ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

ALBERTA RULES OF COURT PROJECT

Expert Evidence and "Independent" Medical Examinations

Consultation Memorandum No. 12.3

February 2003

THE RULES PROJECT CONSULTATION MEMORANDA

No.	Title	Date of Issue	Date for Comments
12.1	Commencement of Proceedings in Queen's Bench	October 2002	January 31, 2003
12.2	Document Discovery and Examination for Discovery	October 2002	January 31, 2003
12.3	Experts: Notice of Expert Evidence and Medical Examinations	February 2003	May 16, 2003

Available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are C.W. Dalton, Q.C.; A. de Villars, Q.C.; A.D. Fielding, Q.C.; The Hon. Judge N.A. Flatters; Dr. P. Hughes; W.H. Hurlburt, Q.C.; H.J.L. Irwin, Q.C.; P.J.M. Lown, Q.C. (Director); A.D. Macleod, Q.C.; Dr. D.R. Owram; The Hon. Madam Justice B.L. Rawlins; W.N. Renke; D.R. Stollery, Q.C. and The Hon. Mr. Justice N.C. Wittmann (Chairman).

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ACKNOWLEDGMENTS

This Consultation Memorandum sets out the proposals of the Working Committee with responsibility for the topic of Discovery and Evidence. The Committee's views are communicated in this paper which was written by Cynthia Martens, one of the Institute's counsel. She was greatly assisted by the members of the Committee, who were generous in the donation of their time and expert knowledge to this project. The members of the Committee are:

Discovery and Evidence Committee
The Hon. Justice Scott Brooker, Court of Queen's Bench of Alberta
The Hon. Justice Keith G. Ritter, Court of Appeal of Alberta
Alan D. Hunter, Q.C., Code Hunter LLP
Douglas A. McGillivray, Q.C., Burnet, Duckworth & Palmer
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Ms. Martens is grateful for both the drafting and research assistance provided by University of Alberta law student Dr. Tania Bubela.

PREFACE AND INVITATION TO COMMENT

Comments on the issues raised in this Memorandum should reach the Institute on or before May 16, 2003.

This consultation memorandum addresses issues concerning expert evidence and medical examinations. Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Committee has identified a number of issues and made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas of expert evidence and medical examinations, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

We encourage your comments on the issues and the proposals contained herein. You may respond to one, a few or many of the issues addressed. You can reach us with your comments or with questions about this consultation memorandum or the Rules Project on our website, by fax, mail or e-mail to:

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The process of law reform is essentially public. Even so, you may provide anonymous written comments, if you prefer. Or you can identify yourself, but request that your comments be treated confidentially (i.e., your name will not be publicly linked to your comments). Unless you choose anonymity (by not identifying yourself), or request confidentiality by indicating this in your response, ALRI assumes that all ***written comments are not confidential***. ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although usually we will discuss comments generally and without specific attributions.

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BACKGROUND

A. The Rules Project

The Alberta Rules of Court govern practice and procedure in the Alberta Court of Queen's Bench and the Alberta Court of Appeal. They may also apply to the Provincial Court of Alberta whenever the *Provincial Court Act* or regulations do not provide for a specific practice or procedure. The Alberta Rules of Court Project (the Rules Project) is a 3-year project which has undertaken a major review of the rules with a view to producing recommendations for a new set of rules by 2004. The Project is funded by the Alberta Law Reform Institute (ALRI), the Alberta Department of Justice, the Law Society of Alberta and the Alberta Law Foundation, and is managed by ALRI. Overall leadership and direction of the Rules Project is the responsibility of the Steering Committee, whose members are:

The Hon. Mr. Justice Neil C. Wittmann (Chair); Court of Appeal of Alberta
The Hon. Judge Allan A. Fradsham; Provincial Court of Alberta
Geoff Ho, Q.C. (Observer); Secretary, Rules of Court Committee
Peter J.M. Lown, Q.C.; Director, Alberta Law Reform Institute
The Hon. Justice Eric F. Macklin; Court of Queen's Bench of Alberta
Alan D. Macleod, Q.C.; Macleod Dixon
June M. Ross, Q.C.; Special Counsel, Alberta Law Reform Institute
Phyllis A. Smith, Q.C.; Emery Jamieson LLP
The Hon. Madam Justice Joanne B. Veit; Court of Queen's Bench of Alberta

B. Project Objectives

The Alberta Rules of Court have not been comprehensively revised since 1968, although they have been amended on numerous occasions. The Rules Project will address the need for rewriting that has arisen over the course of this lengthy period. As well, the legal community and the public have raised concerns about timeliness, affordability and complexity of civil court proceedings.[1] Reforms have been adopted

[1] Notable recent civil justice reform projects responding to these concerns include: Ontario Civil Justice Review, *Civil Justice Review: First Report* (Toronto: Ontario Civil Justice Review, 1995) and Ontario Civil Justice Review, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice (continued...)

in Alberta and elsewhere to address these issues. In Alberta, some of these new procedures have been included in amendments to the rules, others have been implemented by other means, such as practice directives. The Rules Project will review and assess reform measures that have been adopted and consider other possible reforms.

The Steering Committee approved four Project Objectives that address both the need for rewriting the rules and reforming, or at least rethinking, practice:

Objective # 1: Maximize the Rules' Clarity
Results will include:

- simplifying complex language
- revising unclear language
- consolidating repetitive provisions
- removing obsolete or spent provisions
- shortening Rules where possible

Objective # 2: Maximize the Rules' Useability
Results will include:

- reorganizing the rules according to conceptual categories within a coherent whole
- restructuring the rules so that it is easier to locate relevant provisions on any given topic

Objective # 3: Maximize the Rules' Effectiveness
Results will include:

- updating the rules to reflect modern practices
- pragmatic reforms to enhance the courts' process of justice delivery

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[1] (...continued)
Review, 1996) [Ontario Civil Justice Review, 1996]; The Right Honourable H.S. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: Lord Chancellor's Department, 1995) and The Right Honourable H.S. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996) [Woolf Report]; and Canadian Bar Association, Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Toronto, Ontario: Canadian Bar Association, 1996).

- designing the rules so they facilitate the courts' present and future responsiveness to ongoing technological change, foreseeable systems change and user needs

Objective # 4: Maximize the Rules' Advancement of Justice System Objectives
Results will include:

- pragmatic reforms to advance justice system objectives for civil procedure such as fairness, accessibility, timeliness and cost effectiveness

C. Purpose Clause

In all Canadian jurisdictions other than Alberta and Saskatchewan, the rules contain a general principle to the effect that they are to be interpreted liberally to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The Steering Committee views this purpose clause as consistent with the Project Objectives and proposes the inclusion of such a clause in the new rules.

D. Legal Community Consultation

Rules reform should address the needs and concerns of the users of the civil courts. As informed users of the system, and as representatives for public users, lawyers play a particularly essential role in reform. In conducting the Rules Project, ALRI has been looking to the legal community, including both lawyers and judges, to provide the information and views that give the project its direction.

Consultation with the legal community commenced in the fall of 2001 with ALRI presentations to 9 local bar associations across the province. This was followed by 17 meetings with law firms and Canadian Bar Association (CBA) sections in Edmonton and 17 meetings with law firms and CBA sections in Calgary. In addition, there were meetings with Queen's Bench justices and masters, and Provincial Court judges. An Issues Paper describing the Rules Project and seeking input on a range of issues was widely distributed in paper form and made available on the ALRI website and through links on the Law Society of Alberta, Alberta Courts, Alberta Justice and Justice Canada websites. In addition to the input received through consultations with local bar associations, firms and CBA sections, ALRI received 64 letters and e-mails from the legal community with feedback on the Rules Project.

Input from the legal community, whether in the form of letters, e-mails or notes from meetings, was categorized and entered into a central ALRI database. As of September 23, 2002, this database numbered 288 pages and contained 783 comments on different aspects of the civil justice system. This input has been provided to the Rules Project working committees on an ongoing basis, and is summarized in a Report available on our website <http://law.ualberta.ca/alri/>. An excerpt from that Report is set out below.

E. Legal Community Comments

1. Objectives and approach of the Rules Project

There was widespread agreement among those who commented on this issue that one of the objectives of the Rules Project should be to make the existing rules shorter, more organized and generally more user friendly. Many respondents also expressed the view that some degree of flexibility and informality needed to be retained in the rules such that counsel may reach agreements as to scheduling and other matters amongst themselves. In a similar vein, while some felt that fairly detailed rules are required, others expressed the view that the rules should stay away from "micro managing" and instead provide broad directions and principles for counsel to abide by.

Another theme running through many of the responses in this area was that the Rules Project should not go too far in trying to rewrite the substance of the rules–if it is not "broke", the Project should not try to fix it. Some respondents voiced concerns about the existing rules annotation becoming redundant and procedural points needing to be re-litigated if there are too many significant changes.

Some of the responses raised the issue of implementation of the new rules–it was suggested that the educational and transitional process for the bench and Bar should be an important component of the Rules Project.

2. Models from other jurisdictions

Some recommended looking to the British Columbia Rules of Court as a model–the comments reflected the view that these rules are short, effective, well-organized and generally user-friendly. Others thought that the Ontario Rules are a model of good organization. Another model suggested for consideration in framing the new rules was the Code of Professional Conduct. The new rules could be fixed, kept fairly short and simple, and be amplified by commentaries and rulings which could change from time to time. Finally, some commented that the Federal Court Rules are not a good model.

3. Uniformity

A frequent comment was that it would be useful to make Alberta practice as consistent with other provinces as possible, particularly the western provinces, due to the increase in inter-provincial litigation and the relaxation of mobility rules.

4. Regional concerns

Some respondents commented that the concerns addressed by the rules don't necessarily apply in smaller centres. Sometimes the problems are "big city/big file" problems, but the "solutions" are imposed across the board. Another point raised was that judges visit from Edmonton, Calgary and elsewhere and each judge brings his or her own practice, which complicates practice in the smaller centres.

5. Application and enforcement of the rules

A frequently expressed concern was that the rules are not being consistently applied and enforced. Respondents pointed out that people need to know that the rules will be applied in a predictable manner, that they will be enforced, and that judges will not impose steps not contemplated by the standard rules. Some also commented on the differences in application by clerks in Edmonton and Calgary. There were concerns that

clerks are making policy, for example, the "docketing statement" which is required in the Calgary Court of Appeal.

F. Public Consultation

A Public Consultation Paper and Questionnaire was prepared and distributed to organizations with interests that relate to the civil justice system and to the general public. Despite extensive circulation of the Questionnaire, the return rate was disappointing. A total of 98 questionnaires were received by the cutoff date of June 30, 2002. A Public Consultation Paper has been prepared and is available on our website <http://law.ualberta.ca/alri/>. Copies of the Report will also be provided to Rules Project committees and other interested persons. An excerpt from the Report's Conclusions is set out below.

G. Public Consultation Report: Conclusions

Overall, survey respondents provided insightful feedback and suggestions on various aspects of the Alberta Rules of Court. While many areas received moderate to relatively high satisfaction scores, the purpose of this study is to focus on areas of improvement, or areas receiving relatively high dissatisfaction ratings. Aspects under study can be grouped into high, medium and low levels of respondent dissatisfaction.

Aspects with **high** levels of dissatisfaction (50% or more of respondents dissatisfied) included:

- cost of legal fees;
- time to resolve legal cases; and
- the overall legal process.

Aspects with **medium** levels of dissatisfaction (40 - 49% of respondents dissatisfied) included:

- court forms;
- information available through the court;
- ease of understanding of the legal process;
- the trial;

- the discovery stage; and
- interlocutory hearing(s).

Aspects with **lower** levels of dissatisfaction (30 - 39% of respondents dissatisfied) included:

- documentation required;
- alternatives to a full trial;
- the pleadings stage; and
- formality of the legal process.

H. Working Committees

Over the course of the Rules Project, working committees have been and will be established to examine particular areas of the rules. The committee structure reflects the "rewriting" and "rethinking" objectives of the Rules Project, and ensures that specialized topics will be reviewed by persons with relevant experience. To date, the General Rules Rewrite Committee and the "Rethink" Committees dealing with Early Resolution of Disputes, Management of Litigation and Discovery and Evidence have been created. At a later date, specialized areas of practice will be dealt with by committees dealing with rules relating to the Enforcement of Judgments, Appeals, Costs, Family Law and other matters. Family law rules and practice are also the subject of a specialized legal community consultation, now underway with the issuance of an Issues Paper: Family Law Rules, available on our website <http://www.law.ualberta.ca/alri/>.

I. Process for Developing Policy Proposals

The major task for working committees is the development of policy proposals regarding the topics included in their mandates. The committees consider the project objectives and purpose clause, rules from other jurisdictions, research prepared by ALRI counsel, and information received in the consultation process. At the current stage of the Rules Project, the committees are concerned with issues of policy, dealing with civil practice and the content of the rules. Drafting issues, such as the organization and the wording of the rules, will be addressed at a later stage.

J. Discovery and Evidence Committee

Among the areas in the Rules of Court identified as requiring a great deal of attention are the rules pertaining to notice of expert evidence and medical examinations. To ensure that these areas receive appropriate attention, the Discovery and Evidence Committee ("the Committee") was struck to consider specific issues concerning, *inter alia,* expert evidence and medical examinations. The Committee members are:
The Hon. Justice Scott Brooker, Court of Queen's Bench of Alberta
The Hon. Justice Keith G. Ritter, Court of Queen's Bench of Alberta
Alan D. Hunter, Q.C., Code Hunter LLP
Douglas A. McGillivray, Q.C., Burnet, Duckworth & Palmer
Robert A. Graesser, Q.C., Reynolds, Mirth, Richards & Farmer
Beverly Larbalestier, Larbalestier Stewart
Professor Christopher Levy, University of Calgary, Faculty of Law
Cynthia L. Martens, Counsel, Alberta Law Reform Institute
Doris I. Wilson, Q.C., Special Counsel, Alberta Law Reform Institute

The Committee met during the spring and fall of 2002. Many issues concerning expert evidence and medical examinations were discussed at great length. The Committee considered research prepared by ALRI counsel, comments received through Rules of Court consultations or from individuals who had contacted the Institute directly, and rules from other jurisdictions both within and outside of Canada.

K. Consultation Memorandum

This consultation memorandum addresses issues concerning expert evidence and medical examinations. Having considered case law, comments from the Bar and the Bench, and comparisons with the rules of other jurisdictions, the Committee has identified a number of issues and made preliminary proposals. These proposals are not final recommendations, but proposals which are being put to the legal community for further comment. These proposals will be reviewed once comments on the issues raised in the consultation memorandum are received, and may be revised accordingly. While this consultation memorandum attempts to include a comprehensive list of issues in the areas of expert evidence and medical examinations, there may be other issues which have not been, but should be, addressed. Please feel free to provide comments regarding other issues which should be addressed.

EXECUTIVE SUMMARY

This summary highlights only some of the issues that the Committee discussed and the proposals which it has made. The complete discussion of all issues and Committee proposals is contained in the consultation memorandum.

A. Highlights of Expert Evidence Issues

1(1) What timelines should there be for the exchange of expert reports?

Although the Committee discussed the question of timing of expert reports, it makes no specific proposal, as a proposal regarding the timetabling of all aspects of litigation will be forthcoming shortly from the Management of Litigation Committee. This proposal takes the approach that the timing of expert report should follow discovery, rather than working backwards from the date of trial.

1(2) Should the reports be exchanged simultaneously or sequentially?

The Committee reached a consensus that expert reports should be exchanged sequentially. This is the more common method utilized in Alberta presently and most counsel are comfortable with this process. Simultaneous filing is inefficient as it requires unnecessary speculation on the contents of the expert report from the opposing party. This can lead to a party including matters that are not really in issue in the initial expert report, which can create additional delay and increase costs of the expert opinion. Having sequential exchange should assist parties to focus on the actual matters in issue for which expert opinions are required. While superficially sequential exchange may appear more cumbersome than simultaneous exchange, overall it is the most efficient way of identifying issues which ought to be the subject of expert reports and responding to the initial expert opinions.

