



Best Practices for Civil Trials

The Advocates' Society

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THE ADVOCATES' SOCIETY

BEST PRACTICES FOR CIVIL TRIALS

INTRODUCTION

The length and cost of civil trials is a significant problem in Ontario. As Chief Justice Strathy remarked at the Opening of the Courts Ceremony on September 9, 2014, “It strikes me that we have built a legal system that has become increasingly burdened by its own procedures, reaching a point that we have begun to impede the very justice we are striving to protect.” The Chief Justice stated the problem succinctly:

“Our justice system has become so cumbersome and expensive that it is inaccessible to many of our own citizens.”

Other senior judges have expressed similar concerns. Associate Chief Justice Marrocco has commented on the migration of civil cases to private arbitration, with the attendant loss to the evolution of jurisprudence and compromises to the open court principle. In time, the bench and bar could lose the ability to try a broad spectrum of civil cases.

Excessively long trials consume scarce judicial resources to the point that timely access to the courts is compromised. Civil litigants’ concerns about timely and efficient resolution of their disputes must be seen as relating not only to their own interests, but also to the public interest in ensuring the continuing availability of public resources for dispute resolution.

With the judiciary’s encouragement, The Advocates’ Society has taken a leadership role in response to the serious threat to access to justice that lengthy civil trials pose in Ontario.

In early 2014, the Society struck a Task Force comprised of civil litigators and judges to examine the issues more closely. For almost a year, the Task Force researched civil trial practices across Canada and from other jurisdictions, including a review of reports from various institutes, bar associations and governments.

On January 28, 2015, the Society hosted the Civil Trials Symposium, a forum where over 100 participants – judges, lawyers drawn from the private bar and government, and leading legal academics – shared their views on how to ensure the fair and timely resolution of civil disputes through our court system. A consensus emerged about ways in which this important goal can be achieved. That consensus is reflected in this document – the *Best Practices for Civil Trials*.

By publishing these *Best Practices for Civil Trials*, the Society strives to promote a culture in which civil disputes are resolved more frequently, whether by trial or otherwise, in a more accessible, proportionate, and cost-effective manner, without compromising fairness. The goal is to equip trial judges to make properly-informed adjudications in an efficient way; to equip counsel to make the most efficient use of client and court resources; and to preserve our civil trial process for future generations.

Establishing best practices for civil trials is an evolving process and the *Best Practices for Civil Trials* are not intended to be exhaustive. This is and will be a living document. The Advocates' Society is committed to supplementing and amending the *Best Practices in Civil Trials* from time to time with additional means of enhancing the efficiency of the civil trial process.

The focus of the Task Force in developing the *Best Practices for Civil Trials* was on civil trials in Ontario. The Society believes that these *Best Practices* could have application across Canada, with necessary modifications to take into account differences in legislation and court practice. The Advocates' Society welcomes feedback on these *Best Practices* from the judiciary, and from the Society's members nationwide. Feedback on the *Best Practices* may be provided via email at policy@advocates.ca.

PRINCIPLES OF INTERPRETATION

The *Best Practices for Civil Trials* are grouped into four areas:

- A. Case Management
- B. Trial Planning and Management
- C. Use of Documents and Technology at Trial
- D. Expert Evidence at Trial

While grouped into different areas of trial practice for convenience, the Society encourages readers to read the *Best Practices for Civil Trials* holistically, as these four areas are interdependent and interconnected.

The following principles must also be kept in mind when reading the *Best Practices for Civil Trials*:

- The *Best Practices for Civil Trials* are anticipated to be used in both judge alone and jury trials;
- Where applicable, counsel may find it useful to substitute the word “trial” with “hearing”, as the *Best Practices for Civil Trials* can apply to the hearing of applications, hybridized forms of civil proceedings and alternative models of adjudication;
- Counsel should seek to cooperate with one another in the interests of keeping the civil process as fair and efficient as possible;
- The *Rules of Civil Procedure* and the *Evidence Act* provide rules of general application which govern various procedural aspects of civil trials, but generally speaking, those rules should be regarded as minimum standards only; these *Best Practices for Civil Trials* are intended to go beyond what is required by statutory and regulatory instruments, and reflect that counsel should adopt practices that ameliorate the demands of the civil trial process on the administration of justice, while at all times respecting the best interests of their clients;
- Not every Best Practice will be appropriate for every case;
- Regional differences may arise in the application of different Best Practices, based on the judicial resources available and existing regional practices; and
- Trial and pre-trial practices, including the implementation of these Best Practices and the cost involved for each step in the civil process, should always remain

proportional to the matters in issue, and in particular, to their importance and complexity.

