

**LIANS / NSBS Solo and Small Firm
Virtual Conference
November 18, 2025**

- **Expert Evidence**
- **Impeaching on Prior
Inconsistent Statements**
- **Browne v Dunn**

Expert Evidence

General Rule

Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is “for the jury to form opinions, and draw inferences and conclusions, and not for the witness”.

What Judges Want from Experts:

- Impartiality
- Independence
- Education

Two-Part Admissibility Test

- (1) Expert opinion is relevant, necessary, not barred by exclusionary rule, and qualified; and
- (2) Acting as a gatekeeper, the Judge must find evidence beneficial despite potential risks.

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- (1) Impartial in the sense that it reflects an objective assessment of the questions at hand;
- (2) Independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained the expert or the outcome of the litigation; and
- (3) Unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained the expert.

Guidance for Experts & Counsel

- Have candid communication about limits of expertise and opinions reached by expert that run counter to counsel's theory of the case.
- Reports must address all aspects — positive and negative.
- Reports should not stray from the qualified area of opinion.
- Advocacy is the purview of counsel, not the expert.
- Simple, direct language demonstrates command of subject matter.
- Be candid regarding how factual changes might alter conclusions.
- Would opinion remain the same if retained by other party?

Civil Procedure Rule 55

- Strict adherence required for content and timing of reports. Relief from non-compliance is difficult to obtain.
- Default timing – six months prior to finish date – is subject to agreement of counsel or direction by DAC Judge.
- Rebuttal reports are limited in scope.

Impeaching on Basis of Prior Inconsistent Statement: Why

- Impeachment is one of the most effective tools to demonstrate weaknesses in opposing witness.
- Look for inconsistencies between the evidence at trial and evidence at discovery.
- Inconsistencies demonstrate that the witness has the "*capacity to be wrong*".
- *Wigmore:*
 - *We place his contradictory statements side by side, and, as both cannot be correct, we realize that in at least one of the two he must have spoken erroneously. Thus, we have detected him in one specific error, from which may be inferred a capacity to make other errors.*

Impeaching on Basis of Prior Inconsistent Statement: How

- Some counsel insist on showing previous inconsistent statement to witness, but that requirement was changed in 1854.
- Section 10, *Canada Evidence Act*.
- Focusing on the inconsistency requires clarity. Remove any risk of arguing with witness by following 3-step process:
 1. Confirm current testimony.
 2. Credit context of prior statement.
 3. Confront the witness directly.

Impeachment Example

- Assume the issue is when an incident was first reported.
 - Confirm, Credit, Confront

Browne v. Dunn

- The rule is one of fairness, thus not a fixed or invariable rule, much less a rule of admissibility.
- Compliance with the rule in *Browne v. Dunn* requires a cross-examiner to confront the witness with matters of substance, not inconsequential detail, on which the cross-examining party seeks to impeach the witness and call contradictory evidence.
- When it is apparent from the tenor of counsel's cross-examination of a witness that the cross-examiner does not accept the witness's version of events, the confrontation is general and known to the witness, and the witness' view on the contradictory matter is apparent, specific confrontation of the witness is not necessary.

Browne v. Dunn (Continued)

- **Q:** *"I suggest to you that on June the 3rd, you were at Mr. Smith's house."*
A: *"No, I've never been to Mr. Smith's house."*
- **Q.** *"Okay. I suggest, while you were at Mr. Smith's house, you ... [did this that and the other.]"*
 - This is a pointless question, because the witness already denied that she's been to Mr. Smith's house. You can move on.