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How to Introduce Evidence at Trial

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1. Introduction

By the time you get to trial, a great deal will already have happened in your litigation file. Some of this excitement will have been expected and much of it which will have altered your initial sense of how you thought the litigation ought to have played out. Defendants rarely roll over and play dead. Witnesses never hold up during discovery (as well you would hope anyway). Similarly, the pending performance of the witnesses at trial, with the added burden of the angst of the litigation and the effect of the effluxion of time on their imperfect recollections, is surely going to be less than ideal. If the trial is the main event, how is it that, at its start, things seem so stressful and in such disarray? The rhetoric – "its not a tea party"; "it is what it is"; "you have to break a few egg shells to make an omelet" – is never helpful at this point. Trial is stressful.

This paper does not attempt to displace that notion; the goal is to lessen the stress of the unknown. The purpose of this paper is to identify some key elements of trial preparation for the practitioner to consider when getting ready for trial. Trial preparation in terms of advocacy – witness selection, style, demeanor – is profoundly personal. This author would not and could not hazard to suggest winning techniques. Rather, this author merely wishes to raise awareness of key issues so that early consideration can be brought to bear on points that might eventually turn out to be helpful.

2. Start early

As a young litigation associate, I can remember being coached by a seasoned mentor that one should do everything in the course of a litigation file with the view that the "trial is tomorrow." Such a view focuses the mind. Suddenly, the need for case assessment and strategy emerges. Such a view puts a sentinel on counsel's lips; conversations, correspondence and

exchanges on the record automatically become censored. Such a view focuses document review and discovery. Such a view enables adaptation. For example, if your opponent pursues a path on discovery or in an expert report that you had not fully anticipated, you are forced to ask yourself the question: "What will I say about this tomorrow?"

Establishing a mindset of keeping an eye on the trial will (eventually) engender some helpful habits: key documents will be identified; clean copies of cases will be segregated for later use; witness files will be maintained and added to as the case develops. Keeping the file tidy and on track from day one will enable you to drive your efforts into execution which will have the effect of ensuring that precious limited time, as the trial approaches, is not consumed by laborious research or tedious details, when urgent attention is required to be paid to the significant issues (*i.e.*, getting ready). It is worthwhile underscoring the point that when assembling evidence for introduction at trial, if you do not know why you are doing it, you will be overwhelmed when it comes time to do it. Start early by thinking deeply about your case and taking only those steps which will advance your position when the trial begins – tomorrow!

3. Determine the evidence required to support your theory of the case

Supporting your theory of the case with evidence should be distinguished from developing the theory. By time you get to trial, your case theory should have been fully developed. The legal framework of your case should be articulated, the helpful "good facts" and harmful "bad facts" identified, together with strategies for enhancing the former and downplaying the latter. By the time to get to trial, you will want to be thinking about the narrative that you need to play out for the Court and the factual matters you need to lay down, and the order in which to lay them down, to build that narrative.

Some commentators have wisely proposed that, in developing a trial plan, the advocate should start with the closing argument and work backwards[1]. This is great advice. In your closing you will be summarizing the key facts in a narrative fashion. You will apply those facts to the legal framework of your case borne out of your early case assessment. The facts when laid onto that analysis will lead the trier of fact to your asserted conclusion. Facts persuade; the law confirms.

Draft your closing argument. Then, go back and highlight all of the facts, inferences and opinions upon which you need to rely. Extract the highlights and list them. You now have a checklist of facts or factual conclusions (i.e., opinions or inferences) that you will need to establish to make out your case. You should be able to fit the facts into various categories:

1. Facts that do not need to be proven.
    (a) admissions;
    (b) requests to admit;
    (c) examinations for discovery of adverse party.
2. Facts that need to be proven by a witness.
3. Hearsay facts, that will require evidence of necessity and reliability if you need to admit them.[2]
4. Facts in documents that would otherwise be considered to be hearsay but that can be admitted by giving notice under the *Evidence Acts* (federal or provincial).[3]

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[1] Steusser, L, *An Advocacy Primer* (3rd), (Toronto: Thomson Carswell, 2005) at p.3; see also Morton, J.C.; Iacovelli, M.J.; Stienberg, C.D., *Procedural Strategies for Litigators* (2nd), (Toronto: LexisNexis Canada Inc., 2007) at p. 127.

