Ethical Considerations in Retaining and Advising a Medical Expert

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Introduction and General Governing Principles

The relevant rule governing expert evidence, with the exception of summary trials under Rule 9-7, is B.C.S.C. Rule 11-1. The right to appoint your own experts is found in Rule 11-4 which provides that parties to an action can each appoint his/her/their own expert and tender expert opinion evidence to the court on an issue.

The duties of counsel in the retainer of expert evidence must be considered within the overriding objective of the Rules of Court as set out in BCSC Rule 1-3. In other words, expert evidence is permitted in order to "facilitate the goal of just speedy and inexpensive determination of every proceeding on its merits." It must be proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding.

In the zeal to advocate for one's client, it can be easy to overlook the overriding purpose of all rules as they interact with the rule on experts. The first question to be asked is whether or not the retainer of the expert facilitates these goals. In other words, do not over expert your file. Ensure that your retainer meets the proportionality test. The retainer must facilitate the determination of the proceeding in a proportionate way.

It is critical in the assessment and retainer of expert evidence to ensure that one broadly keeps in mind the principle that the expert is not the expert of the party, but rather an expert retained to give relevant evidence to assist the court. Subject to issues of litigation privilege, there really should be no property in a witness. This is another concept that can be lost in the necessary zeal of the advocate in developing his/her/their case.

Andersen Enterprises Ltd. v. Kerrisdale Plaza Projects Ltd. 2009 BCSC 570 is an excellent example of the application of these principles. In *Andersen Enterprises Ltd. v. Kerrisdale Plaza Projects Ltd,* the issue was whether the defendant, a class of strata owners, could seek a declaration that they retain a geotechnical engineer who had previously been retained by counsel for the plaintiff to prepare a report. The proposed engineering evidence would deal with the primary issue in the litigation that was a subsidence problem. Due to his earlier retainer, the geotechnical engineer had an opportunity to view the premises much closer to the subsidence failure date. The court noted at paragraph 12 that the application brought into conflict two established principles. The first was the proposition that there was no property in a witness. The second was the proposition that, where an expert has provided advice to a party that may guide litigation strategy, a court would be reluctant to permit another party to the litigation to retain that expert to provide a litigation opinion. In dismissing the application, the court considered the law and found the test at paragraph 23 to be that an expert opinion obtained by a party on the basis of confidential information and obtained by the party in the conduct of the litigation is entitled to substantial, but not absolute, protection. The factors to be considered in applying the test include prejudice to another party who is denied access to the opinion, the nature of any confidential information including whether or not that information can be available through the discovery process; and the effect that preventing the party from seeking access to the expert would have on its ability to fairly conduct the litigation.

This case holds that the opinion is substantially, but not absolutely protected. In the result, there are judicial authorities for the proposition that the purpose of the expert is to level the playing field for all parties. Therefore, timely and meaningful notice of expert evidence have both been judicially upheld. One

such example is *Ramcharitar v. Gill* 2007 BCSC 401 where the court ruled against the admissibility of an endocrinology report.

The duty of the expert witnesses is codified in Rule 11 -2. The expert must not be an advocate for either party and has an affirmative duty to assist the court. Hence the requirement in rule 11-2(2) for the expert to certify the awareness of that duty and to give that testimony in conformance with the duty.

An expert strays outside of this duty where the expert demonstrates bias. In other words, an expert who advocates and argues for the positions asserted by counsel has not met his, her, or their duty to the court. While engaging with your expert in the process of giving suitable instructions is appropriate and necessary, encouraging your expert to mine the case for evidence in support of either the plaintiff or the defendant should be discouraged. An example of this problem can be found in *Warkentin v. Riggs* 2010 BCSC 1706. This was a case assessing damages for chronic pain allegedly caused by a motor vehicle accident. The defendant had objected to the admissibility of the report of Dr. Hunt on the basis that Dr. Hunt's opinion did not provide a balanced discussion of fibromyalgia and the discussion and application of medical principles was done in a biased and argumentative manner. The court found at paragraph 58 that the experts use of bold font to highlight words and phrases that supported his diagnosis and the corollary use of regular font on those words and phrases that did not support his opinion constituted advocacy. Similarly, the picking and choosing of citations from the textbook was done in a manner that supported the plaintiff's claim and his diagnosis. He also selected only those portions of the literature and studies that supported his theory and was either unaware or eliminated portions of literature and studies that were contrary to his theory. He disregarded portions of literature requiring a causal connection be linked by a temporal connection to the development of chronic pain. After considering the law, the court found that Dr, Hunt was not a neutral and impartial expert providing assistance to the court but rather an advocate. His own description of his role as an expert consultant providing opinions on behalf of patients with chronic pain who are seeking legal remedies with respect to their condition revealed his bias. In the result, it was found that he presented the medical literature in a manner that suggested consensus where there was no evidence for it. His evidence was also given in the manner that supported a finding of advocacy. The evidence of a neuropsychologist was rejected for similar reasons in *Alafianpour-Esfahani v. Jolliffe,* 2017 BCSC 701.

