

2013

MANAGING THE RISK OF FRAUD

LEVI & SINCLAIR, SENCRL
LLP

1303 Greene Avenue, Suite 400
Westmount, Quebec H3Z 2A7
Tel: (514) 931-7600 Fax(514) 931-3600
alert@levifca.com

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The expert witness who, because of their knowledge or experience in a specific area, is allowed to give opinion evidence.

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Expert Witness Rules of Evidence Part 2

Expert witnesses have been an integral part of the tribunal system and their importance is growing. With that growth comes the need to regulate and control the role and manner in which experts are used and abused by the parties to litigation.

As a result, the professional bodies and the legal jurisdictions have developed rules, standards and codes which the expert must follow. The degree of adherence to these rules will have a direct impact on how the expert's report, testimony and opinions are considered by the trier of fact.

This is the second in a series of newsletters that will look at the existing and new rules, standards and codes that are applicable to expert witnesses, including the Standard Practices for Investigative and Forensic Accounting Engagements, the Federal Rules and the new Federal Code of Conduct, the provincial rules of procedure and the new rules in Ontario, British Columbia and Alberta.

In addition, the series will review the Daubert rules in the US and the recent changes to Rule 26 governing the discoverability of experts in the US as well as the US Federal rules, State rules and the American Institute of Certified Public Accountants rules.

The rules applicable to Chartered Business Valuators and the American Society of Appraisers will be examined as well.

As the rules, standards and codes have expanded, so has the focus of the courts on the expert's adherence to these rules, standards and codes. Readers will have a better

awareness of their obligations to the courts and will be prepared to respond in the affirmative when questioned about their methodology and compliance with these rules, standards and codes.

LEGAL CODES

CANADIAN FEDERAL COURT RULES

To ensure that expert witnesses understand their independent advisory role to the Court, a Code of Conduct has been included as a Schedule to the Federal Court's Rules.

In addition, the new rule 52.2, applicable to both applications and actions, requires counsel to provide an expert witness with a copy of the Code of Conduct and to file a certificate signed by the expert acknowledging that the expert agrees to be bound by the Code of Conduct.

To assist in streamlining the qualification

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process and to identify situations where there are disputes as to whether a witness is qualified to testify as an expert, rule 52.2 requires that the expert witness's proposed area of expertise be identified in the report, and that a copy of the expert's curriculum vitae accompany the report.

EXPERT WITNESSES

Expert's affidavit or statement

52.2 (1) An affidavit or statement of an expert witness shall:

- (a) set out in full the proposed evidence of the expert;
- (b) set out the expert's qualifications and the areas in respect of which it is proposed that he or she be qualified as an expert;
- (c) be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it; and
- (d) in the case of a statement, be in writing, signed by the expert and accompanied by a solicitor's certificate.

Failure to comply

- (2) If an expert fails to comply with the Code of Conduct for Expert Witnesses, the Court may exclude some or all of the expert's affidavit or statement.

Limit on number of experts

52.4 (1) A party intending to call more than five expert witnesses in a proceeding shall seek leave of the Court in accordance with section 7 of the Canada Evidence Act.

The following are not new rules but included for their relevance to expert witness testimony.

Objection to expert

52.5 (1) A party to a proceeding shall, as early as possible in the proceeding, raise any objection to an opposing party's proposed expert witness that could disqualify the witness from testifying.

Expert conference

52.6 (1) The Court may order expert witnesses to confer with one another in advance of the hearing of the proceeding in order to narrow the issues and identify the points on which their views differ.

Presence of parties and counsel

(2) Subsection (1) does not preclude the parties and their counsel from attending an expert conference but the conference may take place in their absence if the parties agree.

Presence of judge or prothonotary

The Court may order that an expert conference take place in the presence of a judge or prothonotary.

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MANAGING THE RISK OF FRAUD has been prepared for the general information of our clients, staff and other interested parties. The enclosed comments are of a general nature and are not intended to cover all aspects of the subject matter. Prior to implementing any planning based upon information in this publication, the specific facts pertaining to any particular situation should be carefully considered. We will be pleased to assist in this regard and to provide further details pertaining to the matters discussed herein.

If you know of someone who should be added to our mailing list or if you require additional copies, please contact us at (514) 931-7600

Joint statement

- (4) A joint statement prepared by the expert witnesses following an expert conference is admissible at the hearing of the proceeding. Discussions in an expert conference and documents prepared for the purposes of a conference are confidential and shall not be disclosed to the judge or prothonotary presiding at the hearing of the proceeding unless the parties consent.

RULE 52.2**CODE OF CONDUCT FOR EXPERT WITNESSES****General Duty to the Court**

1. An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.
2. This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.

Expert's Reports

3. An expert's report submitted as an affidavit or statement referred to in rule 52.2 of the Federal Courts Rules shall include:
 - (a) a statement of the issues addressed in the report;
 - (b) a description of the qualifications of the expert on the issues addressed in the report;
 - (c) the expert's current curriculum vitae attached to the report as a schedule;
 - (d) the facts and assumptions on which the opinions

in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule;

- (e) a summary of the opinions expressed;
 - (f) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;
 - (g) the reasons for each opinion expressed;
 - (h) any literature or other materials specifically relied on in support of the opinions;
 - (i) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;
 - (j) any caveats or qualifications necessary to render the report complete and accurate, including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise; and
 - (k) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.
4. An expert witness must report without delay to persons in receipt of the report any material changes affecting the expert's qualifications or the opinions expressed or the data contained in the report.

Expert Conferences

5. An expert witness who is ordered by the Court to confer with another expert witness
 - (a) must exercise independent, impartial and objective judgment on the issues addressed; and
 - (b) must endeavour to clarify with the other expert witness the points on which they agree and the points on which their views differ.

Form 52.2

Certificate Concerning Code of Conduct for Expert Witnesses

Company A Inc.

(Plaintiff)

vs

Company B Inc.

(Defendants)

Federal Court File T-1234-05

I, _____ having been named as an expert witness by Company A Inc., certify that I have read the Code of Conduct for Expert Witnesses set out in the schedule to the Federal Courts Rules and agree to be bound by it.

Dated this _____ day of , 201X.

Signature of Expert Witness

(Name, address, telephone and
fax number of expert witness)

Ontario Rules

Amendments to the Rules of Civil Procedure, effective January 1, 2010, take on a very similar look to the new Federal Rules as well as those that have surfaced in other provinces across Canada.

The general theme of all of the country's rules is that expert witnesses are to act as independent experts and not advocates for their client.

Rule 4.1 - 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.
- (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.

Taking Evidence Before Trial

- 36.01 (4) Before moving for leave to examine an expert witness under subrule (2), the moving party shall serve on every other party the report of the expert witness referred to in subrule 53.03 (1) (calling expert witness at trial) unless the court orders otherwise.

53.03 Experts' Reports

- (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)
- (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.

Quebec Draft Reform Expert's Mission and Duty

231. A joint or court-appointed expert is vested with the court's authority to gather the evidence required to carry out his or her mandate. The expert can examine any document or thing and visit any premises. With the authorization of the court, the expert can gather testimony and, if necessary, summon witnesses. The expert swears in summoned witnesses, hears their depositions, preserves their evidence and certifies its source and integrity.

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.

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CONTACT INFORMATION

LEVI & SINCLAIR SENCRL
LLP

1303 Greene Avenue, Suite 400

Montreal, Quebec H3Z 2A7

Tel: (514) 931-7600

Fax: (514) 931-3600

Philip C. Levi, CFE, FCPA auditor, FCA, CPA/CFF, FCA•IFA

plevi@levifca.com

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