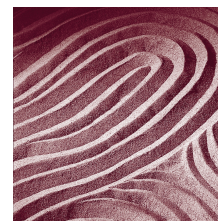
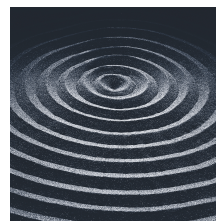


MILLER THOMSON LLP

Barristers & Solicitors
Patent & Trade-Mark Agents

Accelerator Building
295 Hagey Blvd., Suite 300
Waterloo, ON Canada
N2L 6R5
Tel. 519.579.3660
Fax. 519.743.2540
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The Expert Witness

Steven J. O'Melia

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Introduction

Expert witnesses play a large and increasingly important role in the trial of actions in Canada. The majority of all civil and criminal cases currently litigated involve expert evidence of some sort. Administrative tribunal hearings, by their very nature, lend themselves to the use of expert witnesses to an even greater degree. This paper deals briefly with some of the issues in the production and presentation of evidence which arise uniquely in those cases where the use of an expert is required.

The Purpose for Calling an Expert Witness

Unlike ordinary "lay" witnesses, the expert witness is called not to testify with respect to the factual background of an action but rather to provide an opinion with respect to those facts which will help the judge, jury or tribunal reach its conclusion. The ability of an expert witness to provide evidence in connection with a factual situation with which they had no connection is thus a major exception to the hearsay rule, which generally provides that indirect evidence may not be led to support the truth of the matter asserted. Expert evidence is by definition an opinion only, based on facts which have been provided by a first-hand examination by the expert, by listening to the testimony of lay witnesses who are familiar with the facts of a case, or by responding to a hypothetical fact situation.

In his reasons for judgment in *Regina v. Abbey*, [1982] 2 S.C.R. 24, Mr. Justice Dickson (as he then was) of the Supreme Court of Canada commented on the role which experts play in the trial process as follows (at p. 42):

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven

facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary” (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L. J.)

An expert witness, like any other witness, may testify as to the veracity of facts of which he has first-hand experience, but this is not the main purpose of his or her testimony. An expert is there to give an opinion. And the opinion more often than not will be based on second-hand evidence.

As stated by Mr. Justice Dickson in the above passage, an expert may (and in fact preferably should) have first-hand knowledge of the facts of a case, but this knowledge is only incidental to the purpose for which the expert is allowed to testify. A familiarity with the facts of a case may enable an expert witness to better form his or her opinion, but it is not required that an expert have any such particular knowledge. In fact, the expert may, in certain circumstances, provide answers to purely hypothetical questions without any direct knowledge of the facts whatsoever.

As also stated in the above excerpt, the purpose of obtaining an expert opinion is to assist the trier-of-fact in its decision-making process. The opinion of the expert is not meant to usurp the role of the judge or jury, which must still apply their own judgment to the expert’s opinion in the context of the proven factual background. Usually, this will involve weighing the conflicting opinions of experts called by both parties to the litigation and accepting or rejecting all or part of each opinion.

Finally, Mr. Justice Dickson’s reasons for judgment reproduced above make it clear that expert evidence is necessary only where the judge or jury would not be able to form an adequate opinion based solely upon their own knowledge. The judge in an action must decide, prior to allowing the expert testimony to be presented, that such evidence would be of assistance to the Court. Expert evidence is inadmissible in cases where only a common-sense or otherwise non-expert opinion is necessary.

Locating and Retaining an Expert Witness

Unlike an ordinary witness, who comes to the litigation by virtue of circumstance, the expert witness can usually be chosen by the party which is presenting the testimony of the witness in evidence (one exception which comes to mind is the case of a treating physician in a personal injury action). Hence, a lawyer has the opportunity to select an expert or experts who will be the most effective in assisting in the presentation of his or her client’s case.

Several factors should be considered when deciding among potential expert witnesses, including the following:

- the expert's type and level of expertise and the degree in which this expertise relates to the subject at hand.
- the expert's articulateness and ability to communicate his or her opinion to the court.
- the expert's availability to spend time preparing for his or her testimony and in assisting counsel in dealing with the opposing party's experts.
- the cost of retaining potential expert witnesses in relation to the benefit which their evidence is likely to bring to a party's case.

