November 15, 2016

Can an expert retain counsel to help prepare an opinion? Absolutely.

Is it improper for an opinion expert to hire his or her own lawyer to help prepare an opinion? That was the issue in the recent decision of Justice Perell in *Wright v. Detour Gold*. Justice Perell ruled that there was nothing improper in an expert retaining counsel to assist with the preparation of the opinion. The reasons are interesting in their conceptualization of the expert's overriding duty to the Court, and for their interpretation of the recent Supreme Court of Canada case, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, concerning the admissibility of opinion evidence.

The underlying proceeding in this case is a primary and secondary market securities class action against the defendants, Detour Gold and Gerald Panneton, its former CEO. In such proceedings, the plaintiffs must seek leave from the Court to proceed with the statutory claims for secondary market liability. One of the issues engaged by the plaintiffs' pending motion for leave to proceed with those claims was whether the defendants were obliged to disclose to the investing public certain covenants in Detour's credit facility with a syndicate of Canadian banks.

The defendants engaged an expert, Peter Gillin, to provide an opinion on the scope of their duty to disclose the covenants. Gillin, in turn, retained SkyLaw P.C., a boutique securities law firm in Toronto, to help in the preparation of the opinion. Gillin instructed SkyLaw to compile financial information from publicly available sources such as Bloomberg Markets and SEDAR. SkyLaw's retainer went beyond mere fact gathering and included writing and revising the text of the opinion. The substance of the opinion, however, was Gillin's alone.

Gillin then swore an affidavit containing his opinion evidence and certified that his opinion was prepared in accord with rules 4.1 and 53.03 of the *Rules of Civil Procedure*. During the cross-examination on his affidavit, Gillin was asked to produce any drafts of the affidavit, all correspondence between him and SkyLaw, cover letters that may have been sent by SkyLaw to him, and the invoice that he sent for his fee. The defendants refused to have Mr. Gillin answer these questions.

In the subsequent refusals motion, the plaintiffs argued that Mr. Gillin's refusals presented the spectre of an egregious miscarriage of justice, and that the expert's reliance on the research and drafting work of others displayed a want of independence that endangered the expert's overriding duty to the court. That submission found no purchase with Justice Perell, who characterized it as "bombastically hyperbolic" and not corresponding either to the actual facts of the case or the law governing those facts.

Justice Perell observed there was no connection between Mr. Gillin's reliance on the assistance of his counsel – whose only duties were to him – and any partiality or want of independence in the giving of his opinion for the defendants, which would have been grounds for disqualification. Going to the plaintiffs' argument that Gillin had been caught "red-handed" putting his name on an opinion he did not write, Justice Perell held that "it is simply not correct" to say that an assistant becomes the author of a legal opinion because he or she was involved in the drafting of it. Affidavits for litigation are almost inevitably drafted by lawyers and the witness – whether a lay witness or an expert – swears the truth of the substantive contents that have been drafted by the lawyer.

In Justice Perell's view, the practice of using the expert's counsel to assist in the preparation of an opinion is not something to be deplored. Rather, it is something to be encouraged, because it enhances the expert witness' independence and impartiality by insulating the expert from pressure from a litigant's lawyer to be a partisan witness.

This position is in line with the Court of Appeal's recent decision in *Moore v. Getahun*, where Sharpe J.A. held that it is normal, proper, and helpful to have an expert consult with the lawyer of the party who has commissioned the opinion. That consultation helps the expert to frame his or her opinion in a way that is comprehensible and responsive to the relevant legal issues in any given case. Justice Perell referred to these passages from Sharpe J.A.'s decision in his own reasons and concluded that if consultation between the expert and the litigant's counsel is proper (as was the case in *Moore v. Getahun*), it is difficult to understand why consultation between the expert and his or her own lawyer could be improper.

Justice Perell referred to the first part of the two-stage test for the admission of expert evidence that was described by the Supreme Court of Canada in *R. v. Mohan*, and explained that the refusals motion before him implicated the fourth of the *Mohan* criteria in the first, threshold, stage: the qualification of the witness as an expert.

An expert must satisfy two criteria to be qualified: first, the witness must demonstrate special knowledge in respect of the matters on which he or she will testify; second, and as codified in r. 4.1.01 of the *Rules*, the witness must be independent, objective and impartial. Such impartiality will be assumed if the expert witness acknowledges his or her duties to the court.

Justice Perell looked to the recent Supreme Court of Canada decision *White Burgess* for guidance on how to interpret the expert's special duty to the court to provide fair, objective, and non-partisan assistance. In *White Burgess*, Justice Cromwell concluded that concerns about a witness' impartiality should be addressed as a threshold requirement for admissibility. Absent a challenge, the expert's attestation recognizing and accepting the duty will generally be enough to satisfy the threshold test.

As Justice Cromwell observed in *White Burgess*:

> [the] threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence will be ruled inadmissible for failing to meet it … exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

On the strength of that authority, Justice Perell observed that Mr. Gillin had recognized and accepted the duty he owed to the court, and concluded that the plaintiffs had not shown a realistic concern that Mr. Gillin's evidence should not be received because of any inability or unwillingness to comply with the special duty that an expert owes to the court.

Detour Gold reaffirms that the threshold requirement for the admission of opinion evidence is a relatively low one, and will generally be satisfied in all but rare cases. It is also interesting for its frank acknowledgment and endorsement of the active role that counsel play in the drafting of litigation affidavits. Finally, it develops the jurisprudence articulated in *Moore v. Getahun* on the crucial mediating role that counsel are encouraged to play in helping the court to understand, and benefit from, the expert's opinion.