BECOMING AN EXPERT AS AN EXPERT WITNESS

Whether you are anticipating your first courtroom experience as an expert or are highly familiar with the rigors of the witness stand, being an effective and successful expert is a critical skill for anti-fraud professionals. Drawing on the presenter’s extensive experiences, this session explores specific best-practice areas including the retention process, independence, evidence gathering, report writing, pretrial assistance of counsel, attendance at trial, and expert testimony during direct and cross-examination.

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Are You Ready to Go to Court?
You have been approached by a potential client who wants to retain you for a mandate in which you will use your professional fraud examination skills (as you have done on dozens of assignments over the span of your career). In this case, however, you will also be requested to prepare a written expert report to be used prior to and during court proceedings, and (if the case does not settle) you will be required to provide *viva voce* expert testimony in court to explain and defend your written report. Should you accept this mandate?

What Is an Expert Witness?
Before you accept a litigation support engagement, it is imperative to consider—regardless of if you have never been inside a courtroom or have provided expert witness testimony numerous times before—the fundamental question: do you qualify as an expert witness in the current subject for which you are about to be retained?

In addressing this question, the fraud professional should consider that an expert witness must possess expertise and specialized education in a particular subject beyond that of the average person. Such expertise is customarily obtained by virtue of a professional’s knowledge, education, training, skill, and experience. Demonstrated proficiency of the relevant expertise will result in the expert witness being accepted as *qualified* by the court to provide written and oral testimony. The objective of such testimony is to permit the trier of fact to (ideally) rely on the expert witness’s opinion in arriving at the adjudicator’s ultimate decision.

Types of Expert Witnesses
As outlined above, an expert witness differs from an ordinary fact witness in a trial proceeding as the former has been qualified by the court to provide an expert opinion on
a relevant subject. Frequently, such subjects of expertise are technical, scientific, or specialized in nature. Hence, depending on the subject to which the litigation proceedings pertain, expert witnesses might be required who possess a background as a Certified Fraud Examiner, forensic accountant, handwriting analysis professional, law enforcement agent, computer forensics professional, private investigator, Chartered Professional Accountant, Chartered Business Valuator, security professional, academic, medical professional, engineer, scientist, and so on.

No matter how distinguished and comprehensive the background of the professional is, she or he can only be qualified as an expert witness in an area that lies within the scope of that individual’s scope of expertise. In the United States, a Federal Rule of Evidence known as the Daubert standard has been developed that provides certain guidelines for admitting expert testimony in court. Essentially, the trial judge is required to perform the role of a “gatekeeper” and determine that the expert’s testimony is “relevant to the task at hand” and that it is predicated “on a reliable foundation.”

Among the Daubert guidelines to be considered in determining if a witness should be qualified as an expert include whether:

- The expert’s technical, scientific, or other specialized knowledge will assist the trier of fact to understand the evidence or rule on a contentious fact.
- The expert testimony is the result of reliable methods and principles.
- The expert has dependably applied the methods and principles to the facts of the case.
- The expert testimony is based on sufficient data or facts.
While the *Daubert* standard has not been formally become law in Canada, the Canadian Supreme Court has specifically applied this standard in two cases to date.

**Independence of Experts**

While a professional may possess the perfect experience and background to be qualified to provide expert testimony in a matter, she or he may be precluded from doing so on the basis of a perceived lack of independence. While fact witnesses are not required to be independent (and frequently are not), an expert witness is ultimately expected to be completely unbiased in her or his testimony. This is because the sole role of the written or oral testimony of an expert witness is to assist the trier of fact, rather than function as an advocate for one or more of the parties to a matter (advocacy is the responsibility of legal counsel).

Seasoned courtroom observers might have noticed the presence of consulting experts in trial proceedings. Such experts are not allowed to provide oral or written testimony (as they have not been qualified to do so) and hence are not required to meet the onus of independence. The role of the consulting expert is merely to advise their client or their client’s legal counsel on certain technical or specialized topics addressed by testifying experts or that might otherwise arise during court proceedings.

To avoid the perception of being a “hired gun,” an expert witness should not have concurrent business or personal relationships with parties to a litigation matter. In addition, the expert witness’s remuneration must not be contingent on the outcome of the case or quantum of damages or award. To circumvent this potential obstacle, professional fees should ideally be charged on a flat-fee basis for an engagement, a fixed hourly rate, or some combination thereof. Moreover, to the extent possible, an expert’s
professional fees should be collected in full prior to the courtroom testimony to avert the appearance of favoritism.

