Court File No. C58338

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

BLAKE MOORE

Respondent
(Plaintiff)

- and -

DR. TAJEDIN GETAHUN, THE SCARBOROUGH HOSPITAL-GENERAL DIVISION, DR. JOHN DOE and JACK DOE

Appellants
(Defendants)

Court File No. C58021

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

JEREMY WESTERHOF

Respondent
(Plaintiff)

- and -

THE ESTATE OF WILLIAM GEE and KINGSWAY GENERAL INSURANCE

Appellant
(Defendant)

Court File No. C56514

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

DANIEL McCALLUM

Respondent
(Plaintiff)

- and -

JAMES BAKER

Appellant
(Defendant)

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PART I. OVERVIEW

1. The Advocates' Society (the "**Society**") intervenes on these appeals to make submissions on two issues of importance to the Society's members:

(a) the scope of appropriate communication between counsel and a testifying expert witness, and

(b) the extent to which a fact witness may provide opinion evidence without complying with Rule 53.03.

2. Following an extensive consultation with a broad cross-section of the Society's membership, the Society has concluded that an advocate's duties not only permit, but in many cases require, consultation with a testifying expert prior to the finalization of the expert's report. This conclusion arises from the advocate's duty to ensure that the expert's evidence is independent and objective, relevant, reliable, comprehensible, and of assistance to the court.

3. On the second issue, the Society submits that the limits on a fact witness providing opinion evidence eschew rigid categorization based on the type of witness, or the form of evidence. The line between fact and opinion is often contextual and sometimes challenging to discern. Whether a particular witness is giving opinion evidence that ought to be delivered in accordance with the full strictures of Rule 53.03 is ultimately a question relating to the fairness of a proceeding that trial judges are best positioned to answer on a case-by-case basis.

PART II. THE FACTS

4. In *Moore v. Getahun*, the trial judge held that Rule 53.03 of the *Rules of Civil Procedure* precluded meetings between counsel and testifying experts to review and "shape" expert reports and opinions, on the grounds that such a practice could create a perception of bias or an actual bias, puts counsel in a position of conflict as a potential witness, and undermines the independence of the expert. The trial judge further held that the practice of counsel reviewing draft reports should stop.[1]

5. In the Society's submission, these conclusions, if adopted by this court, will have deleterious effects on the quality of expert evidence presented to courts and tribunals, and will undermine, not enhance, the obligation of advocates to present expert evidence that is of assistance to the court.

A. The Society's Task Force and Principles Governing Communications with Testifying Experts

6. The *Moore* decision gave rise to significant concern among members of the litigation bar, testifying experts, and the Society's members, and prompted a robust discussion about the need for guidance on a broad range of issues arising in connection with the question of communications between counsel and an expert. The Society responded by striking a Task Force that has developed a set of *Principles Governing Communications with Testifying Experts* (the "*Principles*"). The *Principles*, along with the Society's Position Paper on Communications with Testifying Experts, are attached as Schedules C and D to this factum, respectively.

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[1] Reasons for decision, paras. 50, 298.

7. The Task Force was comprised of more than twenty senior advocates who practice in a wide variety of areas, including family, personal injury, intellectual property, corporate commercial, administrative and criminal law.

8. Drafts of the *Principles* were reviewed and commented on by members of the Board of Directors of The Advocates' Society who serve on the Society's Standing Committee on Advocacy and Practice, as well as by senior advocates in a number of law firms and by members of the Executive of the Ontario Trial Lawyers Association and Intellectual Property Section of the Canadian Bar Association. The *Principles* were then reviewed and approved by the Board of Directors of The Advocates' Society in May, 2014.

9. The *Principles* reflect the views of a wide range of litigation counsel who specialize in different practice areas. They identify best practices that, in the Society's view, advocates should follow in their interactions with testifying experts. They are intended to ensure that counsel can fulfill their important duties to their clients and the courts without compromising the independence or objectivity of testifying experts, or impairing the quality of their evidence.

PART III. ISSUES AND ARGUMENT

10. The Society's submissions address two issues:

(a) what is the scope of appropriate communication between counsel and a testifying expert witness, and

(b) to what extent may a fact witness provide opinion evidence without complying with Rule 53.03.

A. Communication between counsel and an expert is appropriate and necessary in some cases

1. The 2010 Rule amendments codified existing duties

11. In the decision below, Justice Wilson described the 2010 amendments to Rule 53.03 as introducing a "change in the role of the expert witness," and wrote that "[i]n light of this change ... counsel's prior practice of reviewing draft expert reports should stop."[2]

12. However, a review of the jurisprudence relating to experts' duties reveals that the amendments to Rule 53.03, along with the addition of Rule 4.1.01,[3] did not introduce a change in the role of expert witnesses, but rather codified well-recognized aspects of experts' duties that had been developed through the common law.

(a) The common law on experts' duties pre-2010

13. A 1992 decision of the Queen's Bench Division (Commercial Court) of England, commonly cited as *Ikarian Reefer*[4], has become a frequently-cited reference point for the common law duties inhering to experts providing their opinions to courts.

14. In *Ikarian Reefer*, Justice Cresswell enumerated seven non-exhaustive duties and responsibilities of a testifying expert:

(a) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

(b) An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

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[2] Reasons for decision, para. 50.

[3] Rule 53.03 enumerates requirements as to the form and content of an expert report, including the requirement to sign an Expert's Certificate; Rule 4.1.01 codifies the expert's duty itself.

[4] *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.*, [1993] F.S.R. 563, [1993] 2 Lloyd's Rep. 68 (Q.B.D.), rev'd on other grounds [1995] 1 Lloyd's Rep 455 (C.A. Civ.) [*Ikarian Reefer*], The Society's Book of Authorities ("BOA"), Tab 27.

(c) 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.

(d) An expert witness should make it clear when a particular question or issue falls outside his expertise.

(e) If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

(f) If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

(g) Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.[5]

15. Justice Cresswell's formulation of a testifying expert's common law duties has been repeatedly cited with approval by courts in Ontario and other Canadian provinces, both in the decades before the enactment of the 2010 amendments,[6] and in the period after the

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[5] *Ikarian Reefer*, [1993] F.S.R. 563 at 565-66, BOA, Tab 27.

[6] See *e.g. Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et al* (1998), 40 O.R. (3d) 456 at para. 10 (Gen. Div.) (QL), BOA, Tab 13; *Frazer v. Haukioja*, [2008] O.J. No. 3277 at para. 141 (S.C.J.) (QL), BOA, Tab 14; *Baynton v. Rayner*, 1995 CarswellOnt 2820 at para. 116 (Gen. Div.), BOA, Tab 6; *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.*, [2001] O.J. No. 5124 at para. 24 (S.C.J.), BOA, Tab 9; *Dansereau Estate v. Vallee*, [1999] A.J. No. 878 at para. 136 (Q.B.) (QL), BOA, Tab 10; *Jacobson v. Sveen*, 2000 ABQB 215 at paras. 32-36, BOA, Tab 19; *Kozak v. Funk*, [1995] S.J. No. 569 at paras. 16 and 27 (Q.B.) (QL), BOA, Tab 20; *Martin v. Inglis*, [2002] S.J. No. 251 at para. 118 (Q.B.) (QL), BOA, Tab 24; *Merck & Co. v. Apotex*, 2004 FC 567 at para. 16, BOA, Tab 26; *Perricone v. Baldassarra*, [1994] O.J. No. 2199 at para. 21 (Gen. Div.) (QL), BOA, Tab 29; *Peter Lombardi Construction Inc. v. Colonnade Investments Inc.*, [1999] O.J. No. 3752 at para. 512 (S.C.J.) (QL), BOA, Tab 30; *Rudberg v. Ishaky*, [2000] O.J. No. 376 at para. 233 (S.C.J.) (QL), BOA, Tab 34; *Teichgraber v. Gallant*, [2003] A.J. No. 70 at para. 88 (Q.B.) (QL), BOA, Tab 35; *R v. Inco Ltd.*, 2006 CarswellOnt 2820 at para. 41 (S.C.J.) (WLeC), BOA, Tab 32; *Dimplex North America Ltd. v. CFM Corp.*, [2006] F.C.J. No. 776 at para. 43 (QL), BOA, Tab 11; *Ontario (Superintendent of Financial Services) v. Norton,* 2007 CarswellOnt 1425 para. 57 (Ont. Ct. J.) (WLeC), BOA, Tab 28; *R v. Norton*, 2007 ONCJ 414 at para. 56, BOA, Tab 33; *Lundbeck Canada Inc. v. Canada (Health)*, 2009 FC 146 at para. 75, BOA, Tab 23; *Widelitz v. Robertson*, 2009 PESC 21 at para. 35, BOA, Tab 36; *Posthumous v. Foubert*, 2009 MBQB

amendments came into force, where it has been cited alongside the amended Rule 53.03 and the new Rule 4.1.01.[7]

16. It is apparent from a review of this jurisprudence that each of the three aspects[8] to the expert's duty codified in Rule 4.1.01 was a duty imposed by common law prior to the 2010 amendments.[9]

(b) Judicial interpretation of the 2010 amendments

17. Whether the 2010 amendments effected a change in testifying experts' duties or not has been the subject of some judicial consideration. Not all has trended in the same direction,[10] but the weight of authority holds that the duties the Rules now expressly impose

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206 at para. 41, BOA, Tab 31; and *Eli Lilly v. Apotex*, [2009] F.C.J. No. 1229 at para. 62 (QL), BOA, Tab 12.

[7] See *e.g. Bailey v. Barbour,* 2013 ONSC 4731 at paras. 17-23, BOA, Tab 3; *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316 at para. 96, BOA, Tab 22; *Henderson v. Risi*, 2012 ONSC 3459, BOA, Tab 17; *Beasley v. Barrand*, 2010 ONSC 2095 at paras. 44-65, BOA, Tab 7.

[8] Those three aspects are:

> Rule 4.1.01(1) ...
>
> (a) "to provide opinion evidence that is fair, objective and non-partisan,"
>
> (b) "to provide opinion evidence that is related only to matters that are within the expert's area of expertise," and
>
> (c) "to provide such additional assistance as the court may reasonably require to determine the matter in issue."

[9] For example, with respect to Rule 4.1.01(1)(a): "to provide opinion evidence that is fair, objective and non-partisan," see *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 at para. 5 (S.C.J.), BOA, Tab 5: "experts must be neutral and objective." With respect to Rule 4.1.01(1)(b): "to provide opinion evidence that is related only to matters that are within the expert's area of expertise," see *Perricone v. Baldassarra*, [1994] O.J. No. 2199 (Gen. Div.) at para. 21 (citing *Ikarian Reefer*), BOA, Tab 29: "An expert should make it clear when a particular question or issue falls outside of the expert's expertise." With respect to Rule 4.1.01(1)(c): "to provide such additional assistance as the court may reasonably require to determine the matter in issue," see *Alfano (Trustee of) v. Piersanti*, [2009] O.J. No. 1224 at para. 6 (S.C.J.), BOA, Tab 2: "the expert, although retained by the clients, assists the court."

[10] In particular, see Master Short's trilogy of decisions at *Giaro v. Cunningham*, 2010 ONSC 4607 (Master), BOA, Tab 15, *Bakalenikov v. Semkiw*, 2010 ONSC 4928 (Master), BOA, Tab 4 and *Aherne v. Chang*, 2011 ONSC 2067 (Master), BOA, Tab 1 [*Aherne*]. Note, however, that, while describing the 2010 amendments as "a major sea change," (*Aherne* at para. 61) Master Short also left open the issue of whether counsel should play a role in the drafting of an expert's report: "I leave open the issue of whether that independence means that consultation between the expert and the Party, counsel, insurer or order defender or indemnifier, must be restricted to the proper and demonstrably transparent passage of information, the asking of questions and receipt of reports, answering the questions asked" (*Aherne* at paras. 58-60).

on experts are not new or different in substance than those to which experts were already bound.[11]

18. This predominant view was well summarized by Justice Lederman in *Henderson v. Risi*. In response to the express submission that, by reason of the 2010 amendments, there was now a higher level of duty on an expert in Ontario than existed at common law, Justice Lederman held that the 2010 amendments "impose no higher duties than already existed at common law on an expert to provide opinion evidence that is fair, objective and non-partisan. The purpose of the reform was to remind experts of their already existing obligations."[12]

19. To the extent, therefore, that Justice Wilson perceived a need for a change in established practice based on a change in the nature of experts' duties, the basis for her conclusion was erroneous.

2. Advocates have a duty to consult with and assist experts in preparing their reports and testimony where appropriate

20. Like experts, advocates have a co-extensive duty to assist the court by presenting the court, where appropriate, with expert evidence that is:

(a) independent and objective,

(b) relevant to the matters at issue in the proceeding in question,

(c) reliable, and

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[11] *Brandiferri v. Wawanesa Mutual Insurance Co.*, 2011 ONSC 3200, BOA, Tab 8; *Beasley v. Barrand*, 2010 ONSC 2095 at paras. 44-65, BOA, Tab 7; *McNeil v. Filthaut*, 2011 ONSC 2165, BOA, Tab 25; *Grigoroff v. Wawanesa Mutual Insurance Co.*, 2011 ONSC 2279, BOA, Tab 16; *Henderson v. Risi*, 2012 ONSC 3459, BOA, Tab 17; *Lee (Litigation Guardian of) v. Toronto District School Board*, 2013 ONSC 3085, BOA, Tab 21; *Bailey v. Barbour,* 2013 ONSC 4731 at paras. 17-23, BOA, Tab 3.

