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# Ensuring Objectivity in Expert Testimony

On the Toronto Commercial List, counsel typically put expert opinions into evidence through affidavits. Although experts must be impartial and non-partisan, affidavits often contain advocacy rather than opinion evidence — language better suited to a factum than an affidavit. In this post, we review best practices for preparing expert opinions, including those in an affidavit.

**The Rules Governing Expert Evidence & Its Admissibility**

Counsel must (and should, in accordance with best practice) educate experts and ensure they comply with their duties, including their duty to provide an impartial opinion and comply with Rules 53.03 and 4.1.

The expert's primary duty is to the Court, not to the party that retained them. Rule 4.1.01 codifies what the Court expects from every expert on a motion, application, or at trial:

- The expert must provide opinion evidence that is fair, objective, and nonpartisan.
- The opinion must address only matters within the expert's area of expertise.
- The expert must provide such additional assistance as the Court reasonably requires to determine a matter in issue.

Rule 53.03(2.1) requires, among other things, that parties serve expert reports with an acknowledgement of the expert's duty (Form 53) signed by the expert.

While the Rule 53 report format and service timelines are trial-oriented, Commercial List judges expect the expert to acknowledge the Rule 4.1 duty in their affidavit, often by attaching a signed Form 53 acknowledgment or including equivalent language in the affidavit. Together, these requirements determine if the Court will admit the opinion and what weight it will receive.

These requirements are explicitly set out in the Practice Direction for the Toronto Commercial List, which directs counsel to ensure expert evidence complies with Rule 53.03(2.1) and to inform their expert witness of their Rule 4.1 duties. Additionally, the Practice Direction (and best practice)

includes directly providing the expert with the language of Rules 4.1 and 53.03 to include in their affidavit or report.

Parties who tender expert evidence that fails to comply with these duties risk challenges to the evidence's admissibility and the possibility the Court will not admit the evidence or will reduce its weight.

A party that wishes to challenge the admissibility of expert evidence may raise the issue at a 9:30, a case conference, or at trial. They may also seek to exclude the evidence through a pre-emptive motion to strike under Rule 25.11 or at the proceeding. Regardless of how a party initiates a challenge to the expert's evidence, Commercial List judges will look for clear adherence to the experts' duties in the affidavit itself and apply the test for the admissibility of expert evidence articulated in *White Burgess Langille Inman v Abbott and Haliburton Co*.

Aspects of an opinion that undermine the expert's duty of impartiality and run the risk of excluding or reducing the evidence's weight include:

- Advocacy or argumentative tone that reads more like a factum than an opinion, or contains legal conclusions ( *Alfano v Piersanti*)
- Being too embedded in the retaining party's litigation strategy; failure to acknowledge their duty as an expert or provide the information mandated by Rule 53.03 ( *Simmermon v Djoudad*)
- Statements regarding witness credibility or making findings of fact based on competing evidence (*Snelgrove v Jensen*)
- Failure to explain the basis and reasons for the opinion, assumptions, or adopting a flawed methodology ( *Bruff-Murphy v Gunawardena*)

**Key Takeaways**

- Ensure the expert includes a Form 53 and 4.1 acknowledgment (or the equivalent language) in their affidavit. The expert's written product (whether affidavit or report) should also meet the requirements of Rule 53, including by defining the scope of their expertise, listing their assumptions, and explaining their methodology.
- Ensure the expert omits legal tests, conclusions about the ultimate issue in the case, or any other argumentative language. The expert should maintain an objective, professional tone, avoiding rhetoric and pejorative characterizations.

- In practice, deficiencies in the expert's affidavit typically reduce the weight the Court affords the opinion, but counsel should be aware that fundamental flaws in independence, foundation, or methodology can lead to exclusion.
- Anticipate case management and challenges pursuant to Rule 25.11 or at trial. Be ready at a 9:30 or a case conference to justify the exclusion (or inclusion) of any contentious material and to seek (or resist) directions to tighten materials.