

# **PREPARING YOUR EXPERT FOR DIRECT AND CROSS**

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## **I. INTRODUCTION**

Given the increasing complexity of cases being brought before our courts, coupled with the advent of specialized regulatory tribunals and boards, the expert witness has become a critical player in the modern lawsuit. Often a complex lawsuit will fall or rise on your expert. Many cases will hinge on whether your expert can prevail over your opponent's expert. For this reason, how you assemble and present your expert evidence, the so-called, "battle of the experts", will often determine whether you will win or lose your case.<sup>1</sup>

As in so many other facets of the trial process, the spade work that is done outside the courtroom determines who wins the battle of the experts. This is especially true when preparing your expert for both direct examination and cross-examination, where well prepared and persuasive experts can determine the outcome of a trial.

## **II. PREPARATION FOR TRIAL**

Your preparation for a successful direct and subsequent cross-examination of your expert witness begins the first day that you retain him or her. Because your expert's testimony is such a vital component of your case, the preparation of your expert will be long and painstaking. You have to ensure that your expert will win the "battle of the experts". Added care is required in preparing an expert witness when compared with lay witness because of the complex issues involved and it may be necessary to hold several meetings with your expert in order to properly prepare him or her and yourself.

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<sup>1</sup> See for example, *Berton Seed v. Sementi Dotto* [1996] O.J. No. 3211, where the defence's forensic accounting evidence prevailed resulting in damage of \$6,883.00 rather than the \$300,000 claimed by the plaintiff's forensic accountant.

## Choice of Expert

The first step to a successful direct and subsequent cross-examination begins with the selection of the expert. Always make sure that you get the best expert that you can afford. One must be sure from the outset that the right expert who possesses the necessary skills in the precise field that you require is retained. In short, at the very outset choose your expert with care, you do not want to find out at trial that your expert does not have the proper expertise and as a result is barred from testifying. Also, determine whether the proposed expert has a disqualifying conflict of interest by providing to your expert the names of the parties and verify that he or she completed a conflict search. This is important as the courts have begun, in several cases, to apply a similar standard with respect to conflict of interest to expert witnesses as lawyers.<sup>2</sup> If a conflict check is not performed you may find out after substantial preparation for trial that your expert is disqualified from testifying.

Ask tough questions right at the outset of your relationship with your expert about his or her background such as whether they have any “skeletons in their closet”. It would be most unfortunate during the cross-examination of your financial expert, the court learns that he or she is a bankrupt or has a criminal record.

You must find out if your expert has been disciplined or sanctioned by his or her professional body. Otherwise you run the risk of your opponent exposing it at trial. Find out about the witness’ other potential weaknesses, for example, adverse comments made by a judge about your expert or his or her other past failures at trial. Find out if the expert has taken a different position in another case. This is critical preparation for your experts testimony at trial.

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<sup>2</sup> See, for example, *United States Mineral Products Co. v. Pinchin Harris Holland Associates Ltd.*, (June 30, 1992), Doc. No. Vancouver A922314 (B.C.S.C.) also see *Kallinen v. Ministry of Transportation and Communications*, (1977), 13 L.C.R. 172 at 173.

It is critical to meet with your expert in person to determine how they will come across to a judge or jury. If your expert is located in another jurisdiction then a telephone interview may be the only option. In a major case, go and meet with your expert or have your expert visit you.<sup>3</sup> It does not matter if you have hired a Nobel Prize winner, if he or she cannot communicate effectively and come across in the witness box well, then they will not be useful for your case.

Be careful not to retain a “gun for hire” or “professional witness”. Some experts tend to give evidence for one side quite frequently and this tendency may be ammunition for your opponent in cross-examination. If it is necessary to do so, be sure that your witness is prepared for this line of attack from the very outset of the case. As a practical tip, a witness who earns a substantial portion of his or her livelihood solely from testifying will often not be well received by the trier of fact.

However, that being said, it is preferable in most circumstances to hire an expert who has given evidence on prior occasions and who has been well received by the courts. The witness will be more comfortable with the trial process and likely make for a better witness on both direct and cross-examination.