[12] *Henderson v. Risi*, 2012 ONSC 3459 at para. 19, BOA, Tab 17.

(d) clear and comprehensible.[13]

21. In many cases, this duty requires an appropriate degree of consultation with testifying experts. The scope of the consultation required will vary from case to case, but in each case should be determined by the duties of both the advocate and the expert to assist the court.

22. For example, in many cases, counsel must learn about the specialized subject matter to which the opinion of the expert relates in order to identify what evidence is relevant; similarly, the expert must learn enough about the case or dispute in question, and the legal process, to understand what issues should be addressed.

23. In cases where advocates are called upon to present complicated expert evidence, the role of counsel can be critical to ensuring that the expert evidence will be readily understood by the trial judge or jury, who may have little or no background, experience, expertise, or training in the subject of the expert evidence. For example, in the context of the technical scientific evidence of forensic pathologists, the *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* suggests that counsel must properly prepare expert witnesses in order to facilitate their ability to communicate their opinions to the court.[14]

24. The Goudge Report also emphasizes the important role counsel play in ensuring the reliability of expert evidence presented to a court. In that context, the Goudge Report

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[13] Consider, for example, Rule 2.01(2) of the *Rules of Professional Conduct*, requiring lawyers to perform services to the standard of a competent lawyer, and Rule 4.01(1), requiring advocates to represent clients resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

[14] *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General, 2008), pp. 47-48 ["Goudge Report"], BOA, Tab 18.

suggests that prosecutors have an obligation to meet with experts in advance of court proceedings in order to understand the limitations of the witness's expertise and opinions.[15]

25. The form, format, and technical or legal language of an expert report are also areas on which it may be helpful or necessary for counsel and expert to confer. Some expert witnesses have more experience in preparing reports and in testifying than others; some experts are more capable than others of preparing properly organized, succinct, and cogent reports that appropriately address the relevant legal issues. Many experts will need input from counsel to comply with the particular requirements of the jurisdiction in which their evidence is sought to be tendered.

26. In many cases, and invariably in complex cases, a report prepared by a testifying expert without the involvement or assistance of counsel will be of limited benefit; it risks being confusing, difficult to understand, and at worst, misleading. A report that is poorly organized or written, mistakenly omits important facts or assumptions, misstates the relevant issues or fails to address a relevant matter that the expert has been asked to opine on may unintentionally restrict the expert's testimony, may expose the expert to unnecessary criticism, and may be unfairly prejudicial to the proper presentation of the client's case.

27. Communication by counsel with the expert witness to achieve these objectives, which serve the interests of justice, would not create a reasonable apprehension of bias in a reasonable person who was fully informed.

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[15] *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General, 2008), p. 455, BOA, Tab 18.

28. Adherence to the requirements set out by Justice Wilson would have the effect of favouring, as experts, "professional experts," and discouraging inexperienced experts from participating in court proceedings. The requirements would also likely lead to an increase in the number of cases where parties must abandon their reliance on an expert who prepares a poorly written, disorganized, or non-responsive report, adding to the cost and expense of litigation, and favouring more affluent litigants over the less affluent. Access to justice will be impaired, and members of the judiciary will be deprived of potentially useful and informative expert evidence.

29. Part of the problem with a blanket prohibition on consultations between counsel and an expert is that it is a "one size fits all" approach that is discordant with the reality of modern civil and criminal litigation. Advocates in different practice areas who appear before different courts and tribunals to litigate different types of cases follow different practices when dealing with testifying experts, which frequently reflect the particular challenges of the relevant subject area of expertise.

30. Thus, in relatively straightforward cases, at least some counsel may have almost no contact with experts between the date the experts are retained and the time they testify at trial. By contrast, many lawyers who specialize in intellectual property cases play an active role in drafting affidavits of experts who testify in proceedings in the Federal Court of Canada.[16] Similarly, many family lawyers have ongoing and relatively extensive interactions with experts throughout their cases, and work collaboratively with them in case conferences, mediations and contested hearings. In commercial litigation, experts are frequently accountants, economists, scientists or engineers who may well be inexperienced

[16] The *Federal Court Rules* contemplate that expert evidence be delivered by affidavit: Rule 52.2.

in giving evidence and have a limited knowledge of the legal process. Typically, inexperienced experts require higher levels of instruction by and consultation with counsel.

31. At the same time, the expert's and counsel's respective duties prescribe boundaries to the communications between the two, to avoid any risk of impairing or undermining the expert's independence and objectivity. This mischief remains an important concern, but one that is poorly addressed through the blanket prohibition on consultations between counsel and an expert proposed by Justice Wilson.

32. Instead, the Society submits that maintaining institutional and public confidence in the independence and objectivity of testifying experts is best achieved by creating an appropriate level of transparency about the role of the expert and the process that produced his or her report. This transparency can be achieved by:

(a) requiring experts to acknowledge their overriding duty to the court (codified in Rule 4.1.01, Rule 53.03, and the expert's certificate), and

(b) requiring that counsel be prepared to disclose any communication with a testifying expert that:

(i) relates to compensation for the expert's analysis or testimony

(ii) identifies facts or data that the expert considered in forming the opinions to be expressed

(iii) identifies assumptions that the advocate provided or the expert relied on, or

(iv) pertains to the contents of the expert's report or to the substance of the expert's evidence.

B. The Principles

33. The *Principles* developed by the Society reflect the views of a broad range of senior advocates. They have been developed to provide guidance to members of the bar about how to discharge their obligations to present evidence effectively and efficiently while avoiding interference with an expert's independence.

34. It is integral to the *Principles* that advocates play a crucial role *as a bridge between experts and the justice system*. Advocates' duties require them not only to seek out and present expert evidence that is independent and objective, relevant, reliable, comprehensible, and of assistance to the court or tribunal, but also to ensure that experts understand their role within the justice system and the duties expected of them when they appear before a court or tribunal.

35. It is hoped that these *Principles* will be of assistance to the court as it considers the appropriate scope of communication between counsel and a testifying expert.

C. Westerhof and McCallum

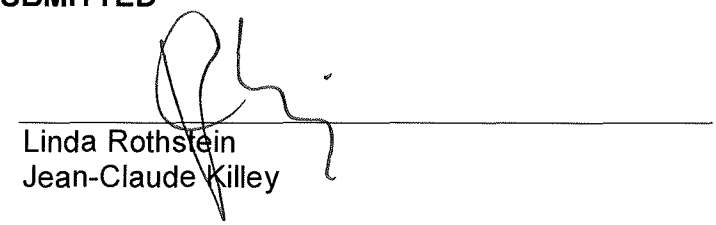
36. In *Westerhof* and *McCallum*, the courts commented on the extent to which a party's treating physician could give evidence about his or her opinions without complying with Rule 53.03.

37. In the Society's submission, opinion evidence ought generally be tendered in compliance with Rule 53.03; the question is not the scope of the witness's relationship to the proffering party, but the nature of the evidence (fact or opinion) being tendered. Whether

any particular proposed evidence constitutes fact or opinion is highly context-specific, and can in many cases be difficult to determine. It will be for trial judges to balance, in the context of each particular case, the relevant fairness considerations, including fairness to the proffering party seeking to rely on the evidence, and fairness to the opposing party in having the protections of Rule 53.03 and an appropriate opportunity to test the evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 15, 2014



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TAB A

SCHEDULE A – LIST OF AUTHORITIES

1. *Aherne v. Chang*, 2011 ONSC 2067
2. *Alfano (Trustee of) v. Piersanti*, [2009] O.J. No. 1224 6 (S.C.J.)
3. *Bailey v. Barbour,* 2013 ONSC 4731
4. *Bakalenikov v. Semkiw*, 2010 ONSC 4928
5. *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (S.C.J.)
6. *Baynton v. Rayner*, 1995 CarswellOnt 2820 (Gen. Div.)
7. *Beasley v. Barrand*, 2010 ONSC 2095
8. *Brandiferri v. Wawanesa Mutual Insurance Co.*, 2011 ONSC 3200
9. *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.*, [2001] O.J. No. 5124 (S.C.J.)
10. *Dansereau Estate v. Vallee*, [1999] A.J. No. 878 (Q.B.) (QL)
11. *Dimplex North America Ltd. v. CFM Corp.*, [2006] F.C.J. No. 776 (QL)
12. *Eli Lilly v. Apotex*, [2009] F.C.J. No. 1229 (QL)
13. *Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et al* (1998), 40 O.R. (3d) 456 (Gen. Div.) (QL)
14. *Frazer v. Haukioja*, [2008] O.J. No. 3277 (S.C.J.) (QL)
15. *Giaro v. Cunningham*, 2010 ONSC 4607
16. *Grigoroff v. Wawanesa Mutual Insurance Co.*, 2011 ONSC 2279
17. *Henderson v. Risi*, 2012 ONSC 3459
18. *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General, 2008)
19. *Jacobson v. Sveen*, 2000 ABQB 215
20. *Kozak v. Funk*, [1995] S.J. No. 569 (Q.B.) (QL)
21. *Lee (Litigation Guardian of) v. Toronto District School Board*, 2013 ONSC 3085
22. *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316 96
23. *Lundbeck Canada Inc. v. Canada (Health)*, 2009 FC 146

24. *Martin v. Inglis*, [2002] S.J. No. 251 (Q.B.) (QL)

25. *McNeil v. Filthaut*, 2011 ONSC 2165

26. *Merck & Co. v. Apotex*, 2004 FC 567

27. *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.*, [1993] F.S.R. 563, [1993] 2 Lloyd's Rep. 68 (Q.B.D.), rev'd on other grounds [1995] 1 Lloyd's Rep 455 (C.A. Civ.)

28. *Ontario (Superintendent of Financial Services) v. Norton,* 2007 CarswellOnt 1425 (Ont. Ct. J.) (WLeC)

29. *Perricone v. Baldassarra*, [1994] O.J. No. 2199 (Gen. Div.) (QL)

30. *Peter Lombardi Construction Inc. v. Colonnade Investments Inc.*, [1999] O.J. No. 3752 (S.C.J.) (QL)

31. *Posthumous v. Foubert*, 2009 MBQB 206

32. *R v. Inco Ltd.*, 2006 CarswellOnt 2820 (S.C.J.) (WLeC)

33. *R v. Norton*, 2007 ONCJ 414

34. *Rudberg v. Ishaky*, [2000] O.J. No. 376 (S.C.J.) (QL)

35. *Teichgraber v. Gallant*, [2003] A.J. No. 70 (Q.B.) (QL)

36. *Widelitz v. Robertson*, 2009 PESC 21

TAB B

SCHEDULE B – STATUTORY REFERENCES

Rule 53.03 of the *Rules of Civil Procedure*

EXPERT WITNESSES

Experts' Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
    i. a description of the factual assumptions on which the opinion is based,
    ii. a description of any research conducted by the expert that led him or her to form the opinion, and
    iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48.

Schedule for Service of Reports

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the

requirements of subrules (1) and (2), unless the court orders otherwise. O. Reg. 438/08, s. 48.

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

(a) a report served under this rule; or

(b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial. O. Reg. 348/97, s. 3.

Extension or Abridgment of Time

(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,

(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or

(b) by the court, on motion.

Rule 52.2 of the *Federal Court Rules*

EXPERT WITNESSES

Expert's affidavit or statement

52.2 (1) An affidavit or statement of an expert witness shall

(*a*) set out in full the proposed evidence of the expert;

(*b*) set out the expert's qualifications and the areas in respect of which it is proposed that he or she be qualified as an expert;

(*c*) be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it; and

(*d*) in the case of a statement, be in writing, signed by the expert and accompanied by a solicitor's certificate.

Failure to comply

(2) If an expert fails to comply with the Code of Conduct for Expert Witnesses, the Court may exclude some or all of the expert's affidavit or statement.

TAB C

SCHEDULE C – PRINCIPLES

Principles Governing Communications with Testifying Experts

The Advocates' Society

June 2014

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THE ADVOCATES' SOCIETY

PRINCIPLES GOVERNING COMMUNICATIONS WITH TESTIFYING EXPERTS

OVERVIEW

For more than five hundred years, expert witnesses have played an important role in the litigation process. By at least as early as the 19th century, members of the judiciary had begun to express concerns about the objectivity and independence of experts, and about the quality and reliability of their evidence. Later, judicial concerns were expressed about the disproportionate weight likely to be given to expert evidence, particularly in jury trials.

Such concerns inevitably led to efforts to enhance the reliability of expert evidence. Thus, for more than 20 years, common law courts have insisted that experts: (i) be independent from the parties who retain them; (ii) provide objective, unbiased opinion evidence in relation only to matters within their expertise; and (iii) avoid assuming the role of advocates for the parties that retain them.[1]

On January 1, 2010, Ontario's *Rules of Civil Procedure* were amended to recognize explicitly and reinforce well-established common law principles concerning expert evidence, including the common law requirements of independence and objectivity. Pursuant to Rule 53.03, experts testifying in civil proceedings in Ontario that are governed by the *Rules* must now sign a prescribed form in which they acknowledge and undertake to abide by their important duties.[2] Similar rules have been adopted in the Federal Court, and in a number of other provinces.[3]

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1 These duties were identified by Justice Creswell in, *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.*, [1993] 2 Lloyd's Rep. 68 (Q.B.D.) ["*Ikarian Reefer*"], rev'g on other grounds [1995] 1 Lloyd's Rep 455 (C.A. Civ.). The Court of Appeal affirmed Justice Creswell's statements regarding the duties of testifying experts. A number of Canadian courts have cited the *Ikarian Reefer* with approval and adopted its formulation of the duties of expert witnesses. See, for example, *Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et al*, (1998) 40 O.R. (3d) 456 at 3 (Gen. Div.) (QL); *Jacobson v. Sveen*, 2000 ABQB 215 at paras. 32-36 ["*Jacobson*"]; *Baynton v. Rayner*, [1995] O.J. No. 1617 at para. 124 (Gen. Div.) (QL); *Kozak v. Funk*, [1995] S.J. No. 569 at para. 16 (Q.B.) (QL); *Lundbeck Canada Inc. v. Canada* (Minister of Health), 2009 FC 164 at para. 75; *Widelitz v. Robertson*, 2009 PESC 21 at para. 35; *Posthumous v. Foubert*, 2009 MBQB 206 at para. 41.

