Expert Evidence in Queensland: Disclosure of Draft Expert Reports Should Be Abolished

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This article considers r 212(2) of the Uniform Civil Procedure Rules 1999 (Qld). This rule provides that a document consisting of a statement or report of an expert is not privileged from disclosure. It is the contention of the authors that the rule ought to be repealed.

INTRODUCTION

Rule 212(2) (the rule) of the *Uniform Civil Procedure Rules 1999* (Qld) (*UCPR*), properly construed, represents a serious intrusion into the common law right of privilege. This interference does not represent uniform practice throughout Australia. The fact that this is not a uniform, national rule of procedure makes the existence of the rule, and the correspondingly, and increasingly broad, interpretation which it has been given, by courts in Queensland, something of an outlier, and an anomalous one at that.

There were no explanatory materials that accompanied the introduction of this important rule. The theme of this article is that there is not a compelling case for the existence of the rule. The existence of the rule has led to the development of contrived practices to avoid anything opined by an expert in conference or otherwise, not being caught by the rule. It should not, however, be thought that these problems do not present themselves, from time to time, in other contexts in other jurisdictions. The disclosure of draft expert reports has arisen for consideration at common law as well as pursuant to s 119(b) of the *Uniform Evidence Law*. However, to facilitate the discussion of this point, this article focuses on the relevant context in Queensland.

It is contended in this article that the rule should be abolished. This is principally because there is no obvious need for the rule. Yet the rule is a significant erosion of legal professional privilege and it interferes, at a fundamental level, with the reason for the existence of privilege. That reason is to enable a person to obtain informed and confidential legal advice based upon truthful and complete communications with a legal adviser, and to order his or her affairs accordingly, without the fear that communications that are necessary to this process (including with an expert) will be revealed outside of the lawyer's office.

In addition, given the existence and operation of the rule, the article also identifies some practical considerations in managing expert evidence when seeking to maintain privilege. These examples are given to highlight the artificial measures that are taken in order to outflank the operation of the rule. Given that there is no compelling reason for the existence of the rule, the time and energy used up with such contrivances are also wasteful and inefficient.

INTERFERENCE WITH LEGAL PROFESSIONAL PRIVILEGE

Interfering with legal professional privilege is no light thing. The authorities that have considered this in Queensland correctly advert to this principle. But the overall impression one receives is that "lip service" has been given to this principle. Interference with privilege should not be viewed as some procedural matter. As Wilson J said in *Baker v Campbell*:[1]

> The principle is clear. A statute will not be construed to take away a common law right unless a legislative intent to do so clearly emerges whether by express words or necessary implication.

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[1] *Baker v Campbell* (1983) 153 CLR 52, 96.

The rule under consideration is contained in subordinate legislation. The rule was introduced into the former Supreme Court rules and found expression in the *UCPR*. But this should not lessen the significance of its effect. Nor should the fact that it appears in a rule of procedure detract from the importance of the principle identified by Wilson J.

WHY LEGAL PROFESSIONAL PRIVILEGE IS IMPORTANT

It is salutary to emphasise why legal professional privilege has been repeatedly recognised as an important common law right by the High Court.[2]

Privilege is important enough that it trumps any requirement that the whole truth necessarily be revealed anywhere outside of a lawyer's office. That is, in the common law system of justice, the administration of justice ranks the ability of a client to consult a lawyer on a privileged basis, and to maintain that privilege, as more important than all of the "truth" being revealed in court. However, as can be readily understood, if privilege were to be abrogated, then there would be very little "truth" to be revealed from communications between a client and a lawyer because the prospect of revelation would inhibit the willingness of a client to be frank with a lawyer in seeking advice. It ought be remembered that part of the administration of justice is avoiding litigation based upon sensible legal advice. It is undesirable for many reasons for every dispute to end up in litigation in court.

The basis for privilege is that it is critical, in an adversarial system of justice, that a person be able to obtain legal advice from a lawyer, free from any concern that what is communicated will be revealed anywhere else, including in a courtroom, in the event that litigation is on foot, or ensues following that consultation.

Privilege is a right and not just a rule of evidence. It is a basic right for a person to seek advice from a lawyer and to feel no inhibitions in relation to communications with that lawyer in seeking such advice. The need for expert guidance or opinion in relation to the giving of legal advice or for the preparation for litigation is a necessary part of that process.

Yet, r 212(2) is a fundamental erosion of privilege insofar as it relates to the seeking and obtaining of expert advice.

Mason J was in the minority (of a 4 to 3 decision) in *Baker v Campbell* but made, with respect, a compelling statement about privilege:[3]

> It is one thing to say that the privacy or secrecy of lawyer-client communications made in aid of litigation, especially in aid of the litigation in which the privilege is claimed, shall prevail over an obligation to produce or disclose all materials relevant to the issues in the litigation. To take but one example: to compel the parties to disclose such communications made in the conduct of that litigation would be unfair to them, hamper the preparation of their cases and protract the determination of the litigation.

One could not improve upon the statement of Lord Brougham LC in *Greenough v Gaskell*:[4]

> [I]t is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

Lord Simon said in *Waugh v British Railways Board*:[5]

> But the exception which most nearly touches the issue facing your Lordships was cogently invoked in this very connection by James L.J. in *Anderson v. Bank of British Columbia* (1876) 2 Ch D 644, at p 656:

[2] See *Baker v Campbell* (1983) 153 CLR 52, 86, 88–89 (Murphy J), 94–97 (Wilson J), 113–117 (Deane J), 123, 125, 127–128 (Dawson J) (Wilson J agreeing); see also *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 505 (Brennan CJ), 540 (Gaudron J).

[3] *Baker v Campbell* (1983) 153 CLR 52, 75 (emphasis added).

[4] *Greenough v Gaskell* (1833) 1 My & K 103; 39 ER 621, quoted with approval by Mason J in *Baker v Campbell* (1983) 153 CLR 52, 77.

[5] *Waugh v British Railways Board* (1980) AC 537.

> "… as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief." The adversary's brief will contain much relevant material; nevertheless, you cannot see it because that would be inconsistent with the adversary forensic process based on legal representation.

Deane J, one of the four majority judges in *Baker v Campbell*, said:[6]

> The explanation of legal professional privilege was initially seen, when the doctrine was recognized during the reign of Elizabeth I, as being the professional obligation of the barrister or attorney to preserve the secrecy of the client's confidences (see Wigmore on Evidence, McNaughton rev. (1961), vol. viii, par. 2290; Radin, "The Privilege of Confidential Communication Between Lawyer and Client", California Law Review, vol.16 (1928), p. 487). From at least the eighteenth century however, it has been generally accepted that the explanation of the privilege is to be found in an underlying principle of the common law that, subject to the above-mentioned qualifications, a person should be entitled to seek and obtain legal advice in the conduct of his affairs and legal assistance in and for the purposes of the conduct of actual or anticipated litigation without the apprehension of being thereby prejudiced (see Wigmore, par. 2291). The fact that the privilege is not restricted to the particular legal proceedings for the purposes of which the relevant communication may have been made or, for that matter, to proceedings in which the party entitled to the privilege is a party plainly indicates that the underlying principle is concerned with the general preservation of confidentiality.

