

MANAGING THE RISK OF FRAUD

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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 3

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 third 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.

Quebec Rules

WRITTEN REPORT REQUIRED

402.1. Except with leave of the court, no expert witness may be heard unless his written report has been communicated and filed in the record in accordance with the provisions of Sections I and II of Chapter I.1 of this Title. However, in the case of a motion other than a motion to institute proceedings, a copy of the report must be served on the parties at least 10 days before the date of the hearing, unless the court decides otherwise.

The filing in the record of the whole or abstracts only of the out of court testi-

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mony of an expert witness may stand in lieu of his written report.

413.1. Where the parties have each communicated an expert's report and the reports are contradictory, the court may, at any stage of the proceeding, even on its own initiative, order the experts concerned to meet, in the presence of the parties and attorneys who wish to attend, and reconcile their opinions, identify the points which divide them and report to the court and to the parties within the time determined by the court.

COURT APPOINTED EXPERT

414. After issue joined, the court, if it is of opinion that the ends of justice will be better attained, may, even of its own motion:

- (1) order that any fact relating to the case be investigated, verified and determined by an expert whom it designates;
- (2) refer to an accountant or practitioner the establishing or auditing of accounts or figures in any matter where accounts have to be rendered or settled and which require calculations to be made, or involve a partition of property.

415. The court may, exceptionally, if in its opinion the difficulty and importance of the case so require, appoint three experts, or three accountants or practitioners, rather than only one.

416. The judgment appointing an expert must state clearly the duties of the person appointed and the time within which he must file his report.

The clerk must, without delay, send to the person

appointed a copy of the judgment.

417. The grounds for recusing an expert are the same as those provided for judges in article 234. Recusation is urged by motion, and if it is held to be well founded the court replaces the person recused.

418. The expert, before entering upon his functions, must be sworn in writing before the judge or clerk to perform his duties faithfully and impartially. If he refuses or neglects to be sworn or to carry out his duties, any of the parties may request the court to replace him.

419. The expert must give the parties at least five days' notice of the time and place at which he will begin to carry out his instructions.

420. The expert may examine any thing or visit any place which he considers useful for the carrying out of his duties.

He may summon witnesses by means of subpoenas issued by the clerk, administer the oath to them and hear their depositions which are taken down in writing and signed by the witness and countersigned by the expert, unless they have been taken down by a stenographer duly sworn.

Mention must be made in the minutes of the relationship of the witnesses with the parties, and of the interest of each in the suit.

421. The expert must, before the expiry of the time fixed by the court, file in the office of the court a signed report of his proceedings and conclusions, to which is annexed evidence of his having been sworn and the documents and testimony which he

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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.

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has taken.

The report must be sufficiently reasoned and detailed to enable the court to appreciate the facts.

If there are several experts and they are unanimous, they may make one and the same report.

424. An expert who refuses or unduly delays to file his report is guilty of contempt of court.

425. Auditors and practitioners have the powers and are subject to the rules prescribed concerning experts, so far as applicable; they are bound to follow the directions of the court.

Nova Scotia Rules

31.06 The court may order that the number of expert witnesses, including medical witnesses, to be called at a trial shall be limited.

WRITTEN REPORT REQUIRED

31.08 (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been

- (a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and
- (b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial, the evidence of the expert shall not be admissible on the trial without leave of the court.

British Columbia Rules

In British Columbia, the new Supreme Court Civil Rules came into effect on July 1, 2010. This was the culmination of a long process which began with the B.C. Justice Review Task Force in March 2002.

Rule 11-2 — Duty of Expert Witnesses

- (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.
- (2) If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she
 - (a) is aware of the duty referred to in subrule (1),
 - (b) has made the report in conformity with that duty, and
 - (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

REQUIREMENTS FOR REPORT

- (1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:
 - (a) the expert's name, address and area of expertise;
 - (b) the expert's qualifications and employment and educational experience in his or her area of expertise;
 - (c) the instructions provided to the expert in relation to the proceeding;
 - (d) the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
 - (e) the expert's opinion respecting those issues;
 - (f) 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.

PRODUCTION OF DOCUMENTS

- (8) Unless the court otherwise orders, if a report of a party's own expert appointed under Rule 11-3 (9) or 11-4 is served under this rule, the party who served the report must,
 - (a) promptly after being asked to do so by a party of

record, serve on the requesting party whichever one or more of the following has been requested:

- (i) any written statement or statements of facts on which the expert's opinion is based;
 - (ii) a record of any independent observations made by the expert in relation to the report;
 - (iii) any data compiled by the expert in relation to the report;
 - (iv) the results of any test conducted by or for the expert, or of any inspection conducted by the expert, if the expert has relied on that test or inspection in forming his or her opinion, and
- (b) if asked to do so by a party of record, make available to the requesting party for review and copying the contents of the expert's file relating to the preparation of the opinion set out in the expert's report,
- (i) if the request is made within 14 days before the scheduled trial date, promptly after receipt of that request, or
 - (ii) in any other case, at least 14 days before the scheduled trial date.