Lastly, it is critical that you be able to work with you expert witness closely. Without a rapport it will be difficult for you to properly prepare him or her for either direct or cross examination.

## **Expert Report**

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<sup>3</sup> As a general rule, with an “imported” expert witness it is even more important to do your due diligence because of the addition expenses required.

The expert's report that has been prepared must contain the "substance of his or her proposed testimony"<sup>4</sup>. Failure to disclose all of the information the expert relies on or failure to disclose other key elements of the opinion may result in those aspects of the expert's testimony being excluded.<sup>5</sup>

Make sure the expert has the evidence correct that he or she relies upon and that the evidence the expert has based the opinion on will be admissible at trial. In addition, make sure all necessary tests have been completed. Do not be afraid to ask your expert about the various available tests and whether they have been utilized. You do not want your expert impeached because he or she has failed to carry out crucial testing.

Be sure that each issue and the factual, documentary and scientific basis that you wish to canvas at trial with your expert is included in the report. Failure to do so may result in your expert being prohibited from testifying about any matters not in the report. Check with the expert that he has included all the information and arguments that support his opinion and stress to him or her the need to be complete and accurate.

If there are any errors in the report and/or you are not satisfied with it immediately request a further and better report. Any weaknesses in the report or conclusions will likely be exploited by your opponent in the form of an opposing expert's report or at trial during on cross-examination. It therefore is critical to make sure that the report is airtight.

As soon as you receive your opponent's expert report, forward it to your expert for evaluation and response. Speak with your expert about the opposing report and have your expert evaluate it objectively. Determine if additional research, material or a supplementary report needs to be

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<sup>4</sup> Ontario Rules of Civil Procedure, Rule 53.03

<sup>5</sup> See for example *Jhah v. York University* (2002), 16 C.P.C. (5th) 324 (S.C.J.)

prepared. The opposing experts report will help both you and your expert prepare for direct and cross examination as it will contain clues as to your opponents strategies.

### **III. PREPARATION OF EXPERT FOR DIRECT EXAMINATION**

Before meeting with your expert to discuss his or her examination-in-chief, you should have your examination mapped out. A checklist should be developed as to the specific facts that you wish to adduce through the witness and should be reviewed with the witness. If an expert has no personal knowledge of the facts, make sure to work out hypothetical questions and take him or her through the questions. Be sure your expert understands this process. The two of you must be in sync to adduce the evidence and avoid any unanticipated responses. Ideally when leading the evidence, you want the expert to lay out his opinion and then the reasoning for it.

#### **Qualification Process**

Start by reviewing your expert's resume with him or her to enable you to highlight important points during the qualifying process. Explain the two step process of qualification and the actual testimony to the expert witness. Explain the *voir dire* hearing that may take place if your opponent challenges the expert's qualifications. The expert must understand that the condition precedent for her giving opinion testimony is the trial judge's ruling. Work out with the witness the precise formulation of the areas in which you will be asking the trial judge permission for the witness to give opinion evidence. You should always ask for very broad language in the judge's ruling to ensure that all the areas you propose to cover with the witness will be permitted.

It should be made clear to the expert that certain portions of their resume are of particular relevance to the case and explore with the witness some of these areas. You will often find that these discussions throw up invaluable information that will strengthen the witness' expertise.

Some of the following points should be canvassed with the expert at this point:

- (i) Personal history.
- (ii) Present position in the industry.
- (iii) All degrees obtained and if in some cases, details about what the course work entailed.
- (iv) Training that the expert has participated in.
- (v) Any licences that the expert may have.
- (vi) Involvement in professional organizations.
- (vii) Publications relevant to the case.
- (viii) Awards or other distinctions.
- (ix) Whether he has testified previously at other proceedings.
- (x) The number of similar cases that he has reviewed.

