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Part 11 - Trial and Hearing

Rule 47 - Place of Trial or Hearing

Educational Notes

This Rule gives the parties and the court broad discretion to select a place of trial, hearing, or even for a motion. Initially the parties must choose an approved courthouse, but R.47.04(2) allows a judge to direct that a trial or hearing be held in "any place and in any suitable building." The Rule allows the parties to follow a traveling judge who is seized with a matter (e.g. to limit an otherwise lengthy delay), or a judge to move a matter to utilize an available courtroom. Rule 47.04 also governs motions to change venue. Rule 47 does not address the legal test to be satisfied. Existing case law will likely remain relevant. This Rule replaces the previous R.28, R.30.03, R.30.05 and R.37.03.

47.01 - Scope of Rule 47

A party may select the place for the trial of an action, or the hearing of an application or proceeding for judicial review, or request a change in the place of the trial or hearing, in accordance with this Rule, unless legislation such as the Land Actions Venue Act provides otherwise.

47.02 - Application of Rule 47

(1) This Rule applies to proceedings other than proceedings in the Family Division.

(2) Rule 59 - Family Division Rules, and Rule 60 - Child and Adult Protection, provide for the place in which a Family Division proceeding is heard.

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47.03 - Selecting place of trial or hearing

(1) A party who starts a proceeding, or makes a motion, must select one of the following places for the trial or hearing:

- (a) a courthouse where there is an office of a prothonotary;
- (b) another courthouse approved by the Chief Justice of the Supreme Court of Nova Scotia for sittings of the court.

(2) The party must state the selected place of trial or hearing in the notice by which the proceeding is started, or the motion is made.

(3) A notice of application in court, a notice for judicial review, or a notice of appeal may state one place for the motion for directions and another place for the hearing of the application, judicial review, or appeal.

47.04 - Changing place of trial or hearing

(1) A party may make a motion to change the place of trial or hearing.

(2) The judge presiding at a trial or hearing may direct that the trial or hearing, or part of it, be held at any place and in any suitable building.

(3) Rule 25 - Motion by Appointment, provides for a motion that may be made by teleconference.

47.05 - Adjourning place of trial or hearing

The presiding judge may adjourn a trial or hearing to any place.

Rule 48 - Translation, Interpretation, and Assistance Rule 49

Educational Notes

This Rule is much broader than the previous R.31.22 and is informed by s.15 of the *Charter*. It sets out a framework for use of interpreters, signers, or assistants, including for a person with a physical or mental disability. The general rule is that the party who calls the witness requiring assistance must also provide the assistance, but R.48.05 allows a judge to determine who should bear the cost, and even allows for a motion on notice for a third party (such as government, or an insurer) to pay the expense.

48.01 - Scope of Rule 48

A party who has difficulty understanding what is being said in court, a witness who has a difficulty communicating in court, and a person with a disability that impedes them in court may be assisted in accordance with this Rule.

48.02 - Assistance for party to understand proceeding

(1) A party with a hearing impairment, or who has difficulty understanding the language in which a trial or hearing is conducted, may make a motion to be assisted by a translator, interpreter, or signer.

(2) A party with a mental or physical disability that impedes them in court may make a motion for appropriate assistance.

(3) A judge who makes an order to assist a party may include terms to ensure a fair balance between the need of the party to understand the trial or hearing and the need of all parties for a trial or hearing conducted without unnecessary disruption.

48.03 - Assistance for witness to communicate

(1) A party who calls a witness at trial, or presents a witness on the hearing of an application, must provide a translator or signer if the witness cannot adequately understand the questions, or cannot give answers that are adequately understood, without the assistance of a person who is able to translate or sign.

(2) The party must satisfy the judge that the proposed translator or signer has the ability to clearly understand the questions to be asked and the answers to be given, and to accurately translate the questions and answers.

(3) The translator or signer must swear to or affirm all of the following, unless the judge permits otherwise:

- (a) the translator or signer will accurately translate each question asked of, and each answer given by, the witness;
- (b) except to translate, the translator or signer will not communicate with the witness during the examination without advising the judge and awaiting the judge's permission;
- (c) the translator or signer is not related by blood or marriage to the witness, is not an employer or employee of the witness, and is independent of the witness.

(4) A party who calls a witness with another kind of difficulty communicating in court may make a motion for means to assist the communication.

48.04 - Assistance for person with disability

A judge presiding at a trial or hearing may order services for a person with a disability that impedes the person in court.

48.05 - Expense of assistance

(1) A judge may determine who must bear the expense of assistance not covered by a government authority, an insurer, or another person.

(2) A party who makes a motion for a government authority, an insurer, or another person to pay the expense of assistance must deliver a copy of the notice of motion and documents filed in support of the motion to the person in the same manner as a person is notified of a proceeding under Rule 31 - Notice, unless the authority, insurer, or other person agrees or a judge orders otherwise.

Rule 49 - Sittings

Educational Notes

This Rule sets out a schedule for jury sittings throughout the province.

49.01 - Scope of Rule 49

(1) This Rule provides for chambers and sittings of the court without a jury at any time or place in Nova Scotia, and it sets the periods and places for jury trials.

(2) This Rule also modifies procedures provided in legislation so as to adapt the procedures to open sittings of the court and to hold chambers.

49.02 - Sittings of the court, or a judge, without jury

(1) The court sits when and where the court is called into session.

(2) A judge holds chambers whenever the judge conducts business of the court without the court being called into session, such as in chambers or during a motion heard by conference.

49.03 - References to sittings in legislation

For the purpose of Section 49 of the *Judicature Act*, legislation requiring something to be done at or before a sitting or session of the court is satisfied if it is done in accordance with these Rules, or at the direction of a judge.

49.04 - Jury sittings

(1) The court sits for jury trials at Halifax and Sydney from the first day the office of the prothonotary is open in September until the third Friday in December and from the first day the office of the prothonotary is open in January until the last work day in June.

(2) The court sits for jury trials at the places, for the periods, and starting on the Monday or, if Monday is a day the office of the prothonotary is closed, the next day the office of the prothonotary is open after the Monday shown on the following chart:

Place	Number of Weeks	Monday
Amherst	3	1st in February
	3	3rd in March
	3	3rd in May
	3	3rd in September
Place	Number of Weeks	Monday
Annapolis Royal	1	3rd in April
	1	3rd in October
Antigonish or Guysborough	3	1st in February
	3	3rd in April
	3	3rd in September
Baddeck	2	1st in June
	2	1st in October
Bridgewater	3	1st in March
	3	1st in May
	3	1st in September
	3	1st in November
Digby	2	1st in April
	2	1st in October
Kentville	3	1st in March
	3	1st in September
Liverpool	1	1st in June
Pictou	3	2nd in January
	3	1st in April
	3	1st in September
Port Hawkesbury or Port Hood	3	last in April
	3	last in October
Shelburne	1	3rd in May
	1	3rd in October
Truro	4	3rd in March
	4	1st in May
	4	1st in September
Place	Number of Weeks	Monday
Windsor or Kentville	3	1st in May
	3	1st in November
Yarmouth	2	1st in May
	2	1st in October

(3) The court sits for jury trials at any other time and place as a majority of the judges decide, or the Chief Justice directs.

