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The Preparation of Expert Reports to be Used in a Civil Lawsuit:
A Guideline for the Expert Witness

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INTRODUCTION

The role of Trial Judge is to decide the issue in dispute by applying the law to the facts of the case. The findings of fact are based on evidence including documents, objects and, of course, the testimony of witnesses.

Whether evidence can be received or considered by the Court is determined by a complex set of rules, both substantive and procedural, governing the "admissibility" of evidence. It takes many years and many trials before even a so-called "trial lawyer" can gain mastery of these rules.

The testimony of experts is often necessary so that a Trial Judge can properly understand scientific or technical issues relevant to the lawsuit. As with other evidence, however, the evidence of an expert is also subject to complicated rules respecting admissibility. The expert witness does not know (and cannot reasonably be expected to know) these rules. The purpose of this brief guideline is to outline some of the "do's and don'ts" in that regard to help ensure not only that the expert's evidence is admissible but that it also receives all appropriate respect.

THE ROLE OF LEGAL COUNSEL IN PREPARING THE REPORT

Legal counsel not only can but, from a practical point of view, *must* assist the expert in the preparation of any report to be used as evidence in the lawsuit. However, it is critical that the opinions expressed in the report be those of the expert and the expert alone, and it is improper for legal counsel to influence the expert's analysis or conclusions.

Legal counsel can and should:

- fully explain the background to the lawsuit, the issues in dispute and the purpose to be served by the proposed expert opinion/report;
- provide copies of all available and relevant documents necessary for the expert to formulate his or her opinion;
- identify the "facts" that are to be assumed by the expert as the foundation for his or her analysis and opinion;
- review with the expert any additional facts or documents that the latter considers necessary for the purposes of the analysis or opinion;
- with the assistance of the expert, if necessary, formulate the questions that are to be answered in the report;

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- provide clear guidance with respect to the formatting of the report, particularly having regard to the requirements of the Rules of Court; and

- review draft reports and make appropriate suggestions re: the presentation and formatting (but *not* the substance) of the opinion.

It must be borne in mind that the Court will reject as inadmissible any expert report which has been unduly revised or "clarified" at the suggestion of and in consultation with legal counsel. While there is often a fine line between what is permissible and impermissible in this regard, it must be understood by the expert that the substance of the opinion should not be changed or influenced by legal counsel.

EXPERT OPINION EVIDENCE: THE TESTS FOR ADMISSIBILITY

Generally speaking, the opinions of expert witnesses will be admitted into evidence if the following criteria are met:

1. **Relevance**: the opinion must be relevant to the issues in dispute in the lawsuit. Relevancy in this regard is decided by the Trial Judge as a question of law;

2. **Proper Qualifications**: the witness must be duly qualified as an expert on the matters about which the opinion is being expressed. Such expertise can be acquired through formal academic studies or simply as a matter of substantial experience; and

3. **Necessity**: the opinion must relate to a subject matter which is outside the ordinary experience or knowledge of the Trial Judge such that the opinion is necessary for the Trial Judge to fully appreciate the technical or scientific issues and to form a correct judgment about it.

Another way to appreciate the tests for admitting expert opinions into evidence is to review some of the more common objections raised in the case law and which Courts have relied upon to reject proposed "expert" evidence. These objections include:

1. **Usurping the Judge's Role**: the report intrudes into the exclusive jurisdiction of the Trial Judge eg. purports to make findings of fact or law, interprets agreements, allocates fault etc.;

2. **Unnecessary Evidence**: the opinion relates to matters of common sense and general knowledge, within ordinary human experience and, accordingly, no expert testimony on the point is required;

3. **Lack of Qualifications**: the opinion is outside the expert's specific area of expertise;

4. **Simply Argument**: the expert reports will be rejected if they simply amount to "arguments in the guise of evidence". As one Judge put it, "it is appropriate for the Court to enforce reasonable limits upon the admissibility of opinion evidence…too often, persons with special training or experience are retained to construct scenarios or

advance arguments in the form of an opinion when, with proper assistance from counsel, the Court is able to itself analyze the evidence and reach a proper conclusion"; and

5. **No Foundation**: the expert opinion is based upon facts that have not been property proved by way of admissible evidence at the trial.

