

Retainer Letters and Expert Reports: Tips and Traps

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This paper covers practical approaches to retainer letters and the obtaining of expert reports. It is informed by substantive law, but is not intended to be a treatment of the current state of the law on topics such as privilege or threshold requirements for admissibility. That will be covered elsewhere in this program. Rather it is intended as a commentary on practical strategies that have worked for me, and may work for you. The expert report serves several functions, two of which are to persuade the defence and to persuade the court. Experts, like counsel, are in the persuasion game, whether they know it or not. The report is something tangible, (hopefully) concise, and easy to refer to and quote. Lawyers and judges are text-oriented, and when a judge wants to summarize a key issue, he or she will reach for a well crafted expert report.

The report lives on in the life cycle of the case, from demand letter, to mediation, to settlement conference, and through oral discovery to trial testimony and appeal. The law lays down standards for the content of the report and prohibits expert testimony from departing from the substance of it. The expert report is the root source of victory and defeat.

Pre-Retention Discussions

In personal injury cases where the treating medical expert is asked to opine on the injuries, without any reflection on liability, pre-retention discussions are usually unnecessary and the retainer or request letter is straightforward. In cases where the expert's opinion is sought on issues of causation or standard of care which go to liability, a pre-retention discussion is virtually mandatory. One reason for the pre-retention discussion is that if the expert's opinion is unfavorable, then your client will not want to pay yet more money for the time and effort represented by a report. Another reason is that a prepared counsel who knows the written record and the law can often assist the expert to shape and target his or her opinion in a legally relevant direction. Sometimes neglected facts can be brought to the expert's attention, and of course most experts cannot be expected to know what will be legally relevant to defence counsel and ultimately to the court. The expert's task is to elucidate the truth in a manner which is legally relevant.

Liability experts often reside in another province, and the pre-retention discussion often takes place by telephone. I ask permission of the expert to tape the conversation, and I have a transcript prepared by office staff afterward, labeled "privileged". There can be difficult

concepts and numerous subtleties involved in a liability opinion, and note taking can be a distraction from the full picture. Reading and re-reading the transcript can drive home points to counsel which would be missed on the first pass through.

Retention Letters

Retention letters to treating physicians and other treating healthcare professionals may be short and vague. The physician is being asked to recite the relevant history, and to state a diagnosis and prognosis. This should be obvious to any treating physician, and for those to whom it is not obvious, a more detailed request probably will not help. I always state in the letter that we will be pleased to receive the expert's reasonable statement of account for professional time involved. The expert's expectation will be that you, not your client, are responsible to pay the fee for the report, and to pay it timely, not when and if the case settles – and the expert will be right, unless some other express arrangement has been made.

For retention on more complex matters, I avoid the appearance of familiarity. I may be on a first name basis with the expert, and may even be a friend, but I use a professional salutation and not a familiarism such as “Dear Bob” or “Dear Joe”. Defence counsel will almost always request copies of the correspondence between counsel and the expert, so one must reflect on what an industrious defence lawyer will be able to imply later from the contents of correspondence. I keep the retention letter as sparse as possible. If one has had a good pre-retention discussion, then the expert understands the task and sparseness is all that is required.

Content of Report

All jurisdictions have rules of court which require service of a report from an expert within a specified timeline. Some jurisdictions have longer service requirements, others less. Ontario requires service of the report of an expert witness not less than 90 days before the commencement of the trial; Newfoundland and Labrador requires service not less than 10 days before the commencement of the trial. Ten days is inadequate. If your jurisdiction has a short timeline, consider getting a direction from a pre-trial judge or motion judge, that reports be served within a more reasonable timeframe. But one way or the other, you must know the timelines set down by the local rules.

With respect to substantive content of an expert report, the rules of court vary. Much of the caselaw with respect to substantive content of the report is generated in Ontario. The Ontario rule reads as follows:

53.03(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony. [Emphasis added]

The rules of the Atlantic Provinces governing substantive content are as follows:

Newfoundland and Labrador, Rule 46.07:

Unless an opposite party has, at least ten days before the commencement of a trial, been given a report of an expert witness who is expected to give evidence on a trial, the evidence shall not be admissible without the approval of the court, which may be granted on such terms as are just.

