Helping the witness help the court

Ontario, B.C. rulings differ widely over the propriety of reviewing drafts of expert reports

Richard Lindsay

Expert evidence is getting considerable judicial attention recently. There is considerable concern that experts are not fulfilling their role as unbiased providers of assistance to the courts, and several Canadian jurisdictions have tackled the concerns in recent revisions to court rules. Examples include Ontario rule 53.03 and B.C. rule 11.

The manner of preparing expert evidence has become uncertain and jurisdictionally inconsistent as a result of two recent rulings. On Jan. 14, in *Moore v. Getahun* [2014] O.J. No. 135, the Ontario Superior Court set out in no uncertain terms that counsel were prohibited from meeting or consulting with an expert to review draft reports. The court expressed the view that the purpose of rule 53.03 was "to ensure the expert witness' independence and integrity." Further, the court felt that to discuss draft reports undermines "the purpose of Rule 53.03 as well as the expert's credibility and neutrality." This was premised on the stated belief that the "expert's primary duty is to assist the court" and that rule 53.30 brought about a "change in the role of the expert witness."

On June 18, in *Maras v. Seemore Entertainment Ltd.* [2014] B.C.J. No. 1242, a different approach was taken by B.C. Supreme Court Justice Patrice Abrioux. Citing *Surrey Credit Union v. Willson* [1990] B.C.J. No. 766, the court concluded that "Counsel has a role in assisting experts to provide a report that satisfies the criteria of admissibility." The line on objectionable input was drawn in asserting that the assistance can only go to "form as opposed to substance." Additionally, the court placed a positive duty on counsel to explain to expert witnesses their role in the litigation process.

It is the writer's opinion that *Moore* is wrong in concluding that reviewing an expert's draft report is "improper." Respectfully, the primary duty of an expert has always been to assist the court. It is the fundamental reason for "opinion" evidence. Nothing has changed. The critical factor is that experts must understand their duty, and that appears to be the primary purpose of the rules requiring a certification of an expert's understanding of that duty. It is reinforcement in writing of what has always been the expert's duty.

The preferred approach for instructing experts is set out in *Surrey Credit Union*. A blanket prohibition would lead to an inefficient and more expensive presentation of expert evidence. This will be far more damaging overall than the ills such a prohibition is attempting to cure.

There are many valid reasons for counsel to be involved in instructing experts. One of the most important is making sure the written report is directed to the issues. Lawyers are advocates; experts are not. The advocate knows the issues requiring expert evidence. Without proper instruction, the expert is left to divine the issues in a vacuum. In jurisdictions where reports are admitted in evidence, the form and legal requirements must be explained. Lack of direction will create inefficiencies at trial and lengthen expert testimony.

Concerns about biased experts are not new. Concerns of undue influence by counsel may be legitimate but there are clear ethical conduct rules in all jurisdictions which are designed to prevent abuse in dealing with witnesses, including experts. Also, lawyers' accumulated duties as officers of the court provide a significant safeguard. An inference that the "credibility and neutrality" of an expert is undermined by meeting to review draft reports is not warranted when the purpose of the review is to properly prepare expert evidence within ethical constraints.

Cross-examination has been an effective tool in rooting out bias and identifying those experts who fail to understand their role. Rule changes requiring a certification statement by an expert setting out that they understand their duty to be unbiased and not advocates assists in avoiding mischief.

On June 18, the Ontario Superior Court, on its own motion in *Bailey v. Barbour* [2014] O.J. No. 2920, applied cost sanctions against counsel for putting forward an expert witness at trial who lacked the impartiality required, contrary to the expert's duty set out in rule 4.1.01 and the common law regarding opinion evidence. The court was critical of the use of a partisan and a less than objective expert witness which "wasted the party's resources." Having such a witness "wasted trial time," and the court concluded counsel should have made such an assessment and not tendered the expert.

Ethical conduct, proper counsel work, expert witness education, proper application of the law and effective court sanctions all counter the assumed impropriety in reviewing draft expert reports. Properly instructed experts by ethical lawyers enhance the judicial process, and the prohibition in *Moore* is unrealistic and unnecessary.

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Five years on chow line for dine-and-dash scam

A Baltimore man notorious for faking seizures in order to skip out on his restaurant bill will be getting more free meals than he bargained for. Andrew Palmer, 47, had been convicted literally dozens of times on petty theft charges resulting from false medical emergencies just as the check arrived, reports the Baltimore Sun. He rarely served more than a few weeks in jail, however, because his bill was never more than US$90 and Maryland law allows only a maximum of 90 days for theft of goods or services under US$100. Prosecutors had tried to combine some of his many restaurant arrests in order to take advantage of another Maryland law that allows for a greater punishment when a theft is valued at "under $1,000" versus "under $100." Even then the longest sentence they could obtain was 18 months. That is until Judge Theodore B. Oshrine decided that Palmer's third severe theft charge made him eligible for up to five years in prison and served him up the maximum. Public defenders have said they will appeal. – **STAFF**