

HOW THE NEW RULES OF COURT WILL AFFECT EXPERT TESTIMONY

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On July 1, 2010, new *Rules of Court* (see *Letter of the Law*, Winter 2009) that are designed to reduce time and money spent on litigation in British Columbia Supreme Court will come into effect. They will provide judges with more authority to control the adversarial process and ensure that the amount of time, expense and process involved in resolving a dispute are proportionate to the dollar amount involved, the importance of the issues in dispute, and the complexity of the proceeding. This authority particularly extends to experts and will affect the firm's clients in two ways: when cases require expert opinions *and* when our professional clients (for example, engineers, accountants and physicians) are hired to give expert opinions for other cases.

The main impetus for the Rules' changes governing experts is that, in court, experts' opinions are frequently critiqued as advocating for the side that hired them. Or, expressed more abruptly, "experts provide the opinion they are paid to provide." This perception often leads to a "battle of experts" who are hired to counter each other, adding to the complexity of trials and the high cost of litigation. In an attempt to reduce these costs, the new Rules address how an expert is appointed and the requirements for expert reports as well as how and when an expert can give evidence at trial.

Most significantly, the Rules clearly state that an expert has a duty to assist the court and cannot be an advocate for any party. This duty is akin to an oath to the court and overrides any obligation the expert may have to any party responsible for the expert's fee. Experts cannot simply advocate for the side that hired them; their opinions must not "cross the line" from being neutral and independent.

To ensure that they understand their role, experts must certify that they have prepared their reports in conformity with that duty and that they will testify in compliance with the duty if called upon to give evidence at trial.

A party may still appoint its own expert and parties with the same interest can appoint a joint expert. Opposing parties can also appoint a joint expert. However, the parties must first agree on several criteria, including the issues the expert will address and who will pay the expert. The parties,

and the expert, must then sign an agreement reflecting those terms. ***Unless a court orders otherwise, the joint expert is the only expert who can give expert evidence on a particular issue.***

Finally, a court may appoint an expert on its own initiative if it considers that an expert opinion may help the court resolve an issue and that expert's report must be tendered as evidence in the trial.

An expert's reports must meet certain criteria under the new Rules: the information contained in the report will include the instructions given to the expert by counsel, details of research by the expert, and a list of all documents the expert relied upon to form the opinion. Experts who testify at trial cannot give any evidence not included in their reports. Similarly, parties are entitled to pretrial review of an expert's working papers and drafts — a provision aimed at reducing advocacy by experts. Drafts reflecting the evolution in an expert's opinion can contain important insights into his or her thinking.

Any party may demand that a joint or court-appointed expert appear at trial for cross-examination; however, only an opposing party may demand the attendance of an expert appointed by another party.

A court will not permit joint experts to give oral evidence unless they are demanded by an opposing party to attend for cross-examination or there are matters that require clarification or explanation. (In such instances, testimony will be limited to those matters.) Further, a party cannot cross-examine its own expert witness.

These rules aim to minimize a trial's length by avoiding unnecessary repetition of expert opinion evidence. Moreover they disallow a party that is unhappy with a joint expert's opinion from circumventing its prior agreement that only one expert may give evidence on a specific issue.

While the new Rules take effect on July 1, 2010, there will be a grace period allowing experts to provide opinions under the old Rules at trials starting before September 1. Experts already engaged to provide opinions for trials commencing on or after that date should be ready to augment their reports with the required certification and form under the new Rules.