[2] See *R. v. Khan*, [1990] 2 S.C.R. 531 and *R. v. Smith*, [1992] 2 S.C.R. 915 and their progeny.

[3] Section 35 of the *Evidence Act* (Ontario) deals with business records. A party seeking to rely on a business record must give seven day notice to all other parties in the action of the intention to use the writing or business record. Two criteria must be met as preconditions to admissibility: (1) the record must have been made in the usual and ordinary course of business; (2) it was in the usual and ordinary course of business to make such a writing. The Canada Evidence Act has a similar provision except that the major condition of admissibility is that the document be

5. Facts to be proven by a document:

    (a) documents offered to show that something was done or said;

    (b) documents offered for the truth of their contents.

6. Facts required to support expert opinions.

7. Opinions.

8. Inferences:

    (a) natural inferences that can readily be drawn between two similarly situated facts;

    (b) adverse inferences:

        (i) failure to produce witness;

        (ii) failure to produce documents.

9. Credibility issues:

    (a) corroboration;

    (b) facts to be used for impeachment;

    (c) facts which will need to be put to witnesses: rule in *Browne v. Dunn.*[4]

Having identified the required facts and the associated modes (and problems) of proving the facts, the challenge will then be to sequence or structure the presentation of the facts to make the greatest impact on the trier of fact.

This can be a difficult challenge. Whereas your closing will be a seamless narrative selected to draw out the main themes of the case, the delivery of evidence, by its piece-meal nature, tends to go in at trial in a disjointed manner. Although trial judges are looking for

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made in the usual and ordinary course of such business to make such a record. The Ontario Act also specifies in section 55 a ten day notice period where the party intends to rely on a copy of a document, rather than an original.

[4] The rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) is a rule that comes up time and time again with witnesses. The rule is based on fairness and provides that if one intends to lead evidence to contradict a witness, that evidence must be put to the witness in cross-examination to provide the witness an opportunity to explain it.

anything to make their assignment easier – after all, the trier of fact is learning as well as absorbing as the trail proceeds – trial judges are accustomed to the nature of evidence. They know that one of the purposes of admitting facts into evidence is to build a record on which an appellate Court can conduct meaningful appellate review. The overriding concern to the advocate at this stage is to make sure it is all there. This is akin to a *necessity* point. Once you know you have it all, the next step is to consider whether, in putting it in, the evidence can be staged in such a way that its presentation to the trier of fact can enhance its persuasive value. This comment relates to the usual array of advocacy issues: context before detail; start strong, finish strong; deal with "hard facts" in chief when they can best be subordinated; point first advocacy; transition from area to area with headlines. These considerations are always subject to the vagueness of scheduling: for example, a witnesses may only be due on certain days and trial judges (who have families and other commitments too) may have their own preferences. Flexibility and adaptability are traits which serve the trial lawyer well.

All of that said, the trial lawyer should have a plan for the way in which the case is going to be presented – making sure that as the case is presented all of the items on the list find their way into the evidence. You may wish to consider preparing an exhibit list, making sure that each fact is identified together with a note about the witness through whom the fact will be proven. As the trial unfolds, you can check off each exhibit (and indicate its exhibit number). When it comes time to prepare the examinations-in-chief of the witnesses, this checklist will be helpful in identifying the exhibits that each witness will need to prove.

4. How to introduce the evidence at trial

In order for the evidence to be useful to you in your closing argument, you have to have it admitted. Evidence goes in through witnesses and documents. Opinion evidence is tendered

through experts. All evidence is subject to it being admissible. Admissibility requires adherence to the rules of evidence and the consideration of evidentiary principles. As a general rule, evidence has to be relevant and probative. A relevant matter is one that engages or deals with an issue raised in a proceeding. If evidence is probative, it will say or amplify something about that matter. If evidence is relevant and probative, generally speaking, it is admissible unless: (a) it is excluded by an exclusionary rule; or (b) its prejudicial nature outweighs its probative value. The typical exceptions to the general admissibility rule are hearsay and opinion evidence.

