

ISSUES RESPECTING EXPERT ADVISORS, EXPERT WITNESSES AND RETAINING COUNSEL

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INTRODUCTION

Retaining an expert is an integral part of a litigation or advisory practice. The relationship between the expert and counsel is complex and multifaceted as both have their own roles, obligations and limitations during the course of a litigation file.

An early assessment of your needs for expert assistance and the role you want your experts to play is essential to advancing your client's interests. As with all facets of litigation, complex ethical and professional issues arise in respect of your choices and dealings with your experts. Such issues often touch on disclosure requirements and privilege and whether the expert or counsel breached their corresponding obligations. As noted in the authorities, the last thing counsel needs in advancing their clients' cause is for counsel's dealings with its experts to become the focal point of a trial.

This article will attempt to address some of these issues and offer practical guidance on how to address them.

THE EXPERT ADVISOR *VERSUS* THE EXPERT WITNESS

Role of the Expert Advisor

The role of the expert as an "advisor" is to advise counsel on technical matters in order to assist counsel to build his or her case. Experts in this role investigate facts, issues and causal relationships and relate their analysis to counsel's legal theory. In essence, the expert advisor is a member of the litigation team, who assists counsel in understanding and advancing the case.

For an expert retained solely as an advisor, and who does not depart from that role, all communications between the expert and counsel and all documents created, produced or assembled by counsel or the expert for the "dominant" purpose of aiding in the conduct of litigation are protected by litigation privilege. Accordingly, retaining an expert advisor on a complex case, such as a construction dispute or a medical malpractice action, may be very beneficial, as the expert will be able to advise counsel on the technical issues of the case without fear of the communications and opinions being disclosed to the opposing party.

Role of the Expert Witness

Rule 11-2(1) of the British Columbia *Supreme Court Civil Rules* codifies the duty of expert witnesses as follows: in giving an opinion to the court, an expert has a duty to assist the court and is not to be an advocate for any party.¹ By way of comparison, Rule 4.1 of the

¹ BC Reg 168/2009.

Ontario *Rules of Civil Procedure*,² states that the expert witness must provide: fair, objective and non-partisan evidence; opinion evidence that is related only to matters that are within the expert's area of expertise; and such additional assistance as the court may reasonably require to determine the matter in issue. Equally, the Alberta courts have recognized that an expert witness should strive to be impartial and independent, and should not be an advocate for either party.³ In essence, irrespective of the jurisdiction, the expert witness' duty is to be objective and impartial and to assist the court, not its client or counsel.

The privilege and disclosure implications surrounding the expert witness are more complex than that of the expert advisor. Once the expert's opinion is disclosed to be relied upon as evidence in court, the litigation privilege over the expert's files is waived. The privilege is waived by either the voluntary disclosure of the opinion or due to the court's need to properly assess credibility and reliability of the opinion.

The Distinction Between the Roles

The distinction between an expert advisor and an expert witness, and the privilege and disclosure implications associated with each, was well described in *Vancouver Community College v. Phillips, Barratt (Vancouver Community College)*,⁴ a 1987 decision of the British Columbia Supreme Court (BCSC). Mr. Justice Finch stated as follows at paragraph 27:

“So long as the expert remains in the role of a confidential advisor, there are sound reasons for maintaining privilege over documents in his possession. Once he becomes a witness, however, his role is substantially changed. His opinions and their foundation are no longer private advice for the party who retained him. He offers his professional opinion for the assistance of the court in its search for the truth. The witness is no longer in the camp of a partisan. He testifies in an objective way to assist the court in understanding scientific, technical or complex matters within the scope of his professional expertise. He is presented to the court as truthful, reliable, knowledgeable and qualified. It is as though the party calling him says: “Here is Mr. X, an expert in an area where the court needs assistance. You can rely on his opinion. It is sound. He is prepared to stand by it. My friend can cross-examine him as he will. He won't get anywhere. The witness has nothing to hide.” [Emphasis added]

The Expert in a Dual Role

Practitioners in British Columbia generally advise against the retainer of one expert who will fill both roles as an advisor and expert witness. The primary reason for this advice is due to Rule 11-6(8)(b) which establishes that prior to the expert testifying, privilege over the expert's file will be lost. Rule 11-6(8)(b) requires the disclosure, if requested by a party of record, of the contents of the expert's file relating to the preparation of the opinion set

² RRO 1990, Reg 194.

³ *IFP Technologies (Canada) v Encana Midstream and Marketing*, 2014 ABQB 470.

⁴ [1987] BCJ No 3149.

out in the expert's report.