(4) A presiding judge may extend a sitting.

49.05 - Scheduling sittings

The judges, including the Chief Justice, of the Supreme Court of Nova Scotia establish sessions, sittings, and circuits without making a Rule under Section 29 of the *Judicature Act*.

Rule 50 - Subpoena

Educational Notes

This Rule is considerably broader than the previous R.31.24-31.31. It sets out the procedure for compelling a witness to give evidence, and the form and duration of a subpoena. Subpoenas must be accompanied with the required fees and travel expenses and be personally delivered to the witness, though a party subpoena may go to his or her designated address. Subpoenas are issued by the prothonotary, though a subpoena on a motion must have the permission of a judge (R.50.02(2)). The prothonotary can require a motion if a subpoena appears to be an abuse of process. A witness who does not appear is subject to a finding of contempt (R.50.13(1)), a warrant for the witness's arrest (R.50.13(1)), or an order that the witness indemnify any party for expenses resulting from an adjournment (R.50.14(4)).

50.01 - Scope of Rule 50

A witness may be compelled to give evidence, in accordance with this Rule.

50.02 - Power of prothonotary to compel attendance

(1) A prothonotary at any courthouse may issue a subpoena for the attendance of a witness at a trial, or at the hearing of an application, an inquiry by a referee, an appeal at which evidence is to be taken, or a commission under Rule 56 - Commission Evidence.

(2) A prothonotary may only issue a subpoena for the attendance of a witness at the hearing of a motion, if a judge permits.

(3) Only the prothonotary at the office where the documents in a proceeding are filed may issue a discovery subpoena in accordance with Rule 18 - Discovery.

(4) A prothonotary may issue a subpoena addressed to a witness who appears to reside outside Nova Scotia, whether or not the party makes a motion for certification of the subpoena under the *Interprovincial Subpoena Act*.

(5) The subpoena may require the witness to bring documents or other evidence.

(6) A prothonotary who believes that issuing a subpoena may lead to an abuse of the court's processes may require the party who seeks the subpoena to make the motion for the subpoena on notice to each other party and the witness, or refer the motion to a judge.

50.03 - Power of judge to compel attendance

(1) A judge may order a witness to attend before the court, a judge, a referee, or a commissioner and to bring documents or other evidence.

(2) A judge may order a witness in Nova Scotia, or direct the prothonotary to issue a subpoena compelling the witness, to attend before a commissioner in Nova Scotia appointed by a court outside Nova Scotia and authorized under Section 70 of the *Evidence Act*.

50.04 - **Issuing subpoena**

(1) A prothonotary may issue a subpoena at the place where the documents in the proceeding are filed by filing the original and delivering two or more certified copies to the moving party.

(2) A prothonotary may issue a subpoena at another place by delivering two or more certified copies to the moving party and the original to the prothonotary at whose office the documents in the proceeding are filed.

50.05 - **Form of subpoena**

(1) A subpoena must contain the standard heading, be entitled “Subpoena”, be issued by the prothonotary, be addressed to the witness, and include all of the following:

- (a) the name of the witness and, if it is known, the community in which the witness resides;
- (b) requirements that the witness attend a trial, hearing, inquiry, appeal, or commission and bring, or provide access to, documents, electronic information, or other evidence;
- (c) the time, date, and place of the trial, hearing, inquiry, appeal, or commission;
- (d) the name of the party who obtains the subpoena;
- (e) a requirement the witness attend the entire trial, hearing, inquiry, appeal, or commission unless excused by a judge;
- (f) a warning of the possible consequences of failing to obey the subpoena.

(2) The subpoena may be in Form 50.05.

Forms

Subpoena(50.05).

50.06 - **Prisoner witness**

(1) A judge may order an authority who has custody of a witness to deliver the witness to the sheriff.

(2) The judge may order the sheriff to bring the witness before the court, judge, referee, or commissioner to give evidence and to return the witness after the evidence is given.

(3) The judge may remand the witness during an adjournment.

50.07 - **Subpoena in aid of another judicial body**

(1) A prothonotary or judge may compel the attendance of a witness at the request of a person or body who makes a judicial decision, such as an arbitrator or tribunal.

(2) The prothonotary or judge may compel attendance before a person or body in a similar way as attendance is compelled under Rule 50.02 or 50.03.

(3) A subpoena in aid of a person or body must contain a standard heading in which the person who applies for the subpoena is named as applicant, it must conform with Rule 50.05 as if the reference to a trial, hearing, inquiry, appeal, or commission were

a reference to the proceeding before the person or body, and it must include both of the following:

(a) a statement identifying the person or body who requests the subpoena;

(b) a description of the proceeding before the person or body.

50.08 - Assisting attendance

(1) A judge may order a person to do what is necessary to secure the attendance of a witness who is the subject of a subpoena issued by the prothonotary, an order for attendance, or a subpoena under the *Interprovincial Subpoena Act*.

(2) The following are examples of orders that may be necessary to secure attendance:

(a) an order for a witness with a disability to be assisted in ways related to the disability;

(b) an order that a person who has custody of a witness provide transportation;

(c) an order that a person explain the subpoena to a witness who may not otherwise understand it.

(3) The judge who orders assistance may include in the order a provision for payment of expenses related to the assistance.

50.09 - Delivery of subpoena

A subpoena, including a replacement subpoena under Rule 50.11, is ineffective unless it is personally delivered to the witness, except a subpoena directed to a party who designates an address for delivery may be delivered to that address.

50.10 - Travel money

(1) A subpoena is ineffective unless the payment of fees and travel expenses required by the *Costs and Fees Act*, or the *Interprovincial Subpoena Act*, is delivered with the subpoena.

(2) A party may supply a witness with reasonable transportation, meals, and accommodations in addition to fulfilling the requirements of the *Costs and Fees Act*, or the *Interprovincial Subpoena Act*.

50.11 - Replacement subpoena

(1) A prothonotary may issue a subpoena to replace another subpoena, such as a replacement subpoena to correct the date of trial.

(2) The party who obtains the replacement subpoena must hold the old subpoena if it was not delivered, and, if the old subpoena was delivered, the party must deliver a written explanation of the change with the replacement subpoena when it is delivered in accordance with Rule 50.09.

