Notice to the Profession
From the Supreme Court Rules Revision Committee

Re: Audio Recording Independent Medical Examinations

The Rules Revision Committee has received a submission from the Trial Lawyers Association of British Columbia proposing a rule change to permit a person who is being examined under Rule 7-6 to audio record the examination. The TLABC's submission is attached to this Notice.

The practice decisions under Rule 7-6 and its predecessor rule have held that the court has jurisdiction to order audio recording of IMEs but this discretion should be exercised rarely and with restraint, and only in circumstances where there is cogent evidence that the use of an audio tape recording will advance the interests of justice. (Wong v. Wong 2006 BCCA 540) The proposed change would give the party being examined the right, on notice, to audio record the examination under Rule 7-6.

The Rules Revision Committee invites comments from the profession, the medical community and other stakeholders on this issue. Specifically, should Rule 7-6 be amended to permit the party being examined under that rule the right to audio record the examination?

Comments should be sent by mail to Ms. Jill Leacock, Secretary, Rules Revision Committee, The Supreme Court of British Columbia, 800 Smithe Street, Vancouver, BC, V6Z 2E1 or by email to Jill.Leacock@courts.gov.bc.ca.

The deadline for comments is October 31, 2014.

July 8, 2014

"Smith, J"

The Honourable Mr. Justice Nathan Smith,
Chair, Rules Revision Committee

TRIAL LAWYERS ASSOCIATION OF BC
SUBMISSION ON THE USE OF AUDIOTAPES
DURING INDEPENDENT MEDICAL EXAMINATIONS

Overview

The Trial Lawyers Association of British Columbia recommends that a provision be introduced in the Rules of Court for independent medical examinations ("IME's") to be audio recorded. Rule 1(5) states that the objective of the rules is to "secure the just, speedy and inexpensive determination of every proceeding on its merits." The TLABC considers that audiotaping will, at relatively little cost, provide increased quality and transparency in expert opinion evidence which in turn will increase the likelihood of securing a just result.

While videotaping occurs in many medical settings and its benefits are that much greater than audiotaping because it provides a visual record as well an oral record, there may be a corresponding increase in costs. Consistent with the practice of proceeding with small, incremental changes to the rules, it is recommended that the initial step be limited to introducing audio recording.

Background

A. Independent expert evidence in an adversarial system

The common law is based on an adversarial system, in which each party is responsible for obtaining evidence in support of their position and against that of the opposing party. In this setting, there is potential for tensions to arise between the interests of parties and the independence of experts retained to provide an opinion supporting one party and/or attacking the other.

Experts are the only category of witness allowed to give opinion evidence. While there are specified limits to the use of expert evidence, in the last several decades, the expansion of knowledge has led our judicial system to increasingly accept the evidence of experts to shed light on issues in dispute.

At the present time, the B.C. Rules of Court provide limited tools to test the independence and accuracy of independent expert evidence. These generally consist of cross-examination and the use of opposing expert opinion evidence. Unfortunately much can transpire in a medical examination which pits the expert's version of what was said and done against a party's version. Without any objective record of what was actually said and done, courts and parties are left to piece together the foundations of an expert's opinion based on circumstantial evidence. The dynamics of a system in which experts are assumed to be highly knowledgeable and independent on one hand, while a party's credibility is routinely subject to attack on the other hand, create a degree of imbalance that can undermine the public's confidence in fairness of the system. This is particularly applicable to medical examinations where the subject matter of the expert's opinion is the party him or herself.

Given the potentially vital role that experts can play in the litigation process, it is worthwhile to examine whether technology can introduce greater accountability without excessively increasing costs or delaying proceedings. It is anticipated that such measures will in turn increase the likelihood that litigation will produce a fair and just result and may also enhance the potential for settlement.