A. BEST PRACTICES FOR CASE MANAGEMENT

Best Practice #1: The aim of case management is to increase the efficiency of civil justice without compromising the just determination of cases on the merits. Case management should be flexible to fit the circumstances of each case. As early as possible in the litigation process, counsel should confer about the elements of the proceeding and endeavour to: discuss the likely form and requirements of the final hearing; fix the trial date; establish a timetable for reaching that trial date; and consider and determine whether settlement, in whole or in part, is possible.

Commentary

1.1 Different cases will require different degrees of case management. Case management must be responsive to these differing needs and should not impose uniform and inflexible requirements on all matters. In some cases, once a timetable has been set, the parties will encounter no difficulty moving the case forward and will not require a further case conference until the trial management conference/pre-trial conference. In other cases, multiple interlocutory matters and other issues will arise, and more frequent case conferences will be necessary.

1.2 Case management should be carried out with the following guidance from the Supreme Court in mind:

There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.¹

1.3 At the initial case management conference, some consideration should be given to the form that the final adjudication of the case is likely to take. This will guide the determination of what steps are necessary to get to trial (or some other form of hearing), how much time is necessary to complete those steps and how long the hearing is likely to take. In order that these issues can be addressed, it is essential that counsel attend the initial case management conference having informed themselves about the file and , as much as reasonably possible given the circumstances of the case the likely key issues, number of witnesses and

¹ *Hryniak v Mauldin*, 2014 SCC 7 at para. 27.

documents. Counsel should not be strictly held to estimates given at the initial case management conference. As the case progresses, counsel will learn and think more about the case. As counsel's understanding of the case evolves, further case management conferences may become necessary and the form or length of trial may require revisiting. However, as the trial date draws near and greater clarity concerning the issues and requirements is achieved, time limits should be more firmly established, with a view to ensuring the best use of the court's resources.

1.4 The trial date, and the length of the trial, should be fixed as early as possible. Fixing a trial date early in the process is helpful in focusing the parties on what is required to get the case ready for trial. A fixed trial date may eliminate or reduce disproportionate discovery requests, unnecessary motions and other problems that tend to increase costs and delay the progress of cases.² Fixing a trial date also provides a degree of certainty and predictability to the parties as to when their dispute will be finally resolved, which is a major concern for litigants. Fixing the length of the trial at an early stage will assist the parties in narrowing the issues and focusing the litigation on the essentials of the dispute.

1.5 A realistic timetable should also be set to ensure the parties are ready for trial and to reduce adjournment requests. Deadlines set at case management conferences must be reasonable and meaningful. If deadlines are missed without adequate justification, there should be consequences (including costs) to provide an incentive to comply with the timetable. Counsel should commit to completing the procedural steps necessary to adhere to the timetable, and the set trial date, in order to avoid adjournments of trial dates.

1.6 Case management should also address such other items as the parties and the case management judge see fit. For example, simple discovery disputes often can be addressed at a case management conference or a trial planning conference without the need for a formal motion. The viability and benefits of a mediation or a settlement conference should also be addressed during case management. Counsel should consider engaging in such dispute resolution options as early as is reasonable in the proceedings (for example, if the facts are not in dispute, prior to documentary production), as even partial settlement of a matter will eventually result in a more efficient trial.

1.7 In cases where the case management judge is also the trial judge, case management conferences should not be used as settlement conferences. Generally, it is preferable to separate case management and settlement conferences in order to ensure that the case management function of the conference does not become overshadowed by settlement discussions, especially those that do not succeed.

² The court can grant leave to avoid the consequences of Rule 48.04 when fixing the date.

Best Practice #2: Case management is not mandatory and counsel are encouraged to implement the elements of an efficient proceeding on consent. Where requested by one or more parties, or where ordered by the court, case management should be available.

