INTRODUCTION

I am a great believer in the liberal use of expert witnesses. Judges and juries love to be taught things that they do not know. If you have chosen the right expert, and prepared him/her appropriately, the presentation of your expert’s evidence can be a beautiful thing! Conversely, if you have made a poor selection, or not prepared your expert appropriately, the unsuccessful presentation of your expert witness, particularly at the end of a successful cross-examination, can put the nail in the coffin of an otherwise potentially successful case.

The critical advantage that your expert witness has in a case is the fact that your expert already knows exactly what he has to say and why it is the right thing to say. There are supposed to be no surprises!

The other distinct advantage of using an expert witness is, of course, that all of us as trial lawyers are dying to give our own “opinions” to the judge or jury about what’s really important in the case and what the outcome should be. In the entire course of the trial, however, only your expert witness can do that for you. In some cases your own expert can even opine on the ultimate issue that the judge or jury has to decide. This is why their evidence and participation in your case is so critical to a favourable outcome.

What then can you as trial counsel do to enhance the probability of success and minimize the potential damage? As I see it, there are four essential components to your preparation:

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1 For the sake of readability, and to avoid issues of political correctness, for the balance of this paper will eliminate references to “his/her” and use one or the other.

1. The selection of the expert witness
2. The report preparation
3. Preparing the expert to give testimony
4. The execution of the examination-in-chief

What follows here is obviously based on healthy doses of common sense and the application of some basic strategies. It is by no means exhaustive of the subject matter. Numerous books have been written on the subject and I do not profess to have any novel approaches that have not been described somewhere else. This is simply the way I like to do these things. Let’s look at each component in turn.

SECTION 1: SELECTION OF YOUR EXPERT WITNESS

The fundamental truth for all expert testimony is that your expert, above all else, must be seen to be knowledgeable, articulate, credible, and fair. Often, however, finding an expert like this, however, can be very difficult. Many a case has been lost from the outset because counsel has not taken the time, effort, or energy to ensure that these four criteria have been adequately met. For example, some experts are undoubtedly extremely knowledgeable, but are simply incapable of explaining anything to anybody. Another may be entirely articulate and fair but, for whatever reason, cannot present their evidence in a way that is credible. How many of us have had witnesses (expert or otherwise) we knew were telling the truth but no one would ever believe them. In my criminal practice, it happens all the time!

a. The Initial Conversation

In almost every case where I have to retain an expert, I try to speak to, or even meet with, that person at the very outset of our relationship, to get a sense of who they are, what they know, and whether they’re capable of conveying information to me or anyone else in a concise and logical manner. A brilliant but entirely aloof and arrogant expert will likely not play well in the courtroom. There may well be differences in the choice of experts as between jury and non-jury trials, but sometimes a particular witness is unsuitable for either venue.

I always want to know if the witness has ever testified, and if she has, how has her evidence been received. Sometimes witnesses are reluctant to give you that latter information. A search on CanLII, QuickLaw or WestLaw, to name a few sources, can give you that answer soon enough. On more than one occasion, I’ve seen experts undermined because of critical comments made about them by judges in other cases. You certainly have to know about that before you put your witness on the stand; and, hopefully, even before you retain her.

b. Adequacy of the Curriculum Vitae

I also like to look at the expert’s CV and to discuss whether she is able to give me the precise opinion I’m looking for without going beyond the field of her own expertise.
This is fast becoming an increasingly important issue in the presentation of expert witness testimony throughout Canada. The Goudge Commission Inquiry relating to the conduct of the now disgraced former Ontario Coroner and Paediatric Pathologist, Dr. Charles Smith, in Ontario, should become required reading for all trial lawyers who wish to present expert testimony in court. You can anticipate that judges will be taking their “gate-keeping” role to the admission of expert testimony much more seriously in the future. They will certainly want to canvas the specific area of expertise that you wish to elicit an opinion about in order to determine whether it falls squarely within the field of your chosen witness.

