DUTY CALLS: THE NEW ROLE OF EXPERTS IN THE ONTARIO CIVIL JUSTICE SYSTEM

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The relevant rule changes with respect to experts are in rules 4.1, 31.06(3), 53.03 and to a lesser extent 50.06, 50.07, 50.08 and 50.11. Copies are attached as schedule "A".

The significant changes are that:

(a) the default requirement is that the main expert's reports are to be served not less than 90 days before the rule 50 pre-trial conference (rather than commencement of trial) with responding expert witness reports due 60 days before the pre-trial. There is no change to rule 53.03(3)(b) whereby supplementary reports are to be served no less than 30 days before trial;

(b) notwithstanding these "default" timing requirements, new rule 53.03(2.2) requires the parties to agree on a schedule for exchange of experts' reports within 60 days after the action has been set down for trial;

(c) while the reports are still not evidence (subject to exceptions such as s. 52 of the *Evidence Act*—medical reports), the contents of reports are now specified in some detail.

Previously the signed report only had set out the expert's name, address and qualification and the substance of the proposed testimony. Now the report must contain (rule 53.03(2.1)):

> "1. The expert's name, address and area of expertise.
>
> 2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
>
> 3. The instructions provided to the expert in relation to the proceeding.
>
> 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
>
> 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion."

(d) Rule 4.1 is a new rule formally setting out the expert's obligation:

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

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

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

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

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

(e) The expert must also acknowledge this duty using form 53 (copy attached as schedule "B").

There have been no changes to:

(i) rule 53.08 whereby the court shall grant leave to admit expert evidence on short notice or no notice (unless there is prejudice or undue delay);

(ii) rule 52.03 whereby the court may appoint experts on its own initiative.

Nor have there been any changes to the *Evidence Act*, R.S.O. 1990, c.E.23, s. 12 (number of experts) and s. 52 (medical reports).

Note that civil case management (rule 77) applies only where a case has been assigned to case management. Obviously orders concerning the relevant experts may be tailor-made in actions governed by that rule.

In a similar vein in the context of motions for summary judgment the motion's judge may make certain specific orders dealing with experts: thus, rule 20.05(2)(k) provides:

> 20.05(2)(k) [if there is to be a trial the court may make an order] that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,
>
> > (i) there is a reasonable prospect for agreement on some or all of the issues, or
> >
> > (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

THE OSBORNE REPORT

Justice Osborne's report for the Civil Justice Reform Project was presented in November 2007 and is found at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf. This report is the genesis for these and the other significant rule changes implemented this year (O.Reg. 438/08). Chapter 9 of the Osborne Report deals with expert evidence. Pages 76-81 are attached as schedule "C".

The Civil Justice Reform Project was concerned about the proliferation of experts testifying at trials, as well as a perception that experts had become increasingly adversarial, rather than objective advisors. Justice Osborne considered various options, not all of which found his approval, nor were all of his recommendations implemented. Options considered, but rejected, included proposals that parties should retain a single, joint expert or that multiple experts could only produce a single, joint report or that experts could be examined for discovery (but cf. rule 31.10(1)). The law in the UK and Australia has also already been reformed to deal with similar issues. Those jurisdictions have, however, tried to reduce costs by moving to a single-expert model (Justice Osborne thought the latter was a good idea which would not usually work in practice).

THE EXPERT'S DUTY

The rule amendments dealing with experts are designed to weed out "hired guns" and "opinions for sale". The rule changes presuppose that expert bias will be precluded where the expert is expressly required to acknowledge an overriding duty to the court, rather than the party. Although Justice Osborne was somewhat half-hearted in recommending the changes. With respect to a signed certification of independence he stated that:

> "An express duty would reinforce existing professional obligations and ensure that this duty is consistently applied to all professionals that provide expert evidence."