With the sequential method, it is appropriate for rebuttal reports to raise new issues not raised in the primary report in addition to addressing matters arising from the primary report. It would also be appropriate for the rules to provide for surrebuttal to respond only to new matters arising from the rebuttal report.

2. What sanctions should there be for failing to abide by timelines for expert reports?

Failing to comply with timeliness in the exchange of expert reports has long been a problem and has contributed to the delay which is a common concern with the litigation process. Sanctions such as refusing to admit the report into evidence, costs, or adjournments are effective if enforced by the courts. Providing for new sanctions will likely not resolve the problems of non-enforcement. The Committee proposes that the current rules regarding sanctions for non-compliance with rules governing the exchange of expert reports be retained.

3. Should there be prescribed criteria for the form of expert reports?

It was generally agreed that standardizing the format or prescribing minimal standards for the content of expert reports has many benefits. Doing so may assist in ensuring that expert reports provide useful and complete information to the court. A draft list of guidelines has been attached as an Appendix to this memorandum. Some of the matters suggested in the draft Guidelines include, inter alia:

- An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
- All assumptions made by the expert should be clearly and fully stated.
- The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of the person who carried out any such test or experiment.
- There should be attached to the report, or summarized in it, the following:
  (i) the facts, matters and assumptions upon which the report proceeds; and
  (ii) the documents and other materials which the expert has been instructed to consider.
- Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.
- The expert should make it clear when a particular question or issue falls outside his or her field of expertise.
- Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

A full summary of the proposed guidelines is found in the Appendix.

4. How should objections to expert evidence be made?

Objections to either the expert or any portion of the expert report should be made as soon as possible. The requirements currently in Rules 218.14 and 218.15 that notice of objections to expert evidence with reasons be given within a reasonable period of time prior to trial should be retained. There was general agreement that some applications may be appropriately determined before trial, while others are better left to the trial judge, depending on the type of issue. The Committee considered whether it would be possible to have applications concerning the admissibility of expert evidence made to the trial judge prior to trial. However, this may be difficult as trial judges are often not assigned until just prior to trial. While having pre-trial applications may save trial time, the Committee was concerned that it may be difficult for a chambers judge to be fully informed of all of the relevant information to make a determination regarding the admissibility of the evidence, particularly if the issue concerns relevance. In most instances the trial judge is in a far better position to assess relevance. The proposal is to use the framework for notice of objections set out in Rule 218.14 for all objections to admissibility of the expert evidence. The initial court application to deal with the objection may be made at trial, or before trial in chambers. The pre-trial judge can decide the matter or refer the issue to the trial judge if the matter is more appropriately decided in the context of the trial itself.

5. Should experts be required to testify at trial?

The Committee proposes to retain the current mechanisms whereby the parties may replace oral expert testimony with a written expert report upon notice. Once an expert report has been served, other parties should have an option of requiring the expert to be produced either at trial, or even before trial, for cross-examination. There should also be an option of examining the expert before trial either in chief or cross-examination by consent of the parties or with leave of the court. Parties should be encouraged to use these procedures during case management meetings or pre-trial conferences, as well as through education aimed at making counsel more comfortable with proceeding without viva voce expert testimony.

6. Should there be a limit on the number of experts each party may call?

While it may seem attractive to impose limits on the number of experts which may be called on a specific issue, the Committee had concerns about the practical application

of such limits, particularly in determining what comprises a "single issue". A"single issue" often is comprised of discrete aspects that may involve different areas of expertise. Limiting the number of experts to one per issue may create more litigation than it eliminates if counsel disagree on what comprises an issue. The Committee's initial opinion is that the current Rules provide adequate safeguards limiting the number of experts that can be called. Mechanisms such as the present Rule 218.1 which requires that advance notice be given of the experts to be called at trial together with a summary of their evidence allows parties to evaluate the propriety of the other side's experts. A party must give advance notice of any objection to the propriety of a particular expert, and an application may be made either prior to or at trial to determine whether an expert is necessary. The Committee proposes to retain these types of limitations on expert evidence rather than imposing *prima facie* limits on the number of experts which may be called. However, there is currently a limit in the Very Long Trial rules of one expert per party per issue without leave. As no comments have been received regarding the practical effect of this limitation, the Committee is interested in feedback from the profession as to whether this limitation is effective and should be retained, and perhaps extended to all matters where experts are involved.

7. Should the use of joint experts be required or encouraged?

While the Committee recognizes the perceived benefits of requiring parties to use single joint witnesses, it had doubts about the practical application of doing so. There was a concern that arguments concerning choosing and instructing the joint expert would cause extensive delay and result in numerous court applications. In the Committee's view requiring joint experts would likely cause more problems than it would solve. However, the rules should permit the parties to use a joint expert by consent or with leave of the court

8. Should the rules permit the court to appoint its own experts?

It was noted that court appointed experts are rarely used except in some family law matters where privacy and confidentiality are in issue. As the court prefers to let the parties run their own cases and there is concern about imposing expenses on parties, the courts are generally reluctant to appoint their own experts. However, there are times when court appointed experts can be useful, as noted above. The Committee proposes that the Rules regarding court appointed experts remain as they are.

9. Should the rules permit the court to appoint assessors or referees?

The Alberta Law Reform Institute published a "Report on Referees"[2] wherein it recommended increased use of referees. In the Committee's opinion, assessors or referees can be of assistance to the court if used properly. The Committee proposes to retain the rules governing assessors and referees, and consolidate these rules with the court appointed expert rules. The rules should clearly distinguish between the roles and functions of assessors, referees and court experts.

10. Should expert witnesses be examined for discovery? If so, what limits, if any, should there be on the scope of the examination?

The Committee had serious concerns about permitting a *prima facie* right to discover experts prior to trial. Problems identified by the Committee included the expense of examining the expert, the delay caused by the inevitable unavailability of many experts, and concerns about alienating experts by imposing the additional burden of attending at discovery. This last concern is particularly prevalent with experts who do not specialize in providing expert litigation advice but whose primary occupation concerns their own practices or businesses. The Committee also saw little benefit in pre-trial discovery of experts in light of the requirements that expert opinions be exchanged in a timely fashion prior to trial. Requiring experts to be present for discovery in addition to trial may be impractical and expensive, especially if experts are located outside of Alberta. As there may be circumstances where oral discovery of experts may be of assistance, the Committee proposes that the court may, on application, grant leave to discover experts in any action (other than one falling in the streamlined actions) rather than limiting the procedure to discovery in Very Long Trials. The rules should specify this procedure is intended for exceptional circumstances and there should be a heavy onus on the person seeking the discovery to justify the necessity thereof.

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[2] Alberta Law Reform Institute, *Report on Referees*, Research Paper No. 18 (Edmonton: Alberta Law Reform Institute, February 1990).

11. Should Alberta adopt any of the recent innovations in expert evidence used in other jurisdictions?

It has been suggested that a pre-trial conference of experts may be a useful procedure. The experts could meet amongst themselves prior to trial, and try to reach areas of agreement and highlight areas where their opinions differ.

Requiring experts to meet amongst themselves prior to trial is an interesting idea, but is one that the Committee feels is unlikely to be embraced by the Alberta Bar. As with discovery of experts, the expense of a pre-trial conference of experts would be significant and it may be difficult to schedule, causing more delay than it would remedy. Another problem is that if the conference indicates that an expert is deficient, it is likely that a party will simply retain a new expert, resulting in additional cost and likely causing further delay. The Committee proposes that pre-trial conferences of experts should be an option for very long or complex trials only, and then only with consent of the parties or leave of the court.

A second suggestion emanating from foreign jurisdictions is referred to as the "hot-tub rule". This is an alternative method for calling expert evidence at trial by having a panel of experts give testimony, rather than having the experts called one at a time as part of a party's case. The Committee was not in favour of a requirement that expert evidence be presented in a panel format as it is a significant infringement on the parties' ability to call their evidence in the manner they so choose. Parties should be able to determine whether it is necessary to have all expert evidence in a trial heard together, or whether it is sufficient to do so in the traditional fashion. However, the rules should provide an option to have experts give testimony as a panel, or consecutively, with the consent of the parties or with leave of the court.

12. Should there be guidelines governing conduct of experts?

While the Committee believes that the notion of ethical guidelines for experts (as distinguished from the guidelines for the format for expert reports, discussed above) is laudable, it was questioned whether this should be done in the Rules of Court or left to the governing bodies of the particular professions within which the experts practice. There was doubt as to whether guidelines in the rules would have any real or practical effect on expert testimony, particularly in curing bias. Whether or not ethical guidelines are adopted, some Committee members thought they should be made

available to the profession outside of the Rules, as it would be a "best practice" to send out the guidelines to experts to assist them in preparing for a court appearance. The guidelines could also assist junior members of the Bar in ascertaining their own duty and that of their expert witnesses.

The Committee concluded that there should be no ethical or conduct guidelines for experts in the Rules.

B. Highlights of "Independent" Medical Examination Issues

Currently Rule 217 in the Alberta Rules of Court permits the court to order a medical examination ("ME") of a person who claims damages in respect of injuries. This procedure was implemented to avoid trial by ambush. It also acts to remove privilege from medical reports which once attached to reports generated for the purposes of litigation.

13. When and by whom may an ME be requested? Should it be extended to an examination of any party if their physical or mental condition is in issue?

There are situations where a party's physical or mental condition may be put in issue in the pleadings outside of personal injury claims. If it is clear from the pleadings that any party's physical or mental condition is in issue, the Committee is of the view that the opposite party should be entitled to conduct a medical examination. This would also be consistent with the rules in most other Canadian jurisdictions. Therefore, the Committee proposes to expand the rules for court ordered MEs to any action where either the mental or physical condition of any party is placed in issue by the proceedings. However, the rule should contain a qualification similar to that in jurisdictions that specify that the physical or mental condition must be relevant to a material issue to prevent parties from abusing the rule. Limiting court ordered medical examinations to situations where a party's physical or mental condition is a material issue should minimize the potential for abuse of the rule and prevent unnecessary examinations that could be prejudicial or embarrassing to a party.

14. Who should bear the cost of the attendance of the examinee's medical nominee?

There must be some procedure for ensuring that the medical practitioner's questions are fair and that the record of the examinee's answers is accurate. Having a medical

nominee attend is one way of facilitating both of these objectives. Sending a nominee to the medical examination is expensive and it can be difficult to find a nominee in many cases. It is proposed that the rules specify that the examinee may choose to have a nominee attend at the ME at the examinee's expense, in the first instance. This expense may be recovered through costs at the end of the day if the examinee is successful, as would any other disbursement. The Committee also felt that there could be other options available to the examinee which would mitigate the expense and difficulties associated with nominees, such as having the procedure videotaped, discussed below.

15. Should the person being examined have the option of videotaping the examination?

As noted above, it is expensive to have a party attend the medical examination with a nominee and it is often difficult to schedule a nominee's attendance. It would be much less expensive to have the examination videotaped. Permitting the examinee to videotape the examination would also dispense with scheduling issues currently encountered with the nominee procedure. Videotaping the examination would also address other concerns about the partial nature of MEs, including the concerns regarding the questions that the examining medical professional may ask.

16. Should the distinction between "duly qualified medical practitioners" and "health care professionals" be retained in any or all parts of the rules?

Though the Committee proposes to expand the types of examinations which may be ordered under Rule 217, it felt that the types of medical examinations that a party may be required to undergo should be limited to those done by practitioners who are subject to some form of professional regulation. To determine the appropriate types of medical practitioners who should be permitted to perform Rule 217 type examinations, the Committee referred to the *Health Professions Act*[3] which governs certain types of medically related professions which have governing bodies and specified regulations. Having reviewed the professions covered by this legislation, the Committee proposes that the rules permit the court to order MEs by the following medical professionals, even if the examinee may not intend to call such a practitioner as an expert at trial:

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[3] R.S.A. 2000, c. H-7.

(i) Members of the Alberta College of Physicians and Surgeons;
(ii) Dentists and oral surgeons;
(iii) Occupational therapists;
(iv) Physical therapists;
(v) Registered nurses; and
(vi) Psychologists.

The Committee was of the opinion that it is not necessary to include all of the professions listed in the Health Professions Act, as many of these are not those who would normally conduct any sort of physical or psychological examination of a party in a civil litigation action.

17. Should the rules specify when the medical practitioner can call for other experts to assist in the examination?

It is proposed that the rules should not specify that a duly qualified medical practitioner may request others to conduct further examinations as this is a matter which should be decided on a case by case basis and should remain in the discretion of the court.

18. Must a defendant obtain their own medical report before being able to obtain the plaintiff's medical report?

This is an area where there is a battle between two principles: the sanctity of privileged records, being medical reports prepared in contemplation of litigation; and the benefits of timely and efficient disclosure. The disparate treatment of this issue in other jurisdictions indicates that there are differing views as to which principle should be more dominant. There were no comments during consultation about problems with requiring a medical examination in order to trigger disclosure of otherwise privileged medical records under Rule 217, which leads to the Committee to believe that the current procedure under Rule 217 provides a suitable approach to the issue of disclosure of privileged medical records.

However, the Committee is interested in hearing the legal profession's views as to whether the requirement that an opposing party must first request an ME under Rule 217 to gain access to medical records is reasonable or necessary. An alternative could simply be to compel a party whose medical condition is in issue to produce all

relevant medical reports, regardless of whether they were created solely for the purpose of litigation.

LIST OF ISSUES

CHAPTER 1. EXPERT EVIDENCE

A. Introduction

[1] In matters calling for special or expert knowledge, the court may not have sufficient knowledge to draw proper inferences from the evidence such that it may adjudicate on the matters in issue. In these instances, the parties may call a witness who is an expert on the subject matter to state an opinion. For expert evidence to be admissible, it must be reasonably necessary, both logically and legally relevant, emanate from a properly qualified expert who has special knowledge and experience going beyond that of the trier of fact, and not infringe an exclusionary rule of evidence.[4]

[2] The Rules governing expert evidence are found in Parts 15 and 15.1 of the Alberta Rules of Court. Several amendments to Part 15 of the Rules relating to expert evidence came into force on 1 September 1998.[5] These amendments were intended to promote pre-trial disclosure to prevent surprise at trial, which in turn would minimize disruption of the trial process.

[3] This memorandum raises issues in expert evidence that have been identified through case law, comments from the Bar, and the rules governing expert evidence in other jurisdictions. While this memorandum attempts to include a comprehensive list of issues in the area of expert evidence, there may be other issues that have not been, but should be, addressed. We welcome comments on the issues raised herein and any other matters concerning expert evidence.

B. General Issues with Expert Evidence

[4] Though expert evidence can assist in settling actions and may be of great value to a trial judge, retaining experts contributes significantly to many of the concerns associated with the civil litigation system. In particular, expert evidence can be

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[4] *R. v. Mohan*, [1994] 2 S.C.R. 9.

[5] Glen H. Poelman & Eugene J. Bodnar, "Civil Procedure and Practice: Recent Developments" (1999) 37 Alta. L. Rev. 909 at 945-6.

expensive, therefore increasing the cost of litigation; it may be a source of pre-trial delay; and it can greatly increase trial time. These problems are augmented when every party retains their own expert witnesses, particularly when there is more than one issue requiring expert evidence.[6] The partisan nature of many experts also contributes to cost and delay issues in litigation.[7] The appropriate role of experts is also brought into question when trials become a "battle of the experts", forcing a technically untrained judge to select between competing theories. Other problems associated with expert evidence include that:

- the court may not hear opinions from the most qualified expert, it hears only those most favourable to the respective parties or partisan experts who frequently appear for one side;
- as experts are paid for their services and instructed by one party only, some bias is inevitable;
- questioning by lawyers may lead to the presentation of an inaccurate picture that may mislead the court and frustrate the expert;
- where a substantial disagreement concerning a field of expertise arises, it is difficult for a judge to weigh the evidence as the judge has no criteria by which to evaluate the opinions;
- success may depend on the plausibility or self-confidence of the expert, rather than the expert's professional competence;[8]
- a party with greater resources may use expert testimony to overwhelm the evidence of the opposing party;[9]
- the adversarial system may not adequately distinguish between majority and minority views in the expert community.