Deane J went on to say:[7]

> The importance of the principle that a person should be able to seek relevant legal advice and assistance without apprehension of prejudice has been recognized in many cases. Thus in *Pearse v. Pearse* (1846) 1 De G & Sm 12, at pp 28-29 [1846] EngR 1195; (63 ER 950, at p 957), Knight Bruce V. C. pointed out, in a judgment which Lord Selborne L.C. was subsequently to describe as "one of the ablest judgments of one of the ablest Judges who ever sat in this Court" (*Minet v. Morgan* (1873) 8 Ch App 361, at p 368, that it could not even be sacrificed to promote the main purpose of the existence of courts of justice, namely, the discovery, vindication and establishment of truth. The Vice-Chancellor added (1846) 1 De G & Sm, at p 29 (63 ER at p 957):
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> > "And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself."
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> To the same effect was the comment made, in the same year, by Lord Langdale M.R. in *Reece v. Trye* [1846] EngR 483; (1846) 9 Beav 316, at p 319 (50 ER 365, at p 366):
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> > "The unrestricted communication between parties and their professional advisers, has been considered to be of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained" (italics added). (at p115)

It is with those principles in mind that the abrogation of privilege in relation to expert reports needs to be considered.

The Importance of Expert Evidence and Expert Advice

It is relevant to note, at least briefly, the importance of expert opinion in litigation, but also as a fundamental part of giving advice to a person, who may potentially become a litigant. When an expert is retained litigation may be on foot. But it may not have commenced. It may be essential that expert advice be obtained as an inherent part of the provision of legal advice. It is somewhat artificial to seek to differentiate between the use of expert advice for litigation and for the giving of legal advice.

Expert evidence plays a critical role in civil and criminal litigation. There are two principal reasons why that is so. The first is obvious. Experts, by definition, are able to express opinions, as evidence, about matters that is beyond the ken or experience of a non-expert person.

[6] *Baker v Campbell* (1983) 153 CLR 52, 113–114.

[7] *Baker v Campbell* (1983) 153 CLR 52, 114–115.

An expert is not a witness in the narrative of the case, and is not called upon to recall facts about an incident or transaction, which is what a lay witness does. The expert may set out a narrative in her opinion but this will not be as a witness to what occurred but based upon instructed assumptions. The expert expresses an opinion based upon facts and assumptions that should be clearly stated in a report.

The second reason is that the expert should, according to the standards imposed by the rules of court, but even prior to such standards being stated in the rules, be an impartial witness. Thus, the expert has the privilege of expressing an opinion on a matter about which she has appropriate expertise. But the expert should be independent and impartial and not an advocate for the interests of any party.

If this latter requirement is followed, the expert can, and should be, of great inestimable assistance to the court.

Unfortunately, not all experts behave with impartiality, despite the duty to do so. The field of personal injuries litigation provides an example of this. It is a widely known fact in the profession that there are groups of medical practitioners, who make a handsome living from giving evidence for plaintiffs, and others who make handsome livings from typically giving evidence for defendants (insurance companies). This type of "industrial" scale of partisanship is much to be deprecated.

Usually, if an expert is partisan, this becomes apparent in a trial in the course of cross-examination. But it can be more difficult to establish this than with a lay witness for various reasons. One is that lay witnesses can often be shown to be unreliable historians by the conflict between their evidence and contemporaneous records, a feature which is not normally of any import with an expert. Another reason is that it is more difficult to demonstrate that an expert witness is being partial, due to the fact that, by definition, no one, including the judge or jury, normally has anything like the same familiarity with the subject matter about which the expert is expressing an opinion. For example, whether someone is truly experiencing debilitating back pain is a matter about which it is very difficult to determine where a court is faced with two medical experts taking entrenched and opposed positions.

Partisanship can be present but not so obvious in a field of expertise. Further, due to the duties imposed upon experts, which most experts do take seriously, courts are slow to find that an expert is partial. However, it is respectfully submitted that where an expert does not behave independently, it is a serious misuse of the privilege which the expert enjoys in giving evidence and courts ought not to be reticent about finding that an expert has not behaved independently. Such a finding ought be made, *pour encourager les autres*.[8]

A problem with r 212(2) is that it is capable of eroding the common law right of legal professional privilege, which gives a person a right to seek expert assistance (and then seek legal advice based upon that assistance). The serious implications of the rule as an erosion of privilege do not appear to be the subject of concern in the various authorities that have considered the rule, despite the effect of the authorities being, effectively, to broaden the scope of the rule. When the original form of the rule was introduced there were no extrinsic materials explaining the justification for the rule. We contend that the prudent course is to abolish the rule and to maintain privilege in expert reports.

Rule 212(2)

Before discussing the authorities it is necessary to set out r 212. It provides, relevantly:

> **212 Documents to which disclosure does not apply**
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> (1) The duty of disclosure does not apply to the following documents -
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> (a) a document in relation to which there is a valid claim to privilege from disclosure
>
> …
>
> (2) A document consisting of a statement or report of an expert is not privileged from disclosure.

[8] A phrase said to have been phrased by the French writer Voltaire, when commenting upon the execution by the Royal Navy (King George II having refused a pardon) of Admiral John Byng in 1757.

Rule 212(2) was included in the *UCPR* from the *UCPR's* inception in 1999. Previously, O 35 r 5(2) of the *Rules of the Supreme Court* (Qld) was amended in 1994 to include, for the first time, a rule that was in identical terms to what is now r 212(2).

Rule 212(2) is unique to Queensland.[9] However, it should not be thought that the issue of disclosure of expert reports does not present itself in other jurisdictions. By way of example, where the common law needs to be applied, there are competing authorities on whether disclosure of draft reports is required.[10] Similarly, questions have arisen under s 119(b) of the *Uniform Evidence Law* in relation to the disclosure of draft expert reports.[11] On such an important topic, it is vital that a consistent and coherent approach is taken across jurisdictions. In order to facilitate discussion, this article focuses on the position in Queensland.

Obtaining Expert Advice and Expert Evidence

The decision in *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board*[12] means that a draft expert report must be disclosed. In that case, the defendant had disclosed reports by two experts, but refused to disclose draft reports on the basis that they were prepared for the purposes of discussion with the defendant's solicitor and counsel and, thereby, were privileged.

In concluding that r 212(2) required the disclosure of draft reports, Justice Douglas stated:[13]

> In my view the answer to the question may be sought by asking whether a draft statement or report by an expert is nonetheless his statement or report even though it might not be his final view. If an expert has prepared a draft report it is still his report or statement, no doubt normally reflecting his state of mind at the time he wrote it. The fact that, after consultation with lawyers in an action, he may prepare a further report or amend the draft does not prevent the draft from meeting the description in the rules.

[9] There is a cognate rule expressed in terms that are more clearly destructive of the privilege, in South Australia: see *Uniform Civil Rules 2020* (SA) rr 74.3, 74.4. Prior to the introduction of the *Uniform Civil Rules*, see r 160 of the *Supreme Court Rules 2006* (SA) which contained similar intrusions into the law of privilege.