Note, however, that the courts have long been inclined to throw out biased reports which were more in the nature of advocacy.[1]

MEET AND CONFER

Although Justice Osborne thought the experts should "meet and confer" in advance of trial, this proposal was not implemented as a general proposition (although see rule 20.05(2)(k) which allows for this as part of an order dealing with a summary judgment motion and see also rule 50.07(1)(c) which incorporates this power into the pre-trial judge's arsenal).

TIMELINES

The timelines for delivering experts' reports were substantially modified in recognition that parties are often unwilling to have meaningful settlement discussions without reports in hand. The reports are now to be available for the pre-trial, on the understanding that the pre-trial will be held reasonably close to trial.

The timelines (90 and 60 days before the pre-trial conference for the main reports) are intended to be default timelines, although the default times are likely be more common than an agreed schedule.

The intention is that the parties will agree on a schedule within 60 days after the action has been set down for trial (rule 53.03(2.2)).

Note, however, that rule 53.08 was not amended. This rule says that the trial judge ***shall*** grant leave to serve an expert's report late (possibly on terms) unless to do so will cause prejudice or undue delay. Justice Osborne's recommendation to change "shall" to "may" was not implemented.[2]

STANDARD REPORTS

The rule changes in rule 53.03(2.1) which list mandatory contents for reports are intended to introduce a degree of standardization to reports and to further guard against bias and partiality. The latter is somewhat achieved by requiring that the instructions given to the expert are to be included. Not that this is really anything new.[3]

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[1] *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd.* (1995), 92 R.T.R. 26 (Fed.T.D.).

[2] For the mandatory nature of this rule see *Hunter v. Ellenberger* (1988), 25 C.P.C. (2d) 14 (Ont.H.C.).

[3] See, for example, *Carmen Alfano Family Trust v. Piersanti*, (March 18, 2009) 2009 CarswellOnt 1576 (S.C.J.).

CONCLUSION

It is likely the rule changes will focus most experts on greater objectivity. At least it will put an end to the "paperless" production of experts' reports. A "paperless" report is one (no matter the complexity or length) created without any written instructions or background; and usually without any drafts having been kept. When I recently showed a draft retainer letter to U.S. counsel they strongly opposed the formality of a retainer letter for an expert.[4] This will now change.

[4] The actual email is attached as schedule "D".

SCHEDULE "A"

RULE 4.1 DUTY OF EXPERT

DUTY OF EXPERT

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

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

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

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

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.

SCOPE OF EXAMINATION

Expert Opinions

31.06(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and

(b) the party being examined undertakes not to call the expert as a witness at the trial.

EXPERT WITNESSES

Experts' Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

   i. a description of the factual assumptions on which the opinion is based,

   ii. a description of any research conducted by the expert that led him or her to form the opinion, and

   iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

Schedule for Service of Reports

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1) and (2), unless the court orders otherwise.

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

(a) a report served under this rule; or

(b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial.

Extension or Abridgment of Time

(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,

(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or

(b) by the court, on motion.

MATTERS TO BE CONSIDERED

50.06 The following matters shall be considered at a pre-trial conference:

1. The possibility of settlement of any or all of the issues in the proceeding.

2. Simplification of the issues.

3. The possibility of obtaining admissions that may facilitate the hearing.

4. The question of liability.

5. The amount of damages, if damages are claimed.

6. The estimated duration of the trial or hearing.

7. The advisability of having the court appoint an expert.

8. In the case of an action, the number of expert witnesses and other witnesses that may be called by each party, and dates for the service of any outstanding or supplementary experts' reports.

9. The advisability of fixing a date for the trial or hearing.

10. The advisability of directing a reference.

11. Any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

POWERS

50.07 (1) If the proceeding is not settled at the pre-trial conference, the presiding judge or case management master may,

(a) establish a timetable and, subject to the direction of the regional senior judge or a judge designated by him or her, fix a date for the trial or hearing;

(b) in the case of a proceeding governed by Rule 77, order a case conference under rule 77.08 if it is impractical to establish a timetable; and

(c) make such order as the judge or case management master considers necessary or advisable with respect to the conduct of the proceeding, including any order under subrule 20.05 (1) or (2).