(3) A party who obtains a replacement subpoena may deliver the subpoena without further payment, if both of the following apply:

(a) the old subpoena was delivered to the witness with the required payment;

(b) the witness did not travel in obedience to the old subpoena.

50.12 - **Duration of subpoena**

A subpoena continues in effect until the end of the trial, hearing, inquiry, appeal, commission, or proceeding before a person or body who makes a judicial decision and requested the subpoena, or when one of the following occurs:

(a) a judge excuses the witness from the subpoena;

(b) the person or body who makes a judicial decision and requested the subpoena notifies the witness that attendance is no longer required;

(c) counsel who obtained the subpoena notifies the witness that the issues are settled and the trial, hearing, inquiry, appeal, or commission is not to go ahead.

50.13 - **Arrest**

(1) A person who fails to attend at the time and place provided in a subpoena or order for attendance that is delivered, with the required travel money, to the person may be dealt with under Rule 89 - Contempt.

(2) In addition to the contempt power, a judge may issue a warrant to arrest the witness, detain the person for no more than one day, and bring the person before a judge on the day of the arrest.

(3) An arrest warrant for failure to attend a trial, hearing, inquiry, appeal, or commission must contain the standard heading, be entitled “Warrant for Arrest of Defaulting Witness”, be addressed to the sheriff for the municipality in which the witness is to be found, and include all of the following:

(a) a statement of the judge’s findings by which the warrant is authorized;

(b) a direction to the sheriff to arrest the witness and bring the witness before a judge on the day of the arrest;

(c) a statement of the purpose in bringing the witness before the judge, namely, to secure the witness’ attendance to give evidence and, if required by the judge, to start contempt proceedings;

(d) a direction to the sheriff to inform the witness promptly of the reasons for, and purpose of, the arrest and detention and of the witness’ right to retain and instruct counsel without delay;

(e) a direction to assist the witness who wishes to seek, or communicate with, counsel.

(4) The warrant for arrest of defaulting witness may be in Form 50.13.

(5) An arrest warrant for failure to attend before a person or body who requested a subpoena may be in a similar form, with necessary changes.

(6) The sheriff is not obligated to execute the warrant, unless a judge is available on the day of the arrest and at a time when the witness can be brought before the judge.

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Forms

Warrant for Arrest of Defaulting Witness(50.13).

50.14 - Arrested witness

(1) A judge before whom an arrested witness is brought may do any of the following:

(a) resume a trial or hearing and require the witness to testify;

(b) direct that the witness be taken immediately to give evidence in the proceeding for which the subpoena, or order for attendance, was issued;

(c) remand the witness to a lock-up facility until the trial or hearing of the proceeding resumes, if it is to resume in a reasonable time;

(d) order the release of the witness, on the condition that the witness promises to attend the trial or hearing when it resumes and on any other conditions, such as posting security or providing a surety, as the judge considers necessary.

(2) The judge who remands the witness must provide for return of the witness to give testimony as soon as is reasonable.

(3) A judge who decides to start a contempt proceeding may grant bail or remand the witness as provided in Rule 89 - Contempt.

(4) Without starting contempt proceedings, the judge may order the witness to indemnify a party for the expenses resulting from an adjournment caused by the witness' failure to attend.

Rule 51 - Conduct of Trial

Educational Notes

This Rule provides for much earlier notice (by the finish date) of a party's intention to offer various types of evidence at trial. Rule 51.03 requires a judge to exclude evidence for late or no notice, unless it would be unjust, and allows for costs consequences if the evidence is admitted. Rule 51 addresses advances in technology and codifies the proper procedure at a trial, from the order of presentations, to motion for a non-suit, proof of facts, exclusion of witnesses, and entering exhibits. Consistent with the current practice, R.51.05 does not allow for opening statements. Codification of trial procedure will benefit new and infrequent litigators as well as self-represented litigants.

A few additional points of note:

- Pre-trial briefs are due 10 days before trial;
- Rule 51.03(1)(c) excludes evidence offered by a party who failed to give that evidence on discovery despite a direct question;
- Rule 51.08 allows for testimony by video conference or even telephone in accordance with R.56;
- Rule 51.10 requires parties to communicate about preparing a common exhibit book for all exhibits to be admitted by consent;
- Rule 51.12 permits taking a view;
- Rule 51.15 allows for excluded evidence to be marked as an exhibit at the hearing of the objection and maintained separately in the court file.

Rule 51 replaces R.30 and R.31.

51.01 - Scope of Rule 51

A judge who presides at the trial of an action directs the conduct of the trial and, unless the judge directs otherwise, the trial may be conducted in accordance with this Rule.

51.02 - Notice of some kinds of evidence

(1) Nothing in this Rule 51.02 diminishes the requirements for making disclosure under Part 5 - Disclosure and Discovery, or Rule 55 - Expert Opinion.

(2) A party must notify each other party of a decision to offer any of the following evidence at trial as soon as the decision is made, but no later than the finish date:

(a) an affidavit to be tendered in accordance with Rule 51.07;

(b) an excerpt from a record of evidence given already in the proceeding, or on a trial or hearing in another proceeding;

(c) a plan, photograph, audio recording, visual recording, audio-visual recording, model, or other real or demonstrative evidence;

(d) proof of foreign law;

(e) evidence that was the subject of a claim of privilege made by the party, but which the party decides to use as evidence in the proceeding;

(f) the subject of a question on discovery or interrogatory, or of a demand for production, if the party objects to the question, interrogatory, or demand and later

decides the subject is admissible, such as when the party decides to call evidence on the subject.

(3) A judge may order a party who unreasonably delays making a decision about evidence mentioned in Rule 51.02(2) to indemnify another party for expenses caused by the delay.

51.03 - Exclusion of evidence for non-compliance

(1) A judge who presides at a trial must exclude evidence of the following kinds, unless the party offering the evidence satisfies the judge it would be unjust to exclude it:

(a) evidence for which notice is required, but for which notice is not given;

(b) evidence required to be disclosed under, but not disclosed in accordance with, Part 5 - Disclosure and Discovery;

(c) evidence offered by a party who fails to give the evidence, or to give information leading to the evidence, in response to a direct question asked at discovery or by interrogatory, such as by answering that the party does not know the answer and failing to make disclosure when the answer becomes known or by objecting to the question on the ground of relevancy;

(d) expert opinion not disclosed under Rule 55 - Expert Opinion.

(2) A judge who admits evidence despite non-compliance with the Rules for notice, disclosure, or discovery must consider ordering the party proposing the evidence to indemnify each other party for expenses caused by the introduction of the evidence, including expenses resulting from an adjournment.

51.04 - Trial brief

A party must file a brief no less than ten days before the day a trial is scheduled to start.