[10] At common law, some authorities have concluded that draft expert reports are not privileged: *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, [21], *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 948, [7]–[12], *Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 768, [28]–[29], *Ryder v Frohlich* [2005] NSWSC 1342, [11]–[12]. However, the weight of authority is to the effect that draft reports of an expert are privileged at common law: see *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245, [16], *Filipowski v Island Maritime Ltd* [2002] NSWLEC 177, [22], *Brookfield v Yevad Products Pty Ltd* [2006] FCA 1180, [15], *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [22], *Ray Fitzpatrick Pty Ltd (in vol liq) v Minister for Planning* [2007] NSWLEC 833, [10], *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 242 IR 1, [25]–[44]. See also *Natuna Pty Ltd v Cook* [2006] NSWSC 1367, [15], *Re Southland Coal Pty Ltd (rec and mgr apptd) (in liq)* (2006) 203 FLR 1, [16]–[20].

[11] Jurisdictions which have enacted the Uniform Evidence Law prohibit the disclosure of the contents of a confidential document, whether delivered or not, that was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding, or an anticipated or pending proceeding: see, eg, *Evidence Act 1995* (Cth) s 119(b). A draft expert report has been held to be privileged under s 119(b): *Natuna Pty Ltd v Cook* [2006] NSWSC 1367, [10]. In *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [29]–[36], White J concluded that a draft expert report was privileged under s 119(b), at least where it was prepared for the dominant purpose of being provided to a party's lawyers for advice or comments. His Honour added that it was arguable that drafts would not be privileged if they were brought into existence for the dominant purpose of the expert forming his own opinions to be expressed in the final report: [30]. In reliance on this decision, among others, Heerey J in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7)* [2008] FCA 323 concluded at [3] that "there is a clear line of authority which establishes that draft documents and other communications of a like nature with an expert witness proposed to be called in litigation are privileged under s 119(b) …" See also *Matthews v SPI Electricity Pty Ltd (No 8)* (2013) VSC 628 (which followed White J's decision in *New Cap Reinsurance*, adding that if a draft expert report was prepared for the dominant purpose of being submitted for advice or comments by a party's lawyers, it would not matter whether or not the draft was actually so delivered to that party's lawyers: [55]), *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 2)* (2014) 312 ALR 403, [49], *Shea v TRUenergy Services Pty Ltd [No 6]* (2014) 242 IR 1, [46], [48], [60]; *Sprayworx Pty Ltd v Homag Pty Ltd* [2014] NSWSC 833, [49].

[12] *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2005] 1 Qd R 373.

[13] *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2005] 1 Qd R 373, 376–377 [13].

Thus, Justice Douglas concluded that a draft report was within the meaning of r 212(2) and, as such, had to be disclosed. The reasons for decision focused on the proper construction of r 212(2) and did not consider the underlying policy reasons why it is in the interests of justice for draft reports to be disclosed.

We contend, respectfully, that the decision was not correctly decided, either in terms of a proper reading of the rule, nor was it justified by any policy consideration which was expressed in the judgment. Why a draft of an expert report, without more, would be directly relevant to matters in issue, and thereby, disclosable, is not at all clear. If an expert were to change her mind during various iterations of preparing a report, it is difficult to fathom what possible forensic value any discarded draft could have to the determination of the real issues in dispute at trial.

Mitchell Contractors was followed by Crow J in *Murphy Operator Pty Ltd v Gladstone Ports Corp Ltd*.[14] However, the decision in *Murphy Operator* extended the reach of the rule further in that it decided that the rule requires the disclosure of an expert report even if that report is not deployed in court (see [104]). That is, one must disclose an expert report of an expert whom one is not calling as a witness.

This means that if a party retained an expert not to give evidence in court, but to comment upon important issues in a case, any report or draft report of that expert must be disclosed. This would seem to create a serious inhibition from obtaining a report or draft report from such an expert.

Further, if an expert report is obtained but not "deployed" there may be several legitimate reasons why that is so. It may be that upon conferring with an expert it becomes clear that the expert will not make a convincing witness due to his inability to answer questions directly. With a sophisticated client, who understands the subject matter of the expert advice, a view may be formed that the expert is simply wrong in her view and that it is not desirable to call her as a witness. There may be issues of inexperience. The particular expert may be entirely inexperienced in giving evidence in court and this may sometimes become evident by an inability to focus upon questions and to answer them. Another reason for not using an expert is that the lawyers advising the party may consider that the report is not persuasive according to its own terms. Why disclosing this is of any assistance is not clear. But on the current state of the law, the expert report must be disclosed. Such disclosure may interfere with the ability of a client to compromise a dispute on any kind of satisfactory basis. It may lead to a case going to litigation which ought, on any sensible view, not go to court.

One can consider the example of where a client may cause a lawyer to retain a valuer on a matter concerning the resumption of the client's land. The valuer may express a view (in draft form) that the land is worth $1,000,000. However, the client, who may be well versed in the value of the land, may consider that the expert is not competent and that the land is worth considerably more. The client may decide not to retain the valuer as, during the conference, the client and lawyers may form the view that the valuer is not competent. They may retain another valuer, who appears considerably more competent and who values the land at $5,000,000. Is there anything wrong with this? The answer must be "no".

What would be wrong is for someone to suggest to the incompetent valuer that he should increase his value to $5,000,000. The decision not to use an expert because of doubts about the expert's competence is an entirely legitimate forensic decision for a lawyer and client to make. It involves no wrongful conduct. But on the existing state of the authorities a report or draft report by the incompetent valuer would be disclosable under the rule.

The question would then be: what relevance would a draft report of an incompetent valuer that the land was worth $1,000,000 have? To a tribunal properly instructed and having the advantage of competent valuers from each side of the dispute, the draft report should be of no relevance. But, in a practical sense, having to disclose it would pose real problems for the party making the disclosure in attempting to settle the case on satisfactory terms. At any mediation the other side will emphasise the value of $1,000,000 and the report that is not going to be deployed. The requirement to disclose may make the case not capable of being resolved without litigation.

[14] *Murphy Operator Pty Ltd v Gladstone Ports Corp Ltd* [2019] 3 Qd R 255, [71]–[105].

The requirement to disclose the report means that the client's opponent in the litigation will be emboldened by having the adverse view set out in a report. So the requirement to disclose the report, that is not being deployed, is a serious abrogation of privilege. Insofar as it prevents a settlement occurring at a mediation, it is more likely to prolong rather than to shorten litigation, and it will not promote efficiencies in litigation.

A related point is that it might be speculated that the rule was intended to prevent experts changing their draft reports to suit the interests of the party calling them. But that is speculation and is something of a "long bow". In that regard, there is nothing inappropriate with an expert changing their mind. Indeed, an expert ought to change her mind if that is the appropriate way to express a true opinion.

In *Linter Group Ltd v Price Waterhouse*,[15] Harper J stated:

> [A]n expert is surely permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted … experts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material then before the expert. Just as a judge ought never to allow publication of a draft of a judgment, in part because it is necessary to preserve the freedom to change his or her mind on further reflection about the case, so experts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material then before the expert.