Order Binds Parties

(2) An order made under this rule binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustice.

Copy of Order

(3) A copy of any order made under this rule shall be placed with the trial or application record.

PRE-TRIAL CONFERENCE REPORT

Requirement

50.08 (1) If a date for a trial or hearing is fixed under clause 50.07 (1) (a), the presiding judge or case management master shall complete a pre-trial conference report,

(a) stating what steps need to be completed before the action is ready for the trial or hearing, and how much time is needed to complete those steps;

(b) stating the anticipated length of the trial or hearing; and

(c) setting out any other matter relevant to scheduling the trial or hearing.

Copy of Report

(2) A copy of the pre-trial conference report shall be placed with the trial or application record.

Certificate

(3) Each party or the party's lawyer shall certify on the copy of the pre-trial conference report that is to be placed with the trial or application record that he or she understands the contents of the report and acknowledges the obligation to be ready to proceed on the date fixed for the trial or hearing.

Duty of Lawyer

(4) Each lawyer who represents a party shall, in addition to giving the certificate described in subrule (3), undertake to the court to advise the party of,

(a) the contents of the pre-trial conference report; and

(b) the obligation to be ready to proceed on the date fixed for the trial or hearing.

DOCUMENTS TO BE MADE AVAILABLE

50.11 All documents intended to be used at the trial or hearing that may be of assistance in achieving the purposes of a pre-trial conference, such as any medical reports and reports of experts, shall be provided to the presiding judge or case management master at the conference.

SCHEDULE "B"

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Plaintiff

- and -

Defendant

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is . I live at _____, in the _____ of _____.

2. I have been engaged by or on behalf of to provide evidence in relation to the above-noted court proceeding.

3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:

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

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

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

4. 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.

Date _____ _____

Signature

NOTE: This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the *Rules of Civil Procedure*.

SCHEDULE "C"

Civil Justice Reform Project

An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at minimum, cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures. Matched with a certification requirement in the expert's report, it will reinforce the fact that expert evidence is intended to assist the court with its neutral evaluation of issues. At the end of the day, such a reform cannot hurt the process and will hopefully help limit the extent of expert bias.

Secondly, this reform would consistently apply a standard for all experts that is already prescribed for some. For example, Article 4150 of the Canadian Institute of Actuaries Standards of Practice – General Standards, provides that "an actuary's testimony should be objective and responsive," and that "the actuary's role…..is to assist the court…and the actuary is not to be an advocate for one side of the matter in a dispute." An express duty would reinforce existing professional obligations and ensure that this duty is consistently applied to all professions that provide expert evidence.

Finally, the most relevant organizations on this issue, including the medical experts and actuaries who participated in this Review, endorsed imposing an overriding duty to the court on experts, along with a certification that they understand that duty. England and Wales, Queensland, Australia and the B.C. Civil Justice Reform Working Group have all endorsed this approach.

Expert bias can, I think, best be reduced or somewhat controlled by a "meet and confer" requirement. In its Supplemental Report, the Discovery Task Force proposed this as a best practice where there are contradictory expert reports.[76] The authority to require experts to meet and confer exists in other jurisdictions, including England and Wales,[77] and in Australia[78] under certain circumstances. In Alberta[79] and New Brunswick[80] the court

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[76] Task Force on the Discovery Process in Ontario, *Supplemental Report of the Task Force on the Discovery Process in Ontario* (October, 2005) at 16.
[77] U.K. Rules, r. 35.12.
[78] Australia Federal Court Rules, (Statutory Rules 1979 No. 140) r. 34A(3)

may order experts to meet at the pre-trial stage. British Columbia's Civil Justice Working Group recommended that a case planning conference judge have the authority to order opposing experts to meet to identify areas of agreement or disagreement and narrow the issues.[81]

During consultations, medical experts noted that doctors often work well in forming consensus. They suggested that it would be very useful to have experts meet to consider whether issues can be agreed upon and determine which are still in dispute. For all experts, this reform would provide a level of peer review that expert opinions do not now routinely undergo. It may also assist in clarifying disparate interpretations of underlying facts and assumptions and would introduce a level of accountability that may deter "hired guns."