In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education) (CSF)*,⁵ the BCSC further explained the disclosure principles under Rule 11-6(8)(b) at paragraphs 41 and 44:

“With regard to the scheme of [Rule] 11-6(8), I note that [Rule] 11-6(8)(a) enumerates a number of documents that must be served on a requesting party immediately, namely written statements or statements of facts on which the expert based his or her opinion; records of independent observations made by the expert in relation to the report; data compiled by the expert in relation to the report; and the results of any tests conducted by the expert or inspections conducted by the expert. Rule 11-6(8)(a) thus already requires production of the observations and analysis underlying the expert's opinion. Rule 11-6(8)(b) should therefore be read as requiring production of something more than the underpinning of the report.”

“My interpretation of [Rule] 11-6(8)(b) thus takes a middle road between the broad scope of disclosure at common law and the narrow view asserted by the plaintiffs. As I see it, on request pursuant to [Rule] 11-6(8)(b), an expert must produce the contents of the expert's file that are relevant to matters of substance in his or her opinion or to his or her credibility unless it would be unfair to do so.” [Emphasis added]

Even earlier than *CSF*, *Vancouver Community College* established that an expert loses privilege immediately on entering the witness box. As stated by Justice Finch at paragraph 34:

“When an expert witness who is not a party is called to testify, or when his report is placed in evidence, he may be required to produce to counsel cross-examining all documents in his possession which are or may be relevant to matters of substance in his evidence or to his credibility, unless it would be unfair or inconsistent to require such production. Fairness and consistency must be judged in the circumstances of each case. If those requirements are met, the documents are producible because there is an implied intention in the party presenting the witness's evidence, written or oral, to waive the lawyer's brief privilege which previously protected the documents from disclosure. [Emphasis added]

That the expert produce “all documents in his possession” has been followed in subsequent cases, including in *Delgamuukw v. British Columbia*:⁶

“Thus the present law requires an expert witness who is called to testify at trial to produce all documents which are or have been in his possession, including draft reports (even if they come from the file of the solicitor with annotations) and other communications which are or may be relevant to matters of substance in his evidence or his credibility unless it would be unfair to require production. It is a presumption of law that solicitor's privilege is waived in respect to such matters of substance, etc., when the witness is called to give evidence at trial.”

As a result of the difficulties associated with one expert acting as both an advisor and

⁵ 2014 BCSC 741.

⁶ 1988 CanLII 3195 (BCSC), para 11.

witness, and in particular those involving the loss of privilege over the expert's file, practitioners in British Columbia have in some cases retained two experts — one as an advisor and one as an expert witness. Where only one expert is retained, counsel should conduct discussions with the expert in a such way that the risk of disclosure is minimized. Without commenting on the probity of this practice, some practitioners advise their experts not to commit his or her views to writing until asked to do so.⁷

Having said this, according to Justice Finch, the skilled expert can indeed, with the assistance of counsel, fill both roles of advisory and witness successfully:⁸

“I do not think there are, or should be, any limitations on the pre-opinion, or pre-trial, exchanges between counsel and their expert advisers (...) I do, however, think that when the decision is made to adduce the experts opinion into evidence, either orally or in writing, counsel must anticipate the prospect of a thorough cross examination, and decide whether the anticipated good will outweigh the possible bad. The trustworthy expert will not be uncomfortable about disclosing his pre-trial communication with counsel. Nor will counsel be embarrassed if his communication were directed towards refining an objective opinion based upon reasonable factual assumptions.” [Emphasis added]

OBLIGATIONS OF EXPERTS AND COUNSEL

Consequences where Experts Breach their Duties

In circumstances where an expert does not conform to the standards expected of the expert, the court may: (i) refuse to admit the expert's report; or (ii) penalize the party or the counsel tendering the expert through an award of special costs. An award of special costs against counsel for a party will only be awarded in circumstances in which the court views the conduct of the party or counsel as reprehensible. Examples of circumstances giving rise to these outcomes are illustrated by the cases below.

Inadmissibility of Report

The examples discussed below are provided in chronological order and not in order of significance. It should be noted that there are few reported decisions on the exclusion of expert reports. This reflects the reality that orders excluding such evidence are generally made orally during a trial. As a result, the following are mere examples of where experts have been found to not provide unbiased assistance to the Court.

In *Coulter (Guardian ad Litem of) v. Ball*,⁹ an expert opinion was challenged on the

⁷ *Expert Evidence in British Columbia Civil Proceedings* (Vancouver: Continuing Legal Education Society of British Columbia, 2011).

⁸ LSG Finch, “The Court's Perspective” in *Experts and Experts Reports* (Vancouver: Continuing Legal Education Society of British Columbia, 1988).

