

EXPERT WITNESS ADVOCACY

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During the course of education and training of a forensic scientist, substantial care and attention focuses on aspects of scientific discipline. Familiarity with appropriate laboratory procedures, strict adherence to professional guidelines and standards, correct application of methodology and instrumentation and the detailed completion of scientific reports all receive significant emphasis.

Having regard to the fact that the forensic scientist is regularly called upon to explain his or her observations and opinions in a courtroom setting, however, by comparison relatively little time is spent on the most effective way in which to communicate scientific expertise in the giving of testimony. What follows is intended to provide an overview of the many considerations to be addressed in the role of scientist as witness.

There is a substantial likelihood that a young forensic scientist is told by his more experienced colleagues, by way of an offer of reassurance to overcome the apprehension that may accompany the service of the first subpoena or court notification, "don't worry - the more you testify, the better you will get". Notwithstanding that training methods in the delivery of evidence may be conducted by more senior

forensic scientists, it is less common that prosecution and defence counsel, particularly those that are trained in the teaching of trial advocacy skills, are involved in this portion of education. As a result, not only does the young scientist risk learning by unpleasant experience but, further, early errors may not necessarily be rectified by repetition.

In fact, the process of giving oral evidence in a courtroom setting is so unlike ordinary human experience that it could properly be considered rather “unnatural”. The witness is restricted to answering only the questions asked, and subjected to often vigorous confrontation on cross-examination by a lawyer fully comfortable with the trial process and familiar with the rules of evidence and procedure, in which areas the scientist has received little or no formal instruction. The trier of fact, whether a judge or a jury, will be called upon to carefully scrutinize every word of the testimony as well as the demeanour in which the evidence is given. In the absence of meaningful instruction or critique from a trained educator, increasing experience may be something akin to a golfer with a very fast swing. His game will never have the opportunity to improve, no matter how much he plays.

It is hoped that the principles outlined below will have direct practical application which, with some modifications depending on the system of justice in place, may still prove to have universal value. However, the perspectives offered are based on experience in the prosecution and defence counsel roles in the Canadian criminal justice system.

The Role of the Expert Witness in the Trial Process

Under Canadian law, an expert witness must be found by the Court to be properly qualified to possess sufficient skill and knowledge as to be able to express an opinion, in an area of evidence not generally permitted to the lay witness other than in matters of general and ordinary experience. Further, the opinion to be expressed must be in an area which is relevant to the issues to be decided by the Court and beyond the expertise of the trier of fact. The evidence will be the subject of scrutiny on issues of reliability, particularly if it is proposed to advance a novel scientific theory or technique and, further, must be considered to have sufficient probative value that it would outweigh any prejudicial effect. Before the witness is allowed to express an opinion, counsel will be called upon to lead from the witness evidence of his or her qualifications to give the opinion on the particular subject at hand. The witness will be limited to those opinions which the judge determines that the witness is qualified to offer and the witness must take care not to answer questions beyond the scope of that level of expertise.

The witness will be permitted to give evidence about physical observations involving the use of equipment or methods which call for a particular skill and experience which have been performed by a properly qualified individual. The witness may choose to rely upon the texts, research, consultations with recognized source material and even information provided by counsel. The witness may be called upon to answer questions involving hypothetical fact situations. However, to the extent that an opinion is based on hypothetical facts, a judge or jury must be satisfied that such facts

have been properly established, as a failure to accept such facts will result in a reduction of the weight to be given to the opinion of the witness. Otherwise, an expert is considered the same as any other witness. A jury is told that they may choose to believe some, all or none of what the witness has said and can reject the witness's evidence even though no other contrary expert evidence is introduced.

Under any system of justice, it is critical for the expert to be aware of what may be characterized as “the purpose of the exercise” namely what is the basis upon which the evidence is being offered for consideration by the Court. All aspects of the expert's experience which may be referable to the trial proceedings should be conducted with this ultimate purpose in mind.

Quite apart from the basis for the admissibility of the evidence, any legal system of justice, whether inquisitorial or adversarial, involves the determination of issues based on evidence. The oral presentation of evidence involves the use of language which, in turn, adds significance to the precise use of language. Every witness, whether civilian, police officer or expert, must always be cognizant of the fact that it is the specific language that is used which comprises the evidence, not inferences, assumptions or extrapolations. The words used are considered by the trier of fact to constitute the record of the trial for the purposes of appellate review. Accordingly, the choices made by the witness on the way in which to express his or her evidence are critical to the trial process as the basis for the most accurate expression of opinion.