51.05 - Order for presentations, role of counsel, and new evidence

(1) The parties in a trial without a jury may make presentations as follows:

(a) the plaintiff opens the plaintiff's case without making a speech and does so by tendering agreed exhibits, causing a record to be made of agreed facts, and calling the first witness;

(b) the plaintiff adduces the rest of the plaintiff's evidence and, when the evidence is finished, closes the case and tenders the exhibits of the plaintiff;

(c) the defendant announces that the defendant calls no evidence and tenders exhibits the defendant proved during the plaintiff's case, or opens the case in defence by calling the first witness;

(d) the defendant who opens a case in defence adduces the defendant's evidence and, when it is finished, closes the case in defence and tenders exhibits of the defendant;

(e) the plaintiff announces there is no rebuttal, or adduces rebuttal evidence after informing the trial judge and the other parties of the subject to be dealt with on rebuttal;

(f) the parties make a closing speech, the one who last opened a case going first with the opportunity to make a reply on new points raised by the other party.

(2) Rules 51.05(3) to (6) apply to a trial with a jury or without a jury.

(3) If there is more than one defendant and at least one of them acts on their own or by different counsel, the following order of opening cases or announcements about not calling evidence applies, unless the judge directs otherwise:

(a) first, the defendant whose name is first in the heading and, if that defendant is represented, all others represented by the same counsel;

(b) second, the next named defendant who has not opened or announced, and all others represented by the same counsel;

(c) third and so on, in the order provided in the heading.

(4) The presiding judge must provide directions for the order of presentations in a trial that includes a third party claim.

(5) A party represented by counsel must speak, and adduce evidence, through that counsel.

(6) The presiding judge may direct any order of presentations, and may permit a party to present further evidence at any time before the final order is issued in an action tried without a jury or after the jury begins deliberations in a trial with a jury.

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51.06 - Non suit

(1) At the close of the plaintiff's case and before the defendant elects whether to open the defendant's case and present evidence, the defendant may make a motion for dismissal of the proceeding, or a claim in the proceeding, on the ground that there is no evidence on which a properly instructed jury could find for the plaintiff.

(2) A defendant who unsuccessfully makes a motion for a non suit must elect whether to open the defendant's case and call evidence when the motion is dismissed.

51.07 - Proof of facts

(1) A party may prove a fact in a way permitted by legislation, established at common law, or permitted by these Rules.

(2) A party may prove a fact in any of the following ways:

(a) tendering an agreed statement of fact signed by each party for whom the fact is material to a claim or defence;

(b) obtaining, in open court, a stipulation of the truth of a fact by each party for whom the fact is material to a claim or defence;

(c) tendering a document, electronic information, or other evidence with the consent of all parties for whom the document, information, or other evidence is relevant to a claim or defence, and stating any conditions on the consent;

(d) tendering a request for admissions under Rule 20 - Admission, and either proving the request was not answered or tendering an admissible answer;

(e) tendering excerpts from a certified discovery transcript, as provided in Rule 18 - Discovery;

(f) tendering a certified transcript of commission evidence, as provided in Rule 56 - Commission Evidence;

(g) tendering an affidavit, if the judge permits and the witness is, or will be, available for cross-examination;

(h) tendering an affidavit, if the judge is satisfied that the evidence in the affidavit cannot reasonably be contested.

(3) A presiding judge may order any method of proving a fact or document, or of adducing evidence, if the judge is satisfied that the method is consistent with the rules of evidence.

51.08 - Testimony by video conference

A presiding judge may permit testimony by video conference, or by telephone or other telecommunication, in accordance with Rule 56 - Commission Evidence.

51.09 - Control of witness

(1) A presiding judge may order that a witness who is not a party, a designated manager of a party, or an officer of a party be excluded from the courtroom until called, and the judge may extend the exclusion after the witness has testified if there is a likelihood the witness will be recalled.

(2) The judge who orders exclusion of a witness may direct a party who intends to testify to do so before an excluded witness is called by that party.

(3) A presiding judge may order a witness not to communicate with any other witness about the case until all witnesses have testified.

(4) No person may communicate about evidence, submissions, or rulings with a witness who is excluded.

(5) A presiding judge who is satisfied that the exclusion of a witness is necessary for either of the following purposes may exclude a party, a designated manager of a party, or an officer of a party from all or part of a trial:

(a) conducting the trial in an orderly way, for example when a witness persistently interrupts the trial without good reason;

(b) finding the truth through testimony, for example when a witness' presence is likely to have a severe adverse affect on the testimony of another witness.

51.10 - Common book or file

(1) The parties must communicate with each other before trial for the production of a common documents book, or a common file of electronic information that the presiding judge or jurors can read.

(2) All documents and electronic information a party wishes to offer, and to which no other party will object, must be bound in the common book, or placed in the common file.

(3) The common book or file may be presented at the beginning of trial as containing jointly offered exhibits or exhibits to be tendered separately when the party offering the exhibits closes the party's case.

(4) A document in a common book, or electronic information in a common file, may be removed if no witness has identified the document, or information.

(5) Unless the judge orders otherwise, a document or electronic information is taken as admitted if it is not removed from a common book or a common file when the last party closes that party's case.

(6) The contents, including hearsay, of a document or electronic information taken as admitted are taken to be evidence for all purposes unless the parties agree, or the judge rules, that the document or information is admitted for a limited purpose.

51.11 - How to prove a document, or electronic information

(1) The presiding judge may give directions for proof of a document, and this Rule 51.11 applies in the absence of directions.

(2) A party who wishes to have a document or electronic information admitted by consent of each party, or by operation of law permitting admission without a sponsoring witness, may prove the document by doing all of the following:

  (a) show the document, or information, to each other party by physical or electronic means;

  (b) establish the consent, or the requisites for admission by operation of law;

  (c) deliver the document physically to the court reporter, or deliver a storage medium containing only the electronic information to be admitted;

  (d) deliver a copy of the document, or information, by physical or electronic means to the court reporter for delivery or transmission to the judge;

  (e) request that the judge direct the document, or storage medium, given to the reporter be entered as an exhibit.

(3) A party who seeks to prove a document or electronic information, the authenticity of which is admitted, must do all of the following:

  (a) show the document, or information, by physical or electronic means to each other party, and to the court reporter for delivery or transmission to the judge;

  (b) show the document or information to the witness;

  (c) through the witness, prove what the document or information is;

  (d) await cross-examination on admissibility, or on admissibility for a limited purpose only;

  (e) if, after submissions, the judge admits the document or information, deliver the document physically, or deliver a storage medium containing only the admitted electronic information, to the court reporter.

(4) A party who seeks to prove a document or electronic information, the authenticity of which is not admitted, may do so in the same way another document or electronic information is proved except the party must present evidence proving authenticity and, unless the judge directs otherwise, each of the following applies:

  (a) the original of a document must be available for inspection or introduction;

  (b) the original source of electronic information must be available for inspection;

  (c) the document or electronic information is not shown to the judge, or read aloud, until the judge rules on authenticity.