In *Ray Fitzpatrick Pty Ltd (in vol liq) v Minister for Planning,* Lloyd J stated:[16]

> The comparison by Harper J of a draft expert's report with a draft judgment is, in my opinion, valid. In my experience it is not unusual, for example, for a judge to walk off the bench at the end of the case and prepare a draft judgment leading to a particular conclusion. However, as one's reading and thinking about a case develops over the ensuing weeks, it is not unusual for successive drafts to be completely re-written leading to the opposite conclusion. I agree with Harper J that this is to be encouraged also with experts. They may be discouraged from reformulating their opinions and conclusions or changing their minds after further reading or examination if their drafts were not subject to privilege.

The fact that an expert may change her mind during the course of the formulation of an expert report is neither surprising nor is it to be discouraged. It is far from clear why a draft, which is different from the final report, will have any particular forensic value at all. This is so given that there are numerous innocent and valid reasons why an expert can change her mind. A new fact may be brought to the attention of the expert. The expert may consider the matter in greater depth than previously. Further, the expert, on reflecting upon a matter, may form a different view. This happens on a regular basis with lawyers giving advice. It should not be thought that other expert disciplines do not have the same issues.

The fact that the expert may change her mind is of no relevance to any issue in a trial. It may possibly evidence that the production of a report was difficult or involved a changing of view. But so what? It does not establish anything else on its own. The same could be said of a solicitor or barrister giving an opinion to a client. While preparing an opinion a lawyer may change his view several times. This may be reflected in changes from draft to draft. This does not matter. The opinion of the lawyer is the opinion that the lawyer applies his signature to, not a draft. This is why barristers only sign the final version of their opinion. To make a barrister disclose various drafts of an opinion would be irrelevant in terms of finding out what opinion the barrister was prepared to sign off on and stand behind.

The fact that an expert is entitled to change their opinion is also reflected in r 429K of the *UCPR*. It applies where an expert changes, in a material way, an opinion included in a report and provides for the expert to give notice of the change, and the reasons for it, when that occurs.

Thus, the authorities recognise that an expert is entitled to change their opinion. Therefore, this does not provide a justification for requiring disclosure of draft expert reports. In that regard, experts are in a different position from lay witnesses. The evidence that a lay witness gives should not change dramatically, other than by the accretion of more detail – for the simple reason that their evidence is based on factual matters that they have observed. By comparison, given that expert evidence, by its

[15] *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245, [16], referred to in *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [52].

[16] *Ray Fitzpatrick Pty Ltd (in vol liq) v Minister for Planning* [2007] NSWLEC 833, [10].

nature, necessarily involves the giving of an opinion, there is nothing inappropriate in an expert reaching an opinion which differs from their earlier thinking.

It has also been suggested that disclosure of draft reports is appropriate because the effect of improper influence or excessive input in the substantive content of an expert report will be revealed.[17] This assumes that lawyers are not behaving properly. It is not a compelling basis for the rule. Nor is it consistent with expectations that lawyers will behave according to ethical standards, an expectation which both faith in the system, and optimism for the future, should encourage. Indeed, ethical rules prevent legal practitioners from engaging in those practices.[18] The *UCPR* also says, in express terms, that a party to a proceeding "must not give instructions, or allow instructions to be given, to the expert to adopt or reject a particular opinion".[19] Similarly, r 429F(2)(b) says that an expert must not accept instructions from any person to adopt or reject a particular opinion.[20] Thus, there are important restraints on practitioners which prevent them from trying to influence the substantive content of an expert report. Corresponding restraints also apply to experts.

If these were the mischiefs at which the rule were aimed, and this has not been stated anywhere in any explanatory materials, it is somewhat odd that it has not been embraced in other jurisdictions in Australia in the past 25 years. It is also the case that the rule would be a blunt way of addressing such a problem, if this was what was intended, given that any partisan expert "worth her salt" could be expected to be canny enough not to commit to writing a draft report which was adverse to the party calling her.

In any event, without a clear policy reason for this rule having been stated by the legislature, it is not clear why the rule exists, or why it has now been interpreted to have a serious interference with the law of privilege which does not exist in other Australian jurisdictions. While various Queensland authorities discussed below, have widened the reach of the rule, not one of them has wrestled with the idea of why the rule is a good idea as a matter of policy, or why there is really a compelling case for broadening its reach.

Queensland's r 212(2) is unique to it. South Australia has a cognate provision which expressly goes further in requiring the disclosure of any expert report.[21] No other state has this procedural rule relating to disclosure despite it having been in effect in Queensland for more than a quarter of a century. Nor has such a rule been enacted in England.[22] A party to a civil proceeding in England cannot be compelled to disclose an expert report against its wishes.[23] Similarly, draft reports need not be disclosed in that jurisdiction and remain privileged, even when the final report has been served.[24]

The relevant principle was identified by Lord Justice Longmore in *Jackson v Marley Davenport Ltd*,[25] where his Honour stated:[26]

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[17] Ian Freckelton AO KC, *Expert Evidence* (Thomson Reuters, 2023) [5.10.360]; *Landel Pty Ltd v Insurance Australia Ltd* [2021] QSC 247, [19].

[18] For example: Queensland Law Society, *Australian Solicitors Conduct Rules 2012* (1 June 2012) r 24.1; Bar Association of Queensland, *Barristers' Conduct Rules 2018* (23 February 2018) r 68.

[19] *Uniform Civil Procedure Rules 1999* (Qld) r 429E(2). See also r 429F(2)(b), which says that an expert must not accept instructions from any person to adopt or reject a particular opinion.

[20] See also r 7(2) of the Code of Conduct for Experts in Queensland, contained at Sch 1C of the *Uniform Civil Procedure Rules 1999* (Qld), which is to the same effect.

[21] See *Uniform Civil Rules 2020* (SA) r 74.3, 74.4. Prior to the introduction of the *Uniform Civil Rules 2020* (SA), see r 160 of the *Supreme Court Rules 2006* (SA) which contained similar intrusions into the law of privilege.

[22] See Tristam Hodgkinson and Mark James, *Expert Evidence: Law & Practice* (Sweet & Maxwell, 4th ed, 2015) [7-005].

[23] Hodgkinson and James, n 22, [7-010], referring to *Comfort Hotels Ltd v Wembley Stadium Ltd* [1988] 1 WLR 872; *Derby & Co Ltd v Weldon (No 9)*, the Times, 9 November 1990, upheld on appeal, Court of Appeal, Civil Division, Transcript No 878 of 1990; *Carlson v Townsend* [2001] 1 WLR 2415 (CA); *Jackson v Marley Davenport Ltd* [2004] 1 WLR 2926 (CA).

[24] Colin Passmore, *Privilege* (Sweet & Maxwell, 4th ed, 2019) [3-251], [3-259].

[25] *Jackson v Marley Davenport Ltd* [2004] EWCA Civ 1225 (CA), [13]–[15]. This decision is cited by the leading English texts on evidence in support of the proposition that draft expert reports remain privileged, even when the final version of the report has been served: see Colin Tapper, *Cross & Tapper on Evidence* (OUP, 12th ed, 2010) 442, 541; Hodge Malek, *Phipson on Evidence* (Sweet & Maxwell, Thomson Reuters, 18th ed, 2013) [33-33].

