Working with an Expert
I. Introduction

One of the great benefits that comes with being a litigator is the opportunity to work with professionals in other disciplines in the prosecution or defence of a case. The use of experts in litigation has grown in proportion to the complexity of our world. As our world has become more complex and our understanding of it becomes more sophisticated, there are an ever-growing number of fields of endeavour which fall outside the normal experience of lay persons and which require a person possessing specialized skill and knowledge to assist the trier of fact, whether a jury or a judge.

There are a number of issues to be considered by a litigator when mulling over potential expert evidence. One must first determine in any given situation whether retaining an expert is necessary or desirable. This requires a clear understanding of the legal and factual issues in a case coupled with an analysis of whether tendering opinion evidence is sufficiently “necessary” to assist the trier of fact.

If you have been served with an expert report by the opposing party and are of the opinion that you must retain an expert, whether to respond or to present a fresh stand-alone opinion, you must evaluate what type of expert to retain. This is a frequent issue in personal injury cases. We are all familiar with the concept of the “level playing field” where the court will consider whether a defendant has had sufficient opportunity to conduct independent medical examinations. Simply because the plaintiff has reports from a number of experts, it is generally unlikely that a court will consider this fact as justification for the defendant to have the right to insist on an examination by experts retained by the defence in all of those areas.

Consideration must be given as to how the expert will be employed. There are times when an expert is retained purely for the purpose of assisting the lawyer in understanding technical aspects of a case including the opinion(s) rendered by the opposing party. It is less common for this to be done in the personal injury context than in cases where scientific or technical issues are present. More often in personal injury claims the expert is retained to provide an opinion or responsive opinion; however, it is essential that the role of the expert be understood early on in the retainer since the extent of disclosure to the opposing party hinges on whether the expert will be asked to submit a report. Of course, the duties of the expert can evolve over time which may prompt a further consideration of whether it is a good idea to ask an expert initially retained purely to provide advice to later render an opinion or whether it is preferable to retain another expert for that purpose.
Finally, it is of paramount importance to remember that an expert witness is after all, just a witness. The trier of fact is instructed that, as with any other witness, he/she is entitled to accept some, all or none of what the expert says. As counsel, the only way in which we can minimize the risk of having expert evidence blow up in our face at trial, is to work hard with the expert to provide the most comprehensive and fairly put facts and assumptions to the witness and to ensure that we understand the expert’s opinion as well as the thought process that leads to the opinion.

II. Choosing an Expert

A. Understand Your Case

By the time you have determined that it is necessary to retain an expert, you will already have worked up the file to the point that you have a fairly clear understanding of the legal and factual issues in the case and, in the course of doing so will have identified areas outside the realm of ordinary knowledge and experience. Admittedly, in most personal injury cases, the nature of the injuries will dictate the type(s) of expert to be retained.

In other cases, the choice may not be quite so simple. In a product liability case against a manufacturer for example, you may need to retain an engineer who can identify the means of failure of the product but that same engineer may not possess the knowledge and skill necessary to comment on the issues of the complexity and cost of remedial measures that would have avoided or minimized the risk of failure and rendered the product reasonably safe. By understanding early on what you will need to prove at the end of the day you will ensure that you have chosen an expert or experts who will address all of the matters that you will ultimately address in your closing submissions.

B. Do Your Due Diligence in the Selection Process

There are numerous ways to find expert witnesses. They include asking colleagues, reviewing reasons for judgment (this should always be done before committing), reading trade publications, seeking input from the client, performing Internet searches and asking experts whom you know and trust and who may be able to recommend a qualified colleague in an allied area of practice.

In the context of medical specialists, the sheer number of personal injury actions means that the same experts tend to be used over and over. It is tempting to go with a “known” commodity (i.e., someone who is more likely to provide the opinion that you are looking for). Within reason, it is understandable that two well qualified specialists may reach differing conclusions concerning the aetiology and prognosis of a particular injury and who can in good conscience make the required certification under Rule 11-2(2). However, simply selecting the expert because of his or her willingness to support your client’s case is fraught with dangers since it may make for fruitful cross-examination or enable an opposing expert to point out bias or a failure to acknowledge the uncertainty in the literature, thereby damaging your client’s case.

It is also true that in certain fields (mild traumatic brain injury perhaps being the poster child) the lines are drawn between those specialists who believe that lasting sequelae from MTBI are not recognized sufficiently and those who believe that in the area of personal injury it is over-reported. Clearly, it would be as much of a mistake to send your client to a physician who has a philosophical bent against your client’s claimed injury as it would to send the client to a physician who will support the client regardless of whether the facts and state of scientific knowledge support such a finding.