It can be difficult to draw the line between appropriate instruction and engagement and the encouragement of advocacy by an expert. This can be difficult to define but we all know it when we see it. Consider these temptations and rule them out in the development of your expert strategy for your case. Consider the attitude of the expert in conversation with you. Is the expert willing to go outside of his/her/their expertise? Review the literature that your expert relies upon. Ask yourself if the literature is being fairly cited? If you use the same expert for multiple cases, do you see a pattern of advocacy either in thinking, and presentation on the stand, or, and the structure of the report. Where the expert is arguing in favour of their opinion, you have an obligation to point this out and to ensure that your expert does not stray from the proper role of assisting the court. Always keep in mind; this is your proper role as counsel.

In all dealings with the expert, counsel must keep in mind these basic principles in order to avoid the temptation to provide instructions and/or engage in conduct that is inconsistent with these principles. In addition, counsel should be encouraged to keep in mind the concept of proportionality. In our view, the concept of proportionality must also be considered in the retainer of the expert. This duty of counsel is outside and in addition to recent statutory amendments limiting the sheer number of experts.

Experts' and Counsels' Respective Roles with Instructions and the Development of Assumptions

Assumptions

In their report, an expert must indicate the factual assumptions on which his/her/their opinion is based. (BCSC Rule 11-6(1)(f)(i)). Generally, assumptions upon which an expert's opinion are based must be proven in evidence at trial.

When preparing a letter of instruction to the expert, some lawyers may provide a short paragraph on background information and a summary of injuries and treatment. This is often followed by a caveat that the expert shall not rely on the information to formulate his or her opinion and that the accuracy of those assumptions should be confirmed directly with the client, or through the medical records provided. Other lawyers may provide specific factual assumptions which they expect the expert to rely on to formulate his/her/their opinion. Both of these scenarios are appropriate; however, it is important to give the expert the freedom to make their own assumptions based on the interview of the client, observations made during the assessment, or based on the medical records provided. If the assumptions are provided solely by the lawyer, certain assumptions that could have influenced the expert's opinion may inadvertently be left out. This is especially true in situations where there is complex medical information that only the expert may truly comprehend and consider in a way that could change his or her opinion.

Another important issue is that the lawyer must ensure that he or she will be able to prove the factual assumptions that the expert relied on at trial. In *Sebastian v. Neufeld* [1995] B.C.J. No. 1684, Justice Preston considered the admissibility of three expert reports prepared by a psychologist. The issue with the reports is that the expert relied on inadmissible evidence including reasons for judgment that related to matrimonial proceedings between the Plaintiff and her former husband that commented on her credibility, and two expert reports that were not tendered into evidence. The Court ruled that the report was not admissible. In the ruling at paragraph 15, the Court specifically pointed to a common problem that arises in personal injury matters with respect to an expert's assumptions:

> *"There are other considerations. In personal injury cases arising from motor vehicle accidents, the plaintiff and defence bars have, in recent years, developed "stables" of expert witnesses whose opinions predictably favour one side or the other in the litigation. There has been a tendency, of concern to this court, for experts to combine the role of expert and advocate. This is encouraged where experts approach their task with an unrestricted mandate and are given, by instructing counsel, material that is inadmissible but calculated to bias the expert in the formation of his or her opinion. Experts should be asked to answer specific questions. They should conduct their own investigations, except where they rely upon a statement of facts that the instructing counsel is confident that he or she can prove at trial. Counsel should not encourage experts to undertake a broad review of voluminous material and make a vague statement that the opinion is based on that material. It is simply an unacceptable manner in which to present an expert opinion."*

It is part of the necessary task of instructing counsel to ensure that irrelevant or inadmissible material is not provided to the expert for his/her/their review. Keep in mind that in order to ensure that the resulting report is of value to the trier of fact, it is your job as counsel to review what you have sent to the expert and to ensure that it is admissible and/or that the assumptions provided to the expert can be proven in

the court room. Inflammatory and prejudicial materials should not be put before the expert. If clinical records are being put to the expert, irrelevant commentary that may affect considerations of credibility should be redacted.