[26] *Jackson v Marley Davenport Ltd* [2004] EWCA Civ 1225 (CA), [13].

> There can be no doubt that, if an expert makes a report for the purpose of a party's legal advisers being able to give legal advice to their client, or for discussion in a conference of a party's legal advisers, such a report is the subject matter of litigation privilege at the time it is made. It has come into existence for the purposes of litigation. It is common for drafts of expert reports to be circulated among a party's advisers before a final report is prepared for exchange with other side. Such initial reports are privileged.

Thus, differences exist between the law in Queensland and the other jurisdictions in Australia, as well as with the law in England. In that regard, there is much to be said for consistency and uniformity in the law. Leeming JA in *Hasler v Singtel Optus Pty Ltd*,[27] made this important point when discussing the difference between the English and Australian positions on the second limb of *Barnes v Addy*. His Honour endorsed Lord Neuberger's statement in *FHR European Ventures LLP v Cedar Capital Partners LLC*[28] that it is highly desirable for common law jurisdictions to lean in favour of harmonising the development of the common law around the world, and that there is frequently much to be learnt from the experience of other jurisdictions whose legal system share a common ancestor.

In short, if there was a good reason for the existence of r 212(2), one may ask why has it not been taken up in other jurisdictions?

A related point is that practitioners should, in fact, be involved in the preparation of expert reports so that the report presents the expert's evidence in a comprehensible, accessible, and admissible manner. That is, matters of form, such as proofreading, addressing issues of admissibility and requesting the expert to reveal the process of reasoning for their conclusions, are all matters where practitioners can, and should, assist in the preparation of an expert's report. Doing so is not inappropriate and finds support in the authorities.[29] Recently, Dalton J, as her Honour then was, observed that "while lawyers must not coach witnesses, or influence the substance of an expert report so that it favours their client, it is permissible, and usually desirable, that lawyers do become involved in the editing of expert reports so that they present material in a way which is accessible and comprehensible, and do not contain irrelevant material".[30] Given that is the case, why is it desirable that an earlier draft prepared by an expert, without the benefit of this type of input from lawyers, should be disclosed? There is no good answer as to why this should be the case.

Thus, given (1) that practitioners should be involved in this manner in the drafting of the report; (2) that there are ethical rules preventing practitioners from trying to influence the substantive evidence of an expert; and (3) that experts are permitted to change their mind on an issue, why is it in the interests of justice for draft expert reports to be disclosed? And moreover, why is it appropriate to abrogate an important common law immunity, so as to require the disclosure of draft expert reports? There are no compelling answers to these questions and the authorities do not explain what the answers are. The preferable view is that the rule should be abolished.

Further, in terms of efficiencies in the conduct of litigation, it can be doubted that requiring the disclosure of iterations of draft reports is efficient or is likely, in the grand scheme of things, to be of any particular forensic value. Courts, generally, tend to discourage onerous or too much disclosure in modern litigation where possible. So disclosing draft expert reports, or any other expert report not deployed in litigation, appears to be "beating against the current".

Finally, something should be said in relation to the principle that there is no property in a witness. This principle means that there is nothing to prevent the other party, or its solicitors, from contacting the expert witness. Should that occur, it would be open to the expert to communicate with the other party and its solicitors. However, in doing so, the expert would be required to keep confidential any information that was confidential. The fact that an expert may have a conversation with the solicitors for the other

[27] *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 809.

[28] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250, [45]; [2014] UKSC 45.

[29] *Harrington-Smith v Western Australia (No 7)* (2003) 130 FCR 424, [19]; *R v Doogan* (2005) 193 FLR 239, [118]; *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171, [679]; *Landel Pty Ltd v Insurance Australia Ltd* [2021] QSC 247, [19]; *New Aim Pty Ltd v Leung* (2023) 410 ALR 190, [119]–[122] (Kenny, Moshinsky, Banks-Smith, Thawley and Cheeseman JJ).

[30] *Landel Pty Ltd v Insurance Australia Ltd* [2021] QSC 247, [19].

party does not, in and of itself, mean that any privilege in relation to earlier communications between the expert and the first party are lost.

The position was summarised by Lord Nicholls in *Re L*, where his Lordship said:[31]

> In the time honoured aphorism, there is no property in a witness. The fact that an expert or other potential witness has already been approached by one party, and given a statement to that party, does not excuse him from giving evidence at the hearing at the behest of another party. If necessary his attendance can be compelled by service of a subpoena. He cannot be required to disclose the contents of communications between himself and the first party's legal adviser. But his evidence on the issue before the court, which is all that is material, can be compelled.

Thus, the contents of confidential communications with an expert are to remain confidential. In other words, the fact that there is no property in a witness does not provide a reason, or a justification, for compelling disclosure of draft expert reports.

THE DECISION IN ENKELMANN

Recently, the Queensland Court of Appeal in *Enkelmann v Stewart*[32] acknowledged the need to disclose drafts of expert reports. The focus of that decision, however, was whether file notes taken by a solicitor of a conference with an expert were privileged. In that regard, and as has been mentioned, r 212(2) abrogates privilege in documents consisting of a statement or report of an expert.

The Court of Appeal in *Enkelmann* concluded that the relevant file notes did not meet this description and, thereby, privilege in the file notes was not abrogated by this means. In the result, however, the Court ordered that the file notes be disclosed by reason that privilege had been impliedly waived. This came about because, during the trial, no objection had been taken to questions during cross-examination in which the expert was asked about the discussions that occurred during a conference. This had the consequence that the relevant communications with the expert were no longer confidential and, thereby, could not attract privilege. No communication is privileged if it is not confidential. Given its significance, it is convenient to examine the background and the Court's decision in *Enkelmann* in further detail.

The Factual Background in Enkelmann

The relevant facts in *Enkelmann* can be described in relatively short compass.

The plaintiffs sued a number of defendants, advancing claims in nuisance and negligence in which they alleged that certain works and modifications to the defendants' property impacted on the plaintiffs' land where flooding occurred.[33] In support of their case, the plaintiffs engaged a hydrology expert called Mr Giles.[34] Mr Giles' evidence was described by the primary judge as "[pivotal] to the pleaded case".[35] In that regard, the statement of claim pleaded particular results based on the modelling undertaken by Mr Giles.[36] Originally, the plaintiffs had engaged Mr Sargent as their expert.[37] The defendants' hydrology expert was Dr Markar.

Mr Giles was asked, in a written letter of instruction, to "conduct a peer review" of the reports by Mr Sargent and Dr Markar and provide his opinion on "the most accurate outcome to be garnered from the reports".[38] Mr Giles was also asked for his opinion on the "preferred approach" and "the likely effect

[31] *Re L* [1997] AC 16, 34 (emphasis added).

[32] *Enkelmann v Stewart* [2023] QCA 155 ("Appeal judgment").

[33] *Enkelmann v Stewart* [2023] QSC 111, [15] ("First instance judgment").

[34] *Enkelmann v Stewart* [2023] QSC 111, [2].

[35] *Enkelmann v Stewart* [2023] QSC 111, [15].

[36] *Enkelmann v Stewart* [2023] QSC 111, [15].

[37] *Enkelmann v Stewart* [2023] QSC 111, [4].