Ultimately, you as counsel must be satisfied that the expert you have retained will arrive at an opinion where he/she has rigorously applied specialized skill and knowledge to the factual assumptions provided and is therefore in a strong position to defend the opinion. In large part this is a matter of judgment on the part of counsel after taking all reasonable steps to identify a field of suitable experts.
Aside from ensuring a starting point of dispassionate professionalism, counsel should spend sufficient time, where possible, to interview the proposed expert. Above and beyond the requirement of ensuring that a proposed expert possesses a sufficient skill set well matched to the issues, counsel must keep in mind that ultimately the expert will probably need to testify to explain technical aspects of the report and to be questioned in cross examination. Accordingly, the ability to communicate is fundamental to the expert’s function in a forensic setting.

C. Other Developments

When one surveys the legal landscape in BC over the past 25 years, it is clear that the courts have gone to some lengths, and the new Supreme Court Civil Rules have codified aspects of expert evidence with a view to ensuring as far as possible that counsel and expert alike appreciate that the role of the expert is to assist the court rather than to advocate on behalf of one party. The duty to disclose all file materials, instructions and results of tests in a timely fashion combined with the requirement that the expert certify an understanding of his duty are important steps toward ensuring transparency and objectivity in the process.

However, while these developments are significant, other jurisdictions have gone further in training the experts themselves in the responsibilities of acting in the capacity of an expert. Since 1987, The Academy of Experts in Great Britain has trained and provided a system of accreditation of expert witnesses. TAE establishes training by experts for experts to establish and promote high objective standards. While there is participation of the bench and bar in TAE, it was intended to be administered by experts to provide a list of trained and accredited experts in a wide variety of technical and scientific endeavours. I suggest that the work of counsel and of the court would be facilitated were there a system in place in BC which sought to standardize the presentation of expert evidence as far as possible.

III. Retaining the Expert

A. The Retainer

Retainer agreements between a law firm and an expert can be drafted in many ways but all such agreements where there is the likelihood of a report being generated should include certain provisions at a minimum. These include the following:

(a) a brief description of the type of case;
(b) the area or areas of expertise in respect of which the expert is being retained;
(c) the scope of the type of assistance the firm is looking to the expert to provide;
(d) a statement regarding the expert’s duty to the court;
(e) description of duty of confidentiality;
(f) advice to maintain all file material so that they are readily producible;
(g) the trial date (if known) and the possibility of being required to attend trial;
(h) remuneration.

There may be other contract language counsel wishes to insert. In addition, in cases where the expert will be serving solely to critique the work of others, provide technical guidance and assist in preparation for cross examination, the retainer will need to be altered. I will discuss the issues of privilege below. There are two excellent retainer precedents found in the 2011 CLE publication, Expert Evidence in British Columbia Civil Proceedings (3rd edition). In addition, counsel should have in hand a copy of the cv of the expert from the outset.
IV. Communications with an Expert; Reports and Draft Reports

Once the terms of the retainer are sent and agreed to by the expert, the task of preparing the opinion begins. The construction of the report is not complex; however, it is absolutely essential to distinguish between factual assumptions, which are given to the expert, and the opinions of the expert which are his or her own. The absence or insufficiency of factual assumptions curiously does not go to admissibility but rather to weight. Of course, the absence of any or any adequate factual assumptions will entitle the opinion to no weight.

It must be remembered that factual assumptions are provided to the expert. Due to the prohibition against an expert making findings of fact it is not permissible for the expert to draft her own facts. In any event, to permit an expert to do so undermines the entire expert evidence process. The factual assumptions are what counsel understands the evidence to be at the time they are drafted plus the facts that counsel believes will come to light in the trial. Thus, it can easily be seen that the ultimate persuasiveness of an expert opinion will depend not only on the knowledge and skill of the expert but on the established facts upon which the expert is instructed to rely. If the evidence ultimately fails to support the facts and assumptions the extent of that failure will affect the force of the opinion.

