

RULE 34 – EVIDENCE OF OWN EXPERTS

Application

- (1) This rule does not apply to summary trials under Rule 19, except as provided in that rule.

Admissibility of written reports of expert opinion

- (2) A written report setting out the opinion of an expert is admissible at trial, without proof of the expert's signature, if a copy of the report is delivered to every party of record a reasonable time before the report is tendered in evidence, which shall not be less than 60 days, unless the court otherwise orders.
- (3) The report shall be tendered in evidence.

Admissibility of oral testimony of expert opinion

- (4) An expert may give oral opinion evidence if a written report of the opinion has been delivered to every party of record a reasonable time before the expert testifies, which shall not be less than 60 days, unless the court otherwise orders.

Form of report

- (5) The report shall set out or be accompanied by a supplementary report setting out the following:
 - (a) the qualifications of the expert;
 - (b) the facts and assumptions on which the opinion is based;
 - (c) a description of documents reviewed and relied upon by the expert including any tests, and
 - (d) the name of the person primarily responsible for the content of the report and the names of all other persons who contributed to the report.

Production of documents

- (6) Unless the court otherwise orders, if a report of a party's own expert is delivered under this rule, the party who delivered the report must:
 - (a) promptly after being asked to do so by a party of record, deliver on the requesting party whichever one or more of the following has been requested:
 - (i) any written statement or statements of facts on which the expert's opinion is based;

- (ii) a record of any independent observations made by the expert in relation to the report;
 - (iii) any data compiled by the expert in relation to the report;
 - (iv) the results of any test conducted by or for the expert, or of any inspection conducted by the expert, if the expert has relied on that test or inspection in forming their opinion; and
- (b) if asked to do so by a party of record, make available to the requesting party for review and copying the contents of the expert's file relating to the preparation of the opinion set out in the expert's report:
- (i) if the request is made within 14 days before the scheduled trial date, promptly after receipt of that request; or
 - (ii) in any other case, at least 14 days before the scheduled trial date.

Proof of qualifications

- (7) The assertion of qualifications of an expert is evidence of them.

Admissibility of evidence

- (8) If a report that does not conform to subrule (5) has been delivered:
- (a) it is inadmissible under subrules (2) and (3); and
 - (b) the testimony of the witness under subrule (4) is inadmissible

unless the court otherwise orders.

Notice of trial date to expert

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

Demand to cross-examine

- (10) A party to whom a report has been delivered under subrule (2) and who is adverse in interest to the party delivering the report may, by demand to that party, require the attendance of the expert at trial for cross-examination.
- (11) The expert need not attend at trial unless the demand is made within a reasonable time after delivery of the report.

Costs of cross-examination

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

Notice of objection to expert evidence

- (13) A party who receives a written report under subrule (2) or (4) shall notify the party delivering the report of any objection to the admissibility of the evidence that the party receiving the report intends to raise at trial.
- (14) No objection under subrule (13) of which reasonable notice could have been given, but was not, shall be permitted at trial unless the court otherwise orders.

Dispensing with statement

- (15) At trial, the court may dispense with the requirement of delivery of a report.
- (16) Without limiting the generality of subrule (15), the court may dispense with the requirement of delivery of a report on one or more of the following grounds:
- (a) where facts have come to the knowledge of the party tendering the witness after the delivery of the report of that witness' evidence, that could not, with due diligence, have been learned in time to be reduced to a further report and delivered within the time required by this rule;
- (b) where the non-delivery is unlikely to cause prejudice:
- (i) by reason of an inability to prepare for cross-examination; or
- (ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to present evidence in response; or
- (c) where the interests of justice require it.

Time

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

Experts to confer

- (18) The court may order that, if 2 or more reports are delivered under subrule (2) in relation to the same issue, the experts who prepared those reports must confer and must, at least 35 days before the date scheduled for trial, produce and sign a statement setting out the points of difference between them.

Lawyers not to attend

- (19) Unless the court otherwise orders, the experts must confer and produce their statement under subrule (18) without participation of the parties or their lawyers.

Court may make directions

- (20) The court may provide directions to the experts referred to in subrule (18) respecting:
 - (a) matters to be
 - (i) considered by them when conferring; and
 - (ii) referenced in the statement;
 - (b) the form of the statement; or
 - (c) any other matter the court considers appropriate.

Delivery of statement

- (21) Promptly after receipt of a statement produced by experts under subrule (18), the parties who appointed those experts must deliver a copy of the statement to all other parties of record.

Privilege

- (22) Except for the statement referred to in subrule (18), evidence of anything done or said or of any admission made at the conference referred to in that subrule is not admissible at a trial of the action unless the experts and all parties to the action agree.

Duty of expert

- (23) In giving an opinion to the court, an expert appointed under this rule has a duty to assist the court and that duty overrides any obligation the expert may have to any party or to any person who is liable for the expert's fee or expenses.

Advice and certification

- (24) If an expert is appointed under this rule:
 - (a) the party appointing the expert or that party's lawyer must advise the expert when the expert is retained of the expert's duty under subrule (23); and
 - (b) the expert must, in any report they prepare under this rule, certify that they
 - (i) are aware of that duty;

(ii) have made the report in conformity with that duty; and

(iii) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.