Commentary

2.1 Some cases do not require case management, the most common example being cases where counsel are able to agree on procedural matters and do not need the court's assistance prior to trial. Assigning such cases to case management would be an unnecessary use of the court's and the parties' resources.

2.2 Where a party seeks to bring a motion, however, the court's resources are being engaged prior to trial. Parties should consider whether case management could be used to resolve interlocutory disputes without the need for a formal motion, thus ensuring the most efficient use of resources. Case management can prevent motions that are frivolous, designed to delay or otherwise provide no real benefit to the proceeding.

2.3 Even where no motion is being brought, judges or masters may identify cases that would benefit from some form of case management, such as cases that are factually or legally complex or involve multiple parties.

2.4 Judges and masters should be able to assign cases to case management of their own accord, including cases involving self-represented parties.

2.5 Counsel should also be able to request case management, and such requests may be made unilaterally. Counsel will often be able to identify problematic or difficult cases at an earlier stage than the court. The fact that case management is available if requested will discourage non-responsive, uncooperative or otherwise unreasonable behaviour by parties and their counsel. In other words, even if case management is not actually engaged, its ready availability can be used to ensure that cases progress in a more reasonable and efficient way.

Best Practice #3: It is preferable to have the same judge case-manage an entire proceeding (including hearing motions and the pre-trial conference), at least until the trial management conference. In some cases, it may be beneficial for that judge also to conduct the trial. In some cases, it also may be beneficial for the case management judge to have expertise in the subject matter at issue.

Commentary

3.1 There are two key benefits to having the same judge case manage a case up to trial, including the pre-trial conference. First, it avoids a judge having to familiarize him or herself with the case each time a conference is held. Second, it provides an incentive for the parties to act reasonably at each step of the proceeding. A party will be disinclined to take a meritless position on a motion and counsel will be disinclined to act uncivilly if they know the next time they want to

bring a motion or informally resolve an interlocutory matter, they will be appearing before the same judge.

3.2 It is also beneficial for the case management judge to have knowledge or experience in the subject area of the case, as it will enable him or her proactively to identify issues and deal with them in less time than a judge who is unfamiliar with that substantive area.

3.3 Consideration should be given to the option of having the case management judge also act as the trial judge. In such a case, the case management judge would not conduct the pre-trial conference or engage in settlement conferences with the parties without the consent of the parties.

3.4 In Toronto Region, case management should be presided over by judges but motions within a master's jurisdiction should be heard by masters, although counsel may request that the case management judge hear all motions as a means of resolving issues and avoiding motions before multiple judicial officers. There should be some co-ordination between case management judges and masters with regard to the scheduling of masters' motions. Case management is most effective when one judicial officer retains ultimate control of the process.

Best Practice #4: In the ordinary course, a case management conference should be available within 30 days of a party requesting one. Case management conferences should be held by telephone or, where permitted by court resources, by videoconference, unless the case management judge orders otherwise. Counsel attending the case management conference must have carriage of the case or possess sufficient knowledge of the case to be able to address any issues that might arise at the case management conference.

Commentary

4.1 Case conferences should be readily available and case management conferences must be meaningful. Otherwise, they can become another procedural delay in moving the case forward.

4.2 Depending on available resources, certain jurisdictions may be able to convene case management conferences more quickly than others. However, creativity and flexibility are encouraged so that case management conferences can be convened without undue delay. Holding the case conference by telephone or videoconference,³ for example, promotes the efficient use of resources and should be encouraged. Case management judges may also wish to deal with some issues via e-mail. Case management judges should retain the discretion to require personal attendance by counsel or parties where appropriate.

³ Other technological options for connecting the parties for a teleconference, such as GoToMeeting™, may also be considered.

4.3 Regardless of the form of case conference, participating counsel must be sufficiently briefed and with sufficient instructions to make the conference productive.

Best Practice #5: Judges, masters, court staff and the bar should be educated about case management so that there is a common understanding about its purpose, availability and use. A bench and bar committee in each judicial region should regularly address case management so that problems are identified and addressed quickly.

Commentary

5.1 Like counsel and their clients, different judges have different strengths and interests. Case management will work best with the participation of judges who are skilled at and interested in case management. Tools available to judges in promoting use of these *Best Practices* include the use of time management techniques and costs awards to advance the litigation process. In implementing new case management procedures, it is critically important that court staff are consulted and trained so that administrative hurdles are eliminated or reduced.

