

**Writing an Effective Expert Report:
The Nuts and Bolts of Complying with Rule 53.03**

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Introduction

Most lawsuits settle. It is therefore quite infrequent that an expert is actually called as a witness at trial, and examined and cross-examined in front of a judge and jury. Because most lawsuits settle, the written reports prepared by the expert witnesses are of utmost importance in the litigation process.

A clear, concise, factually sound, edited and well-written report prepared by a qualified expert can change the tide of litigation. A poorly-written and confusing report, riddled with typos, factual errors and opinions beyond the expert's scope does not help anyone. This paper will set out the technical requirements for an expert report from a legal perspective, and also provide some tips and guidelines for writing the types of expert reports that win cases.

General Principles

The Purpose of an Expert Report

The purpose of an expert report is to give notice to the opposing parties of the opinion evidence of an expert that will be tendered through oral testimony at trial. In essence, expert reports are designed to avoid trial by ambush, which is heavily frowned upon in modern litigation. The report should include not only the opinion of the expert, but importantly the facts upon which the opinion is based.

Ultimately, an expert report should be a standalone document, from which the reader can understand the factual assumptions, the available evidence, the results of any independent testing, and the expert's opinion, without needing to look at any other documents.

Basic Formatting and Drafting Issues

First and foremost, every expert report should include the following:

- (i) Date of the report;
- (ii) Identity of the parties in the action;
- (iii) Page numbers;
- (iv) Use of headings;
- (v) Date of the assessment or inspection (if applicable);
- (vi) A clear and concise conclusion or set of conclusions;
- (vii) A carefully reviewed and edited final draft; and

- (viii) Signature of the expert.

Most of the other general requirements for drafting an effective expert report are now helpfully set out in Rule 53.03 of the *Rules of Civil Procedure*.¹

Meeting the Requirements of Rule 53.03 – A Framework for Expert Reports

As a result of amendments to Ontario's *Rules of Civil Procedure* in January of 2010, there is now a common structure or framework of requirements for all expert reports. Rule 53.03 requires that every expert report 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; and
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

These requirements are intended to make the expert's role more transparent, and to ensure that experts fully explain the basis for their opinions within their reports.

Each of the requirements of Rule 53.03 must be met in order for an expert's report to comply with the Rule, regardless of whether the expert is retained by the plaintiff or the defence. As such, the requirements themselves have created a convenient template for drafting an expert report.

¹ R.R.O. 1990, Reg. 194.

1: The Expert's Name, Address and Area of Expertise

This is (hopefully!) the simplest part of the report. However, keep in mind that one of the requirements of Rule 53.03 is that the expert's report sets out his or her "area of expertise". It is always best if the expert can set out his or her particular area of expertise clearly and concisely, at the outset of the report. The expert's area of expertise should be specific, and should explain why the expert is qualified to address the issues in the litigation with the opinions in his or her report.

2: The Expert's Qualifications and Employment / Educational Experiences

A summary of the expert's qualifications and employment/educational experiences is all that is necessary for the purposes of the expert report. Be sure to set out any particularly impressive credentials, such as positions with academic journals or areas of research relevant to the opinion being given. However, an exhaustive review of the expert's career and credentials should be saved for his or her *curriculum vitae*.

3: The Instructions Provided to the Expert in Relation to the Proceeding

A brief review of the instructions provided to the expert should be included in the report. This section does not need to be exhaustive. For example, some experts start their reports in a manner similar to the following:

Further to your request, I have prepared a report that describes the future care requirements and their associated costs for John Smith.

This achieves the general requirement to set out the instructions provided.

Another acceptable method is to establish a separate section for instructions, as in the following example:

Instructions

We were asked to review the materials listed in Appendix A to technically assess the incident premises for its compliance with relevant codes and by-laws.

It is also helpful in this section for the expert to set out whether or not he or she had the opportunity to personally assess the patient/property at issue. If such an assessment has taken place, the date of the examination and the identity of the assessor (if different from the author of the report) should be noted.

4: The Nature of the Opinion Being Sought and the Issues in the Proceeding to Which the Opinion Relates

This segment of information required by Rule 53.03 is quite straightforward and does not necessarily require its own section of the report. If the expert's report has answered the following questions overall, it is likely in compliance with the Rule:

- (i) What type of opinion is being sought by the instructing party? In other words, what aspect of the expert's area of expertise is being utilized?
- (ii) Where does the opinion fit into the case generally? Is it about liability or fault, or an aspect of the injuries or damages of the plaintiff?

There is usually no need for an expert to refer back to the statement of claim or the statement of defence in an attempt to distil the broader issues of the litigation into the report. Rather, a simple statement of the issue or issues being directly addressed by the expert will suffice.

5: The Expert's Opinion Respecting Each Issue and Summary of Range of Opinions

The expert's opinion is the most important aspect of the report – and the reason the expert was retained. Accordingly, it is important that the expert's opinions are set out in a clear and concise manner, using common language and with as little jargon or terminology from the expert's field as possible. Where technical terms are required, definitions and explanations should be given.

An expert should not comment on matters which are outside his or her area of expertise. This is a common mistake, and one that often raises concerns with opposing counsel about the validity of the expert's opinions in light of their willingness to opine on matters outside their field. Experts should stick to opinions that fall squarely within their area of expertise.

6: The Expert's Reasons for the Opinion

In this section, the expert report should:

- (i) Describe the factual assumptions on which the report is based;
- (ii) Describe any research conducted by the expert which led to the opinion; and
- (iii) List every document relied on by the expert in forming the opinion.

An appropriate review of the factual assumptions on which the opinion is based is vital. This usually forms a substantial portion of the overall report. The relevant evidence should be summarized and, where applicable, a chronology given, in order to provide some context to the expert opinion. References to key pieces of evidence should be quoted verbatim, particularly if there is any controversy in the facts.