[38] *Enkelmann v Stewart* [2023] QCA 155, [9].

of each such issue in light of the opinion" that he reached.[39] The letter of instruction said that those things were required for a mediation.[40]

As matters turned out, Mr Giles was not asked to provide a written report on those matters, but rather, was asked to undertake a different task.[41] During the course of cross-examination at trial, Mr Giles was asked about this and gave evidence that, before receiving those written instructions, he had orally expressed his opinion on those matters during the course of a conference with instructing solicitors and counsel.[42] The defendants then called for production of any file notes prepared by instructing solicitors in relation to the conference.[43]

The file notes were described in the following terms:[44]

> The notes are of oral comments by a registered professional engineer, Mr Giles, made in a conference with the appellants' solicitors and counsel. They are about the relative strengths of written reports by two other engineers, Mr Sargent, who had been retained by the appellants, and Dr Markar, who had been retained by the respondents. The appellants' solicitors had asked Mr Giles to do a "peer review" of the two reports.

The plaintiffs resisted production on the basis that the file notes attracted legal professional privilege.[45] That is, the plaintiffs contended that the file notes had been brought into existence for the dominant purpose of providing confidential legal advice or for use in a pending legal proceeding.[46] By comparison, the defendants contended that r 212(2) of the *UCPR* abrogated any privilege in the file notes, such that they had to be disclosed or alternatively, that the plaintiffs had, by their conduct, waived privilege.[47]

The learned primary judge, delivering ex tempore reasons, ordered that any such file notes be disclosed. On appeal, the Court of Appeal upheld her Honour's orders, but did so on a different footing to the learned primary judge.

The starting point, for the Court of Appeal, was that the ability to resist production of privileged documents was an important common law immunity.[48] A critical reason for the existence of this common law immunity is to enable clients to communicate freely with legal advisers. What may be sometimes seen as an "offshoot" to this critical role, is where privilege inheres in communications brought into existence for the dominant purpose of use in court proceedings.

The Court of Appeal observed that from the time courts of common law began to order disclosure, a party was permitted to resist production of "expert opinions obtained to guide parties and their legal advisers".[49] Their Honours summarised the position, as it existed historically, as follows:[50]

> [A] party to civil litigation could assert legal professional privilege and decline to produce a confidential written statement of an expert taken by the solicitor, or an expert's written report requested by a solicitor, made for the purpose of being placed before the party's legal advisor to obtain confidential professional legal advice or for use in anticipated or pending litigation.

[39] *Enkelmann v Stewart* [2023] QCA 155, [9].

[40] *Enkelmann v Stewart* [2023] QCA 155, [9].

[41] *Enkelmann v Stewart* [2023] QCA 155, [11].

[42] *Enkelmann v Stewart* [2023] QSC 111, [6]; *Enkelmann v Stewart* [2023] QCA 155, [12].

[43] *Enkelmann v Stewart* [2023] QSC 111, [1], [9]; *Enkelmann v Stewart* [2023] QCA 155, [1].

[44] *Enkelmann v Stewart* [2023] QCA 155, [1].

[45] *Enkelmann v Stewart* [2023] QSC 111, [24]; *Enkelmann v Stewart* [2023] QCA 155, [2].

[46] *Enkelmann v Stewart* [2023] QCA 155, [2], referring to *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, [61] (Gleeson CJ, Gaudron and Gummow JJ), [173] (Callinan J).

[47] *Enkelmann v Stewart* [2023] QCA 155, [3], [13].

[48] *Enkelmann v Stewart* [2023] QCA 155, [5].

[49] *Enkelmann v Stewart* [2023] QCA 155, [5], citing *Cossey v London, Brighton and South Coast Railway Co* (1870) LR 5 CP 146, 149 (Bovill CJ), 153 (Montague Smith J), 154 (Brett J).

[50] *Enkelmann v Stewart* [2023] QCA 155, [20].

In other words, at common law, statements or reports of an expert obtained in order that a lawyer could provide legal advice to a client were privileged from disclosure. The same was true of statements or reports of an expert obtained for pending or anticipated litigation.

Thus, historically, expert opinions, whether contained in a final report, or in an earlier draft, were privileged from disclosure.

The Court of Appeal stated that r 212(2) had the effect of abrogating privilege in a "document consisting of a statement or report of an expert".[51] Their Honours observed that r 212(2) is "a limited exception to the substantive right to an important common law immunity".[52] But the inroads into the privilege are substantial and there does, not, with respect, appear much limitation to the intrusion.

The essence of the Court of Appeal's reasoning in this respect is contained in the following passages:[53]

> [21]On its proper construction, the effect of r 212(2) is to abrogate legal professional privilege that might otherwise entitle a party to refuse to disclose a statement or report of an expert. The rule affects a document brought into existence to be a statement or report of an expert, whether taken by a solicitor or prepared by the expert or prepared by a solicitor at the dictation of the expert. This includes a draft of such a statement or report.
>
> [22]Only rights in respect of a statement or report of an expert are abrogated. The words "consisting of" do not extend the scope of r 212(2) to abrogate privilege in respect of a document that is neither a statement nor a report of an expert. A solicitor's file note of a conference with an expert, noting or reporting an opinion expressed by the expert at the conference, is not a document consisting of a statement or report of an expert, within the meaning of r 212(2). Nor are any parts of the note that refer to the expert's opinion.

It is, with respect, difficult to reconcile the underlined passages of paras 21 and 22 of the reasons of the Court of Appeal. Paragraph 21 states that if a solicitor writes down, by dictation (but not limited to that), the statement or draft statement of an expert, it is disclosable. Paragraph 22 then says that a solicitor's file note of a conference with an expert noting or reporting an opinion of the expert expressed at the conference is not caught by the rule.

This appears to open up a very fine distinction as to whether a solicitor is intending to write down the opinion of the expert as expressed in the conference, or whether the solicitor is making a "file note" of it. This fine distinction can be seen as a further gateway for litigation about file notes of solicitors, or, at least, for solicitors to be in two minds as to whether notes they are taking do or do not fall on the wrong side of the distinction. In the former case it appears that the note is disclosable. In the latter it is not. But the distinction appears so fine that it can reasonably be expected to cause difficulties in the future for practitioners about questions of degree.

Further, on a practical level, and given the very varied ways in which solicitors take notes, one would need to have confidence that the notes were complete in any event. It is not uncommon, when one takes notes, to leave out words if the speaker is speaking hurriedly. If one leaves out the word "not" or the expression "this is not my preferred method", one can ask rhetorically, "what possible relevance can these notes have?" Further, one could then prolong the litigation by calling the solicitor to try to interpret his or her notes if they appear to be incomplete.

In the result the Court of Appeal held that r 212(2) did not operate so as to abrogate privilege in the file notes.[54] In other words, absent other considerations, the plaintiffs were entitled to maintain a valid claim to privilege.[55] However, the difficulties in reconciling paras 21 and 22 of the decision remain. Rather than for these difficulties to be part of practice in Queensland, the better course would be for r 212(2) to be abolished.

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[51] *Enkelmann v Stewart* [2023] QCA 155, [21].

[52] *Enkelmann v Stewart* [2023] QCA 155, [23], referring to *Interchase Corp Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141, 159.

