

Working with Experts: Practical Skills

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Dealing with Experts - Selecting and Retaining an Expert

Irfan Kara
Torys LLP

Grant Worden
Torys LLP



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Grant Worden and Irfan Kara, Torys LLP

Selecting and retaining an expert requires special care. The use of expert evidence in any civil proceeding can be essential in advancing the position of party, as well as assisting the Court in better understanding the relevant issues.

Experts can testify to their opinions, even when they have no personal knowledge of the facts relevant to the litigation. Experts are able to testify on a wide range of information, essentially anything relevant to the case. The Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 set out four criteria to determine the need and admissibility of expert evidence:

- **Relevance of the issue** – the benefits of using expert evidence for this particular issue must outweigh the costs
- **Necessity in assisting the trier of fact** - must be beyond the knowledge of the trier of fact
- **Absence of any exclusionary rule**
- **Properly qualified expert** – may sometimes require a *voir dire*

This test is still considered the threshold test in using admissible expert evidence today.

Selecting an expert can be a difficult, costly and time consuming exercise. In the past, clients and parties used more liberal budgets and resources in aggressively pursuing experts. With today's growing emphasis on reducing costs and fees, experts may not always be the most effective way to prove your case – this makes the decision to use/not use an expert more important than ever before. It is essential, at the outset of a file, to thoroughly understand the legal and factual issues of a case, understanding how they intersect and what issues arise that may possibly need expert

evidence to prove. In completing this exercise, the *Mohan* threshold factors must be carefully considered, along with a costs-benefit analysis for your client.

The following outlines several suggested best practices when selecting an expert.

Selecting an Expert

1. Identify the need for expert evidence – consider whether expert evidence and/or an expert witness is required. Are the facts of your case complex, technical or scientific? Are there issues that require specialized knowledge?
2. Consulting expert vs. testifying expert – consider whether the case requires a testifying expert and/or a consulting expert. Consulting experts could be involved in developing case strategy, assisting in discovery preparation etc.
3. Picking the best expert – consult various resources when determining who the best expert would be for your case. Colleagues, the internet, previous experiences and historically similar cases are helpful sources to get you started on the search for an expert. See slides 7-11 of our PowerPoint for an example of a search.
4. Investigate the expert's background – once you have narrowed down your choice(s), thoroughly review the expert's background. This includes his/her qualifications, experience, publications, memberships, awards, previous testimony, public statements/social media, litigation involvement, previous expert reports etc. When reviewing the expert's credentials, be sure to keep in mind the *Mohan* factors (properly qualified expert).

5. Investigate the expert's presentation history – in addition to academic qualifications, it is important to find an expert that presents and speaks well. The best resources for this task would be current colleagues or other lawyers who many have worked with this expert in the past. For some experts (especially academics like professors), you may find recorded lectures online or promotional videos on YouTube.

Once selected, the process of retaining an expert must also be conducted carefully. The following outlines several suggested best practices when retaining an expert.

Retaining an Expert

1. Timing – consider whether you should retain an expert earlier or later in the litigation. It may be beneficial to retain the expert earlier if there are concerns that the expert may be retained by the other side/another party. However, there may be some benefit in waiting until later in the proceedings before retaining the expert so that any duty to disclose the expert's findings and conclusions is not triggered too early.
2. Communications – best practice suggests that counsel should retain the expert directly, as opposed to the client, making it easier to attach privilege to the communications with the expert.
3. Initial Meeting – speak in advance with the expert, either in person or over the phone, to explain what the expert is being asked to do (without divulging sensitive information about the case). Educate the expert on the litigation process and the law of privilege (if necessary), give clear instructions, explain the need for independence and carefully

describe the process and importance of careful note taking, document retention and communication with counsel.

4. Retainer letter – a carefully drafted written retainer letter should be used to retain the services of an expert. An example has been attached as *Appendix A*. When drafting the letter, avoid providing detailed information about the case, or inadvertently making the expert look like a “hired gun”. Use neutral and objective words such as “normal hourly rate” and “agreed to review materials” (as opposed to implying a special hourly rate for this case or “agreeing to testify for the defense”). Emphasize the need and requirement of independence – this is important if circumstances arise where the letter may become producible (i.e a party shows reasonable grounds to suspect that counsel interfered with an expert’s duties of independence and objectivity).

Appendix A – Precedent Retainer Letter

[Date]

PRIVILEGED AND CONFIDENTIAL

[Expert name]

[Address]

Dear ■:

**Re: [Case name]
Court File No. ■**

We represent [**client name**], in connection with litigation brought [**by/against**] [**opposing party**] involving [**description**].

I confirm that ■ has agreed to retain you as an expert in this matter, to:

- (a) provide us with advice regarding [**identify general area of expertise**] in order to assist us in providing legal advice to our client;
- (b) prepare an expert report, or provide affidavit evidence within your area of expertise, if requested; and
- (c) testify in court, or attend to be cross-examined on your affidavit evidence, if requested.

Our agreement with you is subject to the following terms:

1. You agree to hold in confidence: (a) all information provided to you, and (b) your opinions to us as they relate to the information, whether the information or opinions are documentary or oral. You will not disclose the information or opinions to any person unless we authorize you in writing to do so. All documents given to you in connection with this retainer remain the property of our firm, and are held in trust by you as our agent. You agree to return these documents on request.
2. You agree during this engagement not to provide, directly or indirectly, without our written consent, your consulting services to [**opposing party**], or to any person, corporation or other entity related to [**opposing party**].
3. You confirm that you are free to provide your services to ■ in connection with ■'s representation of [**our client**] in this litigation, and that our firm and our client are free to use and disclose such information in any manner whatsoever.
4. You agree to refrain from referring to our firm or our client, directly or indirectly, in connection with the promotion of your services, without obtaining the prior written approval of our firm.

5. You are to be compensated at your normal hourly rate of \$■ per hour for all services. Please direct your accounts to my attention at the address above.

Please indicate your agreement to the terms of your retainer as set out above, by signing a copy of this letter and returning it to me.

Thank you for your assistance.

Yours truly,

■

Agreed, this _____ day of _____, 20____

[Expert name]