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[6] Lord Woolf, *supra* note 1 at paras. 6.75, 13.12.

[7] See: Australian Law Reform Commission, *A Review of the Federal Civil Justice System*, Discussion Paper 62 (August 1999), online: Australian Law Reform Commission <http://www.austlii.edu.au/au/other/alrc/publications/dp/62/>; Law Reform Commission of Western Australian, *Review of the Criminal and Justice System: Final Report* (1997-1999), online: Law Reform Commission <http://www.wa.gov.au/lrc/RevCCJS-p92/finalreport/finalreportpdf/ch22expert.pdf>; Law Reform Commission of Western Australian, *Review of the Criminal and Justice System: Consultation Drafts Vol. 2* (1997-1999), online: Law Reform Commission <http://www.wa.gov.au/lrc/RevCCJS-p92/ConDrafts/3-3expertevid.pdf> [Review of the Criminal and Justice System: Consultation Drafts]; Woolf Report, *ibid.* at para. 13.6.

[8] Woolf Report, *ibid.* at para. 6.75.

[9] *Ibid.* at para. 6.77.

[5] A full response to concerns about expert evidence could entail major changes to the adversarial system that are far beyond the scope of the Rules Project. But more limited responses can also amount to steps in the right direction towards addressing these problems. In its work, the Discovery and Evidence Committee has made every effort to balance the right of parties under the adversarial system to marshall and present their evidence, as against the resulting problems that have been identified above. The Committee has attempted to keep this balance in view in its deliberations regarding each of the specific issues addressed in this consultation memorandum.

C. Specific Issues

1. (1) What timelines should there be for the exchange of expert reports?
   (2) Should the reports be exchanged simultaneously or sequentially?
2. What sanctions should there be for failing to abide by timelines for expert reports?
3. Should there be prescribed criteria for the form of expert reports?
4. How should objections to expert evidence be made?
5. Should experts be required to testify at trial?
6. Should there be a limit on the number of experts each party may call?
7. Should the use of joint experts be required or encouraged?
8. Should the rules permit the court to appoint its own experts?
9. Should the rules permit the court to appoint assessors or referees?
10. Should expert witnesses be examined for discovery? If so, what limits, if any, should there be on the scope of the examination?
11. Should Alberta adopt any of the recent innovations in expert evidence used in other jurisdictions?
12. Should there be guidelines governing the conduct of experts?

D. Discussion of Specific Issues

ISSUE No. 1
(1) What timelines should there be for the exchange of expert reports?

[6] The current rules prescribing timelines for the exchange of expert reports or statements are Rule 218.1(1) for primary reports and Rule 218.12(1) for rebuttal reports. A party intending to adduce expert evidence at a trial must serve a statement of the substance of the expert's evidence and a copy of any expert's report on which the party intends to rely, on other parties to the action not less than 120 days before the trial commences or such other time as may be ordered by the court. Rebuttal expert reports (including a statement of the substance of the opinion) must be served on all other parties within 60 days of service of the first expert report. A party must also provide notice of the proposed area of expertise for the expert. The rules do not expressly provide for any surrebuttal.[10]

[7] The current Rule 218.1 was designed to prevent the disruption of the trial process through adjournments that are often necessary when litigants are taken by surprise. Further reasons for the rule include:

- saving expense by dispensing with the need to have experts testify when there is really no dispute (which may be determined by examining the substance of the expert opinion and the expert report);
- the possibility of avoiding late amendment of pleadings;
- preparation on the basis of knowledge of the case to be met;
- settling issues within the trial;
- shortening trials; and
- enabling the experts themselves to prepare their evidence more thoroughly and helpfully.[11]

[8] Some reports suggest that early disclosure of expert reports may facilitate settlement of some or all issues. Where settlements are not possible early disclosure assists in preparing focussed and relevant expert evidence for trial.[12]

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[10] *Wade v. Baxter*, [2001] 302 A.R. 1 at para. 34 (Q.B.).

[11] *Commonwealth Construction Co. v. Syncrude Canada Ltd.* (1985), 64 A.R. 132 (Q.B.); *Wilson v. Walton* (1987), 79 A.R. 97 (Q.B.).

[12] Australian Law Reform Commission, *Background Paper 6: Experts* (1999) at 35, online: Australian Law Reform Commission <http://www.austlii.edu.au/au/other/alrc/publications/bp/6/experts.html> [Background Paper 6: Experts].

[9] There was mixed reaction from the Bar on the question of timelines for exchanging expert reports. Some suggested that the timelines, particularly for rebuttal reports, require reports to be exchanged too early. This necessitates follow up expert reports closer to trial which can be expensive. Others note that the present timelines are unworkable in that often a trial date may be assigned which is less than 120 days away. In these circumstances parties are unable to comply with the timing requirements in Rule 218.1.

Rules in Other Jurisdictions

[10] The timelines for exchanging expert reports vary from province to province.[13] Some jurisdictions require the reports to be filed a certain number of days prior to trial, in other jurisdictions expert reports must be exchanged either before or shortly after the filing of the equivalent of a certificate of readiness. Rebuttal reports are exchanged 60 days prior to trial in Ontario and 30 days prior to trial in Federal Court. In Saskatchewan a party served with an initial report must serve any rebuttal reports within 15 days of the assignment of the trial date. There is no specific mention of rebuttal reports in other Canadian jurisdictions.

Discovery and Evidence Committee Proposal

[11] Although the Committee discussed the question of timing of expert reports, it makes no specific proposal, as a proposal regarding the timetabling of all aspects of litigation will be forthcoming shortly from the Management of Litigation Committee. This proposal takes the approach that the timing of expert report should follow discovery, rather than working backwards from the date of trial.

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[13] Ontario, *Rules of Civil Procedure* [Ontario], r. 53.03: 90 days prior to trial, although the Ontario *Evidence Act*, R.S.O. 1990, c. E-23, s. 52(2) provides that a report obtained by or prepared for a party to an action by a medical practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days' notice has been given to all other parties, admissible in evidence in the action; *Federal Court Rules* [Federal], r. 279(b): 60 days prior to trial; British Columbia, *Supreme Court Rules* [British Columbia], r. 40A(2): 60 days prior to the report being tendered into evidence; Saskatchewan, *Queen's Bench Rules* [Saskatchewan], r. 284C and r. 284D(3): 10 days prior to the pre-trial conference where trial date set; Nova Scotia, *Civil Procedure Rules* [Nova Scotia], r. 31.08 and Prince Edward Island, *Rules of Civil Procedure* [Prince Edward Island], r. 53.03: within 30 days of filing the Notice of Trial; Newfoundland, *Supreme Court Rules* [Newfoundland], r. 46.07: 10 days prior to trial; Manitoba, *Court of Queen's Bench Rules* [Manitoba], rr. 48.01, 53.03(1) and *Evidence Act*, C.C.S.M., c. E150, s. 50: reports must be included in pre-trial brief although medical reports need only be served 14 days prior to trial; New Brunswick, *Rules of Court* [New Brunswick], r. 52.01(1): as soon as practicable before matter set for trial.

ISSUE No. 1

(2) Should the reports be exchanged simultaneously or sequentially?

[12] Another issue dealing with exchange of expert reports is whether reports must be exchanged consecutively or concurrently. The rules do not explicitly state whether there should be a simultaneous or sequential exchange of information and there has been conflicting jurisprudence on this issue. The resolution of this issue will also affect the scope of primary and rebuttal expert reports.

[13] There are significant differences between the simultaneous and sequential exchange. With simultaneous exchange, all parties disclose their expert evidence under Rule 218.1. Though all parties would be able to respond with rebuttal reports, rebuttal reports would be limited to responding to issues raised in the primary reports of other parties. Under the sequential exchange method, one party (usually the one with the burden of proof) discloses its expert evidence first and other parties then respond with their rebuttal expert reports. These rebuttal reports may not only respond to issues in the primary report but also present new arguments and theories about the issues. If new issues are raised in the rebuttal reports, a surrebuttal report from the initial party may be permitted.

[14] In *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*[14] the court discussed the difference between simultaneous and sequential filing but did not specify a preference for one over the other. Instead, the court found that this to be a matter of discretion.[15] The court rejected a narrow interpretation of rebuttal that excludes primary theories as being inconsistent with the overall policy of the rules to provide full pre-trial disclosure.[16] The court was concerned with the suggestion that the party with the burden of proof on a particular issue has the obligation to file the primary

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[14] (1994), 159 A.R. 173 (Q.B.).

[15] *Ibid.* at para. 37.

[16] *Ibid.* at paras. 21, 24, 31.

report because the burden of proof may be difficult to establish, and the rule makes no such distinction.[17]

[15] In *Sherstone v. Westrock Industries Ltd.*,[18] the pre-trial judge interpreted the rule outside of case management as requiring simultaneous exchanges of primary expert reports. The theories of the experts of all parties must be served simultaneously in primary reports and the rebuttal must be confined to commenting on the theories in the primary report of the opposing expert. This decision was based on a literal reading of Rules 218.1 and 218.12. The court found that a rebuttal report cannot contain issues not addressed because the rule does not expressly allow for surrebuttal reports. The court also applied a dictionary definition of "rebuttal" when interpreting Rule 218.12, consequently limiting the rebuttal report "to refuting the prior opinion and providing background and reasoning so as to refute; it should not provide alternative theories."[19] The court distinguished *Pocklington Foods* on the basis that it was decided in the context of case management, where the parties and the court had more time and flexibility to work with the rule.

[16] In yet another contrary decision, the court in *Wade v. Baxter* concluded that the approach taken in *Pocklington Foods* is the most persuasive, though the court had concerns about the discretionary case-by-case approach.[20] The court accepted that a rebuttal report should not be confined to merely commenting on the primary reports but may also present alternative theories.[21] However, it noted that "the sequential approach to expert disclosure does require a more liberal approach to surrebuttal evidence."[22] The court further recommended that the rules remain flexible. They should not mandate that the party with the burden of proof must always file first even though this is the practical reality in most cases. The rules should also remain flexible

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[17] *Ibid.* at para. 29.

[18] (2000), 269 A.R. 278 at para. 7 (Q.B.).

[19] *Ibid.* at para. 27.

[20] *Wade v. Baxter*, *supra* note 10 at para. 63.

[21] *Ibid.* paras. 64-68.

[22] *Wade v. Baxter*, *supra* note 10 at para. 70.

in allowing for a surrebuttal in some cases or allowing the primary expert to comment on the rebuttal report during examination-in-chief depending on the nature of the evidence.

Rules in Other Jurisdictions

[17] In Ontario, Rules 53.03(1) and (2) have caused a similar debate on the sequential versus simultaneous method of disclosure in the jurisprudence. It remains unclear as to what is a 90 day report and what is a 60 day report.[23] The point of confusion is whether the party that has the onus of proof must submit a 90 day report that may then be responded to. In medical malpractice cases, it has been suggested that the exchange of reports be simultaneous so that the plaintiff is not disadvantaged by having its reports scrutinized by the defence before its experts commit themselves.[24]

Discovery and Evidence Committee Proposal

[18] The Committee reached a consensus that expert reports should be exchanged sequentially. The Committee noted that this is the more common method utilized in Alberta at present and most counsel are comfortable with this process.

[19] It was noted that simultaneous filing is inefficient as it requires unnecessary speculation on the contents of the expert report from the opposing party. This can lead to a party including matters that are not really in issue in the initial expert report, which can create additional delay and increase costs of the expert opinion. Having sequential exchange should assist parties in focusing on the actual matters in issue for which expert opinions are required. While superficially sequential exchange may appear more cumbersome than simultaneous exchange, the Committee felt that overall it was the most efficient way of both identifying issues which ought to be the subject of expert reports and responding to the initial expert opinions.

[20] With the sequential method, it is appropriate for rebuttal reports to raise new issues not raised in the primary report in addition to addressing matters arising from

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[23] *Field (Litigation Guardian) v. Peterborough Civil Hospital* (2000), 46 C.P.C. (4th) 95 (Ont. Sup. Ct. J.), leave to appeal denied [2000] O.J. No. 1665 (Ont. Div. Ct.) (QL); see also John J. Morris, "Common Experts in Medical Malpractice Actions: Try It, You'll Like It!" (2001), online: Holland Group <http://www.thehollandgroup.org>; *Sherstone v. Westroc Industries Ltd.*, *supra* note 18 at 284-285.

[24] Morris, *ibid.*

the primary report. It would also be appropriate for the rules to provide for surrebuttal to respond only to new matters arising from the rebuttal report.

ISSUE No. 2
What sanctions should there be for failing to abide by timelines for expert reports?

[21] Common consequences of non-compliance with timelines for filing expert reports are that the expert shall not testify without leave of the court,[25] the trial may be adjourned, and costs may be ordered. Costs resulting from adjournments for failure to provide expert reports or give notice of expert evidence in a timely fashion can be substantial.[26] Nonetheless, any award of costs is unlikely to compensate for the costs incurred in having the trial adjourned or for the inconvenience of delaying the trial.

[22] When deciding whether to grant leave for an expert to testify in the event of non-compliance with either Rule 218.1 or 218.12, the court has considered the purpose of the rule, being adequate notice of both the existence and content of expert evidence. The primary consideration for excluding expert evidence which has not been disclosed in a timely fashion is whether the failure has caused prejudice that cannot be remedied by an adjournment or some other mechanism. As the need for notice must be balanced against the need for the trier of fact to hear all relevant evidence and the avoidance of unnecessary expense and delay,[27] the Court of Appeal has held that leave may be granted to call an expert to testify if late notice of the expert testimony remains adequate notice.[28]

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[25] *Wilson v. Walton*, *supra* note 11; *Guarantee Co. of North America v. Beasse* (1992), 124 A.R. 161 (Q.B.).

[26] Nicky Brink, "Lawyer Who Failed to Comply with Expert Report Rule Must Pay Costs" *The Lawyers Weekly* (10 May 2002) 10 reporting on *Kowdrysh v. Delong*, 2001 ABQB 676.

[27] *Wade v. Baxter*, *supra* note 10 at para. 42.

[28] *Lenza v. Alberta Motor Assn. Insurance Co.* (1990), 74 Alta L.R. (2d) 218 (C.A.).

[23] Some cases[29] have only considered prejudice to the parties if a good reason is first given for non-compliance with the Rule.[30] By ending the analysis when no good reason is provided, these cases fail to consider prejudice to the other party and whether it can be remedied.[31] This would appear to be contrary to the Court of Appeal's decision that leave may be granted when late notice remains adequate notice.[32]

Rules in Other Jurisdictions

[24] Most jurisdictions in Canada are similar to Alberta in that expert evidence is not admissible at trial without leave of the court unless notice is served in accordance with the rules.[33] In Nova Scotia, if a party's expert report does not comply with the content and timelines specified in Rule 31.08(1), a judge may make an order requiring the party to comply[34] and the applicant is awarded costs of the application.

Discovery and Evidence Committee Proposal

[25] The Committee noted that failure to comply with timelines in the exchange of expert reports has long been a problem and has contributed to the delay which is a common concern with the litigation process. Sanctions such as refusing to admit the report into evidence, costs, or adjournments are effective if enforced by the courts. Providing for new sanctions will likely not resolve the problems of non-enforcement. The Committee proposes that the current rules regarding sanctions for non-compliance with rules governing the exchange of expert reports be retained.

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[29] The cases are summarized in *Wade v. Baxter*, *supra* note 10 at para. 43. See for example: *Guarantee Co. of North America v. Beasse*, *supra* note 25; *Wilson v. Walton*, *supra* note 11; *Schlutter v. Anderson* (1999), 243 A.R. 109 (the evidence was admitted); *Edmonton (City) v. Lovat Tunnel Equipment Inc.* (2000), 262 A.R. 215 (Q.B.).