New Brunswick, Rule 52.01(1):

Where a party intends to call an expert witness at trial, he shall serve on every other party a copy of the expert's signed report which shall contain, or be accompanied by, a statement containing the expert's name, address and qualifications and the substance of his proposed testimony. Service shall be made as soon as practicable and no later than the Motions Day at which the trial date is fixed. [Emphasis added]

Nova Scotia, Rule 31.08(1):

Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been

(a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and

(b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial, the evidence of the expert shall not be admissible on the trial without the leave of the court. [Emphasis added]

Prince Edward Island, Rule 53.03(1):

Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been

(a) served on each opposite party within thirty days of the filing of the notice of trial and

(b) filed with the court within thirty days of the filing of the notice of trial,

the evidence of the expert shall not be admissible on the trial without leave of the trial judge. [Emphasis added]

The leading case on reporting conditions precedent to testimony, is *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (Ont.C.A.), para. 83, leave to appeal refused at [2001] S.C.C. No. 56. The Ontario Court of Appeal in *Marchand* reinforced at para. 38 that the report of an expert must set out an opinion and provide the basis for the opinion:

Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert's opinion, and the basis for that opinion. Further, while testifying, an expert may explain and amplify what it is in his or her report but only on matters that are "latent in" or "touched on" by the report. An expert may not testify about matters that open up a new field not mentioned in the report. [Emphasis added]

While Newfoundland's rule 46.07 does not state any requirement as to what the report of an expert witness who is expected to give evidence on a trial should contain, the Ontario rule at the time of the trial in *Marchand* required a report that set out the "substance" of the proposed testimony: para. 35. The New Brunswick rule has a "substance" requirement, and Nova Scotia and Prince Edward Island have a "summary of the grounds for each opinion" requirement. Under any regime, the purpose of the expert report is at minimum, to give notice of the nature of the case the adverse party must meet. There is no reason to suppose the intent of the Newfoundland rule is any different.

There is authority that where an expert exceeds the scope of his or her report and the change in the nature of the case is preventable, then the change should be allowed only on the basis of a tender of complete indemnity for the costs caused. This was the order in *Dybongco-Rimando Estate v. Lee* (1999) 34 C.P.C. (4th) 274, para. 22, wherein it was stated:

The defendants are deserving of complete indemnity in respect of what I find was a completely preventable event.

Oral Discovery

Various jurisdictions, including all Atlantic Provinces and Ontario and Manitoba, have rules which require a party to provide the other party in writing with information that any answer given at the examination for discovery is no longer correct and complete. The reason for this requirement is that the parties prepare their case for trial on the basis of the evidence given at the discoveries, and must assume that answers on discovery continue to be correct and complete

unless otherwise advised: *Burke v. Gauthier* (1987), 24 C.P.C. (2d) 281 (Ont. H.C.J.), para. 18, which involved an undisclosed worsening of the plaintiff's medical condition. The court in *Burke* stated:

19 Unless there is some incentive to the plaintiff to disclose a change in the evidence, there is nothing to discourage trial by ambush and little to promote the objects of discovery which include the encouragement of settlement, the narrowing of issues, and the basic rule of fairness that a party should have reasonable knowledge of the case he must meet.

20 Rule 31.09, by enacting very explicitly a continuing duty of disclosure or discovery, is obviously designed to give these principles some teeth.

...

23 In this case the plaintiff ... gave no reason for failing to provide the defendant with the new evidence favourable to the plaintiff's case. There was no application before trial for an adjournment in order to do so and the plaintiff put forward his case in the face of the rule without giving the defendants any knowledge of the new case they had to meet....

24 Had the plaintiff made any attempt to overcome the unfairness to the defendants by even mentioning it before trial or somehow trying to overcome the complete surprise, I might have been inclined to grant leave to introduce the evidence under r. 31.09(3), on terms under r. 53.08 unless the defendants showed some more concrete evidence of specific forms of prejudice.

The court saw no basis to relieve against the clear consequences of the rule, in view of the obvious unfairness and prejudice created by being met with a new case in the middle of trial. Evidence of the plaintiff's changing medical condition since examination for discovery was not admitted, and damages were assessed on the basis of the case as it was understood prior to trial.

The Ontario Court of Appeal approved *Burke* in *Marchand, supra*. The new evidence had "changed the nature of the case the respondents had to meet."

It is a sound practice to reinforce the expectation that the expert will not come up with something new after discovery and prior to trial, thereby "changing the nature of the case". Counsel can do this by obtaining agreement of the expert witness at the end of discovery and on the record, that if the expert changes his or her opinion or develops a new opinion not offered in discovery, the

witness will advise defence counsel of this so that he or she can in writing inform plaintiff counsel of the change in opinion. An appropriate variation of this request is also a good wrap-up question for lay witnesses at discovery.