[53] *Enkelmann v Stewart* [2023] QCA 155, [21]–[22] (emphasis added).

[54] *Enkelmann v Stewart* [2023] QCA 155, [26].

[55] *Enkelmann v Stewart* [2023] QCA 155, [27].

Implied Waiver of Privilege

The Court of Appeal went on to consider a matter that was not the subject of the learned primary judge's reasons. In particular, in the appeal the defendants had filed a notice contending that the plaintiffs had waived privilege in the file notes by reason that Mr Giles had been cross-examined about the opinion he gave during the conference, without any objection by the plaintiffs.[56]

In particular, Mr Giles gave evidence in open Court of what was discussed during the conference.[57] The Court of Appeal found that once this cross-examination had taken place, those discussions were no longer confidential, such that a necessary condition for maintaining privilege was absent.[58]

It was irrelevant that the plaintiffs did not intend to waive privilege.[59] The consequence was that the file notes were not privileged and had to be disclosed. Thus, by this means, the Court of Appeal reached the same conclusion as the learned primary judge, but did so by this alternative process of reasoning.

However, what actually useful probative effect these notes could have is very much open to question. If they were not the report of an expert, which the Court of Appeal found that they were not, then they could presumably only be proved by having the author explain what was in them. From case to case, this could require solicitors to be called to explain their notes.

If the object of this evidence was to be that the expert had expressed a provisional view that had changed somewhat by the time of the final report, this line of inquiry would appear to be irrelevant unless there were some misconduct involved in by the lawyers or client seeking to suborn the expert to a particular view. But absent this, this seems to be a blunt instrument to investigate such conduct, by abrogating, in part, an important common law right.

Practical Considerations

There are at least eight practical considerations which practitioners should bear in mind when managing and leading expert evidence. Some of these considerations arise from the decision in *Enkelmann*, but some of the considerations below reflect practice more generally in relation to experts based on the current state of authorities. One can see from them that some of these practical considerations arise due to the existence of the rule, and the wasting of time and effort in seeking to avoid its operation.

Solicitor's File Notes

First, following the Court of Appeal decision in *Enkelmann*, solicitors are able to make file notes in relation to a conference with an expert, provided those file notes are not a "document consisting of a statement or report of an expert".[60] As noted, there will inevitably be room for argument in the future as to whether a note is or is not a report of an expert. In that regard, it has been observed that a solicitor would not ordinarily be making such a statement or report when preparing a file note.[61] However, and as has been mentioned, difficulties remain. These difficulties mean that some solicitors may prefer to engage in the artificial practice of reporting on the outcome of a conference in a letter of advice to a client, in preference to making a file note of such a conference.[62]

[56] *Enkelmann v Stewart* [2023] QCA 155, [34].

[57] *Enkelmann v Stewart* [2023] QCA 155, [39].

[58] *Enkelmann v Stewart* [2023] QCA 155, [39].

[59] *Enkelmann v Stewart* [2023] QCA 155, [40].

[60] *Enkelmann v Stewart* [2023] QCA 155, [22].

[61] *Queensland v Allen* [2012] 2 Qd R 148, 171 [90] (Fryberg J).

[62] Richard Douglas KC, "Expert Evidence in Civil Litigation – Formulation and Management" (Hearsay, 2022) 90.

Draft Expert Reports

Second, the authorities, including the appeal decision in *Enkelmann*,[63] require draft statements or reports of an expert to be disclosed.[64] This is significant.

The requirement to disclose draft expert reports has led to somewhat strained and unnatural communications with experts. That is, practitioners "communicate with an expert only on the basis that there is a potential that any communication may be required to be produced or become discoverable in the proceedings".[65] As a result some practitioners instruct experts not to create more than one version of their report to ensure that drafts do not exist.[66] In practical terms, this involves an expert only creating one electronic version of their report, which is updated and progressed, from time to time, until it is in final form.

Similarly, another practice involves the use of an expert controlled electronic platform where an expert can share a copy of their draft report with a party's legal advisors.[67] This allows a party's solicitors and counsel to review the draft, during the course of a conference, through the electronic platform. The electronic platform operates such that a copy of the draft report does not come into the possession or come under the control of a party's solicitors.[68] This is done with a view to ensuring that no copy is brought into existence which would need to be disclosed.

These sort of practices, however, are artificial and strained. They only exist due to the requirement that draft expert reports have to be disclosed. Put another way, there would be no need for such practices if draft expert reports were not subject to disclosure. The contrived nature of these practices focuses attention on why rules exist in the first place which give rise to such practices. As mentioned earlier, the preferable view is that the rule should be abolished. However, given its existence, these practices, which seek to avoid its operation, are likely to remain.

There Is no requirement that an Expert Report be "Deployed"

Third, and related to the second point, it does not matter whether or not a statement or report of the expert was ultimately deployed by a party in the proceeding. Rule 212(2) still requires that it be disclosed: *Murphy Operator Pty Ltd v Gladstone Ports Corp Ltd*.[69] Thus, a party cannot resist disclosure of an expert report, or a draft expert report, by reason that the report is not deployed in a proceeding before the Court. Presumably, such a report (or draft of it) is disclosable when it comes into existence. Thus, a party who receives an adverse expert report, in relation to which they may have legitimate reasons for not accepting, are required to disclose it, to their detriment, in a forensic sense, and perhaps to scuttle any chance of compromising a dispute.

Expert Reports are broader than just Opinions

Fourth, r 212(2) abrogates privilege in a document if the document consists of a "statement or report of an expert". In that regard, it is not necessary that a document be comprised of expressions of opinion in order for it to be a statement or report of an expert.[70] That is, a statement or report of an expert can

[63] *Enkelmann v Stewart* [2023] QCA 155, [21].

[64] *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board* [2005] 1 Qd R 373, 376–377 [13], [15]; *Murphy Operator Pty Ltd v Gladstone Ports Corp Ltd* [2019] 3 Qd R 255, 284 [103]–[104]; *Landel Pty Ltd v Insurance Australia Ltd* [2021] QSC 247, [19].

[65] LexisNexis, Australia, Practical Guidance AU - Dispute Resolution (online) <https://www.lexisnexis.com.au/en/products-and-services/practical-guidance/modules/dispute-resolution>.

[66] LexisNexis, Australia, n 65.

[67] Richard Douglac KC, "Expert Evidence in Civil Litigation - Formulation and Management" [2022] (90) *Hearsay* <https://www.hearsay.org.au/expert-evidence-in-civil-litigation-formulation-and-management/>.

[68] Douglac KC, n 67.

[69] *Murphy Operator Pty Ltd v Gladstone Ports Corp Ltd* [2019] 3 Qd R 255, 281 [86], [104].

[70] *Mazelow Pty Ltd v Herberton Shire Council* [2001] QSC 250.

include a factual presentation of data established by scientific means.[71] Cullinane J explained this in *Mazelow Pty Ltd v Herberton Shire Council*, stating:[72]

> I do not think it is necessary that the report or statement be constituted wholly or substantially by expressions of opinion. For example some areas of expertise may not involve expressions of opinion but rather the presentation of data established by scientific means.

