PIA Law Practical Strategies for Experts: Testifying Without Fear

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PREPARING FOR EXAMINATION-IN-CHIEF OF THE EXPERT

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Introduction

The purpose of this paper is to provide practical assistance to counsel and experts who are preparing for trial. To provide some background, I will briefly review the requirements of Rule 53 in preparation of an expert report. A prerequisite for calling expert evidence at trial is the service of a compliant report and an Acknowledgment of Expert's Duty (Form 53). This requirement applies only to "litigation experts" according to the principles set out by the Court of Appeal in *Westerhoff v. Gee Estate*, 2015 ONCA 206.

The remainder of the paper will deal with the practical challenges of organizing and executing adequate briefings. There will some discussion of the format of the expert's evidence at trial since the end result informs the preparation.

It must be remembered that from the advocate's point of view, the purpose of calling an expert is to persuade the court of the merit of the expert's opinion on relevant issues in the litigation. There is a significant tension between that purpose and the expert's obligation to the court to be objective. The resolution of this tension is the high art of trial advocacy.

Preparation of the Report

The requirements of Rule 53.03 (2.1) set out very specifically what must be contained in the expert's report. For convenience of reference, I am setting out these requirements below:

A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. Expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reason for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
    a. A description of the factual assumptions on which the opinion is based,
    b. A description of any research conducted by the expert that led him or her to form the opinion, and
    c. A list of every document, if any relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

It is extremely important that the expert be in complete command of all of the underlying facts and documents which are necessary to the formulation of his opinion. As new facts and documents become available, they should be provided to the expert to be incorporated into the opinion. In my experience, it is extremely useful for the expert to prepare a list of the material relied upon in the report and to attach it as an addendum to the report. The list can then be reviewed in the final stages of preparation for trial to ensure that all material is included.

It is also extremely important that the expert specify the source of information obtained from lay witnesses whether they be parties to the litigation or not. It is usually necessary for counsel to ensure that this foundation evidence is before the court in advance of the expert's testimony. The absence of a critical underlying fact from a witness can significantly impair the force of the opinion.

The Court of Appeal in Westerhoff specifically permits the preparation of draft reports and the input of counsel into the final product. This has been a welcome clarification of pre-trial procedure and permits the creation of a more focused cogent and articulate report.

Generally speaking, the format of the report should predict the format of the expert's oral evidence in court. The assistance of counsel will make it more likely that written and oral evidence are congruent.

Responses to Opposing Expert Opinions

In many cases, the opposing party will retain experts who will have differing opinions on the relevant issues. Those opinions should be provided to the expert as soon as possible and a concise and focused response prepared and served. This dialogue between experts needs to be included in the oral evidence given by the expert and this can be challenging to do so in a way that does not interrupt and impair the flow and force of your own expert's evidence.

It is of considerable assistance if your expert's responses are focused on key points and are kept as concise as possible.

Evidence Given By Other Witnesses at Trial

Counsel will usually ask the court for an exception to the order excluding witnesses so that experts can be advised of evidence that has been given by lay witnesses and other experts at trial before they get into the stand. It is extremely important that this exception be obtained prior to the final briefing of the expert so that you are not in breach of the court's order excluding witnesses.

Pre-Trial Briefing

I like to use the metaphor of a pyramid to visualize the role of the expert in giving evidence at trial. That evidence and ultimately the opinion you are seeking to put before the court is founded on many layers of factual and documentary evidence. This foundation needs to be reliably in place before the expert takes the stand. In briefing the expert, the foundational facts and documents need to be carefully reviewed at the outset. The expert needs to be intimately familiar with every fact and document that he or she is relying on to come to his opinion.

From a practical point of view, it may be impossible to meet with the expert in person for the required number of times that it takes to get through all of the subject matter to be dealt with. The preliminary review of foundation material can usually be done over the telephone and with the assistance of file-sharing software. It is important that counsel and the expert be looking at the same material.

In my experience, briefing an expert is an iterative process. I use an outliner to set out the key headings of the evidence to be given and during the briefing I review each heading and fill in the very specific areas which the expert will be testifying about. I do not use a question and answer format but rather a series of bullets which identify and remind both counsel and expert of the subject matter to be covered under a particular heading.