To give one example, in a recent disciplinary proceeding involving the prosecution by a health profession regulator of an acupuncturist for puncturing a patient’s lung and causing a pneumothorax (collapsed lung) during the course of treatment, all three defence experts, a chiropractor, a massage therapist and an acupuncturist, were disqualified from providing an opinion concerning whether or not the patient’s collapsed lung was caused by the conduct of the defendant acupuncturist. While they had each been trained to recognize the symptoms associated with a pneumothorax, none of them had the requisite “medical” training to provide an opinion on the causation issue in question. The opposing side’s experts then testified completely unopposed by any contrary opinion. The acupuncturist was convicted at the end of the case.

c. Junk Science: The ‘Daubert’ Principles

An increasingly common level of inquiry in court relates to an evaluation of the “validity” of the “science” in question. You must consider at the outset of your case whether the “science” (using that word in the broadest of senses) which you wish the expert to opine upon is sufficiently credible and valid to even permit its admission. The Mohan decision\(^3\); in the Supreme Court of Canada is, along with the Goudge Report, required reading for all of us as trial lawyers who wish to tender expert evidence.

To use but one example, in cases involving child molestation, historically, experts were generally permitted to testify that the fact that a child said nothing at the time of the alleged offence was considered positive evidence that a molestation had actually occurred. Conversely, evidence that the child had complained could also be evidence of molestation! Similarly, as reflected in the Goudge Report\(^4\), much of the evidence of the paediatric pathologist Dr. Charles Smith used to improperly convict a significant number of individuals accused of homicide as a result of “shaken baby syndrome”, was determined at the Inquiry to be baseless, and without any objective scientific foundation. Curiously, Dr. Smith testified with impunity for years because no one, until a few years ago, ever saw fit to challenge Dr. Smith on his credentials in paediatric pathology!

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d. Publications

While having a widely “published” expert is generally advantageous, it can sometimes lead to disastrous consequences. A widely published expert is more likely to have made statements in writings published years before that conflict with his current opinion in your case than another expert who has published very little. It’s always nice to know that before you put your witness on the stand.

e. Timing of the Retainer

When during the course of the case should you begin to think about hiring your expert? The short answer is that it entirely depends on the specific case and the specific issue in question. Let’s look at some examples.

Baby B Case: Lab Expert

In a recent case involving laboratory negligence which resulted in a missed diagnosis of a metabolic disorder resulting in a newborn infant’s mental retardation, a laboratory expert was retained almost from the outset of the case to provide counsel with information and deep background concerning the workings of a laboratory and the mechanics of newborn screening. This was long before counsel ever requested the preparation of a report. The early retention was solely for the purpose of enabling counsel to formulate his discovery questions and to understand the underlying scientific evidence.

In other areas, such as actuarial evidence, the expert’s retainer may only be necessary following completion of discoveries and at the time of your formulation of the damages brief.

PART II - REPORT PREPARATION

In most if not all jurisdictions in Canada, experts are generally precluded from testifying unless they have provided opposing counsel with a detailed report well in advance. The preparation of the expert’s report, obviously, is critical to the entire expert witness process. Not only does it set out your side’s theory of the “scientific” portion of your case, in many jurisdictions it also defines the scope of what your expert can testify about! A number of things are worth mentioning here.

a. Duty To Be Objective

It is essential for the expert to appreciate at the outset that the court requires that he be, for all practical purposes, an entirely neutral and objective witness. It goes without

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5 For example, in Ontario, an expert may be unable to testify about certain issues, opinions and conclusions unless those areas are the subject of comment in the previously released expert report.
saying that expert witnesses are not allowed to become “advocates”. As we’ve discussed, if an expert engages in “advocacy”, he may well be disqualified from testifying altogether; and if not disqualified, his ‘bias’ may be sufficient to cause the judge or jury to simply reject or disregard the witness’ expert opinion.

The Ontario Rules

In Ontario, the duty of an expert is now outlined in our Rules of Civil Procedure. Since January 1, 2010, each expert is required to fill out what is known as a “Form 53” in which the expert acknowledges his ethical obligations when providing testimony.

Form 53

Form 53, and the rule that goes with it, provides a useful summary of the expert’s obligations to the court, something that, whether you’re practicing in Ontario or elsewhere, you should ensure every expert that you intend to employ in a given case understands. Whether or not you have such a form or rule, the philosophy behind the rule, and the Form 53, ought to inform your use of expert witnesses.

The Goudge Inquiry

Lest you think this discussion about the expert’s duty is entirely academic, during the course of the Goudge inquiry into the conduct of Dr. Charles Smith, Dr. Smith essentially acknowledged during his testimony that he thought his obligation was to assist the Crown Attorney’s office in the provision of opinion evidence to support the theory of the Crown’s case rather than the Court.

b. Rule 53 Mandatory Contents of Reports in Ontario

Rule 53 goes on to prescribe the mandatory contents of any expert report. The headings are a useful checklist for all of us to use when instructing our experts about what is required of them; whether practicing in Ontario or otherwise. Let’s take a look.