There is an extensive array of potential expert witnesses, beyond the standard types of experts such as medical doctors, psychiatrists, engineers, accountants and academics, who are able to provide testimony on a diverse range of topics. It is up to the lawyer to be imaginative when asking him or herself whether or not expert testimony would be of assistance in an action. For the more common types of experts, the lawyer can consult trade journals, industry associations, advertisements in legal publications, and other similar sources in an effort to locate potential witnesses. However, expert witnesses do not have to be limited to individuals with extensive formal training or educational backgrounds. In fact, a trier-of-fact will often look more favourably upon a witness who purports to have gained his or her expertise through extended practical experience as opposed to a witness who has purely theoretical knowledge.

One of the best (and easiest) steps that counsel can take when screening potential expert witnesses is to consult with other lawyers who have used a particular expert to provide evidence in the past. Lawyers will generally be quite candid when discussing the effectiveness of an expert witness, particularly where they feel that a retained expert was ineffective in his or her contribution to the case. This is a quick and inexpensive way to determine whether the professional who comes across as cool and competent in your office will be an unconvincing witness in court or will falter under the rigours of a probing cross-examination. An even more

thorough way to accomplish the screening process is to obtain transcripts of the expert's past courtroom appearances.

Where counsel decides that an expert witness will be required, efforts should be made to retain the witness at the earliest possible date, preferably prior to discoveries. In a case which involves technical matters, it will not be possible for a lawyer to properly prepare for the discovery of the opposing party in the absence of expert assistance in determining which areas of inquiry are relevant. There have even been instances where experts have been permitted to assist counsel to conduct examinations for discovery where the subject matter was of a particularly technical nature.

The retainer of the expert witness should be formalized by the lawyer by way of a letter to the expert, setting out all of the facts of a case, a brief of the relevant documents (be wary of inadvertently waiving solicitor/client privilege), and the type of opinion which the party is retaining the expert to give. This letter will likely be produced at trial, so it should be drafted with great care after consulting with the expert with respect to the art of the possible. The letter of retainer should specifically address the issue of fees. Preferably, payment of the expert should be arranged directly between the client and the retained expert. This frees the lawyer from personal responsibility for the expert's fees in the event that the client does not honour the retainer and also instills the client with a sense of the high cost of retaining specialists in support of litigation. Obviously, a lawyer should never make arrangements to retain an expert without first discussing with the client the potential costs and benefits of so doing.

Preparation and the Expert Witness

Use of the Expert Witness in Preparation for Trial

In addition to providing evidence on behalf of a party, experts can be invaluable as an aid in preparing for examination for discovery, reviewing expert reports received from the opposing party in an action, advising on what type of productions to expect, and preparing for the cross-examination of expert witnesses retained by the opposing side. A lawyer must become, at least in a superficial way, an expert in his or her own right in the specific field of knowledge in issue if he or she is to be able to present his or her client's evidence to its best advantage and to conduct a creditable cross-examination. For this reason, it can be very useful to have an expert witness attend at the trial, particularly when the opposing party's expert is giving his or her evidence.

This will assist counsel in his or her cross-examination and will provide the retained expert with the context in which his or her testimony will be received, if it has yet to be given. The presence of a party's own expert can have the added effect of restraining the testimony of the opposing expert, since such testimony is likely to be more tentative in the presence of a colleague who can better determine its weaknesses.

Preparing the Expert Witness for Testimony

Many professionals and other common types of experts who are called upon to testify in support of a litigant will have had previous courtroom experience. Word quickly circulates when an expert is proficient in giving testimony which produces a favourable outcome, and such witnesses quickly become in high demand. The result of this is that many expert witnesses do not need to be prepared as much as a witness who has come to the case solely because of their first-hand knowledge of the facts. However, a lawyer should be cautious and should never assume that an expert is familiar with courtroom procedures and the purpose for which they are providing testimony.