It is the responsibility of legal counsel to ensure compliance with the criteria for admitting a proposed expert opinion into evidence. However, the expert can assist the process by:

- confining his or her opinion to the facts as stated and the documents provided (where additional facts or documents are required, the expert should discuss the matter with legal counsel beforehand);
- maintaining complete objectivity and framing the opinion in a dispassionate and non-argumentative manner; and
- being careful to stay within the designated area of expertise.

PROCEDURAL REQUIREMENTS AND FORMATTING THE REPORT

The Supreme Court Civil Rules provide for certain procedures that must be followed in order for expert opinion to be admitted into evidence at a trial in British Columbia. Such evidence must be tendered by way of a written report prior to any oral testimony. As such, Rule 11-2 of the Supreme Court Civil Rules confirms that experts have a duty to assist the court and not to be an advocate for any part. Accordingly, the expert must certify that he or she is aware of that duty, has prepared the report in conformity with that duty and if called on to testify, will give testimony in conformity with that duty.

Any expert report has to be prepared and tendered to the other party in the lawsuit at least 84 days before the scheduled trial date. Rebuttal reports (in response to the other side's expert) are due 42 days before the scheduled trial date.

The Rules also require that expert reports set out the following:

1. the expert's name, address and area of expertise;
2. the expert's qualifications and employment and educational experience 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 the issues in the proceeding to which the opinion relates;
5. the expert's opinion respecting those issues;
6. the expert's reasons for his or her opinion, including

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i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

If the expert's opinion changes in a "material way", he or she is required to prepare a supplemental report. In doing so, the expert must set out the change in the report and the reason for it. They must again include the certification described above.

There are no rules respecting the precise manner in which an expert report should be formatted. Some reports take the form of correspondence to counsel on the expert's letterhead. Others take the form of multi-page, cerlox-bound professionally printed presentations replete with photographs, charts and diagrams and even computer-generated imagery.

The key to an effective expert report, however, is clarity and organization. Each segment of the report should have its separate heading and in lengthy reports a table of contents is invaluable. At a minimum, the report should be divided into the following sections:

1. **Certification**: include the required statement concerning the expert's duty to the court;

2. **Introduction and Background**: identification of the subject matter of the report and the purpose for which it is being presented;

3. **Qualifications**: a copy of the expert's resume should be attached as an Exhibit to the report but, under this heading, the expert should summarize his or her particular experience and qualifications relevant to the subject matter of the report. This will help the Trial Judge decide how much weight should be given to the opinion that follows;

4. **Facts and Assumptions**: in some instances legal counsel (often with assistance from the expert) will have prepared a "Statement of Assumed Facts". These are facts that the legal counsel is instructing the expert to assume for the purposes of his or her report. They are facts which legal counsel expects to prove based on the evidence he or she intends to lead before the Trial Judge. In addition, however, the expert should list any documents (including documents provided by legal counsel) upon which the expert has relied for the purposes of obtaining information or formulating his or her opinion;

5. **Questions to be Addressed**: to the extent the expert has been requested to express an opinion on specific issues or questions, the latter should be clearly delineated; and

6. **Body of the Opinion**: here the expert actually sets out his or her opinion with respect to the issues to be addressed/questions to be answered. Where there are multiple issues/questions, it is preferable to address each one separately, in logical order and with discrete sub-headings.

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The expert should prepare his or her initial report in draft and submit it to legal counsel for review and comment. While legal counsel must not influence the substance of the expert's opinion, he or she will often be in a position to make suggestions regarding formatting the report to improve presentability and, of course, to ensure compliance with the technical rules re: admissibility. Thereafter, the report can be finalized, signed by the expert and issued to legal counsel for transmittal to the other side in due course.