2 R.R.O. 1990, Reg 194, rr. 4.1, 53.03 and Form 53 ["*Ontario Rules*"].

3 See Federal Court, *Federal Courts Rules*, r. 52.1, Form 52.2 and Schedule to Rule 52.2 , "Code of Conduct for Expert Witnesses" ["*Federal Rules*"]; Nova Scotia, *Civil Procedure Rules Nova Scotia*, r. 55 ["*N.S. Rules*"]; Prince Edward Island, *Supreme Court Rules of Prince Edward Island*, r. 53 ["*P.E.I. Rules*"]; Yukon Territories, *Rules of Court*, r. 34(23) ["*Yukon Rules*"]; Saskatchewan, *Queen's Bench Rules*, r. 5-37 ["*Saskatchewan Rules*"]; and British Columbia, *Supreme Court Civil Rules*, r. 11-2 ["*B.C. Rules*"].

From time to time, decisions have been rendered that call into question the acceptable bounds of conduct that counsel must observe in interacting with experts, including in the preparation of experts' reports and affidavits and in preparing experts to testify at hearings or trials. Moreover, the law in this area is somewhat unsettled, and varies from jurisdiction to jurisdiction. Confusion and concerns have arisen among members of the legal profession and among expert witnesses. Requests have been made for clarity and guidance.

The following *Principles Governing Communications With Testifying Experts* (the "*Principles*") have been developed by The Advocates' Society to provide guidance to members of the profession. Drafts of these *Principles* were developed by a Task Force of the Advocates' Society that was comprised of more than twenty senior advocates who practice in a wide variety of areas, including family, personal injury, intellectual property, corporate commercial, administrative and criminal law. The drafts were then reviewed and commented on by members of the Board of Directors of the Advocates' Society who serve on the Society's Standing Committee on Advocacy and Practice, as well as by senior advocates in a number of law firms and by members of the Executive of the Ontario Trial Lawyers Association and Intellectual Property Section of the Canadian Bar Association. Modifications were made to reflect comments provided during this consultation process. The *Principles* were then reviewed and approved by the Board of Directors of the Advocates' Society in May, 2014.

The *Principles* are not intended to address all aspects of the retention and preparation of expert witnesses. Numerous other works have addressed those issues. Rather, the *Principles* are intended to address the conduct of advocates in their dealings with experts with a view to ensuring that advocates can fulfill their important duties to their clients and to courts and tribunals without compromising the independence or objectivity of testifying experts or impairing the quality of their evidence. The *Principles* are offered with the expectation that adherence to the *Principles* will serve to safeguard appropriately the independence and objectivity of expert witnesses while supporting the proper and efficient administration of justice.

PRINCIPLES

PRINCIPLE 1

An advocate has a duty to present expert evidence that is: (i) relevant to the matters at issue in the proceeding in question; (ii) reliable; and (iii) clear and comprehensible. An appropriate degree of consultation with testifying experts is essential to fulfilling this duty in many cases. An advocate may therefore consult with experts, including at the stage of preparing expert reports or affidavits, and in preparing experts to testify during trials or hearings.[4] An advocate is not required to abandon the preparation of an expert report or affidavit entirely to an expert witness, and instead can have appropriate input into the format and content of an expert's report or affidavit before it is finalized and delivered.

Commentary

Lawyers acting as advocates have a duty to represent their clients resolutely and honourably within the limits of the law, while treating courts and tribunals with candour, fairness, courtesy and respect.[5] It is axiomatic that to meet this duty the advocate must strive to present relevant evidence to courts and tribunals in a manner that is fair, clear and persuasive. Moreover, counsel have an important duty to ensure that expert reports comply with the formal and substantive requirements imposed by the procedural rules of the jurisdictions in which they practice.[6] The effective and efficient presentation of evidence is essential to the proper administration of justice in an adversarial system and is of paramount importance both to parties and to the court or tribunal. The advocate's role in presenting complex evidence is particularly important with respect to expert evidence, the purpose of which is to assist the court or tribunal by providing it with specialized knowledge on an objective and impartial basis. In this context, advocates play an important role in presenting complicated evidence of a technical nature in a manner that ensures it is properly understood by the court or tribunal.

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4 See *MedImmune Limited v. Novartis Pharmaceuticals UK Limited, Medical Research Council*, [2011] EWHC 1669 at paras. 99-114 (Pat.) ["*MedImmune*"]. Among other things, *MedImmune* holds that consultation is entirely proper between an advocate and an expert witness. This is a patent case, but the principles stated there are of more general application, particularly in cases involving complex expert evidence.

5 See Law Society of Upper Canada, *Rules of Professional Conduct*, r. 4.01(1).

6 See the recent decision of Justice Brown in *(Re) Champion Iron Mines Limited*, 2014 ONSC 1988 at paras. 16-19. This proceeding concerned the approval of a plan of arrangement. Justice Brown found that a fairness opinion provided by a financial advisor in the form usually followed when providing advice to Boards of Directors in corporate transactions did not meet the requirements for expert evidence under Rules 53.03(2.1) and Rule 4.1 of the *Ontario Rules* and placed no weight on the opinion. See also *Dr. Andrew Hokhold Inc. v. Wells*, [2005] B.C.J. No. 2147 at para. 11 (S.C.) (QL).

Courts and tribunals depend on advocates to perform this important duty. This can, and indeed must, be achieved without changing the substance of the evidence of testifying experts in an impermissible fashion.[7]

The delivery of an expert's report or affidavit is an important part of the presentation of the client's case. In many cases, reports or affidavits of experts are introduced into evidence, marked as exhibits and play significant roles in the decision making process. Even in circumstances where an expert's report or affidavit serves the limited purpose of disclosing the expert's opinion, and is not entered as the evidence of the expert, the report or affidavit may be used for impeachment purposes and may be relied upon by the court in assessing the admissibility or weight of the expert's evidence. Unbiased reports of independent experts may also be of assistance to clients in considering settlement options, and to advocates in recommending proposed settlements to their clients. An expert's report or affidavit that is poorly organized or written, mistakenly omits important facts or assumptions, misstates the relevant issues or fails to address a relevant matter that the expert has been asked to opine on may unintentionally restrict the expert's testimony, may expose the expert to unnecessary criticism, and may be unfairly prejudicial to the proper presentation of the client's case. Moreover, reports of that nature will be of limited assistance to the court or tribunal, and may give rise to frustration, inefficiency and delay. An advocate must therefore ensure that the expert's report or affidavit is focused, intelligible and properly responsive to the questions posed to the expert, and that any stated factual premises or assumptions are accurate. In many cases, this cannot be achieved without a reasonable degree of consultation between the advocate and the expert in the period before the expert's report or affidavit is finalized and delivered.

PRINCIPLE 2

At the outset of any expert engagement, an advocate should ensure that the expert witness is fully informed of the expert's role and of the nature and content of the expert's duties, including the requirements of independence and objectivity.

Commentary

An advocate should ensure that from the outset of an engagement the expert witness is aware that the role of the expert is to assist the court fairly and objectively.[8] Many

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7 *Stephen v. Stephen*, [1999] S.J. No. 479 at para. 26 (Q.B.) (QL) and *Fournier Pharma Inc. v. Canada (Minister of Health)*, 2012 FC 740. See also *Surrey Credit Union v. Wilson* 1990 CarswellBC 94 at para. 25 (S.C.) (WLeC) ["*Surrey*"] and *Vancouver Community College v. Phillips, Barratt*, 1988 CarswellBC 189 at para. 41 (S.C.) (WLeC) ["*Vancouver*"].

experienced expert witnesses will be well aware of their duties of independence and objectivity. These duties may be unfamiliar to experts who have not previously been involved in litigation, however, and even experts who are familiar with these duties may not fully understand the content of the duties or the consequences associated with their breach. Accordingly, an advocate should ensure that testifying experts have a proper and early appreciation of their duties, and should thereafter remain vigilant to ensure that those duties are complied with. At or near the outset of an expert's engagement, the advocate should provide the expert with a copy of any procedural rule, code of conduct or form of "expert's certificate" related to the expert's duties that may apply in the particular proceeding.[9] The advocate should explain to the expert the nature and content of the expert's duties,[10] have the expert acknowledge that she understands those duties and ask the expert to undertake to abide by them. In this regard, the advocate should consider having the expert execute the certificate of independence and objectivity now provided for in applicable procedural rules or Practice Directions at or near the outset of an engagement, rather than at the time the expert's report is finalized and delivered.[11]

The advocate should explain to the expert that her evidence may be ruled inadmissible or may be given little or no weight if the expert is shown to lack independence or objectivity. The advocate should also discuss with the expert those matters that are generally considered to be indicia of a lack of independence or objectivity, including the selective use of information to support tenuous opinions, the expression of opinions that lie beyond the scope of the expert's expertise, the use by the expert of language that is inflammatory, argumentative or otherwise inappropriate, or other conduct that casts the expert into the role of being an advocate for the party that retained them.[12]

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8 *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297 at para. 108; *Alfano (Trustee of) v. Piersanti*, [2009] O.J. No. 1224 at para. 6 (S.C.J.) (QL); and *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 at para. 5 (S.C.J.) (QL).

9 See, for example, *Federal Rules*, *supra* note 3 r. 52.2; *Ontario Rules*, *supra* note 2 r. 53; *B.C. Rules*, *supra* note 3 r. 11-2; *N.S. Rules*, *supra* note 3 r. 55; *P.E.I. Rules*, *supra* note 3 r. 53; *Yukon Rules*, *supra* note 3 r. 34(23); and *Saskatchewan Rules*, *supra* note 3 r. 5-37.

10 As noted above, a summary of the duties adopted by Canadian courts can be found in the *Ikarian Reefer*, *supra* note 1.

11 See, for example, the Expert's Certificate now required by Rule 53.03, *Ontario Rules*, *supra* note 2. Advocates might also consider providing testifying experts with copies of these *Principles* at the outset of engagements. See also *Saint Honore Cake Shop Limited v. Cheung's Bakery Products Ltd.*, 2013 FC 935 at paras. 17-19, where the court found the affidavit of an expert witness inadmissible after the expert admitted that she had never seen the Code of Conduct outlined in the Rules.

12 See for example, *Gould v. Western Coal Corporation*, 2012 ONSC 5184 at paras. 81-95.

PRINCIPLE 3

In fulfilling the advocate's duty to present clear, comprehensible and relevant expert evidence, the advocate should not communicate with an expert witness in any manner likely to interfere with the expert's duties of independence and objectivity.

Commentary

Advocates must guard at all times against the risk of impairing or undermining the expert's independence or objectivity. An expert's opinion must be the result of the expert's independent analysis, observations and conclusions. The opinion of a testifying expert should not be influenced by the exigencies of litigation, or by pressure from the advocate or the advocate's client. Allowing or causing the expert to lose her independence or objectivity does a disservice to the expert, the client and the court. It does the expert a disservice because the expert may be subject to criticism during cross-examination and in the court's judgment as a result. It does the client a disservice because partisan expert evidence may well be ruled inadmissible, or given little or no weight in the court's determination of the client's case.[13] It does the court a disservice by wasting the court's time and resources, by making the decision making process more difficult than it should be, and by depriving the court of potentially useful and important evidence that could otherwise assist the court in rendering a fair and informed decision.

An advocate must be particularly careful not to persuade, or be seen to have persuaded, an expert to express opinions that the expert does not genuinely share or believe. Advocates should be particularly careful, in this regard, when engaged in an iterative process with testifying experts at the stage of preparing reports or affidavits.[14]

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13 *MedImmune*, *supra* note 4.

14 *Eli Lilly v. Apotex*, [2009] F.C.J. No. 1229 at para. 62 (QL); *Vancouver, supra* note 7 at para. 41; and *Squamish Indian Band v. Canada*, [2000] F.C.J. No. 1568 at para. 49 (QL).

PRINCIPLE 4

The appropriate degree of consultation between an advocate and a testifying expert, and the appropriate degree of an advocate's involvement in the preparation of an expert's report or affidavit, will depend on the nature and complexity of the case in question, the level of experience of the expert, the nature of the witness's expertise and other relevant circumstances of the case.[15]

Commentary

In many cases advocates can, and indeed must, play an important role in the presentation of complex expert evidence to ensure that it will be readily understood, and therefore of assistance to the court or tribunal. Any rule that has the purpose or effect of precluding advocates from reviewing or commenting on draft reports or affidavits of experts in all cases, regardless of the subject matter, complexity or intended use of the expert evidence at issue, would constitute a marked departure from the practice currently followed by advocates in a wide range of different practice areas, and would have a series of unfortunate consequences.[16] Among other things, such a rule would place a premium on "professional experts" who have testified on numerous occasions, are intimately familiar with the litigation process and are therefore experienced in drafting reports for litigation. It would deter parties from retaining experts who have little or no experience in testifying, and would deter such experts from testifying, if asked. Moreover, such a rule could have the effect of causing the withdrawal or abandonment of experts after poorly written, disorganized or incomplete reports are finalized without input from counsel. This would inevitably add to the cost and expense of litigation and would favour affluent litigants over those who are less affluent. Access to justice would be impaired. The courts could be deprived of helpful and informative expert evidence that would assist in the decision making process. The hearing process would be rendered less efficient and effective.