However, an exhaustive review of every document or medical record in the litigation is not required. Reports that contain page after page after page of summaries of every record only serve to detract from the strength of the expert's ultimate opinion. A succinct summary of the key facts relevant to the expert's field and opinion is all that is required.

In terms of factual assumptions, it is critical that an expert be provided with all of the necessary foundational facts to support his or her opinion. If an expert feels that important information is missing, it is best to contact the lawyer who retained the expert, rather than wind up looking careless at trial. A lawyer should not keep anything relevant from the expert, even if it is potentially unhelpful, because this will obviously undermine the expert's opinion and will rarely go unnoticed by the other side.

Furthermore, the expert should review the available facts and evidence with a critical and careful eye, rather than just accepting them at face value. Where the expert must take a side in an area of factual dispute, he or she should set out the apparent contradiction and explain the reason for favouring one explanation over another.

Where there is evidence which potentially undermines the expert's opinion, it should not be disregarded in the expert's report. Rather, it should be summarized, with an explanation as to why it was not persuasive or relevant to the expert.

Any research conducted by the expert should be described, with references where possible. Additionally, any testing or other investigation undertaken should be set out in the report, including the identity of the person who conducted the test (if not the expert personally), their qualifications, and whether it was carried out under the expert's supervision. The results of the testing should also be set out, along with any relevant findings from the testing process.

Lastly, the expert's report must include a list of every document relied upon in reaching the opinion. Most experts simply attach such a list as an appendix to their report. It can also be done in the body of the report, if the number of documents is relatively small.

7: An Acknowledgement of Expert's Duty Form Signed by the Expert

There is a clear trend in the *Rules of Civil Procedure* to move away from the concept of the expert as a "hired gun", and move towards the expert as an impartial and objective specialist. In November of 2007, years of research by the Honourable Justice Coulter Osborne culminated in the following findings:

The issue of "hired guns" and "opinions for sale" was repeatedly identified as a problem during consultations. To help curb expert bias, there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an overriding duty to the court, rather than to the parties who pay or instruct them. The primary criticism of such an approach is that, without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them.

An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at minimum, cause experts to pause and consider the content

of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures. Matched with a certification requirement in the expert's report, it will reinforce the fact that expert evidence is intended to assist the court with its neutral evaluation of issues. At the end of the day, such a reform cannot hurt the process and will hopefully help limit the extent of expert bias.²

The Form 53 which must now be signed by all experts requires an acknowledgement of their duty to provide evidence in relation to the 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.

Lastly, the expert must acknowledge that the duties referred to above prevail over any obligation owed to any party by whom or on whose behalf the expert was engaged.

The Form 53 must be signed by the expert and attached to the expert report. It is not optional.

In light of these significant acknowledgements in Form 53, an expert should be careful never to give the appearance of being an advocate for the party who retained him or her. For medical doctors, the College of Physicians and Surgeons of Ontario's Policy Statement *Medical Expert: Reports and Testimony*³ states:

When acting as medical experts, the College expects that physicians will provide objective and impartial opinions on matters that fall within their scope of expertise.

...

When physicians provide expert opinions, their duty to the adjudicative body prevails over any obligation to the person who is instructing or paying them. Physicians acting as medical experts must assist the adjudicative body by providing objective and impartial opinions; physicians must

² C. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations*, 2007 (Ontario Min. of the Attorney General) at 75-76.

³ Available at: <http://www.cpso.on.ca/CPSO/media/uploadedfiles/policies/policies/policyitems/Medical-Records.pdf?ext=.pdf>

not advocate for any party involved in the legal proceeding. Physicians must be honest, objective and impartial. They must ensure that the opinions they provide are reasonable, fair, balanced, and substantiated by fact, scientific evidence, or experience, and sound clinical judgment. Physicians must not allow personal bias to prejudice the expert opinions they give.

Comments that are unrelated to the expert opinion are inappropriate and must not be provided. In addition, physicians must not make any unprofessional comments or criticisms regarding the other experts or individuals involved in the legal proceeding.

[footnotes omitted]

In light of all the above considerations, the style and content of the expert report are important. If the report contains excessively strong language, hyperbole, argument or speculation, it may be seen as presenting an appearance of bias. The expert must be, and equally importantly must be seen to be, independent of the party who retained him or her.

The Responding or Rebuttal Expert Report

Frequently, experts will be asked to review and provide their opinion regarding an opposing expert's report. There are some additional considerations relevant to these responding or rebuttal expert reports.

As noted above, any unprofessional comments or criticisms of the other expert should be avoided. Rather, a responding report should summarize the opinion of the other expert and set out any areas of agreement or disagreement. The responding report should also point to any evidence which either supports or undermines the opinions set out by the opposing expert.

As with all expert reports, responding reports should not stray outside the expert's area of expertise, regardless of the temptation to do so when the opposing expert has so strayed. A clear statement that the opposing expert has gone beyond his or her expertise is much more helpful than an opinion which cannot be supported by the expert's field of study.

When analysing the opposing expert's opinion, it is often helpful for a responding report to clearly explain any differences between the facts upon which their respective opinions are based. If the opposing expert is relying on assumptions rather than documents or factual evidence, it is very helpful to clearly delineate the differences.

Likewise, if an opposing expert has put too much emphasis on a particular fact or document, this can be explained and the opinion potentially undermined.

Ultimately, a responding or rebuttal report should follow the same framework as any expert report.

Conclusion

Expert reports are critical to the civil litigation process. A well-written expert report can make a significant difference to the outcome of the case. Likewise, a confusing and poorly-written report can hinder a party's chances of success.