It is also important that the expert does not try to step into the shoes of a trier of fact and weigh the evidence before them and decide what they will consider as fact and what they do not believe to be true. The use of discovery transcripts gives rise to an illustration of this problem. In *Hennessy v. Rothman* BCSC Registry Number B862891 February 26, 1988, the court found that a report was inadmissible because the expert had been furnished with many documents, most of which were not before the court and the expert had gleaned facts from this kind of evidence. The court found the factual assumption should be stated clearly by counsel and then the expert be asked to state his opinion on those facts.

In *Croutch (Guardian ad litem of) v. B.C. Women's Hospital & Health Centre*, 2001 BCSC 995, at paragraph 17, Justice Lowry made the following comments about providing experts with discovery transcripts:

> *"In my view, expert witnesses should not base their opinions on discovery evidence that may or may not be read in at trial. Indeed, as a general rule, I do not consider they should be given access to discovery transcripts. The assessment of evidence is not their function, and there is no place for the delivery of an expert's opinion when it is based on facts drawn by the expert from what was said on discovery. The facts underlying an opinion are within the purview of counsel. It is counsel who must be satisfied they are facts that can be proven, and it is for counsel to settle with an expert witness the facts that are to be assumed for the purpose of the opinion. It is those facts that must then be set out clearly in the statement that is to be delivered in compliance with the Rules."*

In *Benek v Pugash* 2004 BCSC 1257 at paragraphs 44-46, Justice Edwards expressed a more nuanced approach to providing experts with discovery transcripts:

> *"There may be situations in which it is appropriate for counsel to simply provide an expert with portions of a discovery transcript, along with instructions to assume the facts contained in that testimony are true. However, in those cases the expert must clearly identify the facts and assumptions he or she has drawn from the discovery transcript. There should be no suggestion that the expert has weighed the discovery testimony against other evidence and chosen the facts that will be assumed, and the discovery transcript should not be appended to the report. Instead, a summary of the assumptions made by the expert arising from the transcript should be put before the court and it is up to the party tendering the expert to prove the assumptions independently."*

In *Benek v Pugash* the discretion to admit the report is predicated in no small part by the fact that the testimony paralleled the examination for discovery and there was no confrontation on the transcript in cross-examination.

In *Tam v. Allard* 2022 BCSC 274, the plaintiff objected to the admission of an expert's report on the grounds that the expert had been provided with examination for discovery transcripts for consideration in preparing his report. The report was admitted because the report listed the factual assumptions relied upon and the sources of the assumptions. The Court held at paragraph 13 of the decision that, "no rule prohibits an expert from reviewing discovery transcripts."

When considering the use of examination for discovery transcripts or any other evidence, it is part of your obligation as counsel to ensure that you do not put your expert in the position of determining facts and assumptions from the material that you have provided. You must ensure that you have provided adequate instructions. In the case of engineering evidence and other technical evidence, there is often no other way to determine technical facts. In this case, where the instructions on assumptions require the assistance of the expert, a better practice is to have the expert review for example the examination for discovery questions and to identify which questions and answers are germane to the development of the opinion and report. Those questions and answers must clearly be identified in the report. Again, the issue is to ensure that counsel do not conflate the expert's role with the role of counsel.

Pre-Report Retainer

Issues to be covered in the pre-report retainer can include such items as investigation of and inspection of real evidence [often the case of engineers] and may include an assessment of whether or not proposed expert is the correct expert for you to use. In the case of real evidence, any preliminary opinion will remain privileged. However, the preservation of real evidence such as black box downloads or on-scene photographs and measurements is likely not privileged. You will need to consider what is appropriately covered by litigation privilege and what is appropriate real evidence requiring disclosure on your list of documents at the appropriate time.

Instructions to the Expert

The instructions to the expert are part of the producible file, therefore they should be provided in the form of a letter or other written format. From time to time, the expert may require additional instructions and the use of supplemental letters of instruction is quite acceptable. The point is to ensure that the relevant information is before the court. The letter to the expert should contain background information about the client; Basic information regarding the incident that resulted in injury; The injuries sustained, and treatment received by the plaintiff; clear assumptions, and index of all relevant documents provided to the expert; and the specifics of the questions that you want answered. In the case of technical experts such as economists or engineers, ensure that you have the expert identify any technical assumptions and definitions of same upon which the opinion is based. Ensure that your expert makes the certifications as required under Rule 11-2 and as noted in the introduction, ensure that you do not encourage your expert to act or to pen an opinion that crosses the line into advocacy.

