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CLEAR AND PARTIAL DANGER: DEFENDING OURSELVES AGAINST THE THREAT OF EXPERT BIAS

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This article provides an overview of the adversarial system and the challenges associated with the use of experts. It focuses on the threat of expert bias, which the author discusses in the context of: (1) expert dishonesty, and (2) adversarial attitudes and expectations. He then offers suggestions to enhance expert impartiality, primarily in civil cases.

Cet article donne un aperçu du système contradictoire et des difficultés que pose le recours à des experts. Il souligne le risque de partialité des experts et traite plus particulièrement : (1) du risque de malhonnêteté; (2) des attitudes contradictoires et des attentes. Il suggère ensuite des moyens d'améliorer l'impartialité des experts, surtout en matière civile.

I. Introduction	286
II. Our Adversarial System	287
A. Modern Feudalism	287
B. The Challenge of Evaluating Expert Evidence	288

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II. <i>Expert Evidence Dangers</i>	291
A. <i>The Dangers</i>	291
B. <i>Expert Bias and Dishonest Experts</i>	293
C. <i>Expert Bias and Adversarial Attitudes and Expectations</i> ..	294
III. <i>Enhancing Impartiality</i>	296
A. <i>Promoting Impartiality</i>	296
B. <i>Suggestions</i>	297
1. <i>Experts</i>	297
2. <i>Procedural Rule Makers</i>	299
3. <i>Lawyers</i>	303
4. <i>Judges</i>	304
5. <i>Professional Societies</i>	306
IV. <i>Conclusion</i>	306

I. Introduction

The independence of experts has been described as the “cornerstone” of expert testimony.¹ One American commentator has gone so far as to say that the “entire system of expert testimony rests upon the assumption that expert witnesses are independent of retaining counsel, and that they testify sincerely.”² But biased experts abound.³ In fact, criticisms about biased expert witnesses have been longstanding.⁴ And notwithstanding a recent Supreme Court of Canada observation that in “some notable instances, it has been recognized that this lack of independence and impartiality can contribute to miscarriages of justice”,⁵ there has been little advancement to guard against bias. The exception, if it can be described as one, is the Supreme Court’s directive to trial judges to

¹ Vern Krishna, “Expert witnesses who are partisan lose their value,” Editorial, *The Globe and Mail* (9 February 2004) p. B11 [Krishna].

² Steven Lubet, “Expert Witnesses: Ethics and Professionalism” (1999) 12 *Geo. J. of Legal Ethics* 465 [Lubet] at 467 and 468.

³ See Kenneth R. Foster & Peter W. Huber, *Judging Science: Scientific Knowledge and the Federal Courts* (Cambridge, Mass.: The MIT Press, 1999) and *R. v. D.D.*, [2000] 2 S.C.R. 275 [*R. v. D.D.*].

⁴ See William L. Foster, “Expert Testimony: Prevalent Complaints and Proposed Remedies” (1897) 11 *Harv. L. Rev.* 169 [Foster], Learned Hand, “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 *Harv. L. Rev.* 40, Lee M. Friedman, “Expert Testimony: Its Abuse and Reformation” (1910) 19 *Yale L.J.* 247 [Friedman] and The Honourable Justice H.D. Sperling, “Expert Evidence: The Problem of Bias and Other Things” (Paper presented to the Supreme Court of New South Wales Annual Conference, 3-4 September 1999) [Sperling] at 20-21, online: Lawlink NSW <http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp_030999>.

⁵ *R. v. D.D.*, *supra* note 3 at para. 52. Justice Major, for the majority of four to three, made this statement after referring to “professional expert witnesses” and stated

evaluate the probative value and prejudicial effects of expert testimony when determining its admissibility. By most accounts, evaluating the reliability of expert evidence is a difficult, time-consuming and expensive task. No doubt our ability to carry out this task would be enhanced if the prevalence of expert bias were to be reduced.

In this article, I provide an overview of our adversarial system and the challenges associated with the use of experts. In doing so, I examine two forces that perpetuate expert bias: (1) expert dishonesty; and (2) adversarial attitudes and expectations. I then offer suggestions to defend against these threats. This article is an appeal to expert witnesses, procedural rule makers, lawyers, judges and professional societies to take steps to enhance expert impartiality.

II. *Our Adversarial System*

A. *Modern Feudalism*

In our adversarial system, lawyers have the main responsibility to gather and sift through the evidence. Gavin MacKenzie describes several problems with this process:

Litigation lawyers learn early in their practices that although the adversarial system functions tolerably well in many civil cases, its defects are nevertheless extensive and profound. Tactics calculated to delay, distort, obfuscate, obstruct and wear down opponents through frustration and cost are common. Questionable conduct is justified by appeals to the ethics of the adversary system. The consequences are often born by clients—through increased cost, delay and conflict...

The problems remain nevertheless—largely because of the attitudes and expectations that the adversarial system engenders.⁶

By contrast, in the inquisitorial system, a common form of civil justice system in continental Europe, judges take the main responsibility for the gathering and sifting of evidence. Judges conduct discovery, direct the inquiry and evaluate the evidence over a series of hearings. Experts are thought of as “judges’ aides”.⁷ The role of lawyers is mainly to direct judges’ attention to particular lines of inquiry.⁸

“Although not biased in a dishonest sense, these witnesses frequently move from the impartiality generally associated with professionals to advocates in the case.”

⁶ Gavin MacKenzie, “Breaking the Dichotomy Habit: The Adversarial System and the Ethics of Professionalism” (1996) 9 Can. J.L. & Jur. 33 (QL, JOUR) [MacKenzie] at paras. 2 and 4.

⁷ John H. Langbein, “The German Advantage in Civil Procedure” (1985) 52 U. Chicago L. Rev. 823 (WL, UCHILR) [Langbein] at 823-27.

⁸ *Ibid.* at 833.

