Principles Governing Communications with Testifying Experts

The Advocates' Society

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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.

[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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