B. Use of audio recording in BC

At the present time, the *Rules of Court* do not provide for the recording of medical examinations. In *Wong v. Wong* 2006 BCCA 540 [*Wong*], the Chief Justice held that it was "well within the discretion of a chambers judge to make an order concerning the use or non-use of an audiotape recorder on a medical examination under Rule 30." (para. 25). Considerations behind refusing to order an audiotape of the IME are found in the following passage:

> "A medical examination under Rule 30, although part of the discovery process, is quite different in nature. The examination is often referred to as an "independent medical examination" (IME), and with good reason. The examination may only be conducted by "a medical practitioner or other qualified person". The examiner must have qualifications as an expert in some aspect of medicine or other relevant discipline. The examination may only be compelled on court order. This provides the means of assuring that the proposed examiner is truly qualified, that his qualifications are in a relevant field of medicine, and that he is independent and therefore likely to be impartial and objective." (para. 28).
>
> … "I do not think what a plaintiff says to an independent medical examiner can in any way be equated with statements taken under oath on an examination for discovery under Rule 27." (para. 29)

The court then reviewed previously decided cases in BC as well as Alberta and Ontario, and in particular, the Ontario Court of Appeal decision in *Bellamy v. Johnson* (1992) 8 O.R. (3d) 591. In that case, a master who had ordered the use of an audio tape recording because of a "defence orientation" on the part of a doctor was set aside on the basis that there was no evidence to support such a finding.

The essence of the court's analysis in *Wong* is that "expert opinion evidence … is *prima facie* objective and impartial." (para. 41)

While agreeing with the majority decision on the basis of the facts in the case before her, Madam Justice Saunders pointed to the general legal right of individuals to audiotape conversations as well as advances in technology and its widespread use to promote transparency to conclude that "a robust attitude to the use of recording devices should be the norm, such that any reasonable explanation for their presence may justify their use, absent clear and convincing reason for their curtailment." (para. 56)

C. Considerations supporting the use of audio recording

The primary reason for allowing the recording of IME's is substantive – it enhances the court's access to the truth. The more that is known about the IME process, the better able the trier of fact is to assess the expert's opinion.

The Court of Appeal decision in M.C. v. L.A.C. [1990] B.C.J. No. 134 is instructive of how the overriding interests of justice mandated use of a new technology (paternity tests) under Rule 30 because it offered the best evidence of an issue before the court. Locke J.A. wrote:

> "I agree with the House of Lords in S. v. S. and in particular with the statement of Lord Denning in the Court of Appeal at (1970) 1 All E.R. at 1165 quoted by Lord McDermott in his speech at 117:
>
> > "... Finally, I must say that, over and above all the interests of the child, there is one overriding interest which must be considered. It is the interests of justice. Should it come to the crunch, then the interests of justice must take first place ... In my opinion, when a court is asked to decide whether a child is legitimate or not, it should have before it the best evidence which is available. It should decide on all the evidence, and not on half of it. There is at hand in these days expert scientific evidence - by means of a blood test - which can in most cases resolve the issue conclusively. In the absence of strong reason to the contrary, a blood test should be made available. The interests of justice so require ...."
>
> The last argument related to opening the floodgates. I am not impressed by the argument and where the evidence can be conclusive, to deny it just because it is new or comparatively costly does not accord with the statement of Lord Denning…
>
> The pleadings show that the issue of paternity and thus support is squarely before the court. To deny the use of the best evidence to the court would be wrong unless overriding considerations show it to be to the child's detriment."

The value of recordings in enhancing the court's understanding of what transpires in a police interview was addressed in *R. v. K.G.B.* [1993] 1 S.C.R. 740 where Cory J. (dissenting, but not on the issue of videotape recordings) wrote:

> "In passing, I would observe that the videotape serves as well to monitor the conduct of the police during the interview. It goes far to ensuring that nothing untoward happened in the course of the interview. The usefulness of the videotape of an interview was aptly described by A. Heaton-Armstrong and D. Wolchover in "Recording Witness Statements", [1992] Crim. L.R. 160, at p. 169:
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> > "The more accurate and comprehensive the record of a statement the stronger the case becomes for introducing it as evidence of the facts contained in it. There is a world of difference between a conventional witness statement signed by the maker but written by a police officer and a video-recorded interview with a witness which will include the questions and other potentially important features

> such as a witness's demeanour, in modern parlance non-verbal communication or, as it is popularly known "body language".
>
> The videotaped statement with its complete and comprehensive record of the questions posed, the answers given and the demeanour of the witness will often serve as a complete answer to the issues of reliability and voluntariness of the statement."