One point which should always be stressed in discussion with the expert witness is that they are providing testimony as an aid to the court. The expert should be told to phrase his or her opinion in language which is understandable to the average individual (for example, a bruised knee should not be referred to as a subcutaneous contusion of the patella). Overly technical language or analysis will not be of assistance to the court and will detract from the testimony of the witness. The expert should also be instructed on the meaning and scope of any concepts of law which are relevant to the case, such as legal insanity or proof on a balance of probabilities, since such concepts will seem like artificial constructs to many expert witnesses. The expert should be informed that to qualify an opinion as would be done in an academic discussion will be to detract from the weight which such an opinion will be given and may render it of little evidentiary value. Such overly zealous qualification has at times hindered the introduction of certain types of scientific evidence in civil and criminal trials, despite the fact that some of these techniques are accurate to an extremely high degree of certainty.

In preparing an expert for direct examination, some lawyers prefer to go through a "test run" of the questions which will be asked at trial. Other lawyers feel that this produces a testimony which sounds overly rehearsed and therefore not as convincing. The question of how

much advance preparation is advisable presents another area in which the lawyer must use his or her own judgment, depending upon the perceived ability of the expert to respond well to questions at trial and upon the nature of the testimony. However, the foremost consideration behind the preparation should be to present expert testimony which is perceived to be impartial. An expert who adopts a position blindly in favour of the party who is retaining the expert will not be assisting that party's case. Rather, the expert's testimony might be regarded as "bought" evidence and disregarded accordingly. The questions asked of an expert witness on direct examination should be for the purpose of eliciting a seemingly unbiased opinion from that expert, and it should be stressed with the expert during trial preparation that this is what counsel is looking for in this respect.

The necessary degree of the expert's preparation for cross-examination will again depend upon the experience of the witness. Inexperienced expert witnesses in particular should be informed of the rationale behind cross-examination. They should be instructed not to argue or otherwise spar with the cross-examining counsel as this will only tend to show that they are colluding with the party who has presented their evidence. It is better for an expert to graciously concede any weaknesses in their analysis than to attempt to explain them away solely in order to support the position of the party which they were paid to represent. As with any witness, the expert should only answer the questions asked and should not volunteer additional information which was not the subject of inquiry.

In most cases, it is preferable to run through a trial cross-examination with your own witness, even if this is not being done to prepare for the direct examination. This type of "practice run" serves two purposes: firstly, it provides the expert witness with some idea of what to expect during the cross-examination which will occur in the courtroom; secondly, it will expose any weaknesses in a party's own case which can either be dealt with or taken into consideration when approaching settlement negotiations. A lawyer should take on the demeanour with his or her own witness which they would display as opposing counsel at trial and then critique the experts response to the questions asked. If time permits, counsel may want to visit the location of the hearing to familiarize the witness with the setting in which they will be testifying.

Viva Voce Evidence Versus Affidavit Evidence

A lawyer will generally want to call an expert witness to provide direct testimony in support of his or her opinion, since this is likely to have a more convincing effect on the trier-of-fact. However, where certain types of expert evidence are involved, courts are willing to accept written reports in place of viva voce evidence. In fact, the Ontario *Evidence Act* provides that, for certain types of medical expert evidence with which courts are quite familiar, a judge may award costs against a party who calls an expert as a witness where such evidence could have been as effectively produced by filing the expert's report.

The Sequence of Steps in the Examination and Cross-Examination of the Expert Witness

The rationale behind allowing expert evidence and the nature of such evidence lends itself to a structured approach to the introduction of expert testimony. Prior to allowing an expert witness to render an opinion on a given fact situation, the expert must first be found to be qualified to give such an opinion in order to assist the trier-of-fact. Once the expert has been qualified in such a manner, the factual basis upon which the expert purports to render his or her opinion must be established. Finally, the opinion of the expert may then be elicited by the questioning party. The cross-examining party has two opportunities to question the witness. The first opportunity arises in the qualification of the expert witness to provide testimony in the action, and the second opportunity is with respect to the quality and content of that opinion. Some factors which enter into this sequence are set out below.

