

## Top Tips for Conducting an Examination-in-Chief of an Expert Witness

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To achieve success at trial it is of pivotal importance that you properly and convincingly present the theory of your case and the evidence in support of it.

In many areas of the law, such as personal injury and medical malpractice, the examination-in-chief of your expert can be indispensable to your ability to convey your case convincingly before a trier of fact.

This paper will present practical tips for conducting an examination-in-chief of an expert witness and some necessary steps to take before you are actually in the courtroom.

### **(1) BE MINDFUL OF THE RULES**

An expert must have his or her findings, opinions and conclusions recorded in a report compliant with the requirements outlined by Rule 53.03(2.1). This report must be served on the opposing party at least 90 days before the pre-trial conference.

A responding expert report must be served at least 60 days before the pre-trial conference, and as of January 1, 2019, supplemental reports are to be served at least 45 days prior to trial, with responding supplementary reports to be served at least 15 days prior to trial.

### **(2) KNOW YOUR EXPERT**

When an expert witness is qualified before the court, his or her CV will be admitted into evidence. Counsel will thus want to ensure that the expert's CV is accurate and up to date.

If counsel is unfamiliar with the expert, it is best practice to do background research to ensure that no aspect of the expert's CV has been overstated or fabricated. You should also ensure that there is nothing in the expert's CV that is contradictory to his or her proposed testimony.

You should address any gaps in your expert's CV, or any questionable aspects of your expert's qualifications, or lack thereof. For example, any gaps in the expert's work history or a qualification of the expert that may have been obtained in a manner uncommon to other professionals in the relevant field should be addressed. This will avoid the possibility of a cross-examination on your expert's CV that will undermine his or her credibility.

If the expert retained is commonly before the courts in the capacity of a litigation witness, you should utilize a legal search engine to see how the expert has been treated by the court in previous cases.

If the expert has received negative commentary from the court, you will want to have knowledge of this and be prepared to address it.

### **(3) PREPARE WITH YOUR EXPERT**

The expert should be made aware of the questions he or she will be asked during the examination-in-chief and counsel should be aware of the answers the expert plans to give. This is particularly important when your expert is less experienced in giving testimony before the court.

You should also review areas and questions that you anticipate will likely come up during cross-examination.

### **(4) KNOW YOUR EXPERT'S REPORT**

An expert's report defines the four corners of the opinion evidence that can be given. As such, counsel should be aware of the parameters of the report and ensure that the report is compliant with Rule 53.

If there is any fundamental evidence you need to prove your case, consider whether a further supplementary report is required.

### **(5) KNOW SPECIFICALLY WHAT YOU WANT YOUR EXPERT TO BE QUALIFIED FOR**

Know well in advance of your examination-in-chief precisely what you want your expert to be qualified for. You should write this down so that you can pass a copy to the judge and opposing counsel during the qualification portion of your examination-in-chief.

If you expect any issues from opposing counsel, you should share the proposed qualifications in advance.

### **(6) CLEAR AND CONCISE QUALIFICATION**

The expert should be led through the highlights of his or her CV that are relevant to the expertise he or she is to be qualified for. Highlights such as academic training, work experience, publications and past proceedings wherein the witness has been qualified as an expert in the delineated area, should be presented to the trier of fact in a clear and concise manner.

Even if the expert is qualified on consent, it is important to review his or her credentials in front of the trier of fact to give further weight to your evidence.

### **(7) ORGANIZATION AND PRESENTATION OF MATERIALS**

In support of a clear, concise and precise qualification of an expert witness, counsel should make use of the available technology in the courtroom and have the expert's CV brought up on a monitor for ease of reference for both the expert and trier of fact.

Further, counsel should plan to have as much of the expert's evidence as possible presented in an easy to digest and user friendly way through the use of diagrams, charts and other visual aids if possible.

### **(8) LEAD YOUR EXPERT THROUGH THE EVIDENCE LOGICALLY**

In keeping with the theme of a clear, concise and precise examination-in-chief, counsel should proceed to lead the expert through the following subject matters in sequence:

- (1) what instructions the expert was given by counsel in relation to the proceeding (i.e. whether the expert was asked to conduct a defence medical assessment of the plaintiff or asked to provide a reply report to the opinions formed by experts retained by the opposing party, etc.);
- (2) the expert's opinions stemming from his or her findings;
- (3) what, if any, documents or information the expert was given that informed his or her opinion;
- (4) what the expert's findings are as a result of what the expert was instructed to do; and
- (5) restate the opinions reached.

**(9) GET OUT IN FRONT OF ANY WEAKNESSES OR HOLES IN YOUR EXPERT'S EVIDENCE THAT MAY COME UP DURING CROSS-EXAMINATION**

The examination-in-chief presents a valuable opportunity to have potential holes or weaknesses in your case addressed and potentially rectified. This detracts from the impact that such issues will have if first brought up by opposing counsel during cross-examination.

In taking advantage of this opportunity it is important, however, to stay within the confines of the expert's report and his or her qualifications.

**CONCLUSION**

A good examination-in-chief of an expert witness can be imperative to the success of a case. This is counsel's opportunity to have opinion evidence proffered that is favorable to their theory of the case. It is also an advantageous time to address potential weaknesses. As such, conducting a concise and convincing examination-in-chief is critical to success.