An appropriate educational dialogue between the expert and the advocate may be essential to ensure that an expert's evidence will be of assistance to the court or tribunal, and can be adduced effectively and efficiently. In many cases, counsel must learn about the scientific, economic or other subject to which the evidence of the expert relates in order to identify what is relevant, and the expert must learn enough about the case or dispute in question, and the legal process, to understand what issues should be addressed.[17] Some expert witnesses have more experience in preparing reports or

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15 *MedImmune*, *supra* note 4.

16 *Surrey*, *supra* note 7 at para. 25; *Vancouver*, *supra* note 7 at para. 40 and *Mendlowitz v. Chiang (Berenblut)*, 2011 ONSC 2341.

17 *MedImmune*, *supra* note 4. See also *Dimplex North America Ltd., v. CFM Corp.*, [2006] F.C.J. No. 776 at paras. 43-44 (QL). In this case, the court recognized that appropriate collaboration

affidavits and in testifying than others, and some experts are more capable than others of preparing properly organized, succinct and cogent reports or affidavits. Moreover, there is a wide variation in the complexity of expert evidence in particular cases. Expert witnesses in complex litigation are frequently leading economists, accountants, engineers or scientists. In many cases they will not have previously given expert evidence in litigation, or may have done so in only a small number of cases. Many experts have little or no knowledge of the relevant legal process. Some foreign experts, regardless of the expert qualifications, may lack a command of English or French. For all of these reasons, expert witnesses will frequently require consultation with, and instruction by, the advocate before finalizing their reports or affidavits, rather than after.[18]

In some complex cases, particularly where the expert's evidence is to be entered in by way of affidavit (or other written form), the above considerations may make it appropriate for an advocate to play a greater role in the preparation of an expert's affidavit (or report).[19] The advocate must always ensure that the resulting affidavit or report represents fairly and accurately the independent analysis, observations and conclusions of the expert.[20]

In some cases the parties will be sufficiently well-funded, and the issues will be sufficiently complex, that an advocate's client will elect to retain separate testifying and consulting experts. Consulting experts do not testify. Instead, they assist in tactical or strategic deliberations and other matters. This can serve to reduce the degree of

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between counsel and expert witnesses occurs to "conform [reports] to varying legal requirements in different jurisdictions or to focus the report on the issues".

18 *MedImmune*, *supra* note 4.

19 This occurs, for instance, in intellectual property cases in the Federal Court of Canada. See also *Ebrahim v. Continental Precious Metals Inc.*, 2012 ONSC 1123, at paras. 59-75. In the context of a refusals motion in a commercial case in the Ontario Superior Court, Justice Brown stated that it was "unusual, to say the least, to come across an expert who has not drafted his own report, in this case in affidavit form". Justice Brown therefore required the production of communications between the testifying expert and counsel.

20 *MedImmune*, *supra* note 4 at para. 110; *Tsilhqot'in First Nation v. Canada (Attorney General)*, [2005] B.C.J. No. 196 at paras. 30-34 (Sup. Ct.) (QL). An advocate is expected to take professional care in the preparation of affidavit evidence. See *Inspiration Management v. McDermott*, [1989] B.C.J. No. 1003 at para. 59 (C.A.) (QL). Referring to the summary trial procedure, the British Columbia Court of Appeal stated, "it should not be good enough for counsel to throw up volumes of ill-considered affidavits and exhibits which do not squarely raise or answer the real issues in the case. The preparation of affidavits for an application or defence under R.18A is a serious matter which requires the careful professional attention of counsel". The fact that counsel has been directly involved in the preparation of an expert's report does not render the report inadmissible, but where an expert testified that his report was only "reasonably accurate", this was found to detract from the reliability of the report: *Brock Estate v. Crowell*, [2013] N.S.J. No. 505 at para. 88 (S.C.) (QL).

consultation required as between the advocate and testifying experts. Many litigants will not have the luxury of retaining dual experts, however, and the retainer of dual experts should not be essential to the proper conduct of any proceeding. Accordingly, where a client has elected not to retain dual experts, a greater degree of consultation with a testifying expert may be necessary and appropriate.

In some cases, the expert will be experienced in giving opinion evidence, or the factual premises and issues upon which their opinion will be given will be relatively straightforward. In such cases, consultation between the advocate and the expert may not be necessary and might be seen as impairing the expert's objectivity and independence.

PRINCIPLE 5

An advocate should ensure that an expert has a clear understanding of the issue on which the expert has been asked to opine. An advocate should also ensure that the expert is provided with all documentation and information relevant to the issue they have been asked to opine on, regardless of whether that documentation or information is helpful or harmful to their client's case.

Commentary

Advocates must treat expert witnesses fairly and with appropriate candour. Among other things, advocates must ensure that an expert witness receives all relevant documentation and information in order to ensure that the expert is in a position to formulate an independent and objective opinion on a properly informed basis. Depriving testifying experts of documentation or information that is relevant to the issue they have been asked to opine on is wrong for many reasons, and may well expose the expert and the advocate to serious criticism. Conduct of this nature breaches the advocate's duties to the court, as well as to the advocate's client.[21]

Moreover, advocates should ensure that expert witnesses understand that they are able to probe and question information and assumptions provided to them before they complete their analysis and express their opinions. Questions posed to advocates or their clients by testifying experts should be responded to properly and on a timely basis.

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[21] *Livent v. Deloitte*, [2014] O.J. No. 1635 at paras. 70 and 72 (S.C.J.) (QL).

PRINCIPLE 6

An advocate should take reasonable steps to protect a testifying expert witness from unnecessary criticism.

Commentary

Different courts and tribunals have different practices and requirements with respect to the disclosure by testifying experts of draft reports, working papers and correspondence. Advocates should generally err on the side of caution and proceed on the basis that disclosure of this nature will be required. The advocate should take reasonable steps to reduce the risk that extensive changes will have to be made to draft reports or affidavits. In complex cases, the advocate should generally discourage an expert from preparing any draft report until the advocate is satisfied that the expert: (a) has a proper understanding of the issue upon which the expert will offer her opinion; (b) understands the facts and assumptions upon which the opinion will be based; (c) has been provided with all documentation and information relevant to the opinion sought; and (d) will confine her analysis, observations and opinions to matters that lie within the expert's area of expertise. The advocate should also discuss with the expert in advance the expected structure and organization of the report. The expert should be reminded that they are obligated to assist the court fairly and objectively.

An advocate should be prepared to disclose any communication with a testifying expert that: (i) relates to compensation for the expert's analysis or testimony; (ii) identifies facts or data that the expert considered in forming the opinions to be expressed; (iii) identifies assumptions that the advocate provided or the expert relied on in forming the opinions to be expressed; [22] or (iv) pertains to the contents to the expert's report or affidavit or to the substance of the expert's evidence. Advocates must be careful not to compromise the independence or objectivity of testifying experts, or to expose them to unnecessary criticism, by communicating with them in a careless, imprudent or improper manner.

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[22] Consider Rule 26(b)(4)(c), *United States Federal Rules of Civil Procedure* ("F.R.C.P").

PRINCIPLE 7

An advocate should inform the expert of the possibility that the expert's file will be disclosed, and should advise the expert witness not to destroy relevant records.

Commentary

An advocate should inform an expert witness at the outset of the engagement that the contents of the expert's file may ultimately be disclosed to opposing parties, as well as to the court or tribunal in question.

The expert should be advised not to destroy relevant records, and should also be told that the destruction of records concerning the expert's retainer, the expert's analysis or findings, the expert's communications with the advocate or the advocate's client or the substance of the expert's evidence may be treated with disfavour by the court or tribunal. This could result in, among other things, adverse findings of credibility, the drawing of adverse inferences and the exclusion of otherwise admissible evidence.

PRINCIPLE 8

At the outset of the expert's engagement, an advocate should inform the expert of the applicable rules governing the confidentiality of documentation and information provided to the expert.

Commentary

While many experienced experts will assume that documentation or information provided to them by an advocate should be treated in a confidential manner, less experienced experts may not be aware of special rules that govern the confidentiality and use of documentation or information disclosed during the litigation process, including at discoveries. A breach of these rules may result in prejudice to other parties to the proceeding in question and to the client, and may also expose the expert to criticism. For these reasons, an advocate should make the expert aware of the applicable rules at the outset of the engagement. Examples of such rules include the common law implied undertaking rule, the deemed undertaking rule contained in the procedural rules of a number of provinces (including Rule 30.1 in Ontario) and the secrecy provisions contained in most provincial securities legislation (including section 16 of the *Securities Act* of Ontario).[23]

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[23] See e.g. the secrecy provisions in the following: R.S.O. 1990, c. S.5, s. 16; British Columbia *Securities Act*, R.S.B.C. c. 418, s. 148; Manitoba *The Securities Act*, C.C.S.M. c S50, s. 24(1); Saskatchewan *Securities Act, 1988*, S.S. 1988-89, c-S 42.2, s. 15; Nova Scotia *Securities Act*, R.S.N.S. c. 418, s. 29A; Quebec *Securities Act,* R.S.Q. c. V-1.1, s. 245; New Brunswick

PRINCIPLE 9

In appropriate cases, an advocate should consider an agreement with opposing counsel related to the non-disclosure of draft expert reports and communications with experts.

Commentary

An appropriate degree of consultation between an advocate and an expert witness normally is beneficial to both sides in a dispute and is consistent with the proper and efficient administration of justice. Moreover, if counsel for one party to a dispute demands production of the files of experts, counsel for other parties in the same proceedings will likely follow suit. Cross-examination may ensue that in some cases will be time-consuming but bear little, if any, fruit. In other cases, cross-examination on the contents of an expert's file may be important in demonstrating a lack of objectivity or independence. As the cost, expense and delays associated with contested litigation have continued to escalate, courts have become increasingly insistent that counsel conduct cases on a reasonably constrained and proportional basis. For all of these reasons, in appropriate cases an advocate should consider entering into an agreement with opposing counsel prior to trials or contested hearings regarding such matters as agreed limits on disclosure of draft reports and communications with experts, and limits on demands for production of the files of experts. Agreements of this nature have been entered into from time-to-time in complex commercial cases, and are consistent with existing practice, procedural rules or jurisprudence in some jurisdictions.[24] Such agreements should reflect these *Principles*.

Securities Act, S.N.B. c. S-5.5, s. 177; Alberta *Securities Act*, R.S.A. 2000, c. S-4, s. 45; Prince Edward Island *Securities Act*, R.S.P.E.I. 1988, c. S-3.1, s. 29; Yukon *Securities Act*, S.Y. 2007, c. 16, s. 29; Nunavut, *Securities Act*, S. Nu. 2008, c. 12, s. 29; North West Territories *Securities Act*, S.N.W.T. 2008, c. 10, s. 29. See also the deemed undertaking rule: *Ontario Rules*, *supra* note 2 r. 30.1; *P.E.I. Rules, supra* note 3 r. 30.1; Manitoba, *Queen's Bench Rules*, r. 30.1.

[24] For example, see Rule 26, F.R.C.P. These Rules were amended in 2010 and gave new protections to draft expert reports and communications between experts and counsel. Rule 26 now requires disclosure of facts or data considered by the expert witness, but protects from disclosure certain communications between counsel and experts. The Committee Notes concerning this amendment suggest that the work-product protection for attorney-expert communications (whether oral, written, electronic, or otherwise) are "designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." See also the recent decision of Master Muir in *Thermapan Structural Insulated Panels Inc. v. Ottawa (City)*, 2014 ONSC 2365.

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TAB D

SCHEDULE D – POSITION PAPER

Position Paper on Communications with Testifying Experts

The Advocates' Society

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THE ADVOCATES' SOCIETY

POSITION PAPER ON COMMUNICATIONS WITH TESTIFYING EXPERTS

Introduction

Since at least as early as the 18th century, courts have emphasized the need for experts to testify in an independent and objective manner, rather than as partisan advocates for the parties that retain them. They have also emphasized repeatedly the important role played by trial judges as the "gatekeepers" of admissible evidence.[1] In the recent decision of *Moore v. Getahun* ("*Moore*"), Justice Wilson of the Ontario Superior Court called attention to another recurring issue that arises from time-to-time when experts are called to testify at trial – the scope of permissible interactions between counsel and expert witnesses.[2]

As explained below, Justice Wilson held that in view of recent amendments to the *Rules of Civil Procedure* in Ontario that, among other things, require testifying experts to sign certificates in which they acknowledge their obligations of independence and objectivity (the "Expert's Certificate"), it is no longer appropriate for counsel to play any role in the preparation of experts' reports. Rather, she held, experts must prepare and finalize their reports without eliciting, relying upon or incorporating comments or input from counsel. Moreover, she held that any exchanges between counsel and experts concerning their final reports must be in writing, and produced to opposing counsel.