This was another extension of the effect of the rule. Why this was considered a good idea is not, with respect, explained in the decision.

This extension is important because such a document is not privileged from disclosure: r 212(2). In *Mazelow*, the plaintiff sought an order that the defendant disclose a document which the defendant contended was privileged. The defendant resisted disclosure by reason that the document was not a statement or report of an expert. In particular, the defendant submitted that it was largely an historical summary of the performance of a contract from the perspective of an engineer, and only contained a small number of statements which could be regarded as opinions. As such, the defendant submitted that the document did not meet the test of a report or statement for the purposes of r 212(2). Ultimately, that contention was rejected and disclosure of the document was ordered. The Court stated:[73]

> The report, the subject of this application, can, in my view, only be understood as the engineers' summary of the history of the contract from its perspective. I think it is fair to say, that it is capable of being regarded as a purported justification of the position adopted by the engineers on behalf of the defendant and thus of the defendant's position.
>
> It is true that in large measure, (although not wholly, because there are opinions expressed in a couple of places), the report constitutes no more than a summary of factual matters which might have been prepared by a person without any expertise who had access to the records. However as I have said the statement must be considered in light of the surrounding circumstances and it is I think, coloured by them.

That said, there must be some degree of expertise applied in order that the document consists of a statement or report of an expert.[74] A document can only consist of a statement or report of an expert if the matters recorded in that document fall within the scope of that person's expertise. In other words, a "statement by a person who happens to be an expert in some field and which deals with a subject matter unrelated to his field of expertise does not fall within the rule".[75]

Documents used by an Expert to form an Opinion

Fifth, documents which are brought into existence, or which were obtained, by the expert, to assist in the preparation of their expert report, are not privileged.[76] In other words, documents used by the expert in order to form an opinion for their statement or report are not privileged.[77] The same is true of documents, which are not privileged from inception, which are provided by a party's solicitor to an expert and which are used by the expert in order to form an opinion.[78] Further, if privileged documents are provided to an expert, and they are used by the expert in the preparation of their report, those documents are no longer privileged.[79]

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[71] *Mazelow Pty Ltd v Herberton Shire Council* [2001] QSC 250, approved by Holmes J, as the former Chief Justice then was, in *Century Drilling Ltd v Gerling Australia Insurance Co Pty Ltd* [2004] 2 Qd R 481, 486 [20].

[72] *Mazelow Pty Ltd v Herberton Shire Council* [2001] QSC 250, approved by Holmes J, as the former Chief Justice then was, in *Century Drilling Ltd v Gerling Australia Insurance Co Pty Ltd* [2004] 2 Qd R 481, 486 [20].

[73] *Mazelow Pty Ltd v Herberton Shire Council* [2001] QSC 250.

[74] *Santos Ltd v Fluor Australia Pty Ltd (No 3)* (2021) 9 QR 353, 378 [64].

[75] *Mazelow Pty Ltd v Herberton Shire Council* [2001] QSC 250, approved by Holmes J, as the former Chief Justice then was, in *Century Drilling Ltd v Gerling Australia Insurance Co Pty Ltd* [2004] 2 Qd R 481, 486 [20].

[76] *Interchase Corp Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141, 156 (Pincus JA), 160–162 (Thomas J).

[77] *Interchase Corp Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 148, (Pincus JA), 160–162 (Thomas J).

[78] *Interchase Corp Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 148 (Pincus JA).

[79] *Interchase Corp Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 161 (Thomas J).

Confidential Communications with an Expert

Sixth, privilege, however, may be claimed in relation to communications between an expert and a party's solicitor when the communication is made for the purpose of confidential use in litigation or for the provision of legal advice.[80] That is, correspondence, and enclosures thereto, between solicitors for a party and an expert for the purpose of giving legal advice in relation to, or obtaining evidence to be used in, litigation, are not statements or reports of an expert, within the meaning of r 212(2), and need not be disclosed.[81] Given this principle, one may ask why a draft report of an expert or a report which is not going to be deployed in evidence, is not privileged? The distinctions at play here do not really make for a coherent principle.

Instructions

Seventh, instructions given to an expert for the purpose of preparing an expert report, together with any documents briefed to the expert, are protected by legal professional privilege.[82] That is, such communications will be privileged, provided they are confidential and made for the dominant purpose of litigation or receiving legal advice.[83] However, it is good practice to proceed on the footing that such instructions will, in due course, need to be disclosed. This is because, if the report is relied on in a court proceeding, an implied waiver ordinarily arises because it would be unfair to rely on the report without disclosure of the instructions.[84] The waiver occurs at the time when the expert's report is first deployed by the party who commissioned the report.[85] Where there are directions for pre-trial exchange of expert reports, the waiver occurs at the time of exchange.[86] As a practical matter, the instructions issued to an expert are often attached to an expert's report in a schedule or appendix.

Implied Waiver during Cross-Examination

Eighth, a failure to object during the cross-examination of an expert to matters which would otherwise be privileged may, depending on the circumstances, give rise to an implied waiver of privilege, such as occurred in *Enkelmann* itself. Thus, it is important, in order to maintain privilege, that objection be taken to any questions during a hearing which would reveal the content of privileged communications. Once there is evidence, to which no objection has been taken, before the Court, privilege in any such communications may have been waived.

Conclusion

Rule 212(2) of the *UCPR* in Queensland requires draft expert reports to be disclosed. The rule has been interpreted to require expert reports to be disclosed, even where the report is not relied upon, or deployed, by a party in a proceeding. Historically, such material was privileged. Thus, the rule abrogates an important common law right. There are not good policy reasons why an important common law

[80] *Interchase Corp Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 162 (Thomas J).

[81] *Enkelmann v Stewart* [2023] QCA 155, [23], referring to *Interchase Corp Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 151–153 (Pincus JA), 159 (Thomas J).

[82] *Interchase Corp Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 160 (Thomas J); *Greenhill Nominees Pty Ltd v Aircraft Technicans of Australia Pty Ltd* [2001] QSC 7, [20]; *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, [21].

[83] *Interchase Corp Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 160 (Thomas J); *Greenhill Nominees Pty Ltd v Aircraft Technicans of Australia Pty Ltd* [2001] QSC 7, [20].

[84] *Australian Competition & Consumer Commission v Lux Pty Ltd* [2003] FCA 89, [46]; *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, [21]; *Sandvik Mining and Construction Australia Pty Ltd v Dempsey Australia Pty Ltd* [2009] QSC 233; *Murphy Operator Pty Ltd v Gladstone Ports Corp Ltd* [2019] 3 Qd R 255, [69].

[85] *Murphy Operator Pty Ltd v Gladstone Ports Corp Ltd* [2019] 3 Qd R 255, 277 [69].

[86] *Murphy Operator Pty Ltd v Gladstone Ports Corp Ltd* [2019] 3 Qd R 255, 277 [69].

immunity should be abrogated. The rule is unique to Queensland. It does not find expression in the other jurisdictions in Australia or in England. One may ask, rhetorically, if there was a good reason for the existence of r 212(2), why has it not been taken up in other jurisdictions? The preferable view is that the rule ought be abolished. This is because it interferes, at a fundamental level, with the underlying reason for the existence of privilege and does so without proper justification.