John Langbein, in an article titled, *The German Advantage in Civil Procedure*, suggests that a European jurist would “express amazement at our witness practice” and be in “disbelief when he discovers that we extend the sphere of partisan control to the selection and preparation of experts.”⁹ He even asks why the adversarial fact gathering process is tolerated in the first place:

The case against adversary domination of fact-gathering is so compelling that we have cause to wonder why our system tolerates it.¹⁰

Although the justification for the adversarial system is the belief that the truth will emerge where advocates of adverse positions compete,¹¹ such belief is questionable¹² in a system that is preoccupied with gamesmanship and contentiousness.¹³ Indeed, there are few rules “that encourage one to stick to an honest and unbiased effort.”¹⁴ In fact, our modern adversarial system has been described as a substitute for private duels and feuds, dignified by the process of trial.¹⁵ Some commentators go so far as to suggest that advocates are only coincidentally engaged in the search for the truth.¹⁶ MacKenzie calls for a reconsideration of the civil justice system and suggests that the search for the truth should be the overarching objective.¹⁷ This would require additional limits on lawyers’ competitive conduct. In the next section this suggestion will be examined in the context of expert evidence, and more specifically, expert bias.

B. *The Challenge of Evaluating Expert Evidence*

While all types of evidence have the potential to undermine the fact-finding process, the adversarial system is particularly vulnerable to expert evidence because that evidence, by definition, is outside the knowledge and experience of judges and jurors. According to David Faigman, of the University of California, the challenge of ascertaining the reliability of

⁹ *Ibid.* at 835.

¹⁰ *Ibid.* at 830.

¹¹ MacKenzie, *supra* note 6 at para. 42.

¹² *Ibid.* at para. 53.

¹³ *Ibid.* at para. 9.

¹⁴ Jeffrey L. Harrison, “Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses” (2001) 18 Yale J. on Reg. 253 (WL, JLR) [Harrison] at 266.

¹⁵ Ronald Joseph Delisle, *Evidence Principles and Problems* (Toronto: Carswell, 1984) at 3.

¹⁶ Jenny McEwan, *Evidence and the Adversarial Process – The Modern Law*, 2nd ed. (Oxford: Hart Publishing, 1998) at 3.

¹⁷ MacKenzie, *supra* note 6 at para. 51.

expert evidence is due to bringing together of law and science:

The difficulty of bringing science to the law should not be underestimated.

There are four readily identifiable and quite substantial barriers to the use of science in every legal context: (1) the availability of data, (2) the lay person's understanding of the science, (3) integrating science into other information, and (4) cultural conflicts between law and science. These barriers are inherent in the two disciplines' different natures and the difficulty presented by their having to work together.¹⁸

In a 1983 United States Supreme Court dissent, in *Barefoot v. Estelle, Director, Texas Department of Corrections*, Justice Blackmun expressed considerable doubts about the forced marriage of science and law: "It is extremely unlikely that the adversary process will cut through the facade of superior knowledge."¹⁹ Ironically, it is the adversarial system itself that tends to "prevent a rational assessment of scientific matters", discourage "complete disclosure or intellectual engagement" and "encourage a false perception of conflict."²⁰ More recently, Justice Breyer, in a leading United States Supreme Court decision, described the challenge of evaluating expert evidence:

This [gatekeeping] requirement will sometimes ask judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer...Yet...judges are not scientists and do not have scientific training that can facilitate the making of such decisions...Of course, neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the 'gatekeeper' duties...²¹

Prior to the 1994 Supreme Court of Canada decision regarding expert evidence in *R. v. Mohan*, our courts exhibited little concern about the problems described by Justice Breyer and Professor Faigman. In fact, seventeen years ago, Justice Wilson, in a Supreme Court dissent, stated that jurors were capable of evaluating the reliability of expert evidence because they were much more sophisticated than they once had been "when some of our restrictive rules of evidence were developed."²² This presumption of capacity coincided with our courts'

¹⁸ David L. Faigman, *Legal Alchemy: The Use and Misuse of Science in the Law* (New York: W.H. Freeman, 2000) at 51.

¹⁹ *Barefoot v. Estelle, Director, Texas Department of Corrections*, 103 S.Ct. 3383 (1983) at 30.

²⁰ P. Brad Limpert, "Beyond the Rule in *Mohan*: A New Model for Assessing the Reliability of Scientific Evidence" (1996) 54 U. T. Fac. L. Rev. 65 at 70 and 100-101.

²¹ *General Electric v. Joiner*, 118 S.Ct. 512 (1997) [*Joiner*] at para. 56.

²² *R. v. Beland*, [1987] 2 S.C.R. 398 at para. 39.

ready admission of expert evidence with little or no evaluation of its reliability in the early 1990s.²³

More recently, in *R. v. D.D.*, Justice Major questioned lawyers' competence to effectively perform their function of challenging expert evidence and recited a passage by David Paciocco, of the University of Ottawa, regarding dangers associated with expert evidence:

As the Mohan Court explained, the four-part test serves as recognition of the time and expense that is needed to cope with expert evidence. It exists in appreciation of the distracting and time-consuming thing that expert testimony can become. It reflects the realization that simple humility and a desire to do what is right can tempt triers of fact to defer to what the expert says. It even addresses the fact that with expert testimony, lawyers may be hard-pressed to perform effectively their function of probing and testing and challenging evidence because its subject matter will often pull them beyond their competence, let alone expertise. This leaves the trier of fact without sufficient information to assess its reliability adequately, increasing the risk that the expert opinion will simply be attorned to.²⁴

In fact, the concerns about expert evidence expressed by the Supreme Court of Canada in *R. v. Mohan*, and in subsequent decisions, stem from doubts about the ability of trial judges and juries to ascertain reliability. Nowadays, most observers would agree that the evaluation of expert evidence is a daunting task. In the United States, the RAND Institute for Civil Justice published a report in 2001 regarding changes in the standards for the admission of expert evidence in the United States federal court system. Its report doubts "whether judges, in spite of their best intentions, have the time or training to carry out their gatekeeper responsibilities effectively[?]"²⁵ Doubts about competence are expressed in even stronger language in the *Reference Manual on Scientific Evidence*, a 1994 publication of the United States Federal Judicial Center:

...No longer can judges and jurors rely on their common sense and experience in evaluating the testimony of many experts...

... courts may not be competent to make reasoned and principled decisions...²⁶

²³ See *R. v. Lavallee*, [1990] 1 S.C.R. 852 and *R. v. Marquard*, [1993] 4 S.C.R. 223.

²⁴ *R. v. D.D.*, *supra* note 3 at para. 57.

²⁵ Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision* (Santa Monica: RAND Institute for Civil Justice, 2001) at 4.

²⁶ *Reference Manual on Scientific Evidence* (Washington: Federal Judicial Center, 1994) at 1.

