FIVE TIPS TO BEING A GREAT EXPERT WITNESS

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INTRODUCTION

The importance of expert testimony in the successful prosecution of a personal injury case cannot be understated; however, the role of the expert is not to be a soldier for one party or the other. The role of the expert is to provide a fair, objective, and non-partisan opinion to assist the Court. The "battle", if any, is to be fought by counsel.

PRELIMINARY NOTE: CONFINES OF THIS PAPER

It should be noted from the outset that this paper will *not* address the issue of who is to be considered an "expert" for purposes of giving opinion evidence, what type of expert must strictly comply with Rule 53.03 of the *Rules of Civil Procedure*[1], or whether it is appropriate for counsel to review draft reports.

At the time of publication, these issues are the subject matter of conflicting judicial authority[2]. Specifically, the recent decision of the Honourable Mme. Justice Janet Wilson in *Moore v. Getahun*[3] has become the source of some controversy and will be addressed by other authors/speakers at this conference. Accordingly, for the balance of this paper, it will be assumed that we are dealing with independent medical-legal experts retained by the parties.

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[1] R.R.O. 1990, Reg. 194 [the *Rules*].
[2] See, for example, *Westerhof v. Gee (Estate)*, [2013] ONSC 2093 (CanLII), which is under appeal; and *Gaudet v. Grewal*, [2014] ONSC 3542 (CanLII).

TOP FIVE TIPS

Tip #1: Understand Your Duty to the Court

i. Overview of the Rules

In January of 2010, the *Rules of Civil Procedure* were amended to codify what had been emerging in the case law for some time; namely, that the role of the expert is to assist the Court, rather than to be a "hired gun" for the party by whom the expert had been retained.

Consequently, rule 53.03(2.1)(7) now requires each expert to sign an Acknowledgement of Expert's Duty ("Form 53") in conjunction with the preparation of the report. A copy of a draft Form 53 is attached to this report at **Appendix A**. The key contents are contained at paragraphs 3 and 4 of the form, which state:

> 3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
>
> (a) to provide opinion evidence that is fair, objective and non-partisan;
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> (b) to provide opinion evidence that is related only to matters that are within my area of expertise; and
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> (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.
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> 4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

The duties set out in Form 53 apply not only to the expert's written report, but also to the oral testimony.

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[3] [2014] ONSC 237 (CanLII) [*Moore*].

ii. Defining an "Advocate"

There is a fine line between being persuasive and being partisan.

The mere fact that an expert has been retained by one side does not mean that the expert is necessarily an advocate for that party. In *820823 Ontario Ltd. v. Kagan*[4], Dambrot J. stated[5]:

> …Like counsel for the defendants, I am troubled by expert witnesses who do not understand their role. Nevertheless, it is unsurprising that an expert called by party will ordinarily give evidence that is helpful to that party. It is part of the expertise of an expert to apply the principles flowing from his or her expertise to a factual situation. While undoubtedly doing so means that the expert has taken a side, this alone does not make the expert an advocate in any impermissible way. Of course, this will remain an open issue when Mr. Davidson testifies. If cross-examination reveals that he has descended into the role of advocate, it will be a matter that may affect the weight of his evidence.

In the decision of *Alfano v. Piersanti*[6], the Ontario Court of Appeal further distinguished an expert from an advocate. The Court stated[7]:

> Courts have taken a **pragmatic approach** to the issue of the independence of expert witnesses. They have recognized and accepted that experts are called by one party in an adversarial proceeding and are generally paid by that party to prepare a report and to testify. The alignment of interest of an expert with the retaining party is not, in and of itself, a matter that will necessarily encroach upon the independence or objectivity of the expert's evidence.
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> That said, courts remain concerned that expert witnesses render opinions that are the product of their expertise and experience and, importantly, their independent analysis and assessment. Courts rely on expert witnesses to approach their tasks with objectivity and integrity. As Farley J. said in *Bank of Montreal v. Citak*, [2001] O.J. No. 1096, "experts must

[4] [2003] CanLII 24295 (Ont.Sup.Ct.).
[5] *Ibid*. at para. 18.
[6] [2012] ONCA 297 (CanLII) [*Alfano*].
[7] *Ibid*. at paras. 106-108.

