requested, as provided in this rule, unless privilege is claimed in respect of that document.

31.03 Affidavit of Documents

(6) The solicitor for a party making an Affidavit of Documents shall endorse it with a certificate that he has explained to the deponent the necessity of making a full disclosure of all relevant documents and that he has no knowledge of any other document which should have been disclosed.

31.04 Inspection of Documents

(4) A court may, at any time, order production for inspection of documents generally or of any particular documents in the possession or control of a party for which no privilege is claimed. Where privilege is claimed for a document, the court may inspect the document to determine the validity of such claim.

31.11 Documents in the Possession of a Person Not a Party

(1) Where a document is in the possession or control of a person not a party to the action, any party may apply to the court, on notice to such person and to every other party, for an order for the production for inspection of such document if it is not privileged.

(2) The court may order a corporate party to the action to disclose all documents which are in the possession or control of a subsidiary or affiliated corporation, and which relate to a matter in issue, and to produce for inspection all such documents which are not privileged.

(3) No order shall be made under this subrule for the production for inspection of a document unless the court is satisfied that the document relates to a material issue in the action and that it would be inequitable to require the applicant to proceed to trial without having discovery of that document.

(4) On an application under this subrule, where

(a) privilege is claimed for a document, or

(b) the court, with respect to a document, is in doubt as to

(i) its relevance, or

(ii) the necessity for its discovery, the court may inspect the document.

32.06 Scope of Examination

(1) Unless ordered otherwise, a person being examined for discovery shall answer to the best of his knowledge, information and belief, any proper question relating to an issue in the action, including any matter made discoverable by paragraph (2) to (4) and a question shall not be objected to on the ground that

- (a) the information sought is evidence,
- (b) the question is cross-examination if it relates to an issue in the action and is not directed solely to the credibility of the witness, or
- (c) the question is cross-examination on the affidavit of documents of the party being examined.

(2) A party being examined for discovery shall answer, to the best of his knowledge, information and belief, any question concerning the names and addresses of potential witnesses.

(3) A party may obtain discovery of any findings, opinions and conclusions of an expert engaged or consulted by or on behalf of the party being examined or his solicitor and relating to an issue in the action; but the party being examined need not disclose such information nor the name and address of the expert where

- (a) the only findings, opinions and conclusions of the expert relevant to an issue in the action were made or formed by him in preparation for contemplated or pending litigation and for no other purpose, and
- (b) the party being examined undertakes that he will not call the expert as a witness at the trial.

(4) A party may obtain discovery of the existence and contents of any insurance policy under which an insurer may be liable to satisfy part or all of any judgment which may be obtained in the action or to indemnify or reimburse any party for money paid by him in satisfaction of the judgment, but such information shall not be admissible in evidence at the trial unless it relates to an issue in the action.

(5) Where information may become relevant after the determination of one or more of the issues in the action and the disclosure of such information prior to that determination would seriously prejudice a party, he may apply to the court for leave to withhold such information until after any such issue has been determined.

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32.07 Effect of Refusal to Answer

Where a party being examined for discovery has refused to answer a proper question or has refused to answer a question on the grounds of privilege, he shall not introduce at the trial the information refused on discovery, except by leave of the trial judge.

32.08 Effect of Solicitor Answering

Questions on an examination for discovery shall be answered by the party being examined but, where there is no objection, a question may be answered by his solicitor; and such answer shall be deemed to be the answer of the party being examined unless, before the conclusion of his examination, he expressly repudiates, contradicts or qualifies that answer.

33.08 Production on Examination

(1) The person to be examined shall bring to the examination and produce for inspection everything in his possession, custody or control, which is not privileged, and which is specified in the Notice of Examination or the Summons to Witness served upon him, or which he is required to produce by Rule 31.05(2).

52.01 Condition Precedent to Calling Expert Witness at Trial

(1) Where a party intends to call an expert witness at trial, he shall serve on every other party a copy of the expert's signed report which shall contain, or be accompanied by, a statement containing the expert's name, address and qualifications and the substance of his proposed testimony. Service shall be made as soon as practicable and no later than the Motions Day at which the trial date is fixed.

(2) Where a party intends to call an expert witness at trial but cannot obtain from him a report, or where, because of the nature of the proposed evidence, the expert is not required by the party to submit a written report, the party may comply with paragraph (1) by serving on every other party a report signed by the party or his solicitor which sets out the name, address and qualifications of the expert and the substance of the evidence which he is expected to give.