Notwithstanding these doubts, the appellate courts that have called upon trial judges to conduct meaningful evaluation of expert evidence at the admissibility stage have expressed their confidence in the ability of trial judges to perform this task.²⁷ After all, appellate courts are not about to undermine the responsibility they impose upon trial judges by questioning their ability to perform this task, especially where it involves deciding matters of fact by evaluating evidence.

Because the accepted wisdom is that the use of experts is on the rise,²⁸ the problems described by Justice Breyer and Professor Faigman are important. This is especially so where the types of expertise are ever broadening and in areas where there appears to be increasing dependence on experts. Indeed, the increased use of experts and doubts about our ability to evaluate their evidence call for an examination of our use of experts. In Part II, I examine the impact of questionable expert evidence and our doubtful ability to evaluate it to demonstrate the need to reconceptualize the role of experts.²⁹ I then focus on the impact of bias on expert evidence. In Part III, I make several suggestions to enhance expert impartiality.

II. Expert Evidence Dangers

A. The Dangers

In *R. v. Mohan*, Justice Sopinka expressed several concerns about expert evidence:

1. It may require an inordinate amount of time not commensurate with its value;
2. It may be misleading in the sense it is out of proportion to its reliability;
3. It may be misused and distort the fact-finding process;
4. It may be dressed up in scientific language that may be accepted as virtually infallible and having more weight than it deserves;
5. It may be dressed up in scientific language that makes judgment more difficult;
6. It may overwhelm and distract the fact-finding process;
7. It may be merely a personal opinion.³⁰

Although Justice Sopinka did not use the term “expert bias”, it is certainly an implicit element of several of his concerns. Six years later, Justice Major, in *R. v. D.D.*, explicitly identified the danger of lack of

²⁷ See *R. v. J.-L.J.*, [2000] 2 S.C.R. 600 [*R. v. J.-L.J.*] at para. 61 and *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993) [*Daubert*] at 2796.

²⁸ In *R. v. J.-L.J.*, *ibid.* at para. 25, Justice Binnie described the growth of the frequency with which expert witnesses are called as “dramatic”.

²⁹ Harrison, *supra* note 14 at 5.

³⁰ *R. v. Mohan*, [1994] 2 S.C.R. 9 at 21, 24 and 37.

expert independence and impartiality, and added that it “can contribute to miscarriages of justice.”³¹ Justice Major pointed out other dangers associated with expert evidence:

1. Its resistance to effective cross-examination;
2. Opinions are “usually derived from academic literature and out-of-court interviews, which material is unsworn and not available for cross-examination”;
3. It is time-consuming and expensive.³²

A month later, in *R. v. J.-L.J.*, the Supreme Court was again called upon to rule on the admissibility of expert evidence and referred to a debate about suitable controls, and precautions, to exclude junk science.³³ Like it did in *Mohan*, the Court directed trial judges to evaluate proffered expert evidence at the admissibility stage and to exclude it where its prejudicial effects exceed its probative value. In doing so, the Court endorsed the leading 1993 United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*. However, no guidance to enhance expert impartiality was provided by the Supreme Court of Canada in this case.

In *Daubert*, the United States Supreme Court ruled that the admissibility of expert evidence is to be determined on the basis of relevance and reliability.³⁴ Although the Court stated that expert evidence “can be...quite misleading because of the difficulty in evaluating it”,³⁵ it did not specifically discuss bias or other dangers. In fact, the *Daubert* Court held that federal trial judges are to evaluate the reliability of proffered expert evidence in terms of its scientific validity.

The United States Supreme Court was confronted again with expert evidence issues in *General Electric v. Joiner* in 1997³⁶ and *Kumho Tire v. Carmichael* in 1999.³⁷ Again, the Court focused on the appropriate methodology to evaluate the reliability of expert evidence. Again, bias was not explicitly discussed.

Clearly, expert evidence may mislead, confuse, distort the fact-finding process, and cause distracting side issues, excessive costs and unnecessary delays. The Supreme Court of Canada’s directives to trial judges to evaluate probative value and prejudicial effects and be

³¹ *R. v. D.D.*, *supra* note 3 at para. 52. Justice Major wrote the majority decision for four justices.

³² *Ibid.* at paras. 54-56.

³³ *R. v. J.-L.J.*, *supra* note 27 at para. 25.

³⁴ *Daubert*, *supra* note 27 at 2799.

³⁵ *Daubert*, *supra* note 27 at 2798.

³⁶ *Joiner*, *supra* note 21.

³⁷ 119 S.Ct. 1167 (1999).

cautious about expert bias are insufficient measures to protect us from the dangers rooted in expert bias. Because it is a factor that can contribute to miscarriages of justice, the threat of expert bias must be defended against. In fact, our tolerance for biased experts has led to a deep suspicion about what all experts say.³⁸ Furthermore, this suspicion undermines public confidence in our system of justice.

In the following section, I discuss experts whose bias is rooted in adversarial attitudes and expectations because bias is not merely a matter of dishonesty. But first, I look at dishonest experts.

B. Expert Bias and Dishonest Experts

Compounding the fundamental problem of distinguishing good expert evidence from bad expert evidence is the intentional and unsavory use of invalid science, or so called “junk science”,³⁹ by dishonest experts. Clearly, the most unflattering comments about expert evidence are made about experts who provide opinions to advance their own cause or opinions that “vary depending upon which side retains them”.⁴⁰ Because these experts may intentionally confuse or mislead the fact-finding process, create distracting side issues, and increase costs and delays, they deserve the unflattering criticism thrown their way. It is not an overstatement to say that they degrade the legal system.⁴¹

Dick Thornburgh, former Attorney General of the United States, redirects the blame from expert witnesses to unethical lawyers for introducing “junk science”:

Broadly speaking, I hold that ‘junk science’ in the courtroom emanates from testimony by expert witnesses hired not for their scientific expertise, but for their willingness, for a price, to say whatever is needed to make the client’s case. Put simply, I believe that it is unethical lawyers who are largely to blame for introducing, or, in settlement negotiations, threatening to introduce this so-called ‘expert’ testimony.⁴²

It goes without saying that all dishonest experts are hired by

³⁸ David L. Faigman *et al.*, *Modern Scientific Evidence*, 2nd ed. (St. Paul, Minn.: West Publishing, 2002) [*Modern Scientific Evidence*] at 108.

³⁹ For example, see Peter W. Huber, *Galileo’s Revenge: Junk Science in the Courtroom* (New York: BasicBooks, 1991) and Frederick Payler, *Law Courts, Lawyers & Litigants* (London: Methuen & Co., 1926) at 182.