Hearsay. An out of Court statement offered to prove the truth of its contents is a hearsay statement. The common exceptions to the hearsay rule are:

1. the evidence is being offered to show that the statement was made (not for the truth of the statement);
2. evidence that meets the test of reliability and necessity;
3. admissions made by an adverse party;
4. declarations against interest;
5. business records where notice is given; and
6. business records where it is established by someone with personal knowledge of an event, whose duty was to record such an event as part of that person's ordinary course of business, that the business record was made at or near the timing of the event (common law exception).

It is not the purpose of this paper to deal with the law of evidence and, in particular, hearsay evidence. However, in thinking about the evidence, and how to get it in at trial, the advocate needs to be mindful of hearsay, as hearsay objections when they are sustained can have a jarring effect on a case. This is particularly disconcerting where, with advance planning, there might have been ways to overcome hearsay objections. For example, in *Pfizer Canada Inc. v.*

Apotex Inc.,[5] Justice Mosely of the Federal Court refused to admit out of Court statements of a key medical researcher and a librarian about the availability of the researcher's doctoral thesis:

> 111 Apotex relies upon two exhibits … These exhibits are two affidavits that were filed in proceedings in the United Kingdom. The first UK affidavit was, on its face, made by Dr. Bush and attests to the presentation and defence of her dissertation in the fall of 1992 and its filing with the thesis and dissertation advisor at UCLA. The second UK affidavit was made by the thesis advisor attesting to the filing of Dr. Bush's dissertation on December 3, 1992. She states that on May 19, 1993 one of the copies provided by Dr. Bush was forwarded to the UCLA biomedical library and the second, a few weeks later, to a commercial organization, University Microfilms International, which stores abstracts. The dissertation was also apparently available to anyone who might attend at the advisor's office and ask to read it.
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> 112 [The evidence must be …] confined to facts within the personal knowledge of the deponent. This embodies the common law rule against hearsay, the rationale being that evidence in an affidavit must be capable of being tested by cross-examination of the affiant …
>
> 113 There was no attempt in these proceedings to rely upon s. 23 of the *Canada Evidence Act* to seek to have the UK evidence admitted under that statutory exception to the hearsay rule. Even where s.23 is engaged, relevance and admissibility must still be established: *Merck & Co. v. Apotex Inc.*, 2005 FC 755, 41 C.P.R. (4th) 35 at paras. 60-61.
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> 114 [… T]he decisions of the Supreme Court in *R. v. Khan*, [1990] 2 S.C.R. 531, [1990] S.C.J. No. 81 and *R. v. Smith*, [1992] 2 S.C.R. 915, 94 D.L.R. (4th) 590 have dramatically clarified and simplified the law of hearsay. The governing principles are reliability and necessity. In the present case, reliability is not at issue. The question is whether it is necessary to receive it in this form. There was no procedural bar to Dr. Bush, the dissertation advisor or another witness [… from testifying] in this proceeding to establish when the thesis was published or otherwise made available to the scientific community.
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> 115 … Apotex has submitted no evidence that it was impossible or difficult to secure direct evidence regarding the availability of this thesis at the relevant time …

The contents of the thesis were relevant but the party proffering the hearsay evidence was not able to rely on them. In subsequent litigation, however, the medical researcher testified directly.[6]

The trial lawyer does not want to go overboard in calling witnesses, but the exercise of vetting out hearsay will assist in identifying whether the most appropriate witness have been called and whether there are gaps on important issues that need to be filled.

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[5] *Pfizer Canada Inc. v. Apotex Inc.*, 2007 FC 971, 61 C.P.R. (4th) 305; aff'd 2009 FCA 8, 72 C.P.R. (4th) 141

[6] *Pfizer Canada Inc. v. Novopharm Ltd.*, 2009 FC 638; aff'd 2010 FCA 242; leave to S.C.C. granted [2010] S.C.C.A. No. 443

Best Evidence Rule. The best evidence rule has been around since at least the 18th century. At that time, a Court stated that "…there is but one general rule of evidence, *the best that the nature of the case will admit*."[7] The best evidence rule is now generally limited to the contents of documents, for example, correspondence and will likely apply to modern methods of strong data. The rule is premised in the point that the best evidence will be that which is original or the most accurate. The rule is seldom used. If used at all, it will be used to diminish the weight to be applied to the evidence; it rarely affects admissibility.