5.2 The bar also needs to be educated about case management and new procedures. Although all counsel should be familiar with Superior Court of Justice practice directions and advisories, more publicity and training may be required in order to inform the bar of the options and expectations relating to case and trial management discussed in these *Best Practices* and elsewhere. This should include interaction and consultation within the jurisdictions in which a member practises to ensure clients are not burdened with unexpected cost consequences for failing to observe the *Best Practices* which have been locally adopted.

5.3 No matter how well thought-out any case management system is, there will inevitably be some unanticipated difficulties. In addition, over time, the needs that case management is designed to address may change. A bench and bar committee in each judicial region should be established to focus on case and trial management. This committee should meet at least twice per year.

B. BEST PRACTICES FOR TRIAL PLANNING AND MANAGEMENT

Best Practice #6: There is no “one-size-fits-all” trial. The trial process should be adapted to meet the requirements of individual cases in the most time- and cost-effective way possible. For example, counsel should consider establishing fixed-time allocations per party within the trial, as well as consider supplementing viva voce evidence and oral submissions with written evidence and submissions.

Commentary

6.1 Effective trial planning involves proactive and organized problem solving. For a trial to be conducted efficiently, counsel must focus on the relevant legal issues

and organize their evidence and submissions accordingly. Reasonable limitations on the trial process can contribute to an efficient trial without impairing the fairness of the process.

6.2 For example, the benefits of a witness giving his or her testimony orally are well-established. However, such benefits should be weighed against the use of the parties' and court's resources at trial. In appropriate circumstances, serious consideration should be given to whether certain parts of the evidence could be introduced in writing, as opposed to *viva voce*. In some circumstances, the evidence of an individual witness can be appropriately offered in part through testimony and in part in writing. The potential for using written evidence should be canvassed in case management, at the pre-trial conference or the trial management conference.

6.3 Oral opening and closing submissions should be time-limited, and counsel should provide written submissions (preferably with page limits) to supplement oral submissions where appropriate or as determined by the trial judge.

6.4 Some trials can be conducted on a "chess clock" basis, where time is equally allocated to the parties and barring exceptional circumstances, counsel are limited to the time allocated. In most cases, counsel should be permitted to allocate that time as desired amongst direct examination, cross-examination and opening statements and closing submissions.

6.5 Subject only to exceptional circumstances, the court should enforce time limits.

Best Practice #7: Counsel should discuss trial planning and strive to reach agreement on procedural issues well in advance of the first day of trial. Where there is disagreement, counsel should take all reasonable steps to ensure that it is resolved prior to trial, whether through case management, at the pre-trial conference or at the trial management conference. Pre-trial and in-trial motions should be minimized.

Commentary

7.1 Parties should strive to agree on the following matters well in advance of the first day of trial:

- Agreed statements of facts;
- Joint document books (whether hard copy or electronic), including identifying the documents comprising the key documents in a case, the use that will be made of them at trial, their authenticity and admissibility and, in appropriate cases, their sufficiency as proof of the truth of their contents
- Method of document delivery and organization for documents not included in the joint document books;

- Number of witnesses and witness coordination, including language and form of testimony and translation;
- Issues relating to expert testimony, including the qualification, admissibility, and scope of expert evidence;⁴
- Preliminary evidentiary issues, including admissibility;
- Time limits on, and allocation between, open and closing submissions and witness examinations, including using a chess clock during the trial itself where the equal division of time is appropriate;
- Compendia, chronologies, casts of characters, *aides memoire* and any other materials that may be handed up or otherwise used at trial;
- Demonstrative evidence to be used at trial; and
- Computers, screens, audio-visual tools and other technology that will be needed or used at trial.⁵

7.2 If parties are unable to agree on these matters, the parties should set out in writing those issues that cannot be resolved and seek to have the matters resolved prior to trial, through a case management, pre-trial or trial management conference.