[30] *Guarantee Co. of North America v. Beasse*, *supra* note 25 in *obiter dicta*. In this case there was no compliance with the Rule. See also *Wilson v. Walton*, *supra* note 11 where Waite J. considered the rule to be absolute absent a satisfactory explanation.

[31] *Wade v. Baxter*, *supra* note 10 at para. 44.

[32] *Ibid.*

[33] See references to rules in other jurisdictions noted in para.10.

[34] Nova Scotia, *supra* note 13, r. 31.08(3).

ISSUE No. 3
Should there be prescribed criteria for the form of expert reports?

[26] Although Rule 218.1(1)(a) sets out certain matters which must be addressed in expert statements, the rules do not set out specific or detailed requirements for the contents of an expert report. Rule 218.6(1) for Very Long Trial Actions requires that expert reports be exchanged between the parties along with "Experts Documents" that give information about the experts. As with Rule 218.1(1)(a), explicit criteria for the contents of the expert report are not specified.

[27] The court may waive the technical requirements of Rule 218.1(1)(a) so long as there is sufficient compliance with the Rule. In *Millott Estate v. Reinhard*, expert statements were admitted into evidence that were served within the time fixed by the court but which the experts had not signed.[35]

[28] Practice Note 10, "Format of Expert Evidence of Economic Loss or Damages" reflects an effort to standardize the contents of expert reports to some extent with respect to reports concerning economic loss or damage. This Practice Note requires that reports on economic loss or damage must include, *inter alia*:

- a list identifying all factors upon which findings of fact must be made to reach an ultimate conclusion;
- all assumptions of fact the expert made to reach conclusions;
- the expert's reasons for choosing particular assumptions rather than using others;
- where alternate methods of calculation are available, the reason why the expert chose the one used in the report;
- if the assumptions are based on the evidence given by that expert, that evidence must be contained in the report.

[29] Some comments from the consultation process suggest that the rules should set out clear, unequivocal criteria for all expert reports similar to the requirements in Practice Note 10. The criteria should include a statement of qualifications, tests

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[35] *Millott Estate v. Reinhard* (2000), 12 C.P.C. (5th) 148 (Alta. Q.B.) at para. 6.

performed, results, comparisons to norms, and in the case of medical examinations, symptoms addressed and whether the condition is permanent.

Rules in Other Jurisdictions

[30] Other jurisdictions set out specific matters which must be addressed in expert reports. The requirements of New South Wales Supreme Court for expert reports are set out in an "Expert Witness Code of Conduct" and include the person's qualifications as an expert; the facts, matters and assumptions upon which the opinions in the report are based; and the reasons for each opinion expressed.[36] The report must also specify the details of the literature or other materials used, any examinations, tests or other examinations performed, and the qualifications of the person who carried them out.[37] The code also requires the expert to comment on whether the report may be incomplete and whether there are any qualifications, or conclusions that may be based on incomplete research or data. In Australia and New Zealand there is support for going even further and disclosing in the expert report instructions that counsel have given to the expert.[38]

[31] The American Federal Rules of Civil Procedure compel the expert to disclose:[39]

- The identity of all experts;
- A report, signed by the expert containing a complete statement of opinions and the bases and reasons for them;
- All data the expert considered in forming the opinion whether or not the data was used in the opinion or relied upon by the expert;
- All exhibits used as a summary of or in support of the opinion;
- The expert's qualifications including all publications for the last ten years;
- The fees to be earned by the expert;

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[36] New South Wales, *Supreme Court Rules 1970*, Schedule K, online: Supreme Court Rules <http://www.austlii.edu.au/au/legis/nsw/consol_reg/scr1970232/>.

[37] *Ibid.*

[38] New Zealand, Rules Committee, *Expert Witnesses: A Second Discussion Paper Prepared by the Rules Committee Including Recommended Rules* (17 July 2001), online: Rules Committee <http://www.courts.govt.nz/rulescommittee/discussionpapers.htm> [N.Z. *Second Discussion Paper*].

[39] U.S., *Federal Rules of Civil Procedure 1998* [United States], r. 26(a)(2) (QL).

- The names of other cases in which the expert actually testified as an expert, at trial or in discovery, within the preceding four years.

The disclosure must be made at least 90 days prior to trial. If a party's expert fails to disclose the material as required by the rule, the party will not be permitted to lead the expert at trial.[40]

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[32] It was generally agreed that standardizing the format or prescribing minimum standards for the content of expert reports has many benefits. Doing so may assist in ensuring that expert reports provide useful and complete information to the court. It is more difficult for an expert to rebut or replicate the results of an opposing expert if expert statements and reports are not sufficiently detailed and do not set out the methodology or data that the expert used in reaching his or her conclusions, thus establishing minimum standards for the content of the report may permit more efficient and effective rebuttal. Reports may be deliberately ambiguous to disguise weaknesses in the conclusion therein.[41] Prescribing minimum standards may allow all parties to better evaluate both their own and their opponents' positions. Setting minimum standards for the content and format of an expert report was also thought to benefit less experienced lawyers and "non-professional" expert witnesses in creating useful and complete expert reports.

[33] Several suggestions were made about what should be included in the report, with support for requiring relevance, an outline of qualifications, a list of documents that were reviewed, and a list of issues upon which an opinion is being given.

[34] The Committee also discussed whether a statement of the substance of the report is required if a report is exchanged with the other party. It was concluded that it was useful to have a statement summarizing the expert's evidence as an alternative for non-professional experts who do not provide expert evidence on a regular basis.

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[40] Gregory S. Weber, "Potential Innovations in Civil Discovery: Lessons for California from the State and Federal Courts" (2001) 32 McGeorge L. Rev. 1051 (Lexis).

[41] David W. Eryou, "Why Isn't Daubert Being Used in Ontario Civil Cases?" *Practical Strategies for Advocates IX* (4-5 February 2000) 9, at para. 66 (QL).

[35] The Committee has prepared draft Guidelines for Experts drawn from the Australian practice and other sources, contained in the Appendix to this memorandum. The Committee is of the opinion that these requirements reflect common matters addressed, or that should be addressed, in expert reports and thus should be included in the Rules.

ISSUE No. 4
How should objections to expert evidence be made?

[36] Presently the Rules provide that parties must serve notice of an objection to any expert report or part of the report, with reasons, prior to trial within a reasonable amount of time. The party upon whom the first expert report is served must object within 60 days, and objections to rebuttal reports must be made within 30 days of service.[42] All objections must be made within these timeframes, including, *inter alia*, objections on the grounds of relevance, reliability of the expert evidence, bias, or conflict of interest.

[37] Pursuant to Rule 218.15, if a party objects to the admission of an expert's opinion, the cost of calling the expert shall be paid by the party refusing the admission of the expert's report unless the court determines otherwise. Rule 218.7 provides similar relief in the case of Very Long Trials.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[38] The Committee was of the view that objections to either the expert's opinion or any portion of the expert report should be made as soon as possible. In this regard the Committee proposes to retain the requirements currently in Rules 218.14 and 218.15 that notice of objections to expert evidence with reasons be given within a reasonable period of time prior to trial.

[39] The Committee considered at length whether objections to admissibility should be decided in some form of pre-trial application. There was general agreement that some applications may be appropriately determined before trial, while others are better left to the trial judge, depending on the type of issue. The Committee considered

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[42] Alberta, *Rules of Court*, r. 218.14(1).

whether it would be possible to have applications concerning the admissibility of expert evidence made to the trial judge prior to trial. However, this may be difficult as trial judges are often not assigned until just prior to trial. While having pre-trial applications may save trial time, the Committee was concerned that it may be difficult for a chambers judge to be fully informed of all of the relevant information to make a determination regarding the admissibility of the evidence, particularly if the issue concerns relevance. The Committee noted that in most instances the trial judge is in a far better position to assess relevance. It was also noted that as many of the issues regarding admissibility of expert evidence may be complex, they would likely be heard in a special chambers application. This would defeat the goal of reducing delay, as there are often lengthy delays in booking special chambers dates.

[40] The Committee recommends that the framework for notice set out in Rule 218.14 be used for all objections to admissibility of the expert evidence. The initial court application to deal with the objection may be made at trial, or before trial in chambers. The pre-trial judge can decide the matter or refer the issue to the trial judge if the matter is more appropriately decided in the context of the trial itself.

1. Objections regarding reliability of expert evidence

[41] Over the past several years there has been a concern about the reliability of expert evidence based on novel theories which may not be accepted generally in the relevant professional community (sometimes referred to as "junk science"). The Supreme Court of Canada has indicated that judges play an important role in assessing the reliability of expert evidence, particularly with novel scientific evidence.[43] There have been a few cases in Ontario, Manitoba, and B.C. where courts have granted a *voir dire* on the admissibility of expert evidence in a civil trial.[44] Since the United States Supreme Court 1993 decision in *Daubert v. Merrill Dow Pharmaceuticals*[45] and two further cases that complete a trilogy of cases on expert evidence,[46] American

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[43] *Mohan*, *supra* note 4.

[44] The three cases are summarized in Eryou, *supra* note 41.

[45] 509 U.S. 579 (1993) (QL).

[46] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (QL) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (QL).

judges function as active gatekeepers for the screening of unreliable expert evidence. The Federal Rules of Evidence that apply to expert evidence were amended in 2000 to incorporate the *Daubert* criteria. Courts now hold *Daubert* Hearings during which the admissibility of expert evidence is contested prior to trial or as part of the process of qualifying the expert during the trial.[47] The criticism is that such hearings may disrupt and lengthen a trial.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[42] The Committee considered the *Daubert* approach used in the United States. However, it was felt that the instances in which the objections to expert evidence on the ground of being "junk science" are few. As such, it is not desirable nor necessary to specifically include rules addressing this situation. Any objections on the basis of "junk science" may be made in the same manner as any other objection. As noted above, a party could bring the application prior to trial if the matter is such that it could be determined by a judge in chambers, or if not, the objection may be dealt with at trial.

ISSUE No. 5
Should experts be required to testify at trial?

[43] Under Rule 218.13, an expert may be called to testify at trial if the notice requirements in Rule 218.1 for primary experts or Rule 218.12 for rebuttal experts have been complied with. If the requirements have not been complied with, the expert may still be called with leave of the court.

[44] Rule 218.1(2) provides that a party serving an expert's report may serve notice of intention to have the report entered as evidence without the necessity of calling the expert as a witness. A party on whom such a notice is served must then reply within sixty days, or such other time as may be allowed, with a statement identifying which parts of the report it objects to being entered without oral evidence with reasons (Rule 218.11). An agreement in response to a notice of intention does not, by itself, amount to an admission "of the truth or correctness of the evidence submitted" (Rule

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[47] Eryou, *supra* note 41.

218.1(4)).[48] A party who requires an expert to attend for cross examination will be responsible for the costs of the expert's attendance. If the court finds that the cross examination was of assistance, a different order regarding costs may be made (218.11(3)).

[45] Note should also be taken of Rule 230.1, which allows a party to serve a notice to admit a written opinion as correct. If the opinion is admitted, the expert need not be called to give evidence at trial.

[46] Allowing expert evidence to be put in by way of a written report rather than orally in examination in chief of the expert is intended to reduce costs and trial time. Expert fees for attendance at trial can be extremely expensive. Expert testimony can often be lengthy, particularly if the testimony concerns very technical or difficult concepts. As one justice of the Court of Queen's Bench commented during consultations:

> "...if the expert has done an adequate report, he usually merely summarizes it or reads it in any event and I found that less than useful. What I found more useful is to be able to read the report in detail myself first and understand as best I can so that when the witness is on the stand there can be, in addition to cross-examination, any necessary clarification questions. To have an expert witness stand up "cold" and read or summarize his report and then go into cross-examination has not been very helpful to me ... I find the examination-in-chief a waste of time".

[47] As noted in the comment above, it may not be desirable to eliminate completely expert attendance at trial. If there is no examination in chief, experts may feel that they have not had the opportunity to properly explain their opinions to the court before being subjected to cross-examination.[49] Experts should be able to correct any misstatement or misunderstanding of the evidence arising from the expert report. Cross examination is also very important in highlighting problems or issues with an expert's opinion, and the trial judge may also wish to clarify certain matters with the expert witness.

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[48] Poelman & Bodnar, *supra* note 5 at 948.

[49] Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) at para. 6.113, online: Australian Law Reform Commission <http://www.olustlii.edu.au/au/other/alrc/publications/bp/6experts.html> [Managing Justice].

[48] One comment from the Bar suggested that there should be very short examination-in-chief of experts provided that the expert report is done fully and is provided to the court for review prior to the hearing. There should either be rules allowing full cross-examination of the expert on income, testifying history, and lack of objectivity, or the system should move to court-appointed experts (discussed below). Other counsel during consultations suggest that parties be required to seek leave of the court to call an expert to testify at trial.

Rules in Other Jurisdictions

[49] The rules regarding expert attendance at trial vary greatly across the country.[50] Many provide that a written expert report may substitute for oral evidence, usually with consent of the parties. As in Alberta, several jurisdictions permit the party on whose behalf the report is tendered to give notice as to whether the expert will be called. Opposing parties who wish to cross examine the expert may then require the expert to attend for cross examination at trial.

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[50] Ontario's rules are silent on whether parties may dispense with the need for an expert to attend at trial. In Nova Scotia, *supra* note 13, r. 31.08(4) states that if an expert report is filed according to rule 31.08(1), the expert is required to attend at the trial unless the person receiving the report gives notice that such attendance is not required. Rules 279 and 280 of the Federal Court, *supra* note 13, provide that an expert must be available for cross examination at trial, but with leave of the court and consent of all parties the expert statement may be read in without the expert being in attendance. Similarly, r. 52.01(5) in New Brunswick, *supra* note 13 provides that the expert report may substitute for oral testimony of the expert by consent of all parties. In British Columbia, *supra* note 13, r. 40A provides the option for an expert to give oral testimony. The rules require that the party on whose behalf the expert report is made must advise the expert of the trial date and that the expert may be required to attend for cross examination. Any party adverse in interest may demand the expert to attend for cross examination, and such demand must be made within a reasonable period of time after service of the expert report. If the court finds that the cross examination was not of assistance, the party requiring the cross examination may be ordered to pay "appropriate" costs. Rule 53.03 in Manitoba, *supra* note 13, states that the expert report alone is admissible, but any party may require the witness to attend for cross examination upon at least 10 days' notice prior to trial. The costs of the subpoena and expert's attendance are the responsibility of the party tendering the report, but the court may order that these be taxable costs. In Prince Edward Island, *supra* note 13, r. 53.03(2) states that the expert must attend at trial unless the party receiving the report gives notice that the expert's attendance is not required. In Saskatchewan, *supra* note 13, r. 284C(4) a party who wishes an expert to attend for cross examination on an appraisal or medical report must give notice at least 10 days prior to trial.

[50] The South Australian Supreme Court has proposed that evidence in chief of all expert witnesses should be given in writing only, unless there are exceptional circumstances.[51]

[51] The Law Reform Commission of Western Australia takes quite a different approach in its draft recommendations. It first recommends that "no expert evidence should be adduced without leave of the court."[52] It also proposes that experts should be given an opportunity to present their opinion and reasoning orally rather than preparing a written report to submit into evidence.[53] The Commission views comprehensive expert reports as being too time consuming and costly. Oral testimony is preferable, in the Commission's opinion, as experts are "used to presenting their opinions orally and to do so is likely to assist in communicating the basis for the opinion and place in context the cross-examination which follows."[54]

[52] The Woolf Report strongly recommends that the court have complete control over the use of expert evidence.[55] The new Civil Procedure Rules state that no expert evidence may be adduced without leave of the court.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[53] The Committee considered whether it was possible to dispense with expert testimony in all but exceptional matters, and concluded that it was not. Having experts give oral testimony, including examination in chief, can be useful in many cases as doing so allows the expert to explain the conclusions in the expert report. The impressions given by a witness on the stand are very important, and limiting oral evidence to answers given on cross examination may put the expert at a disadvantage. It is likely that if the default procedure is that an expert may only give oral testimony on notice, such notice would be served in the majority of cases thus creating an additional step with the associated costs of doing so.

