

## REVIEW

### *The Art of Using Expert Evidence*

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*The Art of Using Expert Evidence*, by Robert B. White, Q.C.  
Aurora: Canada Law Book, 1997, xii + 162 pages.

RICHARD WHITE'S *The Art of Using Expert Evidence* follows his previous books, *The Art of Trial* and *The Art of Discovery*. It is a practical guidebook for advocates on how to use expert evidence, and it is a tool which, in Mr. White's words, "belongs in the head and the hand, not on the shelf." At a modest 151 pages, initial thinking may be that there were too few pages between the covers to make this book useful. Such a thought is wrong. This is not a book on the substantive law of using expert evidence which would stretch it out to some length. Rather, it is a book aimed to allay practitioners' discomfiture of expert evidence.

Mr. White is very particular in his use of terminology. He argues that to understand the basic principles of using expert evidence, one must have a clear knowledge and appreciation of the terms which are the building blocks of those principles. For example, in one of his introductory chapters, Mr. White explains the difference between "facts" and "evidence," urging practitioners and courts to take greater care in their indiscriminate use of these words. This is not pedantry—it is simply precision with a goal of better understanding of the foundations of the topic. To eliminate any suspense, Mr. White proposes that all information presented to the court through testimony, documents, etc., is "evidence," and it only moves into the realm of "fact" once the court or jury has made a finding on that evidence.

Mr. White is equally precise in his characterisation of the nature of expert evidence. He questions the common relegation of the topic of expert evidence to the "opinion evidence" section in leading texts. He properly reminds his

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readers that experts give non-opinion evidence as well as opinion evidence. He cites as an example a physician who may testify about things learned as a result of training without having to draw any inferences. Indicating the ulna is a bone in the forearm requires no inference to be drawn and would be classified as expert non-opinion evidence. When the physician takes the next step and indicates the ulna was broken due to a blow with a blunt instrument, the expert is drawing an inference from the evidence presented, and thus is giving expert opinion evidence. This clarification shows the relative strength of experts' evidence. The evidence an expert gives without giving an opinion will be much stronger than pure opinion evidence. Keeping this distinction in mind makes analysing expert evidence much clearer.

After clarifying the terms of reference, Mr. White moves to preparing the case. He covers both the plaintiff/prosecutor and defendant's point of view by setting out brief lists for preparation. The point made in this chapter (and indeed an underlying theme of the book) is "Be Prepared." Another point which recurs in the book is the sometime over use of calling experts. Proper preparation will eliminate this expensive and time consuming habit. The first question to ask is whether an expert is required at all to present evidence or to rebut evidence. The next consideration is the scope of the evidence an expert can give and whether an expert is required to give opinion evidence or non-opinion evidence. A careful, sober look at one's case, along with proper preparation, will help eliminate the unnecessary use of experts. As Mr. White indicates, do not call an expert when you do not truly need one.

Mr. White takes the first 40 pages—amounting to three chapters—to go over the above. The heart of the book is contained in chapters four through eight. Chapter four is entitled "Expert Evidence: The Components," and runs the gamut from expert definitions to the evidentiary basis of opinions. Here, and throughout his book, Mr. White helpfully uses transcripts of examinations of witnesses, along with a running commentary to convey his message. The few ideas which may seem abstract from the text proper are clarified by his numerous helpful examples. Whether quoting from the infamous O.J. Simpson criminal trial or creating his own transcripts, Mr White is able to give us a clear picture of how his ideas and concepts work in practice.

The next chapter, entitled "The Ultimate Issue," touches all too briefly on the existence and nature of the ultimate issue rule.<sup>1</sup> This seems an issue for which one should consult a text on the substantive law of expert evidence rather than a text of this kind. While the points he argues are valid and helpful procedurally, his analysis may be too brief for substantive purposes.

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<sup>1</sup> The ultimate issue is "that question which must finally be answered as, for example, the defendant's negligence is the ultimate issue in a personal injury action." J.R. Nolan *et al*, eds., *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at 1522.

The chapter entitled "The Paradox of the Uninformed Expert" is an enjoyable one. The title of the chapter ties in neatly with a well crafted discussion on authoritative literature. The chapter considers the use of authoritative literature in giving an opinion and gives tips on how to use it when cross-examining an expert. Mr. White again effectively uses examples, which were especially helpful in illustrating how to commit an expert to certain literature and then use that literature against him or her including the expert's own published works. The "paradox" occurs when an expert does not know of authoritative literature or knows about it and does not agree with it. The expert appears uninformed for not knowing of the literature or of questionable expertise when discounting or arguing with obviously authoritative works. Both are effective techniques to discount a witness's credibility.

The remaining two chapters deal with the direct and cross-examination of an expert witness. Mr. White reminds us of the importance of being well prepared to handle expert witnesses. By definition, these individuals have a specific knowledge that the lawyer will not have. To effectively prepare and understand an expert witness, it is imperative that the lawyer learns as much as possible about the subject in question. This reduces the possibility of embarrassment and should earn the respect of the expert being examined. Mixing up or misusing terms lessens counsel's effectiveness. Using examples, Mr White sets out how to conduct a precise examination and how to elicit from the expert the precise evidence one needs to establish.

The outset of the final chapter contains a very useful discussion of the objectives of cross-examination and its inherently unpredictable nature. Mr. White employs an interesting comparison between cross-examinations and "chaos theory" to illustrate this unpredictable element. The end of the chapter (and the book) contains further examination transcripts with the usual accompanying commentary that are instructive. However, one is left with a feeling of wanting additional guidance on the perplexing and often frustrating subject of cross-examination. That being said, Mr. White rightly concedes that the subject of cross-examination is difficult and that entire texts could be (and have been)<sup>2</sup> devoted to it alone. It would be asking for too much to expect a thorough review of the art of cross-examination in a book intended to cover the whole area of expert evidence. However, Mr. White has managed to provide useful commentary and guidance on a difficult area and hopefully stimulated the reader to do as he advises and search out more extensive literature on the topic of cross-examination.

Footnotes are kept to a minimum and there is virtually no discussion of case law in this book. This is entirely proper and in keeping with its purpose: to pro-

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<sup>2</sup> See, for example, J.L. Glissan, *Cross-Examination Practice and Procedure*, 2d ed. (Butterworths: Sydney, 1991); and R.E. Salhany, *Cross-Examination: The Art of the Advocate*, 2d ed. (Butterworths: Toronto, 1991).

vide a utilitarian and practical approach to expert evidence. This is a book which will not become dated. Mr White expresses the hope that you will feel comfortable to pack this book in your briefcase as you go off to trial. Frankly, it is not realistic to see this book being referred to in court in the thick of a trial. The lessons taught by the book would best be studied when preparing for the trial. If not prepared to handle the "how-tos" of expert witnesses by the time the lawyer is in trial, he will need more than this book to help his case.

Mr White asks that this book be "in the head and in the hand, not on the shelf." It is a book which lends itself to re-reading, which you will consult as you prepare for the task using or examining experts. When the book is not in hand, it should at least be close by—keep it on the shelf next to your desk, but not on the shelf up in the library.