⁹ [2003] BCJ No 1804.

grounds of bias. The trial judge concluded that the expert report was argumentative, evasive and not the sort expected from an expert endeavouring to assist the court. In the result, the trial judge concluded the expert was acting as an advocate for the defence and accordingly his opinions could not be relied on. The judge, however, did not find that tendering the report was intended to mislead the court and therefore the use of the expert did not constitute conduct warranting a costs penalty.

The following two cases involve situations where the excessive use of bolded fonts to emphasize conclusions provided indicia that the expert tendered was acting as an advocate.

In *Warkentin v. Riggs*,¹⁰ the expert used bold font to highlight words and phrases in the report which benefitted the plaintiff's claim and supported his diagnosis. Matters contrary to the plaintiff's claim or that did not support his diagnosis were either omitted or presented in non-bolded font. The trial judge found the report amounted to an advocacy piece and ruled the report inadmissible. The court concluded that the report was likely to distort the fact-finding function for the trier of fact and, therefore, its prejudicial effect far outweighed its probative value.

Similarly, in *Turpin v. Manufacturers Life Insurance Company*,¹¹ the plaintiffs objected, among other things, that an expert report: did not comply with requirements established by the *Supreme Court Civil Rules*; and was acting as an advocate for a party. The Court's findings in this regard were based on the author's use of bold and italicized font in the report. The court held the report did not comply with the requirements (i.e. the report did not list every document relied upon in the opinion) and the use of emphasis is not to be encouraged and may have been introduced by counsel's letter of instructions. The report was held to be inadmissible.

In *Maras v. Seemore Entertainment Ltd. (Maras)*,¹² the court held that a particular expert's report suffered from a number of deficiencies which resulted in it not being admitted. The deficiencies cited include:

- (i) the report contained many pages of comments on, and summaries of, various records and reports the expert reviewed, which were neither necessary nor of assistance to the jury unless there was a specific purpose for doing so which related to the opinion;
- (ii) what constituted facts, assumptions and opinions were not clearly identified; and
- (iii) the report contained certain "editorial comments", which should, at the very least, have been linked to an assumed fact and/or the expert's opinion.

¹⁰ 2010 BCSC 1706.

¹¹ 2011 BCSC 1159.

¹² 2014 BCSC 1109.

Cost Awards

The following examples of cases in which costs penalties are imposed for experts departing from their obligations are also listed in chronological order and not necessarily in order of significance.

In *Heppner v. Schmand*,¹³ the Court of Appeal approved an award of special costs where the insurer, despite previous judicial criticism of the same practice, repeatedly introduced similar engineering opinions on behalf of its insured defendants.

In *Jayetileke v. Blake*,¹⁴ the plaintiff sought costs because the defendant called an expert witness who had been branded as an advocate in prior cases, and whose conduct in the trial was deserving of rebuke. The court awarded special costs against the defendant, as the defendant's expert witness, among other things:

- (i) had a history before the courts where his evidence was rejected and his objectivity called into question;
- (ii) was an advocate, argumentative, defensive, non-responsive, and prone to rambling discourses that were not relevant to the questions posed in cross-examination;
- (iii) displayed an alarming inability to appreciate his role as an expert and the accompanying privilege to provide opinion evidence;
- (iv) was asked to leave the courtroom so that counsel could argue about questions to be put to him, but was seen peeking into the courtroom and listening to the discussion; and
- (v) defence counsel was alive to the expert's propensity to abuse the role of an expert.

In *Bailey v. Barbour*,¹⁵ the court awarded costs against counsel for calling an unqualified and biased expert witness. The subject expert's initial evidence under cross-examination conveyed an involvement in the proceeding beyond that expected of an expert witness. The court found: the expert was biased and effectively acted as co-counsel and advocate; and having the expert testify was wasted trial time. Ultimately, the court held that the calling of the expert by the lawyer, knowing of the expert's lack of objectivity, was enough to warrant an award of personal costs against the lawyer. In its reasons, the court highlighted the following at paragraphs 45 and 46:

“Similarly, it defies common sense and reason to accept that a lawyer who receives an email from his expert that refers to another expert's report as a ‘load of bs’, and further states that ‘my guess is that he is never given expert evidence in court before, and Izaak has not told him that he cannot protect him from cross-examination. He thinks that he can get away with this crap’, could fail to recognize that the expert was too personally involved to objectively comment upon the other

¹³ (1998) 59 BCLR (3d) 336 (CA).

¹⁴ 2010 BCSC 1478.