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[51] Background Paper 6: Experts, *supra* note 12 at 40.

[52] Review of the Criminal and Justice System: Consultation Drafts, *supra* note 7, rec. 241.

[53] *Ibid.* at 698.

[54] *Ibid.*

[55] Woolf Report, *supra* note 1 at para. 13.13.

[54] The Committee proposes to retain the current mechanisms whereby the parties may replace oral expert testimony with a written expert report upon notice. Once an expert report has been served, other parties should have an option of requiring the expert to be produced at trial, or even before trial, for cross-examination. There should also be an option of examining the expert before trial in chief or cross-examination by consent of the parties or with leave of the court. Parties should be encouraged to use these procedures during case management meetings or pre-trial conferences, as well as through education aimed at making counsel more comfortable with proceeding without *viva voce* expert testimony.

[55] The Committee is interested in hearing whether the profession would prefer more stringent limits on oral expert testimony at trial.

ISSUE No. 6
Should there be a limit on the number of experts each party may call?

[56] Currently the only limit on the number of expert witnesses that a party may call is in Rule 218.4(1), which applies only to Very Long Trials. There is a limit of one expert per issue per party without leave for Very Long Trials. The *Alberta Evidence Act* formerly limited each party to three expert witnesses, but since this provision has been repealed[56] there are no *prima facie* limits on expert witnesses for matters to which the Very Long Trial rules do not apply.

[57] During consultations many people supported limits on the number of experts. Many suggest that only one expert should be allowed *per* party *per* issue.

Rules in Other Jurisdictions

[58] Section 12 of the Ontario *Evidence Act* limits the number of experts to three without leave of the court.[57] In Nova Scotia, the number of experts who may be called

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[56] *Alberta Evidence Act*, R.S.A. 1980, c. 1-21, s. 10; repealed. S.A. 1996, c. 28, s. 3.

[57] *Evidence Act*, R.S.O. 1990, c. E-23, s. 12.

by each party may be limited during a pre-trial conference[58] or the pre-trial conference judge may make an order limiting the number of expert witnesses, including medical witnesses.[59] Rule 46.05 in Newfoundland also permits the court to limit the number of expert witnesses. The New Brunswick *Evidence Act*, c. E-11, s. 23 limits the number of experts to three *per* side *per* issue, and the Saskatchewan *Evidence Act*, R.S.S. 1978, c. S-16, s. 48 has a five expert *per* side *per* issue limit. Other Canadian jurisdictions are silent on this matter.

[59] The rules in the Australian Federal Court,[60] Western Australia and New Zealand give discretion to the court to limit the number of expert witnesses.[61] The United Kingdom Civil Procedure Rules emanating from the Woolf Report enable the court to limit the number of experts called by each side on any issue, either generally or in a given specialty, or direct that no experts be called.[62]

[60] Generally in the United States there has been no move to limit the number of expert witnesses.[63] The two exceptions are Alaska and Arizona where the number of experts are limited to three *per* side and presumptively one *per* side, respectively.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[61] While it may seem attractive to impose limits on the number of experts who may be called on an issue, the Committee had concerns about the practical application of such a limit, particularly in determining what comprises a "single issue". A"single issue" often is comprised of discrete aspects that may involve different areas of expertise. Limiting the number of experts to one *per* issue may create more litigation than it eliminates if counsel disagree on what comprises an issue.

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[58] Nova Scotia, *supra* note 13, r. 36.01(d).

[59] *Ibid.*, r. 31.06.

[60] Australia, *Federal Court Rules*, O 10 r 1(2)(j), online: Federal Court Rules – Table of Regulations <http://scaleplus.law.gov.au/html/pastereg/0/49/top.htm>.

[61] Review of the Criminal and Justice System: Consultation Drafts, *supra* note 7; N.Z. *Second Discussion Paper*, *supra* note 38.

[62] Woolf Report, *supra* note 1 at para.13.13.

[63] Weber, *supra* note 40 at 1098.

[62] The Committee's initial opinion is that the current Rules provide adequate safeguards to limit the number of experts who can be called. The requirement that advance notice be given of the experts to be called at trial and a summary of their evidence allows parties to evaluate the suitability and necessity of the other side's experts. For uncontroversial matters, an expert's attendance at trial may be dispensed with. In addition, the other side must give advance notice of any objection to the admissibility of an expert's opinion, and an application may be made either prior to or at trial to determine the validity of the objection. Possibly, objections could extend to questions of suitability or necessity, as well as admissibility. The Committee proposes to retain these types of limitations on expert evidence rather than imposing *prima facie* limits on the number of experts.

[63] However, it is noted that there is currently a limit in the Very Long Trial Rules of one expert *per* party *per* issue without leave. As no comments have been received regarding the practical effect of this limitation, the Committee is interested in feedback from the profession as to whether this limitation is effective and should be retained, and perhaps extended to all matters where experts are involved.

ISSUE No. 7
Should the use of joint experts be required or encouraged?

[64] Currently there is no rule requiring parties to appoint a joint expert. The rationale for retaining a joint expert is that if the expert is truly independent, that expert should be able to render an impartial opinion on the questions in issue regardless of the parties' differing positions. There are many benefits of using one expert instead of two (or more): it is far more cost effective; there is likely to be less delay; and the court may benefit from an impartial expert by not having to decide between two competing opinions.

[65] Examples of a common use in Alberta of what is effectively a single joint expert may be found in the home assessment procedure in family law. As few people can afford two separate home assessments, often only one assessment is done by a mutually agreed upon expert and the cost is split either evenly between the parties, or proportionally depending on their respective incomes. There are other areas of civil

litigation where a joint expert may be used successfully.[64] These include matters where:

(i) confidentiality is a concern and one party does not wish the other to have access to its records. A joint expert may still be questioned on methodology and findings; and

(ii) issues are complex enough to require an expert but the means are limited on both sides. A joint expert may reduce costs and improve access to the legal system.

2. Use of joint experts in other jurisdictions

[66] Many law reform reports have recommended the increased use of single joint experts, including the Australian Law Reform Commission,[65] the Woolf Report[66] (particularly on issues of quantum) and the Law Reform Commission of Western Australia.[67] The Commission's main concerns related to the cost of calling experts and the perceived partisanship of many experts in the adversarial process. The Commission suggested that a pre-trial hearing enquire about the need to call more than one expert. Further, the court should "order costs associated with the use of multiple experts against parties who do not cooperate in the appointment of a single expert witness."

Discovery and Evidence Committee Proposal

[67] While the Committee recognizes the perceived benefits of requiring parties to use single joint witnesses, it had doubts about the practical application of doing so. There was a concern that arguments concerning choosing and instructing the joint expert would cause extensive delay and result in numerous court applications. In the Committee's view requiring joint experts would likely cause more problems than it would solve. However, the rules should permit the parties to use a joint expert by consent or with leave of the court (though appointing a joint expert through leave of the court may bring the court appointed expert rules into play, discussed below).

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[64] Robin Taylor, "When Should You Use a Single Joint Expert?" *The Lawyers Weekly* (10 May 2002) 10.

[65] Managing Justice, *supra* note 49 at para. 6.103.

[66] Woolf Report, *supra* note 1 at paras. 13.16-24.

[67] Review of the Criminal and Justice System: Consultation Drafts, *supra* note 7 at 678 and rec. 238.

ISSUE No. 8
Should the rules permit the court to appoint its own experts?

[68] Rule 218 permits the court to appoint its own expert in certain circumstances. In practice the functions of court appointed experts and joint experts are similar if they are the only experts called in a matter. However, court appointed experts may be used even if parties have called their own experts, while presumably joint experts would replace the need for parties to retain their own experts. The rationale for having court appointed experts is set out in *Blackburn v. Kochs Trucking Inc.*:

> The object of the order is presumably to enable the parties to save costs and expenses in engaging separate experts in respect of a technical or scientific question which can be resolved fully, quickly and comparatively cheaply by an independent expert appointed by the court, and also possible to prevent the Court being left without expert assistance in cases in which the experts of the parties may well be giving entirely contradictory evidence on technical or scientific questions.[68]

[69] Court appointed experts may also be useful when the matter in issue is unusual and would be difficult to deal with without recourse to an independent examination.[69] There are two competing factors that must be weighed when having the court appoint an expert: the adversarial nature of the justice system where evidence is gathered by the litigants; and that justice is best served when all relevant information is before the court.[70]

[70] The general consensus in most jurisdictions is that the court should only appoint an expert when the parties cannot agree on a joint expert. Therefore, the parties may have little input into the issues posed to the court expert; if the parties cannot agree on a joint expert, most likely they will not agree on instructions to a court expert. It may not be appropriate for the court to appoint expert witnesses who are known to favour a

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[68] *Blackburn v. Kochs Trucking Inc.* (1988), 86 A.R. 321 (Q.B.).

[69] In *Grayson v. Demers* (1974), 57 D.L.R. (3d) 211 (Alta. C.A.) the respondent alleged that his car ran out of control after he became unconscious due to a medical condition and hit the appellant on the sidewalk. This defence was unusual and the appellant was entitled to know whether it could be supported medically. Rule 218 empowered the court to use its discretion to order that the respondent be examined by an independent medical examiner.

[70] *R.(M.J.) v. R.(A.)*, [1995] 6 W.W.R. 327 at para. 9; *Grayson v. Demers*, *ibid.*

particular party to a litigation.[71] The court should not make orders under Rule 218 if there is a risk that the balance of fairness between the litigants would be upset and if another way exists to achieve the same result.[72] Court or joint experts may be most useful in disputes over quantum rather than liability, particularly where valuation of assets is at issue.[73] Court-appointed experts may reduce costs and the duration of proceedings unless parties call their own experts to refute or supplement the evidence of the court expert. Costs may also increase if the expert has to be present during most of the trial to hear the testimony of other witnesses.

[71] Although Rule 218 gives the court broad discretion to appoint independent experts,[74] there are fairly defined procedures which apply to court appointed experts. Any party may apply for leave to cross-examine the expert on the report either prior to, or at, trial. The cost of the court appointed expert is divided equally between the parties in the first instance subject to the ultimate determination as to costs generally (Rule 218(8)).[75] The rule does not enable the expert to go into the field and gather evidence.[76] Rule 218(4) states that "the report of the court expert shall be in writing, verified by affidavit, and shall be admitted as evidence at the trial and given such weight as the court thinks fit." Rule 218(3) provides that, if possible, the parties should agree on the questions or issues put to the expert and hence, indirectly, the contents of the expert report. If the parties do not agree, then the court may instruct the

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[71] *Millott Estate v. Reinhard*, *supra* note 35 at para. 22. In *Millott Estate*, the defendants wished to call two police officers, who had investigated the motor vehicle accident, as expert witnesses. The judge ruled that they could be admitted as expert witnesses under Rule 218.1 even though their statements did not comply with all of the formalities. His comments on alternatively admitting them as court-appointed experts under Rule 218 were *obiter*.

[72] *R.(M.J.) v. R.(A.)*, *supra* note 70 at para. 11. In *R.(M.J.) v. R.(A.)*, the plaintiff sued her father, alleging sexual assault and that he was the father of her seventeen year old son. A paternity test would have settled the issue of liability but the defendant opposed the application. The court was loathe to subject an individual to even a minor but intrusive medical test absent consent. Instead, the court relied on a provision in legislation dealing with putative fathers and directed the trial judge to draw a strong inference from defendant's refusal to undergo paternity testing.

[73] Background Paper 6: Experts, *supra* note 12 at 78.

[74] *R.(M.J.) v. R.(A.)*, *supra* note 70 at para. 6.

[75] *Westfair Foods Ltd. v. Watt* (1992), 131 A.R. 142 (C.A.).

[76] *Ibid.*

expert. Under Rule 218(10) parties can still call their own experts if a court has appointed an expert.

[72] Court appointed experts have been used for valuations where there is a discrepancy between those done by opposing parties.[77] They are also used in family law cases or other matters where privacy is in issue, particularly where the welfare of children is concerned. The court can appoint its own expert to perform a psychological assessment of a child for an application to vary a custody and access order.[78] Rule 218(1) includes a medical practitioner as one who may be appointed as a "court expert" and the rule has been interpreted as empowering the court to order a defendant to be examined by an independent medical expert in situations where Rule 217 (court ordered medical examinations) does not apply.[79]

3. Use of court appointed experts in other jurisdictions

[73] The rules in most Canadian jurisdictions contemplate court appointed experts and provide procedures similar to those in the Alberta rules.[80]

[74] The Australian Law Reform Commission has recommended that due to the concern that a court appointed expert may usurp the role of the trier of fact, court appointed experts should only be used when parties fail to agree on a joint expert or where the views of partisan experts are so widely divergent that the court requires assistance or a more moderate view.[81] There is also a philosophical concern that the appointment of court experts shifts the judicial model to an inquisitorial system rather than the traditional adversarial system.

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[77] *Hoffman v. Ohlson Ranch Ltd.* (1995), 165 A.R. 68 (C.A.).

[78] *Tucker v. Tucker* (1994), 148 A.R. 306 (Q.B.); *Marko-Laschowski v. Laschowski* (1999), 239 A.R. 162 (Q.B.) at para. 11.

[79] *Grayson v. Demers*, *supra* note 69.

[80] Newfoundland, *supra* note 13, r. 35; Ontario, *supra* note 13, r. 52.03; British Columbia, *supra* note 13, r. 32A; Federal, *supra* note 13, r. 52; Nova Scotia, *supra* note13, r. 23; New Brunswick, *supra* note 13, r. 54.03; Manitoba, *supra* note 13, r. 52.03; Prince Edward Island, *supra* note 13, r. 52.03.

[81] Background Paper 6: Experts, *supra* note 12 at 61 and 78.

[75] In the United States, Rule 706 of the *Federal Rules of Evidence* authorizes court appointed experts to give testimony; experts that act in an advisory capacity only may also be appointed under the inherent authority of the court.[82] The *Daubert* case mandated that judges in the United States play an active role in screening expert evidence with the assistance of court appointed experts.[83] Despite this recommendation, court appointed experts are not used frequently in the American courts.[84] Court appointed experts are entitled to fair compensation in the first instance by the parties as directed by the court, subject to the awarding of costs at the end of the trial.[85]

Discovery and Evidence Committee Proposal

[76] It was noted during the Committee's discussions that court appointed experts are rarely used except in some family law matters where privacy and confidentiality are in issue. As the court prefers to let the parties run their own cases and there is concern about imposing expenses on parties, courts are generally reluctant to appoint their own experts. However, there are times when court appointed experts can be useful, as noted above.

[77] The Committee proposes that the Rules regarding court appointed experts remain as they are.

ISSUE No. 9
Should the rules permit the Court to appoint assessors or referees?

[78] The current Rule 235 allows for the appointment of assessors or referees. Though Rule 403 defines "referees", the Rules do not define "assessor" and Rule 235

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[82] Note, "Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence" (1997) 110 Harv. L. Rev. 941 at 947 (Lexis).

[83] *Ibid.* at 941.

[84] Si-Hung Choy, "Judicial Education After *Markman v. Westview Instruments, Inc.*: The Use of Court-Appointed Experts" (2000) 47 UCLA L. Rev. 1423 at 1428, 1439; Robert L. Hess II, "Judges Cooperating with Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors" 54 Vand. L. Rev. 547 at 550 (Lexis).