With respect to the court's reasoning in *Wong*, it is respectfully submitted that the court failed to consider the context in which a presumption of independence is made.

A presumption of independence is both necessary and appropriate when applied to a judge or jury, given their explicit role of impartiality in a trial, and their complete financial independence of the outcome.

With respect to parties or witnesses, however, whether lay or expert, the dynamics of an adversarial system introduce pressures that leave the door open to conscious or even subconscious polarization. In situations where experts are regularly retained by either plaintiffs or defendants, financial considerations add to the potential for polarization. It is naïve to assume, without more, that a medical expert who generates significant income from providing IME's for a particular "interest group" is completely immune to these pressures, whether they are acted on or not. It should also be recognized that the pressures may well increase in the presence of a large institution that regularly requires IME experts to provide opinions taking a particular view of the issues[1]. While obvious instances of unreliable expert evidence may be infrequent, any time an expert is less than honest, the potential for a just result is undermined.

The pressures facing medical experts which are inherent in an adversarial system are inevitably exacerbated in an IME setting where the party being examined (often the plaintiff) is cognitively or emotionally vulnerable, or where the person being examined has limited language skills or faces cultural inhibitions that impact on the assessment. Clearly one hopes that a medical expert will not only be qualified to conduct a competent assessment but will also be independent and unbiased in formulating his/her opinion. But what if he or she is not? Experiences in many settings involving interactions between persons in positions of authority and those in positions of vulnerability (e.g. residential schools, prisons and seniors homes) demonstrate that the greater the imbalance of power and the less accountability there is in the system, the more potential there is for abuse. How does a plaintiff with functional or memory impairments challenge the evidence of a highly trained, articulate and experienced expert? The optics of forcing a vulnerable party to be examined by an opposing expert who will be able to testify from a position of power and prestige, and depriving the party of any independent record of the event, are not good. Justice must not only be done but be seen to be done. Experts can and should be given a mandate of independence. This cannot be confused with granting them a *presumption* of independence.

Insight into these concerns can be found in Rule 6. A "person under disability" receives layers of protection, including the involvement of a litigation guardian, a lawyer, protection in the discovery and trial process, and review of a settlement (and in cases, the lawyer's fees) by either the Public Guardian and Trustee or the court. Given that disabilities occur in a spectrum, it

[1] Note the use by ICBC of Dr. Murray Allen, discussed in *Paris v. Scott* [1996] B.C.J. No. 2839 and *Rai v. Wilson* [1997] B.C.J. No. 2984; affirmed [1999] B.C.J. No. 611 (BCCA).

would be preferable for rules to be structured to recognize this reality. Creating some protection and accountability within the IME process would be an important step in this direction.

The potential for conflict and lack of impartiality involving medical experts has raised concerns in various jurisdictions (see *Toth v. Jarman* 2006 EWCA Civ. 1028, *Lowe v. Guarantee Co. of North America* [2005] O.J. No. 2991 and *Worthman v. AssessMed Inc.* [2006] O.J. No. 925).

The value of recording an IME lies not only in the fact that a record is created which adds a degree of transparency to the process, but also in the additional insights that come from reviewing the actual communications that formed the basis of the expert opinion. In fact, there are several medical settings in which audio and video recording is undertaken in order to identify shortcomings in doctor/patient communication and identify ways to improve interview methodology[2]. For example, in the introduction to a second in a series of Research Briefs on Health Communications, completed as part of The Health Literacy Project, a joint initiative of the Centre for Literacy of Quebec and the Nursing Department of the McGill University Health Centre, the authors wrote:

> "Some research on adult literacy and social policy has suggested a correlation between limited literacy skills and poor health… Patients and their families found tape-recorded medical consultations and information valuable, and positive results were identified in patients' behavioural change and self-care.."

