



# Position Paper on Communications with Testifying Experts

The Advocates' Society

June 2014

## **THE ADVOCATES' SOCIETY**

### **POSITION PAPER ON COMMUNICATIONS WITH TESTIFYING EXPERTS**

#### **Introduction**

Since at least as early as the 18<sup>th</sup> 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.<sup>1</sup> 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.<sup>2</sup>

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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<sup>1</sup> 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.

<sup>2</sup> *Moore v. Getahun*, 2014 ONSC 237 ["*Moore*"].

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

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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<sup>3</sup> 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.

<sup>4</sup> 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.

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[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**").<sup>5</sup> 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

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<sup>5</sup> 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.<sup>6</sup>

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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<sup>6</sup> 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***").<sup>7</sup> Justice Cresswell 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 Cresswell 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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<sup>7</sup> [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...<sup>8</sup>

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.<sup>9</sup>

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".<sup>10</sup> Courts have been clear that experts must have a "minimum requirement of independence" and "must not be permitted to become advocates".<sup>11</sup> Experts are required to be neutral and objective.<sup>12</sup> A "fundamental

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<sup>8</sup> *Ibid* at pp. 69.

<sup>9</sup> *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*"].

<sup>10</sup> *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.

<sup>11</sup> *Fellowes*, *supra* note 9 at p. 3.

<sup>12</sup> *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.<sup>13</sup>

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.<sup>14</sup>

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**").<sup>15</sup> 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.<sup>16</sup>

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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<sup>13</sup> *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)"].

<sup>14</sup> *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"].

<sup>15</sup> 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.

<sup>16</sup> See *Mohan*, *supra* note 1.

not "expressly impose an overriding duty to the court" when experts are called to testify.<sup>17</sup> 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.<sup>18</sup>

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".<sup>19</sup>

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**").<sup>20</sup> 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.<sup>21</sup> The Report recommended that experts be required to certify that they

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

<sup>18</sup> Osborne Report, *supra* note 17.

<sup>19</sup> 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.

<sup>20</sup> 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"].

<sup>21</sup> 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.<sup>22</sup> 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.

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Counsel, whether Crown or defence, should properly prepare forensic pathologists they intend to call to give evidence.<sup>23</sup>

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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<sup>22</sup> The Goudge Report, *supra* note 20 at 505.

<sup>23</sup> 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.<sup>24</sup>

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;<sup>25</sup>
- (ii) the Amendments were aimed at addressing problems of expert bias when opinion evidence is led at trial;<sup>26</sup>
- (iii) the Amendments had the purpose and effect of making the duties of experts clear, and of reminding experts of those duties;<sup>27</sup>
- (iv) the Amendments provide a comprehensive framework of the principles governing the duties of experts when called as witnesses at trial;<sup>28</sup> and
- (v) the Amendments advance an already existing and growing body of jurisprudence surrounding the duties of expert witnesses.<sup>29</sup>

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<sup>24</sup> *Brandiferri v. Wawanesa Mutual Insurance Co.*, 2011 ONSC 3200 ["Brandiferri"]; *Beasley 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.

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

<sup>26</sup> *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"].

<sup>27</sup> *Lee, supra* note 24 at para. 70; *Bailey, supra* note 14 at para. 321.

<sup>28</sup> *McNeil, supra* note 24 at para. 39.

<sup>29</sup> *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".<sup>30</sup>

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".<sup>31</sup> Master Short found that as of January 1, 2010, "entirely new obligations were placed on all experts".<sup>32</sup>

### **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.<sup>33</sup> 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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<sup>30</sup> *Henderson, supra* note 14 at para. 19.

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

<sup>32</sup> *Ibid.*

<sup>33</sup> 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".<sup>34</sup> 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.<sup>35</sup> 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";<sup>36</sup> discussing the limits of an opinion with an expert to ensure they have a full understanding of their role;<sup>37</sup> 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.<sup>38</sup>

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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<sup>34</sup> 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](http://www.thehollandgroup.ca)> at 2.

<sup>35</sup> 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".

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

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

<sup>38</sup> *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.<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup>

### **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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<sup>39</sup> 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*"].

<sup>40</sup> *Surrey*, *supra* note 37 at para. 25.

<sup>41</sup> *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.<sup>42</sup>

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.<sup>43</sup> 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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<sup>42</sup> 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.

<sup>43</sup> 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.<sup>44</sup>

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

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<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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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<sup>45</sup> 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.

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

rules of the jurisdictions in which they practice.<sup>47</sup> 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.<sup>48</sup>

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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<sup>47</sup> 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).

<sup>48</sup> *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.<sup>49</sup> 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.<sup>50</sup> The advocate should explain to the expert the nature and

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<sup>49</sup> *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.

<sup>50</sup> 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,<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup>

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

<sup>52</sup> 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.

<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

#### **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.***<sup>56</sup>

#### **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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<sup>54</sup> *MedImmune*, supra note 45.

<sup>55</sup> *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).

<sup>56</sup> *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.<sup>57</sup> 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.<sup>58</sup> 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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<sup>57</sup> *Surrey*, *supra* note 37 at para. 25; *Vancouver*, *supra* note 39 at para. 40 and *Mendlowitz v. Chiang (Berenblut)*, 2011 ONSC 2341.

<sup>58</sup> *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.<sup>59</sup>

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).<sup>60</sup> The advocate must always ensure that the resulting affidavit or report represents fairly and accurately the independent analysis, observations and conclusions of the expert.<sup>61</sup>

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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<sup>59</sup> *MedImmune*, *supra* note 45.

<sup>60</sup> 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.

<sup>61</sup> *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.<sup>62</sup>

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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<sup>62</sup> *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;<sup>63</sup> 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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<sup>63</sup> 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).<sup>64</sup>

## 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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<sup>64</sup> 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.<sup>65</sup> Such agreements should reflect these *Principles*.

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<sup>65</sup> 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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