Other guidance to be considered by experts wishing to maintain the perception of independence is that it is desirable to be retained by a variety of disparate clients and lawyers in one’s professional practice. Similarly, it is recommendable that an expert be retained over time by both plaintiffs and defendants to avoid impressions of bias.

**Mandate Phase One: Preparation of Written Expert Opinion**

Once the expert mandate has been confirmed, the first stage of the process will typically constitute the evidence-gathering phase. While the specifics of this phase are myriad and depend on the particular nature of the mandate, a few general pieces of advice are salient. One predominant aspect is that the expert witness (and all members of the expert’s supporting team, if applicable) should continuously maintain the perception of independence and unbiased attitude from the inception of the mandate.

Another important characteristic for the fraud expert to maintain is professional skepticism. While the client (and opposing party) may make many assertions during the evidence-gathering process, it is incumbent upon the expert to sufficiently challenge each assertion prior to relying on it in arriving at an expert opinion. It is highly likely that the extent to which the expert has adequately satisfied herself or himself as to the veracity of such assertions will be of intent interest to the cross-examining counsel, as well as the judge during trial.

In addition, interviews should only be conducted by qualified personnel (if possible, the interviewer should be the expert witness who will be signing the written expert opinion).
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report and providing *viva voce* testimony at court). This is because expert witnesses are allowed to present hearsay evidence (evidence related to the expert by another party of which the expert has no direct, first-hand knowledge) that will be admissible in court. Ideally, a detailed physical record of the interview should be obtained and preserved by the interviewer (e.g., video or audio recordings, formal transcript, handwritten notes, etc.).

A prudent expert should also be familiar with the specific rules as to which evidentiary information is privileged (i.e., allowed to remain confidential prior to and during trial proceedings) and discoverable (subject to production as evidence); these rules may significantly vary throughout Canadian jurisdictions.

A further quality for the successful expert to recognize during the evidence-gathering phase is that if a required piece of information or data requested is not made available initially, tenacity should prevail. Often, the more resistant a party is to providing certain information, said party is commensurately waving a proverbial red flag directly in your face. In practice, if the fraud expert encounters sufficient resistance, the client’s lawyer should make a motion requesting the judge to order the contentious information be provided by the recalcitrant party (who should, at a minimum, provide a satisfactory explanation as to why such information cannot be obtained). Judges and arbitrators typically afford significant latitude to experts seeking to obtain relevant information and evidence in arriving at their opinion (as long as the requested data is not part of an unrelated “fishing expedition”). Ultimately, if access to essential information is denied or otherwise unavailable, any conclusion expressed by the expert should be qualified and the limitation on the scope of work clearly set out in the report.
Ideally, a written expert report should be balanced between:

- Providing sufficient detailed support explaining approaches adopted, procedures performed, and conclusions obtained
- Containing extraneous information that could be used to weaken the credibility of the expert

In a fraud context, an expert should never express a conclusion of guilt (or innocence) in an oral or written report.

**Mandate Phase Two: Pretrial Assistance**

Typically, the fraud expert might perform a variety of professional procedures between the issuance of the written report and the commencement of trial. Among these activities are frequently included:

- The review and critique of reports from other experts (including those engaged by the same client or the opposing party)
- Preparation of explanatory charts, detailed computations, exhibits, and so on to be filed at trial in support of the expert’s anticipated testimony
- Gathering documents and formulating questions to be put by the client’s legal counsel to the opposing party’s expert during cross-examination

If the fraud expert attends any negotiation strategy settlement sessions with the client or legal counsel, the expert should take not care not to jeopardize his or her independence by offering settlement advice to the client.

**Mandate Phase Three: Attendance at Trial Proceedings**

Expert witnesses are used in a variety of legal proceedings. Testimony from a fraud expert witness is accepted at civil and criminal trials before a judge, a tribunal of several judges, or a jury. Moreover, fraud expert witnesses
frequently appear in hearings (e.g., government panels), arbitration, and mediation proceedings.

At trial, expert witnesses are often retained by a particular party to the litigation (in more complex cases, it is not uncommon to have a litigious party retain two or more experts). However, fraud experts are increasingly being retained jointly by both parties to a dispute; judges have also seen fit to retain their own court-appointed expert. These latter two examples theoretically are perceived to both expedite the litigation process and minimize total professional fees incurred by the parties.

Specific courtroom testimony admonitions and anecdotes will be related during the remainder of this presentation.