The Advocates’ E-Brief
A publication of The Advocates’ Society

“The Advocates’ E-Brief” is intended to be a forum in which members of The Advocates’ Society can communicate with the board of directors and with each other. Submissions on subjects that are of widespread interest to the membership are welcome. Please contact the Editor:

Sonia Holiad
Director of Marketing & Communications
The Advocates’ Society
2020 - 438 University Avenue
Toronto, ON M5G 2K8
Tel: 416-597-0243 x.112
Fax: 416-597-1588
E-mail: sonia@advocates.ca
Web site: www.advocates.ca

For advertising information, please contact Middleton & Associates, 1-800-710-9396 or middletn@interlog.com

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Expert Evidence Checklist

The following checklist was developed out of the Society’s 2004 “Expert Evidence” program, chaired by Barry Leon of Torys LLP, and Bonnie A. Tough of Tough & Podrebarac LLP. The chairs wish to thank Saro Sarmazian, an articling student at Torys LLP, for his assistance.

1. Determining Whether an Expert is Needed
   (a) Consider whether the facts in issue involve scientific, technical or specialized knowledge that is outside the sphere of expertise of the trier of fact.
   (b) Consider the "ultimate issue" restriction on expert evidence.
   (c) Consult with an expert to ascertain what expert testimony may be available.
   (d) Consider whether the other side may have expert evidence on issues.
   (e) Consider retaining a "consulting" expert in addition to a "trial testifying" expert.

Remember that R. v. Mohan (1994), 114 D.L.R. (4th) 419 (S.C.C.) says admission of expert evidence depends on the application of the following four criteria:
   (a) relevance;
   (b) necessity in assisting the trier of fact;
   (c) the absence of any exclusionary rule, and
   (d) a properly qualified expert.

(f) Consider any formal limitations on numbers of experts, and the scope for exceptions.

2. Determining When to Retain an Expert
   (a) If it is determined that an expert may be required, retaining as early as possible can be helpful in preparation, discoveries and developing theories of the case.
   (b) Consider, however, the applicable rules on disclosure of the findings of experts, and the required timing of that disclosure.

3. Finding an Expert
   (a) When seeking an expert, the following sources should be investigated:
      (i) your client;
      (ii) others in your law firm;
      (iii) other lawyers in your practice area;
      (iv) surveying the literature in the area of expertise;
      (v) universities and academic institutions;
      (vi) research institutes and laboratories;
      (vii) professional organizations for the area of expertise, and
      (viii) consulting firms.
   (b) Sometimes one contact will lead to another, and so on, ultimately taking you to the best expert for your case.

4. Selecting the Best Expert for the Case
   (a) Factors to consider in selecting the expert:
      (i) technical expertise;
      (ii) reputation in the field;
      (iii) communication skills;
      (iv) source of expertise (e.g. practical experience; academic training)
      (v) prior litigation/courtroom experience;
      (vi) prior testimony on the issue;

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(vii) writing and speaking on the issue;
(viii) cost;
(ix) open-minded and independent,
(x) in-house experts.

5. Retaining and Instructing the Expert
(a) Engagement Letter
   (i) Consider including in the engagement letter the following provisions:
       (A) scope of engagement;
       (B) fees, disbursements and billing arrangements;
       (C) confidentiality;
       (D) conflicts, and
       (E) return of materials
   (ii) If the expert provides a draft engagement letter:
         (A) consider whether "standard terms" are appropriate (e.g.: how will they appear to the trier of fact?)
         (B) do not mistake success or contingency fees.
(b) Assignment
   (i) Inform the expert of the scope of the assignment.
   (ii) Supply the expert with the information:
         (A) necessary to the expert's work,
         (B) so that the expert will not be surprised later on.
   (iii) Do not provide the expert with information that it may be best that the expert not know.
   (iv) Do not provide privileged information to the expert.
   (v) Inform the expert of factual assumptions, if any, that the expert should make.
(c) Independent Investigation
   (i) Remind the expert that you want an independent investigation, without preconceived notions as to the result to be achieved.
(d) Educate the Expert
   (i) Educate the expert on relevant parts of the litigation process, particularly if a first-time or out-of-the-jurisdiction expert (including reports; no deposition of experts in Ontario).
   (ii) Educate the expert on the legal issues and legal requirements for the data, analysis, and conclusions.
(e) Communication and Records
   (i) Remind the expert that all notes and working materials may be subject to disclosure, so appropriate care should be taken.
   (ii) Suggest that the expert not commit preliminary musings to writing, and not send e-mails, memos or other written communications to you prematurely -- production of these documents may occur.
(f) Factual Evidence to Support Expert
   (i) Consider (at this stage or later) the facts that will underlie the expert's opinion and will need to be proven by direct (non-hearsay) evidence.
(g) Relying on other Experts
   (i) Ascertain if the expert will need to rely on the opinions of experts in other fields;
   (ii) if so, arrange to retain the necessary experts.