One might think that in the face of the clear requirement of Newfoundland Rule 30.08A(1) and its exact equivalents elsewhere, which require correction or completion in writing of any examination answer subsequently discovered to be incorrect or incomplete, such a wrap-up question would be unnecessary. But there is no predicting the behavior of a trial judge. I argued an appeal of a trial outcome only days ago, in which I had warned the defence expert, on the record of the discovery, that if he varied his opinion and sought at trial to offer opinion on a new field not covered in his report or in the discovery, I would object. The expert did exactly that, I objected at trial, and the judge brushed aside the objection. In some quarters, trial by ambush seems to be alive and well, and protected by trial judges. This is why we have appeal courts.

Weighing Credibility of Expert Evidence

The form and content of the written report and its impression of competence and confidence are factors which are weighed in the intangible calculus of credibility. The audience which plaintiff counsel's expert report is attempting to impress is primarily defence counsel and their instructing defendant. That is because the normal objective is to win at settlement. But cases sometimes do not settle, and the ultimate audience is the trial judge, and if your bad luck continues to run, the further ultimate audience is the appeal court. In fact, a soundly constructed expert report may be more impressive in the appeal court than it is in the trial court, where expert razzle dazzle, smoke blowing, and an English accent may carry the day. The appeal court does not hear the English accent.

The primary audience for most reports is the opposing party, and the report and the propounder of the opinion in the report alike, should project credibility. What courts say they look for in evaluating credibility is pertinent to what counsel should look for. In *Cooper v. Cooper*, 2001 CarswellNfld 17, Green JJ.A. discussed the concept of credibility at para. 11:

Credibility means simply worthiness of belief. If evidence is credible, it is of such a character that it is capable of being relied on by the trier of fact. When a court purports to rely on any piece of evidence, it in essence is making an assessment that that evidence is worthy of belief. In making that determination the court will rely, depending on the circumstances of each case, on a host of factors including the consistency with other known facts, its rational strength when viewed against common experience, the reputation and means of knowledge of the witness presenting the evidence and the language employed in its presentation, in addition to the performance of the witness in the courtroom.

In *R. v. Gagnon*, 2006 SCC 17, the Supreme Court of Canada noted:

20 Assessing credibility is not a science.

One of the elements that feeds into what the Supreme Court in *Gagnon* called the “complex intermingling of impressions” that add up to credibility, is a competent report.

Most adverse parties and almost all courts will wish to penetrate below the superficial impression of competence, and evaluate a variety of factors in determining the credibility of the report, and therefore of the expert. Lists of factors used in evaluating credibility will vary, but it is instructive to reflect on some of the lists which appear in reported caselaw. Recent Newfoundland caselaw has adopted criteria from *Malette v. Shulman* (1987), 63 O.R. (2d) 243, for evaluating the reliability or credibility of medical expert evidence:

[68] To determine the standard of practice to be reasonably expected of the defendant doctor, the evidence of independent expert medical witnesses must be considered in light of:

- (1) The relevance of their training, experience and specialty to the medical issues before the Court;
- (2) Any reason for the witness to be less than impartial;
- (3) Whether the standard of care propounded reflects the standard of the great majority of medical practitioners in the field in question;
- (4) Whether that testimony appears credible and persuasive compared and contrasted with the other expert testimony at the trial.

One might suggest two further criteria:

- (5) Whether the testimony appears credible compared to testimony adopted in caselaw;
- (6) Whether the testimony is reasonably grounded in medical literature.

Other caselaw has supplemented the *Malette* criteria. *Georghiades v. MacLeod*, 2005 CarswellOnt 1680 (S.C.J.), proffered the following additional criteria, at paras. 74 and 78:

- (7) Expert witnesses must be neutral, objective, independent, and may not advocate a position for one of the parties;

- (8) The most credible expert is one who is available and consulted by plaintiffs and defendants, in different cases.

Georghiades added that the factors for evaluating the assistance of expert testimony “are important when, as here, one counsel is critical of certain expert witnesses”: para. 73, and that “the strength of opinion evidence is dependant on how it is presented by the witness in court and, in particular, how it stands up to cross-examination”: para. 80. Though the case may never reach trial, the expert will often be discovered as to the substance of the opinion stated in a report, and the assumptions on which it is based. Both the adverse party and ultimately the judge will wish to consider the effect of cross-examination – designated by Wigmore as “the greatest legal engine for the discovery of truth.”

In *Day v. Karagianis*, 2006 NLTD 135 (CanLII), the trial judge set out a list of factors to consider in defining the medical standard of care:

[61] In defining the required standard of care of a physician, the evidence of expert medical witnesses must be considered on the basis of the following:

- (a) the independence or impartiality of the expert witness;
- (b) the training, experience and special accreditation of the physician in relation to the medical issues;
- (c) the standard of care set out by the expert witnesses must be similar to that which is accepted by the majority of practitioners in the medical field in question; and
- (d) the testimony of the expert witnesses must be credible and persuasive in comparison to the evidence (in general) and the evidence of the other expert witnesses (in particular).