One thing that is clear to most litigators is that in all but the simplest cases, the facts have a tendency to change over time. Often the facts will change sufficiently over time that the factual underpinnings of an opinion will need to be restated and in some cases the opinion itself will change. Rule 11-6(6) mandates that the expert prepare and make available a supplementary report where the expert’s opinion has changed and the party retaining the expert still intends to rely upon it. However, where a factual assumption underlying the opinion changes it may also be prudent to serve an addendum discussing the factual changes and their impact upon the opinion, if any. Where the factual assumptions have altered in trial, it is appropriate to alert the expert to the change so that he or she will be able to process how such altered facts might affect the opinion and be prepared to address the issue in cross examination.

Insofar as communications are concerned, there is nothing wrong with counsel having communications with an expert during the preparation of the report and before it is finalized and served. There are good and valid reasons for such communication ranging from clarifying factual assumptions, seeking clarity on certain issues, requesting amplification of certain concepts etc. The very basic point is that the expert in a very real sense owns and is solely responsible for her opinion. Anything said or written by counsel that attempts to qualify or alter the opinion itself is improper and ought to be avoided entirely. The lawyer must assiduously avoid identifying too closely with a client’s cause. A report (or proposed report) that is unhelpful to a client’s cause is unfortunate and presents a situation which may require a work around or taking a different approach to settlement. It is that simple.

As a result of a line of cases, most significantly Vancouver Community College v. Phillips, Barratt, 919870 20 B.C.L.R. (2d) 289, the extent of the duty to disclose the expert file is now codified in Rule 11-6(8). It is clear from the case law and the new sub-rule itself that the production is geared toward all communications, observations and tests which ground the opinion itself.

A. Dual Roles of the Expert

Where the expert is retained not only for the purpose of drafting an opinion but also for the purpose of assisting counsel to prepare to meet the other party’s case and how to cross examine their experts, the retained expert essentially wears two hats. While litigation privilege will not attach to materials made or reviewed in contemplation of an opinion once the opinion is prepared and served, it will attach to services of an expert where those services are directed to assisting counsel in the defence or prosecution of the action other than by way of preparing an opinion.

The policy reason behind this distinction is clear. Privilege, whether solicitor client or litigation privilege is a class privilege that the law seeks to protect. The courts recognize that forcing disclosure of discussions which could have an impact on the manner which counsel responds to the opposing party’s evidence would deal as serious blow to the law of privilege and accordingly, the policy for maintaining the privilege is clear.
However, in the case of work done and discussions had in relation to an opinion, ultimately the expert is being tendered as a person who is there for the sole purpose of rendering assistance to the court. In order to determine if the expert has discharged that role appropriately, it is essential that the process that was undertaken to arrive at the opinion be examined. Without access to all materials pertaining to the opinion the ability to evaluate the opinion is seriously impaired.

Thus, where the expert is wearing the hat of consultant as well as expert witness, it is essential for counsel and the expert to keep separate files for privileged and non-privileged communications. By so doing, counsel and the expert will clearly recognize what is to be produced in accordance with Part 11 and what materials retain their privileged character.

As a subsidiary issue, there is some debate about the obligation to retain drafts. Rule 11-6(8)(b) requires production of the expert’s entire file if it is requested. If the file contains drafts, they must be produced since they may go to the weight of the opinion and the credibility of the expert. The real question is therefore what advice can or ought to be given to the expert in relation to retaining drafts. In my view, when one returns to first principle that an expert is tasked with assisting the court, it is clear that if the expert is in the habit of making and keeping draft opinions, those drafts should be retained and are subject to production. I would like to think that an expert retained for the purpose of providing an opinion would be able to demonstrate a legitimate process of arriving at the final opinion by way of the development of the draft opinions.

B. Support for Opinion

One area on report preparation that deserves mentioning is the right of an expert to refer to and rely upon authoritative texts and articles within the discipline of the expert. In my view, this serves three important functions. First, authoritative, peer reviewed articles which support your expert’s opinion underscore the fact that the expert’s opinion is based upon generally accepted principles. Second, the inclusion of such materials assist counsel to grasp the principles and concepts contained within the expert’s report. Finally, having access to authoritative works is an invaluable tool for cross examining the other party’s expert. References to learned treatises is something that is not done frequently enough in my view.

V. Conclusion

There is no reason to have trepidation when assembling expert evidence. The codification of the procedure in the Civil Rules if followed dutifully will keep one clear of all ethical pitfalls. Careful preparation for engaging the expert by presenting full and meaningful factual assumptions upon which he or she will be asked to rely provides counsel with a means of honing counsel’s knowledge of the case and provides counsel with the opportunity to get ahead on preparing cross examination of the opposing expert.