

Focus HEALTH LAW

Prepping the medical expert witness



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In modern litigation, though trials are few and far between, the prospect of an eventual trial continues to be the infrastructure around which cases are built. The steps in preparing an expert for trial ensure parties identify the issues in dispute and distill complex matters to the essence. While the specific nature of allowable communication between counsel and experts may differ by jurisdiction, universally the courts will be looking to the expert to be an impartial advisor. The expert's evidence will assist the court in understanding complex technical matters in the decision-making process.

The role of the expert is to inform, not to overtake, the role of the fact finder. The expert is held to a high standard and is expected to be impartial and scrupulously honest. The expert must avoid the role of advocate and must demonstrate detachment and objectivity.

Cross-examination is an essential part of the trial process. The evidence will be tested, and its reliability and partialness assessed. The outcome of the cross-examination will factor into the court's assessment of weight to be placed on the evidence.

For instructing counsel, preparation is the key. The lawyer's goal is to assist the expert to be direct, concise, and clear. The expert strives to give evidence in a way that effectively educates the court in a reliable and credible way. Preparation ahead of time, including review of reports, literature, and qualifications, as well as prac-

tical courtroom tips, will help the expert feel at ease as much as possible and ready to present and defend her or his evidence.

The expert will benefit from knowing that during cross-examination the judge will be watching for indications of advocacy, partiality, flawed reasoning, and inadequate underpinning of the opinion. It will be helpful for the witness to understand the process the judge goes through in weighing the evidence and deciding which evidence will be preferred.

The lawyer should also consider the perspective of the expert, as found in a CanLNC Experts survey sent out to 175 doctors and

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nurses who have acted as expert witnesses and agreed to consult with both plaintiff and defence counsel. They were surveyed on their experiences with the legal instruction they had received on

several issues including advocacy, trial, and cross-examination. The survey's response rate was approximately 10 per cent, and revealed an unexpected disconnect between what lawyers want them to know and what they actually know. Instructions currently provided on the issue of advocacy were reported as less than helpful and sometimes contradictory.

“The gap between the information that was received and the practices that are observed was inordinately deficient and compounded by information that I was supposed to be both unbiased, yet supportive of the lawyers' position,” said a Toronto neurologist. Although clearer instruction on this topic may have been included in letters of engagement, the letters were not always read. Some experts reported that their unbiased opinions, when presented to the lawyer, were met with criticism.

On the topics of trial and cross-examination, several experts indicated fear of the process and varying degrees of instruction by the lawyer. An obstetrical nurse said of her first experience in the courtroom: “It was like playing in someone else's sandbox without any of your friends and none of your own toys. I was scared to death.” A vascular surgeon from Toronto stated: “Dealing with physicians is problematic at the best of times since most of us are megalomaniacal prima donnas who love to have our egos stroked. That said, most of us live in morbid fear of being sued, a real but very misunderstood risk. Those of us who have done some medical-legal work might have a bit less fear of the judicial system.”

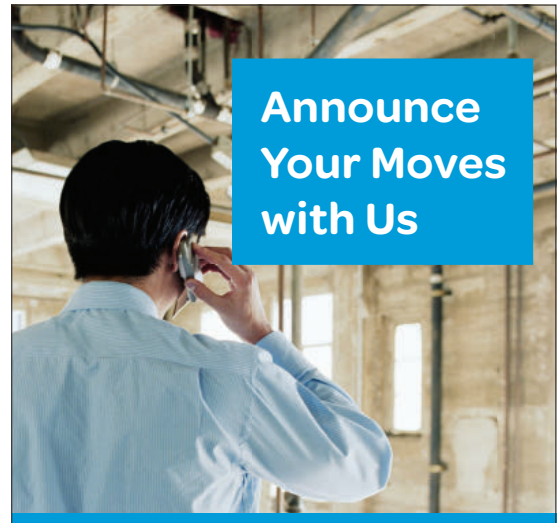
In spite of the somewhat negative feedback received in the survey, many of the respondents indicated willingness for an increased sharing of knowledge, to both learn more and teach more. While

the personality traits and skill sets of lawyers and health-care professionals differ, the desire for professional preparedness is mutual.

It may be helpful for lawyers to understand that the need to be of service is part of what makes nurses and doctors “tick,” and that the concepts of impartiality and advocacy are separate but intertwined in health care. Learning to avoid advocacy may require time, experience and repeated instruction. The adversarial elements of trials and cross-examinations are foreign and frightening to many health-care professionals, enough so that some shy away from the role of expert witness purely to

avoid the courtroom experience. There is opportunity for counsel to provide further instruction to health-care experts, while respecting the legal and moral boundaries of both professions.

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Labelling: Prison, large fine for defying recall

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and minerals, herbal remedies, homeopathic medicines, traditional Chinese medicines, as well as probiotics, and other products like amino acids and essential fatty acids.” The NHP Directorate is part of the Health Products and Food branch of Health Canada, and is the regulating authority for NHP products for sale in this country. According to its website, its mandate is to “ensure that Canadians have ready access to natural health products that are safe, effective and of high quality

while respecting freedom of choice and philosophical and cultural diversity.”

That is all fine and good. The problem is that these products are sold over the counter, without a prescription, and in the current unregulated environment anyone can make whatever they claim they want. Health Canada steps in when a complaint or problem arises, but that isn't proactive. Another problem is the length of time involved to process a recall.

Health Canada's mandate is not an easy one. Medicinal herbs are the fastest-growing segment

of alternative medicine in North America, with as many as 29,000 herbal substances for sale, and it's difficult keeping track of them all. Let's hope that the new legislation becomes law soon, and the government gives Health Canada the resources it needs to better protect us.

Deborah Campbell is one of Canada's most respected compliance professionals, an advisor to the Natural Health Products Directorate of Health Canada, and founder and president of Quality & Compliance Services Inc.