[85] U.S., *Federal Rules of Evidence*, r. 706(b) (QL).

is rarely used.[86] Referees may also be appointed to conduct inquiries or accounts under Part 35. On the rare occasions where referees are appointed, the court usually refers the matter to masters (who are one of the groups included in Rule 403) . As the role of the referee is usually limited to matters such as mathematical calculations rather than actual fact finding, opinion, or adjudicative functions, cross-examination on the referee's conclusions normally is not required. There are benefits to using a referee rather than a court appointed expert, being that there is no extra cost to the parties. Referees may also free up judicial resources which will help to eliminate backlogs or delays in court time.[87]

[79] In *Blackburn v. Kochs Trucking Inc.*[88] the court distinguished assessor from court-appointed experts on the question of long-term rehabilitation expenses in a personal injury claim:

> Rule 235 does not contain the same limited wording as Ontario Rule 276(1) which does not speak of assessors but has the same purpose - to enable the court to "obtain the assistance of merchants, engineers, accountants, actuaries or scientific persons, in such a way as it thinks fit, the better to enable it to determine any matter of fact in question in any cause or proceeding ..." In *Phillips v. Ford Motor Co.* (1971), 18 D.L.R. (3d) 641 at pp. 666-667 (Ont..C.A.), Evans, J.A. held that the role of such persons was limited to explaining to the judge the evidence adduced by the parties, not to question witnesses.

Use in Other Jurisdictions

[80] Most other Canadian jurisdictions provide for the appointment of assessors or referees to be used in a capacity similar to that which assessors are used in Alberta.[89]

[81] Assessors and referees are options, albeit rarely used, available to the Federal Court in Australia for assisting with technical and scientific evidence. Assessors are

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[86] *Blackburn v. Koch Trucking Inc.*, *supra* note 68. Hereinafter, referees and assessors will be referred to collectively as "referees".

[87] Alberta Law Reform Institute, *Report on Referees*, *supra* note 2 at 2.

[88] *Supra*, note 68 at 326.

[89] New Brunswick, *supra* note 13, r. 56.01; Saskatchewan, *supra* note 13, r. 251; Newfoundland, *supra* note 13, r. 43; Prince Edward Island, *supra* note 13, r. 54; Manitoba, *supra* note 13, rr. 54 & 55; Ontario, *supra* note 13, rr. 54 & 55; Nova Scotia, *supra* note 13, r. 35; British Columbia, *supra* note 13, r. 32, Federal, *supra* note 13, r. 52.

not sworn or cross-examined but give private advice to a judge on the effect or meaning of expert evidence.[90] The Australian Law Reform Commission and the Woolf Report both recommended the use of assessors, but the Law Reform Commission of Western Australia, recommended a more conservative approach with the use of assessors limited to special cases.[91]

[82] Referees in Australia are appointed by the court to inquire and report on issues in dispute and have a direct influence on decision making.[92] Determinations can be binding or not binding on the parties, depending on the circumstances, and the judge can accept, reject, or vary the referee's report.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSALS

[83] The Alberta Law Reform Institute published a "Report on Referees"[93] wherein it recommended increased use of referees. In the Committee's opinion, assessors or referees can be of assistance to the court if used properly. The Committee proposes to retain the rules governing assessors and referees, and consolidate these rules with the court appointed expert rules. The rules should clearly distinguish between the roles and functions of assessors, referees and court experts.

ISSUE No. 10
Should expert witnesses be examined for discovery? If so, what limits, if any, should there be on the scope of the examination?

[84] Examination for discovery of experts may be one method of ensuring full disclosure and avoiding surprise at trial, particularly if expert reports or statements are ambiguous, incomplete, or only include favourable but not unfavourable results. Having guidelines for the contents of expert reports and statements may be an

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[90] Managing Justice, *supra* note 49 at para. 6.124. For a summary of the caselaw on where assessors have been used or objected to see H.D. Sperling, "Expert Evidence: The Problem of Bias and Other Things" (Supreme Court of New South Wales Annual Conference, 3-4 September 1999) [unpublished], online: Supreme Court New South Wales <http://www.agd.nsw.gov.au/sc/sc.nsf/pages/sp_030999>.

[91] Sperling, *ibid.*

[92] Managing Justice, *supra* note 49 at para. 6.126.

[93] *Supra*, note 2.

alternative method of ensuring full disclosure, particularly if both favourable and unfavourable results must be included.

[85] The current Rule 218.8 for Very Long Trials contemplates pre-trial examination of expert witnesses with leave of the case management judge.[94] Under this rule, the examination is conducted as if it were an examination for discovery of an employee under Rule 200. Rule 218.8 enables an examination for discovery only of those proposed experts in respect of whom an "experts document" has been delivered[95] and the examination is limited to the contents of the experts documents that are required under Rule 218.6(2). Though this rule is rarely used,[96] in one of the few reported cases where this rule was relied upon the court commented that "Rule 218.8 does demonstrate a change in the procedure which has prevailed in Alberta until recently. An expert may now be fully examined prior to trial."[97]

[86] There was a difference of opinion on allowing experts to be examined for discovery evident in the consultation comments from the Bar. Some supported discovery of experts on the grounds that such examination would useful in narrowing the issues and may eliminate the need for the expert to be called at trial. Others did not support examination of experts, voicing concerns that this would lead to further delay and expense. There was also a concern that allowing either discovery or examination and cross-examination of experts could result in an abrogation of litigation privilege.

Rules in Other Jurisdictions

[87] In Ontario, Saskatchewan and Manitoba, an expert may not be examined for discovery and is expressly excluded from the non-parties that may be examined with leave of the court.[98] In British Columbia, the court may order the examination of the other party's expert hired in anticipation of litigation only if the party cannot obtain

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[94] *Stodley v. Ferguson* (2001), 93 Alta. L.R. (3d) 78 at para. 16 (Q.B.).

[95] *Phillip (Next friend of) v. Whitecourt General Hospital* (2001), 290 A.R. 228 at para. 27 (Q.B.).

[96] *McCormac v. Elaser*, [1998] A.J. 728 (Q.B.) (QL).

[97] *Ibid.* at para. 7.

[98] Ontario, *supra* note 13, r. 31.10(1); Saskatchewan, *supra* note 13, r. 222A; Manitoba, *supra* note 13, r. 31.10.

facts and opinions on the same subject by other means.[99] In Newfoundland and Nova Scotia, an expert may be examined on matters that are not privileged,[100] and in Nova Scotia the opposite party must pay the expert a reasonable attendance fee.[101] New Brunswick's rules do not expressly preclude expert witnesses from the general rule that any witness may be discovered by order of the court.[102] In Prince Edward Island, an expert may be discovered with leave unless the party on whose behalf the expert is retained undertakes not to call that expert as a witness at trial.

[88] In most American jurisdictions experts can be deposed prior to trial about their background, prior reports, and expected testimony.[103] In California, these matters are addressed through an exchange of expert witness lists that occurs only if demanded by one of the parties.[104] Experts may be deposed following the exchange of the lists. In other American jurisdictions, such as the federal courts, deposition of an expert may only occur following the automatic disclosure of a comprehensive expert report.[105] In practice, deposition of experts has become standard. Comprehensive reforms in 1993 of disclosure requirements for expert reports were intended to reduce or eliminate the need for a deposition.[106] These amendments only apply to experts specifically retained by a party. Other experts, such as treating physicians, may be deposed without a written report.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[89] The Committee had serious concerns about permitting a *prima facie* right to discover experts prior to trial. Problems identified by the Committee included the

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[99] British Columbia, *supra* note 13, r. 28(2).

[100] Newfoundland, *supra* note , r. 31; Nova Scotia, *supra* note 13, r. 18.01.

[101] Nova Scotia, *supra* note 13, r. 31.08(2).

[102] New Brunswick, *supra* note 13, r. 32.10.

[103] Weber, *supra* note 40 at 1097.

[104] *Ibid.* at 1097.

[105] United States, *supra* note 39, r. 26(b)(4).

[106] United States, *supra* note 39, Notes of Advisory Committee on 1993 amendments to Rules, Rule 26(b)(3)(A) (QL); Weber, *supra* note 40 at 1052.

expense of examining the expert, the delay caused by the inevitable unavailability of many experts, and concerns about alienating experts by imposing the additional burden of attending at discovery. This last concern is particularly prevalent with experts who do not specialize in providing expert litigation advice but whose primary occupation concerns their own practices or businesses. The Committee also saw little benefit in pre-trial discovery of experts in light of the requirements that expert opinions be exchanged in a timely fashion prior to trial. Requiring experts to be present for discovery in addition to trial may be impractical and expensive, especially if experts are located outside of Alberta.

[90] As there may be circumstances where oral discovery of experts may be of assistance, the Committee proposes to permit the court to grant leave to discover experts in any action (other than one falling in the streamlined actions) rather than limiting it to discovery in Very Long Trial Actions. The rules should specify this procedure is intended for exceptional circumstances and there should be a heavy onus on the person seeking the discovery to justify the necessity thereof.

ISSUE No. 11
Should Alberta adopt any of the recent innovations in expert evidence used in other jurisdictions?

4. Pre-trial conferences of experts

[91] One innovation in the recent amendments to the Alberta expert rules concerns pre-trial conferences of experts. Pre-trial expert conferences are optional in Very Long Trial actions under Rule 218.9(1). In Very Long Trial matters, the case management judge may order experts to "consult on a without prejudice basis to determine any matters on which agreement can be reached" at any time prior to trial:

> The judge also has the authority to set an agenda and prescribe other terms that may be considered appropriate. The procedures allow for a form of agreement to be made if some issues in dispute are resolved. Subject to such agreement being made, however, no evidence on the consultations is receivable at the trial.[107]

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[107] Poelman & Bodnar, *supra* note 5 at 946.

[92] Pre-trial conferences of experts may be useful in helping to identify and narrow issues in dispute and facilitate settlement and should therefore be conducted as early as possible prior to trial.[108] However, several concerns may be noted about expert pre-trial conferences, including the cost of the experts' attendance at such a meeting, the difficulty in scheduling such a meeting due to the schedules of the respective experts, and the ability of aggressive experts to exert undue influence over less aggressive experts. With regard to the latter consideration, it was noted that if it appeared that one expert was "weaker", a likely outcome is that the weaker expert would be let go and a new one retained, resulting in increased cost and delay.

[93] The Woolf Report considered that ordering experts to meet was the most promising practice aimed at narrowing the issues between experts and that this method was capable of reducing costs if it encouraged settlement or a narrowing of issues but increased costs if it was unsuccessful. Lord Woolf recommended that such meetings be held with only the experts present and that the result, wherever possible, should be a joint investigation and report that highlighted areas of disagreement.[109]

[94] Other jurisdictions have recommended or adopted procedures permitting pre-trial conferences of experts. Some features of expert pre-trial conferences in other jurisdictions or recommendations include:

(i) In connection with settlement conferences in New Brunswick, the judge may "direct that expert witnesses meet, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree";[110]

(ii) The Australian Law Reform Commission's recommendations that pre-trial conferences or other methods of communication and contact between relevant experts from opposing parties should be encouraged, with guidelines governing the conduct of the conference.[111] The ALRC also recommended that "experts should be required, where requested by a party

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[108] Managing Justice, *supra* note 49 at para. 6.86.

[109] Woolf Report, *supra* note 1 at para. 13.42; recs. 172, 169.

[110] New Brunswick, *supra* note 13, r. 50.09(g).

[111] Managing Justice, *supra* note 49 at rec. 62.

and with the leave of the court or tribunal, to prepare for and answer questions from parties upon payment prior to trial of the reasonable costs of answering questions";[112]

(iii) the Supreme Court Rules in New South Wales,[113] where with leave of the court, a conference may follow the submission of expert reports that express conflicting opinions, resulting in a joint report that specifies matters agreed on and matters that remain in issue with reasons. There are guidelines for the Experts' Conference that require the experts to exercise their independent, professional judgment in endeavouring to reach an agreement on material issues;[114]

(iv) the Western Australia Rules where the pre-trial conference procedure involves the attendance of the solicitors at a meeting between experts, followed, if disagreement persists, by a mediation between experts, presided over by a mediation registrar. The solicitors then provide a report to the court as to the points of agreement and differences that have been established;[115]

(v) the Rules Committee in New Zealand's recommendations that the court be given the power to direct pre-trial conferences for experts with the discretion to appoint an independent expert convener with the consent of the parties.[116] Discussions between experts should be held without prejudice. The experts may prepare a joint statement setting out matters of agreement and disagreement which could be either a report to the court or

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[112] *Ibid.* at rec. 63.

[113] Bill Madden, "Evidence: Changes to the Role of Expert Witnesses" (2000) 38(5) LSJ 50, discussing New South Wales, *supra* note 36, Part 36 r. 13CA.

[114] New South Wales, *supra* note 36, Schedule K.

[115] Sperling, *supra* note 90. There are a wide range of options to direct pre-trial conferences of experts in the Case Management Options in the Western Australia, *Rules of the Supreme Court* (1971), r. 3, online: Austlii <http://www.austlii.edu.au/cgi-bin/download.cgi/download/au/legis/wa/consol_reg/rotsc1971281.txt>. The Rules relating to expert evidence are located in Order 36A.

[116] New Zealand, Rules Committee, *Rules Committee Consultation Paper: Proposed Amendments to the High Court Rules and the District Courts Rules* (17 December 2001), online: The Rules Committee <http://www.courts.govt.nz/rulescommittee> [N.Z. *Consultation Paper*].

treated as a witness statement to be used at trial.[117] Whether counsel is allowed to be present at the pre-trial conference should be determined on a case-by-case basis.[118]

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[95] Having experts meet amongst themselves prior to trial[119] is an interesting idea, but is one that the Committee feels is unlikely to be embraced by the Alberta Bar. As with discovery of experts, the expense of a pre-trial conference of experts would be significant and it may be difficult to schedule, causing more delay than it would remedy. Another problem is that if the conference indicates that the expert is deficient, it is likely that a party will simply let that expert go and retain a new one, resulting in additional cost and likely causing further delay.

[96] The Committee proposes that pre-trial conferences of experts should be retained as an option for very long or complex trials only, and then only by consent of the parties or with leave of the court.

5. The panel of experts ("the hot-tub rule")

[97] Expert evidence presented at trial through examination and cross-examination may not be the clearest method for presenting expert evidence, particularly in complex cases. Many respondents to a survey on expert evidence of over 50% of the Australian judiciary indicated that poor advocacy and partisan experts led to difficulties in evaluating expert opinions.[120] An alternative method is to have a panel of experts at

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[117] *Ibid.* at 47.

[118] N.Z. *Second Discussion Paper, supra* note 38 at 41.

[119] The question of whether experts should meet prior to Judicial Dispute Resolution ("JDR") will be raised in an upcoming consultation memorandum on Early Resolution of Disputes.

[120] Ian Freckelton, Prasuna Reddy & Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study- Summary of Key Findings and Outcomes* (The Australian Institute of Judicial Administration Incorporated) at 3-4, online: Australian Institute of Judicial Administration Incorporated <http://www.aija.org.au/expsumm.doc>. In 1999, all 478 judges in Australia were sent a questionnaire but judges without trial experience were asked not to respond. Fifty-one percent of judges (244) responded, although the response rate for judges with trial experience was closer to 60%. Sixty-five percent of judges responded that they encountered bias and partisanship on the part of expert witnesses occasionally and 26% encountered it often. 40% of total respondents said that partisanship was a significant problem for the

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trial. This approach has been used in the Australian Competition Tribunal and adapted for use in the Federal Court in 1998. The Australian Law Reform Commission recommends that "procedures to adduce expert evidence in a panel format should be encouraged whenever appropriate."[121] A panel presentation of expert evidence

> has generated significant efficiencies in the litigation process...the total time for considering expert evidence is considerably reduced whereas their contribution to the relevant court or tribunal is immediate.[122]

[98] In the panel approach:

- experts submit written statements to the tribunal, which they may freely modify or supplement orally at the hearing, after having heard all of the other evidence;
- all of the experts are sworn in at the same time and each in turn provides an oral exposition of their expert opinion on the issues arising from the evidence;
- each expert then expresses his or her views about the opinions expressed by the other experts;
- counsel cross-examine the experts one after the other and are at liberty to put questions to all or any of the experts in respect of a particular issue. Re-examination is conducted on the same basis.[123]

[99] The panel approach allows the testimony of all experts to be compared within a limited time frame as opposed to expert testimony being spread throughout the trial. Experts are less likely to be partisan and consider this procedure a "better way of informing the court."[124] Parties can still reserve the right to cross-examine witnesses. However, this method may not be appropriate in all circumstances as it can be "over-

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[120] (...continued)
quality of fact-finding in their court.