In your discussions with the expert, ensure that you do not actually suggest an opinion. It is fair ground to challenge their facts and assumptions if the expert has made incorrect facts and assumptions that you know to be inaccurate and to encourage the expert to consider these facts in coming to his/her/their opinion. It is also fair to provide the expert with updated materials and evidence that may change his/her their opinion. The line has been crossed when you are trying to convince or to change the mind of your properly instructed expert who has all of the relevant facts.

What Documents to Provide

The expert should be provided with all relevant documents that may influence their opinion. However, not all the documents related to the claim may be relevant. As noted above, do not include inflammatory material of limited relevance. Do not include swaths of documents that may not be admissible.

Issue Arising from the Draft Report

Prior to drafting a report, many experts will talk to a lawyer over the phone to discuss their opinions. If the expert's opinion is unfavorable, the lawyer may choose not to order the report. There is nothing wrong with this. The expert is hired by the lawyer in the course of litigation as part of their investigations, the lawyer is not obligated to commission a report, and this does not have to be disclosed.

Some experts will provide a draft report to the lawyer for comments before finalizing the report. This is an important step, and as long as the lawyer and expert do not cross certain lines it is completely ethical. Draft reports are usually protected by litigation privilege. Reviewing a draft report is an important step. It is the role of legal counsel to make sure that the expert has presented their opinion in a way that conforms to the rules, and that will be understood by the trier of fact. As noted above, ensure that your discussions with the expert do not cross the line.

In *Hennessy v. Rothman* [1988] B.C.J. No. 350, Justice Meredith ruled that the opinion will generally require careful analysis by counsel. She went on further to say that if unedited reports of experts are to be admitted, the cost and duration of litigation is bound to multiply, and the precision of the trial process will be jeopardized. The lawyer is aware of what opinion is required and how it relates to the issues in the trial. Experts are not qualified in legal matters and; therefore, the lawyer has to guide them as to what is necessary in the report and to ensure that all the requirements in rule 16 of the Supreme Court Civil Rules have been satisfied.

However, there are situations where collaborations between the lawyer and the expert go too far. In *Vancouver Community College v. Phillips Barratt*, [1988] B.C.J. No. 710 considered the claim of Vancouver Community College for damages against its architect and engineers. The court considered the admissibility of the expert evidence. Their evidence was premised on conclusions or assumptions of a witness, Mr. Atkins. The court made unfavourable findings regarding the evidence of Mr. Atkins. His report had been revised on ten occasions with advice and commentary from counsel for Vancouver community College. The court disallowed the evidence. In so holding, the court stated as follows:

> (33) 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 experts work product as it develops towards its final form.

The court found that the boundaries were not observed. Counsel participated too much and inappropriately in the preparation of the reports. Counsel suggested deletions and additions to the reports. This went far beyond statements concerning factual hypotheses, their evidentiary foundation, the definition of issues, or other matters on which counsel may properly have advised or commented. Rather, the suggestions went to the substance of the opinion and the manner in which it was expressed. Critical references to Vancouver Community College were removed and complaints about the defendant were elaborated. The result was a hopelessly unfair and partisan document amounting to nothing more than advancing arguments for the mouth of an expert. One critical element was an analysis of unusable or missing space. No factual evidence was called to support this analysis. Since the Atkins evidence was of no value, it tainted the evidence of the other experts cold by Vancouver community College. Their evidence was similarly rejected.

The lesson here for counsel is illustrative. In *Vancouver Community College v. Phillips Barratt*, the failure of counsel to understand their role as advocates and the expert's rule to assist the court resulted in the dismissal of their client's case.

At the end of the day, the lawyer needs to ensure that in their discussions with the expert they are not trying to influence the expert's opinion or push them to compromise their duties of objectivity and assisting the court.

File Production

Where the report has not yet been served, litigation privilege has not been waived over the contents of the expert's file *Popat v. Popat,* 2021 ONSC 5194.

The production of the expert's file in British Columbia is governed by Rule 11-6 (8). The rule provides that upon service of the report, the party who served the report (a) must promptly after being asked to do so serve on the requesting party (i) any written statement or statements of facts on which the expert's opinion is based; (ii) a record of any independent observations made by the expert in relation to the report; (iii) any data compiled by the expert in relation to the report; (iv) and then the results of testing if relied upon informing the opinion. Further guidance in (b) provides that if asked to do so by a party of record the person serving the report must make available to the requesting party for review and copying the contents of the expert's file relating to the preparation of the opinion set out in the report promptly after receipt of the request or at least 14 days before the scheduled trial date.

This will not include all of the expert's file in some cases. There will be a distinction between the expert's file for assistance with cross-examination or other technical matters and the expert's file containing the information and notations relevant to the production and creation of the report served in the litigation.

