

# Crossing the Line: Avoidable Missteps by Litigation Practitioners

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## What is expert evidence?

- ▶ The Rule against opinion evidence: Witnesses can only testify on facts they have perceived, and not to the inferences they draw from those facts – *White Burgess*, 2015 SCC 23, para. 14.
- ▶ Expert evidence is the main exception to this rule evidence and allows a witness who has expertise in a particular area that is relevant to an issue to give opinion evidence.

## Types of Expert Evidence

- ▶ Evidence of opinion based on facts that have been proven to the court.
- ▶ Evidence to explain technical or complex subject areas or the meaning of technical terminology.
- ▶ Evidence of fact that requires an expert to fully comprehend, observe, and describe.

## The Role of the Expert – Independent, Objective, and Impartial

- ▶ Independent, impartial and objective”. Fundamental principle: You are there to assist the court
- ▶ Expert certification: BC SCCR 11-2 / SCFR 13-2: you have a “duty to assist the court and not be an advocate for any party”.

## Avoidable Misstep 1 – The Hired Gun

- ▶ *Ladner v. Higgins, Inc.* (La. 1954), 71 So.2 d 242-  
Louisiana Court of Appeals

“My impression in this particular instance is there is not sufficient evidence to support a neurosis,” and that instead of being afflicted with a post traumatic neurosis, plaintiff was a malingerer for economic gain.

Is that your conclusion that this man is a malingerer?

I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a posttraumatic condition.”

## Partisan Presentation Leading to Inference of Hired Gun

- ▶ *Drax Power Ltd and Simon Gibson Transport Ltd.*

[the defendants' experts] need to take an undergraduate university course on vehicle dynamics to understand the assumptions and their relevance to the circumstances of the incident...

Would like to point out that the two [defence] experts also have problems with understanding both the second law and the third law of Newton... encourages them to learn the engineering meaning of 'possible' and 'probable'

## Avoidable Misstep 2 – Bias

- a) Financial Interest
- b) Personal Interest

## Financial Interest

- ▶ Commercial Interest in the Instructing Party
- ▶ *Technomed v Bluecrest Health Screening* [2017] EWHC 2142 (Ch), para 14.
  - ▶ Professor Mond was put forward as an independent expert when in fact a company of which he is medical director was in commercial discussions with Express, the second defendant.
  - ▶ Conflict of interest was not disclosed early in proceedings so it could be dealt with in advance – the conflict only became apparent in cross-examination.



## Financial Interest – Cont.

- ▶ Avoid contingency fees – *InterOil Corporation v. Mulacek*, 2016 YKCA 14, para. 28

## Financial Interest – Cont.

- ▶ Employment Relationship with the instructing party does not automatically disqualify a person from giving expert evidence as long as their evidence is objective and not advocacy - *R. v. Inco Ltd.*, 2006 CanLII 14962

## Personal Relationship with the Instructing Party

- ▶ Personal Relationship between an expert and a party does not automatically disqualify - *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16
- ▶ But can result in disqualification - *Liverpool Roman Catholic Archdiocesan Trust v. Goldberg*:

*Where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be.*

## Emotional attachment to the Instructing Party

- ▶ Expert witnesses can become emotionally involved with the instructing party, particularly if they have spent considerable time with that party acted close to that party's advisors.
- ▶ *Vernon v. Boslym*, [1997] 1 All ER 577. Expert attended the trial as member of the litigation team

## Avoidable Misstep 3 – Overstepping Qualifications

- ▶ Credibility Issues - *Parliament v. Conley*, 2021 ONCA 261.
- ▶ Making conclusive findings of fact on disputed issues - *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 565(11th Cir. 1998), cert. denied, 528 U.S. 812 (1999).
- ▶ Giving a legal interpretation of contractual requirements.

## Avoidable Misstep 4: Lawyer influence on the report Influence on the Report

- ▶ Lawyer should have appropriate input into the format and content of an expert's report or affidavit before it is finalized and delivered.
- ▶ *Moore v. Getahun*, 2015 ONCA 55 - Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties

## Lawyer Influence Crosses the Line

- ▶ Ghostwriting grounds for exclusion - *Numatics Inc. v. Balluff Inc. and Barnum Company* (13-11049),

“The pictures, charts, and diagrams are the same. The Citations are the identical. The prose is indistinguishable down to the punctuation, leading to only one possible conclusion: the report was ghost-written by Balluff’s attorneys as a legal brief disguised (thinly) as an expert disclosure.”

## Avoidable Misstep 5 – Limited Facts provided to the Expert

- ▶ Lawyers must ensure that expert witness receives all relevant documentation to ensure that expert witnesses receive all relevant documentation and information to ensure that they are in a position to formulate an independent and objective opinion on a properly informed basis.
- ▶ *Livent v. Deloitte*, 2014 ONSC 2176, [2014] O.J. No. 1635 at paras. 70 and 72.



## Why use experts at all . . . .

- ▶ Better than the alternatives . . . .

# Common law alternatives to Experts

## Ordeal of Water



## Trial by Fire



## Ordeal by Inquisition



- ▶ Can you tell the air speed velocity of this unladen swallow?

## Takeaways - Drafting your Report

List your assumptions – both those provided by counsel and your own. Consider if they are reasonable and complete.

Avoid evocative and/or purely conclusory language.

The “Acid Test”: would your opinion be different if the other side had retained you? *White Burgess*, 2015 SCC 23 at para. 32.

## Questions?

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