"Best witnesses." Coupled with best evidence rule is the maxim that all evidence is to be weighed in accordance with the power of a party to produce it[8]. While the best evidence rule would pertain to documents and physical exhibits, Wigmore's maxim relates to the calling of the appropriate witness. The former is rarely applied. The latter is oft applied. While there is no obligation to call every witness and certainly (subject to ethical rules) no obligation to call a witness whom you know to be harmful, it is often the case that your opponent will charge that you failed to put the right witness forward – that you "hid the ball." Of course, if the witness is not under the control of you or your client, you can brunt any attack. If, however, the witness is one you control, you must assess whether you are putting the right witness forward. Failing to put forward a relevant witness may result in an adverse interest being drawn against your client. For example, consider these observations from Justice Barnes of the Federal Court:

> [The witness'] attempt to use hearsay evidence in this manner is completely unacceptable and this evidence is inadmissible. If the responsible laboratory technician was available to speak to [the witness] she was presumably available to [testify…]. [The party's] failure to produce [evidence] from the responsible laboratory technician and to thereby open up the possibility of a cross-

[7] *Omychand v. Barker*, (1744), 1 Atk. 21, 26 E.R. 15 (Ch.)

[8] John Henry Wigmore, Evidence at Trials at Common Law, Vol. 2. § 285 (Toronto: Little, Brown & Company, 1979)

> examination on this important evidence leads me to draw an adverse inference and to conclude that [the witness], at a minimum, overstated the significance of what he was allegedly told.[9]

5. Mechanics of marking

Getting a document marked as an exhibit follows a fairly systematic pattern. First, the document is given to the witness. For example, if the document is a memorandum, you might say: "I am showing you a memorandum dated March 9, 2012." At that time, you will hand a copy of the document to opposing counsel, or identify the location of the document in the document brief[10]. You will then ask a series of questions to lay a foundation for the document:

1. Qualify the witness' testimonial capacity: "Do you recognize this document?"

2. Authenticate the document by having the witness confirm that the document is what it purports to be:

   "Please explain what this document is?"

   Or, "this document was authored by you?"

   Or, "you are indicated to have been c.c.'d on this memo: you would have received this memo on or about its date?"

3. Tender the document as an exhibit and have it marked. Exhibits are marked sequentially with numbers.[11] Sometimes, the relevance of an exhibit has to be established before it is marked. In those instances you would ask questions about the document:

   "Q: I'm showing you a paper published in 1988 in the New England Journal of Medicine. Do you recognize it?

   A: Yes, I am an author of that paper. [The fact that the witness had authored a paper does not establish relevance.]

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[9] *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2008 FC 13.

[10] Some commentators will say that in today's modern civil litigation system, in which there are to be no surprises (or ambushes), all exhibits should be produced in advance to approaching counsel before they are shown to the witness: see Lubet, S., adapted by Block, S. and Tape, C., *Modern Trial Advocacy Canada* (2nd), (Notre Dame: National Institute of Trial Advocacy, 2000), at p. 297.

[11] *Federal Court Rules*, Rule 276; Ontario *Rules of Civil Procedure*, Rule 52.04

Q: On the second page of that article you say, "the treatment of the disease was a Holy Grail." In saying that you meant to convey that in 1988 no one had conceived of how to treat the disease?

A: That is correct. People had theories, but no one had done it.

Q: May I please mark that article as the next exhibit."

In the foregoing example, once relevance had been established, the document was marked as an exhibit.

4. In the instance that a witness is not able to fully authenticate a document, the exhibit may be marked for identification (marked with a letter). It is then subject to further proof from another witness.