⁴⁰ MacKenzie, *supra* note 6 at para. 86.

⁴¹ Krishna, *supra* note 1.

⁴² Dick Thornburgh, “Junk Science-The Lawyer’s Ethical Responsibilities” (1998) 25 Fordham Urb. L.J. 449 [Thornburgh].

lawyers. In fact, lawyers are supposed to seek out and hire expert witnesses whose opinions support their clients' cases, and in so doing, create a demand for these experts. That, by itself, is not the problem. It is the lawyers who knowingly retain dishonest experts, sometimes for the sole purpose of increasing costs and delays, or confusing and misleading others, whose conduct warrants attention.

Surprisingly, few efforts have been made to control the conduct of dishonest experts and the lawyers who knowingly hire them. The stakeholders appear to have accepted that such conduct is inescapable and are satisfied to rely on traditional evidence concepts to root out expert bias. As stated above, there are few rules to "encourage one to stick to an honest and unbiased effort."⁴³ But expert partiality is not just a matter of dishonest experts. The problem is part of a larger problematic context, namely, the adversarial system itself.

C. Expert Bias and Adversarial Attitudes and Expectations

The adversarial system is accompanied by attitudes and expectations that can be accurately described by the name of the system: adversarial. Participants expect the presentation and content of evidence to be based on gaining advantage. Participants expect lawyers and litigants to be more engaged in gaining advantage than in the search for the truth. Participants expect gamesmanship and contentiousness. Participants expect the questionable tactics described earlier by Gavin MacKenzie. Participants expect a preoccupation with gaining advantage through an adversarial approach that often "has the result of displacing substantive communication, common sense and a problem-solving orientation..."⁴⁴ These adversarial attitudes and expectations have been justified by appeals to the adversarial system.

Differing visions of the role of experts in the adversarial system ought not be a surprise. After all, there are differing visions about the importance of truth. On the one hand, there is the belief that the truth will emerge where advocates compete. And on the other hand, lawyers and litigants may have only a passing commitment to the truth in the system characterized by gamesmanship and contentiousness.⁴⁵ The same dissonance is seen between the "assumption" that experts are impartial and the tolerance for their bias. Although the primary duty of experts is supposed to be to the court,⁴⁶ the adversarial attitudes and

⁴³ Harrison, *supra* note 14 at 266.

⁴⁴ Canadian Bar Association, Task Force Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association, 1996) [C.B.A. Report of the Task Force] at 18.

⁴⁵ MacKenzie, *supra* note 6 at para. 9.

⁴⁶ Krishna, *supra* note 1.

expectations⁴⁷ can help explain the problem of expert bias.

Some experts genuinely view it as their proper role to advocate for their own particular cause or that of their retainer *as experts*, but are wise enough not to stray too far away from the bounds of disciplinary knowledge.⁴⁸ There is no doubt that these experts are biased, but not necessarily dishonest.⁴⁹ They do, however, overlook any duty to tell the “whole” truth. These experts do not view their role as aiding judges or jurors to understand the evidence or make correct findings of fact. In fact, they utilize a number of techniques to advocate for their retainer: They focus on and accentuate evidence that supports the litigants who retain them and emphasize the weaknesses of opposing litigants’ evidence. They use selective language and selectively use and interpret facts and elements of disciplinary knowledge. They express their opinions with favorable specificity or generalization. They assert that there is consensus among colleagues where one does not exist. They create and magnify matters in dispute. They disregard alternative explanations. They provide opinions regarding matters that are outside their expertise. And they resist opposing litigants’ efforts to ascertain the validity of their opinions.

There is no question that such advocacy can mislead, confuse and complicate the evaluation of expert evidence, cause distracting side issues and increase costs and delays.

Less blameworthy than lawyers who knowingly retain dishonest experts, are lawyers who use the above-described experts as advocates. Presumably, this use of experts is based upon what Steven Lubet describes as the “classic formulation of the advocate’s duty”:

In the classic formulation of the advocate’s duty, [James Boswell in *The Life of Samuel Johnson*] reported that Samuel Johnson did not hesitate to raise arguments that he knew to be weak, saying, ‘...you do not know it to be good or bad till the judge determines it...An argument which does not convince yourself, may convince the judge to whom you urge it: and if it does convince him, why, then Sir, you are wrong and he is right.’⁵⁰

The problem is that these lawyers, like their colleagues who knowingly retain dishonest experts, provide a market for the wares of expert advocates. In my experience, the prevalence of lawyers who embody the “classic formulation of the advocate’s duty” is commonplace and explains the proliferation of biased experts in our

⁴⁷ MacKenzie, *supra* note 6 at paras. 2 and 4.

⁴⁸ *Modern Scientific Evidence*, *supra* note 38 at 107.

⁴⁹ *R. v. D.D.*, *supra* note 3 at para. 52.

⁵⁰ Lubet, *supra* note 2 at 468.

courts. After all, “our ideas of what qualities of lawyers should be admired are informed by” what MacKenzie describes as “the sporting theory of justice.”⁵¹ For those of the “classic formulation” belief, the use of experts as advocates is a simple matter of acceptable advocacy.

But the problem with the “classic formulation” belief does not end with the demand for biased experts. Lawyers who embody the “classic formulation” of the advocate’s duty are deliberate in the ways they use experts as advocates. In turn, experts hired by these lawyers learn tactics employed by lawyers and adopt a “classic” advocate formulation of their own to enhance their effectiveness as “expert advocates”.

Surprisingly, little effort has been made to defend ourselves against bias rooted in adversarial attitudes and expectations and lawyers’ use of experts as advocates. Again, the stakeholders appear to be satisfied that traditional evidence concepts are sufficient to counter the effects that adversarial attitudes and expectations may have on experts and their evidence.

Defending ourselves against expert bias rooted in adversarial attitudes and expectations is not a simple matter of instituting rules requiring impartiality. Reforms must confront the adversarial attitudes and expectations that lead to expert bias. I address the issue of reforms in the next part.

III. *Enhancing Impartiality*

A. *Promoting Impartiality*

Lord Woolf, in his 1996 *Access to Justice Final Report: Final Report to the Lord Chancellor on the civil justice system in England and Wales* concludes, “a new approach is required which emphasizes experts’ impartiality.”⁵² In fact, defending ourselves against expert bias, including the bias rooted in adversarial attitudes and expectations, is an essential, but incomplete, way to enhance the reliability of expert evidence and our ability to evaluate it. Since biased experts are tolerated and can cause many of the dangers associated with expert evidence, impartiality must be promoted to all of the participants in the civil justice system. In the following section, I make suggestions to promote and enhance expert impartiality.

