

CIVIL JUSTICE REVIEW PROJECT FALL OUT: CHANGES IN LEGISLATION, THE RULES AND THE IMPACT ON PRACTITIONERS AND THEIR CLIENTS IN ONTARIO

EXPERT EVIDENCE

Ontario's *Evidence Act* continues to limit the number of experts to three for each side unless leave of a Judge is obtained: s.12. Although recommendations were made in the CJRP to list factors for the Court to consider in exercising discretion to determine how many experts will be permitted, no such amendments were made. Instead, the Rules were amended to provide that experts acknowledge their overriding duty to the Court, meet with experts on the other side to try and settle issues before trial and the timing for service of reports was advanced.

An Expert's Duty

The duty of an expert is now codified in the Rules: Rule 4.1.01. An expert must provide an opinion that is within the area of expertise and must be fair, objective and non-partisan. This obligation is said to "prevail over" any obligation owed to the party hiring the expert.

Pre-Trial Meeting of Experts

Following a Summary Judgment Motion, where Judgment is refused or granted only in part, a Judge may order that the experts engaged by the opposite parties meet to identify the issues on which they agree and those on which they do not agree. They will then issue a joint statement setting out those areas and the reasons for the disagreement. The parties must bear their own costs for such a meeting. The Court's discretion to order the meeting is based on consideration of the costs and time savings achieved proportionate to the importance of the issues or where it is not clear why the experts are disagreeing: 20.05(2)(k) and (5). This meeting can also be ordered by a judge hearing a pre trial.

Service Time for Expert Reports

Currently, parties are required to serve expert reports on every other party at least 90 days prior to trial with responding expert reports to be served 60 days prior to trial. The new Rule 53.03(1) requires that this happen 90 and 60 days before the pre-trial conference rather than the trial. Further, and similar to the discovery plan, within 60 days after an action is set down for trial, the parties must agree to a schedule for service of expert reports.

Contents of an Expert's Report

Experts are now required to include much more information in their report than the prior requirements of name, address, qualifications and substance of proposed testimony. New Rule 53.03(2) essentially codifies the existing case law and then some. Reports must now include:

1. The name of the expert, address and area of expertise;
2. The qualifications, employment and educational experiences;
3. The instructions provided to the experts by the party;
4. The expert's opinion and the reasons for the opinion including a description of the assumptions and research conducted;
5. A list of every document relied on; and
6. An acknowledgement of the duty under Rule 4.1.

Impact on Practitioners and their Clients

It is unfortunate that the factors for the Courts to consider in limiting the number of experts called at trial were not spelled out in a change to the *Evidence Act* as suggested by Justice Osborne. Certainly, in the personal injury context, the number of "experts" has reached the astronomical stage. Long gone are the days when a party called the family physician and orthopaedic surgeon as their only "experts".

Otherwise, there is probably limited impact on practitioners and their clients caused by these changes. How often experts will be required to confer is still very much up in the air. Certainly, if experience in the automobile injury world with the current CAT DAC assessment and rebuttal process is any indication, this will prove to be an enormous and expensive waste of people's time and money.

Earlier service of reports is a "good thing". Any effort to speed "decision day" is welcomed.