



EXPERT WITNESSES NEW DUTIES (as of January 1, 2010)

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Oct 29, 2009



OVERVIEW

The New Expert Rules serve to:

- 1) Codify the duty of an expert (and require the expert to sign and acknowledgement of their duty)
- 2) Specify mandatory requirements for expert reports, and
- 3) Alter the deadline for serving expert reports to dates months before pre-trial conferences



1) THE NEW 'DUTY OF EXPERT'

- The new 'Duty of Expert' rule is nothing new
- Ontario courts have made the following comments about expert evidence and expert witnesses:
 - a) An expert's evidence should be seen to be "the independent product of the expert uninfluenced as to form or content by the exigencies of litigation"
 - b) An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his or her expertise
 - c) An expert witness should never assume the role of an advocate
 - d) An expert witness should state the facts or assumptions upon which his or her opinion is based
 - e) An expert witness should make it clear when a particular question or issue falls outside his or her expertise
- While the role of the expert is well understood by lawyers and judges it is arguably not well understood by the experts



1) THE NEW 'DUTY OF EXPERT'

The New 'Duty of Expert' Rule states:

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.



1) THE NEW 'DUTY OF EXPERT'

- **The Expert must now sign an acknowledgement (Form 53) setting out their understanding of this duty and must attach the signed acknowledgement to their report!**

FORM 53
Courts of Justice Act
ACKNOWLEDGMENT OF EXPERT'S DUTY
(General heading)
ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is _____ (name). I live at _____ (address),
in the _____ (name of city) of _____ (name of province/state).
2. I have been engaged by or on behalf of _____ (name of party/parties) 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.



2) MANDATORY REQUIREMENTS

- The former Rule 53.03 referred to expert reports merely setting out the author's name, address and qualifications along with the substance of their testimony.
- The New Rule 53.03(2.1) provides a checklist of items that must be included in every expert report served.



2) MANDATORY REQUIREMENTS

53.03 (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.



2) MANDATORY CHECKLIST

- While the items identified in subrule 53.03(2.1) are typically already included in most expert reports, by being mandated to follow this checklist, expert may be forced to be even more thorough and comprehensive in their reports
- While the requirement to disclose the expert's instructions in their report is not something new, lawyers will have to be aware that they may not be able to withdraw instructions given to an expert, especially when you consider this requirement in conjunction with the newly codified Expert's Duty section



3) THE NEW DEADLINES

- An important rule change has been made to the timing of service of expert reports.
- In the past, expert reports had to be served at least 90 days before trial.
- The amended Rule 53.03 requires counsel to serve expert reports at least 90 days before the pre-trial conference and requires responding reports to be served at least 60 days before the pre-trial conference.
- A further amendment mandates the parties to agree to an expert report service timetable within 60 days of setting the matter down for trial.



3) THE NEW DEADLINES

- The amended Rule 53.03 states:

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)

Schedule for Service of Reports

53.03 (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.



3) THE NEW DEADLINES

- It is likely that parties will, after setting a matter down for trial, simply agree to exchange expert reports in accordance with the minimum time requirements set out in subrule 53.03(1) to meet the requirements of subrule 53.03(2.2)
- For those concerned about the ability to file further expert reports closer to trial, it should be noted that the rule for serving supplementary reports remains 30 days before trial, presumably to allow the parties to serve updated reports.

CONCLUSION

- The amendments to the expert rules will not have an immediate impact on the use of experts and expert reports in Ontario courts
- In time though, Courts may highlight these new delineated duties when criticizing experts that are seen as advocates, causing a more profound impact on the expert's credibility in other proceedings
- The changes to the expert rules are best described as a warning shot to experts making a handsome living acting as 'hired guns'



Thank you,

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