The Qualification of the Expert Witness

Prior to the introduction of an expert's opinion, the expert must first be found by the judge to be possessed of some unique knowledge, skill, experience or other quality which enables the witness to be of assistance to the trier-of-fact. The witness' expertise must therefore be relevant to the cause in dispute, and be of such a nature that a person of ordinary experience and intelligence would not be able to form a similar opinion based on the same set of circumstances. For instance, "lay" witnesses are entitled to provide opinion evidence with respect to matters which are assumed to be within the competent estimation of the average individual, such as distance, speed, weight, etc. To provide opinion evidence in other than such common instances, the lawyer must show that the witness is an qualified in some area of

expertise which can be of assistance to the court in reaching its decision. This can involve qualifying both the individual expert and the field of expertise.

The test to determine whether a particular field of knowledge qualifies as an area of expertise for the purposes of providing expert testimony has not been explicitly defined in Canada. Attempts to introduce expert evidence relating to new areas of expertise have, for the most part, been subject to the typical evidentiary measures of relevance and assistance to the court subject to the weighing of such probative value against the prejudice to the party against whom such evidence is being adduced. There are no set limits as to the areas of knowledge and/or experience which will qualify as being capable of being expertly attested to, but a lawyer should be prepared to bring forward evidence in support of the merits of a novel field of expertise when attempting to adduce expert evidence in that area.

The process of qualifying an expert witness is accomplished by leading testimony from the witness on direct examination which supports his or her qualification to form a certain type of opinion based on the facts which are before the court. This usually involves a review of the expert's "resume", including educational, practical and other relevant experience. It is important for the lawyer to take his or her time with this process, since the degree of expertise which can be shown will directly affect the credibility of the proffered opinion and therefore the weight which this opinion will be given as evidence. A lawyer will sometimes be met with an opponent's "helpful" offer to consent to the qualification of a witness without the need to submit to the formal qualification process. Such an offer should be refused, since without the credentials of the expert witness being presented to the trier-of-fact, there is no measure by which the testimony of that witness may be weighed against conflicting evidence presented by other experts on the same subject.

The manner in which the qualifying examination is presented should depend on the trier-of-fact. Judges and tribunal members will be used to hearing evidence of a qualifying nature and will be looking for a high degree of formal training and relevant experience on the expert's part. Conversely, a jury, which is composed of individuals of varying backgrounds, may possibly feel that a witness is bragging if counsel insists on highlighting every minute detail of the expert's illustrious career. In this case, it may be wiser to take a softer approach to the qualification of the witness. The possibility of circulating a printed resume to the judge and jury in order to underline

the expert's qualifications during his or her testimony should also be considered. The qualifying examination could then just touch on the highlights of the printed resume and elaborate on the particularly relevant points.

Given the nature of the qualification evidence, a lawyer is permitted to ask leading questions on direct examination. However, such evidence may have a greater impact on the trier-of-fact and make the expert appear more independent if it is elicited directly from the witness' testimony rather than as a series of yes or no answers to leading questions. As in most cases, a lawyer's judgment will have to be used in determining the appropriate way in which to bring out the qualifications of an expert in order to most greatly influence the trier-of-fact.

Once the witness' qualifications have been elicited through direct examination, the opposing party has an opportunity to cross-examine the witness on his or her area and degree of expertise and produce evidence against such expertise prior to the judge ruling on whether or not to allow the witness to present expert evidence. If a party presenting the witness to the court as an expert has been at all diligent and if the area of expertise is a common one, this will not likely be an opportunity to have a witness excluded from the proceedings. However, counsel may attempt to have the court place restrictions on the area in which an expert will be permitted to opine. For example, a general medical practitioner may be limited by a court to providing only general medical opinion evidence and not opinion evidence which would be better given by a specialist.

Another goal which can be accomplished by cross-examination on the qualifications of an expert, even where such cross-examination is not successful in having a witness excluded, is to place some doubt in the judge's or jury's mind as to the weight which the opinion of the expert should be given. However, there is a danger in mounting an aggressive but ultimately unsuccessful attack on an expert's qualifications in that the witness may be given greater rather than lesser credibility in the mind of the trier-of-fact. It may, therefore, be preferable to save this line of questioning to the point where the weight which should be given to the expert testimony is in issue.