One West Holdings Ltd. V. The Owners, Strata Plan LMS 2995, 2020 BCSC 1544 considered a complex commercial case involving parking stalls in the strata unit. The case was set for a summary trial and the liability and damages have been bifurcated. The plaintiffs wanted to tender expert reports on Hong Kong and British Virgin Islands real estate law.

At the trial management conference, the defendant owners sought an order under Rule 12-2(9)(i) requiring the plaintiffs to produce their experts' files pursuant to Rule 11-6(8)(b), including but not limited to documents relating to the experts' involvement in providing advice on the development and leases at

issue. The defendants did not issue a demand within the demand period under Rule 11-7(2) requiring the plaintiffs' experts to attend the trial for cross-examination pursuant to Rule 11-7(3). The defendants argue production of expert files under Rule 11-6(8)(b) is as-of-right when requested. The purpose of Rule 11-6(8), they say, is to permit opposing parties to make informed decisions whether to require experts to attend trial for cross-examination. Although they acknowledge they did not give notice within the time under Rule 11-7(2), the defendants submit they should have an opportunity to reconsider whether to require the experts' attendance for cross-examination, based on the contents of the files. The court declined to make a TMC order requiring production of the expert file in the absence of a request for cross-examination. In so holding, the court noted that documents relating to the preparation of an expert report for possible use in litigation are subject to litigation privilege. At common law, the privilege was waived when the expert was produced for cross-examination. Rule 11-6(8) modifies the timing of the waiver of the litigation privilege and sets out a number of documents that must be produced immediately on request: 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 and sub-rule (b) requires that the contents of the expert's file "relating to the preparation of the opinion set out the expert's report" be produced 14 days before trial (or forthwith if the request is made within 14 days of trial).

The court found the law on production as follows:

[23] In *Conseil scolaire*, Madam Justice Russell held that Rule 11-6(8)(b) does not require production of materials in an expert's file that do not relate to the preparation of the opinion, at para. 44: As I see it, a request pursuant to R. 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. However, the expert need not produce materials that relate to the expert's role as an advisor to counsel about matters that are not addressed in the expert's report.

The court noted that the disclosure obligation could not be divorced from the truth finding process it was intended to serve namely testing the substance and credibility of the expert's opinion at trial. Further, the order was out of proportion with the practical benefit of production given the lack of request for cross-examination.

In *Insurance Corporation of British Columbia v. Teck Metals Ltd*., 2021 BCSC 1477 the court considered a claim by ICBC on behalf of vehicle owners for damages arising from the exposure of vehicles to sulphuric acid spilled on the highway. There had been prior litigation on a similar issue and without litigation had settled. In the course of that litigation, ICBC had served an engineering report. In the case at bar, ICBC produced that engineering report in its list of documents. The defendant argued that the disclosure of the report in the subject litigation entitled it to the entire expert file. ICBC asserted that the expert file continues to be subject to litigation privilege and on that basis has declined to include the file in its list of documents. The court held that:

> [28] However, I agree with ICBC that mere service of the expert report in the prior litigation did not create an immediate waiver of privilege in the expert file. Rather, service of the expert report triggered a potential obligation to produce the expert file in due course under the Rule 11-6(8)(b). Yet the litigation never reached the point where the expert file was produced. On this reasoning, I do not accept that service of the 2011 MEA Forensic report in the prior litigation gave rise to an unconditional waiver of privilege in the associated expert file.

The Court relied on *One West Holdings Ltd. v. The Owners, Strata Plan*. In reviewing the law on this topic, Master Elwood explained at para. 20–21 that:

I. documents relating to preparation of an expert report for possible use in litigation are protected by litigation privilege,

II. at common law the privilege was waived when the expert was produced for cross-examination, and

III. Rule 11-6(8) effectively modified the timing of the waiver. Master Elwood went on to reason at para. 24 of the decision that the request for production was not well founded because "the disclosure obligation in Rule 11-6(8)(b) cannot be divorced from the truth-finding process it is intended to serve", and "production of an expert's file is required by Rule 11-6(8)(b), not for standalone discovery purposes, but rather for the purpose of testing the substance and credibility of the expert's opinion at trial".

[32] Again, the reasoning in *One West Holdings Ltd.* is apt. The document disclosure obligation with respect to production of an expert file that is subject to litigation privilege is effectively codified in Rule 11-6(8). It would defeat the purpose of those provisions to hold that listing of an expert report under Rule 7-1 in circumstances where privilege over the report itself had previously been waived effectively created a waiver of the continuing privilege over the expert's file. I find that there is a continuing litigation privilege over the expert file, and the timing of any future waiver is governed by Rule 11-6(8).