> be neutral and objective [and], to the extent they are not, they are not properly qualified to give expert opinions."
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> When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client. Courts require more. **The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and conclusion**. While the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client. An expert's report or evidence should not be a platform from which to argue the client's case. As the trial judge in this case pointed out, "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court."

iii. Consequences of Perceived Advocacy

In a best case scenario, an expert who presents as an advocate runs the risk of the "opposing" expert's evidence being preferred; in a worst case scenario, the expert's testimony may be entirely inadmissible. In *Alfano*[8], the Ontario Court of Appeal ruled:

> **In most cases, the issue of whether an expert lacks independence or objectivity is addressed as a matter of weight** to be attached to the expert's evidence **rather than as a matter of the admissibility**. Typically, when such an attack is mounted, the court will admit the evidence and weigh it in light of the independence concerns. Generally, admitting the evidence will not only be the path of least resistance, but also accord with common sense and efficiency.
>
> That said, the court retains a residual discretion to exclude the evidence of a proposed expert witness when the court is satisfied that the evidence is so tainted by bias or partiality as to render it of minimal or no assistance. In reaching such a conclusion, a trial judge may take into account whether admitting the evidence would compromise the trial process by unduly protracting and complicating the proceeding: see *R. v. Abbey*, 2009 ONCA 624 (CanLII), 2009 ONCA 624, 97 O.R. (3d) 330, at para. 91. If a trial judge determines that the probative value of the evidence is so diminished by the independence concerns, then he or she has a discretion to exclude the evidence.

[8] *Ibid*. at paras. 110-112.

> In considering the issue of whether to admit expert evidence in the face of concerns about independence, a trial judge may conduct a voir dire and have regard to any relevant matters that bear on the expert's independence. These may include the expert's report, the nature of the expert's retainer, as well as materials and communications that form part of the process by which the expert formed the opinions that will be the basis of the proposed testimony: see *R. v. INCO Ltd*. 2006 CanLII 14962 (ON SC), (2006), 80 O.R. (3d) 594, at p. 607 (S.C.).

A case in which an expert was permitted to testify, but whose evidence was not given great weight due to his perceived bias is the decision of *Geddes v. Bloom*.[9] The Court stated[10]:

> In the case before me, I find that there are several reasons why Dr. Cheung's evidence is preferred over Dr. Kleyman's evidence. First, Dr. Cheung has more experience as a neuro-radiologist with special training of interpreting images of the area of the neck and head. Dr. Cheung has testified in other cases and his opinion has been accepted. He gave his evidence in this case in a forthright and direct manner. On the other hand, Dr. Kleyman tended to be somewhat **argumentative with counsel, as if he was an advocate for the plaintiff's case**. At one point in his testimony, he even **referred to the plaintiff's counsel as "my lawyer"** which may have been a slip of the tongue but demonstrated an adversarial approach. Furthermore, there were inconsistencies in the evidence of Dr. Kleyman touching on matters such as the value of a patient's clinical history or whether there were markings on the images he received for consideration. These contradictions, combined with his manner of testifying in which he assumed the role of an advocate for the plaintiff, made his evidence less helpful to the court...

A case in which an expert was not permitted to testify due to a perceived bias was the decision of *Gutbir v. University Health Network*[11]. This case partially touches upon the issue of who qualifies as an "expert" for purposes of giving opinion evidence, but it is also illustrates that an expert can be precluded from testifying at all if there is a perceived

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[9] [2008] ONSC 4438 (CanLII).
[10] *Ibid*. at para. 33.
[11] [2010] ONSC 6394 (CanLII) [*Gutbir*].

bias. The expert at issue in this medical malpractice action was the Plaintiff's treating neonatologist, who was asked to provide an opinion on the issue of causation. The Court did not suggest that the expert was *deliberately* acting as an advocate, but concluded that it would be "…difficult if not impossible" for the treating expert to be "completely objective" about his opinion.[12] Notably, the Court declined to take the route of permitting the treating expert to testify and considering the issue of his treating capacity as going to the issue of weight.[13]