(5) Electronic information must be proved on a storage medium in which it cannot be rewritten, unless the judge directs otherwise.

(6) A copy of a document, or electronic information, for the judge or jurors may be provided on paper or electronically, as the judge directs.

(7) A presiding judge may order a document or electronic information be removed from the record, if the document or information is marked or tendered in error.

51.12 - Taking a view

(1) A presiding judge may inspect a place or thing outside court in the presence of the parties.

(2) A party may inform the judge in court, and on record, of that which the party wishes the judge to observe.

(3) No one may communicate with the judge about the issues or the evidence when the inspection is being made, except a party may point the way to that which the party wishes the judge to observe.

51.13 - Judge intervening in examination

(1) A presiding judge must give directions necessary to curtail an examination that is abusive or clearly duplicative.

(2) The judge may give directions that tend to cause an examination to move more swiftly, distinctly, or effectively.

51.14 - Judge calling, or recalling, witness

(1) A presiding judge may call a witness, and the judge may examine the witness or provide directions for direct examination and cross-examination of the witness.

(2) The discretion to call a witness includes recalling a witness called by a party.

51.15 - Record of document, or electronic information, objected to

(1) A party against whom an objection to a document or electronic information has been made may have the document, or information, marked as an exhibit in the hearing of the objection.

(2) A document marked as an exhibit in the hearing of an objection that is sustained must be kept separate from the exhibits in the trial.

Rule 52 - **Trial by Jury**

Educational Notes

This Rule provides for any party to elect trial by jury in the request for a date assignment conference or memorandum for the date assignment conference judge, and for a motion that a matter be tried by judge alone (R.52.02). The rest of R.52 codifies existing practice and procedure at civil jury trials, with two important changes:

a. the process for selecting a trial by jury has changed and the burden is now on an objecting party to show why a jury should not be permitted (R.52.02(5));

b. counsel may now make submissions to the jury on an appropriate award of damages (R.52.12).

Rule 52 replaces the previous R.34.

52.01 - **Scope of Rule 52**

A jury trial may be conducted in accordance with the applicable provisions of Rule 51 - Conduct of Trial and in accordance with this Rule.

52.02 - **Jury election**

(1) For the purpose of Section 34 of the *Judicature Act*, the provisions in that Section respecting jury trials and procedure are modified by this Rule 52.02.

(2) An application, and an action to which Part 12 - Actions Under $100,000 applies, must be heard or tried by a judge without a jury.

(3) Parties to an action, to which Part 12 does not apply, must elect trial by judge or trial by jury in the request for a date assignment conference or the memorandum for the date assignment conference judge.

(4) An action must be tried by a judge without a jury, unless a party elects trial by jury in accordance with this Rule 52.02.

(5) An action in which a party elects trial by jury must be tried by a jury, unless another party makes a motion for an order that the action be tried by a judge and satisfies the judge hearing the motion on either of the following:

(a) under a Rule, under legislation, or by operation of other law, the action cannot be tried by a jury;

(b) the action is not for a cause referred to in subclause 34 (a)(i) of the *Judicature Act*, and justice requires trial by a judge rather than by a jury.

52.03 - **Jury selection**

(1) This Rule does not modify the provisions of the *Juries Act* for constituting or selecting a civil jury, except Rule 52.03(2) provides for excusing a jury panel member after jury selection begins, Rule 52.05(2) provides for peremptory challenges by a third party, and Rule 52.10(1) allows for continuation of the selection after a juror is excused.

(2) A judge who is satisfied that a member of the jury panel is unable to perform the duties of a juror may excuse the person from the panel anytime until the person is sworn or affirmed as a juror.

(3) A juror is discharged in accordance with Rule 52.10.

52.04 - **Challenge for cause**

(1) A party who wishes to challenge every potential juror for cause must, no less than ten days before the first day of trial, file a notice of motion for directions.

(2) A party who determines to challenge a potential juror for cause must notify the judge and the other parties of the grounds for the challenge as soon as the party makes the determination.

(3) A challenge for cause must be determined by two triers.

(4) One of the following pairs must be called to be the triers each time a challenge is made:

(a) the last two jurors sworn or affirmed, if there are two or more jurors;

(b) the only juror sworn or affirmed and another person selected at random from the jury panel, if there is only one juror;

(c) two persons selected at random from the jury panel, if no jurors have been sworn or affirmed;

(d) jurors or persons selected at random as the judge may direct, to replace triers who are unable to determine a challenge.

(5) A trier who is to determine a challenge based on partiality, must swear or affirm that the trier will make a fair and just inquiry whether the potential juror is impartial as between the parties and will give a true verdict according to the evidence.

(6) A trier who is to determine a challenge not based on partiality must swear or affirm a form of oath or affirmation directed by the trial judge.

(7) When the triers determine a challenge to be true, the person called to be a juror must be directed to rejoin the other jury panel members, or be permitted to leave.

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52.05 - **Peremptory challenge**

(1) A peremptory challenge must be made in the following ways, unless the presiding judge directs otherwise:

(a) the first person called into the jury box is asked to stand and the plaintiff or all plaintiffs represented by the same counsel say “content” or “challenge”, and nothing more;

(b) if there is more than one plaintiff and they are separately represented or act on their own, the plaintiff whose name appears first in the heading and those commonly represented with the first plaintiff, are given the first opportunity to challenge the first juror, followed by the plaintiff whose name appears next or those commonly represented with that plaintiff, and so on;

(c) if the potential juror is not challenged by a plaintiff, a defendant or all defendants represented by the same counsel, then say “content” or “challenge”, and nothing more;

(d) if there is more than one defendant and they are separately represented or act on their own, the order is the same as with plaintiffs;

(e) if the potential juror is challenged peremptorily by a party who has not used all peremptory challenges, the person is directed to join the other members of the jury panel or permitted to leave;

(f) the second potential juror is asked to stand, and the order for challenges is reversed, and so on until seven jurors are selected.

(2) A third party may peremptorily challenge four jurors, and the judge must give directions for the order in which challenges are to be made in a trial that includes a third party claim.

52.06 - Becoming juror

(1) A potential juror is selected to be a juror when either of the following occurs:

(a) the potential juror is called into the jury box and is not challenged peremptorily or for cause;

(b) the potential juror is challenged for cause, the triers determine the challenge is not true, and no peremptory challenge is exercised.

(2) A selected juror becomes a juror when the selected juror swears or solemnly affirms to try the action impartially, give a true decision according to the evidence, and keep jury deliberations secret.