In addition, the manner in which the evidence is given has its own particular significance to the presentation of testimony. It is my view that an expert is not there simply, to use the Shakespearian phrase, to “strut and fret his hour upon the stage” by delivering answers to questions without consideration of the effect that the manner of such expression may have on the listener. The trier of fact will ultimately be called upon to decide what, if anything, of the witness’s evidence is to be believed. It should matter to the witness whether the evidence being given is understood and accepted, particularly having regard to the time and effort that is involved in the formulation of the opinion. The scientist ought not to be indifferent to the results of that determination, quite apart from the disposition of the case.

The Expert and Counsel

Without question, the expert’s evidence is of significance to the counsel who has chosen to call the witness. Presumably, having regard to pre-trial interviews together with the review of the report and relevant research, counsel has decided, using the necessary judgement and expertise involved in representing a party involved in litigation, that what the witness has to say will be relevant to the case, whether contributing to the proof of guilt/liability or challenging the case for the prosecution/plaintiff.

At the very least counsel is entitled to expect the following:

- the witness has a scientifically valid basis for the opinion. This would include the fact that the opinion falls within a recognized area of

study as well as the fact that the witness has carried out such observations and tests as are necessary, utilizing experience, training, and, as appropriate, consultation with others;

- the expert is possessed of sufficient expertise that he or she can and will be qualified by the Court to give the opinion;
- the expert will give the opinion in Court in the same terms as indicated in the report, consultation with counsel or both including specifically:
 - a) where particular language has been used to represent a level of certainty, the witness will maintain the same language and the same degree of certainty;
 - b) the witness will make at least an effort to maintain that opinion under the rigours of cross-examination, assuming there has been no horrendous error or that counsel has not provided accurate or complete information to the witness.

In addition, although time and intellectual restraint might place some limitation on what the expert can provide, it is desirable that some effort is made to:

- educate counsel on the subject matter of the expertise, as it relates to the salient points of the evidence;
- point out to counsel the limitations, shortcomings and possible problems with the opinion that is expressed;

- make an effort to get on the “same wavelength” with respect to terminology as counsel. Counsel may use words that are part of ordinary parlance for the layperson which may have special significance to the expert. Ideally, counsel will assist the expert in keeping the language clear and understandable. Counsel will also assist in the presentation of such qualifications and aspects of testimony as may follow in a logical progression, ensuring that the witness has been fully briefed on all significant evidence as well as the likely points upon which cross-examination may be anticipated;
- during the course of examination-in-chief, should counsel vary slightly from the terminology or fail to direct the witness specifically to an area that the witness knows, from prior discussions, is significant, it is perfectly appropriate for the expert to help the counsel out to some extent by attempting to deal with the issues in a fashion which may flow naturally from the course of the testimony. Although it has been known to happen, it should not be necessary for counsel to write out every question to the last word in order to provide some measure of certainty that the witness will give the same answer in Court that was provided in the office. Some lawyers have been known to ask a witness, with a moderate degree of frustration, “What question do I have to ask you for you to give me that answer once we are in Court?”

The Expert as a Witness

Having behaved with the appropriate degree of professionalism and responsibility during the course of any testing, calculations, measurements and research as well, examination of all relevant data and evidence, documenting the process under which the opinion is reached and upon which the report is based, a different form of challenge faces the expert in the course of testifying as a witness.

In that regard, it could fairly and properly be stated that the forensic witness is essentially an advocate, not only an expert. It is not suggested that the witness in such circumstances is the proverbial hired gun, paid or retained to put forward the best possible position to benefit the client notwithstanding that that may mean straining the bounds of reason or stretching language to the breaking point – that may be a matter best left to counsel.

Rather, it is fair to say that the expert is an advocate with respect to the opinion which is being given as well as his or her own credibility in doing so. That approach is applicable whether the witness is on permanent staff of a hospital, lab or government agency or retained on an independent basis to provide consultation in an individual case.

It truly makes a difference in a Court as to how the evidence is given and not simply by what is said on the witness stand. An expert on the witness stand is essentially advocating that the opinions expressed are:

- sound, i.e.: they are reasonably based on the evidence in the case as the witness understands it;
- valid based on generally accepted principles in the discipline involved;
- preferable to alternative views;
- couched in terms that convey a degree of certainty which can be properly considered as fair and appropriate in all of the circumstances.

Furthermore, the expert certainly is presenting himself or herself as a forensic scientist whose opinions are worthy of acceptance or, at the very least, is respected as a professional possessed of knowledge, skill and integrity.

It is from this standpoint that the witness develops and maintains a reputation in the Courts which can facilitate, or alternatively devastate involvement in future proceedings. Lawyers and judges are notorious for sharing stories about the fairness and professionalism (or otherwise) of witnesses who have testified in Court and many have particularly long memories.

What's more, court reporters provide transcripts which can be used in future proceedings for confrontation and challenge to credibility.

Accordingly, even a single demonstration of bias, inefficiency, overreaching or ignorance has the potential to undermine the witness's future effectiveness and reliability.