In an article entitled How do patients experience consultations at an orthopaedic out-patient clinic?, published in the European Journal of Public Health, Vol. 8, 1998 No. 1, the authors comment:

> "Studies of consultations with GPs have shown the method of video recording to be successful in obtaining informative material which can illuminate key factors in the physician-patient relationship." (p. 60)

In an article entitled Using Videorecording to Enhance the Development of Novice Researchers' Interviewing Skills, published in the International Journal of Qualitative Methods 6 (1) March 2007, the authors observed that "[l]earning how to interview is a complex and often challenging endeavour." The following passage identifies some of the important aspects of interviewing that the authors were attempting to analyze:

> "Reviewing a transcript can expose the organization of the researcher's questions, the nature of the participant's and interviewer's statements, and the transitional statements made by both. However , it cannot readily reveal rapport between the interviewer and the

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[2] See also the following: Using Video Recording to Identify Management Errors in Pediatric Trauma Resuscitation, PEDIATRICS, Vol. 117, No. 3, March 2006 pp. 658-664; Using video-recorded consultations for research in primary care: advantages and limitations, Family Practice, Vol. 17, No. 5, Oxford University Press 2000; Using standardized patients to measure physicians' practice: validation study using audio recordings, BMJ, Vol. 325, 28 Sept. 2002.

participant, the nonverbal gestures and body positions of both, the influence of the timing of questions or the context on the interview process."

The need for accuracy in reporting what a plaintiff communicates is no less important in the legal setting than the medical setting. Statements which, in a medical-legal report, are attributed to a party through the use of quotations can have a particularly dramatic impact. A recording can allow one to verify whether the statement was actually made. Pauses, inflections, emotions in the voice, the complexity of questions and answers, whether an admission was made, the flow of interaction between examiner and examinee, comments made by the examiner, omissions, all can be compared to the report and assist the trier of fact in weighing the evidence of the expert.

D. The position of medical institutions concerning audio and video recording

A leading study of issues relating to the recording of forensic interviews is found in a report entitled Videotaping of Forensic Psychiatric Evaluations, written by a Task Force for the American Association of Psychiatry and the Law ("AAPL") to examine the pros and cons of videotaping. The Task Force report was approved by the AAPL Executive Counsel in May, 1998[3].

In the report, the AAPL identified the following considerations favouring use of videorecording:

- technological advances have made taping much more feasible than it has been in the past;
- recordings enhance the accuracy of the primary data in the resolution of disputes which may arise about what transpired in the IME (which may be helpful in protecting psychiatrists);
- a psychiatrist can review the tape prior to trial to refresh his/her memory about what transpired; and
- taped IME's are useful for addressing issues such as testamentary capacity.

The negative considerations included the following:

- the potential for interference or distortion as a result of the interview being recorded (see discussion above);
- the use of recordings in impeaching the expert's statements;
- the additional time and cost of reviewing recordings;
- the potential for out-of-court uses of the recording (this would likely not apply in BC due to the implied undertaking of confidentiality);
- logistical problems if the videotaping had to take place in a prison (an unlikely scenario under Rule 30);
- issues of the scope of consent necessary to videotape an interview (not applicable).

[3] J Am Acad Psychiatry Law, Vol. 27, No. 2, 1999

The AAPL Task Force report noted that US courts have used videotaping of children in order to protect the child from the stresses of courtroom testimony and to guard against coercion and suggestion of testimony. The report concluded as follows:

> "After reviewing the case law and practical advantages and disadvantages of videotaped forensic interviews, the APPL task force makes the following recommendations:

1. Given the state of research, feasibility, possible adverse effects on the examiner and examinee, AAPL does not support a blanket rule of requiring videotaping in all forensic interviews. The Task Force finds the option of videotaping to be an ethically acceptable medical practice.

2. AAPL recognizes the existence of other legal and professional sources (statutes, case law, and practice guidelines) that may require or recommend videotaping in certain circumstances, such as (a) interviews where hypnosis is used or (b) when children are being evaluated for sexual abuse.