The decision in *Moore* has given rise to significant controversy and concern among members of the litigation bar and among experts who may be called upon to testify at

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1 The leading case in Canada on admissibility of expert evidence at trial is *R. v. Mohan*, [1994] 2 S.C.R. 9 ["*Mohan*"]. This paper does not aim to discuss the scope of the "Mohan Factors" and whether they work to exclude expert bias. For a discussion of this topic, see David M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 34 Queen's L.J. 565.

2 *Moore v. Getahun*, 2014 ONSC 237 ["*Moore*"].

trials or hearings.[3] This decision has precipitated a sometimes vigorous debate concerning the purpose and effect of the amendments referred to above.[4]

This paper explains why, in the view of the Advocates' Society, *Moore* goes too far by imposing categorical "rules" that apply in all cases for the purpose of safeguarding the independence and objectivity of testifying experts. This paper discusses the numerous problems that would arise from adherence to the requirements contemplated in *Moore,* and reviews jurisprudence that considers the boundaries of appropriate interactions between counsel and expert witnesses.

Finally, this paper describes and discusses "best practices" that advocates should consider following when retaining and interacting with expert witnesses, with a view to ensuring that the evidence of testifying experts can be marshalled efficiently, effectively and properly without compromising their independence or objectivity.

Moore v. Getahun

This case arose out of a personal injury suffered by *Moore* during a motorcycle accident. Claims of medical negligence were made against the treating doctor. The defendants called Dr. Ronald Taylor, an orthopaedic surgeon, to testify as an expert witness concerning the manner in which the plaintiff was treated following his accident. Dr. Taylor submitted a draft report to defence counsel on August 27, 2013. A one-and-a-half hour conference call took place between defence counsel and Dr. Taylor on September 6, 2013 concerning his draft report. Dr. Taylor issued his final report two days later, on September 8, 2013. The contentious issue addressed by Justice Wilson was whether the conference call between Dr. Taylor and defence counsel was improper.

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[3] In some cases, parties or their counsel retain "consulting experts" as well as "testifying experts". Consulting experts do not produce reports or testify. Rather, they are usually consulted about and provide advice concerning litigation tactics and strategy. Interactions with consulting experts are generally shielded from disclosure by litigation privilege, and do not give rise to the concerns commented on by Justice Wilson in *Moore*. Needless to say, in the vast majority of cases litigants cannot afford to, and do not, retain or utilize both testifying experts and consulting experts.

[4] The debate has been fuelled, in part, because of the uncertainty in the law in this area, which varies from jurisdiction to jurisdiction.

Justice Wilson found that the conduct of defence counsel in reviewing and commenting on Dr. Taylor's draft report was improper, and undermined the purpose and intended effect of recent amendments to Rule 53.03 of the *Rules of Civil Procedure* that now require the execution of Expert's Certificates. Justice Wilson held that despite the widespread prior practice of counsel meeting with experts to review draft reports, the 2010 amendments to the Rules now preclude this practice. She stated:

> [50] For reasons that I will more fully outline, the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. **In light of this change in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop.** Discussions or meetings between counsel and an expert to review and shape a draft expert report **are no longer acceptable**.
>
> [51] If after submitting the final expert report, counsel believes that there is need for clarification or amplification, any input whatsoever from counsel should be in writing and should be disclosed to opposing counsel.
>
> [52] I do not accept the suggestion in the 2002 Nova Scotia decision, *Flinn v. McFarland*, 2002 NSSC 272 (CanLII), 2002 NSSC 272, 211 N.S.R. (2d) 201, that discussions with counsel of a draft report go to merely weight. The practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality.
>
> ...
>
> [298] The practice formerly may have been for counsel to meet with experts to review and shape expert reports and opinions. However, I conclude that the changes in Rule 53.03 preclude such a meeting to avoid perceptions of bias or actual bias. Such a practice puts counsel in a position of conflict as a potential witness, and undermines the independence of the expert. [emphasis added]

Justice Wilson relied upon these findings to discount and essentially disregard portions of Dr. Taylor's evidence. She held that aspects of Dr. Taylor's evidence were fair and neutral, but that his opinion had been "shaped" (but not "changed") by defence counsel's suggestions during the September 6, 2013 phone call. She found that Dr.

Taylor had an alignment with the defence, which affected his credibility even though he was "obviously unaware" that it was improper to discuss a draft report with counsel, and to modify the draft report prior to submitting it.

The Defendants lost at trial. They have appealed to the Ontario Court of Appeal, and have raised these findings as grounds of appeal. A number of interested parties have expressed an intention to seek leave to intervene in the pending appeal for the purpose of addressing these findings, including The Advocates' Society.

The Duties of Experts

As is made clear from the extract from *Moore* quoted above, the central basis for the findings of Justice Wilson concerning the permissible scope of interactions between counsel and testifying experts is that recent amendments to the Rules have effected a "change in the role of expert witnesses". These amendments came into force on January 1, 2010 and included the addition of Rule 4.1, entitled "Duty of Expert", the addition of Form 53, entitled "Acknowledgement of Expert's Duty", and corresponding amendments to Rule 53.03 that now require the execution by testifying experts of the Expert's Certificate (the "**Amendments**").[5] The Amendments state the following:

> **A. Rule 4.1**
>
> (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
>
> (a) to provide opinion evidence that is fair, objective and non-partisan;
>
> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

[5] Ontario, *Rules of Civil Procedure*, rr. 4.1, 53.03, Form 53 ["*Ontario Rules*"]. Similar rules have been adopted in the Federal Court, and in a number of other provinces. See e.g. Federal Court, *Federal Courts Rules*, r. 52.1 ["*Federal Rules*"]; Nova Scotia, *Civil Procedure Rules*, r. 55 ["*N.S. Rules*"]; Prince Edward Island, *Supreme Court Rules of Prince Edward Island*, r. 53 ["*P.E.I. Rules*"]; Yukon Territories, *Rules of Court*, r. 34(23) ["*Yukon Rules*"]; Saskatchewan, *Queen's Bench Rules*, r. 5-37 ["*Saskatchewan Rules*"]; and British Columbia, *Supreme Court Civil Rules*, r. 11-2 ["*B.C. Rules*"].

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

B. Rule 53.03

(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

C. The Expert's Certificate

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within my area of expertise; and

(c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.

4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.[6]

In our view, Justice Wilson's finding that these Amendments constituted a "change" in the role of expert witnesses is mistaken. In fact, the role and essential duties of testifying experts have been recognized for many years, in Ontario and elsewhere. For decades before the *Rules* were amended in Ontario, our courts have emphasized the requirement for experts to testify independently and objectively, and have admonished expert witnesses not to act, or appear to act, as advocates for the parties that retain them. Our courts have made clear that the role of testifying experts is to assist courts and tribunals fairly and impartially in respect of matters that lie properly within their areas of expertise.

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[6] It is perhaps significant that the Amendments did not prohibit interactions between counsel and experts at the stage of preparing experts' reports or affidavits, or at the stage of preparing for trial. The Amendments could easily have included such a prohibition, had that been the intention of the Rules Committee at the time.

The duties of testifying experts were outlined succinctly in 1993 by Justice Cresswell of the Commercial Division of the British Court of Queen's Bench in *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd.*, (the "***Ikarian Reefer***").[7] Justice Creswell emphasized explicitly an expert's duties of impartiality and independence.

The *Ikarian Reefer* involved an insurance dispute. The plaintiff's ship caught fire off the coast of Sierra Leone. The defendant insurers claimed that the fire had been set deliberately. Justice Creswell rejected the expert evidence adduced by the defendants and found that the fire was accidental. In doing so, he held that the role and duties of expert witnesses were governed by the following principles:

> Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise...An expert witness in the High Court should never assume the role of advocate.
>
> An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion...
>
> An expert witness should make it clear when a particular question or issue falls outside his expertise.
>
> If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one...
>
> If after exchange of reports, an expert witness changes his view on a material matter...such change of view should be communicated...to the other side without delay and when appropriate to the Court.

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7 [1993] 2 Lloyd's Rep. 68 (Q.B.D.) ["*Ikarian Reefer*"], rev'g on other grounds [1995] 1 Lloyd's Rep 455 (C.A. Civ.).

> Where expert evidence refers to photographs, plans, calculations...survey reports of other similar documents they must be provided to the opposite party at the same time as the exchange of reports...[8]

Well before the Amendments were enacted, a number of Canadian courts had cited with approval and adopted the principles set forth in the *Ikarian Reefer*. A review of this jurisprudence reveals that the fundamental requirements of independence and objectivity were embedded firmly in the law of Ontario well before the Rules were amended in 2010. The Amendments did not change the "role" of testifying experts. They did, however, emphasize the importance of, and codify, the principles of independence and impartiality.[9]

In adopting the findings and observations of Justice Creswell in the *Ikarian Reefer*, courts have held that although the duties of experts were not codified in procedural rules, they are "fundamental nonetheless".[10] Courts have been clear that experts must have a "minimum requirement of independence" and "must not be permitted to become advocates".[11] Experts are required to be neutral and objective.[12] A "fundamental

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8 *Ibid* at pp. 69.

9 *Fellowes, McNeil v. Kansa General International Insurance Company Ltd. et al,* (1998) 40 O.R. (3d) 456 at 3 (Gen. Div.) (QL) ["*Fellowes*"]; *Frazer v. Haukioja*, [2008] O.J. No. 3277 at para. 141 (S.C.J.) (QL); *Baynton v. Rayner*, [1995] O.J. No. 1617 at para. 124 (Gen. Div.) (QL); *Carleton Condominium Corp. No. 21 v. Minto Construction Ltd.*, [2001] O.J. No. 5124 at para. 24 (S.C.J.) (QL); *Dansereau Estate v. Vallee*, [1999] A.J. No. 878 at para. 136 (Q.B.) (QL); *Jacobson v. Sveen*, 2000 ABQB 215 at paras. 32-36 ["*Jacobson*"]; *Kozak v. Funk*, [1995] S.J. No. 569 at paras. 16 and 27 (Q.B.) (QL); *Martin v. Inglis*, [2002] S.J. No. 251 at para. 118 (Q.B.) (QL); *Merck & Co. v. Apotex*, 2004 FC 567 at para. 16; *Perricone v. Baldassarra*, [1994] O.J. No. 2199 at para. 21 (Gen. Div.) (QL) ["*Perricone*"]; *Peter Lombardi Construction Inc. v. Colonnade Investments Inc.*, [1999] O.J. No. 3752 at para. 414 (S.C.J.) (QL); *Rudberg v. Ishaky*, [2000] O.J. No. 376 at para. 232 (S.C.J.) (QL); *Teichgraber v. Gallant*, [2003] A.J. No. 70 at para. 88 (Q.B.) (QL); *R v. Inco Ltd.*, 2006 CarswellOnt 2820 at para. 41 (S.C.J.) (WLeC); *Dimplex North America Ltd. v. CFM Corp.*, [2006] F.C.J. No. 776 at para. 43 (QL) ["*Dimplex*"]; *Ontario (Superintendent of Financial Services) v. Norton,* 2007 CarswellOnt 1425 para. 57 (Ont. Ct. J.) (WLeC); *R v. Norton*, 2007 ONCJ 414 at para. 56.; *Lundbeck Canada Inc. v. Canada (Minister of Health)*, 2008 FC 164 at para. 75; *Widelitz v. Robertson*, 2009 PESC 21 at para. 35; *Posthumous v. Foubert*, 2009 MBQB 206 at para. 41; and *Eli Lilly v. Apotex*, [2009] F.C.J. No. 1229 at para. 62 (QL) [*"Eli Lilly"*].

10 *Jacobson, supra* note 9 at para. 35. See also *Perricone, supra* note 9 at para. 20, in the context of a motion where judges do not have the opportunity to assess the credibility of an expert's opinion after cross examination.

11 *Fellowes, supra* note 9 at p. 3.

12 *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 at para. 5 (S.C.J.) (QL) ["*Bank of Montreal*"].

principle" in qualifying experts is their ability to provide assistance to the court on a fair, objective and unbiased fashion, and expert reports are required to be the result of independent analysis.[13]

Significantly, in the period following the enactment of the Amendments in 2010, the *Ikarian Reefer* has continued to be cited alongside Rules 4.01 and 53.03.[14]

The Amendments were based on, among other things, the findings of the Honourable Coulter Osborne in his Report entitled "Report of the Civil Justice Reform Project – Recommended Changes to the Rules of Civil Procedure, Statutory Amendments and Best Practices for the Legal Profession" (the "**Osborne Report**").[15] The Osborne Report was published in 2007. It considered a variety of issues, including problems that had arisen from time-to-time when experts were called to testify at trial.

In the years before the Osborne Report was published, judges had expressed frustration and concerns pertaining to testifying experts who were biased, had been "coached" improperly by counsel or their clients or who testified in respect of matters that were beyond their areas of expertise. Courts recognized that the various problems associated with evidence of this nature were potentially serious given that expert evidence may be given disproportionate weight by both trial judges and juries. They emphasized repeatedly the need for trial judges to discharge properly their important "gatekeeper" function when considering the admissibility of expert evidence.[16]

The Osborne Report found that the use of "hired guns" and "opinions for sale" was a common problem and that there was no overriding policy reason why the *Rules* should

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13 *Carmen Alfano Family Trust (Trustee of) v. Piersanti*, 2012 ONCA 297 at para. 108 ["*Carmen Alfano*"] and *Alfano (Trustee of) v. Piersanti*, [2009] O.J. No. 1224 at para. 6 (S.C.J.) (QL) ["*Alfano (Trustee of)*"].