To summarize, expert witnesses must remember the purpose of the exercise including their role in the trial process. They must work together with counsel to ensure the most clear and accurate presentation of the testimony. On the witness stand, the expert must behave with the utmost professionalism, having regard to the effect not only on the immediate trial but future proceedings for the sake of just results and the preservation of a proper reputation.

Preparation for Trial

Preparation for the presentation of testimony begins with the witness's very first involvement in the investigation. Having regard to principles of evidence, whereby counsel for each side will be permitted access to notes, memoranda, test data and other materials which may be developed during the course of investigation and the formation of any opinion evidence, the end of the process must be kept foremost in mind at the outset.

As a result, it is of critical importance that complete notes and records, diagrams, photos, sketches, measurements and samples as well as detailed descriptions of procedures must be retained for the purpose of possible review. While evidence on examination-in-chief might focus particularly on the conclusions with only a general

summary of methodology, the reverse may become the subject of scrutiny by cross-examining counsel. A challenge to methodology, fairness and the ability to recall or present what investigative steps were carried out months or even years before may provide the basis to raise disbelief or challenge the reliability of the testimony.

The expert's report must be fair, complete and accurate, especially with respect to the language utilized. Just as the trial process, with its focus on the language of testimony, requires precision, so too should the report maintain that same level of precision. In almost any jurisdiction, that report provides a basis for examining counsel to appreciate what may form the subject of testimony. At the same time, the report may provide the foundation for cross-examination by opposing counsel.

In an ideal setting, the expert should endeavour to prepare examining counsel about what was involved in the formation of the opinion and how it may be explained. As appropriate, the expert may wish to seek the opportunity to do so. Pre-trial consultation lets the witness explain the proposed evidence in language which may more readily be understood by counsel and, in turn, by the trier of fact. In addition, counsel and the witness may be able to streamline the evidence by omitting such extraneous background information as may only serve to confuse.

In addition, such consultation may enable counsel to understand those highlights of the *curriculum vitae* which may facilitate qualification of the witness by the Court to give expert opinion testimony. Examining counsel may also benefit from a review of

texts or articles relied on by the expert so as to better understand the evidence to be introduced.

A major ethical dilemma may arise when counsel attempts to elicit an opinion which is at the outer reaches of the witness's level of certainty or expertise. Phrases which may provide some indication that this is being sought include "I don't want to put words in your mouth but..." or "So what you are really saying is...". In this sense, the expert is most certainly not an advocate of the cause. The witness may have to think, "Would this opinion stand up to scrutiny by another equally qualified expert retained by opposing counsel? Is the opinion which is being requested within my area of expertise and a fair reflection of the state of scientific knowledge upon which I feel qualified to express an opinion?" If the answer is anything other than "yes" to both questions, the witness should advise counsel that assistance on the point will not be forthcoming.

It is desirable for counsel to meet with the witness prior to trial to provide an outline of the areas intended to be addressed during the course of testimony and the sequence in which the issues will be covered. As necessary, the exhibits which will be referred to should be reviewed to ensure a smooth and efficient presentation of the evidence.

Finally, before testifying, it is important for the expert to review the file contents as well as the report. All of these materials may properly be used by the witness in Court during the course of giving evidence.

Testimony in Court - Examination-in-Chief

There are many suggestions which may be beneficial to the witness on the stand. These comments are equally applicable to civilian or police witnesses. Some might even serve to assist in the performance of counsel. Consideration should be given to the following:

- The witness should be aware of his or her physical presence. Hand positions, body language, posture and movements or mannerisms have the capacity to undermine the credibility of the witness or distract from the content of their evidence;
- Habits such as failing to make eye contact with examining counsel, jingling loose change in one's pocket, fiddling with a pen or exhibits, et cetera may similarly serve to distract;
- The witness should be cognizant of demeanour. How is the witness going to be perceived, having regard to tone, attitude, posture and manner of speech? Arrogant or polite? Overly intellectual or practical and realistic? Confrontational or responsive in a firm, yet fair manner? Uncertain or thoughtful? Not every witness has the capacity to engender affection but the desire should still be to avoid arousing animosity. Judges and juries value qualities such as sincerity, fairness, impartiality, confidence and

thoroughness. A polite, relaxed tone may enable the trier of fact to be more receptive to the evidence presented by the witness;

- Consideration should also be given to manner of speech. The appropriate volume, pace, clarity, emphasis and expression may assist in a judge or jury understanding the evidence;
- The expert must concentrate on every word of every question. On examination-in-chief, it is appropriate to consider what the examining counsel is seeking to elicit. The witness should not “jump ahead” too quickly. Counsel may choose to introduce the subject or specific features on a step-by-step basis and the witness should permit counsel to do so. It may be advantageous to pause with a sufficient level of frequency that counsel may not have to interrupt, should clarification be desired. It is sometimes possible to discern from observing the judge or a jury whether the evidence is being understood and, if not, find a different way to provide a clearer explanation;
- Response to questions: The most preferable answer is the one which is both concise and precise. A witness need only answer what is being asked. Collateral or irrelevant considerations ought not to be included. The response should be applicable to the evidence and issues in the case. A point form outline may assist in the judge or jury being able to

appreciate the opinion proffered. In Canadian jury trials, the trial judge is required to review with the jury a summary of evidence introduced during the course of the trial and relate it to the issues in the case. The expert has the capacity to assist in this regard by a clear presentation of evidence.