¹⁵ 2014 ONSC 3698.

expert's methodology and conclusions ... the Court can reach no conclusion other than that [the lawyer] was aware, or should have been, that [the expert] had taken on a role beyond that of an expert witness.

... the decision to provide the Court with expert testimony is part of the role of the lawyer having carriage of the matter, and his or her professional expertise should include an understanding that it undermines the integrity of the justice system to direct a biased expert to step into the witness box ... [The lawyer] cannot shield himself from costs where he has acted in a manner that is contrary to the administration of justice. Accordingly, I must find that it is [counsel] who caused the unnecessary waste of costs."

In *Seaspan ULC v. Director, Environmental Management Act*,¹⁶ the British Columbia Environmental Appeal Board (the "Board") awarded costs against an appellant, despite its policy to only award costs in "special circumstances". The special circumstances justifying an award of costs require a party's behaviour to be reprehensible. After hearing submissions on the question of costs, the Board ordered the appellant to pay the respondent and third parties their costs. In doing so, the Board was critical about many aspects of the appellant's expert's opinion and about the dealings between the expert and counsel. The Board's concerns included that:

- (i) the expert's conclusion had changed from a previous draft that stated that contamination "could have" resulted from a particular source to an opinion in the final draft that "more probably than not" the contamination resulted from that source;
- (ii) the original question posed to the expert had been whether the contamination "could have originated" from a particular source, whereas the question posed for the final report had morphed to what was "the cause of the contamination" (with no corresponding additional analysis being conducted by the expert);
- (iii) on counsel's directions, the expert did not address in his report significant evidence that contradicted his opinion;
- (iv) the expert in direct examination changed his position on a material aspect from his written opinion without explaining to the panel that he had done so, let alone explaining why.

The Board concluded that the expert's opinion was deceptive, that he had ignored relevant data (including ignoring data on the instructions of counsel), and that the opinions were such that his report was "fundamentally unsound and irredeemably flawed". In issuing an award for costs, the Board also held that the expert's client bore responsibility for advancing a position that was "ill conceived", "preposterous" and "should never have been pursued."

¹⁶ Decision Nos 2010-EMA-005(c) and 2010-EMA-006(c).

The Lawyer's Role in Assisting an Expert in Preparing the Report

General Practice

In assisting an expert in preparing his or her report, counsel should:¹⁷

- (i) ensure the expert's retainer letter does not suggest the desired opinion;
- (ii) ensure the expert receives an objective set of facts;
- (iii) limit communications between counsel and expert while the expert is reviewing the facts and formulating the substance of his or her opinion;
- (iv) discuss the expert's views orally before he or she provides anything in writing;
- (v) limit the number of drafts provided to counsel;
- (vi) keep counsel's editing of the report to a minimum.

Despite these points of caution, the courts have permitted certain involvement from counsel, as discussed in the cases below.

Case Law

In *Vancouver Community College v. Phillips, Barratt*,¹⁸ disclosure of the expert's working files demonstrated the expert revised his opinion several times at the suggestion of counsel. The court ultimately held the revisions went beyond mere clarification and the opinion was rejected. Finch J. stated as follows at paragraphs 33 and 34:

"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 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. I have no doubt that in many cases these ends are achieved, and counsel and experts alike respect the essential boundaries concerning the extent to which a lawyer may properly discuss the expert's work product as it develops towards its final form.

Regrettably, in this case, the boundaries were not observed. I cannot avoid saying that generally counsel participated far too much, and inappropriately, in the preparation of [Mr. A's] reports. [Mr. A] willingly permitted such participating by counsel and seriously compromised the objectivity of his opinions. Counsel suggested, and [Mr. A] agreed to, many additions and deletions to his report. These suggestions went far beyond statements concerning factual hypotheses, their evidentiary foundation, the definition of issues, or other matters on which counsel might properly have advised

¹⁷ Nevin Fishman, *Preparation of the Expert Report – How Much Input from Counsel?* (Vancouver: Continuing Legal Education Society of British Columbia, 2009).

¹⁸ [1988] BCJ No 710.

or commented. Rather, the suggestions went to the substance of [Mr. A's] opinions and the way in which they were expressed. The suggested changes were all one way."

In *William et al. v. British Columbia et al.*,¹⁹ the court stated as follows with respect to the expert's file and counsel's involvement therein:

"The exchange of correspondence between counsel and [the expert] contained unfortunate language which left open the argument that counsel dictated the opinion required and [the expert] complied with the dictates of counsel. Counsels' editing of the report left open a similar argument. Counsel should strive, at all times, not to place themselves in the position where their conduct becomes a focal point of the court's concerns."