14 *Bailey v. Barbour,* 2013 ONSC 4731 at paras. 17-23 ["*Bailey*"]; *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316 at para. 96; *Henderson v. Risi*, 2012 ONSC 3459 ["*Henderson*"]; *Beasley v. Barrand*, 2010 ONSC 2095 at paras. 44-65 ["*Beasley*"].

15 The Honourable Coulter Osborne was asked by the Attorney General of Ontario to prepare a Report reviewing potential areas of reform and to deliver recommendations to make the civil justice system more accessible and affordable for Ontarians. A section of the final Report was dedicated to expert evidence.

16 See *Mohan*, *supra* note 1.

not "expressly impose an overriding duty to the court" when experts are called to testify.[17] The Report recommended that the *Rules* be amended "to establish that it is the duty of an expert to assist the court on matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment". The Report also recommended that the Rules be amended to require testifying experts to certify that they understand their duties.[18]

The stated object of these recommendations was to "cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures".[19]

The recommendations contained in the Osborne Report, and the principles articulated in the *Ikarian Reefer* and its progeny, were considered in the Report of Mr. Justice Stephen Goudge concerning his "Inquiry into Pediatric Forensic Pathology in Ontario" (the "**Goudge Report**").[20] The Goudge Report was published in 2008, and also discussed the role of expert witnesses in the justice system. The Goudge Report recommended the adoption of a Code of Conduct that would outline an expert's duty to assist the court, and emphasized again that the expert's duties to the court prevailed over any obligation the expert might otherwise have to the person or party that retained them.[21] The Report recommended that experts be required to certify that they

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17 Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ministry of the Attorney General, 2007), at 75 ["Osborne Report"].

18 Osborne Report, *supra* note 17.

19 The Osborne Report points to Article 4150 of the *Canadian Institute of Actuaries Standards of Practice – General Standards* which provide that "the actuary's role...is to assist the court...and the actuary is not to be an advocate for one side of the matter in a dispute". Osborne Report, *supra* note 17 at 76.

20 The basis of the Report was to conduct a review and an assessment of the policies and procedures in pediatric forensic pathology in Ontario from 1981 to 2001. Ontario called an inquiry after the Chief Coroner announced the results of a review that had been conducted concerning the expert evidence in criminal trials of a pediatric pathologist – Dr. Charles Smith. The results indicated that multiple errors had been made by Dr. Smith concerning "shaken baby syndrome" that had resulted in a number of wrongful convictions. The report of the Goudge Inquiry, *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General: 2008) at 503 ["Goudge Report"].

21 The Goudge Report notes the importance of expert testimony, quoting the principles described by the Court of Appeal of England and Wales in *R. v. Harris* [2005] EWCA Crim 1980, at para. 271. *R. v. Harris* cites the *Ikarian Reefer*, *supra* note 7.

understand their duties and agree to be bound by the obligations contained in the proposed Code.[22] Justice Goudge stated the following:

> One of the principal lessons learned at the Inquiry is that, although it is vital that forensic pathologists be highly skilled scientists, it is equally vital that they be able to communicate their opinion effectively to the criminal justice system. Improvement in the quality of forensic pathology must be paralleled by improvement in the effectiveness with which forensic pathologists are able to communicate to the criminal justice system. It is with the better achievement of this objective in mind that I make a number of specific recommendations on how opinions and their limitations should be articulated, in light of the principles I have set out.
>
> ...
>
> Counsel, whether Crown or defence, should properly prepare forensic pathologists they intend to call to give evidence.[23]

The recommendations made in the Goudge Report were similar to those contained in the Osborne Report. Both Reports recommended codifying the duties of experts, particularly their duties of independence and objectivity. The Goudge Report emphasized as well the duty of experts to refrain from expressing opinions on matters that fall beyond the limits of their expertise.

Neither Report recommended that fundamental changes be made to the roles or duties of testifying experts, which had been well established in the common law by the time these Reports were written.

Judicial Interpretation of the 2010 Amendments

A number of decisions have considered the purpose and effect of the Amendments. Although there are conflicting cases in this area, the weight of authority holds that the Amendments did not impose new or different obligations on experts that did not exist or had not been recognized in the period before the Amendments were enacted. Although

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22 The Goudge Report, *supra* note 20 at 505.

23 The Goudge Report, *supra* note 20 at 45 and 47.

aspects of the Amendments can fairly be regarded as new, such as the requirement imposed by Rule 53.03 to sign Expert's Certificates, the duties of independence and impartiality that are recognized in and emphasized by the Amendments are longstanding.[24]

In interpreting the Amendments, Judges and Masters have made the following observations:

(i) the Amendments reflected the concerns and recommendations raised by the Osborne Report;[25]

(ii) the Amendments were aimed at addressing problems of expert bias when opinion evidence is led at trial;[26]

(iii) the Amendments had the purpose and effect of making the duties of experts clear, and of reminding experts of those duties;[27]

(iv) the Amendments provide a comprehensive framework of the principles governing the duties of experts when called as witnesses at trial;[28] and

(v) the Amendments advance an already existing and growing body of jurisprudence surrounding the duties of expert witnesses.[29]

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24 *Brandiferri v. Wawanesa Mutual Insurance Co.*, 2011 ONSC 3200 ["*Brandiferri*"]; *Beasly supra* note 14; *McNeil v. Filthaut*, 2011 ONSC 2165 ["*McNeil*"]; *Grigoroff v. Wawanesa Mutual Insurance Co.*, 2011 ONSC 2279 ["*Grigoroff*"]; *Henderson supra* note 14; *Lee (Litigation Guardian of) v. Toronto District School Board*, 2013 ONSC 3085 ["*Lee*"]; *Bailey, supra* note 14. See also Master Short's trilogy which is discussed below in footnote 24.

25 *Beasley, supra* note 14 at para. 61; *Brandiferri, supra* note 9 at para. 28; *McNeil, supra* note 24 at paras. 21-23.

26 *Grigoroff, supra* note 24 at para. 17 and *Beasley supra* note 14 at para. 62. The Court held that the Amendments were intended to address problems like, "calling unnecessary expert opinion; having too many experts testify; calling experts who are biased or clearly advocates on behalf of one of the parties; and experts who do not have the necessary expertise to be of assistance to the court". *Bakalenikov v. Semkiw*, 2012 ONSC 4928 at paras. 66-68 ["*Bakalenikov*"].

27 *Lee, supra* note 24 at para. 70; *Bailey, supra* note 14 at para. 321.

28 *McNeil, supra* note 24 at para. 39.

29 *Beasley, supra* note 14 at para. 52.

One of the most succinct summaries of the purpose and effect of the Amendments is that of Justice Lederman of the Ontario Superior Court in *Henderson v. Risi*. After citing the *Ikarian Reefer*, Justice Lederman held that the Amendments:

> "impose no higher duties than already existed at common law on an expert to provide opinion evidence that is fair, objective and non-partisan. The purpose of the reform was to remind experts of their already existing obligations".[30]

Admittedly, others have expressed the view that the Amendments were more significant. Master Short, for instance, has rendered a trilogy of decisions in which he has characterized the Amendments as "a major sea change".[31] Master Short found that as of January 1, 2010, "entirely new obligations were placed on all experts".[32]

The Scope of Permissible Conduct

In our opinion, the findings made by the Court in *Moore* concerning the scope of permissible conduct between counsel and expert witnesses are in error. They rest upon a mistaken view of the significance of the Amendments. They also fail to reflect the important and entirely appropriate role that advocates can and should play in ensuring that expert evidence, and the reports of experts, are presented in a cogent, succinct and well organized fashion that will assist trial judges, juries and administrative tribunals during the decision making process.[33] That role is particularly important in complex cases, in which advocates are called upon to present complicated evidence efficiently and effectively, and in such a fashion that it will be readily understood by a trier of fact who may have little or no background, experience, expertise or training in the subject matter in question. This important role can, and indeed must, be performed in an

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30 *Henderson, supra* note 14 at para. 19.

31 *Aherne v. Chang*, 2011 ONSC 2067 at para. 61 (Master) ["*Aherne*"]. Master Short's trilogy is comprised of *Bakalenikov*, *supra* note 26; *Giaro v. Cunningham*, 2010 ONSC 4607 (Master); and *Aherne*, *supra* note 31 at para. 61.

32 *Ibid.*

33 Paul Michell and Renu Mandhane, "The Uncertain Duty of the Expert Witness" (2005) 42 Alta. L. Rev. 635 at para. 36 (QL) citing Tania M. Bubela, "Expert Evidence: The Ethical Responsibility of the Legal Profession" (2004) 41 Alta. L. Rec. 853 at 868.

appropriate fashion without compromising the objectivity or independence of expert witnesses.

In many cases, counsel assist in editing or reformatting lengthy and intricate reports of a technical nature. They also assist in ensuring that, among other things: (i) the assumptions or factual predicates of experts are consistent with the evidence they expect will be adduced at trial; (ii) experts have addressed succinctly and in a readily understandable fashion the questions posed to them; (iii) experts have identified and explained the various concepts and other matters that are necessary for a proper understanding of the expert's analysis, observations and conclusions; and (iv) experts have not strayed beyond the limits of their expertise, including by addressing questions or issues that lie beyond the scope of their retainer. All of this can, and indeed must, be accomplished without changing or even influencing the analysis or opinions of testifying experts in an impermissible fashion.

In this regard, it is perhaps significant that shortly following the release of Justice Wilson's decision in *Moore*, the Holland Group released a Position Paper expressing strong concerns about the findings reached by Justice Wilson and signifying an intention to seek leave to intervene in the appeal in that case. The Holland Group is comprised of senior members of the bar who appear for both plaintiffs and defendants in medical malpractice cases. The current Chair of the Holland Group is the Honourable Coulter Osborne. The purpose of this Group is to promote dialogue amongst all parties involved in the medical malpractice field with a view to reaching a consensus concerning best practices and improving access to justice.

The Position Paper of the Holland Group outlines the potential consequences associated with enforcing the rules adopted in *Moore* and suggests best practices for counsel when interacting with experts. The Holland Group takes the position that the rules articulated in *Moore*, if followed, would impair "normal, reasonable and prudent litigation practices, would substantially increase the cost of litigation, would do a disservice to the Court in terms of hearing fulsome, well-organized and appropriate evidence, and ultimately would result in a chilling and significantly restrictive effect on

access to justice".[34] The Paper states that counsel and experts should interact in the preparation of reports, provided that interaction does not offend an expert's duty to the court. Further, the Paper states that communications between counsel and experts do not conflict with an expert's duty to the court, the need to maintain neutrality or the changes recommended in the Osborne Report, as adopted by the Amendments.

A number of courts have recognized that interactions between counsel and expert witnesses at the stage of preparing reports or affidavits, or in preparing experts to testify in contested proceedings, are entirely appropriate. They have, however, recommended boundaries to limit the scope of such contact.[35] Permissible conduct between counsel and expert witnesses includes: advising on factual hypotheses, evidentiary foundations and affirming issues; ensuring that the evidence of experts is material, relevant, of use to the court and "not beyond the ken of the trier of fact";[36] discussing the limits of an opinion with an expert to ensure they have a full understanding of their role;[37] and ensuring that experts are not required to undertake an overly broad review of the evidence in a case in conducting their analysis or expressing their opinions.[38]

In discussing the editing of draft reports before they are submitted, Justice Finch of the British Columbia Supreme Court stated:

> I in no way wish to condemn the practice of an expert's editing or rewriting his own reports prepared for submission in evidence or, for that matter, prepared solely for the advice of counsel or litigants. Nor do I wish to condemn the practice of counsel consulting with his experts in the pre-trial

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34 The Holland Group, "Position Paper of the Holland Group Regarding Issues Arising from a recent Ontario Superior Court of Justice Decision in *Moore v. Getahun*, [2014] ONSC 237". Available online: <www.thehollandgroup.ca> at 2.

35 Note that Master Short in *Aherne*, *supra* note 31 at paras. 58-60 left open the issue of whether counsel should play a role in the drafting of an expert's report: "I leave open the issue of whether that independence means that consultation between the expert and the Party, counsel, insurer or order defender or indemnifier, must be restricted to the proper and demonstrably transparent passage of information, the asking of questions and receipt of reports, answering the questions asked".

36 *Stephen v. Stephen*, [1999] S.J. No. 479 at para. 22 (Q.B.) (QL) ["*Stephen*"].

37 *Surrey Credit Union v. Wilson* 1990 CarswellBC 94 at para. 26 (S.C.) (WLeC) ["*Surrey*"].

38 *Sebastian v. Neufeld,* [1995] B.C.J. No. 1684 at para. 15 (S.C.) (QL).

> process while "reports" are in the course of preparation. It is, however of the utmost importance in both the rewriting and consultation processes referred to that the expert's independence, objectivity and integrity not be compromised.[39]

The courts of British Columbia have further endorsed counsel's assistance of an expert witness in preparing to give evidence in complex cases:

> There can be no criticism of counsel assisting an expert witness in preparation of giving evidence. Where the assistance goes to form as opposed to the substance of the opinion itself no objection can be raised. It would be quite unusual in a case of this complexity if counsel did not spend some time in the preparation of witnesses before they were called to give evidence. It is no less objectionable to engage in the same process where the witness to be called is an expert.[40]

Courts have also helped to define the boundaries of impermissible conduct. Courts have held, for instance, that counsel may suggest factors for an expert to include in their report, but that the expert, rather than counsel, should determine whether particular factors are, in fact, included as well as the relevance of those factors to their findings or opinions.[41]

The Unintended Consequences of *Moore*

Although it is clear that some counsel appear to have overstepped the permissible boundaries in communicating with expert witnesses in particular cases, it is equally clear (to use the words of Coulter Osborne in the Osborne Report) that not all counsel deserve to be "tarred with the same brush". Moreover, the scope of permissible interactions between counsel and experts may well vary depending on the nature and

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39 In this case counsel suggested, and the expert agreed, to additions and deletions to a report. The suggestions at issue in this particular case went beyond commenting on the factual hypotheses, the evidentiary foundation or helping to define issues. Instead, the court found that the suggestions went to the substance of the expert's opinion. *Vancouver Community College v. Phillips, Barratt*, 1988 CarswellBC 189 at para. 41(S.C.) (WLeC) ["*Vancouver*"].

