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Proposed Changes to the Rules for Expert Witnesses: Cooperation, Conferencing, & Consequences

In its original Phase 2 Consultation Paper, the Civil Rules Review Working Group proposed radical changes to the way expert witnesses are treated before and during trial, including – most controversially – a call for experts to be jointly appointed and instructed by opposing parties. While some of the initial proposals have been softened following the consultation process, the Working Group's Final Policy Report recommends three major changes to the current regime for expert witnesses:

1. Presumptive joint experts on "financial issues."
2. Mandatory expert conferencing in Trial Track matters.
3. Resequencing and shortening the presentation of expert evidence at trial.

The Working Group also recommends codifying the existing common-law tests for the admissibility of expert testimony under *White Burgess Langille Inman v Abbott and Haliburton Co* . Experts who have breached their duties to the Court will face new consequences, with the introductions of a "two-strikes-you're-out" rule, and the creation of a central registry to track judicial decisions in which an expert has been found in breach of their duties of independence, impartiality, and objectivity.

Presumptive Joint Experts on "Financial Issues"

The Working Group recommends that parties be required to jointly retain and instruct an expert on financial issues, including quantification of past and future economic loss, cost of care, and property valuations. Parties will also be expected to consider the use of a jointly retained expert on all other issues. The issue of jointly retained experts would be canvassed at the Directions Conference or One-Year Scheduling Conference, with the presiding judge having discretion to order joint experts on other issues in the appropriate circumstance.

Where a joint expert is required, parties will be expected to jointly select, instruct, and pay the expert. The Court will be empowered to appoint a joint expert if agreement cannot be reached. All communication with the expert must be transparent, including instruction letters, the provision of documentation, and requests for clarification. Importantly, all parties would retain the right to cross-examine a jointly retained

expert.

Mandatory Expert Conferencing

The proposed *Rules* presumptively require experts in matters proceeding on the Trial Track to engage in conferencing or “hot-tubbing” prior to trial. These conferences would take place in the absence of the parties or counsel. Following the conferences, the experts would be required to issue a joint report summarizing the areas upon which they agree and disagree, as well as the reasons for disagreement.

The Court would have the discretion to dispense with the presumption and to order all experts, some experts, or none to participate in a pre-trial conference. The Court may also order expert conferencing in Summary Track cases, if appropriate.

Expert Testimony at Trial

The recommendations envision the re-sequencing of trial testimony so the fact witnesses for all parties testify first, followed by the expert witnesses. In non-jury trials, expert reports will be filed and taken as read. Experts will be expected to focus their testimony only on areas of disagreement, with only a brief presentation of the areas of agreement.

Implications for Experts & Litigants

All experts, but particularly those who specialize in “financial issues” such as accountants, actuaries, appraisers, and life-care planners, will benefit from broad experience with both plaintiffs and defendants under the proposed new *Rules*.

The move toward presumptive expert conferencing will require litigation experts to develop a different skill set, with greater emphasis on communication skills. Counsel will also have to develop new approaches when preparing experts for joint conferencing.

Because the Court will retain discretion to dispense with any presumptions relating to joint experts and expert conferencing, we anticipate the topic of expert witnesses will be a particularly hard-fought issue at Directions Conferences and One-Year Scheduling Conferences. Exactly how these recommendations will be implemented in practice remains to be seen.

This is only one part of our series, A New Vision for Litigation, analyzing the proposed reforms to Ontario’s Rules of Civil Procedure. See our other blogs here:

- Summary of Proposed Changes to Ontario’s Rules of Civil Procedure

- Preparing for Proposed Changes to the Rules of Civil Procedure in Ontario: Strategic Insights & Practical Steps for In-House Counsel
- Motions Practice Transformed: What the Proposed Civil Justice Reform in Ontario Means for Litigants
- Expediting Justice: Pre-Litigation Protocol in the Proposed Changes to the Rules of Civil Procedure in Ontario
- Up-Front Evidence: A New Era in Discovery Proposed by the Civil Rules Review in Ontario
- Trials on Trial: A New Vision for Adjudication in Ontario