An interesting example is set out in *First Majestic Silver Corp v. Davila* 2012 BCSC 1250 in which the court refused an application for production of notes made by an expert during the calling of the plaintiff's expert evidence. The Defendant argued that Rule 11-6 replaced the common law and limited production to the contents of the expert's file retail leading to the reparation of the opinion. The plaintiffs argued that the only effect of 11-6 was to push back the timing. The court held that the words relating to the preparation of the opinion must be given some meaning and that the rule settled the grey area in the common law. Therefore, notes taken during the course of the trial were not infallible.

Joint Experts

In the context of personal injury claims, joint experts are seldom used if at all. However, this is an area that we wanted to touch on briefly. There is currently a lot of discussion regarding the growing costs of disbursements in motor vehicle accident claims. One way to address this could be the use of joint experts, however, joint experts are not always ideal and that is likely the reason why we do not see them used very frequently.

Rule 11-3 of the *Supreme Court Civil Rules* allows for 2 or more adverse parties to appoint a joint expert as opposed to the common practice of each party appointing their own experts. Specifically, rule 11-3 provides that if two or more parties who are adverse in interest want to jointly appoint an expert, or are ordered to under rule 5-3(1)(k), the following matters must be settled:

a) The identity of the expert;
b) The issue in the action the expert opinion evidence may help to resolve;
c) The facts or assumptions of fact agreed to by the parties;
d) For each party, any assumptions of fact not included under (c) that the party wishes the expert to consider;

e) The question to be considered by the expert;
f) When the report must be prepared by the expert and given to the parties; and
g) Responsibility for fees and expenses payable to expert.

These issues must be addressed by counsel in order to avoid putting the expert in a classic bind of how to report to two different masters. The rule goes on to provide that the parties must enter into an agreement with the expert (2), that the parties may apply for directions on application, at the case planning conference and that the terms of the expert's appointment may be completed there. In addition, the parties must submit on application for an order under subsection 3 that identifies and states their position both on matters (a) through (g) and submitting expert names and qualifications to the court if the expert cannot be agreed upon. Personal connections must also be divulged. Subsection 5 provides that the court has the authority to appoint the specific expert and settle the terms and that this can be done in the context of the case plan order. The mechanics and signing of the agreement are covered in subsection 6. Importantly, without a further court order, subsection 7 will preclude the retaining of additional experts unless a party applies for leave under subsection 8 with additional evidence meeting the test set out in subsection 9. Each party of record has the ability to cross-examine a joint witness: Rule 11-3(10). Critically, this section applies to parties who are adverse in interest. Parties who are not adverse in interest have always treated the ability to pinpoint a joint expert and this is codified in Rule 11 -5 (11).

The question arises as to why counsel may choose a joint expert and the additional considerations that may apply. Specific to the area of personal injury, the area of economic evidence often results in duplicating evidence and costs. Given the current limitation of three expert reports the appointment of a joint economist who can be given different sets of assumptions by each party in order to quantify future losses, management fees, and income tax gross up seems like a good place to start. In non-personal injury matters, valuations of specific assets for asset classes may also be a contender in this area.

Benedetti v Breker 2011 BCSC 464 considered an application by the plaintiff for an order that psychiatrist Dr. O'Shaughnessy be appointed as a joint expert in a personal injury case. The defence objected *inter alia* on the basis that they had retained the physician for a defence independent medical legal assessment. The joint appointment would pre-empt the defences right to an IME with the physician of its choice and it would lose the ability to control whether or not a report was ordered. The thrust of the plaintiff's case was proportionality. The court agreed that BCSC Rule 11-3(3) is the only provision for a joint expert. One must either be ordered at a case planning conference or the parties must agree. The court dismissed the application, likely in no small part because the plaintiff already had five privileged medical legal reports.

Court Appointed Joint Expert

Related to the above rules and helpful in understanding why joint experts are less common is the application of court appointed experts. Rule 11-5 allows for the court to appoint its own expert if it is of the opinion that doing so would help the court resolve an issue in the action. However, such appointments are to be used sparingly according to the case law. This is because civil litigation in Canada is an adversarial process. Wide use of court appointed experts shifts the process into an inquisitorial one: *Hiebert v Hiebert* 2006 BCSC 231 at para 20. As a result, such experts should only be appointed if the issue to be decided is reasonably narrow: *Hiebert* at para 19.