[121] Managing Justice, *supra* note 49 at rec. 67.

[122] *Ibid.* at para. 6.118, citing ACCC Submission 396.

[123] *Ibid.* at para. 6.116.

[124] *Ibid.* at para. 6.117, citing Federal Court Submission 393.

elaborate, too expensive and detract from the orderly and efficient presentation of opposing opinions."[125]

[100] Other jurisdictions, including Australia, have recommended that experts present their opinion directly to the court and not through an examination in chief.[126] The Australian Law Reform Commission has recommended that a lecture format with appropriate technology and displays may be a more effective method for instructing the court than the question and answer session that constitutes an examination in chief. The expert may also feel more comfortable with a lecture presentation. The judge could pose questions directly to the expert in order to clarify any sources of confusion. While this moves away from the judges' role as being passive, it may assist the judge's understanding of complex expert evidence.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[101] The Committee felt that the rules should provide an option to have experts give testimony as a panel, or consecutively. This should be done only by consent of the parties or with leave of the court; it should not be a mandatory or standard procedure as it is a significant infringement on a party's ability to call their evidence in the manner they so choose. Parties should be able to determine whether it is necessary to have all expert evidence in a trial heard together, or whether it is sufficient to do so in the traditional fashion.

ISSUE No. 12
Should there be guidelines governing the conduct of experts?

[102] The Federal Court of Australia issues guidelines for expert witnesses that have generally been found by the legal community to be an important development in improving the litigation process (Appendix).[127] The guidelines "[a]lso set down detailed requirements concerning the form and content of expert evidence to improve the clarity and usefulness of expert reports and encourage openness about instructions

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[125] *Ibid.* at para. 6.119, citing Law Council Submission 375.

[126] *Ibid.* at para. 6.113.

[127] *Ibid.* at para. 6.96.

given to, and factual assumptions used by experts."[128] Guidelines should emphasize that the duty of an expert is to inform the court and not to be partisan.[129] A related initiative is the development of a generic template code of practice for expert witnesses, with specific codes for some disciplines formulated in consultation with professional bodies.[130] Guidelines to experts may emphasize the difference in the duties of experts that are retained to advise a party and those that testify at trial.

[103] The Supreme Court of New South Wales has also instituted guidelines for expert witnesses that emphasize the expert's duty to the court and not as a "hired-gun" for the retaining party.[131] The party engaging the expert is obliged to provide the expert with a copy of the "Expert Witness Code of Conduct." The expert must declare a preparedness to abide by the code. Failure to do so may prevent the expert's report being admitted into evidence[132] or may have professional misconduct implications.

[104] The Rules Committee in New Zealand has recommended a code of conduct for expert witnesses to be appended as a schedule to both the High Court and the District Court Rules.[133]

Discovery and Evidence Committee Proposal

[105] While the Committee believes that the notion of ethical guidelines for experts is laudable, it was questioned whether this should be done in the Rules of Court or left to the governing bodies of the particular professions within which the experts practice. There was doubt as to whether guidelines in the rules would have any real or practical effect on expert testimony, particularly in curing bias.

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[128] *Ibid.* at para. 6.96.

[129] Background Paper 6: Experts, *supra* note 12 at 47.

[130] *Ibid.* at rec. 65.

[131] Madden, *supra* note 113 discussing New South Wales, *supra* note 36, Part 36, rr. 13CA and 13C(2)(a) and the "Expert Witness Code of Conduct" in Schedule K. The rationale for the implementation of the guidelines is discussed in Sperling, *supra* note 90.

[132] New South Wales, *supra* note 36, Part 36, rr. 13C(2)(b) and 13C(2)(b).

[133] N.Z. *Consultation Paper*, *supra* note 116.

[106] Whether or not ethical guidelines are adopted, some Committee members thought they should be made available to the profession outside of the Rules, as it would be a "best practice" to send out the guidelines to experts to assist them in preparing for a court appearance. The guidelines could also assist junior members of the Bar in ascertaining their own duty and that of their expert witnesses.

[107] The Committee concluded that there should be no ethical or conduct guidelines for experts in the Rules.

CHAPTER 2. INDEPENDENT MEDICAL EXAMS

A. Introduction

[108] Currently Rule 217 in the Alberta Rules of Court permits the court to order a medical examination ("ME") of a person who claims damages in respect of injuries. This procedure was implemented to avoid trial by ambush. It also acts to remove privilege from medical reports which once attached to reports generated for the purposes of litigation:[134]

> The procedure which formerly governed regarded evidence of an expert medical witness of the party as privileged. The nature of that evidence, though it dealt with the issue in the law suit, was or could be kept hidden until the medical examiner was called as witness in the trial. The other party to the litigation might have little or no knowledge of the evidence that a medical examiner on the other side might or would give and have little or no opportunity to adduce evidence that would assist the court in assessing the issue This procedure of keeping evidence hidden from the other party until trial has been frequently referred to as "trial by ambush".[135]

[109] Though Rule 217 itself refers to these examinations as "medical examinations", MEs ordered under Rule 217 are colloquially referred to as "independent medical examinations", or "IMEs", despite the fact that usually they are conducted by medical practitioners chosen by defendants. The court has noted that referring to such examinations as "independent" is somewhat of a misnomer, as in reality they are intended to be defence examinations.[136]

[110] There are three purposes which Rule 217 serves:

(i) it allows a defendant to have actual medical discovery of the plaintiff;

(ii) it gives the plaintiff access to medical information acquired by the defendant; and

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[134] *Vokes et al. v. Backer* (1996), 194 A.R. 343 (Q.B.).

[135] *Petersen v. Shepard* (1985), 58 A.R. 240 at para. 7 (Q.B.).

[136] *Jacobsen v. Sveen* (2000), 262 A.R. 367 (Q.B.) at 372-373 (Q.B.).

(iii) it gives the defendant full access to the medical evidence acquired by a litigant who claims for damages in respect of personal injury.[137]

[111] Overall the Committee was of the view that the procedures under Rule 217 function quite well and for the most part should be retained, subject to the issues and proposals discussed below.

B. List of Issues

1. When and by whom may an ME be requested? Should it be extended to an examination of any party if their physical or mental condition is in issue?
2. Who should bear the cost of the attendance of the examinee's medical nominee?
3. Should the person being examined have the option of videotaping the examination?
4. Should the distinction between "duly qualified medical practitioners" and "health care professionals" be retained in any or all parts of the rules?
5. Should the rules specify when the medical professional can call for other experts to assist in the examination?
6. Must a defendant obtain their own medical report before being able to obtain the plaintiff's medical report?

C. Discussion of Issues

ISSUE No. 13
When and by whom may a medical examination be requested? Should it be extended to an examination of any party if their physical or mental condition is in issue?

[112] Presently Rule 217 only permits the court to order a medical examination if the damages sought in the action are in respect of personal injury.

[113] There have been several cases where the court has been asked to grant an ME where a party's physical or mental capacity is in issue, but which is not a personal

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[137] *Ibid.*

injury action where the party seeks damages. In such cases the court has held the Rule 217 does not apply because of the specific limitation in Rule 217(1) that the examination be of a person seeking damages for personal injury. Sometimes the court has proceeded to order the examination under Rule 218 pursuant to the court's power to appoint an independent expert.[138] However, Rule 218 is not necessarily an adequate alternative to Rule 217 as the specified procedures and safeguards which exist to protect the person being examined under Rule 217 are not in Rule 218. Presumably the court could include such safeguards pursuant to its authority to make "such further and other directions respecting the carrying out of the instructions of the expert" under Rule 218(7) but there is no assurance that such measures would be imposed.

Rules in Other Jurisdictions

[114] Ontario, British Columbia, Nova Scotia, New Brunswick, Manitoba, Newfoundland, and Prince Edward Island have broader clauses that allow the court to order medical examinations where a party's physical or mental state is in issue, rather than limiting medical examinations to circumstances where a plaintiff seeks damages for personal injury.[139] Ontario, New Brunswick, Prince Edward Island and Manitoba have a qualification to their medical examination rules: if a party's physical or mental state is put in issue by another party, no medical examination shall be ordered unless the condition is relevant to a material issue and there is good reason to believe that there is substance to the allegation. The Federal Rules and the Saskatchewan *Queen's Bench Act*[140] mirror Alberta's rules in that MEs will only be ordered when damages are claimed for personal injuries.

Discovery and Evidence Committee Proposal

[115] The Committee noted that there are situations where a party's physical or mental condition may be put in issue in the pleadings outside of personal injury claims. If it is clear from the pleadings that any party's physical or mental condition is in issue, the

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[138] *Grayson v. Demers*, *supra* note 69; *R.(M.J.) v. R.(A.)*, *supra* note 70; *Ms. R. v. W.A.* (2001), 304 A.R. 78.

[139] *Courts of Justice Act*, R.S.O. 1990, c. C-34, s. 105(2); British Columbia, *supra* note 13, r. 30(1); Nova Scotia, *supra* note 13, r. 22; New Brunswick, *supra* note 13, r. 36.02(1); Manitoba, *supra* note 13, r. 33.01, Newfoundland, *supra* note 13, r. 34.01 and Prince Edward Island, *supra* note 13, r. 33.01.

[140] *Queen's Bench Act*, R.S.S. 1978, c. Q01, s. 36.

Committee is of the view that the opposite party should be entitled to conduct a medical examination. This would also be consistent with the rules in most other Canadian jurisdictions. Therefore, the Committee proposes to expand the rules for court ordered MEs to any action where either the mental or physical condition of any party is placed in issue by the proceedings. However, the rule should contain a qualification similar to that in jurisdictions that specify that the physical or mental condition must be relevant to a material issue to prevent parties from abusing the rule. Limiting court ordered medical examinations to situations where a party's physical or mental condition is a material issue should minimize the potential for abuse of the rule and prevent unnecessary examinations that could be prejudicial or embarrassing to a party.

ISSUE No. 14
Who should bear the cost of the attendance of the examinee's medical nominee?

[116] Rule 217(5) currently provides that the person being examined may nominate a medical practitioner to be present during the examination.

[117] Prior to the decision in *Pohynayka v. Vries*[141] the case law was divided on the question of which party bears the costs of the medical nominee.[142] In *Pohynayka*, the Court of Appeal held that "the normal default rule is that a party who is the subject of a medical examination bears the cost of a nominee in the first instance and, if successful at the end of the trial, can seek the costs of the nominee". A party may make an application under Rule 600(3) to have costs paid in the first instance, but those are then determined on the merits pursuant to the court's discretion.

Rules in Other Jurisdictions

[118] As in Alberta, the rules governing MEs in other jurisdictions do not address costs of the nominee directly.

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[141] (2001), 277 A.R. 72 (C.A).

[142] See *Morales v. Seymour* (1997), 205 A.R. 151 (Q.B.); *Garrido v. Pui* (1998), 222 A.R 248 (Q.B); *Bouilianne et al. v. The County of Two Hills No. 2* (unreported, Action No. 9303-0298, May 13, 1999, Q.B.).

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[119] The Committee felt that it is important to retain the practice of allowing the person being examined to bring with them a nominee. A concern expressed by plaintiffs' lawyers is that in a Rule 217 ME, plaintiffs are questioned without counsel present. It is acknowledged that it is important for medical practitioners to have the authority to question parties being examined to reach a proper diagnosis. However, some plaintiffs' counsel had concerns that despite the limitation in Rule 217(4) that the examiner shall not "interrogate the person being examined", medical practitioners often go beyond purely medical questions. They ask the questions from their own perspective and relay the answers to the defence lawyer, often including in the medical reports opinions on the credibility of the plaintiff. As the plaintiff is not represented during the examination, there is no assurance that the plaintiff understood the question when giving a particular answer. The person being examined may feel, and may actually be, quite vulnerable in this situation if not accompanied by someone who is capable of protecting that person's interests.

[120] The Committee was of the view that there must be some procedure for ensuring that the medical practitioner's questions are fair and that the record of the examinee's answers is accurate. Having a medical nominee attend is one way of facilitating both of these objectives.[143]

[121] The Committee noted that sending a nominee to the medical examination is expensive and it can be difficult to find a nominee in many cases. However, the Committee proposes to retain the rule that the examination itself is to be paid for by the party seeking it and the Committee felt that it was not fair for that party to also pay to have the examinee's nominee present. Also, as having a nominee attend is optional rather than mandatory, the party being examined may decide against bringing a nominee. The Committee also felt that there could be other options available to the examinee which would mitigate the expense and difficulties associated with nominees, such as having the procedure videotaped. This alternative is discussed in detail below.

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[143] Videotaping the examination would also accomplish this, as discussed below.

[122] In light of the above considerations, the Committee proposes that the rules specify that the examinee may choose to have a nominee attend at the ME at the examinee's expense, in the first instance. This expense may be recovered through costs at the end of the day if the examinee is successful, as would any other disbursement.

ISSUE No. 15
Should the person being examined have the option of videotaping the examination?

[123] An issue that many members of the Bar raised during consultation (plaintiffs' counsel in particular) is whether the person being examined should have the option of videotaping the examination rather than having a medical nominee attend. The reasons given for this are:

(i) scheduling the attendance of the nominee at the examination can be difficult;
(ii) it is expensive to have the nominee attend;
(iii) it is necessary to have a record of the examination, as it is not uncommon for the examining physician to "cater" to the insurance company by misrepresenting what actually happened in the examination.

[124] The question of whether a plaintiff should be permitted to videotape a Rule 217 medical examination was discussed in *Crone v. Blue Cross Life Insurance.*[144] The plaintiff had been unsuccessful in finding a medical nominee to accompany her to the examination. The plaintiff suggested that videotaping the examination was analogous to a nominee's attendance, as the video could later be viewed by a doctor of her choice. The plaintiff also suggested that the videotape may ultimately be used as evidence at trial by either party. The examining doctor opposed the application.

[125] The Court rejected the application to have the examination videotaped.

[126] Reviewing the few decisions concerning videotaping medical examinations, the court identified two main reasons for denying the application:

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[144] 2001 ABQB 787 (Q.B.) (QL).

(i) there was no compelling reason to deny the examining doctor the ability to conduct the examination as he/she saw fit. It was noted that allowing the examination to be taped would allow the plaintiff's doctor's to "pick apart" the examination. There would be no comparable opportunity to "pick apart"the plaintiff's doctors' examinations as these examinations were not taped. The court was also concerned with the fact that the videotape would be available to many people after the examination, which is contrary to the policy that only certain medical nominees are allowed to the attend the examination. In essence, there would be an "electronic presence" of many other people at the examination; and

(ii) there is usually an absence of evidence to show bias or a demonstrated lack of accuracy in the evaluation of the examining physician. It cannot always be assumed that the examining physician has a defence bias that influences their opinion. Allowing a medical nominee to attend better achieves the purpose of the medical examination, which is to put the parties on equal footing in collecting evidence of the plaintiff's injuries, as videotaping can prejudice the defence (discussed above). The court also found that the rule allowing a medical nominee occupied the field and thus precluded the alternative of videotaping. Finally, any bias of the examiner can be exposed through cross-examination. Cases of bias which influence the report wrongly may be the subject of complaints to College of Physicians and Surgeons.

[127] The court did reference an advisory to the medical profession in which the Alberta College of Physicians and Surgeons recommended that non-treating physicians videotape examinations done in furtherance of litigation. However, the court found that this advisory was irrelevant to the application as it was aimed at reducing complaints against doctors and not at protecting the interests of patients.