I then send the outline to the expert as an aid memoire and a guide to the next briefing session. In my experience, with the exception of the simplest cases, it takes several briefing sessions to cover the necessary material. The outline will grow with each meeting.

My outline generally follows the format of the expert's report but I do not like to slavishly follow the report and I do not encourage the expert witness to read from it. Generally speaking, the judge will have a copy of the report in front of him

while the expert is giving evidence. I nevertheless want the trier of fact to be listening to the oral evidence rather than reading the report. Having said this, it is important that an expert be limited to the facts and opinions contained in his report and you will face strong opposition from opposing counsel if you or your expert attempt to interject fresh material into the oral evidence being given.

In the course of the several briefing sessions you will require, it is useful to use email and FaceTime conferences to reduce the logistical barriers to preparation. The briefings really amount to a rehearsal of the expert's evidence. It takes time and practice to create a cogent and convincing presentation.

Organization of File Material

The expert will need to be able to refer to his file material when he is in the stand. It is extremely helpful to have a well-organized brief which contains every underlying fact and document required for the expert's opinion. If a file-sharing system is available, it is vastly superior to having binders of documents in the witness box. An iPad can be used by the witness to access the file.

It is also useful if counsel can isolate and project onto a screen the key documents or statements so that the trier of fact can see what the expert is referring to in his oral evidence. The goal of these organizational efforts is to help the expert appear to be in control of his foundational material while in the witness box.

Format of Trial Evidence

The format of the expert's evidence will depend to some extent on whether the case is being tried by a jury or by a judge without a jury. In the former case, the trier of fact will not have a copy of the expert's report and will not have the contextual knowledge that many judges have of the subject matter at issue. This

means that the evidence is likely to take longer with a jury than with a judge alone.

Qualification of the expert is a critical step whether the trial is with a jury or a judge alone. Care must be taken in the pre-trial briefing process to rehearse the expert's qualifications. He should not simply read his resume. In the United States, the qualification process is called Voir Dire. There is an excellent article in the bibliography that sets out the reasons that great care must be taken in the qualification process. There is also a list of questions for the expert that takes him through his expertise in a comprehensive and engaging way. The final result of the process is to obtain leave from the court to have the expert provide opinion evidence on the relevant subject areas. Counsel should prepare his statement to the court with respect to the scope of the expert's testimony and review it carefully with the expert prior to trial.

The body of the expert's evidence at trial will flow from the outline prepared by counsel with the assistance of the expert in the briefing sessions. I think of this outline as the expert's report "deconstructed". The process will start with a review of the letter of instruction to the expert and should include careful definition of key words or concepts – particularly where the case is being tried with a jury. After the body of evidence is given (including responses to opposing expert's opinions) the expert will summarize his opinion on the matter or matters in issue. This needs to be a concise statement which has been carefully prepared and rehearsed in advance. It is usually the "finale" of the expert's evidence-in-chief. It can be very helpful if the opinion can be projected on a screen for the trier of fact to see. The only risk of doing this is that judge and jury will be distracted from the oral evidence being presented.

Preparation for Re-Examination

Part of your briefing process should be an explanation of the role of re-examination and some practice re-examination questions. It is hard to anticipate what questions may arise since re-examination is dependent on the questions asked in cross-examination but the expert should understand why he is being addressed by his own counsel again.

Preparation for Cross-Examination

It goes without saying that the expert must be prepared for cross-examination. Key areas of controversy should be identified and practice questions given to the expert during your briefing sessions. It is sometimes helpful to have another lawyer familiar with the case do the practice cross-examination. Not only does it divide the work load but it provides a fresh face for the very different approach taken by a cross examiner. The rules of cross-examination need to be explained to the expert and he must understand that there are very few limits on the material that can be presented to him for comment. It can be helpful to have a written summary of the principles of direct examination, cross-examination and re-examination for review by the expert.

Conclusion

The bibliography attached to this paper contains a number of very useful references. I commend them to you for bedtime reading.

Experienced expert witnesses will require less rehearsal than an expert who has never given evidence before. Whether experienced or new to the task, the briefing process builds on a carefully constructed report and is essentially an iterative process. It takes time and cannot be done in a single session. It is always better to meet in person but where that is impossible, the use of technology can increase the effectiveness of the collaboration between counsel and expert.

The object of the exercise is to persuade the court of the merit of the expert's opinion. The more practiced the presentation, the more likely it is that this will occur.

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