52.07 - Assistance for juror with disability

The presiding trial judge may order assistance for a juror with a disability.

52.08 - Roll call

On each of the following occasions, a presiding judge or the court reporter may announce for the record that all jurors are present and, otherwise, the court reporter must call the name of each juror and note the juror's response:

(a) when the jurors have been selected and first appear in court to begin the trial;

(b) each day the jurors are required to attend, when they first appear in court;

(c) on days of deliberation, before the deliberations begin for the day;

(d) when the jurors assemble to receive further instruction or announce a verdict.

52.09 - Order of presentations

(1) The parties in a jury trial must make all of the following presentations in the following order, unless the presiding judge directs otherwise:

(a) the plaintiff makes a speech opening the plaintiff's case;

(b) the plaintiff adduces the plaintiff's evidence, and when it is finished, closes the case and tenders exhibits without a speech;

(c) the defendant makes a speech opening the case in defence or announces to the jury, without a further speech, that the defendant calls no evidence and tenders exhibits proved by the defendant and admitted into evidence during the plaintiff's case;

(d) the defendant who opens a case, adduces the defendant's evidence and, when it is finished, closes the case and tenders exhibits without a speech;

(e) the plaintiff announces there is no rebuttal or adduces rebuttal evidence after informing the judge and the other parties, without the jury being present, of the subject to be dealt with on rebuttal;

(f) the parties make a closing speech, the one who last opened a case going first, without a reply.

(2) The judge may direct that the order of presentations is reversed in a trial in which the defendant bears the burden of proof on all issues to be determined by the jury.

52.10 - Discharge of jurors and mistrial

(1) A presiding judge who, before any party opens a case, is satisfied that a selected juror is unable to perform the duties of a juror may discharge the juror and resume jury selection.

(2) A judge may discharge one of the seven jurors after a party's case is opened and direct that the trial proceed, in accordance with Section 18 of the *Juries Act*.

(3) A judge who discharges jurors such that five or less remain on the jury must declare a mistrial, except the judge may discharge all the jurors and continue the trial without a jury in either of the following circumstances:

(a) the discharge did not result from the misconduct of a party and all parties consent;

(b) the discharge resulted from the misconduct of a party and all other parties consent.

(4) After a judge declares a mistrial, a party may make a motion under Rule 52.02(5)(b) that the action be tried by a judge without a jury.

52.11 - Taking a view

A presiding judge may permit the jury to inspect any place or thing, and the judge must accompany the jury during the inspection.

52.12 - Instructions on damages

A judge who instructs a jury on assessment of damages may give guidance, and the parties may make submissions, to the jury on the amount of damages.

52.13 - Verdict and answers

(1) A presiding judge may direct a jury to give a general verdict, to give a special verdict, or to answer jury questions and, in the absence of directions, the jury may return a general verdict or a special verdict.

(2) A judge may not direct a jury to return a special verdict or answer questions in an action for defamation, unless all parties consent.

(3) A judge who directs a jury to answer jury questions must settle the wording of the questions and provide them in writing to the jurors.

(4) The questions must be such that the answers will determine all issues in the action, except issues that must be determined by the judge.

(5) A party who is not satisfied that the jury questions cover all issues in the action may request the judge to include a supplementary question.

(6) The judge may provide the jurors with a form on which to record the agreement of the jury on the verdict or an answer, and the form may provide for the signature of the foreperson if the jury chooses one, or of all jurors if the jury chooses to proceed without a foreperson.

52.14 - Sequestration

(1) Jurors need not remain together before deliberations start, unless the judge directs otherwise.

(2) Jurors must not separate during deliberations, unless the judge permits otherwise.

(3) From when deliberations start until the jurors are discharged by the judge, jurors must avoid communicating with others, except as the judge or jury manager permits.

52.15 - Jury Manager

(1) A presiding judge must appoint a sheriff as a jury manager to supervise the sequestration of a jury, provide for the needs of a juror during sequestration, and relay permissible communications.

(2) The jury manager must swear an oath or make an affirmation to keep the jurors together, and apart from other persons who may influence a juror, except as permitted by the trial judge.

(3) A juror may communicate with the jury manager to obtain services, to pass a question to the judge, to advise that a verdict has been reached, or for any other practical purpose that does not involve discussing the issues, evidence, or deliberations.

52.16 - Questions and announcement by jury

A jury may, in writing, ask the trial judge a question or announce deliberations have ended by giving the writing to the jury manager, and the manager must deliver the writing to the judge.

52.17 - Majority verdict or answers

(1) A verdict or answers must be unanimous if given before the jury deliberates for four hours.

(2) A verdict may be given, and a question may be answered, by five jurors after four hours of deliberations.

(3) Jury questions may be answered by differently composed majorities of five jurors.

52.18 - Conditional verdict

(1) A presiding judge may permit a party to prove a fact, document, electronic information, or other thing at a later time.

(2) The judge who permits later proof must either adjourn the trial to the later time or instruct the jury to treat the fact, document, electronic information, or other thing as proved.

(3) The judge must conditionally accept the verdict of a jury instructed to treat something as proved, until it is proved to the satisfaction of the judge or the judge finds it is not proved.

(4) The judge may grant a final order in accordance with the verdict or, if the judge finds the fact, document, electronic information, or other thing is not proved, in accordance with the verdict as modified in light of the finding.

52.19 - Mistrial after jury deliberates

(1) A presiding judge must declare a mistrial when one of the following occurs:

(a) the required majority is unable to agree on a verdict or answers to jury questions;

(b) the jury returns a special verdict without making findings on which judgment can be granted;

(c) the jury answers some questions, but not all of them, and judgment cannot be granted on the answers that are given;

(d) the jury gives conflicting answers, such that judgment cannot be granted on the apparent findings.

(2) The judge may grant judgment on some claims and order a mistrial on others if the jury returns a special verdict, or answers some questions, and the verdict, or answers, entitle a party to judgment on some claims.

(3) The prothonotary must schedule a date assignment conference as soon as possible after a mistrial, unless the judge directs otherwise.

(4) For the purpose of Section 34 of the *Judicature Act*, the judge who declares a mistrial may order that the new trial is to be conducted without a jury, if justice requires.

52.20 - Record of verdict or answers

(1) A foreperson chosen by the jurors, or each juror if there is no foreperson, must announce the verdict or answers after court is opened for that purpose, and the presence of all jurors is announced or the roll call is taken.

(2) After a foreperson announces the verdict or answers, a party may require a poll of the jurors.

(3) A form provided by the judge to record the agreement of the jury on the verdict or questions must be delivered to the court reporter for inspection by the presiding judge and the parties, and it must be marked as an exhibit.

(4) The judge must grant an order for judgment consistent with the verdict or answers.