40 *Surrey, supra* note 37 at para. 25.

41 *Stephen, supra* note 36 at para. 26.

complexity of the case in question. For example, a restrictive approach may work sensibly and fairly in a relatively straightforward personal injury cases where treating physicians play the role of "fact finder", and record their observations or medical diagnoses in reports documenting their assessment or treatment of particular patients. By contrast, in a complex commercial case the same approach may impair the ability of counsel to adduce expert evidence in an efficient and appropriate manner that will be helpful to the court or tribunal in question.[42]

A simplistic "one size fits all" approach is discordant with the reality of modern civil and criminal litigation. Advocates in different practice areas who appear before different courts and tribunals to litigate different types of cases follow different practices in dealing with testifying experts. This is neither surprising nor troubling. Examples of these differences abound. By way of example, at least some counsel appear to have almost no contact with experts in relatively straightforward cases between the date the experts are retained and the time they testify at trial. By contrast, many lawyers who specialize in intellectual property cases play an active role in preparing affidavits of experts who testify in proceedings in the Federal Court of Canada. Many family lawyers have ongoing and relatively extensive interactions with experts throughout their cases, and work collaboratively with them in case conferences, mediations and contested hearings.[43] In commercial litigation, experts are frequently accountants, economists, scientists or engineers who may well be inexperienced in giving evidence and have a

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42 For example, in *MacDonald v. Sunlife Assurance Company of Canada*, 2006 CanLII 41669 (Ont. S.C.J.), a third party defence medical group that retained experts and prepared their reports implemented changes to an expert report before it was filed. This was drawn to the court's attention when the expert read from a draft report, while testifying at trial, that was markedly different from the served report. As well, a stamp signature was applied by a third party without expert's permission or authorization. Also, in *Carmen Alfano, supra* note 13, the Defendant, who also happened to be a lawyer, contacted the expert via e-mail. It later became clear that the expert based his analysis of the position of the Defendant on theories advanced by the Defendant.

43 This ongoing relationship is, in some cases, prescribed by statute. For example, section 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, states that a court may, by order, appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability or willingness of the parties to satisfy the needs of the child. As well, lawyers often retain Chartered Business Valuators ("CBV") to assess the value of the party's assets and liabilities. The practical reality is that CBVs often accompany counsel and client to settlement meetings, conferences and mediations.

limited knowledge of the legal process. Many inexperienced experts require higher levels of instruction by and consultation with counsel.

A strict application of the restrictive approach taken in *Moore* that prohibits any consultation to guide or assist experts in the process of preparing their reports or affidavits may well result in a series of unfortunate and unintended consequences. Among other things, such an approach would place a premium on "professional experts" who have extensive experience in preparing reports and testifying in contested proceedings. Other experts who have little or no experience would be deterred from participating, and therefore from assisting the Court. Following the rules spelled out in *Moore* would no doubt lead to the withdrawal or abandonment of experts who prepare poorly written, disorganized or non-responsive reports without input from counsel. The approach called for in *Moore* would inevitably add to the cost and expense of litigation, and favour affluent litigants over those who are less affluent. Access to justice would be impaired, and the hearing process would be rendered less efficient and effective.

Recommended Best Practices

The Advocates' Society has developed a set of *Principles Governing Communications With Testifying Experts* (the "*Principles*") to reflect the views of a wide range of experienced litigation counsel who specialize in different practice areas. The *Principles* identify "best practices" that advocates should follow in their interactions with experts. The *Principles* are intended to ensure that counsel can fulfill their important duties to their clients and the courts without compromising the independence or objectivity of testifying experts, or impairing the quality of their evidence.[44]

Drafts of these *Principles* were developed by a Task Force of the Advocates' Society that was comprised of more than twenty senior advocates who practice in a wide variety of areas, including family, personal injury, intellectual property, corporate commercial, administrative and criminal law. The drafts were then reviewed and commented on by

[44] Counsel may consider it advisable or appropriate in particular cases to provide the *Principles* to testifying experts, and to document at the outset of engagements the mutual commitment of counsel and testifying experts to abide by the *Principles*.

members of the Board of Directors of the Advocates' Society who serve on the Society's Standing Committee on Advocacy and Practice, as well as by senior advocates in a number of law firms and by members of the Executive of the Ontario Trial Lawyers Association and Intellectual Property Section of the Canadian Bar Association. Modifications were made to reflect comments provided during this consultation process. The Principles were then reviewed and approved by the Board of Directors of the Advocates' Society in May, 2014.

The *Principles* state the following:

PRINCIPLE 1

An advocate has a duty to present expert evidence that is: (i) relevant to the matters at issue in the proceeding in question; (ii) reliable; and (iii) clear and comprehensible. An appropriate degree of consultation with testifying experts is essential to fulfilling this duty in many cases. An advocate may therefore consult with experts, including at the stage of preparing expert reports or affidavits, and in preparing experts to testify during trials or hearings.[45] An advocate is not required to abandon the preparation of an expert report or affidavit entirely to an expert witness, and instead can have appropriate input into the format and content of an expert's report or affidavit before it is finalized and delivered.

Commentary

Lawyers acting as advocates have a duty to represent their clients resolutely and honourably within the limits of the law, while treating courts and tribunals with candour, fairness, courtesy and respect.[46] It is axiomatic that to meet this duty the advocate must strive to present relevant evidence to courts and tribunals in a manner that is fair, clear and persuasive. Moreover, counsel have an important duty to ensure that expert reports comply with the formal and substantive requirements imposed by the procedural

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45 See *MedImmune Limited v. Novartis Pharmaceuticals UK Limited, Medical Research Council*, [2011] EWHC 1669 at paras. 99-114 (Pat.) ["*MedImmune*"]. Among other things, *MedImmune* holds that consultation is entirely proper between an advocate and an expert witness. This is a patent case, but the principles stated there are of more general application, particularly in cases involving complex expert evidence.

46 See Law Society of Upper Canada, *Rules of Professional Conduct*, r. 4.01(1).

rules of the jurisdictions in which they practice.[47] The effective and efficient presentation of evidence is essential to the proper administration of justice in an adversarial system and is of paramount importance both to parties and to the court or tribunal. The advocate's role in presenting complex evidence is particularly important with respect to expert evidence, the purpose of which is to assist the court or tribunal by providing it with specialized knowledge on an objective and impartial basis. In this context, advocates play an important role in presenting complicated evidence of a technical nature in a manner that ensures it is properly understood by the court or tribunal. Courts and tribunals depend on advocates to perform this important duty. This can, and indeed must, be achieved without changing the substance of the evidence of testifying experts in an impermissible fashion.[48]

The delivery of an expert's report or affidavit is an important part of the presentation of the client's case. In many cases, reports or affidavits of experts are introduced into evidence, marked as exhibits and play significant roles in the decision making process. Even in circumstances where an expert's report or affidavit serves the limited purpose of disclosing the expert's opinion, and is not entered as the evidence of the expert, the report or affidavit may be used for impeachment purposes and may be relied upon by the court in assessing the admissibility or weight of the expert's evidence. Unbiased reports of independent experts may also be of assistance to clients in considering settlement options, and to advocates in recommending proposed settlements to their clients. An expert's report or affidavit that is poorly organized or written, mistakenly omits important facts or assumptions, misstates the relevant issues or fails to address a relevant matter that the expert has been asked to opine on may unintentionally restrict the expert's testimony, may expose the expert to unnecessary criticism, and may be

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47 See the recent decision of Justice Brown in *(Re) Champion Iron Mines Limited*, 2014 ONSC 1988 at paras. 16-19. This proceeding concerned the approval of a plan of arrangement. Justice Brown found that a fairness opinion provided by a financial advisor in the form usually followed when providing advice to Boards of Directors in corporate transactions did not meet the requirements for expert evidence under Rules 53.03(2.1) and Rule 4.1 of the *Ontario Rules* and placed no weight on the opinion. See also *Dr. Andrew Hokhold Inc. v. Wells*, [2005] B.C.J. No. 2147 at para. 11 (S.C.) (QL).

48 *Stephen*, *supra* note 36 at para. 26 and *Fournier Pharma Inc. v. Canada (Minister of Health)*, 2012 FC 740. See also *Surrey*, *supra* note 37 at para. 25 and *Vancouver*, *supra* note 39 at para. 41.

unfairly prejudicial to the proper presentation of the client's case. Moreover, reports of that nature will be of limited assistance to the court or tribunal, and may give rise to frustration, inefficiency and delay. An advocate must therefore ensure that the expert's report or affidavit is focused, intelligible and properly responsive to the questions posed to the expert, and that any stated factual premises or assumptions are accurate. In many cases, this cannot be achieved without a reasonable degree of consultation between the advocate and the expert in the period before the expert's report or affidavit is finalized and delivered.

PRINCIPLE 2

At the outset of any expert engagement, an advocate should ensure that the expert witness is fully informed of the expert's role and of the nature and content of the expert's duties, including the requirements of independence and objectivity.

Commentary

An advocate should ensure that from the outset of an engagement the expert witness is aware that the role of the expert is to assist the court fairly and objectively.[49] Many experienced expert witnesses will be well aware of their duties of independence and objectivity. These duties may be unfamiliar to experts who have not previously been involved in litigation, however, and even experts who are familiar with these duties may not fully understand the content of the duties or the consequences associated with their breach. Accordingly, an advocate should ensure that testifying experts have a proper and early appreciation of their duties, and should thereafter remain vigilant to ensure that those duties are complied with. At or near the outset of an expert's engagement, the advocate should provide the expert with a copy of any procedural rule, code of conduct or form of "expert's certificate" related to the expert's duties that may apply in the particular proceeding.[50] The advocate should explain to the expert the nature and

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[49] *Carmen Alfano*, *supra* note 14 at para. 108; *Alfano (Trustee of)*, *supra* note 14 at para. 6; and *Bank of Montreal*, *supra* note 12 at para. 5.

[50] See, for example, *Federal Rules*, *supra* note 5 r. 52.2; *Ontario Rules*, *supra* note 5 r. 53; *B.C. Rules*, *supra* note 5 r. 11-2; *N.S. Rules*, *supra* note 5 r. 55; *P.E.I. Rules*, *supra* note 5 r. 53; *Yukon Rules*, *supra* note 5 r. 34(23); and *Saskatchewan Rules*, *supra* note 5 r. 5-37.

content of the expert's duties,[51] have the expert acknowledge that she understands those duties and ask the expert to undertake to abide by them. In this regard, the advocate should consider having the expert execute the certificate of independence and objectivity now provided for in applicable procedural Rules or Practice Directions at or near the outset of an engagement, rather than at the time the expert's report is finalized and delivered.[52]

The advocate should explain to the expert that her evidence may be ruled inadmissible or may be given little or no weight if the expert is shown to lack independence or objectivity. The advocate should also discuss with the expert those matters that are generally considered to be indicia of a lack of independence or objectivity, including the selective use of information to support tenuous opinions, the expression of opinions that lie beyond the scope of the expert's expertise, the use by the expert of language that is inflammatory, argumentative or otherwise inappropriate, or other conduct that casts the expert into the role of being an advocate for the party that retained them.[53]

PRINCIPLE 3

In fulfilling the advocate's duty to present clear, comprehensible and relevant expert evidence, the advocate should not communicate with an expert witness in any manner likely to interfere with the expert's duties of independence and objectivity.

Commentary

Advocates must guard at all times against the risk of impairing or undermining the expert's independence or objectivity. An expert's opinion must be the result of the expert's independent analysis, observations and conclusions. The opinion of a

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51 As noted above, a summary of the duties adopted by Canadian courts can be found in the *Ikarian Reefer*, *supra* note 7.

52 See, for example, the Expert's Certificate now required by Rule 53.03, *Ontario Rules*, *supra* note 5. Advocates might also consider providing testifying experts with copies of these *Principles* at the outset of engagements. See also *Saint Honore Cake Shop Limited v. Cheung's Bakery Products Ltd.*, 2013 FC 935 at paras. 17-19, where the court found the affidavit of an expert witness inadmissible after the expert admitted that she had never seen the Code of Conduct outlined in the Rules.

53 See for example, *Gould v. Western Coal Corporation*, 2012 ONSC 5184 at paras. 81-95.

testifying expert should not be influenced by the exigencies of litigation, or by pressure from the advocate or the advocate's client. Allowing or causing the expert to lose her independence or objectivity does a disservice to the expert, the client and the court. It does the expert a disservice because the expert may be subject to criticism during cross-examination and in the court's judgment as a result. It does the client a disservice because partisan expert evidence may well be ruled inadmissible, or given little or no weight in the court's determination of the client's case.[54] It does the court a disservice by wasting the court's time and resources, by making the decision making process more difficult than it should be, and by depriving the court of potentially useful and important evidence that could otherwise assist the court in rendering a fair and informed decision.