Importantly, *Gutbir* does not stand for a general rule that treating medical experts cannot provide expert opinions in all personal injury cases. The Court specifically distinguished the circumstances in this medical malpractice action to that of a personal injury action, where the treating expert may be called upon to testify as to prognosis. The Court stated[14]:

> The situation in the case before me is quite different from that encountered in a personal injury case where, for example, a treating orthopaedic surgeon is asked to provide an expert opinion at trial on the future prognosis for the plaintiff in terms of treatment and disability. That opinion is, arguably, of great assistance to the trier of fact precisely because the treating orthopaedic surgeon, with his or her familiarity with the Plaintiff's injury and treatment, may be in the best position to opine on what the future holds for the patient. That is not what is being asked of Dr. Perlman in the case at hand. Rather, he has been asked to review the very limited records available and provide an opinion as to when the brain damage occurred to Zmora.

[12] *Ibid*. at para. 29.
[13] *Ibid*. at para. 23.
[14] *Ibid*. at para. 18.

iv. Avoid Appearing as an Advocate

In order to provide a persuasive opinion, without crossing the line to advocate, consider the following:

1. Accompany your opinion with a reasoned explanation.
    a. An expert who provides a bald conclusion without supporting rationale is more likely to appear like an advocate. Further, the expert's report may not comply with rule 53.03(2.1).
2. Concede the obvious.
    a. No case is "won" on each and every point. To maintain objectivity, acknowledge the weaknesses in your assumptions, methodology, or opinion.
3. Do not be combative.
    a. Let the lawyers do the lawyering. It is up to you to present the opinion; it is up to the lawyer to convince the Court that it is the opinion to be preferred.
4. Stay within the confines of your expertise.
    a. If you are asked to provide an opinion that goes beyond the scope of your expertise, speak with the lawyer right away. In some circumstances, an expert may be permitted to testify beyond his direct scope of expertise[15]. In other circumstances, it may be that a different or additional expert will need to be retained.
5. Do not launch personal attacks against the expert retained by the opposing party.

[15] There are medical malpractice cases, for instance, in which an expert specialist of one discipline has been permitted to testify as to the standard of care of a different specialist or non-specialist, but the difference in expertise can go to the weight to be afforded to the expert's opinion. By way of illustration, see *Robinson v. Sisters of St. Joseph of the Diocese of Peterborough*, [1999] O.J. No. 530 (C.A.), where the Ontario Court of Appeal permitted an orthopaedic surgeon to provide a standard of care opinion in respect of a family physician/emergency medicine specialist; and *Malinowski v. Schneider* [2010] A.J. No. 1380 (Q.B.); aff'd [2012] A.J. No. 759; leave ref'd [2012] S.C.C.A. No. 279, where a neurosurgeon was permitted to testify as to whether a chiropractor fell below the standard of care.

a. While it is appropriate to attack the methodology, assumptions, and/or opinion of another expert, it is not appropriate to attack him personally (e.g. "Well of course he said that, he is always on for the defence.")

Tip #2: Ensure Your Written Report Complies with Rule 53.03

i. Overview of the Rules

Rule 53.03(2.1) of the *Rules*[16] itemizes what *shall* be contained in an expert's report.

These include:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences 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 each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

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. a description of any research conducted by the expert that led him or her to form the opinion, and
    c. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

ii. Areas of Ambiguity in Rules 53.03(2.1)

Although rule 53.03(2.1) purports to provide the expert with clarity and guidance about the content of the report, some of the language does leave room for interpretation.

For instance, sub-paragraph 3 requires the report to contain "the instructions" given to the expert. This leaves open the question as to whether it is sufficient for the expert to simply summarize or paraphrase the instructions that were given (e.g. "I was asked to provide an opinion on whether Dr. X fell below the standard of care) or whether the letter provided by the referring lawyer must be attached to the report.

Further, sub-paragraph 6(c) requires the expert to list every document upon which he *relied*. This leaves open the question as to whether an expert must also disclose within his report other documents which he may have reviewed, but upon which he did not rely.