3. Videotaped forensic interviews done by trainees and experienced experts are extremely useful teaching materials. All forensic training programs should consider the educational use of videotaping equipment."

Problems with communication are a significant reason for complaints in both the medical and legal setting. In the CPSBC 2007 Annual Report, 406 complaints were reviewed by the Quality of Medical Performance Committee in 2006. The report stated:

> "Once again, communication between health care professionals and patients was identified as a major cause of problems."

In the Spring 2002 issue (#36) issue of the *College Quarterly*, the College of Physicians and Surgeons of British Columbia provided guidance to doctors on independent medical examinations, stating:

> "You can tape or videotape the examination if you obtain the claimant's consent first. You can agree to the claimant taping or videotaping, if you wish, but if you do, you are strongly advised to make your own tape at the same time."

Recording also occurs in many other contexts including, but not limited to, the following:

- video-recording of traffic on roads, intersections, bridges
- video-recording in banks, stores and malls
- audio recording of telephone calls to large financial institutions for quality control
- video-recording recording legislatures, Supreme Court of Canada proceedings
- video-recording recording during conduct of autopsies and generally in forensic pathology
- video-recording of surgeries, processes for obtaining consents

- video and audio recording within medical research settings

E. The disadvantages of audio recording

The reasons not to record IMEs are generally considered to be the following:

1. it will unduly interfere with the examination process;
2. it will add to the cost of litigation; and
3. it will add to the complexity of litigation.

The first concern relating to the possibility of undue interference has two aspects. One concern is whether a recording device might cause a distortion of the interview process because of the awareness by both the patient and the IME expert that the interview is being recorded.

A second concern arises from the fact that IMEs involve, to some extent, an overlap of law and medicine. The question then is: to what extent should rules of civil procedure encroach on the purview of medical experts conducting an IME?

With respect to the first issue, there does not appear to be any reliable research to the effect that recording IMEs interferes to any significantly measurable degree with the examination process. The AAPL report noted that there was little research on the effects of videotaping on the interview and what research had been conducted had shortcomings with respect to methodology and reliability.

The report noted that in one study involving only audiotaping "60 percent of patients demonstrated no significance disturbance and another 20 percent showed no disturbance after the first few moments." This would suggest that there is relatively little likelihood that audiotaping would interfere with the examination process. As outlined above, the medical profession engages in fairly extensive use of not only audiotaping but also videotaping in various settings to assess the quality of medical care, for educational purposes, and to record medical events, including even the provision of oral consent.

With respect to the second issue regarding what degree of deference courts should give to doctors conducting assessments in a medical-legal context, it should be noted that an IME under Rule 30 is a litigation procedure conducted exclusively for litigation purposes. Although the concept of an IME has become familiar, it is important to note that an IME is a highly invasive procedure that strips an individual of important privacy rights relating to personal information and his/her physical person. An IME is not undertaken in, and does not create a doctor/patient relationship. The IME expert does not engage in medical treatment. In contrast to every other medical procedure, the IME expert is not accountable to the person he/she is examining and in fact, the IME expert does not even report to the patient at all. To the extent accountability exists in this setting, it is in relation to the accuracy and quality of opinions expressed in the report. The only party that has a direct relationship to enforce this accountability is the party that retains the expert, whose interests are adversarial to the party being examined.

If the *raison d'être* of an IME is to enhance the search for truth, surely an independent record of what transpires in an IME is not only consistent with this objective but is an important complement to it and ought to be allowed unless there are compelling arguments and/or evidence to the contrary.

The potential costs of audio recording IMEs include the following:

a) the purchase or rental of recording equipment by the party being examined and the examiner;
b) the cost of transcribing the interview;
c) the cost of having counsel and the examining and/or opposing expert review the audio recording and/or the transcript;
d) the additional time involved in reviewing the audio recording and/or the transcript at trial.