An advocate must be particularly careful not to persuade, or be seen to have persuaded, an expert to express opinions that the expert does not genuinely share or believe. Advocates should be particularly careful, in this regard, when engaged in an iterative process with testifying experts at the stage of preparing reports or affidavits.[55]

PRINCIPLE 4

The appropriate degree of consultation between an advocate and a testifying expert, and the appropriate degree of an advocate's involvement in the preparation of an expert's report or affidavit, will depend on the nature and complexity of the case in question, the level of experience of the expert, the nature of the witness's expertise and other relevant circumstances of the case.[56]

Commentary

In many cases advocates can, and indeed must, play an important role in the presentation of complex expert evidence to ensure that it will be readily understood, and therefore of assistance to the court or tribunal. Any rule that has the purpose or effect of precluding advocates from reviewing or commenting on draft reports or affidavits of experts in all cases, regardless of the subject matter, complexity or intended use of the

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54 *MedImmune*, *supra* note 45.

55 *Eli Lilly*, *supra* note 9 at para. 62; *Vancouver, supra* note 39 at para. 41; and *Squamish Indian Band v. Canada*, [2000] F.C.J. No. 1568 at para. 49 (QL).

56 *MedImmune*, *supra* note 45.

expert evidence at issue, would constitute a marked departure from the practice currently followed by advocates in a wide range of different practice areas, and would have a series of unfortunate consequences.[57] Among other things, such a rule would place a premium on "professional experts" who have testified on numerous occasions, are intimately familiar with the litigation process and are therefore experienced in drafting reports for litigation. It would deter parties from retaining experts who have little or no experience in testifying, and would deter such experts from testifying, if asked. Moreover, such a rule could have the effect of causing the withdrawal or abandonment of experts after poorly written, disorganized or incomplete reports are finalized without input from counsel. This would inevitably add to the cost and expense of litigation and would favour affluent litigants over those who are less affluent. Access to justice would be impaired. The courts could be deprived of helpful and informative expert evidence that would assist in the decision making process. The hearing process would be rendered less efficient and effective.

An appropriate educational dialogue between the expert and the advocate may be essential to ensure that an expert's evidence will be of assistance to the court or tribunal, and can be adduced effectively and efficiently. In many cases, counsel must learn about the scientific, economic or other subject to which the evidence of the expert relates in order to identify what is relevant, and the expert must learn enough about the case or dispute in question, and the legal process, to understand what issues should be addressed.[58] Some expert witnesses have more experience in preparing reports or affidavits and in testifying than others, and some experts are more capable than others of preparing properly organized, succinct and cogent reports or affidavits. Moreover, there is a wide variation in the complexity of expert evidence in particular cases. Expert witnesses in complex litigation are frequently leading economists, accountants, engineers or scientists. In many cases they will not have previously given expert

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57 *Surrey*, *supra* note 37 at para. 25; *Vancouver*, *supra* note 39 at para. 40 and *Mendlowitz v. Chiang (Berenblut)*, 2011 ONSC 2341.

58 *MedImmune*, *supra* note 45. See also *Dimplex North America Ltd., v. CFM Corp.*, [2006] F.C.J. No. 776 at paras. 43-44 (QL). In this case, the court recognized that appropriate collaboration between counsel and expert witnesses occurs to "conform [reports] to varying legal requirements in different jurisdictions or to focus the report on the issues".

evidence in litigation, or may have done so in only a small number of cases. Many experts have little or no knowledge of the relevant legal process. Some foreign experts, regardless of the expert qualifications, may lack a command of English or French. For all of these reasons, expert witnesses will frequently require consultation with, and instruction by, the advocate before finalizing their reports or affidavits, rather than after.[59]

In some complex cases, particularly where the expert's evidence is to be entered in by way of affidavit (or other written form), the above considerations may make it appropriate for an advocate to play a greater role in the preparation of an expert's affidavit (or report).[60] The advocate must always ensure that the resulting affidavit or report represents fairly and accurately the independent analysis, observations and conclusions of the expert.[61]

In some cases the parties will be sufficiently well-funded, and the issues will be sufficiently complex, that an advocate's client will elect to retain separate testifying and consulting experts. Consulting experts do not testify. Instead, they assist in tactical or strategic deliberations and other matters. This can serve to reduce the degree of consultation required as between the advocate and testifying experts. Many litigants will not have the luxury of retaining dual experts, however, and the retainer of dual

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59 *MedImmune*, *supra* note 45.

60 This occurs, for instance, in intellectual property cases in the Federal Court of Canada. See also *Ebrahim v. Continental Precious Metals Inc.*, 2012 ONSC 1123, at paras. 59-75. In the context of a refusals motion in a commercial case in the Ontario Superior Court, Justice Brown stated that it was "unusual, to say the least, to come across an expert who has not drafted his own report, in this case in affidavit form". Justice Brown therefore required the production of communications between the testifying expert and counsel.

61 *MedImmune*, *supra* note 45 at para. 110; *Tsilhqot'in First Nation v. Canada (Attorney General)*, [2005] B.C.J. No. 196 at paras. 30-34 (Sup. Ct.) (QL). An advocate is expected to take professional care in the preparation of affidavit evidence. See *Inspiration Management v. McDermott*, [1989] B.C.J. No. 1003 at para. 59 (C.A.) (QL). Referring to the summary trial procedure, the British Columbia Court of Appeal stated, "it should not be good enough for counsel to throw up volumes of ill-considered affidavits and exhibits which do not squarely raise or answer the real issues in the case. The preparation of affidavits for an application or defence under R.18A is a serious matter which requires the careful professional attention of counsel". The fact that counsel has been directly involved in the preparation of an expert's report does not render the report inadmissible, but where an expert testified that his report was only "reasonably accurate", this was found to detract from the reliability of the report: *Brock Estate v. Crowell*, [2013] N.S.J. No. 505 at para. 88 (S.C.) (QL).

experts should not be essential to the proper conduct of any proceeding. Accordingly, where a client has elected not to retain dual experts, a greater degree of consultation with a testifying expert may be necessary and appropriate.

In some cases, the expert will be experienced in giving opinion evidence, or the factual premises and issues upon which their opinion will be given will be relatively straightforward. In such cases, consultation between the advocate and the expert may not be necessary and might be seen as impairing the expert's objectivity and independence.

PRINCIPLE 5

An advocate should ensure that an expert has a clear understanding of the issue on which the expert has been asked to opine. An advocate should also ensure that the expert is provided with all documentation and information relevant to the issue they have been asked to opine on, regardless of whether that documentation or information is helpful or harmful to their client's case.

Commentary

Advocates must treat expert witnesses fairly and with appropriate candour. Among other things, advocates must ensure that an expert witness receives all relevant documentation and information in order to ensure that the expert is in a position to formulate an independent and objective opinion on a properly informed basis. Depriving testifying experts of documentation or information that is relevant to the issue they have been asked to opine on is wrong for many reasons, and may well expose the expert and the advocate to serious criticism. Conduct of this nature breaches the advocate's duties to the court, as well as to the advocate's client.[62]

Moreover, advocates should ensure that expert witnesses understand that they are able to probe and question information and assumptions provided to them before they complete their analysis and express their opinions. Questions posed to advocates or their clients by testifying experts should be responded to properly and on a timely basis.

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62 *Livent v. Deloitte*, [2014] O.J. No. 1635 at paras. 70 and 72 (S.C.J.) (QL).

PRINCIPLE 6

An advocate should take reasonable steps to protect a testifying expert witness from unnecessary criticism.

Commentary

Different courts and tribunals have different practices and requirements with respect to the disclosure by testifying experts of draft reports, working papers and correspondence. Advocates should generally err on the side of caution and proceed on the basis that disclosure of this nature will be required. The advocate should take reasonable steps to reduce the risk that extensive changes will have to be made to draft reports or affidavits. In complex cases, the advocate should generally discourage an expert from preparing any draft report until the advocate is satisfied that the expert: (a) has a proper understanding of the issue upon which the expert will offer her opinion; (b) understands the facts and assumptions upon which the opinion will be based; (c) has been provided with all documentation and information relevant to the opinion sought; and (d) will confine her analysis, observations and opinions to matters that lie within the expert's area of expertise. The advocate should also discuss with the expert in advance the expected structure and organization of the report. The expert should be reminded that they are obligated to assist the court fairly and objectively.

An advocate should be prepared to disclose any communication with a testifying expert that: (i) relates to compensation for the expert's analysis or testimony; (ii) identifies facts or data that the expert considered in forming the opinions to be expressed; (iii) identifies assumptions that the advocate provided or the expert relied on in forming the opinions to be expressed; [63] or (iv) pertains to the contents to the expert's report or affidavit or to the substance of the expert's evidence. Advocates must be careful not to compromise the independence or objectivity of testifying experts, or to expose them to unnecessary criticism, by communicating with them in a careless, imprudent or improper manner.

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[63] Consider Rule 26(b)(4)(c), *United States Federal Rules of Civil Procedure* ("F.R.C.P").

PRINCIPLE 7

An advocate should inform the expert of the possibility that the expert's file will be disclosed, and should advise the expert witness not to destroy relevant records.

Commentary

An advocate should inform an expert witness at the outset of the engagement that the contents of the expert's file may ultimately be disclosed to opposing parties, as well as to the court or tribunal in question.

The expert should be advised not to destroy relevant records, and should also be told that the destruction of records concerning the expert's retainer, the expert's analysis or findings, the expert's communications with the advocate or the advocate's client or the substance of the expert's evidence may be treated with disfavour by the court or tribunal. This could result in, among other things, adverse findings of credibility, the drawing of adverse inferences and the exclusion of otherwise admissible evidence.

PRINCIPLE 8

At the outset of the expert's engagement, an advocate should inform the expert of the applicable rules governing the confidentiality of documentation and information provided to the expert.

Commentary

While many experienced experts will assume that documentation or information provided to them by an advocate should be treated in a confidential manner, less experienced experts may not be aware of special rules that govern the confidentiality and use of documentation or information disclosed during the litigation process, including at discoveries. A breach of these rules may result in prejudice to other parties to the proceeding in question and to the client, and may also expose the expert to criticism. For these reasons, an advocate should make the expert aware of the applicable rules at the outset of the engagement. Examples of such rules include the common law implied undertaking rule, the deemed undertaking rule contained in the procedural rules of a number of provinces (including Rule 30.1 in Ontario) and the

secrecy provisions contained in most provincial securities legislation (including section 16 of the *Securities Act* of Ontario).[64]

PRINCIPLE 9

In appropriate cases, an advocate should consider an agreement with opposing counsel related to the non-disclosure of draft expert reports and communications with experts.

Commentary

An appropriate degree of consultation between an advocate and an expert witness normally is beneficial to both sides in a dispute and is consistent with the proper and efficient administration of justice. Moreover, if counsel for one party to a dispute demands production of the files of experts, counsel for other parties in the same proceedings will likely follow suit. Cross-examination may ensue that in some cases will be time-consuming but bear little, if any, fruit. In other cases, cross-examination on the contents of an expert's file may be important in demonstrating a lack of objectivity or independence. As the cost, expense and delays associated with contested litigation have continued to escalate, courts have become increasingly insistent that counsel conduct cases on a reasonably constrained and proportional basis. For all of these reasons, in appropriate cases an advocate should consider entering into an agreement with opposing counsel prior to trials or contested hearings regarding such matters as agreed limits on disclosure of draft reports and communications with experts, and limits on demands for production of the files of experts. Agreements of this nature have been entered into from time-to-time in complex commercial cases, and are consistent with

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[64] See e.g. the secrecy provisions in the following: R.S.O. 1990, c. S.5, s. 16; British Columbia *Securities Act*, R.S.B.C. c. 418, s. 148; Manitoba *The Securities Act*, C.C.S.M. c S50, s. 24(1); Saskatchewan *Securities Act, 1988*, S.S. 1988-89, c-S 42.2, s. 15; Nova Scotia *Securities Act*, R.S.N.S. c. 418, s. 29A; Quebec *Securities Act,* R.S.Q. c. V-1.1, s. 245; New Brunswick *Securities Act*, S.N.B. c. S-5.5, s. 177; Alberta *Securities Act*, R.S.A. 2000, c. S-4, s. 45; Prince Edward Island *Securities Act*, R.S.P.E.I. 1988, c. S-3.1, s. 29; Yukon *Securities Act*, S.Y. 2007, c. 16, s. 29; Nunavut, *Securities Act*, S. Nu. 2008, c. 12, s. 29; North West Territories *Securities Act*, S.N.W.T. 2008, c. 10, s. 29. See also the deemed undertaking rule: *Ontario Rules*, *supra* note 2 r. 30.1; *P.E.I. Rules, supra* note 3 r. 30.1; Manitoba, *Queen's Bench Rules*, r. 30.1.

existing practice, procedural rules or jurisprudence in some jurisdictions.[65] Such agreements should reflect these *Principles*.

[65] For example, see Rule 26, F.R.C.P. These Rules were amended in 2010 and gave new protections to draft expert reports and communications between experts and counsel. Rule 26 now requires disclosure of facts or data considered by the expert witness, but protects from disclosure certain communications between counsel and experts. The Committee Notes concerning this amendment suggest that the work-product protection for attorney-expert communications (whether oral, written, electronic, or otherwise) are "designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery." See also the recent decision of Master Muir in *Thermapan Structural Insulated Panels Inc. v. Ottawa (City)*, 2014 ONSC 2365.

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