Time for Delivery of Expert Reports

The timing of delivery of expert reports under the current rules does not promote early settlement and may result in late requests for trial adjournments. Rule 53.03 requires a party who intends to call an expert to serve opposing parties with a copy of the expert's report not less than 90 days before trial.[82] A party who intends to call an expert to testify in response must serve a responding expert report not less than 60 days before trial.[83] Any supplementary report must be served not less than 30 days before trial. Anchoring these tight timelines to the trial event has been cited as a problem for both litigants and experts, resulting in last-minute requests for trial adjournments.

There was much support among those consulted for delivering expert reports sooner in order to promote early settlement of cases. Without disclosure of these reports, parties

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[79] Alberta Rules, r. 218.9(1). In very long trial matters, a case management judge may order experts to "consult on a without prejudice basis to determine any matters on which agreement can be reached."
[80] New Brunswick Rules, r. 50.09(g).
[81] *BC Civil Justice Reform Working Group Report*, *supra* note 6 at 32.
[82] Ontario Rules, r. 53.03(1).
[83] Ontario Rules, r. 53.03(2).

are often unwilling or unable to enter into meaningful settlement discussions. It was also said that the 90/60/30 day rule does not work because experts are often too busy to prepare a reply report in 30 days. In bilingual proceedings, these limits can make timely translation difficult.

Several organizations were in favour of anchoring the 90/60/30 day rule to the date of the pre-trial or settlement conference. Personal injury lawyers were largely in favour of this reform, but said that if the pre-trial is too far in advance of the trial (i.e., more than six months), expert reports may not be current by the time of a trial, resulting in additional costs incurred to update the reports.

In its 1996 *Report of the Task Force on Systems of Civil Justice*, the Canadian Bar Association recommended early disclosure of expert reports and the exchange of expert critique reports in a timely fashion before trial.[84] As mentioned earlier, the Discovery Task Force also considered this issue. It recommended the 90/60/30 day timelines be calculated from the date of the pre-trial or settlement conference, subject to a court order or the parties' agreement otherwise, provided that it remains possible to have meaningful pre-trial or settlement conference discussions.[85]

I note that rule 50.05 already requires parties to make available at the pre-trial all documents that may assist at the pre-trial, "such as medical reports and reports of experts." Rule 76.10(4) also requires the disclosure of expert reports at the pre-trial for simplified procedure cases, as does rule 77.14(6) for settlement conferences in case managed actions.

Linking the delivery of expert reports to the pre-trial assumes that there will be a pre-trial (in some areas, actions go to trial without a pre-trial) and that the pre-trial is held at a time reasonably proximate to the trial.

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[84] *CBA Systems of Civil Justice Report*, *supra* note 2 at 44.
[85] *Discovery Task Force Report*, *supra* note 3 at 128-131.

Civil Justice Reform Project

In the end it seemed clear to me that one rule, be it the 90/60/30 day rule or some other trilogy of numbers, simply will not work in all cases. In many commercial cases the simultaneous exchange of expert reports is often agreed to by counsel, who include in their agreement a specified time for each side to reply to the other's reports. In negligence actions, that model becomes impractical since a defendant frequently needs to know on what expert evidence the plaintiff's claim is being advanced.

In my view, the timing for delivery of expert reports is best left to counsel. They should be required to determine on a case specific basis when and how experts' reports will be exchanged.