Technological advances have made recording devices portable, affordable, and reliable. A digital voice recorder that records 9 hours of high quality recordings can be purchased at a cost of approximately $80. A quality recorder that produces stereo sound quality and near-absence of background noise with four integrated microphones can be purchased for approximately $200.

The costs for reproducing the recording depend to some degree on the nature of the medical examination. Most IME's last between two and three hours. A forensic psychiatric examination would likely have the most lengthy interview, lasting up to 3 hours. Neuropsychological assessments and functional or work capacity evaluations are longer and may last the better part of a day. In most other assessments, the interview portion of the assessment lasts no more than 1 hour, with the remaining time spent on a physical examination.

The cost of transcribing a 2 hour interview in British Columbia would be no more than the cost of a 2 hour examination for discovery.

Whether an audio recording would be transcribed or reviewed and whether it would be used at trial will likely depend on the perceived benefit in doing so, which will vary from case to case. It is likely that if made available, an audio recording would significantly reduce the time that would otherwise be spent cross-examining an expert concerning what transpired in the IME.

Proposed rule allowing audiotaping of IME

The following issues arise if audio recording is to be introduced:

1. what are the circumstances in which taping will be allowed?
2. what are the uses to which the recordings could be put?
3. what measures can be taken to make the recording reliable/authentic?

It is recommended that any party ordered to undergo an IME under Rule 30 be allowed to audio tape the assessment, subject to the discretion of the court to disallow taping. In other words, the parties would have a *prima facie* right to record. While there do not appear to be any cogent

reasons for not allowing an examination to be audiotaped, it would be advisable to grant the court discretion to address whatever circumstances may arise.

The use to which the recordings are put should be self-evident: they are designed to shed light on the issues for which the IME assessment was ordered and the IME process itself.
In order to ensure the fair use of audiotaping, a provision would be required for parties to give notice of their intention to tape an opposing expert's IME and notice of their intention to use the tape at trial. The requirement for such notices can be added to Rules 30 and 40A. It would be incumbent on the party seeking to use the audiotape to cover the cost in the first instance of transcription and to provide a copy of the recording and the transcript to the opposing party when notice is given.

Reliability of the recording process can be most easily addressed by allowing both parties to record the interview and requiring notice to be given if there is any concern about the reliability of the recording. This is what is contemplated by the BC College of Physicians and Surgeons. If instances of tampering are found to have occurred (it should not be assumed that conduct of this nature will happen), arrangements could be made for the actual recording device to be picked up from the doctor's office from the doctor's office immediately following the IME and delivered to court reporters to prepare an "official" disc and/or transcript.

Appendix A sets out the proposed wording of Rules 30 and 40A allowing audiotaping.

Conclusion

Within the legal setting, the ultimate goal of our legal system is to achieve justice. Within the medical setting, codes of ethics are built around principles of accountability and transparency, which are designed to ensure fairness to the public. These principles operate in harmony and form a strong foundation for the introduction of simple measures to allow the audio recording of IMEs under Rule 30. It is anticipated that such a measure will reassure individuals who are compelled to undergo Rule 30 examinations of the value placed on fairness and openness in civil proceedings and will in a general sense promote public confidence in our system of justice.

Faith E. Hayman

Appendix A

Rule 30 — Physical Examination and Inspection

Order for medical examination

(1) Where the physical or mental condition of a person is in issue in a proceeding, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order, it may make

(a) an order respecting any expenses connected with the examination, and

(b) an order that the result of the examination be put in writing and that copies be made available to interested parties.

Subsequent examinations

(2) The court may order a further examination under this rule.

Questions by examiner

(3) A person who is making an examination under this rule may ask any relevant question concerning the medical condition or history of the person being examined.

(3.1) A person who is being examined may bring an audio recording device to the examination and record the examination in its entirety.

(3.2) If the person being examined intends to audio record the examination, notice must be given to the opposing party at least 48 hours prior to the examination.

(3.3) Where notice is given under subrule (3.2), a person who is making an examination under this rule may also audio record the examination in its entirety.

