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How to be an “**EXPERT**” expert

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Who is an Expert?

Special skill, knowledge, training or expertise

Observations and Opinions will assist the Court

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Duty of All Experts (Rule 4.1)

Provide an opinion that is fair, objective, and non-partisan;

Limit his/her opinion to his/her expertise; and

Assist the Court to determine and issue

DUTY TO THE COURT FIRST

Required Contents of Expert Reports (Rule 53.03)

The instructions provided by counsel

The nature of the opinion

The opinion

The reasons for the opinion including any assumptions, research, documentation

A signed Acknowledgment of Expert's duty

Objective Experts v Partisan Experts



- Use Neutral Language



- Give a Well Reasoned Opinion



- Acknowledge Limitations



- Avoid Personal Attacks

Legal Language

It's **IMPORTANT**



HELPFUL Language



Probably



Likely



More Likely Than Not



Will



Real and Substantial Possibility or Risk (Future)



Materially Contributed to (No-Fault Benefits)

UNHELPFUL Language

- ✘ May
- ✘ Possibly
- ✘ Unlikely
- ✘ Could
- ✘ Can
- ✘ Perhaps
- ✘ A Chance That
- ✘ Lost Opportunity

When Preparing Written Reports, Experts Should Consider:

1

- Have I reviewed all of the records that may be relevant and which may be available to me (e.g. diagnostic imaging CDs, photographs, medical charts, etc.)?

2

- Have I interviewed or examined the Plaintiff in-person, if necessary?

3

- Is the information that I have been given relatively up-to-date?

4

- Should I request to speak to a corroborating source?

When Preparing Written Reports, Experts Should Consider:

5

- Have I considered all other expert evidence that may be available?

6

- Have I included the information required under rule 53.03?

7

- Have I addressed the main issues in the case and/or the referral questions?

8

- Have I cited all supporting documentation, literature, and/or reasons for my opinion?

9

- Have I sufficiently explained the rationale for my opinion?

RESPONDING REPORTS

Acknowledge consistencies with opposing expert, where possible

Responding Reports

Potential areas to **critique** the opposing expert:

1

- Did the other expert rely upon an unfounded assumption?

2

- Is the expert's reasoning flawed?

3

- Does the expert's opinion demonstrate bias?

4

- Has the expert provided an opinion that is inconsistent with views the expert has previously expressed?

5

- Did the expert conduct a test or rely upon a theory that is outdated, experimental, or invalid?

Responding Reports

Potential areas to **critique** the opposing expert:

6

- Has the expert failed to mention , consider, or incorporate into his opinion any critical piece of evidence?

7

- Has the expert made bald statements without providing any underlying rationale or support for the opinion?

8

- Has the expert considered lay evidence or corroborating information?

9

- Has the expert provided an opinion or made a statement that demonstrates a misunderstanding of the evidence?

10

- Has the expert focused on only a narrow aspect of the Plaintiff's life?

Responding Reports

Potential areas to **critique** the opposing expert:

11

- Has the expert applied the wrong burden of proof?

12

- Is there literature that rebuts the expert's opinion?

13

- Is there a way to “read between the lines” of the expert's opinion to weaken its impact?

14

- Are there ways to explain the expert's negative findings?

15

- Has the expert gone outside his scope of expertise?

How to respond to critique:

Consider if opposing expert's opinion is based on misstatement or misunderstanding

- If yes, CORRECT IT

Consider if opposing expert's opinion is based on disagreement

- If yes,
 - Offer further explanation
 - Offer literature
 - Offer further information in support of opinion
 - Differences of opinion are normal and healthy

TREATING EXPERTS
VS.
MEDICAL-LEGAL EXPERTS

TREATING EXPERTS

Can give opinions without a *RULES* complaint report if:



The opinion is based on observation or participation in the event , and




The expert's opinion is part of the ordinary exercise of her skill, knowledge, training and expertise

TREATING EXPERTS

May be restricted in providing opinions about:



- Causation



- Future extra-ordinary needs



- Impact of injury on ability to earn income, etc.

Interaction between Experts and Lawyers

CAN WE TALK?

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INTERACTION BETWEEN EXPERTS AND LAWYERS

Answer:

YES – we should!

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INTERACTION BETWEEN EXPERTS AND LAWYERS

According to the Ontario Court of Appeal in *Moore v Getahun*:

“It would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.”

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INTERACTION BETWEEN EXPERTS AND LAWYERS

According to the Ontario Court of Appeal in *Moore v Getahun*:

- Consultation and collaboration between counsel and expert witnesses is essential

- Reviewing a draft report enables counsel to ensure the report complies with the *Rules*, is relevant and is comprehensible

- Leaving the expert entirely to his or her own devices would result in delay and increased costs

- Counsel must be able to meet with experts, test hypotheses and edit draft reports under an umbrella of protection

INTERACTION BETWEEN EXPERTS AND LAWYERS

According to the Ontario Court of Appeal in *Moore v Getahun*:

Draft reports need not be disclosed

Notes and records of consultations between experts and counsel need not be disclosed

Inquiries about draft reports will not be permitted, but

INTERACTION BETWEEN EXPERTS AND LAWYERS

The Court will **NOT** permit improper conduct:



Counsel must not persuade or attempt to persuade an expert to give an opinion that the expert does not genuinely believe;



Counsel cannot interfere with the expert's independence or objectivity; and



Counsel must remain alive to the expert's duty to remain objective and impartial.

Preparation of an expert for trial

**It is essential that lawyers
and experts meet in advance!**

**“Briefing, Briefing, Briefing”
(L. H. Mandel)**

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Preparation of an Expert for Trial

Expert briefings should include:

1

- A review of the duty of the expert, in order to prevent the appearance of advocacy.

2

- A review of the theories and themes of the case.

3

- A review of all of the records which may be relevant to the expert's opinion.

4

- Review and refinement of visual aides.

5

- A review of the facts in the case, especially if those facts have been relied upon for any assumptions or conclusions.

6

- A review of other expert opinions in the case, both corroborating and conflicting.

Preparation of an Expert for Trial

Expert briefings should include:

7

- A review of any authorities (e.g. textbooks), which may be put to the expert in cross-examination.

8

- A review of those flaws in the expert's report that may have become apparent with the fullness of time.

9

- A review of the “four corners” of the expert's report.

10

- A review of the contents of the expert's file, which may have to be brought to Court.

11

- A review of any questions or concerns that the expert may have with respect to giving oral testimony in a Courtroom.

Expert Presentation at Trial

Speak slowly and clearly

Look at the Judge/Jury when speaking

Use simple language (where possible)

Be responsive to questions

Be prepared to use demonstrative aids

THANK YOU

Please feel free to call or email us with questions.

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