In *Medimmune Ltd. v. Novartis Pharmaceuticals, UK Ltd. & Anor*,²⁰ the England and Wales High Court noted that expert witnesses may require a "high level of instruction by the lawyers" and "considerable assistance from the lawyers drafting their report" in highly technical areas such as patent law. Despite this, the court cautioned that lawyers must always keep the expert's need to remain objective at the forefront.

In *Maras*, the court directed plaintiff's counsel to review the deficient expert reports with the expectation that the length of the reports could be considerably shortened and accordingly more accessible to the jury. The court further stated that counsel has a role in assisting experts to provide a report that satisfies the criteria of admissibility and quoted Mr. Justice McColl in *Surrey Credit Union v. Willson*:²¹

"There can be no criticism of counsel assisting an expert witness in the 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. Indeed had the process been followed here much of the objectionable material might have been avoided."

In *Moore v. Getahun*,²² at issue was the preparation of expert reports in the context of a medical malpractice action. The trial judge held it was improper for counsel to assist an expert witness in the preparation of the expert's report. During cross-examination at trial, the expert indicated he had sent a draft of one of his reports to the appellant's counsel for review. The expert testified he had produced his final report following an hour and a half conference call with counsel. The trial judge expressed concern over the call and asked the expert to organize his file in chronological order and to provide the court with draft reports. The judge also directed the appellant's counsel to provide the court with all instructing letters and records of any conference calls. Subsequently, the expert's draft reports were reviewed in detail and the notations and changes made as a result of discussing the draft

¹⁹ 2005 BCSC 131.

²⁰ [2011] EWHC 1669 (Pat) at para 110.

²¹ 1990 CanLII 1983 (BCSC).

²² 2015 ONCA 55.

reports with the appellant's counsel were scrutinized. Ultimately, the trial judge rejected the expert's evidence, as she concluded there had been significant changes as a result of discussions with counsel and the expert's duty of impartiality was breached.

The issue on appeal was whether the trial judge erred in her treatment of the appellant's expert opinion evidence by criticizing the appellant's counsel for discussing with an expert witness the content of his draft report. The Ontario Court of Appeal accepted that consultation between counsel and expert witnesses in the preparation of reports, within certain limits, is necessary to ensure the efficient and orderly presentation of expert evidence and the timely, affordable and just resolution of claims. In addition, the court held the changes to the expert's draft report could be described as relatively minor, editorial and stylistic modifications intended to improve the clarity of the reports. The court held there was no evidence of any significant change in substance or anything to indicate that either counsel or the expert did anything improper or that the expert's report reflected anything other than his own genuine and unbiased opinion.

Ultimately, the Ontario Court of Appeal held the trial judge erred in holding it was unacceptable for counsel to review and discuss the draft expert reports. In its reasons, the Ontario Court of Appeal emphasized that reviewing a draft report enables counsel to ensure that the report: (i) complies with the rules of civil procedure and the rules of evidence; (ii) addresses and is restricted to the relevant issues; and (iii) is written in a manner and style that is accessible and comprehensible.

THE RETAINER LETTER

General Practice

When dealing with experts the importance of the retaining letter cannot be overstated. The retainer letter governs the relationship between the expert, counsel and retaining party. Accordingly, its terms must be carefully considered and tailored to the particular case, the expert at hand and the specific role that the expert is expected to play. At the very least, the retainer letter for an expert witness should include clarity on the following:

- (i) the question or issues the expert is expected to address;
- (ii) the experts obligations to the Court;
- (iii) the facts and assumptions the expert is expected to rely on; and
- (iv) the materials the expert is entitled to rely on in formulating his or her opinion;

In addition to the foregoing, counsel should address with the expert, perhaps outside the retainer letter, the following issues:

- (i) expectations about confidentiality and dealing with persons adverse in interest;

- (ii) the principles governing the admissibility of expert reports under the rules of civil procedure and the legal limits on expert testimony;
- (iii) the preservation and disclosure of the expert's file, including, notes, working papers, drafts and correspondence; and
- (iv) a fee arrangement, which must not include a "incentive" or "contingency" agreement.

Where Expert has Dual Role

The retainer letter may be slightly more complex if one expert is retained as both an expert advisor and expert witness. In this circumstance, the letter should clearly state that the retainer is for two separate services, namely that the expert is to provide: (1) advice and consulting services; and (2) opinions. Some practitioner's instruct their experts to keep two separate files for the experts two separate roles. It is unclear from the authorities whether by doing so a party can resist the disclosure of their experts "advisory" files once the expert is tendered as an expert witness.