7.3 The joint book of documents may consist of documents for which authenticity is not in issue, or it may comprise a convenient brief where documents are organized with each being proved in the ordinary manner. Counsel should agree on the authenticity and admissibility of as many documents as possible. Disagreements with regard to these issues should be addressed prior to the trial. The parties should carefully document their agreement regarding the documents and file the agreement with the court along with the documents. Where necessary, formal mechanisms contemplated by the *Rules of Civil Procedure*, such as Requests to Admit, should be used. Counsel should not refuse to admit the authenticity of documents that are not in dispute, as disputes surrounding authenticity often result in the unnecessary utilization of resources.⁶

7.4 The case management judge or pre-trial judge may make orders with regard to procedural trial matters on which the parties are unable to agree. However, issues related to the admissibility of evidence should be resolved by the trial judge, but preferably prior to the first day of trial.

⁴ See also Section D below: Best Practices for Expert Evidence.

⁵ See also Section C below: Best Practices for the Use of Documents and Technology.

⁶ The Honourable Michelle Fuerst and The Honourable Mary Anne Sanderson, eds., *Ontario Courtroom Procedure*, 3rd ed. (2012: Markham, LexisNexis) p. 1263.

7.5 Time limits should be set having regard to the nature and complexity of the issues. The trial judge should hold counsel and parties to the time limits set, while retaining the discretion to grant modest time extensions where necessary.

7.6 Procedural motions during the trial itself should be rare and, generally speaking, permitted only in the most exceptional and unexpected circumstances. However, the trial judge should retain the discretion to permit and determine in-trial motions as appropriate.

7.7 Counsel should consider agreeing on the quantum of costs awarded to the successful party in a trial to obviate the need for costs submissions following a trial.

Best Practice #8: A trial judge should be assigned to the case at least 60 days in advance of the first day of trial and should conduct a trial management conference as soon as practicable thereafter.

Commentary

8.1 The trial judge should be assigned to the case at least 60 days in advance of the first day of trial. The trial judge should conduct a trial management conference as soon as practicable thereafter, and in any event, well in advance of the first day of trial. More than one trial management conference may be necessary in order to ensure trial readiness.

8.2 As with case management, trial management can effectively make use of telephone conferences, videoconferences and emails, but the trial judge should retain the discretion to require personal attendance by counsel or parties where appropriate.

8.3 Counsel should raise any procedural or admissibility issues with the trial judge in advance of the trial, whether at a trial management conference or otherwise.

Best Practice #9: Parties should use the trial management process to consider alternative ways to resolve a case or different issues within a matter, where appropriate.

Commentary

9.1 Trials and other final determinations can take many different forms. The *Rules of Civil Procedure* are flexible with respect to how cases should move forward.

9.2 Counsel should consider the substantive and procedural aspects of the case as early as possible in the litigation process, including creative alternative ways to resolve a case or certain issues in it. Counsel should discuss these alternatives as early as practicable, whether formally or informally, during case management or pre-trial and trial management conferences. Among other things, partial or full summary disposition should be considered if appropriate in the circumstances of the individual case.

C. BEST PRACTICES FOR THE USE OF DOCUMENTS AND TECHNOLOGY

Best Practice #10: Counsel should engage in document management and production after the close of pleadings and work together to prepare a discovery plan. Early organization of documents and agreement on the scope and manner of production will assist the parties in preparing the documents for trial.

Commentary

10.1 By working together to create a discovery plan, counsel will identify and resolve many discovery-related issues in a timely fashion and reduce litigation costs.⁷ If the trial is to proceed electronically (and it is noted that electronic trials can take several forms), the discovery plan should set out specifics for electronic production of documents. Early planning of the organization of electronic documents will facilitate and reduce the costs of an electronic trial.⁸

10.2 A number of items should be considered in the discovery plan and discussed by counsel, including (a) whether or not documents will be produced electronically, (b) the electronic searchability of documents (through optical character recognition), (c) the format of production of electronic documents (such as PDF for documents, and JPEG for photographs), (d) the use of a consistent naming convention for documents, (e) unique identification codes for documents and (f) a cost-effective litigation support software for electronic production (if applicable).⁹

10.3 While meeting their clients' production obligations, counsel should strive to minimize the number of documents produced without undermining the achievement of a just and accurate result in the proceedings. Where appropriate, counsel should cooperate in this regard, for example, by agreeing to narrow issues and the identities and/or functions of document custodians. Similarly, counsel may also agree to forego the production of duplicate copies of documents.