After both parties have had the opportunity to conduct their examination of the expert's qualifications, the trial judge will make a ruling on the expert's ability to give expert witness. In cases where the judge rejects the witness' qualifications the witness will be dismissed, since

there is no basis upon which he or she can provide expert testimony. If the ruling is favourable to the witness, the party presenting the expert may then proceed to directly examine the witness on their knowledge of the facts of the case and then elicit the expert's opinion based upon those facts.

Direct Examination of the Expert Witness

As stated earlier, one of the most practical considerations in the presentation of expert evidence is that it must be perceived to be impartial. This may be difficult, since the expert will usually be retained by one of the parties to the action specifically to give evidence which supports that party's view of the facts. This is only natural, since there are few people (including lawyers) who are willing to spend time in a courtroom without some degree of compulsion or reward. Despite this relationship between the party and its witness, it is to the party's benefit to retain an expert who will candidly admit to any weaknesses in their position. Such information is bound to come out, with more damaging effect, in cross-examination. Introducing it in direct evidence defuses this negative potential, and has the effect of portraying the expert as fulfilling the role he or she is supposed to fulfill an aide to the court and not merely a "hired gun" for one of the parties.

The questions posed to the expert witness in order to elicit his or her opinion should follow a three-step approach. Firstly, the factual basis upon which the expert purports to give his or her opinion must be established, by asking the witness how he or she has become familiar with the facts of the case. This may include running through the details of any first-hand examination made by the witness or by reviewing the testimony of prior factual witnesses and asking the witness if he or she is familiar with this evidence. Secondly, the lawyer must then ask the expert witness if, based upon the facts as he or she knows them, they have been able to form an opinion. Finally, and presuming the answer to the above question is in the affirmative, the lawyer may then ask the witness what his or her opinion is. This stepped approach to producing the expert opinion allows the opposing party to object to the introduction of the expert's opinion prior to such opinion being heard. It is improper for examining counsel to simply ask an expert for their opinion without first establishing the parameters in which the opinion is given.

The facts upon which an expert may base his or her opinion are limited to those facts which the expert has personally observed, those facts which were elicited in the courtroom, or

those facts which are put to the expert in the form of a hypothetical question. It is acceptable if the facts put forward by the examining lawyer in a hypothetical question differ from the actual facts of a situation. These differences go to the weight and not the admissibility of the response to such questions. However, it is obviously preferable from an examining lawyer's point of view to phrase hypothetical questions in a way which will shed some light on the actual fact situation. Such a question should be precisely formulated and should be communicated to the witness in advance of the trial. In forming his or her opinion, the expert may rely upon facts and make assumptions which are non-contentious and can properly be relied upon or assumed by experts in that particular field.

A lawyer should marshal the expert evidence into a presentable form. The purpose of the testimony is to tell a story, not to mindlessly follow the format of the expert's report. Counsel should ensure that during the direct examination the expert does not revert to technical jargon, and where this happens the witness should be asked to re-phrase his or her response in plain language. It is desirable to begin the examination by eliciting information from the expert witness with respect to the general subject matter of the opinion before narrowing the questioning further to deal with the specific facts of the action. Demonstrative evidence such as charts, graphs, and maps should be utilized wherever it can assist in reducing a technical presentation to more understandable terms. The expert should be instructed to, as much as possible, give absolute opinions and distinguish in any qualification the difference between a possibility and a probability.

Cross-Examination of the Expert Witness

The cross-examination of an expert witness can be difficult since the witness is dealing with a subject to which they will have devoted a substantial portion of their life.