⁵¹ MacKenzie, *supra* note 6 at para. 8.

⁵² Lord Woolf, *Access to Justice Final Report: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (London: Lord Chancellor’s Department, 1996) [Woolf Report] at section III, chapter 13, para. 27, online: Department of Constitutional Affairs <[http:// www.dca.gov.uk/civil/final/contents.htm](http://www.dca.gov.uk/civil/final/contents.htm)>.

B. Suggestions

Efforts to enhance expert impartiality should be aimed at all stakeholders, all of whom have a role in perpetuating or reducing bias. I discuss each participant in turn: 1. experts; 2. procedural rule makers; 3. lawyers; 4. judges; and 5. professional societies.

1. Experts

Bias, whether a result of an adversarial vision of the expert's role or lack of a clearly defined impartial role, is an element of several dangers associated with expert evidence. Prospective expert witnesses should be educated about the proper role of experts to ensure that they are aware that they are to be independent and impartial. Ideally, expert witnesses should be able to strive confidently to be impartial and counter demands from lawyers to be advocates.

In a 1993 decision of the English Queen's Bench in *The Ikarian Reefer*,⁵³ Justice Cresswell set out a list of the duties and responsibilities of expert witnesses after having concluded that certain of the experts in the case had misunderstood their role as expert witnesses:

The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of expert uninfluenced as to form or content by the exigencies of litigation...
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise...An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion...
4. An expert should make it clear when a particular question or issue falls outside his expertise.

⁵³ *National Justice Compania Naviera S.A. v. Prudential Assurance Co, Ltd.* ("The Ikarian Reefer"), [1993] 2 Lloyd's Rep. 68 (Q.B., Com. Ct.).

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one...In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report...
6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports...⁵⁴

Although they are not referred to by the Supreme Court of Canada or by any Canadian Court of Appeal, Justice Cresswell's expert duties and responsibilities have been endorsed by the English Court of Appeal⁵⁵ and by numerous trial courts in Canada,⁵⁶ Australia⁵⁷ and Hong Kong.⁵⁸ For example, in the 1998 Ontario General Court decision in *Fellowes, McNeil v. Kansa General International Insurance*, Justice MacDonald endorsed the "*The Ikarian Reefer*" and reiterated that experts must refrain from becoming advocates:

⁵⁴ *Ibid.* at 81-82. This decision was appealed. In [1994] E.W.J. No. 2139 (C.A., Civil Div.) (QL) at para. 299, the English Court of Appeal described Cresswell J.'s comments as "an admirable resumé of the duties and responsibilities of expert witnesses."

⁵⁵ See *Stevens v. Gullis*, [1999] E.W.J. No. 4187 (C.A., Civil Div.) (QL) at para. 28.

⁵⁶ See *Perricone v. Baldassarra*, [1994] O.J. No. 2199 (Gen. Div.) (QL) at para. 21, *Kozak v. Funk*, (1995), 28 C.C.L.T. (2d) 81 (S.Q.B.) at paras. 16 and 27, *Fellowes, McNeil v. Kansa General International Insurance*, (1998), 40 O.R. (3d) 456 (Gen. Div.) [*Fellowes, McNeil*] at p. 4, *Dansereau Estate v. Vallee*, (1999), 247 A.R. 342 (Q.B.) at para. 136, *Jacobson v. Sveen*, (2000), 262 A.R. 367 (Q.B.) at para. 35, *Prairie Well Servicing v. Tundra Oil and Gas*, 2000, Man. R. (2d) 284 at para. 25, and *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (S.C.J.) (QL) [*Bank of Montreal*] at paras. 6 and 7, *Martin v. Inglis*, (2002), 218 Sask. R. 1 at para. 118, *Teichgraber v. Gallant*, 2003 ABQB 58 at para. 89 and *Kirby Lowbed Services v. Bank of Nova Scotia*, 2003 BCSC 617 at para. 36. *The Ikarian Reefer* is cited as a footnote in John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at 624.

⁵⁷ See *Collins Thomson v. Clayton*, [2002] NSWSC 366 at paras. 21 and 22, online: <http://www.worldlii.org/au/cases/nsw/supreme_ct/2002/366.html> and *Sampi v. State of Western Australia*, [2000] FCA 1862 at para. 9, online: Federal Court of Australia <http://www.worldlii.org/au/cases/cth/federal_ct/2000/1862.html>.

⁵⁸ See *Chan Mun Kui v. Lau Yuk Lai*, [1999] HKCFI 1071 at 7, online: Court of First Instance of Hong Kong <<http://www.worldlii.org/hk/cases/HKCFI/1999/1071.html>>.

I turn briefly to the case law in the role of an expert. Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise...⁵⁹

A list of these duties and responsibilities could be given to prospective expert witnesses at the time they are retained. Experts should also be advised of the importance of their impartiality, such as described by Justice Farley, in *Toronto-Dominion Bank v. E. Goldberger Holdings*:

I pause to note that experts must conduct themselves as objective neutral assisters of the court and, if they fail to fulfill this function, their testimony should be ruled inadmissible and therefore ignored after they have been eviscerated...⁶⁰

Explicitly apprising experts of their impartial role is necessary to dispel adversarial attitudes and expectations, clarify the expert's role and emphasize the overarching objective of accurate fact finding.

The Woolf Report concludes that it is "particularly important that each opposing expert's overriding duty to the court is clearly understood" and even recommends making available training courses for expert witnesses.⁶¹ Although training courses would stress to experts their obligation to be impartial, I suspect that such courses would have little appeal to prospective experts. Of course, such training would be unnecessary if experts were already aware of their impartial role.

2. Procedural Rule Makers

Rules of civil procedure include statements of overarching objectives by which the rules are to be interpreted. The stated purpose of the rules in most Canadian jurisdictions is to secure the just, speedy and inexpensive determination of every civil proceeding on its merits.⁶²

⁵⁹ *Fellowes, McNeil*, *supra* note 56 at 4.

⁶⁰ *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.*, [1999] O.J. No. 5324 (S.C.J.) (QL) at para. 2. In a subsequent case, *Bank of Montreal*, *supra* note 56 at paras. 6-7, Justice Farley also endorsed the principles set out in "*The Ikarian Reefer*".