10.4 Counsel should also observe the principles in Commentary 10.3 above in order to minimize the number of documents produced at the trial itself.

10.5 In preparing a discovery plan involving electronic documents, the parties should consult "The Sedona Canada Principles Addressing Electronic Discovery"

⁷ Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (November 2007) at 65; The Sedona Canada Principles Addressing Electronic Discovery, 2d. Ed. Public Comment Version (February 2015) (<https://thesedonaconference.org/publication/The%20Sedona%20Canada%20Principles>), p. 30.

⁸ Ontario E-Discovery Implementation Committee, *Model Document # 11 – E-Trial Checklist* (2010): <http://www.oba.org/Advocacy/E-Discovery/Model-Precedents>).

⁹ *Ibid* at 1. See also The Advocates' Society's *Paperless Trials Manual*.

developed by and available from The Sedona Conference¹⁰ and The Advocates' Society's *Paperless Trials Manual*.

Best Practice #11: Counsel should discuss the court's preferences and capabilities for receiving evidence, including documents electronically or in hard copy format and testimony via videoconference, and make appropriate arrangements well in advance of trial.

Commentary

11.1 Counsel should inform themselves about the court's preferences and technical constraints with respect to documents. For example, counsel should file a second copy of all documents for the trial judge's use, as the original copy will become an exhibit. If documents are being filed electronically, counsel should coordinate with the appropriate court staff to ensure that the trial judge has the required software to view the electronic documents. In some cases, it may be necessary to arrange for the judge to be trained on the software program that is to be used. The pre-trial conference and trial management conference are the appropriate times to discuss with the court the technology that the parties intend to use at trial.

11.2 Electronic versions of written evidence, submissions and authorities are often of assistance to trial judges. For example, counsel should consider providing written closing submissions on a USB key, with hyperlinks to caselaw and other important documents which are also included on the USB key. Details around the provision of such materials, including the proper format, should be discussed between counsel and the trial judge well in advance of the trial.

11.3 Where court resources permit, counsel and the court should also discuss the potential for out-of-town witnesses to testify via videoconference. Counsel should ensure that the court can accommodate the videoconference request and is comfortable with the testimony being heard by videoconference.¹¹ Video technology has advanced such that courts have found that it is possible to make findings of fact and decisions about credibility based on videoconference evidence.¹²

Best Practice #12: Counsel should recognize that electronic trials can be a means of reducing trial time and cost and increasing access to justice. Over time, electronic trials will be considered the norm and not the exception.

¹⁰ *Ontario Rules*, r. 29.1.03(4); The Sedona Canada Principles Addressing Electronic Discovery, 2d. Ed. Public Comment Version (February 2015)

(<https://thesedonaconference.org/publication/The%20Sedona%20Canada%20Principles>).

¹¹ *Ontario Rules*, r. 1.08(2) – (4).

¹² *P. v. C.*, 2012 ONCJ 88 at para. 27; *Wright v. Wasilewski*, 2001 CanLII 28026 (S.C.J.).

Commentary

12.1 In most cases the cost of an electronic trial will be less than the cost of conducting the same trial using a paper record. A net cost savings is achieved due to the reduction in preparation time and trial time associated by using trial-preparation technologies and also through reduced photocopy costs.¹³

12.2 There is no one model for an electronic trial. In some basic electronic trials, technology is used to display and submit only the documents to the court electronically. In more sophisticated electronic trials, all evidence (including testimony, exhibits and read-ins) is received and stored electronically during the trial.¹⁴

12.3 In Ontario, the parties generally supply the computers, software and other electronic aids required to run an electronic trial as few courtrooms are currently equipped with the necessary technology. (However, the parties may still experience a significant cost saving over a paper trial.) Accordingly, it is important for counsel to inform the court as early as possible that the trial will proceed electronically.

12.4 Counsel considering an electronic trial are encouraged to consult various guidelines available including The Advocates' Society's *Paperless Trials Manual* and the Ontario E-Discovery Implementation Committee's Model Document #11: E-Trial Checklist.

D. BEST PRACTICES FOR EXPERT EVIDENCE

Best Practice #13: Where appropriate, counsel should engage experts at an early stage of the litigation process, and well in advance of the times anticipated or required under the Rules, in order to become properly informed of the issues and merits of prosecuting or defending an action.