Appointing joint experts is seemingly a cost and time effective way of producing expert evidence. However, the reality is in an adversarial system, it is impractical. Joint experts and court appointed experts

deviate from the standard in civil litigation of each party presenting their own experts and their evidence with the opposing party cross examining that witness. Joint experts and court appointed experts likely confuse this process in that examination of such witnesses would likely blur the line between direct and cross-examination. There may be limited circumstances in which the issue is narrow and not a deciding factor in a case that it may make sense to discuss joint experts with opposing counsel. However, those situations are likely rare. This decision raises interesting questions of the ethical considerations for the city of justice in making such an order.

In *MacDonald v. Leung* 2019 BCSC 299, a case heard under the Family Law rules, a joint expert was appointed. The claimant was granted leave to introduce evidence of an additional expert after the joint expert failed to disclose that he had been retained previously by the respondent. The Honourable Madam Justice Dillon stated at paragraph 13 that, "It is fundamental to the fairness of the process of deciding on a joint expert that each party have full disclosure about the expert, particularly as it pertains to a prior relationship with one of the parties."

These comments are equally applicable to any joint expert appointment. Firstly, the court will need to consider whether or not the issue is sufficiently narrow such that the court can consider the imposition of a court appointed expert without straying into the inquisitorial rule. Secondly, each side will need to disclose any prior relationship or retainers of the proposed expert so that the court can adequately deal with questions of inappropriate bias.

Rule 7-5 and Swirski Issues

Confidentiality rights in the context of personal injury litigation have been considered in *Swirski v. Hachey,* 1995 CanLII 617 BCSC a case in which a motor vehicle accident caused ongoing brain injury and seizures. There were a number of neurologists who had treated the plaintiff. At least one of those neurologists attributed the presence of seizures to psychiatric conditions and not to organic evidence of brain injury. Counsel for the defendant sought to interview the neurologists. It was held that there is a limited waiver of confidentiality created by the instigation of litigation. This was only as wide as the medical matter at issue in the lawsuit and any ancillary matters that may be relevant to have a bearing on such matters.

The court provided a process for interviewing such witnesses as follows:

- Notice required to PC for informal discussions
- Notice must be sufficient to allow PC to seek an order that PC be allowed to be present during informal discussion for sole purpose of objecting on the basis of continuing doctor-patient privilege (36)
- Onus on PC to apply for restrictions upon defendant's right to interview (35)
- "Doctors can always refuse to take part in such discussions entirely or agree to do so only in the presence of both counsel" (33)

The court found the scope of the waiver at paragraph 42 of the judgement:

a) There is no doctor-patient confidentiality attaching to the plaintiff's treating doctors concerning information relevant to the claims made herein for purposes of this action.
b) Defendants' counsel in this case are at liberty to discuss such matters with the plaintiff's said physicians in the absence of the plaintiff or her counsel.

c) In this Province, the commencement of an action for damages for injury is a waiver of doctor-patient confidentiality for medical matters relevant to and bearing upon matters raised in the action.

d) In this province, such waiver also constitutes as a matter of law an implied authorization to the physicians for the release of such information for purposes of the litigation.

e) Absent privilege, the only basis for imposing any restriction on such discussion would be the risk of inadvertent release of irrelevant (and thus still confidential) information.

f) In future cases, it is not necessary for defence counsel to apply for approval to discuss the case with the plaintiff's physicians, but as a matter of practice in preparing the case for the court, general notice should be given to the plaintiff of an intention to seek informal discussions with named medical treatment givers. The notice should not be given until the limits of relevance and confidentiality have been set with reference to documents.

The onus will then be on the plaintiff to make application to bar or restrict such interviews. Unlike rule 7-5, this decision in no way compels the physician. Attendance is voluntary.

The best practice when relying upon this limited right of interview is to pick up the phone and to talk to the other lawyer and to invite them into the process. If the negotiation process fails, and the proposed physician does not wish to proceed, the party affected may consider the more formal rule 7-5 process. In particular, items to canvass with the other side on such an interview are voluminous. To avoid misunderstandings and to avoid inadvertent breaches of privacy, the best practice for such an interview involves the following:

1. agree with the other side as to the general nature of the questions you will be asking;

2. reach an agreement in advance about any materials outside the proposed witnesses' own file;

3. if other materials are being presented, to bring context of the interview, reach an agreement on any and all redactions.

This witness may at some point be asked to prepare a medical or other report. The goal is not to poison the mind of the expert. The goal is to ensure that all of the relevant facts are equally available to both sides. This is a remedy that should be used sparingly. Most of the time, the questions can be answered from documents on file with the assistance of other experts.

Real life examples of issues that required a Swirski Interview include:

1. physical findings of a pathologist with regards to whether or not a blood clot was disorganized or organized, and the process required to make assentation and the specific observations that led pathologist to that conclusion; and,

2. whether or not certain notations made by a neurologist were suggestive of myleopathic or radicular symptoms.