⁶¹ Woolf report, *supra* note 52 at paras. 27, 54 and 56.

⁶² These are the stated objectives of the British Columbia, *Rules of Court*, B.C. Reg. 221/90 [British Columbia], r. 1(5), Manitoba, *Queen's Bench Rules*, Man. Reg. 553/88 [Manitoba], r. 1.04(1), Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [Ontario], r. 1.04(1), Prince Edward Island, *Rules of Civil Procedure* [Prince Edward Island], r. 1.04(1), New Brunswick, *Rules of Court*, N.B. Reg. 82-73 [New Brunswick], r. 1.03(2), and the *Federal Court Rules*, 1998, [SOR/98-106] [Federal Court], r. 3.

The rules could easily be amended to explicitly declare that the truth is the overarching objective.⁶³ Such an amendment would serve to further dispel the attitudes and expectations upon which expert advocacy has been justified.

Civil procedure rules also provide requirements for the content of expert reports. Here, too, there is an opportunity to enhance expert impartiality. For example, rules could be amended to require experts to include a written declaration of their independence, such as recommended in the Woolf report. In fact, Lord Woolf makes several recommendations to enhance impartiality, many of which are now set out in the England and Wales *Civil Procedure Rules* and *Practice Directions*.⁶⁴

1. Expert reports should be addressed to the court;
2. Expert reports are to be accompanied by written instructions and a note of any oral instructions;
3. Expert reports should include a declaration that the report includes everything relevant to the opinion and draws attention to the court any matter which would affect the validity of that opinion;
4. "The Working Group on Intellectual Property has proposed a form of declaration which would include statements that the expert:"
 - a) understands that his or her primary duty is to the court;
 - b) has endeavored to be accurate and complete and mentions all material matters;
 - c) draws attention to any matter which might adversely affect the opinion;
 - d) indicates the source of factual information;

⁶³ See British Columbia, *ibid.*, r. 1(5), Manitoba, *ibid.*, r. 1.04(1), Ontario, *ibid.*, 1.04(1), Prince Edward Island, *ibid.*, r. 1.04(1), New Brunswick, *ibid.*, r. 1.03(2), *Rules of the Supreme Court of the Northwest Territories*, R-010-96 [Northwest Territories], r. 3 and Nova Scotia, *Civil Procedure Rules* [Nova Scotia], r. 1.03, and the Federal Court, *ibid.*, r. 3. The *Alberta Rules of Court*, Alta. Reg. 390/68 [Alberta] and Saskatchewan, *Queen's Bench Rules* do not include a stated purpose.

⁶⁴ England and Wales, *Civil Procedure Rules*, online: Department of Constitutional Affairs <http://www.dca.gov.uk/civil/procrules_fin/contents/parts/part35.htm> and England and Wales, Department of Constitutional Affairs, *Practice Direction-Experts and Assessors*, online: Department of Constitutional Affairs <http://www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part35.htm>.

- e) has not included anything in the report without forming his own independent view on the matter;
- f) will notify his instructing lawyers of any errors or omissions;
- g) understands that his report will form evidence, that he may be cross-examined and that he 'is likely to be the subject of public adverse criticism by the judge' if the court concludes the expert has not fairly tried to meet the standards set out in the declaration;
- h) indicates the extent of the range of opinion where there is a range of reasonable opinion.⁶⁵

In recent months, the Federal Court of Australia implemented its *Guidelines for Expert Reports*, several of which overlap with those of Lord Woolf:

- 2.1 An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
- 2.2 All assumptions of fact made by the expert should be clearly and fully stated.
- 2.3 The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and state the qualifications of the person who carried out any such test or experiment.
- 2.4 Where several opinions are provided in the report, the expert should summarise them.
- 2.5 The expert should give reasons for each opinion.
- 2.6 At the end of the report the expert should declare that "[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court."
- 2.7 There should be included in or attached to the report (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials which the expert has been instructed to consider.
- 2.8 [If an expert changes a material opinion, the change should be communicated to all parties in a timely manner].

⁶⁵ Woolf Report, *supra* note 52 at paras. 30 and 33-36.

2.9 If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

2.10 The expert should make it clear when a particular question or issue falls outside the relevant field of expertise.

2.11 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.⁶⁶

A set of guidelines could be drafted from an amalgam of the guidelines cited above and provided to experts⁶⁷ at the same time they are provided with the list of their duties and responsibilities.

The rules in all Canadian jurisdictions authorize courts to deny a party's own costs or award costs to opposing parties where steps taken by a party are improper or unnecessary.⁶⁸ The rules also authorize courts to make lawyers personally liable for the costs,⁶⁹ typically where the lawyer "has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default..."⁷⁰ While the existing rules regarding costs are another means that could be used to motivate impartiality, the issue relating to them is their use. I discuss that in section 4.

What about court appointed experts? Justice Breyer, in a recent United States Supreme Court decision, strongly endorsed their use.⁷¹

⁶⁶ Federal Court of Australia, *Practice direction: Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia*, (19 March 2004) [*Guidelines for Expert Witnesses*] at 3-4, online: Federal Court of Australia <http://www.fedcourt.gov.au/pracproc/practice_direct.html>.

⁶⁷ Sperling, *supra* note 4 at 20-21 and *Guidelines for Expert Witnesses*, *ibid.*

⁶⁸ See British Columbia, *supra* note 62, r. 57(14), Alberta, *supra* note 63, r. 601(1), Manitoba, *supra* note 62, r. 57.01, Ontario, *supra* note 62, r. 57.01, New Brunswick, *supra* note 62, r. 59.02, Prince Edward Island, *supra* note 62, r. 57.01, Nova Scotia, *supra* note 63, r. 63.04, Newfoundland and Labrador, *Rules of the Supreme Court*, 1986, Nfld. Reg. 52/97, [Newfoundland and Labrador], r. 55.14(1), and the Federal Court, *supra* note 62, r. 400.

⁶⁹ See British Columbia, *ibid.*, r. 57(37), Alberta, *ibid.*, r. 602, Manitoba, *ibid.*, r. 57.07, Ontario, *ibid.*, r. 57.07, New Brunswick, *ibid.*, r. 59.13, Prince Edward Island, *ibid.*, r. 57.06, Nova Scotia, *ibid.*, r. 63.15, Newfoundland and Labrador, *ibid.*, r. 55.14(2), and the Federal Court, *ibid.*, r. 404.