Rule 53 - Conduct of Hearing

Educational Notes

This Rule provides procedures for hearing applications. Generally they will proceed by cross-examination on affidavits. Rule 53.04 codifies the current order of presentation for a contested matter set for special time chambers. Rule 53 offers considerable flexibility at the hearing: (a) a judge may permit cross-examination to occur out of court with transcript filed (R.53.03); (b) the judge may permit cross-examination by video or telephone or commission (R.53.05); and (c) the judge may limit the time for examinations or submissions (R.53.04(5)).

53.01 - Scope of Rule 53

A judge who presides at the hearing of an application directs the conduct of the hearing, and, unless the judge directs otherwise, the hearing may be conducted in accordance with this Rule.

53.02 - Direct evidence by affidavit

The direct evidence of a witness on a motion or application must be provided through an affidavit, unless a presiding judge permits direct examination.

53.03 - Cross-examination

(1) No cross-examination is permitted at the hearing of an application in regular chambers, and a party who wishes to exercise a right of cross-examination must arrange for a hearing at an appointed time or in court.

(2) Cross-examination and any re-direct examination must be conducted before the presiding judge, unless the judge directs that cross-examination and any re-examination be conducted out-of-court.

(3) A party who seeks to have cross-examination conducted out of court must undertake to file a transcript of the testimony no less than two days before the day the hearing starts.

(4) The judge may direct that the cross-examination and re-direct examination out-of-court be recorded visually, as well as sound recorded.

53.04 - Order of presentation and limits

(1) The order of presentation in a hearing scheduled to take a half-hour or more must be as follows, unless a judge directs otherwise:

- (a) the applicant refers to the affidavits in support of the application;
- (b) the respondent makes objection to anything in an affidavit that is inadmissible, the parties are heard, and the judge rules on the objection;
- (c) the applicant calls witnesses of whom a respondent gave notice that crossexamination is required;

(d) the respondent cross-examines each, and the applicant questions the witness on re-direct examination if permitted;

(e) the applicant conducts a direct examination of a witness the applicant has permission to call without an affidavit;

(f) the respondent cross-examines, followed by re-direct examination if permitted;

(g) the respondent refers to the affidavits in support of the respondent, the applicant makes objections on admissibility, and the respondent calls witnesses, as in the applicant's case;

(h) the applicant cross-examines each, and the respondent questions the witness on re-direct examination if appropriate;

(i) there is no rebuttal;

(j) the applicant makes submissions, followed by the respondent, followed by a brief reply.

(2) The judge assigned to hear the application may, before or during the hearing, set limits on the time for examinations and submissions.

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53.05 - **Cross-examination by video conference**

A judge may permit cross examination on an affidavit by video conference, or by telephone or other telecommunication, by appointing a commissioner under Rule 56 - Commission Evidence, and limiting the commission to cross-examination.

53.06 - **Control of witness**

(1) A presiding judge may order that a witness, who is not a party, a designated manager of a party, or an officer of a party be excluded from the hearing until cross-examined, and give directions to the witness about communicating with other witnesses.

(2) A presiding judge who is satisfied that the exclusion of a witness is necessary for either of the following purposes may exclude a party, a designated manager of a party, or an officer of a party from all or part of a hearing:

(a) conducting the hearing in an orderly way, for example when a witness persistently interrupts the trial without good reason;

(b) finding the truth through testimony, for example when a witness' presence is likely to have a severe adverse affect on the testimony of another witness.

53.07 - **Trial Rules**

Rules 51.12 to 51.15, of Rule 51 - Conduct of Trial, apply to the conduct of a hearing.

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53.08 - No jury

For the purpose of Section 34 of the *Judicature Act*, an application is heard by a judge without a jury.

Rule 54 - Supplementary Rules of Evidence

Educational Notes

How This Rule Works

This Rule supplements the common law rules of evidence and proof on a number of different points, but any legislation governing evidence or proof prevails over R.54.

Rule 54.02 provides that an affidavit of delivery is sufficient proof of delivery in the absence of evidence to the contrary.

Rule 54.03 allows for proof of the law of another province or territory by reference to official publications, cases, or authoritative sources, or via expert witness, where necessary.

Rule 54.04 allows for proof of foreign law by reference to official publication, judicial decisions, or authoritative sources, or through expert opinion. It presumes that foreign law is the same as in Nova Scotia unless a party gives notice by a pleading that the law of the foreign state is in issue and goes on to prove that it is different.

Rule 54.05 creates a presumption of authenticity for documents and electronic information unless a party denies the presumption in writing with respect to a specific document or electronic information and gives reasons for denying its authenticity no more than 25 days after disclosure is delivered. The denying party must then prove the contrary at the trial or hearing.

Rule 54.06 allows a party who calls any adverse party, or current officer, director, or employee of an adverse party, to cross-examine without the need to show the witness is adverse under s.55 of the *Evidence Act*.

Highlights of Changes

Proof of foreign law was addressed in the previous R.31.23, which required a party intending to raise an issue of foreign law to give notice at least 10 days before the trial or hearing. Rule 54.04(2) requires notice that the law of a foreign state is in issue to be made “by a pleading.” Rule 51.02(2)(d) requires a party to give notice of a decision to offer evidence on proof of foreign law no later than the finish date. It is not entirely clear how these separate deadlines interact.

Although the previous R.31.23 allowed for proof of foreign law through “any relevant material or source, including testimony,” it was customary to do so using expert evidence. Rule 54.05 specifically allows for proof of foreign law in the same manner as Canadian law.

Authenticity of documents was addressed in the previous R.20.03. Rule 51.05 maintains the presumptions of authenticity but offers two routes for another party to object: (1) in writing, for a specific document or electronic information, with reasons, within 25 days of delivery; or (2) by proving the contrary at trial or hearing. Taking the first option casts the onus of proving authenticity back on the proffering party, while the second option leaves the door open to prove a document is not what it purports to be, even if the original deadline is missed.

Practice Tips

A party using expert opinion to prove the law of another province, territory, or foreign state, must comply with Rule 55 – Expert Opinion. Given the much simpler option in R.54 to prove the law using official publications, cases, or authoritative sources, experts will only be needed in the most complex or contested cases.

A party objecting to authenticity of a document or electronic information under R.54.05 must do so with respect to a *specific* document or electronic information. Blanket objections are not permitted.

54.01 - Scope of Rule 54

(1) This Rule provides for rules of evidence and proof, in addition to those of the common law.

(2) Legislation that provides for rules of evidence or proof prevails over this Rule, to the extent the legislation is inconsistent with this Rule.

54.02 - Proof of delivery

An affidavit of delivery of a document required to be delivered in accordance with a Rule proves delivery at the time and in the manner stated in the affidavit, in the absence of evidence to the contrary.