Commentary

13.1 There are multiple junctures throughout the pre-trial stage when counsel should consider engaging experts. First, early in the case, experts can (and in some cases, should) be consulted about the merits of prosecuting or defending a case. Timely interaction with experts, and asking the right questions, can help ensure that cases without merit are resolved early, with minimal expense. Second, where there is good reason to pursue or defend a claim, the most efficient and cost-effective way to proceed is often to provide early notice of experts' views to opposing counsel.

¹³ Ontario E-Discovery Implementation Committee, "What is an Electronic Trial" (Ontario Bar Association, 2010) p. 5.

¹⁴ See, e.g., Ontario E-Discovery Implementation Committee, "What is an Electronic Trial" (Ontario Bar Association, 2010); The Advocates' Society *Paperless Trials Manual*.

Best Practice #14: Where appropriate, counsel should serve any expert reports on the opposing side earlier than the times required in the Rules to allow the opposing side to consider the proposed expert evidence and the need, if any, to respond.

Commentary

14.1 The early engagement of experts and disclosure of their opinions benefits the parties in both the pre-trial process and trial itself. In some cases, an effective discovery cannot be obtained without having appropriate expert evidence and guidance. Settlement negotiations, mediations and pre-trial conferences are significantly enhanced when all parties have engaged their experts in advance and have received and served final reports. The early exchange of expert reports will, of course, have tactical implications in certain cases. Counsel must balance these implications against the efficiency benefits of early exchange of reports.

Best Practice #15: Most issues concerning expert testimony should be capable of resolution without formal motions.

Commentary

15.1 Frequently, issues as to admissibility and scope of expert testimony are not raised until after the trial commences. This can consume considerable time at trial. But there are broader implications for trial efficiency: in many cases, knowing in advance what evidence will be permitted at trial would allow counsel to determine whether a trial is necessary in the first place.

15.2 Generally, counsel should not wait until trial to raise issues regarding the qualifications of experts or the scope or admissibility of their opinions. In some cases, waiting until trial to raise these issues amounts to the last vestige of trial by ambush. Given the considerable resources demanded by the trial process, these are matters that are best dealt with before the trial commences.

15.3 For example, the admissibility of expert evidence may be challenged based on the number of experts a party intends to call. This is particularly problematic in personal injury trials. Where counsel intends to object to the number of witnesses called, they should do so before the assigned trial judge, in advance of trial.

15.4 Challenges to the admissibility and scope of expert evidence should be made prior to trial. Wherever possible, and particularly where experts reside outside of the jurisdiction, challenges to the admissibility and scope of expert evidence should be made by videoconference. In order to facilitate timely challenges to the admissibility and scope of expert evidence, either when or as soon as possible after serving an expert report, counsel should identify any opinions in the report on which counsel does not intend to rely at trial.

Best Practice #16: In appropriate cases, counsel should mark the entirety of the expert report as evidence unless there are portions that are inadmissible, in which case the excluded portions should be redacted.

Commentary

16.1 There is no provision for the routine filing of expert reports and conventions vary across Ontario, depending on the practice area. The *Evidence Act* allows for the filing of medical reports in limited circumstances. In the personal injury field, it has become routine to provide the trial judge with copies of expert reports as *aides memoire*, but they are not routinely admitted as evidence. In commercial litigation, expert reports are – and should be – routinely admitted as evidence even where their authors testify.

16.2 Where a trial is necessary, it is in the interests of the parties and the administration of justice that the least expensive and most expeditious way of introducing expert evidence be achieved, balanced against the rights of the parties. The admission of expert reports into evidence serves this purpose in two ways: (i) it expedites the examination-in-chief of expert witnesses; and (ii) it provides the trial judge with the means to be informed of the evidence to come. Where an expert report merely constitutes a descriptive account of the factual scenario relating to a legal dispute, the report should not be entered into evidence.

16.3 It is acknowledged that this practice would likely be inappropriate for jury trials.

16.4 The trial judge should retain the discretion to hear and determine any issues with regard to the admissibility of expert reports, including factual inaccuracies and unsupported conclusions, but preferably well in advance of trial. Formal motions should not be required except in exceptional circumstances.