In both cases, the only remedy was to obtain the observations straight from the treating physician.

In the unlikely event that you cannot make these arrangements after engaging with the other side, there is limited applicability in this area for the application of rule 7-5. In particular, it must be considered whether or not there is an implicit waiver over matters that might appropriately be the subject of

privilege. In *Stelmaschuk v the College of Dental Surgeons* 2017 BCSC 1371 a solicitor, on advice from counsel, refused to answer questions regarding the plaintiff's capacity to understand at the time of his signature on an agreement. The agreement was the subject of the litigation with the College. The court held as follows:

> "There is a clear nexus between the privileged communications and Mr. Stelmaschuk's state of mind: Soprema at para. 121.
>
> To allow Mr. Stelmaschuk the benefit of the privilege would be to confer an unfair litigation advantage upon him" (15) "where a party makes its state of mind material to its claim or defence in such a way that maintenance of privilege would be unfair to the other party, privilege will be considered waived. Such waiver may occur in the absence of intention, where fairness and consistency so require" (17) At para 34, the Judge found that privilege had been waived but declined to order the solicitor examined as he had not had the opportunity to provide a responsive statement which is a pre-requisite to ordering a Rule 7-5 examination.

The court noted as follows at paras [32]-[37]:

1. There is discretion under this rule to order an interview of a witness rather than an examination under oath.
2. A pre-condition to an order under the rule is that the witness must have refused a request to give a responsive statement.
3. If the witness is willing to give such a statement but the opposing party does not waive privilege, an order may be made for an interview once waiver has been established.
4. If a responsive statement is still provided, then an order for an examination may be made.

An Expert not retained by any party who has material evidence to the litigation may be examined as to facts and opinions*" Sinclair v March* 2001 BCSC 102.

In such a case where Rule 7- 5 is touching on matters that maybe normally covered by confidentiality or matters of privilege, although not required, the best practice is to send a copy of your letter to the other side at the time you serve the expert. This will allow counsel the opportunity to clearly set out any matters that he/she/they take the position are covered by litigation privilege. Keep in mind, the concept of proportionality and the ultimate goal that must always be to have a level playing field in which both parties are entitled to the same access to facts. Consider that investigations done by either counsel on such matters will be most free from unnecessary conflict and expense if approached with proportionality, fairness, and respect for litigation privilege in mind.

Conclusion

In conclusion, the vast majority of problems arising in this practice area come from an overly aggressive adversarial approach. As the process unfolds, from time to time, question your approach and re-evaluate issues.

Is Your Approach Proportionate?

Ensure that your retainers are proportional to the matter at hand. Excessive numbers of experts do not assist the court in coming to decisions and judgements on matters of fact.

Are You Conflating the Role of Counsel and Expert?

When approaching the retainer and instruction of expert witnesses, keep in mind that you must distinguish the expert rule from your own role. Do not encourage your expert to pursue a path of advocacy by overly inserting yourself in the process or by trying to dictate the opinion.

Are You Encouraging and Developing Relationships That Support Truth Finding?

Do encourage your expert to pursue a vigorous examination of the facts upon which the opinion is bounded. Encourage your expert come to these facts by reviewing appropriate evidence as instructed by counsel. If you encounter an expert who over engages in advocacy and who is not receptive to corrective instructions, avoid that expert in the future.

Are You Conflating the Expert's Role to the Court with the Expert's Role to Assist with Cross Examination?

Ensure that your expert understands the difference between their role in assisting you with cross-examination which in and of its nature does involve the assistance of the pursuit of advocacy and their obligation in presenting their opinions to the court that require the opposite and that they refrain from advocacy. Ensure that your expert understands that the ultimate goal is to assist the court.

Are You Overcontrolling the Process?

Do not over engage and overcontrol your expert's opinion. Feel free to challenge it and feel free to ensure that your expert has adequate materials and admissible evidence that you can prove in court to support the assumptions and findings that your expert is speaking. Ensure that your conversations do not amount to you bullying your expert in to changing the opinion.

What About Privilege?

As matters come forward throughout the litigation, respect the concepts of litigation privilege and ensure that you understand where the Rules of Court create a waiver and/or where waiver is created a common law so that you understand firstly what you must list in your list of documents and secondly so that you ensure that any ongoing investigations or interviews conducted respect the obvious privileged areas. When in doubt, pick up the phone and speak to the other side.

In conclusion, keep in mind that the adversarial process does not require that each and every issue create adversity and arguments. You may be surprised how often you can reach consensus.