There is nothing that is more embarrassing at trial than asking a question to an expert when qualifying him or her and receiving a negative response. It makes you look unprepared, diminishes your credibility with the trier and highlights the weaknesses in the expert's background. This scenario can be avoided with through proper selection and preparation of the expert.

Always be sure at trial that you have extra copies of your experts resume handy. A copy of the resume should be filed as an exhibit, and copies should be available for your adversary, the trial judge, and the juniors.

Make sure that your expert is aware that during the qualification process he or she will be cross-examined by your opponent on his/her qualifications. Accordingly, your witness should be prepared for a direct attack on his/her qualifications.

### **Your Expert's Testimony**

Unless you understand your experts report and testimony completely including all of its relevant nuances you will not be able to use his testimony to its maximum efficiency or prepare him or her properly for the direct examination.

When preparing the expert you must have a total understanding of both your expert's report and the transcripts, reports, and other information surrounding the case. You should canvas all key facts, especially the damaging ones, with the expert prior to trial

Be sure you review the opposing expert's report with your expert and formulate answers with your expert for the points advanced by the opposing expert. When conducting the direct examination it will be important to review these points with your expert.

You should make the expert aware that during his direct examination he/she will be permitted to refer to authoritative texts or articles that he used to form his opinion, and any portion that he relies on is admissible into evidence. In addition, the expert is entitled to refer to the textbook to assist him while he is giving testimony. However, the expert must make it clear that the textbook he is referring to merely supports his conclusion.

The final time that you meet with your expert should be a trial run of his or her testimony. At this session be sure to explain court room etiquette to the expert and make sure that he or she knows what role he or she will be playing in the case.

During this trial run verify that your expert is in a position to give the requisite evidence in the critical areas of your case. For example, in a medical malpractice case he must establish the proper standard devolving on the defendant. In addition, he must establish the casual connection between the breach of the standard and the injury sustained by the client. Review carefully all critical points with the witness.

It is often difficult to adduce all the evidence you wish to put before the Court in a clear and concise manner. Write out all of your questions in advance; this will help you in formulating the question during your examination. More importantly, the written questions will ensure that you cover these vital propositions during your examination.

### **Courtroom Procedure**

Often a courtroom is an unfamiliar place to your expert. It is very important that you brief your expert as to what is likely to occur and why. If your expert has no previous experience testifying in Court, explain the rules of evidence to him, such as, the hearsay rule and the exception made for expert's opinion. Your function at this point is to make the expert feel as comfortable as possible.

### **Demonstrative Evidence**

Finally, it is helpful when presenting expert evidence to use demonstrative aids. Given the nature of expert testimony being complex and technical, demonstrative evidence acts to simplify and streamline the expert's testimony. In addition, it adds credibility to the expert's testimony and triggers better retention of information. There are many types of demonstrative evidence that can be used such as photographs, charts, X-rays, overheads, slides, and models. Keep in mind that this evidence should be carefully reviewed at this stage to ensure it is accurate and admissible.

## **V. PREPARATION OF EXPERT FOR CROSS EXAMINATION**

Even if your expert has prior experience testifying, it is important to prepare him or her for cross-examination. If your expert has not testified before, attempt to arrange for him to watch a portion of a trial so that he will be comfortable when he or she testifies before the court.

Never assume that just because your expert has testified before, and been cross-examined, that he or she will make a good witness.

Just as important, by this time you should have provided a copy of the opposing expert's report to your witness. You do not want your expert to be surprised by a line of attack that your opponent intends to mount. You should also be very familiar with this report because it will give you an insight as to the cross-examination your expert will face. By this time you should have received from your expert a memorandum critiquing the opposing expert's report and possible grounds of attack that will be the foundation for your cross-examination of the other expert.

Your expert must understand that all facets of his testimony will be attacked from the assumptions that he or she made to the conclusions. In addition, he must be prepared to face a direct attack on his credibility. Proper preparation consists of mastering all of the relevant facts.