Unlike an eyewitness to an accident or a party to a commercial dispute, the memory of the witness is not particularly in issue since it is opinion and not fact which is being put forward as evidence. It is, therefore, necessary for the cross-examining lawyer to become familiar with the area of expertise in which the witness is providing evidence. A lawyer must learn the language used by professionals in the expert's field of knowledge and to reduce this language and reasoning to a level which the trier-of-fact will be able to comprehend more easily. This may

be effectively accomplished where an opposing expert witness attempts to couch a rather weak position in technical and confusing language.

The purpose of cross-examination is to either obtain admissions or evidence against the interest of the opposing party, to contradict or impeach the witness, or to otherwise weaken the effect of the expert's testimony in the mind of the trier-of-fact. It will be a rare instance when an expert witness will be able to be wholly discredited, unless he or she has made an egregious error or omission in the preparation of his or her opinion. A cross-examining lawyer is generally attempting to cast the testimony of the opposing expert in a bad light so that the opinion of the lawyer's own expert is given greater credence by the trier-of-fact.

One method of cross-examining an expert witness is to put to the witness any theories in his or her profession which conflict with the testimony which the witness has put forward. The expert can be asked to explain these inconsistencies or admit that differences of opinion may reasonably be held. If any prior writings or testimony of the expert witness conflict with the opinion which has been given by that expert in an action, counsel should not lose the opportunity to bring this to the court's attention (and for this same reason a lawyer should take care to review the past works of any expert which he or she intends to call as a witness).

If there is a leading or major text in the specific area of expertise, the expert can be cross-examined as to its contents. In order to do this, the expert witness must first acknowledge that the text, article or other information is considered to be authoritative in his or her field. If the expert admits to this, he or she will then be considered to be responsible for having a knowledge of its contents. Even where the expert's testimony does not directly contradict the contents of such a text, cross-examination can be damaging where the expert is not able to answer questions regarding the text which one would customarily expect a professional in the field to be able to answer. For this reason, a lawyer should warn his or her own experts to be careful about admitting the authority of any texts in their area of expertise.

Another avenue of cross-examination is to question the expert witness on the facts upon which the expert's opinion is based. If the expert's opinion is based on a first-hand examination of the facts, the methodology, degree of care, and other aspects of the expert's examination can be probed. It may be that the expert is forming a hasty opinion upon a somewhat cursory review of the situation. If the expert's opinion is based upon testimony which he or she has heard

adduced at trial (or upon assumed facts), alternative scenarios can be presented to the expert to determine if his or her opinion would change in such circumstances. An expert opinion based upon a fact situation as related by other witnesses (or assumed) is only as strong as those facts upon which it is based, and this should be made clear to the trier-of-fact through the cross-examination, particularly in a jury trial.

The expert witness should also be cross-examined on facts of the case which were not used as a basis for their opinion to determine their awareness of the full set of circumstances in which they are giving their opinion.

Once all avenues of cross-examination on the contents and quality of an opinion have been exhausted, it may still be desirable to launch a collateral attack on the witness. To ask very few questions, even where there is little to cross-examine on, may be perceived by the trier-of-fact (particularly a jury) as acquiescence to the testimony of the expert. Collateral attacks can include inquiring about:

- any interest the expert has in the outcome of the case.
- the compensation that the expert has received from the opposing party.
- the number of times the expert has previously appeared in court as a paid witness.
- the degree of discussion that the expert had with the opposing party or lawyer prior to forming his or her opinion.
- the degree of preparation which the witness underwent prior to his or her testimony.
- the expert's qualifications to give the actual expert opinion given, despite the expert's formal qualification at the outset of his or her testimony.

Although all of the above tactics can be used by both sides, a lawyer should keep them in mind when engaged in a cross-examination where little of substance has been obtained by questioning on the merits of an expert opinion.

Re-Examination of the Expert Witness

Re-examination of an expert witness is done for the same reasons as the re-examination of any witness to clarify or expand upon any matters which were brought up in cross-examination of the witness. Re-examination may not be used to introduce any new evidence to the court.

Statutory Provisions Affecting the Production of Expert Evidence

The Ontario *Rules of Civil Procedure* and the Canada and Ontario *Evidence Acts* provide for compliance with additional provisions when the evidence of an expert, or certain types of experts, is intended to be relied upon at trial.