Pending judicial clarification, it would be prudent for practitioners to consider dividing their files into three categories: one containing only the documents described above; one that complies with the professional requirements of the expert's affiliation(s) (i.e. CBVs, CAs etc); and one containing material over which counsel may wish to claim privilege.

Rule 11-7 — Expert Opinion Evidence at Trial

Reports must be prepared and served in accordance with rules

- (1) Unless the court otherwise orders, opinion evidence of an expert, other than an expert appointed by the court under Rule 11-5, must not be tendered at trial unless
 - (a) that evidence is included in a report of that expert that has been prepared and served in accordance with Rule 11-6, and
 - (b) any supplementary reports required under Rule 11-5 (11) or 11-6 (5) or (6) have been prepared and served in accordance with Rule 11-6 (5) to (7).

Alberta Rules

In Alberta, the new Alberta Rules of Court came into force on November 1, 2010. The Rules are the result of a multi-year Rules Project, led by the Alberta Law Reform Institute.

Some of the sections of the Alberta Rules that would be of particular interest to the forensic expert are:

5.37 QUESTIONING EXPERTS BEFORE TRIAL

- (1) The parties may agree, or in exceptional circumstances the Court may direct, that an expert be questioned by any party adverse in interest to the party proposing to call the expert witness at trial.
- (2) The questioning must be limited to the expert's report.
- (3) The Court may impose conditions about questioning with respect to all or any of the following:
 - (a) Limiting the length of questioning;
 - (b) Specifying the place where the questioning is to take place;
 - (c) Directing payment of costs incurred;
 - (d) any other matter concerning the questioning.
- (4) Evidence of an expert under this Division is to be treated as if it were evidence of an employee of the party who intends to rely on the expert's report.

CONTINUING OBLIGATION ON EXPERT

5.38 If, after an expert's report has been provided by one party to another, the expert changes his or her opinion on a matter in the report, the change of opinion must be

- (a) disclosed by the expert in writing, and
- (b) immediately served on each of the other parties.

USE OF EXPERT'S REPORT AT TRIAL WITHOUT EXPERT

5.39 (1) A party serving an expert's report may, at the same time, also serve notice of intention to have

the report entered as evidence without calling the expert as a witness.

- (2) If a party serves a notice of intention under subrule (1), no objection may be made at trial to entering the expert's report as evidence unless, within 2 months after service of the notice under subrule (1), any other party serves a statement on the party serving the notice of intention
- (a) setting out all or parts of the report that that other party objects to being entered as evidence under this rule, and giving reasons for the objection, or
- (b) serving on the party a request that the expert attend the trial for cross-examination.
- (3) Agreeing to have the expert's report entered as evidence without calling the expert as a witness, either explicitly or by allowing subrule (2) to operate without objection, is not an admission of the truth or correctness of the expert's report.
- EXPERT'S ATTENDANCE AT TRIAL**
- 5.40(1) A party who agrees to have all of an expert's report entered in evidence at trial, either explicitly or by allowing rule 5.39(2) to operate without objection, may, at the same time as responding to the notice of intention, serve a request that the expert be in attendance at trial for cross-examination.
- (2) The expert whose entire report is to be entered at trial must not give oral evidence at trial unless
- (a) a request that the expert attend for cross-examination has been served, or
- (b) the Court permits.
- (3) The party who requests an expert's attendance for cross-examination must pay the costs of the expert's attendance, determined under Schedule B, unless the Court is satisfied that the cross-examination is of sufficient assistance to warrant a different order about who is to pay those costs.
- (4) If the party proposing to enter the expert's report receives a request that the expert attend for cross-examination, the party proposing to enter the report may question the expert at trial.

Quebec Draft Reform Expert's Mission and Duty

235. Before the trial begins, a party can demand that an expert's report be dismissed on the ground of irregularity, substantial error or bias, in which case the demand must be notified to the other parties within 10 days after the report is submitted.

If the court considers the demand well-founded, it orders that the report be corrected or that it be withdrawn. In the latter case, it can allow another expert to be appointed. The court can also reduce the amount of the fee payable to the expert or order that the expert repay any amount already received, to the extent specified.

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