⁷⁰ Ontario, *ibid.*, r. 57.07.

⁷¹ *Joiner*, *supra* note 21 at 8.

Although most Canadian jurisdictions authorize the use of court appointed expert witnesses⁷² and many commentaries endorse their use,⁷³ such experts remain an anomaly in Canada. In fact, the use of court appointed experts is not without criticism, including uncertainty of the role of court appointed experts in the adversarial system, unconscious bias of court appointed experts,⁷⁴ aggravation of the contest by the addition of another class of expert,⁷⁵ increased costs, usurpation of the role of the trier of fact, and philosophically, a shift to an inquisitorial system.⁷⁶ Considering the extent of the criticism, the lack of a concerted effort to enhance expert impartiality even within the existing adversarial system, and the good prospects for enhancing impartiality without court appointed experts, it is premature to look to them as the solution to the problem of expert bias.

3. Lawyers

The adversarial attitudes and expectations are embedded in a lawyer's duty to his or her clients. Lawyers need to be reoriented to abide by their preeminent duty to the court, which, in my view, includes the use of impartial experts. Since the legal community will likely resist any incursions into their adversarial attitudes and expectations, it is essential to promote expert impartiality and enlighten lawyers about the dangers caused by expert bias and its impact on public confidence in our justice system. Judicial declarations, expert guidelines, civil procedure rule amendments and a renewed debate about expert bias are necessary to make the expert's role clear and to make experts impartial.

The Canadian Bar Association Code of Professional Conduct provides rather vague guidance regarding the conduct of lawyers. It

⁷² Court appointed expert witnesses are permitted by the following Canadian civil procedure rules: Ontario, *supra* note 62, r. 52.03, Manitoba, *supra* note 62, r. 52.03, British Columbia, *supra* note 62, r. 32A, Alberta, *supra* note 63, r. 218, Newfoundland and Labrador, *supra* note 68, r. 35, Nova Scotia, *supra* note 63, r. 23.01, New Brunswick, *supra* note 62, r. 54.03, Prince Edward Island, *supra* note 62, r. 52.03.

⁷³ *C.B.A. Report of the Task Force*, *supra* note 44 at 44, recommends the use of court appointed experts in "appropriate cases". The Alberta Law Reform Institute, Alberta Rules of Court Project, *Expert Evidence and "Independent" Medical Examinations: Consultation Memorandum No. 12.3* (Edmonton: Alberta Law Reform Institute, 2003) [Alberta Law Reform Institute] at 24, online: Alberta Law Reform Institute <http://www.law.ualberta.ca/alri/pdfs/cnslt_memo/cm12-3.pdf> reports: "The Committee proposes that the Rules regarding court appointed experts remain as they are". See also Sperling, *supra* note 4 at 19. Justice Sperling recommends: "That more use be made of...appointed court experts".

⁷⁴ Friedman, *supra* note 4 at 252.

⁷⁵ Foster, *supra* note 4 at 181.

⁷⁶ Alberta Law Reform Institute, *supra* note 73 at 25-26.

requires lawyers to discharge their duties with integrity, candour, and fairness, encourage public respect for the administration of justice and maintain the integrity of the profession.⁷⁷ Commentators more explicitly discuss ethical conduct regarding the use of experts and argue that lawyers must not knowingly perpetrate a fraud on the Court by false evidence.⁷⁸ Although they argue that lawyers should have a good faith basis to believe that their experts' evidence is *reliable* as a precondition for ethically offering the evidence,⁷⁹ they have not made any explicit suggestion about bias. In my view, a lawyer's duty to the court should include an obligation to: (1) advise a prospective expert of the impartial role of expert witnesses; (2) have a good faith basis to believe that an expert is not dishonest or biased before offering his or her evidence; and (3) refrain from using an expert as an advocate. These duties are necessary for a lawyer to act with integrity, candour, and fairness, encourage public respect for the administration of justice and maintain the integrity of the profession. The question left unanswered is to what lengths is a lawyer required to go to meet the requisite good faith basis to believe that an expert is not dishonest or biased.

As discussed above, biased expert evidence is not attributable entirely to dishonest experts. Lawyers who embody the "classic formulation of the advocate's role" account for much of the demand for expert advocacy. It is this demand that must be curtailed.

4. *Judges*

While a declaration of the expert's role will have little impact on dishonest experts, it is necessary to control expert advocacy rooted in adversarial attitudes and expectations. The importance of accurate fact-finding and impartial experts should be clearly proclaimed by the judiciary. Experts need a clearly defined role. The lawyers who retain them need the same clarity.

To emphasize the importance of impartiality to experts and lawyers, judges could endorse and promote the duties and responsibilities of expert witnesses as enumerated in *The Ikarian Reefer* and the Woolf Report.

Notwithstanding the dangers that stem from expert bias, courts have been surprisingly delicate when dealing with experts who they

⁷⁷ Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1996) [*Code of Professional Conduct*] at chapters I, IX, XIII and XV.

⁷⁸ Thornburgh, *supra* note 42 at 462 and *Modern Scientific Evidence*, *supra* note 38 at 97.

⁷⁹ Thornburgh, *ibid.* at 463 and *Modern Scientific Evidence*, *ibid.* at 98.

found were biased.⁸⁰ In fact, expert bias has been considered to be a matter of weight⁸¹ rather than admissibility. And in cases where expert testimony was excluded because of expert bias, courts have described the reason for the exclusion in delicate terms, i.e., it was unnecessary, not relevant or the expert was not qualified.⁸² Only in a handful of cases have judges actually stated that expert testimony was excluded *because of bias*.⁸³ Although the rationale for treating expert bias as a matter of admissibility or weight may be based on the degree of bias, there is no doubt that the exclusion of an expert's testimony because of bias would have a chilling effect on that expert and other prospective experts. Indeed, there is little more that could be done to emphasize impartiality than to declare that biased experts will not be heard in our courts.

Judges should not be delicate in articulating their views of expert witnesses who fail to meet their duties and responsibilities as contemplated in Lord Woolf's proposed declaration:

The Working Group on Intellectual Property has proposed a form of declaration which would include statements that the expert...(g) understands that (i) his report will form evidence...(ii) he may be cross-examined...and [that he] (iii) 'is likely to be the subject of public adverse criticism by the judge' [if the court concludes the expert has not fairly tried to meet the standards set out in the declaration].⁸⁴

Simply put, trial judges who find experts biased should explicitly say so in their decisions. Such public comments would likely deter prospective expert witnesses and quell the demand for experts who have been described by judges as biased.