Cross-Examination

There are a range of areas which may form the basis for attack by opposing counsel. These include challenging the witness's qualifications, personal experience, bias, inaccuracy, the lack of thoroughness and even the general subject of their discipline.

Further, the witness may be challenged with respect to the opinion lacking scientific validity, the existence of alternative opinions, the evidence in the case at bar which the expert may not have considered or which may change the basis for the opinion. Counsel might even attempt to question the opinion by the use of what may be considered common sense.

How May the Witness Best Deal with Cross-Examination?

It may be worth remembering that the expert has the ability to control the pace of the cross-examination by the speed with which the questions are answered. The witness has every right to be deliberate, answering in a considered and measured fashion. Cross-examining counsel often seek to generate momentum by asking a rapid-

fire series of questions which may call for very brief answers. These may not always be fair or appropriate depending on the form in which they are being asked.

That being said, if a question on cross-examination can be answered succinctly, regardless of whether it evokes the feeling that the witness is making too great a concession, the fair answer should be given without hesitation. A witness who constantly takes issue with counsel's terminology may begin to take on an adversarial posture in the eyes of the judge or jury.

Lawyers regularly seek to use phrases such as, "Is it fair to say...?" or "Is it possible...?" in the hope of extracting an affirmative response. The form or style of question is meant to play on the natural human instinct for a witness to want to appear fair. Appropriate caution should be utilized in responding. The fairest answer is one that is truthful, whatever effect it may have on the outcome of the case.

Questions about possibilities are often based on the lack of absolute certainty in matters of science. One senior scientist, when challenged repeatedly on matters of possibility, simply responded, "Almost anything is possible. If you ask me if I can take my pants off over my head, that's not possible, but aside from that, almost anything is possible." Another senior expert chose to answer more benignly on a matter of possibility, "I would suppose that is possible, but I can only say that in the hundreds of similar examinations in which I, for the record, have been involved, I've never seen it." However, if a suggested possibility is realistic, it has to be conceded.

In a manner akin to that ascribed to counsel retaining an expert, some cross-examiners also seek to entice the witness to the very limits of their expertise and beyond in the hope of taking the witness outside of the zone of confidence that comes from experience and training. It is perfectly appropriate, and in fact recommended, particularly keeping in mind the duty of the witness to the Court, for the witness to indicate that the question calls for a response beyond the witness's expertise;

The use of hypotheticals forms a frequent basis for cross-examination. In this regard, it is essential to take into consideration all components of the question in the formation of any response which may, quite appropriately, commence with the phrase "On the basis of all of the factors outlined in the hypothetical..."

Some counsel choose to interrupt the witness or attempt to unfairly limit the ability to respond fully. Universal recourse available to the expert in such circumstances is a request of the Court (or counsel), "If I might be permitted to explain." Few judges, if any, would prevent an expert from offering an explanation when the opportunity to do so has been requested;

As suggested with respect to examination-in-chief, the expert should be mindful of the importance of demeanour and attitude during cross-examination. At all times, it is desirable to be fair, objective and sometimes even conservative in the expression of an opinion. In fact, the more that cross-examining counsel is harsh or aggressive, the more the witness may choose to answer in a polite and restrained manner.

Re-Examination

In Canada, the trial process permits the counsel who has called the witness to re-examine in order to clarify certain responses given or to deal with new issues which have arisen on cross-examination. Re-examination is not permitted to repeat testimony given on examination-in-chief or to address matters which should have been included in the initial testimony. This step in the trial process may provide a degree of reassurance to the expert under cross-examination that there will remain an opportunity to provide a further explanation, should counsel wish to adduce it, in re-examination.

Conclusion

In summary, the role of the expert witness in Court provides a unique series of challenges, requiring a blend of skill in matters of science, reason, language and communication.

There is no assurance that there will be an improvement in the performance of the witness simply by repetition of any experiences. All expert witnesses would benefit from both initial and ongoing training and evaluation, coupled with the underlying awareness of their role in the trial process.

Over time, the experience of testifying in Court as an expert witness might even become enjoyable!