In Toronto, once an action is set down for trial, parties are required to jointly or separately complete a Certification Form to Set Pre-Trial and Trial Dates. This form requires parties to identify when expert reports will be exchanged. Similar to the practice in Toronto, I would recommend that counsel be required to consult and seek to reach agreement on the timing of exchange of expert reports within the 60 day period following an action being set down for trial. This agreement should be documented and be before the pre-trial judge or master.

Where no agreement has been reached, a general default period should be established. Accordingly, I think that rule 53.03 should be amended so that expert reports, responding reports and any supplementary reports must be delivered within 90, 60, and 30 days, respectively, prior to pre-trials and settlement conferences. Since this is a default period, it would apply only where there is no agreement or court order obtained on motion to extend or abridge the default time lines.

There will still be those who will seek late requests to file expert reports on the eve of trial. During Review consultations, some judges said they feel compelled to permit late delivery of expert reports given the language of 53.08(1), which states leave "shall" be

granted unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial. Since time must be granted for the filing of reply reports, trial dates often have to be rescheduled. Thus, many proposed that the word "shall" be replaced by the word "may" in rule 53.08(1), so that judges do not feel compelled to allow late delivery of expert reports. I endorse this change, which would provide flexibility in appropriate cases and at the same time signal that allowing late delivery of expert reports should not be taken for granted.

During consultations it became clear that there was meagre support for rule changes that would permit some form of pre-trial oral examination of experts. In my view, this change would add yet another layer of cost in all cases involving experts for a questionable benefit. I do not recommend this reform. If, in a particular case, settlement discussions would be advanced if certain experts were examined, it would be open to counsel to agree to produce the experts for examination. This occurs now in some arbitrations.

Disclosure of Basis for Expert Opinion

I do, however, think that there should be more regulation of the standard content of expert reports.

In Queensland, Australia, experts are required to include in their report a description of their qualifications, all material facts on which their report is based, references to material that has been relied upon in forming the opinion and, if there is a range of opinion, a summary of that range and the reasons why the expert adopted a particular opinion.[86] Similarly, in its Supplemental Report, the Discovery Task Force recommended as a best practice that expert reports should include, at a minimum:

- Expert's name, address and current curriculum vitae;

[86] Queensland, Australia, Uniform Civil Procedure Amendment Rule (No. 1) 2004, section 7, Part 5 – Expert Evidence, Division 2, online: Queensland Legislation <http://www.legislation.qld.gov.au/LEGISLTN/SLS/2004/04SL115.pdf>.

- A detailed description of the expert's qualifications and area of expertise;
- A description of research conducted by the expert to be able to reach his/her opinion;
- The nature of the opinion being sought and the specific issues to which the opinion relates;
- A description of the factual assumptions on which the opinion is based;
- A list of any documents relied upon in formulating the opinion; and
- The opinion and the basis for the opinion.

In the U.K., a Practice Direction prescribes the contents of an expert's report. In addition to many of the items recommended in the Discovery Task Force's best practice, the U.K. Practice Direction also requires the expert report to:

- Contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- Make clear which of the facts stated in the report are within the expert's own knowledge;
- Say who carried out any examination, measurement, test or experiment which the expert has used for the report, give qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision; and
- Where there is a range of opinion on the matters dealt with in the report, summarize the range of opinion and give reasons for his/her own opinion.

Currently, rule 53.03 requires the expert only to set out his/her opinion, name, address, qualifications and the substance of his or her proposed testimony. It is silent about the degree of information to be provided in the report.

SCHEDULE "D"

As to the letter to Dr. _____; unless there is some Canadian procedure which requires such a formal letter discussing his retention and requesting his opinion, I would suggest not sending the letter. Instead we should just contact him by phone to set up a meeting and send him the materials you want him to review. Of course I was trained in a firm founded by former OSS spies where I was told to never send any correspondence to an expert which said anything other than, "Please call me to discuss the enclosed at your earliest convenience".