5. Now, use the document. Take the witness through the portions of the document, particularly the most important passages in the exhibit. Go slowly at this point, as you want to give the trier of fact time to read and absorb the document in addition to hearing the witness' testimony on the point. (As one judge said to the author: "I can read. I can write. I can listen. I can do at most two things at once.")

6. Once a document has been introduced into evidence, the exhibit may be used on the cross-examination of other witnesses, provided the document is relevant to that subsequent witness' testimony.

Counsel are often urged by the Court to submit joint document books which house the exhibits. In cases where there are many witnesses, a document book should be prepared for each witness. The purpose of the joint or witness books is not to dispense with authentication (unless authenticity has been admitted) but rather to make the manipulation of the record more manageable for the Court. While documents may be admitted as exhibits, they are not proof of the facts mentioned in them unless confirmed by a witness as being true, or unless there is an agreement on record between the parties as to the purposes to which that document may be put.

6. Ethical issues associated with entering evidence at trial

Rules of Professional Conduct. We work within an adversarial system where advocates have to zealously and fearlessly represent their clients' interests – to ask all questions that have to be asked, no matter how uncomfortable they might be. However, our zealous advocacy does have limits. Advocates, as officers of the Court, must adhere to the *Rules of Professional Conduct*. There are two rules that are particularly important to the topic of introducing evidence at trial:

1. you cannot lead evidence that you know to be false; and
2. if you submit evidence that you later find to be false, you must correct the record at once.[12]

False evidence. Rule 4.01 of the *Rules of Professional Conduct* sets out a general mandate[13] and a list of prohibitions.[14] These prohibitions include the rule that the advocate cannot lead evidence that it knows to be false. Rule 4.01(2)(e) sets out the proscription, together with other elements which all have as their foundation the need to act with honesty and integrity. Rule 4.01 provides, in part, as follows:

> 4.01 (1) When acting as an advocate, a lawyer shall represent client client resolutely and honourably within the limited of the law while treating the tribunal with candour, fairness, Courtesy, and respect.
>
> (2) When acting as an advocate, a lawyer shall not
>
> …
>
> (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonorable,

[12] A third rule for discussion might be that the advocate should not use inadvertently disclosed confidential information. However, in almost twenty years of practice the writer has never encountered a situation in which information that I have inadvertently disclosed has been used against him.

[13] Rule 4.01(1)

[14] Rule 4.01(2)

…

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what out to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of the statute or like authority,

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,

…

(i) dissuade a witness from giving evidence or advise a witness to be absent,

(j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(k) needlessly abuse, hector, or harass a witness,

…, or

(m) needlessly inconvenience a witness.

Correcting the record. Rule 4.01 (5) provides that a lawyer who has unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of this rule and who discovers it, shall, subject to rule 2.03 (confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it. Put another way, if you have led evidence that you now learn to be false, you must fix it.

These issues will arise: when they do, they can be stressful. However, as with most things, bringing the matter forward quickly for resolution is, and will always be, the right thing to do. For example, in a recent matter for Justice Phelan in the Federal Court,[15] the evidentiary phase of the trial had closed and the matter was under reserve. Information came to light which

[15] *Varco Canada Ltd. v. Pason Systems Corp.*, 2011 FC 467; 92 C.P.R. (4th) 399

was said to paint some of the trial testimony as inaccurate. The plaintiff's counsel promptly brought the matter to the attention of the Court, and was commended by the trial judge for doing so[16]. Taking this case as an example, when counsel becomes aware of an inaccuracy or a falsity in the record, counsel should promptly advise the other side and the Court.

It will often be the case that new documents are discovered. Once, a senior trial lawyer with a great, long-standing reputation was once contacted long after a matter had concluded by an opposing (younger) lawyer who, on another matter for the same client, had unearthed another box of documents touching on the issues in the first case. The younger lawyer, expecting a blast of the "guns of Navarone," was pleasantly surprised, after answering a question of whether there was anything material in the box, to receive a comment from the senior to the effect that, "there is always something new … in every case." The point of this anecdote is that you have to be able to work with your opposing counsel. In preparing for trial, your relationship with opposing counsel will be strained, as you each fervently advance your clients' position. However, you must try to conduct yourself such that your opponent can trust you to work effectively through ethical issues with integrity.