Order for inspection and preservation of property

(4) Where the court considers it necessary or expedient for the purpose of obtaining full information or evidence, it may order the production, inspection and preservation of any property and authorize samples to be taken or observations to be made or experiments to be conducted on or with the property.

Entry upon land or buildings

(5) For the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter upon any land or building.

Application to persons outside British Columbia

(6) Rule 27 (26) applies to examinations and inspections ordered under this rule.

Rule 40A — Evidence of Experts

[en. B.C. Reg. 55/93, s. 14, eff. Aug. 30, 1993]

Application

(1) This rule does not apply to summary trials under Rule 18A, except as provided in that rule.

Admissibility of written statements of expert opinion *and audio recording of examination*

(2) A written statement setting out the opinion of an expert is admissible at trial, without proof of the expert's signature, if a copy of the statement is furnished to every party of record at least 60 days before the statement is tendered in evidence.

(2.1) A transcript of an examination under Rule 30 is admissible at trial if a copy of the transcript of the audio recording of the examination, together with a disc of the audio recording, is furnished to every party of record within 7 days of receipt of a written statement under subrule (2).

Admissibility of oral testimony of expert opinion *and audio recording of examination*

(3) An expert may give oral opinion evidence if a written statement of the opinion has been delivered to every party of record at least 60 days before the expert testifies.

Idem

(4) The statement also may be tendered in evidence.

(4.1) The transcript and disc of an examination may also be tendered in evidence.

Form of statement

(5) The statement shall set out or be accompanied by a supplementary statement setting out the following:

(a) the qualifications of the expert;

(b) the facts and assumptions on which the opinion is based;

(c) the name of the person primarily responsible for the content of the statement.

Proof of qualifications

(6) The assertion of qualifications of an expert is prima facie proof of them.

Admissibility of evidence

(7) If a statement that does not conform to subrule (5) has been delivered

(a) it is inadmissible under subrules (2) and (4), and

(b) the testimony of the witness under subrule (3) is inadmissible

unless the court otherwise orders.

Notice of trial date to expert

(8) A party who delivers a statement shall, on delivery or when a trial date has been obtained, whichever is later, inform the expert of the trial date and that the expert may be required to attend at trial for cross-examination.

Demand to cross-examine

(9) A party to whom a statement has been delivered under subrule (2) and who is adverse in interest to the party delivering the statement may, by demand to that party, require the attendance of the expert at trial for cross-examination.

(9.1) A party to whom a transcript and disc have been delivered under subrule (2.1) and who challenges the authenticity of the disc or the accuracy of the transcript must give reasonable notice of its position and particulars if requested.

Idem

(10) The expert need not attend at trial unless the demand is made within a reasonable time after delivery of the statement.

Idem

(11) The convenience and other commitments of the expert shall be taken into account in determining whether the demand has been made within a reasonable time.

Costs of cross-examination

(12) If an expert has been required to attend for cross-examination and the court is of the opinion that the cross examination was not of assistance, the court may order the party who required the attendance of the expert to pay, as costs, a sum the court considers appropriate.

Notice of objection to expert evidence

(13) A party who receives a written statement under subrule (2) or (3) shall notify the party delivering the statement of any objection to the admissibility of the evidence that the party receiving the statement intends to raise at trial.

Idem

(14) No objection under subrule (13) of which reasonable notice could have been given, but was not, shall be permitted at trial unless the court otherwise orders.

Dispensing with statement

(15) At trial, the court may dispense with the requirement of delivery of a statement.

Idem

(16) Without limiting the generality of subrule (15), the court may dispense with the requirement of delivery of a statement on one or more of the following grounds:

(a) where facts have come to the knowledge of the party tendering the witness after the delivery of the statement of that witness's evidence, that could not, with due diligence, have been learned in time to be reduced to a further statement and delivered within the time required by this rule;

(b) where the non-delivery is unlikely to cause prejudice

(i) by reason of an inability to prepare for cross-examination, or

(ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to present evidence in response;

(c) where the interests of justice require it.

Time

(17) Before or at trial, the court may extend or abridge the time limits set out in this rule.