There are no clear-cut answers to these questions. Some judges emphasize the importance of litigation privilege until trial, other judges emphasize the importance of transparency when it comes to experts. As a best practice, experts should at least be mindful of these ambiguities and be mindful of the fact that their *complete* file will be subject to production once they step into the witness box.

iii. Consequences for Non-Compliance with Rule 53.03(2.1)

Although, again, there has been conflicting case law on the strict interpretation or application of rule 53.03(2.1), it is possible that non-compliance with the rule could prevent the expert from testifying.

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[16] *Rules*, supra note 1.

In the decision of *Beasley v. Barrand*[17], the Court refused to permit a tort Defendant to call experts who had assessed the injured Plaintiff at the behest of his accident benefits insurer. The refusal was based upon the fact that the insurer examination ("I.E.") reports were not compliant with rule 53.03(2.1). For instance, sub-paragraph 3 requires the experts to disclose the instructions provided to him "in relation to the proceeding"; however, the experts' instructions were not provided in the context of the tort proceeding but rather in the context of an I.E. Similarly, Form 53 requires the experts to acknowledge that they had been retained "by one of the parties", when they had initially been retained by the accident benefits carrier. Further, the experts proposed to testify about matters that went beyond the specific instructions that had been provided to them by the accident benefits carrier.

Although the I.E. assessors were not permitted to testify in *Beasley*, it is important to appreciate that the issue was not the fact that they were I.E. assessors *per se*, but rather that they had not complied rule 53.03(2.1). The Court stated[18]:

> I suggested that the defendants could invite the doctors, at the defendants' expense, to write meaningful, rule 53.03 compliant, reports to plaintiff's counsel which, if relevant and producible, could help me to understand any opinions they might be able to express on issues between the parties before this court. That was not attempted. No request has been made for more time to redress the current situation.
> …
> **I am not to be heard to state that experts retained by accident benefits insurers cannot give opinion evidence in a tort action; rather, I say that such experts should first comply with rule 53.03**. I say "should" for there may be cases where that is not possible and then the court might consider relieving against non-compliance to ensure a fair adjudication of the issues upon their merits but this is not one of those cases.

[17] [2010] ONSC 2095 (CanLII) [*Beasley*].
[18] *Ibid*. at paras. 68, 70.

Tip #3: Use Legal Language

One of the main difficulties personal injury lawyers come across with respect to expert reports is the language used in the report. Inconsistent use of or the failure to use appropriate legal language can often lead to the conundrum of having a draft report. When setting out an expert opinion, it is vital for the expert to be aware of the burden of proof in civil litigation and the legal test for entitlement. The Plaintiff or insured is not required to prove the case "beyond a reasonable doubt". This is the burden of the Crown that applies only to criminal cases.

i. Tort

In civil/tort cases, the requirement of the Plaintiff is to prove the case "on the balance of probabilities". One hundred percent certainty is not required of an expert; rather, the opinion must be "more likely accurate than not".

In tort cases, the basic rule for the recovery of damages is for the Plaintiff to establish that "but for" the Defendant's negligence or statutory breach, her injuries would not have occurred[19]. The "but for" test, as it is called, is to be applied by the Court using a "robust and pragmatic" approach; meaning that the Court will consider all of the evidence (expert and otherwise).

Only in *exceptional* circumstances can the Plaintiff be successful by showing that the subject incident "materially contributed" to her injuries (a less stringent threshold than

[19] *Clements v. Clements*, [2012] SCC 32 (CanLII).

the "but for" test). These exceptional circumstances are limited to circumstances where the Plaintiff either[20]:

1. has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; or

2. through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

Given the rarity of these limited exceptions, it should always be assumed that the Plaintiff will be required to meet the "but for" test of causation with respect to proving her injuries.

Once the Plaintiff has proved, on the balance of probabilities, that "but for" the Defendant's negligence or statutory breach, she would not have suffered her injuries, she must further prove that consequences or damages have flowed from her injuries.