Rule 53.03 dictates that all reports require:

1. The expert’s name, address and area of expertise
2. The expert’s qualifications, employment and educational experience in his or her areas of expertise
3. The instructions provided to the expert
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates
5. The expert’s opinion with respect to each issue
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. The description of any research conducted
   c. A list of every document relied upon
c. The Letter of Instructions

The letter that you send to the witness requesting an opinion is also an extremely important document. Not only will it assist the expert in understanding what you want of him, but it will also likely be the subject of a production request either before trial, or during the course of the cross-examination of your expert at trial. In other words, at some point it will fall into enemy hands!

What does this mean? Simply, that all of us as counsel must be vigilant to ensure that our instruction letter is scrupulously accurate insofar as the information that we provide to our experts is concerned. We must also be extremely careful in the way that we formulate our questions. Indeed, you may wish to ask the expert for assistance in the formulation of the actual questions that you wish him or her to answer.

As a matter of practice, I liberally sprinkle words like “fair”, “unbiased”, and “neutral” in the body of my instructing letter to my experts, as well as comments such as asking him to “assist the jury and the court in understanding this complex area”. You never know when this document may be useful during your re-examination. It’s nice to be seen as fair and trying to help!

d. Demonstrative Aids

Your expert witness may also assist you in the creation of a demonstrative aid to be presented at trial. I often ask experts, in a case where it makes sense to do so, to refer to some photograph, picture and the like, or to create a chart, in an attempt to explain or elaborate on their opinion. While the report itself, certainly in Ontario, is inadmissible as a trial exhibit when the witness actually testifies at the trial, demonstrative aids created and referenced in the report itself can generally be introduced as exhibits for the assistance of the trier of fact.

A.G.’s CAT Scan

Let me give you one example. In a recent case, I made sure that my neuro-radiologist referenced and attached a copy of a hospital CT Scan taken within hours of my client’s accident along with a copy of a “normal” CT Scan by way of comparison. My expert’s evidence-in-chief then became a primer on diagnostic imaging techniques and the relative pros and cons of x-rays, MRI’s and CT’s. All of the documents referenced in the report were marked as an exhibit at the jury trial, and stayed in the deliberation room while the jury pondered its verdict.

Similarly, in connection with a damages issue, I often have my forensic accountant or economist prepare explanatory charts or graphs that can explain in pictures what his 25 page report is trying to explain.
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e. Draft Reports

As we’ve discussed earlier, and as will be discussed later, you must consider the issue of draft reports. There is nothing worse than having an expert provide you with a draft report that “needs work”. That is not to say that our involvement as counsel will result in an amendment in a fundamental way of the report. It cannot. The reality is, however, that most of the time, our experts are not lawyers and do not appreciate, in some instances, that the use of a word in a particular context may mean very different things to lawyers, judges or juries, than it does to the expert. Part of your job is to ‘teach’ the expert the difference before he provides you with a problematic draft!

For that reason, I instruct my expert witnesses never to send me draft reports. Receiving such a draft may ultimately create disclosure obligations. It may also raise questions of potential collusion between the expert and his instructing lawyer, even in the absence of any such collusion.

In my cases, I attempt to have an informal discussion with the expert about the opinions, report language, and the structure of the report before the report is ever finalized. There is nothing wrong with “educating” an expert on why the use of certain words may convey entirely different things to different audiences. I recognize, of course, that in some instances, an expert simply will not cooperate with that exercise. That may well be a reason to pick someone else!

f. Providing an Adequate Foundation

For obvious reasons, it is essential to ensure that your expert is provided with literally every relevant document, and all pieces of available anecdotal information, prior to the preparation of his report. Nothing is worse than watching your own expert witness decimated in cross-examination because the instructing counsel failed to either provide the expert with, or inform the expert of, certain pieces of critical evidence that would undermine the opinion.

Keep Information Updated

The same is true with information that comes to counsel’s attention after the initial material has been provided to your expert. Be sure you send the expert anything new that is material to the opinion being elicited as soon as it is received. If the information mandates a supplementary report, so be it. Your expert needs to have it all. To insulate your expert from embarrassment and worse, he needs to be fully informed at all times.

g. Supplementary Reports

This leads me to the subject of supplementary reports. In most cases, your opposing counsel will produce a responding report to challenge the opinions of your own expert. We all want to know what our response to that report will be. Generally, this can only be obtained from our own expert witness. Certainly in Ontario, if I want my expert to
discuss and demolish the opposing opinion from the witness box, I am generally obliged to ensure that a report setting out those criticisms has been prepared and served on the opposing counsel in advance of the trial.

