

## An Expert's View On The Inefficiencies Of The Litigation Process: Why The Tortoise Does Not Move Like The Hare?

By Andrea Pontoni



I'm sitting here in my office thinking about the number of expert reports that I'm in the process of preparing or have completed and waiting to testify.

I've come to the conclusion that being an expert can be a challenging and rewarding profession, however, at times a frustrating one.

At the start of this article, you have to understand that civil litigation is a business and like any other business, the development of relationships and generation of revenue are key to its success. These success factors may at times differ from the client's ("you") success factors.

Don't get me wrong, the many lawyers I have dealt with over my career are genuinely interested in the success of their clients, however, how some get there could be more effective, at least when dealing with rule 53.03 of Civil Procedure the "Expert Evidence."

What is an expert witness?

*"A witness in a legal proceeding or an arbitration proceeding, who by virtue of his/her experience, training, skill and knowledge of a particular field or subject is recognized as being especially qualified to render an informed, unbiased and independent opinion on matters to that field or subject."*

*The primary function of the expert witness is to provide legal counsel, judge and jury with additional knowledge of a technical nature which may be outside of their circle of knowledge in order to assist them in the decision making process."*

So you might be asking what your point is? Too often I'm called into a file at the final hour and expected to prepare a quality expert report in a very short time period.

Now, you might be saying deadlines are part of life. I would agree, however, when the litigation process started several years earlier from the time the expert was contacted, you have to ask yourself why?

The typical excuse given to me during my career is that we wanted to use the external corporate accountant. The same corporate accountant who is intimately involved with both the management and the shareholders.

The lawyer fully understands, when strategizing the litigation approach, that the external corporate accountant won't be the expert at trial for the following reasons:

- The external corporate accountant is

not independent in fact and appearance. The external corporate accountant typically has a long history with the company, management and shareholder group and has an economic interest in lucrative annual recurring accounting and consulting fees.

An independent expert is impartial and his/her only economic interest in the company is his/her contract with the company for the litigation matter.

All fees owed to the expert are paid prior to attending trial. The independent expert does not worry about losing future fees or damaging a longstanding relationship.

- The external corporate accountant, while competent in financial reporting, tax returns and tax planning, may not possess the required accreditations, training and experience to qualify as an expert in court. In particular, on business valuation, damage quantification and forensic accounting matters.

- Prior to attending trial in accordance with sub rule 53.03(1) or (2) of the rules of civil procedure, the expert has to sign an acknowledgement form to **the courts** as follows:

***I acknowledge that in relation to this proceeding, it is my duty to provide:***

***(a) opinion evidence that is fair, objective and non-partisan;***

***(b) opinion evidence that is related only to matters that are within my area of expertise; and***

***(c) such additional assistance as the court may reasonably require, to determine a matter in issue.***

***I acknowledge that the duty referred to above prevails over any obligation, which I may owe to any party by whom or on whose behalf I am engaged.***

It doesn't take much to surmise that the external corporate accountant, or any other professional without the **required knowledge, technical training, experience and independence**, would have difficulty signing.

So why does all of the above matter to the client? Well, from start to finish the litigation process in itself is a lengthy process. If the appropriate expert is not engaged from the start of the litigation process, you may be arguing over issues and amounts which may differ from the ones included in the actual expert's report, causing inefficiencies.

Think about it, you spent several years

where both the external corporate accountant and legal counsel have argued issues and amounts, which may not be relevant.

It's been my experience that the external corporate accountant and legal counsel don't work for free.

By the time the client actually engages the expert who will be providing testimony at trial, they are 'fee shocked' as costs and resources incurred have been ineffective.

The inability of being able to rely on the corporate external accountant or any other professional due to independence, credibility and technical competencies issues, whether in fact or appearance, has cost you, the client.

With the introduction of an independent and credible expert right from the start, the expert has the opportunity to educate the client, legal counsel, opposing parties and judicial bodies, which may lead to an early resolution at mediation hearings, case conferences, pre-trial, settlement discussions and other proceedings.

So, if you are in the process of a litigation matter, contemplating filing a claim, there is risk of a matter being in dispute or ending up in court consider the above. As with any purchase of goods or services **"let the buyer beware."** ❌

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