When it comes to past damages, whereby the "past" references the period between the date of the incident and the date of the trial (e.g. past loss of income, past out-of-pocket expenses, past services rendered, past subrogated claims, etc.), these damages must be proved on the balance of probabilities. General damages (e.g. claims for pain, suffering, and a loss of enjoyment of life) must also be proved on the balance of probabilities. For instance, assuming the Plaintiff suffered a crush injury to her ankle and was off work for six months, she must prove that it is "more likely than not" that the injuries prevented her from carrying out her employment duties.

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[20] *Ibid*. at para. 46(2).

Future damages or contingencies (e.g. future deterioration, future surgery, future income loss, future care, etc.), however, are subject to a lesser burden. Future damages and contingencies need only be proved on the basis of a "real and substantial risk or possibility." The seminal case on this point is the Ontario Court of Appeal's decision in *Schrump v. Koot*[21]. The Court stated:

> …Speculative and fanciful possibilities unsupported by expert or other cogent evidence can be removed from the consideration of the trier of fact and should be ignored, whereas substantial possibilities based on such expert or cogent evidence must be considered in the assessment of damages for personal injuries in civil litigation. This principle applies regardless of the percentage of possibility, as long as it is a substantial one, and regardless of whether the possibility is favourable or unfavourable. Thus, future contingencies which are less than probable are regarded as factors to be considered, provided they are shown to be substantial and not speculative: they may tend to increase or reduce the award in a proper case.
> …
> In charging the jury, the presiding Judge will, in a proper case, warn them to exclude from their consideration remote, fanciful or speculative possibilities. He will leave for their consideration any **real and substantial risk**, with the higher degree or the greater chance or risk of a future development attracting a higher award.

Accordingly, assuming that the Plaintiff with the crush injury returned to work after six months, the questions for her future may include whether she will develop arthritis in the foot, whether she will require a future surgery, whether she will have to retire from her job early or switch careers, and whether she will have future care needs. The Plaintiff need not show that it is "more likely than not" that these future contingencies or damages will occur, but rather that there is a "real and substantial risk or possibility" of them occurring.

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[21] [1977] ONCA 1332 (CanLII).

ii. Accident Benefits

Although in tort, the causation test is the "but for" test, the same cannot be said about claims for accident benefits. When the issue is an insured's entitlement to accident benefits, it is sufficient for her to prove that the motor vehicle crash "materially contributed" to her injuries/medical condition.

The seminal case on the application of the "material contribution" test in the accident benefits context is the Ontario Court of Appeal's decision in *Monks v. ING Insurance Company of Canada*[22]. The Court ruled[23]:

> I agree. There is no indication in the SABS of a legislative intent that an insurer's liability for the accident benefits in issue in this case should be subject to discount for apportionment of causation due to an insured's pre-existing injuries caused by an unrelated accident. The SABS simply states, in clear and unambiguous language, that an insurer "shall pay an insured person who sustains an impairment as a result of an accident" medical, rehabilitation and attendant care benefits (ss. 14(1), 15(1) and 16(1)).
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> Accordingly, where -- as here -- a benefits claimant's impairment is shown on the "but for" **or material contribution** causation tests to have resulted from an accident in respect of which the claimant is insured, **the insurer's liability for accident benefits is engaged** in accordance with the provisions of the SABS.

iii. Examples of Legal Language

Accordingly, "helpful" legal language includes:

- probable;
- likely;
- more likely than not;
- will;

- on the balance of probabilities;
- real and substantial possibility (when addressing future contingencies);
- real and substantial risk (when addressing future contingencies);
- materially contributed to (in the accident benefits context).

Conversely, "unhelpful" language includes:

- may;
- possibly;
- unlikely;
- could;
- can;
- perhaps;
- a chance that;
- lost the opportunity to (with respect to potential past losses or claims).

Tip #4: Ensure the Report is Comprehensive

In order to prepare a comprehensive report, it is important that the expert be familiar with the facts of the case; and review all records which may be relevant to the expert's opinion (e.g. documents, photographs, discovery transcripts, etc.). Although supplementary or addendum reports can sometimes be filed (subject to certain deadlines[24]), once the trial

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[22] [2008] ONCA 269 (CanLII).
[23] *Ibid*. at paras. 95-96.
[24] Pursuant to rule 53.03(1) expert reports must be filed at least 90 days prior to the pre-trial conference. Pursuant to rule 53.03(2), responding expert reports must be filed at least 60 days prior to the pre-trial.

commences, the expert will generally be required to testify within the “four corners” of his report.