Whether or not you have such an obligation, it is important for your own expert to have reviewed and considered his position with respect to each fundamental issue upon which the opposing side’s expert has opined.

h. The CV - Is it Accurate And Up to Date

Before leaving the subject of an expert’s report, let me speak briefly about the subject of the expert witness’s written CV. Some experts have wonderful CV’s in the sense that the actual document is organized and aesthetic. Others have muddled, incomprehensible and occasionally inaccurate CV’s.

Remember, your expert’s CV will, in almost every case, become an exhibit at the trial. You want it to be as impressive and as clear as it can possibly be. For that reason, I insist on seeing my expert’s CV’s before it has been released to the other side. If I don’t like the format, I have the expert re-format it.

I also look for clerical and, perhaps, other errors in the document and ask the expert to do the same. Nothing is worse than having an expert taken to task, at the outset of his examination, because of an inaccurate or inadequate CV. It sets the stage for all that follows.

PART III – PREPARING THE EXPERT FOR THE EXAMINATION-IN-CHIEF

a. The Presentation is Important

Let me provide you with a penetrating glimpse into the obvious: your expert’s opinion is only as good as the quality of his in-court presentation. If he makes a lousy witness, you’re in serious trouble. For that reason, I spend as long as is necessary to ensure that the expert understands the questions I’m going to ask, the answers he’s going to give, and, as importantly, the questions that are going to be put to him in cross-examination. I also want him to be able to present his evidence in a clear, cogent, and organized fashion. Just because he knows the subject matter does not mean he can deliver it well. In short, this is no less than a serious dress rehearsal!

How much time does it generally take? In some instances, these preparation sessions can be one or two hours if the witness is experienced. In others, it can sometimes last 1-2 days, particularly where the expert you’re dealing with has never testified before.
b. Speak Directly to The Trier of Fact

While no two preparation sessions are alike, there are some common strategies for giving evidence that I use that may, or may not, accord with those employed by other counsel. For example, I tell my experts to speak directly to the jury or to the judge. I want the trier of fact to be engaged and to feel like they have a relationship with my expert directly. If the expert has difficulty doing that, I sometimes try to stand next to the jury, if the trial judge will let me, when I’m asking the question, so that the witness at least seems to be looking in their direction.

c. ‘Teach the Judge or Jury’

At all times I want my expert to “teach” the judge or jury in words that anyone can understand. I often tell my experts that if the person mowing your lawn or selling you groceries cannot understand what your expert is saying, they haven’t done their job and, as importantly, you haven’t done yours. To the extent possible, I also want my expert to refer to demonstrative aids to assist them in the “teaching” process. If your expert can ‘teach’ and keep it interesting, you’re half-way home!

d. Review the Expert’s CV

I also spend time, during trial preparation, reviewing the expert’s CV’s, so that I can lead the witness through his credentials in a concise, organized and relevant manner. In jury trials I generally take much more time with the expert’s CV than I ever do during a trial with a judge alone.

You will also have to rehearse the specific areas of expertise that you want the witness to opine on. You have to reach an agreement with your expert on the formulation of the question that will enable the witness to give the answer that you need to get to enable you to ask the critical questions in your case without objection from the trial judge.

e. Demeanour

It is vitally important to discuss the witness’s demeanour on the witness stand. In every case, whether dealing with an expert witness or not, I implore my witnesses to demonstrate the same degree of openness, candour, humility and cooperation with opposing counsel as they do when speaking to me. I do not want them ever to get angry, unless their personal integrity is challenged; and then, only in a controlled and dignified way. In some instances, you may have to beat the arrogance out of the witness - then duck! Condescension and arrogance is a path to a witness’s ruin. I recently saw a judge ‘penalize’ an expert by reducing his allowable fees by almost 40% during the costs arguments at the end of a case, in large part because of his inappropriate demeanour in the witness box!