(3) A party who has not complied with this subrule shall not call an expert witness without leave of the court.

(4) Where a report has been served under paragraph (1) or paragraph (2), on motion the court may order that any records, documents or other materials on which the report is based be produced for inspection and copying.

Evidence Act, Chapter E-11, R.S.N.B. (1973)

43.1 An investigative report that is prepared for the dominant purpose of being submitted to a solicitor for advice with respect to, or use in, contemplated or pending litigation, or any part of an investigative report in which an opinion is expressed, regardless of the purpose for which that report was prepared, is privileged from disclosure and production in civil proceedings.

New Brunswick Institute of Chartered Accountants

Rules of Professional Conduct

207 Unauthorized benefits

A member, or student shall not, in connection with any transaction involving a client or an employer, and a firm shall not, in connection with any transaction involving a client, hold, receive, bargain for, become entitled to or acquire, directly or indirectly, any fee, remuneration or benefit for personal advantage or for the advantage of a third party without the knowledge and consent of the client or employer, as the case may be.

Confidentiality of information

208.1 A member, student or firm shall not disclose any confidential information concerning the affairs of any client, former client, employer or former employer except:

- (a) when properly acting in the course of carrying out professional duties;
- (b) when such information should properly be disclosed for purposes of Rule 211 or Rule 302;
- (c) when such information is required to be disclosed by order of lawful authority or, in the proper exercise of their duties, by the Council, the [names of appropriate Institute committees];
- (d) when justified in order to defend the member, student or firm or any associates or employees of the member, student or firm, as the case may be, against any lawsuit or other legal proceeding or against alleged professional misconduct or in any legal proceeding for recovery of unpaid professional fees and disbursements, but only to the extent necessary for such purpose; or
- (e) when the client, former client, employer or former employer, as the case may be, has consented to such disclosure.

208.2 A member, student or firm shall not use confidential information of any client, former client, employer or former employer, as the case may be, obtained in the course of professional work for such client or employer

- (a) for the advantage of the member, student or firm,
- (b) for the advantage of a third party, or
- (c) to the disadvantage of such client or employer

without the knowledge and consent of the client, former client, employer or former employer.

208.3 A member or firm engaged to perform a particular service may contract for the services of a person not employed by the member or firm to assist in the performance of that service, provided the member or firm first obtains the written agreement of that person to carefully and faithfully preserve the confidentiality of any information acquired for the purposes of the engagement and not to make use of such information other than as shall be required in the performance of such services.

Conflict of Interest

- 210.1** A member or firm engaged in the practice of public accounting or in a related business or practice shall, before accepting any professional engagement, determine whether there is any restriction, influence, interest or relationship which, in respect of the proposed engagement, would cause a reasonable observer to conclude that there will be a conflict as contemplated by Rule 210.2.
- 210.2** Subject to the provisions of Rule 210.3, a member, student or firm shall not accept, commence or continue any engagement to provide professional services to any client in circumstances where a reasonable observer would conclude that the member, student or firm:
- (a) is in a position or has placed any person in a position where any of their interests conflicts with the interest of a client; or
 - (b) is in a position where the duty owed to one client creates a professional or legal conflict with the duty owed by the member, student or firm to another client.
- 210.3** Where the acceptance of a proposed engagement would result in a conflict under Rule 210.2 or where a previously unidentified conflict under Rule 210.2 arises or is discovered in the course of an existing engagement or engagements, the member or firm must decline the proposed engagement, or withdraw from all existing engagements that are affected, unless:
- (a) (i) the member or firm is able to rely upon conflict management techniques that are generally accepted and the use of such techniques will not breach the terms of an engagement with or duty to another client;
 - (ii) the member or firm informs all affected clients of the existence of the conflict and the techniques that will be used to manage it; and
 - (iii) the member or firm obtains the consent of all affected clients to accept or continue the engagement or engagements; or
 - (b) the affected clients have knowledge of the conflict and their consent for the member or firm to accept or continue the engagement is implied by their conduct, in keeping with common commercial practice.
- 210.4** For purposes of Rule 210, a client includes any person or entity for whom the member, student or firm, or any other person engaged in the practice of public accounting or a related business or practice in association with the member, student or firm, provides or is engaged to provide a professional service.