The four corners doctrine was explained by the Ontario Court of Appeal in the landmark decision of *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*.[25] The issue in *Marchand* was that an expert was being asked to testify on matters that were not directly addressed in his report. It should be noted that at the time of the *Marchand* decision, rule 53.03 did not yet contain the 2010 amendments. Rather, the wording at that time indicated that the report had to contain the “substance” of the expert’s opinion. Presently, the rule sets out a more particularized list of what must be contained in the expert’s report. In any event, the “four corners” concept still extends to the new *Rules*. The Court stated[26]:

> In our view, these cases indicate that the "substance" requirement of rule 53.03(1) must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert's opinion, and the basis for that opinion. Further, while testifying, an expert may **explain and amplify what is in his or her report** but only on matters that are "latent in" or "touched on" by the report. An expert **may not testify about matters that open up a new field not mentioned in the report**. The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report.

Accordingly, the expert must include in his report all of the topics that may need to be addressed at trial.

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[25] (2000), 51 O.R. (3d) 97 (CanLII) [*Marchand*].

Tip #5: Be Comfortable in the Witness Box

Of paramount import, the expert must be well-briefed for trial. The better the briefings, the more comfortable the expert will be in the witness box.

i. Trial Briefings

While lawyers are well-aware that experts carry on busy practices and sympathize with the inconvenience caused by trial briefings, the fact is that these briefings are absolutely critical and are beneficial to the expert. Briefings are not only used to go over the expert's opinion, but also to review areas of critique that may arise in cross-examination. In that sense, briefings educate the expert in advance of trial (where the credibility of the expert will be attacked and scrutinized).

Expert briefings should include, but not be limited to:

1. A review of the duty of the expert, in order to prevent the appearance of advocacy, as discussed above.
2. A review of helpful and hurtful legal language, as discussed above.
3. A review of the theories and themes of the case.
4. A review of the facts in the case, especially if those facts have been relied upon for any assumptions or conclusions.
5. A review of other expert opinions in the case, both corroborating and conflicting.
6. A review of any authorities (e.g. textbooks), which may be put to the expert in cross-examination.
7. A review of those flaws in the expert's report that become apparent with the fullness of time, more evidence, and intensive trial preparation.
8. A review of the contents of the expert's file, which may have to be brought to Court.

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[26] *Ibid*. at para. 38.

ii. Oral Testimony

A persuasive expert will:

1. Speak slowly and loudly for all to hear.

    a. If the judge is taking notes, it is helpful to keep an eye on the judge's pace so that he or she has time to write down anything important that is said.

2. Look at the trier of fact when answering questions.

    a. It may seem unnatural to look away from the person with whom you are engaged in conversation, but it is not the lawyer that needs to be convinced of the expert's opinion.

3. Speak in "English."

    a. While sophisticated terminology may sound impressive, if no one understands what the terminology means then the message will be lost. For instance, "he suffered a fracture of the talus" means that "he broke his ankle bone." Often, where the expert forgets to "translate", the lawyer may ask a follow-up question for that purpose, such as "What is the talus?"

4. Be responsive.

    a. It is important for an expert to listen to the specific question being asked and to respond to the question. Doing so will enhance the expert's credibility.

5. Consider using demonstrative aids.

    a. Experts should not be afraid to alert the referring lawyer *well in advance of trial* to a demonstrative aid that might assist the expert when providing his testimony. Demonstrative aids are not necessary all the time, but can be particularly helpful when the evidence will be complicated, lengthy, or involve sophisticated terminology. Demonstrative aids include, but are not limited to: medical illustrations, charts, graphs, photographs, and videos.

CONCLUSION

The use of experts in personal injury litigation is a crucial part of the presentation of the case. In order for the expert's testimony to be permitted and preferred, it is vital for the expert's report to be Rule 53.03 compliant; and for the expert to be authoritative, informed, and impartial.

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