7. Witnesses

Generally speaking, evidence at trial is given by witnesses who appear before the Court. As mentioned above, the evidence must meet the requirements of relevance and materiality. A witness must give evidence based upon his or her own personal knowledge.

[16] *Ibid*, at para 4.

Witnesses will often voluntarily appear. This is, for any number of reasons, preferred. Many books on advocacy will advise you to issues summon (or subpoenas)[17] even for friendly witnesses, just to make sure they show up. You will have to assess the need for a summons. Clearly, if the witness is not friendly, you will have to serve a summons and the accompanying attendance money. If the witness needs to be compelled to testify, there are a number of options to consider. If the witness resides in the jurisdiction, the potential witness can be served with a summons or subpoena requiring that person to attend. Make sure that you think through the witness issues as you may need to consider the *Interprovincial Summonses Act* if you are in an Ontario proceeding and your witness is in another province.[18] If the witness resides beyond the jurisdiction of the Court, the party can ask the Court to issue a letter of request, to be directed to a Court in the jurisdiction in which the witness resides. If you are going down the route of pursuing a letter of request, plan for this many months in advance of the trial. In either case, the summons and Letter of Request will detail those things in the person's power possession and control that the witness needs to bring to the proceeding.

What if I have a witness who cannot testify at a later date because of time or location? If you have a witness who because of some good reason (infirmity, future medical condition, 50th Anniversary of the Guild of Scotch-tasters) cannot be compelled to testify, it is possible to seek an order to take that witness' testimony on commission in advance of trial. In the *Varco* case, referred to above at note 15, the trial judge traveled to Texas to take the evidence of a witness.

[17] The form of summons is specified in Ontario: it must be in Form 53A and must be signed by the registrar. A summons to a witness must be served on the witness personally, together with attendance money. Proper service and payment may be proved by affidavit. In Federal Court, subpoena may be issued using Form 41.

[18] See Rule 53.06 of the *Rules of Civil Procedure*.

The foregoing does not apply to expert witnesses. If you are putting forward an expert, it will be your job to ensure that the expert is made available for cross-examination.

8. Expert Witnesses

In Ontario, the *Rules of Civil Procedure*, provide that an expert report shall be served no less than 90 days before the pre-trial conference. An opponent may call an expert to respond, whose report shall be served no less than 60 days before the pre-trial conference. Supplementary reports are done 30 days before the trial. In Ontario, these time limits are subject to the rule requiring parties to agree, within 60 days after the action is set down for trial, to a schedule for the service of the principal expert reports (i.e., the 90 day and 60 day reports).

In Federal Court, the expert presents the expert opinion in an *affidavit*. In any proceeding in the Federal Court, leave is required to call more than five expert witnesses, see Rule 52.4 (1). Expert witnesses in Federal Court have to agree to be bound by a Code of Conduct for Expert Witness (attached to this paper as Appendix A). The expert affidavits are required to be filed as part of the pre-trial conference memorandum. At a pre-trial conference, the Court will deal with the issue of the timing of additional or rebuttal affidavits.

The Federal Court practice expressly provides that a disqualification objection to an opponent's expert should be raised as early as possible[19] and, at any event, in the pre-trial conference material[20]. The Ontario Rules of Civil Procedure do not expressly provide for objection to be raised at the time of the pre-trial. However, given the large number of extensive

[19] Rule 52.5(1)

[20] Rule 52.5(2)(b) and Rule 262(2)

matters raised, prudence would dictate that if you had an objection to make, you would make it at the pre-trial conference.[21]

In Federal Court, the rules of practice were recently amended to permit expert conferences – a topic colloquially referred to as "expert hot-tubbing", Rule 52.6. This practice, widely discussed and debated among practitioners in Canada and in many foreign jurisdictions, was introduced to assist the Court in getting down to the hub of the issue in conflict between the experts. The expert conference may take place with the parties and their counsel present – or not! The conference may take place with a judge or prothonotary present, although this is likely to be someone other than the trial judge. While a joint statement prepared by the hot-tubbing experts is admissible at trial, the discussions between the experts at the conference are not to be disclosed absent consent of the parties: Rule 52.6 (2), (3), and (4).

