February 22, 2018

Falguni Debnath
Secretary, Civil Rules Committee
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N5

Dear Ms. Debnath,

On December 27, 2015 I sent a submission to the Rules Committee asking that it adopt a "three-strikes-and-you-are-out" approach to enforcing the requirement that experts honour their Form 53 promise of impartiality. In its July 14, 2016 response, the Committee rejected my suggestion, writing the following:

> *"The existing Rules establish that the duty of an expert is to the court and not to the parties: see rule 4.1.01. Form 53 (Acknowledgement of Expert's Duty) requires any expert to sign an acknowledgement of the matters set out in rule 4.1.01.* ***It is clearly good practice for counsel to assess their own expert witness in the light of any prior adverse judicial comments about a particular expert, and to seek to introduce any prior adverse judicial comments about an opposing expert witness****. A judge has the authority to disqualify an expert, to limit the scope of the expert's evidence, or to refuse to admit any evidence that is found to be impartial."*

While this is an excellent depiction of what ought to happen, it is a far cry from what is actually happening. Judges have been refusing to allow plaintiff lawyers in the personal injury (auto insurance) context to adduce prior adverse judicial findings of bias as a means to challenge insurer medico-legal defence experts. The consequent complete failure in terms of oversight and accountability as it relates to expert evidence in this context has recently been chronicled in a series of investigative reports in the mainstream press (*The Globe & Mail* and *National Post*, for example; see below). It is ironic that when investigative reporters want to get a handle on this or that expert's propensity for bias, they matter-of-factly look to prior judicial findings of partisanship as their barometer. Yet, stunningly, judges are refusing to take the same common sense approach to this issue. It beggars belief that what the Committee describes as "good practice" is seen by the judiciary as so utterly improper that "seeking to introduce" prior judicial findings of bias can now attract punishment in the form of extra costs for wasting the courts' time:

> "Second, there was the fact that Plaintiff's counsel sought to cross-examine Dr. Rezneck on findings made about his reports in previous cases. **I ruled that cross-examining an expert about judicial findings in previous cases where that expert had testified was not within the scope of proper cross-examination. The argument on this ruling, and the consideration of the cases that counsel for the Plaintiff filed consumed a couple of hours of court time. Raising this issue unnecessarily lengthened the trial time, and it should also be considered in a minor way in assessing the costs"** (Sharma v Stewart, 2017, ONSC).

When judges refuse to allow prior adverse judicial comments to be adduced as a means to challenge expert impartiality, they are conflating a judicial **expectation** of impartiality (in accordance with the Form 53) with a judicial **presumption** of impartiality. But as Master Short pointed out, without enforcement of the Form 53 promise such a presumption is unsafe. Taking for granted that long-time partisan experts will honour their Form 53 promise to be impartial is judicial folly of the worst sort.

Arguably, there is no better synopsis of the rationale and hopes for the 2010 New Rules (as they apply to experts) than Master Short's in Bakalenikov v. Semikiw, 2010, ONSC. "To help curb bias, there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an ***overriding duty to the Court***, rather than to the parties who pay or instruct them." With the adoption of Rule 53 (and Form 53) Master Short states that "the Court now implicitly holds out to jurors (and to vulnerable litigants) that the experts testifying are the Court's experts independent of the plaintiff or of the defendant." In holding out a promise of expert witness impartiality, the Court owns the responsibility of realizing its promise.

However, Master Short noted, the primary criticism of such an approach is that ***"without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them."***

In fact, the Form 53 promise hasn't worked; Master Short was right to ask whether the mere signing of a form would prompt long-time hired gun experts to change their "partisan stripes." Rather, the Form 53 has made the situation worse: in the Ontario civil law (personal injury) context the Form 53 has come to stand in for and displace the judge's gatekeeping function as described by Justice Gouge:

> Judges also play an important role in protecting the legal system from the effects of flawed scientific evidence. Although this objective will be greatly assisted by the use of rigorous quality assurance processes in preparing expert opinions, by the integrity and candour of expert witnesses, and by vigorous testing of expert evidence by skilled and informed counsel, ***the judge must bear the heavy burden of being the ultimate gatekeeper in protecting the system from unreliable expert evidence*** – evidence that can, as our Inquiry showed, contribute to miscarriages of justice (Goudge Inquiry, Executive Summary).

The Rules Committee has stated that it is "good practice" for counsel to "seek to introduce any prior adverse judicial comments about an opposing expert witness" in legal proceedings. This practice would surely help curtail the proliferation of hired gun experts tainting civil justice/personal injury cases, often causing wrongful decisions. Would the Committee facilitate this good practice, then, by adopting a rule that would instruct judges to exercise their gatekeeping function and consider findings of their colleagues in prior cases which challenge the impartiality of expert witnesses? It seems without given this instruction, judges will continue to gamble on hired-gun medical experts honouring their Form 53 promises. Vulnerable litigants will pay the price when that gamble goes south.

Regards,

Brian Francis

"Hired gun in a lab coat: how medical experts help car insurers fight accident victims,"
National Post Jan.5, 2017

"Insurer father-daughter psychology team blasted for dodgy testing of severely hurt motorcyclist,"
National Post Nov. 16, 2017

"Licensed to bill: how doctors profit from injury assessments that benefit insurers,"
Globe and Mail Dec. 1, 2017

"Insurance assessment firm altered, ghostwrote accident victim reports," *Globe and Mail* Dec. 4, 2017