The trial judge in *Day* further discussed factors for evaluating expert evidence at paragraph 65. Lists may vary, but a thoughtful recent extra-judicial commentary on the evaluation of expert credibility is contained in “Aspects of Credibility”, Hon. Justice Benjamin Taylor, Supreme Court Trial Division, Prince Edward Island, paper delivered at conference of the Atlantic Provinces Trial Lawyers Association, St. Andrew’s, New Brunswick, July 2006, pp. 3-4.

Although this is not a paper on the standards of appellate review, it is significant to note that recent appellate caselaw has laid down that trial judges should explain their reasons on credibility so as to permit adequate review, and that the duty to give adequate reasons pertains equally to civil as to criminal cases: *Diamond v. Robbins*, 2006 NLCA 1 (CanLII), para. 102; *Lawson v. Lawson*, 2006 CanLII 2657 (ON C.A.).

Cross Examination

Sometimes the report permits a purely collateral attack. This may be the best workable strategy against the arrogant and combative, yet highly credentialed expert. Counsel may strategically decide to avoid direct engagement on the substance of the opinion, and yet undermine it on the believability of an expert who is made to look partisan and extreme. For example, the following is the entire cross examination of a defence cardiovascular surgeon in a medical negligence case. The report was dogmatic in tone and I did a brief discovery in which I asked a question that I usually pose to causation experts, namely, to what degree of certainty do you hold your opinion in percentage terms? The expert testified in direct at trial for two hours. An attack on the substance of this combative expert's opinions would have degenerated into hours of trench warfare. Instead, counsel made a strategic decision to get in and nick an artery of credibility, before the expert's defences were up. The cross lasted less than two minutes.

THE CLERK: Please be seated.

THE COURT: I'm still trying to get over your CV. I think when this is over I'm taking this CV and I'm going to show it to other people so that they can ... I've never seen the likes of it, my goodness.

DR. CHRISTAKIS: ... *(laughter)* ...

THE COURT: Yes, we'll need a trolley the next time you come back, Doctor.

CROSBIE, QC: Sir, it's your opinion that the aortic tissue was not dissecting on August 30th.

DR. CHRISTAKIS: Yes.

Q. And the pain the patient experienced was not the pain of dissection. A. Yes.

Q. And you're 99.9 percent certain of that? A. Yes.

Q. Do you hold all the other opinions you've testified to today to a similar level of certainty? A. I didn't say that.

Q. So it might vary on the other opinions. A. Well, depending on the circumstances, yes.

Q. Justice, believe it or not, that's all I have.

THE COURT: Okay, well, Doctor, my goodness gracious, this is ... I was ready for the whole afternoon here.

DR. CHRISTAKIS: I feel like I was ambushed.

THE COURT: Yeah, well, look, thank you very much, Doctor, for coming down.

Alternatively, counsel may chose, if forearmed, to tackle the expert on the substance of his or her opinions. Members of ATLA are familiar with the reports of a certain neurologist who is notorious for lengthy IME reports, often 40-90 pages in length. The detail contained in these reports tends to produce shock and awe in counsel and trial judge alike. But if counsel does the necessary preparation, a lengthy report can provide extra opportunity for effective cross examination. As one recent case (*Gerimia*, cited below) succinctly put it, "The longer the report, the greater the petard, and the easier the hoist". In the following exchange, plaintiff counsel failed to object to the defence neurologist's previously undisclosed PowerPoint presentation, a mistake which he will never repeat. However, chance favors the prepared mind, and counsel was able to exploit overstatements in the slideshow which were not in the report and which undermined credibility. The main issue in the case was whether the client's back condition had been caused by the accident or was the result of a pre-existing condition. The most dangerous exaggeration was the statement that the client had experienced "recurrent mid back pain over the years" before the accident.

Crosbie, QC: The reason for the presentation to Dr. Goodridge, sir, was it back problems or was it headache?

Dr. King: Headache at the time, yes.

Crosbie, QC: Right. So this back pain information was captured on general functional inquiry?

Dr. King: I believe so, yes.

Crosbie, QC: The back pain not being the reason why she went to him?

Dr. King: No, she went to see him for what I took was a migraine headache.

Crosbie, QC: So presumably Dr. Goodridge had to ask for this information about back pain?

Dr. King: Yes.