The first step in expert testimony is to qualify the expert witness. The witness is called and the first questions asked are intended to elicit the expert's background and credentials. The examiner is given some latitude to lead the witness through the qualifications. Following the qualification of the expert, the witness is tendered to the court as an expert in a particular area. There might be cross-examination on the qualifications of the expert by the opposing party at this juncture.

Once the witness is qualified, the examiner should take the expert through the expert examination-in-chief being sure to identify all factual assumptions that the expert has made. It is important that the expert stay within the confines of the expert report and the expert's defined area of expertise.

[21] RRO 1990, Reg 194, s. 50.06 (superseded by O. Reg. 438/08, s.47)

There will be instances, where because of time constraints, when you will be asked whether the expert's evidence-in-chief can be given by the filing of an expert affidavit. The expert would attend at trial to be cross-examined. Try as you might to resist this practice unless you know that your witness will be a star on cross-examination. In cross-examination, the witness will be forced to answer leading questions and will be on the defensive throughout. By having the expert testify in chief, particularly through the warm-up of reviewing the qualifications of the expert, you will give the Court a greater opportunity to take a liking to your witness.

9. Demonstrative Evidence

Except with leave of the Court, no demonstrative evidence prepared or obtained for use at trial is admissible in evidence at trial, other than in the course of a cross-examination, unless at least 30 days prior to trial all other parties have been given an opportunity to inspect it and consent to its admission without further proof. Even when notice is given, the evidence may be struck. For example, in *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd*.[22] Justice Heneghan of the Federal Court considered a very live type of demonstrative evidence:

> 22 Prior to commencing the cross-examination… the Plaintiff attempted to provide a laptop and a copy of the computer software to the witness, in order to have [the witness] demonstrate searches of the software she had conducted. The Plaintiff wanted to adduce this evidence in order to contradict a "very serious allegation" made …
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> 24 In my opinion, there was a substantial risk in allowing the demonstration of the program since the machine upon which it would be run would not be available as an exhibit.

In Ontario, the decision of the trial judge to admit demonstrative evidence is discretionary: see *Draper v. Jacklyn*, [1970] S.C.R. 92; *Shipman v. Antoniadis* (1975), 8 O.R. (2d) 449 (C.A.); *Marchand (Litigation Guardian) v. Public General Hospital Society of Chatam*

[22] 2011 FC 340, 92 C.P.R. (4th) 6

(2001), 51 O.R. (3d) 97 (O.C.A.) at para. 109. It is always a good practice to show your potential demonstrative exhibits to opposing counsel ahead of time. If an objection is made, it can be resolved by the trial judge where the test is whether the information is tied to the record, is probative and is not prejudicial: see for example, *Reis v. Doman*, [2004] O.J. No. 5024, 10 C.P.C. (6th) 305 (Ont. S.C.J.), which gives a view of the Court's analysis in accepting or rejecting demonstrative evidence:

> 1 At the commencement of trial, the plaintiff's counsel brings a motion for … an order … granting the plaintiff permission to refer to demonstrative evidence consisting of the medical illustrations and photographs of the plaintiff's hip injury… The plaintiff intends to tender and prove these illustrations and photographs during the course of the trial of this action …
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> 5 Counsel for the plaintiff argues that all of these illustrations are demonstrative aids which would be used during the trial to inform and assist the jury in understanding their responsibilities. He argues that their probative value outweighs the prejudicial effect.
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> 6 Counsel for the defence on the other hand argues that all these depictions will have an inflammatory effect on the jury and that the prejudicial effect of allowing them to be tendered into evidence far outweighs the probative value. The defence argues that this is especially true with respect to the fourth illustration which depicts a possible future outcome that does not currently exist and which may never occur.
>
> 7 I have examined each of the illustrative aids that counsel intends to tender. As well, I have carefully considered the positions of both counsel and I am of the view that the first three illustrative aids are informative depictions which will be of great assistance to the jury in their overall understanding and assessment of the evidence. I find those illustrations are not inflammatory or excessive and that their probative value far outweighs their possible prejudicial effect. I therefore find that the plaintiff is allowed to use the first three illustrations to aid the jury in understanding the evidence.
>
> 8 With respect to the fourth illustration, I agree with defence counsel's argument and rule that it is not admissible as its prejudicial effect in this case far outweighs the probative value. This illustration is a concept of possible future outcome, not a reflection of the current state of the injury. There is no certainty that what is depicted in the illustration will ever be a reality. Therefore, this illustration ought not to be tendered into evidence nor referred to by counsel.