Some of the following instructions will assist your expert in preparing for cross-examination:

- (i) The expert must understand that his/her testimony must be independent and uninfluenced by the law suit. His role is to provide assistance to the court in his unbiased decision.
- (ii) The expert must make clear the facts or assumptions on which his/her opinion is based.
- (iii) To concede matters where he or she has erred or where there is another possible explanation.
- (iv) To admit his or her limitations. If he or she does not know the answer to a question, he or she must not guess. Also he or she has an obligation to answer all "yes" – "no" questions posed by opposing counsel.
- (v) To answer the question put to him or her and not to anticipate where the cross-examiner is going. Do not encourage your expert to depart on long speeches while testifying.
- (vi) Not to testify in areas outside of expertise.
- (vii) If there is insufficient data available on a certain point, then the expert should make it clear that the opinion is a provisional one.
- (viii) Not to appear partisan, but to project an image of impartiality.

- (ix) Not to be surprised by trick questions such as whether he or she has discussed the case with you. He or she should indicate that he or she has and that such a consultation is normal and necessary to ensure all the facts will be laid before the court.
- (x) Not to be surprised if he or she is questioned about fees. He is a professional and should not be embarrassed about them.
- (xi) To use simple lay language and to explain any scientific or medical terms.
- (xii) To review any notes that he or she intends to bring to court to ensure that they do not contain any matters giving rise to damaging cross-examination.
- (xiii) Not to underestimate or to be condescending to the cross-examiner.
- (xiv) Not to lose composure or temper.
- (xv) If the question that is being posed is not heard or understood, to ask to repeat the question.
- (xvi) To be prepared for questions that will incorporate different facts in an attempt to solicit a different opinion.
- (xvii) To be aware that his or her report has been reviewed by the other side and by the opposing expert. He should not be surprised if the opposing expert is in court during his testimony and assisting the cross-examiner during the cross-examination
- (xviii) He or she should not criticize the opinion of the other expert because it may hurt the appearance of impartiality
- (xix) He or she should be prepared that the cross-examiner will seek his opinion or will put a hypothetical question to him premised on facts different from those posited to him in your examination.
- (xx) Instruct him or her how to address the court.
- (xxi) Assure your expert that re-examination is an opportunity to clear any matters up that are left open or confused by the cross-examination.

Now is the time to review with the expert any possible points of attack that he or she may face in cross-examination. The following are some of the areas that should be canvassed:

- (i) Can an attack be mounted on your expert's qualifications?
- (ii) Is there any basis for alleging bias or pecuniary interest?
- (iii) Has your expert made any prior inconsistent statement either in other proceedings or in his writings?

- (iv) Has the expert carried out the full gambit of testing necessary? Were the tests carried out as per standard, accepted procedure
- (v) Is the evidence consistent with prevailing scientific opinion?
- (vi) Are there any contradictions between your expert and your opponent's expert?
- (vii) Look for any inconsistency between the expert's evidence and other factual, documentary, demonstrative, or scientific evidence.
- (viii) Is there a flaw in the chain of logic used by the expert to formulate his opinion?
- (ix) Has the expert taken into consideration all of the facts on the record?
- (x) Can your opponent get some factorable admissions from the expert report?
- (xi) Can different interpretations be made of the fact and consequently a different conclusion be drawn from your expert?
- (xii) Can a collateral attack be mounted on the witness?

When going through these issues with your expert, pay particular attention to the points raised by the opposing expert's report.

Make sure that you have acquired a copy of all texts and articles on which your expert and your opponent's expert relies upon. You should be acquainted with all of your expert's writings on the subject. Your expert and you should be acquainted with any difference between his opinion and the general opinion in the literature of the field. More importantly, the expert should explain to you any discrepancies between his own writings and the opinion he will render. The expert must know that he may be confronted with such writings and that he must be prepared to defend his position. Discuss with the expert where he feels vulnerable to attack and why.

## **V. CONCLUSION**

A well selected and well prepared expert can make or break a case. It is your job to put your expert in a situation where he or she can succeed. Creativity and preparation are the twin sources

of success in trial work. The application of these principles to expert witnesses will pay handsome dividends.