In the final analysis, you have to get the witness to understand that if the judge or the jury likes them, they will more probably like the evidence that they give as well.
f. The Importance of the Witness’ Own Preparation

It goes without saying that in addition to you preparing your expert, you must emphasize that the witness must know his ‘brief’ and prepare intensely as well. No amount of your preparation will act as a substitute for the witness’s own necessary work. If your witness comes to court unprepared, the results, again, can be disastrous.

g. Stay Within Field Of Expertise

Before leaving the subject of witness preparation, it is important to impress upon your expert the importance of restricting his testimony to his own field of expertise. Proffering an opinion beyond that scope can open the expert up to a withering cross-examination and the undermining of otherwise unimpeachable testimony. It’s like lowering your guard. You don’t want to give the opposition an opportunity to land a crushing blow.

h. Preparation for Cross-Examination

Nothing is more important than ensuring that your expert can withstand a withering cross-examination. All the ‘good’ that you’ve accomplished through your brilliant examination-in-chief can be for naught if your expert fails to make it through a punishing cross-examination. If opposing counsel is competent, and many of them are, you can rest assured that you will never be able to anticipate each and every parry and thrust that your witness will be exposed to. The most you can do is to provide the expert with as much information as you possibly can about the likely subject areas of cross-examination, including a detailed review and analysis of the opposing expert’s opinions, and the strengths or weaknesses underlying those opinions.

Without purporting to be exhaustive (and that would take a book or two), let me point out simply a few of the things that I routinely tell my experts about the cross-examination to come.

(i) Authoritative texts and treatises

An effective cross-examination frequently employs the use of authoritative texts and treatises in an attempt to impeach the witness. I tell my expert about this stratagem and emphasize the importance of their understanding that they ought not to agree that a text or treatise is authoritative too readily. Sometimes, of course, authoritiveness cannot be denied. However, as we all know, if an expert denies the authoritateness of a text or treatise, he cannot be cross-examined upon it. If there is any question of the authoritateness of what’s being proffered, I instruct my expert to hold firm.
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(ii) **The Possibility of “New” Facts or Foundation**

In some cases, for example in personal injury actions, late-breaking facts may arise (for example, a change in the plaintiff’s current level of activity) that were not available to your expert at the time that he prepared his various reports. Alert him to that possibility of ‘new’ evidence’ and try to prepare him for the kinds of responses that he might wish to give. In any case, if you’ve done your job in providing your expert with the appropriate foundation, this kind of cross-examination will seldom achieve positive results for the opposition. But ensure he is forewarned.

(iii) **Opinions about the Opposing Expert**

Experts are frequently asked whether they are familiar with, and respect, the opposing party’s expert. Knowing that this question may be asked, and giving your expert time to formulate an answer in advance of going on the witness stand, will go a long way to avoiding a pitfall.

In a recent case, I asked this very question of the opposition’s expert (because I knew the answer) and got the witness to agree that my expert taught the witness “everything he knew”! In a word, a beautiful thing!

**PART 4: THE EXECUTION OF THE EXAMINATION-IN-CHIEF**

Let me turn, finally, to the actual execution of the examination-in-chief. Once again this is a thumbnail sketch and is not intended in any way to be exhaustive. I am not going to deal with issues that apply to all witnesses, like keeping your questions simple and short, and asking only one question at a time. Here are just a few of the things that I do.

**a. Order of Examination**

If the expert’s report is well-written and follows the order that I’ve suggested, I find it useful for myself, and comforting for the expert, for the examination-in-chief to follow, in general terms, the format of the expert’s report. In almost every case, that means I examine on the following areas in the following order:

1. Who he is;
2. What he was asked to do;
3. What he looked at and/or was given;
4. What he did and/or examined;
5. What he found;
6. What were his conclusions and opinions;
7. Why did he reach the conclusions and opinions that he did.

In my experience, following this format enables the judge or jury to understand the evidence, and the progression that the expert followed on the way to, what you hope they will accept as, his inevitable conclusions.
b. The Big Finish

I always like to end on a high note, with a big splash. I rehearse and re-rehearse the final question and answer so that the last thing that the judge or jury hears is really a lovely and articulate summary of the central opinion my expert has expressed. When I’m satisfied with that, and after getting my answer, I shut up, sit down and, like all of us as trial lawyers, fervently begin to pray!

CONCLUSION

At the end of the day, an examination-in-chief will never be as exciting, or as enjoyable, as a well-executed and successful cross-examination. It obviously lacks the drama of hand to hand combat. It is always more ‘boring’ to be at peace, than at war.

It remains a fact, however, than an effective presentation of your expert’s examination-in-chief, and your expert’s ability to withstand the rigors of an aggressive cross-examination, are both absolutely essential if you are to be successful in the case that you are presenting.

As with all things involved with litigation, exhaustive and meticulous preparation is the key to success. To use again a well-worn adage, the harder you work, the luckier you get!

Richard H. Shekter
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