

Lessons From Ontario's New Rules

By: Richard Steinecke
March 2010 - No. 144

On January 1, 2010, the Rules of Civil Procedure of Ontario were significantly amended. Two of those amendments may be of interest to regulators.

The first relates to expert reports. In recent years the courts have increasingly insisted that expert witnesses be neutral and impartial, providing assistance to the court rather than being an advocate for the party calling the expert. This expectation is fostered by the recognition that courts are reliant upon experts on issues that are outside of the court's expertise. In addition, many experts belong to professional regulatory bodies that require their members to be candid in all of their professional activities.

To promote this goal, the new rules have two features. The first is that the expert report must cover the following topics:

1. The expert's name, address and area of expertise.
2. The expert's qualifications, 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.

It would be simple and helpful for tribunals to make a similar rule for their hearings.

The second feature is that expert witnesses must include with his or her report a certificate indicating that the expert understands and has complied with his or her duties. An adaptation of that certificate for tribunals might read as follows:

Acknowledgement of Expert's Duty

1. My name is *(name)*. I live in *(city)* in the province of *(name of province)*.
2. I have been retained by *(name of party)* to give evidence in the above noted hearing before the *(name of tribunal)*.
3. I acknowledge that it is my duty to provide opinion evidence that is fair, objective and neutral.
4. I acknowledge that it is my duty to provide opinion evidence that is related only to matters within my area of expertise.
5. I acknowledge that it is my duty to provide such additional assistance as the Committee may reasonably require to determine the matters in issue.
6. I acknowledge that these duties prevail over any obligation which I may owe to the party that retained me or the party's representatives.

This too could be required by tribunals.

The new rules also specify a schedule of disclosure of expert reports. The plaintiff's reports are due 90 days before the pre-hearing conference, the respondent's 60 days and any reply report 30 days beforehand.

The second issue of interest is that discovery be proportional to the proceedings. The goal is to try to ensure that access to the courts is not effectively barred for most litigants because of the huge burden of discovery, especially of electronic information. The rule states, in part, as follows:

FOR MORE INFORMATION

This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897
Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

WANT TO REPRINT AN ARTICLE

A number of readers have asked to reprint articles in their own newsletters. Our policy is that readers may reprint an article as long as credit is given to both the newsletter and the firm. Please send us a copy of the issue of the newsletter which contains a reprint from Grey Areas.

Grey Areas

In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
- (b) the expense associated with answering the question or producing the document would be unjustified;
- (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- (e) the information or the document is readily available to the party requesting it from another source.

In ... determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

These proportionality rules may be of limited assistance when dealing with disclosure requests relating to the investigation file itself (except in very high volume matters). Generally the entire investigation file must be disclosed. However, when dealing with disclosure requests involving other regulatory records (e.g., the handling of investigations of other members; background information about other witnesses), the principles of this rule may be relevant.

These initiatives may assist tribunals manage their hearings fairly and a bit more efficiently.

FOR MORE INFORMATION

This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897
Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

WANT TO REPRINT AN ARTICLE

A number of readers have asked to reprint articles in their own newsletters. Our policy is that readers may reprint an article as long as credit is given to both the newsletter and the firm. Please send us a copy of the issue of the newsletter which contains a reprint from Grey Areas.