Crosbie, QC: And what he got was a description of "mid back pain intermittently for six months"?

Dr. King: At that time, yes.

Crosbie, QC: This is not the same as “recurrent mid back pain over the years”?

Dr. King: No, I agree.

Crosbie, QC: And you would acknowledge that Dr. Goodridge prescribed no treatment for the back pain?

Dr. King: I acknowledge that.

Crosbie, QC: He must have done a physical examination to some extent because there is mention in the report about fibrocystic tender points?

Dr. King: Yes.

Crosbie, QC: So that implies that he did examine the lady physically?

Dr. King: Yes.

Crosbie, QC: However, he doesn't note any finding of back spasm?

Dr. King: Yes.

Crosbie, QC: Your summary says that mid back pain resulted in the thoracic spine x-ray of 1990?

Dr. King: Yes.

Crosbie, QC: That's under the bullet “recurrent mid back pain over the years”, and the second smaller bullet, it resulted in a thoracic spine x-ray in about 1990?

Dr. King: Yes.

Crosbie, QC: This thoracic spine x-ray was done and we saw this in May of 1990.

Dr King: Yes.

Crosbie, QC: This was actually six months before the presentation to Dr. Goodridge in which there is mention of the back pain?

Dr. King: Yes.

Crosbie, QC: So it's not done as a result of seeing Goodridge?

Dr. King: No.

Crosbie, QC: The clinical indication noted was upper back pain?

Dr. King: Yes.

Crosbie, QC: Not mid back pain? That's not noted?

Dr. King: Yes, I take your point.

Crosbie, QC: Furthermore sir, your slide summary is not consistent, I put it to you, at page 21 box 2 of your report.

Dr. King: Yes, I'm on page 21 of my report, second box, "Dr. Goodridge in his 5 November 1990 report said that in the spring of 1990 she began to have mid back discomfort intermittently."

Crosbie, QC: Again there's no support in that history you give there for back pain over the years in the mid back?

Dr. King: Fair enough.

Crosbie, QC: And again sir, in the fourth box, would you read that?

Dr. King: "In 1990 she had a frozen shoulder on the right side which required treatment with non-steroidal anti-inflammatory drugs, it was investigated, she was seen by a number of people, and it was felt eventually to be a tendonitis perhaps related to tennis or the carrying of heavy luggage, it settled on non-steroidal anti-inflammatories and was not a long-standing problem."

Crosbie, QC: You can't say whether the frozen shoulder in 1990, might have been the reason for the x-rays that were taken in 1990?

Dr. King: No, I don't have any knowledge of that one way or the other.

Crosbie, QC: Yes.

Dr. King: If they're x-raying of the thoracic spine, I would have thought they were looking for a mid back problem.

Crosbie, QC: But he does not say "mid back pain over the years"?

Dr. King: No.

Crosbie, QC: Does your slide summary make allowance for the six months of mid back discomfort possibly being related to GI problems?

Dr. King: No.

Crosbie, QC: Which GI problems cleared up with Zantac by your history?

Dr. King: Yes.

...

Crosbie, QC: She explained that a Dr. Spurrell did a GI examination.

Dr. King: Right.

Crosbie, QC: So that it would be some supporting documentary evidence of the fact that that occurred, and that it took place on August 24th, 1990.

Dr. King: That she had an endoscopic examination.

Crosbie, QC: And you agree with that?

Dr. King: Yes, I don't know about this coding, but I have no reason to doubt it.

Crosbie, QC: Okay. So your summary in the slide at page 28 that there is recurrent back pain over the years is not documented in the medical record?

Dr. King: I would agree with you, it's probably an overstatement.

Crosbie, QC: It's not documented either, "recurrent back pain over the years", in the patient history taken by you?

Dr. King: No, but we had Dr. Goodridge's note suggesting that she had mid back pain.

Crosbie, QC: But not over the years?

Dr. King: No, and I take your point, this would be an overstatement of the information that I have, agreed.

Greater the Petard

Enjoyable as it may be to win in hand-to-hand combat with a highly credentialed and arrogantly opinionated expert, many counsel may prefer a more cautious approach: if the derogatory opinion is not in evidence, it cannot do any damage. In *Gerimia v. Harb*, 2006 CarswellOnt 5237, the report in question was 26 pages in length. The relevant rule required a report which would "summarize the expert's proposed evidence." The court struck 20 pages of the report, stating of the expert report that "it is virtually the entirety of her proposed evidence," and "what is required is a précis, not chapter and verse."

The above neurologist, he of the encyclopedic reports, is vulnerable to this criticism. Go get him.