As discussed above, our courts have the authority to respond to the improper use of expert evidence, including the use of biased experts, by denying costs or awarding costs to opposing parties.⁸⁵ I suspect that the authority to deny or award costs for the misuse of expert evidence has

⁸⁰ See *Fairford First Nation v. Canada*, [1998] F.C.J. No. 47 (T.D.) (QL) [*Fairford First Nation*] at para. 12, *Ruby v. Canada (Solicitor General)*, [2000] 3 F.C. 589 (C.A.) [*Ruby*], *Fowler v. Schneider National Carriers* (2000), 184 N.S.R. (2d) 212 (S.C.) [*Fowler*] at para. 15, *Samson Indian Nation and Band v. Canada*, [2001] F.C.J. No. 50 (T.D.) (QL) [*Samson Indian Band*], *Bank of Montreal*, *supra* note 56 at para. 5 and *Homolka v. Harris*, (2002), 100 B.C.L.R. (3d) 218 [*Homolka*].

⁸¹ See *Fairford First Nation*, *ibid.*, at para. 12 and *Ruby*, *ibid.*

⁸² See *Fowler*, *supra* note 80 at para. 15, *Samson Indian Band*, *supra* note 80, *Bank of Montreal*, *supra* note 56 at para. 5 and *Homolka*, *supra* note 80.

⁸³ See *Fellowes, McNeil*, *supra* note 56 and *Murray v. Galuska*, 2002 BCSC 1532.

⁸⁴ Woolf Report, *supra* note 52 at para. 35.

⁸⁵ See *British Columbia*, *supra* note 62, r. 57(14), *Alberta*, *supra* note 63, r. 601(1), *Manitoba*, *supra* note 62, r. 57.01, *Ontario*, *supra* note 62, r. 57.01, *New Brunswick*, *supra* note 62, r. 59.02, *Prince Edward Island*, *supra* note 62, r. 57.01, *Nova Scotia*,

been underutilized in Canada. Of course, judges could make more use of this discretion.

5. *Professional Societies*

Professional societies should be concerned about their members giving biased evidence in public courts and contributing to miscarriages of justice. At stake is the reputation of such societies and their members. Although lawyers and judges have no involvement in the internal matters of professional societies or a duty to report misconduct, clear judicial comments about findings of expert bias should catch the attention of professional societies.

The risk of facing charges of ethical violations from their own professional bodies should rein in experts' temptation to stray too far into the advocate's role.⁸⁶ As this is an internal matter of professional societies, we can only hope that they will address such problems with their members, such as in the case of *Austin v. American Association of Neurological Surgeons*. In *Austin*, a neurological surgeon was disciplined by his professional association for "[providing] 'entirely false' testimony in a medical malpractice lawsuit against another physician..."⁸⁷

Of course, appeals to professional societies presuppose that experts are members of a society that has a code of conduct. This discussion is moot for the experts who are not members of a society.

IV. *Conclusion*

In this article I discussed the dangers of expert evidence and focused on a underlying element of several dangers, namely, expert bias. Biased experts degrade the justice system and can cause miscarriages of justice. As such, the importance of expert impartiality cannot be overstated. Because expert bias is essentially a product of adversarial attitudes and expectations, limiting attention to dishonest experts serves as only as a fractional measure. The task of enhancing expert impartiality requires reforms directed to change the adversarial attitudes and expectations of experts, procedural rule makers, lawyers, judges and professional societies.

supra note 63, r. 63.04, Newfoundland and Labrador, *supra* note 68, r. 55.14(1), and the *Federal Court*, *supra* note 62, r. 400.

⁸⁶ Carolyn Magnuson, "Expert Witnesses Face Ethics Charges From Medical Societies" *Trial* 37 (April 2001) 12.

⁸⁷ *Austin v. American Association of Neurological Surgeons*, 120 F.Supp. 2d 1151 (N.D. Ill. 2000) (WL).

I endorse Gavin MacKenzie's call for a reconsideration of the civil justice system in which the truth is seen as the overarching objective. Such reconsideration includes many elements. First of all, the role of experts needs to be reconceptualized. How? Enhancement of expert impartiality requires appellate courts to stress that experts are to be impartial and to spell out the role and responsibilities of experts, such as those set out in *The Ikarian Reefer*. Civil procedure rules need to be amended to incorporate the principles contained in *The Ikarian Reefer* and include expert report guidelines and declarations, such as those suggested in the Woolf report and those recently implemented by the Federal Court of Australia. Trial judges should explicitly set out their findings of expert bias and award costs against litigants, and perhaps against lawyers. Not only should courts consider expert bias as a matter of weight, but also as a matter of admissibility. Lawyers are to advise experts of their impartial role, have a good faith basis to believe they are not dishonest or biased before offering their evidence and refrain from using experts as advocates.

These suggestions, primarily for civil cases, are designed to cause the least interference with our party controlled adversarial system. Challenging the adversarial culture will not be easy.⁸⁸ After all, it is an adversarial system. But enhancing expert impartiality is imperative. Ascertaining the reliability of expert evidence is difficult and its associated dangers are significant. Indeed, I expect that John Langbein's fictional European jurist⁸⁹ would be especially amazed at our tolerance for biased experts.

While it has been suggested that a more preferable system would be the use of neutral experts,⁹⁰ it is premature to abandon the party controlled system simply because of the prevalence of biased expert evidence. To date, little effort has been made in Canada to enhance expert impartiality. If the reforms proposed in this paper in keeping with our party controlled system prove to be unsuccessful, then consideration should be given to instituting some sort of system of court appointed experts.

Finally, I conclude by citing advice given by a Dr. Putnam, in the Boston Medical and Surgical Journal in 1896, to colleagues about acting as expert witnesses:

Finally, the scientific witness should come into court with clean hands and a pure heart; with sincerity of purpose; with a tendency and desire to ascertain and

⁸⁸ MacKenzie, *supra* note 6 at para. 93.

⁸⁹ Langbein, *supra* note 7 at 6.

⁹⁰ MacKenzie, *supra* note 6 at para. 87.

recognize truth wherever it may be found; to conceal nothing; mindful of his oath, which requires him to speak not only the truth, but the whole truth.⁹¹

At least to *some* experts, their impartial role is clear. But such clarity is far from our current adversarial battleground.

⁹¹ Foster, *supra* note 4 at 186.