10. Basket Clause

The Ontario Rules of Civil Procedure provide some general provisions, or "catch-alls", for lack of a better word, to remedy oversights. Rule 52.01 provides that where through accident, mistake or "other cause" a party fails to prove some fact or document material to the

party's case, the judge may proceed with the trial subject to proof of the fact or document afterwards at such time and on such terms as the judge directs. The threshold for invoking the rule is high. But, it is available in appropriate cases. This rule is not intended to assuage litigation remorse: where the evidence was available and could have been called but was not due to a deliberate decision, the rule will not be involved: *Kay v. Caberson*, 2010 ONSC 6693 (S.C.J.); *Kelly v. Palluzzo* (2005), 23 C.P.C. (6th) 91 (Ont. S.C.J.). It is better to rely on the rule before the trial has concluded. Indeed, the Courts have held that the discretion of the Court to re-open evidence at trial must be used sparingly and with the greatest of care: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983.

Similarly, if you are faced with a situation where you or your client has:

(a) failed to disclose a document, in which case Rule 30.08(1) would preclude the document from being relied on;

(b) failed to answer, or correct an answer to, a question on discovery;

(c) failed to timely serve an expert report; or

(d) failed to disclose a witness under Rule 76.03.

you can seek leave of the Court to have the evidence admitted: Rule 53.08. The Court shall grant leave unless to do so will prejudice or will cause undue delay. In Federal Court, a trial judge may convene a trial management conference, either before or during the trial, to consider any matter that "may assist in the just and timely disposition of the action".

11. Conclusion

"Nothing matters but the trial." This writer has heard that a thousand times. If one were to adopt the view that the "trial is tomorrow," as has been suggested above, that statement would be true. However, it might be preferable to state that, when it comes to maximizing an outcome

from a trial, there is nothing more important than trial preparation. Thinking through the steps and the evidentiary needs, developing the narrative and planning the foundation for the full drama of the trial will increase the likelihood of victory. When all is fully prepared, the drama of the trial can be fully enjoyed, even though, as they say, “a trial is not a tea party.”

Appendix A

SCHEDULE

(Rule 52.2)

CODE OF CONDUCT FOR EXPERT WITNESSES

[…]

1. An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.

2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

EXPERTS' REPORTS

3. An expert's report submitted as an affidavit or statement referred to in rule 52.2 of the *Federal Courts Rules* shall include

[…]

(*b*) a description of the qualifications of the expert on the issues addressed in the report;

(*c*) the expert's current *curriculum vitae* attached to the report as a schedule;

[…]

(*f*) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;

[…]

(*i*) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;

(*j*) any caveats or qualifications necessary to render the report complete and accurate, including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise; and

(*k*) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.

4. An expert witness must report without delay to persons in receipt of the report any material changes affecting the expert's qualifications or the opinions expressed or the data contained in the report.

EXPERT CONFERENCES

5. An expert witness who is ordered by the Court to confer with another expert witness

[…]

(*b*) must endeavour to clarify with the other expert witness the points on which they agree and the points on which their views differ.

CERTIFICATE CONCERNING CODE OF CONDUCT FOR EXPERT WITNESSES

[…]

CERTIFICATE CONCERNING CODE OF CONDUCT FOR EXPERT WITNESSES

I, *(name)*, having been named as an expert witness by the *(party)*, certify that I have read the Code of Conduct for Expert Witnesses set out in the schedule to the *Federal Courts Rules* and agree to be bound by it.

(Date)

_____

(Signature of expert witness)

(Name, address, telephone and fax number of expert witness)