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6. Expert Educates Lawyer
   (a) Ask the expert to educate you on technical matters.

7. The Report
   (a) Explain to the expert the requirement for a report and its disclosure.
   (b) Explain to the expert the likely uses of the report.
   (c) Discuss with the expert the scope of the report.
   (d) Remind the expert of the need to:
       (i) include all assumptions, facts and source of facts;
       (ii) set out all opinions;
       (iii) possibly use graphs, drawings, computer presentations, etc., and
       (iv) use clear and concise language.
   (e) Discuss your role in reviewing the draft report, and the limits on that role.

8. Use of the Expert Report at Mediation
   (a) Consider whether you will want to deliver the report (final or draft) before mediation.
   (b) Discuss with the expert this possible use of the expert's report.

9. Preparing the Expert for Examination-in-chief
   (a) Remind the expert to look at (make eye contact with) the trier of fact, not the lawyers, when giving evidence (chief and cross).
   (b) Prepare the expert to talk appropriately about his or her impressive and/or relevant achievements in the qualification process.
   (c) Work out a sequence for the examination-in-chief that makes the expert comfortable in explaining the subject matter.
   (d) Often it is appropriate to suggest that the expert take the trier of fact through the subject matter of the testimony in a conversational and explanatory manner -- often the expert should be performing a "teaching" function.
   (e) Assist the expert to develop demonstrative evidence (graphs and charts; PowerPoint slides), beyond what is in the expert's report, where appropriate.

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10. Preparing the Expert for Cross-examination
(a) Explain to the expert that the expert's demeanor should not change from the examination-in-chief.
(b) Remind the expert not to be defensive -- in word, tone or body language.
(c) Remind the expert that judicious concessions should be made where appropriate.
(d) Remind the expert to listen to and answer the question -- briefly and to the point where appropriate.
(e) Explain that the scope of cross-examination is "at large" on any relevant issue or on credibility (particularly when the expert is not experienced as an expert witness or is from another jurisdiction).
(f) Review with the expert points that would be mentioned to any witness about cross examination (e.g. no communication about the expert's evidence; the possibility of re-examination).

11. Qualifying the Expert
(a) Have the expert witness:
   (i) provide a contextual framework for the testimony (i.e. a description of the investigation or examination that the expert was retained to do);
   (ii) identify the expert's training and experience applicable to the expert's assignment - either by asking direct questions only, or by directing the witness to the expert's curriculum vitae (attached to the report);
   (iii) relate these areas of expertise to the issue covered in the report, and to the issues in the case, and
   (iv) allow the expert to talk about key matters, and lead the expert through less material parts of the expert's c.v. -- you want the expert to talk appropriately about his or her impressive and/or relevant achievements in the qualification process.
(b) Qualify the expert in all the areas in which the expert is to give opinion evidence.

12. Challenging the Expert's Qualifications
(a) You can cross-examine on the expert's qualifications either on a voir dire in which the expert is sought to be qualified to give expert evidence, or during cross examination.
(b) A voir dire can be used to object to the legal sufficiency of the expert's qualifications to give the opinions proposed to be given.
(c) A voir dire cross-examination can also be used tactically, to lay certain groundwork for the examination-in-chief and/or the cross-examination to follow.
(d) Cross-examination on qualifications may be used to undermine the weight of the expert's evidence.

13. Conducting the Examination-in-chief: Basic Points to Cover
(a) The expert's qualifications.
(b) Steps that the expert took in forming the opinion.
(c) The expert's opinion.
(d) The reasons and bases for the expert's opinion.

14. Conducting the Cross-examination: Basic Points to Consider Covering
(a) The expert's qualifications - to show that the expert does not have meaningful expertise on the particular matter in issue.
(b) The expert's interest or bias.
(c) The expert's status as a "professional" witness.
(d) The facts and assumptions on which the expert's opinion was based, and how the opinion might differ if certain facts and assumptions were different.
(e) Errors in the expert's report.
(f) Points that will bolster the credibility of the cross-examiner's expert.
(g) Admissions or impeaching statements from the expert's prior testimony, writings, and/or speeches, or from treatises conceded by the expert to be authoritative.
(h) Points relevant to the issues in the case and/or to the expert's expertise that were not covered in the examination-in-chief.

15. Conducting the Re-examination
(a) Re-examine if the expert can explain or clarify a point muddied or not fully answered in cross-examination.
(b) Do not covering every point made during the cross-examination -- doing so may give undue credit and enhance points that would otherwise fall by the wayside.