Rules of Civil Procedure

Examination for Discovery; Rule 31.06(3) provides that a party may, on an examination for discovery, obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action, as well as the expert's name and address. The party being examined must disclose this information except where the findings, opinions and conclusions of the expert are privileged by reason of being formed in preparation for contemplated or pending litigation and the party being examined undertakes not to call the expert as a witness at the trial. There is, therefore, a decision to be made at the discovery stage as to whether a party wishes to call forth the evidence of a specific expert witness at trial. This provides a further reason to retain an expert as early on as possible in a case so that adequate time can be given to the analysis of an issue and a proper decision can be made in this respect. However, the rule also provides an incentive to a lawyer to instruct any experts which have been retained to delay in reaching their conclusions or committing anything to writing until after the opposing party has conducted its examination for discovery.

Several Ontario High Court and High Court Master decisions dealing with the interpretation of Rule 31.06(3) have found that the notes and records which go into the preparation of an expert report are privileged and that it is only the results of this research which must be produced on discovery. Further, it has been held that, under this Rule, only the "findings, opinions and conclusions of the expert must be communicated to the other party, and the production of the actual expert report is not compellable at the discovery stage. However, where an expert witness is later called to testify at trial, he or she will be open to questioning on

the preliminary work which went into forming the expert opinion. Although a detailed examination of the law of privilege is beyond the scope of this paper, this is a matter which will have to be carefully considered during the process of retaining an expert for the purposes of testifying at trial.

Notice of Expert Testimony: Rule 53.03(1) provides that a party who intends to call an expert witness at trial shall, not less than 10 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address, qualifications and the substance of his or her proposed testimony. No expert may testify, except with leave of the trial judge, unless this rule has been complied with. The purpose of this rule is to allow a party responding to an expert's report to have time to examine the substance of the proposed testimony and to prepare responding evidence thereto.

Court-Appointed Experts: Rule 52.03 provides for the appointment by a court of one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in an action. This may be done on motion by either party or on the initiative of the judge presiding at trial. The expert is named by the judge, who also makes an order setting out the terms of reference for the expert's investigation and the method of remuneration of the expert by the parties to the action. The expert's report is filed with the court and becomes part of the evidence at trial. Either party to the action may cross-examine the expert with respect to the contents of such report.

Evidence Acts

Section 12 of the *Evidence Act*, R.S.O. 1980, c. 145, as amended, provides that where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding (the *Canada Evidence Act*, R.S.C. 1985, c.C-5, as amended, provides for a limit of five expert witnesses). These sections are designed to prevent the unnecessary duplication of expert testimony, and the Supreme Court of Canada (in *Fagnan v. Ure*, [1958] S.C.R. 377) has found that such sections do not apply so as to prevent a party from calling a larger number of expert witnesses where there is more than one factual area in which expert testimony would be helpful to the court.

The Ontario *Evidence Act* makes special provision for medical reports, which are quite common in civil and criminal litigation. Section 52 of the Act provides that at least ten days notice must be provided to all other parties of a report obtained by or prepared for a party to an action and signed by a practitioner as defined by the Act. The section also provides that, unless otherwise ordered by the court, a party to an action is entitled to a copy of such report at the time of the notice, together with any other report of the practitioner that relates to the action, and the practitioner may not give evidence at the trial unless this provision is complied with. The filing of medical reports as evidence with the court in this manner is intended to replace and not merely supplement the testimony of the practitioner. If a practitioner is called by a party to testify in an action and the court is of the opinion that the evidence could have been produced as effectively by way of a report, the court may order the party that required the attendance of the practitioner to pay an appropriate sum as costs. This provision should therefore be carefully considered when dealing with expert evidence of this type.

Summary

This paper has outlined some of the issues which arise in connection with the production and presentation of expert evidence. Given the degree to which experts are employed in the resolution of disputes, it is incumbent upon all litigation lawyers to be fully familiar with the considerations which arise specifically with respect to this type of witness. Those interested in a more detailed analysis of this topic matter are directed to the books and articles which have been listed in the accompanying bibliography.

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