Interactions with Counsel

Dealing with Experts in Canadian Litigation

By Jamieson Halfnight

The proper role of expert witnesses in the civil litigation process has become an increasingly contentious issue in most common law jurisdictions in recent years as the stakes and strategies have grown in many types of lawsuits. In Canada, we have seen substantially increased judicial focus on the perceived problem of the "hired-gun" expert; our judges have become increasingly vigilant in reinforcing the modern-age emphasis on the role of the judiciary as active gatekeepers on admitting expert evidence, taking a *Daubert*-like approach as the rule. Additionally, our judges are more ready to disregard the evidence of an expert who is found to be an advocate, rather than an independent and objective witness.

In 2010 the Canadian civil rules were amended to establish an expert's duty to be "fair, objective and nonpartisan" and to certify so explicitly in his or her report. Any duties owed to a client-party are subordinated to the above duties as well, which are, in effect, also owed to a court.

The recent case of *Moore v. Getahun*, 2014 ONSC 237 (Can.), *rev'd*, 2015 ONCA 55 (Can.), has brought into sharper focus the potential pitfalls for counsel in the expert process. In this case involving a dispute about medical expert testimony in a motor vehicle accident lawsuit, the trial judge was evidently concerned about counsel's influence in shaping the expert's opinion and report—an aspect of the "hired-gun" problem—and made two significant departures from established Canadian law and practice. First, she ruled that it was unacceptable and improper for counsel to assist an expert witness in the preparation of the expert's report by reviewing and meeting to discuss a draft report with the expert; such a review and a meeting were common and accepted steps in expert retainers before this ruling.

The second ruling was evidently aimed at allowing an intelligent inquiry into the first issue: the judge ruled that none of the expert's notes of consultations, drafts of reports, and similar documentation from the expert's file were privileged and all must be produced during discovery. Because there is no deposition of experts or other non-party witnesses in Canadian litigation, and unlike most U.S. jurisdictions, it has not been until the actual trial that the opposing parties' counsel have an opportunity to delve into an expert's detailed work and documentation that supports the report—and even that delving is substantially governed by a trial judge's rulings on what can be fairly pursued.

On appeal in *Getahun*, which involved numerous interventions by interested organizations, the court of appeal provided guidance on what is and is not acceptable during the phase of a case when the expert's opinion is being formed. Essentially, the court rejected the trial judge's rulings of law on the interaction between counsel and experts. Counsel is entitled to meet with an expert, discuss the expert's opinion and report, and suggest editorial and stylistic changes that do not touch the substance of the expert's opinion—most typically, this last element would involve matters of expression and language. Such consultation is recognized as necessary for a variety of purposes: to ensure that an expert communicates his or her opinion effectively to a court; to ensure that the report satisfies the criteria of admissibility and complies with the rules and the rules of evidence; to assist an expert in framing his or her opinion and report in a way that is comprehensible and responsive to the pertinent legal issues in the case; to ensure that the report is restricted to the relevant issues and within the expert's area of expertise; to ensure that the report is written in a manner and style that is accessible and comprehensible; to explain to an expert the difference between the legal burden of proof and scientific certainty; to clarify the facts and assumptions underlying an expert's opinion; to ensure that an expert does not usurp a court's function as the ultimate arbiter of the issues; and to explain the legal issues to an expert with a view to counsel's having to present complex evidence to a court.

Because it is of paramount importance that an expert genuinely believes the opinion being presented, counsel must not attempt to persuade the expert to articulate an opinion that he or she does not genuinely hold.

On the issue of which parts of an expert's work must be produced to opposing parties, the appellate court ruled that this included only the expert opinion and vari-

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ous foundational information on which it is based, as well as the expertise of the expert. Consequently, the trial judge's rulings that appeared to change the law were rejected; at first nothing else is producible from an expert's file and remains litigation privileged. That privilege will yield when a court has reasonable grounds to suspect that counsel communications with an expert may have interfered with the expert's duty of independence and objectivity. So a court will order counsel to produce notes, drafts, and similar documents from an expert's file only once such grounds have been demonstrated through cross-examination at trial. Thus, the U.S. practice of producing an expert's file prior to trial is not and will not be the law or practice in Canada. FD