THE EXPERT'S FILE MATERIALS AND WORKING PAPERS

Previously, until such time as the expert report was tendered as an Exhibit at trial or the time when the expert was actually called as a witness to give oral evidence at trial, all documents in the possession of the expert witness (or legal counsel) related to his or her assignment were "privileged" i.e. the other side could not compel production of the same. However, Rule 11-6(8) now permits the opposite party the right to demand access to the expert's file. The party who serves a report must, promptly upon being asked by the opposite party, provide to the requesting party any or all of the following:

1. any written statement or statements of facts on which the expert's opinion is based;

2. a record of any independent observations made by the expert in relation to the report;

3. any data compiled by the expert in relation to the report;

4. the results of any test conducted by or for the expert, or of any inspection conducted by the expert, if the expert has relied on that test or inspection in forming his or her opinion, and

5. the contents of the expert's file (at least 14 days before the scheduled trial).

Documents that may be included in the expert's file include:

- earlier drafts of the expert's report;
- working papers in respect of the expert's analysis;
- correspondence between the expert and others, including legal counsel; and
- documents re: the fee agreements with remuneration of the expert.

The purpose of requesting an expert's file and working papers, of course, is to see whether this material provides fertile ground for cross-examination. The question therefore arises whether expert witnesses (and indeed legal counsel) should retain or discard early drafts and other preliminary materials.

As yet, there is no definitive case law addressing whether it is proper for an expert to discard early drafts or other material that might provide "ammunition" for cross-examination. Most legal counsel sit on the fence and suggest that the expert simply follow his or her standard practice in that

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regard. So long as there is a logical reason for discarding the material (convenience, space requirements, etc.) there is much practical merit in destroying or discarding the same.

PARTICIPATION AT TRIAL

Generally, an expert is not permitted to give oral evidence at trial unless his or her direct evidence is limited to an explanation of any terms or sections of the report which require clarification due to their technical or complicated nature or the expert's attendance has been demanded by the other party.

If the expert's attendance has been demanded by the other side for cross-examination purposes, the Rules provide that the demand must be made at least 21 days prior to the scheduled trial date. In practice legal counsel will be in constant communication with his or her expert witness to coordinate participation at the trial and to minimize inconvenience to the expert's schedule.

If a demand for cross-examination is not made, the expert does not have to attend trial to give oral evidence and his or her report (subject to admissibility) may be tendered and accepted as evidence.

CONTACT BY OPPOSING COUNSEL

It is often said "there is no property in a witness". This means that even though a witness may be called to give evidence on behalf of a particular party, it is perfectly proper for the other side to also contact that witness and to ask questions about his or her proposed evidence. This is also true of expert witnesses, even though the expert has been retained to assist and is being paid by one of the parties.

However, there is no obligation on the part of the witness, including an expert witness, to converse with the legal counsel representing the other side. It is perfectly proper for an expert witness to refuse to speak to that other counsel.

Further, the Professional Conduct Handbook governing the ethical obligations of the legal profession has stipulated certain rules for contacting an opponent's expert as follows:

- before initiating any such contact, the lawyer must notify the opposing party's counsel of his or her intentions;
- when contacting the opposing party's expert, the lawyer must at the outset:
  - state clearly for whom he or she is acting and make it clear he or she is not acting for the party who has retained the expert; and
  - raise with the expert whether the lawyer is accepting responsibility for payment of any fee charged by the expert arising out of the contact; and
  - the lawyer must not question the opposing party's expert on matters that are properly protected by the doctrine of legal professional privilege (i.e. communications between the expert and the lawyer who retained him).

In practice, it is better for the expert to simply refuse communication with the other side. If such communication does occur, however, the expert should keep notes of the discussions and should immediately forward the details to the legal counsel by whom he or she was retained.

CONCLUSION

It is hoped these guidelines will provide some assistance to the expert witness regarding the drafting of expert reports and his or her participation as a witness in the lawsuit. These guidelines are not “rules” nor are they necessarily exhaustive. In every case, however, the expert must have a complete understanding of his or her role and any necessary clarification should be obtained from legal counsel at the outset.

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