Discovery and Evidence Committee Proposal

[128] The Committee discussed at length the arguments in the *Crone* decision, *supra*, against allowing MEs to be videotaped. It then examined the reasons in favour of videotaping MEs at the option of the examinee.

[129] As noted above, it is expensive to have a party attend the medical examination with a nominee. Further, it is often difficult to schedule a nominee's attendance. It would be much less expensive to have the examination videotaped. Permitting the examinee to videotape the examination would also dispense with scheduling issues currently encountered with the nominee procedure. Videotaping the examination would also address other concerns about the partial nature of MEs, including the concerns regarding the questions that the examining doctor may ask.

[130] While videotaping a medical examination could be an invasion of privacy, particularly where the videotape is used as evidence in a trial, it nevertheless seems to be a better option for many parties than the expense and time required to have the party's nominee attend to observe an ME. However, as videotaping an ME could be a significant invasion of privacy and could be embarrassing or prejudicial to a party, it should be offered only as an alternative to having a nominee attend rather than being a mandatory procedure. Further, it should solely be at the option of the party being examined and not the party requesting the examination.

[131] As a result of the above considerations, the Committee proposes that the examinee in an ME should have the option of either providing a nominee to attend the ME or having the examination videotaped. The cost of the videotaping, as with the nominee's attendance, would be that of the examinee. These costs could be recovered at trial if the party is ultimately successful.

ISSUE No. 16
Should the distinction between "duly qualified medical practitioners" and "health care professionals" be retained in any or all parts of the rules?

[132] Rule 217 refers to two types of medical experts: (i) duly qualified medical practitioners, and (ii) health care professionals.

[133] "Duly qualified medical practitioner" is not defined in the rules but has been interpreted to refer only to a person registered or entitled to be registered under the

Alberta *Medical Profession Act.*[145] The primary medical examination that may be ordered under Rule 217(1) must be conducted by a "duly qualified medical practitioner".[146] Rule 217(5) provides that the nominee which may accompany the plaintiff to the examination must also be a medical practitioner (although this subrule does not specify that the medical practitioner must be "duly qualified").

[134] Rule 217(11) defines "health care professional" more broadly than the definition that has been attributed to "duly qualified medical practitioner":

> 217 (11) In subrule (10), "health care professional" means
>
> (a) a duly qualified medical practitioner;
>
> (b) a person licensed, certified, registered or regulated in Alberta, whose practice includes the assessment, diagnosis or treatment of a person's physical or mental condition or capacity;
>
> (c) a person licensed, certified, registered or regulated in a jurisdiction outside Alberta
>
> (i) whose practice includes the assessment, diagnosis or treatment of a person's physical or mental condition...

Rule 217(10) provides that if the plaintiff has been examined by another health care professional who will or may be proffered as an expert, the court may order that the plaintiff be examined by health care professionals of the defendant's choice.

[135] Subsections (10) and (11) of Rule 217 were added in 1999 to address the unfairness caused to a defendant where the plaintiff intends to call evidence of someone other than a duly qualified medical practitioner at trial. Defendants now have the ability to have their own expert examine the plaintiff in those situations. However, the effect of the rule currently is that the defendant does not have the right to have the plaintiff examined by anyone other than a duly qualified medical practitioner unless the plaintiff is likely to call another type of health care professional as a witness at trial.[147] The reason the rule is limited is that it can be very intrusive to subject a party

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[145] R.S.A. 2000, c. M-11; see *Tat v. Ellis et al.* (1994), 155 A.R. 390 (C.A.).

[146] Rule 217(1) has been interpreted as permitting a duly qualified medical practitioner to request that the plaintiff be examined by other types of experts if it is proven that it is necessary for the medical practitioner's assessment; see *Tat v. Ellis*, *supra* note 145; *Carifelle et al v. Griep* (1989), 35 C.P.C. (3d) 15 (Alta. C.A.).

[147] *Turon v. Fiorino*, 2000 ABQB 727; *Hieghes et al. v. Stoutenburg et al.*, 1998 ABQB 851.

to a non-physical examination and extensive examinations can be damaging to a person's integrity.[148]

[136] There have been several cases where the court has held that it had the inherent authority to order the plaintiff to be examined by someone other than a duly qualified medical practitioner, or in circumstances other than those contemplated in Rule 217.[149] These decisions are based on the principle of fairness to give the defendant the opportunity to make full answer and defence by allowing the plaintiff to be examined by certain types of medical professionals even if the plaintiff may not have intended to call that type of medical expert at trial.

Discovery and Evidence Committee Proposals

[137] The Committee considered whether the rules permitting MEs should be expanded to include health care professionals who were not "duly qualified medical practitioners". The case law has extended the rule to include other types of medical practitioners, and in practice examinations by other types of medical practitioners are done by consent of the parties. The Committee was of the opinion that the rule should reflect the current practice if possible.

[138] Though the Committee proposes to expand the types of examinations which may ordered under Rule 217, it felt that the types of medical examinations that a party may be required to undergo should be limited to those done by practitioners who are subject to some form of professional regulation. To determine the appropriate types of medical practitioners who should be permitted to do Rule 217 type examinations, the Committee referred to the *Health Professions Act*[150] which governs certain types of medically related professions which have governing bodies and specified regulations.

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[148] *Bilinski v. Wangerin* (1993), 147 A.R. 211 (Q.B.).

[149] *Stirling v. Mangemulude* (2000), 272 A.R. 184 (Q.B.) (functional capacity evaluation by a physiotherapist); *Lyons v. Khamsanevongsy* (1997), 207 A.R. 385 (Q.B.) (exam by rheumatologist ordered although plaintiff not intending to call one at trial); *Baker v. Yacyshen* (1999), 253 A.R. 373 (Q.B.) (psychologist).

[150] *Supra* note 3.

[139] Having reviewed the professions covered by this legislation, the Committee proposes that the rules permit the court to order MEs by the following medical professionals, even if the examinee may not intend to call such a practitioner as an expert at trial:

(i) Members of the Alberta College of Physicians and Surgeons;
(ii) Dentists and oral surgeons;
(iii) Occupational therapists;
(iv) Physical therapists;
(v) Registered nurses; and
(vi) Psychologists.

The Committee was of the opinion that it is not necessary to include all of the professions listed in the *Health Professions Act*, as many of these are not those who would normally conduct any sort of physical or psychological examination of a party in a civil litigation action.

[140] The Committee further proposes that if the above professionals are added to the list of those who may conduct a Rule 217(1) type examination, there should be a similar limitation to that which currently exists in Rule 217(11) (c)(ii). If the medical practitioner is certified, registered or regulated in a jurisdiction outside of Alberta, absent consent of the parties, leave of the court should be required to have that person conduct the examination. Doing so should ensure that the examining professional has qualifications which are similar or equivalent to those required of like practitioners in Alberta.

[141] The Committee further proposes that the practice currently prescribed in Rule 217(10) and 217(11) be retained to include examinations by other types of health care professionals if the party being examined has been examined by like professionals who will or may be proffered as experts at trial.

[142] It was noted that expanding the scope of MEs may lead to requests for parties to undergo MEs by different types of medical practitioners. To avoid abuse of this rule, the Committee proposes that there be an express limit in the rule similar to that currently in Rule 217(3). A party should be entitled to request one ME as of right; any additional MEs may be done only with consent of the parties or leave of the court on such terms as may be just.

ISSUE No. 17
Should the rules specify when a medical practitioner can call for other experts to assist in the examination?

[143] Currently Rule 217(6) permits a duly qualified medical practitioner to conduct certain tests:

> (6) If the person to be examined consents in writing, or failing this consent, if the court so directs, the examining medical practitioner may in a proper case take, and have analyses made of, samples of blood or body fluids of the person being examined and have other tests made recognized by medical science including, without restricting the generality of the foregoing, X-ray pictures, electro-cardiograms and electro-encephalograms.

[144] There is case law to the effect that a duly qualified medical practitioner conducting a medical examination under Rule 217(1) may ask to have the plaintiff examined by other health care professionals. Such requests must be supported by evidence from the medical practitioner explaining why further examinations are necessary for completing the medical practitioner's report.[151]

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[145] The Committee was of the view that the current rule is adequate and should be retained. The rules should not specify that a duly qualified medical practitioner may request others to conduct further examinations as this is a matter which should be decided on a case by case basis and should remain in the discretion of the court.

ISSUE No. 18
Must a defendant obtain their own medical report before being able to obtain the plaintiff's medical report?

[146] Currently Rule 217(7) provides:

> (7) The party causing the examination to be made

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[151] See *Tat v. Ellis* (1994), *supra* note 145; *Flores v. Sabiston* (1997), 207 A.R. 394 (Q.B. Master) (though approving this principle, ultimately the court denied the application in the circumstances), aff'd. on other grounds without deciding this issue (1998), 219 A.R. 73 (C.A.); *Carifelle et al. v. Griep* (1989), 35 C.P.C. (3d) 15 (Alta. C.A.); *Lyons v. Khamsanevongsy* (1997), 207 A.R. 385 (Q.B.); *Vergara v. Stuart-Como* (1995), 166 A.R. 306 (Q.B. Master).

> (a) shall, upon request, deliver promptly to the party examined or his solicitor a copy of a detailed written report of the examining medical practitioner setting out his findings and conclusions, and
>
> (b) is, upon request, entitled to receive promptly from the party examined a like report of every examination previously or thereafter made of the physical or mental condition of that party resulting from the injuries sustained

[147] This subsection has the effect of overriding privilege which would otherwise attach to medical reports.

[148] Several cases have questioned whether this section requires a defendant to forward the Rule 217 report prior to being able to obtain other medical reports obtained by the plaintiff.

[149] Some decisions have interpreted this rule as allowing the plaintiff to withhold medical reports until they have received a copy of the report of the Rule 217 examination.[152] This line of authority is based on the principle that the paramount interest of the court in Rule 217 examinations is to protect the objectivity of the defendant's examining doctor. Thus, the medical practitioner conducting the "independent medical examination" should not be apprised of the opinions of others which could influence his opinions or findings.

[150] Other decisions have held that there is no requirement for the defendant to deliver all Rule 217 reports prior to receiving the plaintiff's medical reports.[153] These decisions recognize that there is a potential bias in Rule 217 examinations. However, all medical experts are subject to testing for bias through cross-examination, which is an effective method for demonstrating that the practitioner has been influenced by other opinions. These decisions also emphasize that early disclosure of medical reports is necessary to identify the real issues in dispute such that proper medical evidence may be obtained.

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[152] *Soodhar v. Bagley* (1999), 263 A.R. 119 (Q.B.); *Vokes v. Backer* (1996), 194 A.R. 343 (Q.B.).

[153] *Rosario-Paquet v. Hudec* (2000), 279 A.R. 319 (Q.B.); *Jacobsen v. Sveen et al.* (2000), 262 A.R. 367 (Q.B.).

[151] In *Jacobsen*,[154] the Court opined that there was nothing wrong with a defendant requesting a "token" examination under Rule 217 with the primary object of obtaining the contents of the plaintiff's medical file. It is not unfair to relinquish privilege as the plaintiff's medical condition is directly in issue in an action, therefore entitling the defendant to full and ongoing disclosure of material and relevant medical evidence.

[152] The court in *Jacobsen* also noted that it is "odd" that a defendant must first request their own examination prior to being entitled to the plaintiff's medical records. Under the present system, the defendant is not entitled to privileged medical reports of the other party unless and until they conduct an exam under Rule217 or unless the plaintiff discloses them pursuant to Rule 218.1. However, the reports need not be disclosed at all if the plaintiff does not call the expert at trial.

Rules in Other Jurisdictions

[153] The Rules in other jurisdictions differ on several aspects of this issue:

(i) Whether there is any requirement that the party being examined provide any previous or future medical reports at all;

(ii) Whether the party being examined is required to provide medical information covered by litigation privilege;

(iii) If previous medical evidence is to be provided, when that evidence is to be provided.

1. Requirements to provide any medical information at all

[154] The Rules in Saskatchewan, British Columbia and the Federal Court do not address the provision of any medical records in conjunction with an independent medical examination.

2. Providing medical information covered by privilege

[155] Prince Edward Island and Ontario[155] specifically exclude medical information that was prepared for the sole purpose of litigation from production for an independent medical examination:

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[154] *Ibid.*

[155] Prince Edward Island, *supra* note 13, r. 33.04; Ontario, *supra* note 13, r. 33.04(2).

> 33.04(2) At least 7 days prior to the examination the person being examined shall provide any report by a health practitioner relating to the mental or physical state in question except records made in contemplation of litigation and for no other purpose, and all medical records unless made in contemplation of litigation and for no other purpose.

[156] The Rules in Manitoba, New Brunswick, Nova Scotia and Newfoundland provide that any type of report or tests relating to the mental or physical condition in issue must be produced prior to the court ordered examination, without limiting on the basis of litigation privilege.

3. Timing of production of medical records

[157] Ontario, Manitoba[156] and Prince Edward Island require the medical records and reports to be provided to the party obtaining the order at least 7 days prior to the examination. New Brunswick[157] has a two day requirement. Nova Scotia and Newfoundland[158] require the medical records to be furnished promptly upon written request of the party seeking the examination, and state explicitly that the reports may be made available to the examining medical practitioner.

DISCOVERY AND EVIDENCE COMMITTEE PROPOSAL

[158] The Committee considered whether a party should have to obtain its own medical report pursuant to a Rule 217 examination before it is able to obtain the plaintiff's medical reports which would otherwise be privileged. This is an area where there is a battle between two principles: the sanctity of privileged records, being medical reports prepared in contemplation of litigation; and the benefits of timely and efficient disclosure. The disparate treatment of this issue in other jurisdictions indicates that there are differing views as to which principle should be dominant. There were no comments during consultation about problems with requiring a medical examination in order to trigger disclosure of otherwise privileged medical records under Rule 217, which leads the Committee to believe that the current procedure

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[156] Prince Edward Island, *supra* note 13, r. 33.04; Ontario, *supra* note 13, r. 33.04(2); Manitoba, *supra* note 13, r. 33.04(a).

[157] New Brunswick, *supra* note 13, r. 36.05(3).

[158] Nova Scotia, *supra* note 13, r. 22.04(2); Newfoundland, *supra* note 13, r. 34.0.4(2).

under Rule 217 provides a suitable approach to the issue of disclosure of privileged medical records. However, the Committee is interested in hearing the legal profession's views as to whether the requirement that an opposing party must first request an ME under Rule 217 to gain access to medical records is reasonable or necessary. An alternative could be to compel a party whose medical condition is in issue to produce all relevant medical reports, regardless of whether they were created solely for the purpose of litigation.

[159] The Committee looks forward to receiving the views of the Bar and bench on this issue. Subject to such feedback, it is the Committee's view that there should be no change to the manner in which reports are exchanged under Rule 217(7).

APPENDIX

A copy of the following guidelines must be provided to any expert witness retained for the purpose of giving a report. The guidelines are not intended to address exhaustively all aspects of an expert's duties.

The Form of the Expert Evidence

- An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
- All assumptions made by the expert should be clearly and fully stated.
- The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of the person who carried out any such test or experiment.
- Where several opinions are provided in the report, the expert should summarize them.
- The expert should give reasons for each opinion.
- There should be attached to the report, or summarized in it, the following:
  (i) the facts, matters and assumptions upon which the report proceeds; and
  (ii) the documents and other materials which the expert has been instructed to consider.
- Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.
- The expert should make it clear when a particular question or issue falls outside his or her field of expertise.
- If an expert's opinion is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one.
- Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
- At the end of the report the expert should declare that "[the expert has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the court."
- If, after exchange of reports or at any other stage, an expert witness changes his or her view on a material matter, having read another expert's report or for any other reason, the change of view should be communicated in writing (through legal representatives) without delay to each party to whom the expert witness's report has been provided and, when appropriate, to the court.