54.03 - Proof of law of another province

(1) The legislation of another Canadian province or territory may be proved by reference to the official publication.

(2) The common law of a Canadian province or territory may be proved by reference to decisions of the courts and authoritative sources.

(3) The civil law of Québec may be proved by reference to the Code Civil du Québec, other applicable legislation, decisions of the courts, and authoritative sources.

(4) A party who satisfies the presiding judge on both of the following may lead opinion evidence on the law of another province:

- (a) the party has provided a report under Rule 55 - Expert Opinion;
- (b) the assistance of an expert is necessary and the opinion is otherwise admissible.

54.04 - Proof of law of a foreign state

(1) The law of a foreign state may be proved in either of the following ways:

- (a) reference to official publications of legislation, judicial decisions, and authoritative sources;
- (b) expert opinion, introduced in accordance with Rule 55 - Expert Opinion and the rules of evidence.

(2) The law of a foreign state is presumed to be the same as the law of Nova Scotia, unless a party gives notice by a pleading that the law of a foreign state is in issue and proves that that law is not the same as the law of Nova Scotia.

54.05 - **Presumptions about disclosed documents or electronic information**

(1) The presumptions in this Rule 54.05 apply to a document, or electronic information, disclosed in accordance with Part 5 - Disclosure and Discovery, unless a party opposed to introduction of the document, or electronic information, does either of the following:

(a) denies that a presumption is true for a specific document, or electronic information, and gives reasons for the denial in writing delivered to the disclosing party no more than twenty-five days after the day a copy of the document, or electronic information, is delivered for disclosure to the denying party;

(b) proves the contrary at the trial or hearing.

(2) A copy of a disclosed document is presumed to be an exact copy of the original, and disclosed electronic information that is copied to a storage medium is presumed to have been copied from the original source.

(3) The original of a disclosed document is presumed to have been authentically written, signed, executed, or sealed as it purports.

(4) The original of disclosed electronic information is presumed to have been authentically created and authored as it purports.

(5) A disclosed document or electronic information that purports to have been transmitted, or otherwise delivered, is considered to have been transmitted or otherwise delivered when, where, and how it purports.

54.06 - **Calling adverse party for cross-examination**

In addition to cross-examination in accordance with the rules of evidence about a hostile witness, a party may call and cross-examine a party who is adverse in interest or a person who is, when the person is called, an officer, director, or employee of a party who is adverse in interest.

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Rule 55 - Expert Opinion

Educational Notes

This Rule is the most controversial of the new Rules, because it eliminates oral discovery of experts, except by consent. However, restricted discovery of experts is currently the norm in all Canadian jurisdictions except Nova Scotia and Newfoundland and Labrador. When The Honourable Coulter A. Osborne, Q.C. consulted Ontario lawyers about the prospect of re-introducing expert discovery for his 2007 Civil Justice Reform Project report, he found “meager support” for the change, and recommended against it.

In lieu of oral discovery, Nova Scotia’s R.55 requires experts to make representations regarding their independence, prescribes a much more detailed form of report, and permits counsel one opportunity to deliver written questions to the expert, which must be answered in writing. Rule 55.14 also includes special provisions permitting treating physicians to submit a narrative in lieu of a report.

The Expert Report

As with the previous R.31.08, no expert opinion is admissible at a trial or hearing unless the party offering it has filed an expert’s report that conforms with the Rules.

Rule 55.03 makes an initial report due no less than 6 months before the finish date (which is in turn no less than 60 days before trial (R.4.16(6)). The default period works out to about 9 months, but a judge may set a different deadline. At the same time, the party must disclose by supplementary affidavit(s) all of the documents and electronic information considered by the expert that is within the party’s control, along with any real or demonstrative evidence considered by the expert (R.55.08).

Rebuttal reports must be filed no later than 3 months after the day the contested report is delivered. Rule 55.05 limits the content of the rebuttal report. The Rule is not specific on the point, but it appears that a rebuttal report is a second report from any party, not an initial report.

Rule 55.04(1) sets out the expert’s required representations, including objectivity, and responsibility to promptly notify each party in writing of any change in the expert’s opinion, or of a material fact that was not considered that could reasonably affect the expert’s opinion.

Rule 55.04(2) details the required contents of the expert’s report, which in the words of one senior litigator offers “more meat in the sandwich” than reports completed under the current Rules.

Rule 55.11 prohibits obtaining a discovery subpoena for, or delivering interrogatories to, an expert. Instead, each party receiving an expert’s report has 30 days to deliver written questions to be answered by the expert. The Rule also expressly provides for an interview or discovery with the consent of the offering party and the expert.

The expert must fully answer the questions in writing, sign the answer, and deliver it to each party no more than 30 days after the questions were delivered. Failure to respond makes the expert’s opinion inadmissible. Oppressive or inappropriate questions may be dealt with by a motion to set aside or limit the questions. No supplemental questions

are permitted. The questions differ from interrogatories in that the responses are not sworn or affirmed.

Treating Physicians

Rule 55.14 allows treating physicians to submit a narrative in lieu of the detailed reports required by other experts. Rule 55.14 was drafted with family doctors in mind, but extends to any treating physician, though counsel should weigh the risks of not having a full report before using R.55.14 narratives with treating specialists. Treating physicians may also file Rule 55.04 reports like any other expert.

The physician's narrative under R55.14 must include the relevant facts observed and findings made by the physician during treatment. A physician's chart and CV can potentially qualify as a narrative under this Rule. The party offering the narrative must be able to justify that it is sufficient to permit an opposing party to determine whether to retain an expert and prepare adequately for cross-examination, or the narrative will be excluded (R.55.14(6)). Parties can obtain an advance ruling on the point (R.55.15).

Counsel choosing to provide a treating physician's narrative must gather the information early in the litigation process: the narrative must be delivered no more than 30 days after the close of pleadings in an action (R.55.14(2)(a)) for all treatment occurring before the action was started. Supplementary narratives must be delivered within a reasonable time after treatment, but no later than the finish date (R.55.14(2)(b)). In applications, deadlines are fixed during the motion for directions (R.55.14(2)(c)).

Rebuttal reports are permitted under R.55.05 but oral discovery, interrogatories, and written questions of the treating physician are not (R.55.14(4)). The scope of rebuttal reports is quite limited under R.55.05. It's not clear whether R.55.14(3) is intended to limit the scope of expert reports arising out of independent medical examinations under R.21, particularly where the report is the first expert report on the point from the opposing party.

The Expert at Trial

Each party receiving an expert's report must decide whether to contest the expert's qualifications and admissibility of the opinion by the finish date (at least 60 days before trial) (R.55.13(1)).

Rule 55.09 codifies the practices of filing a written statement of qualification with the court setting out the proposed subjects on which a party seeks to qualify an expert.

Rule 55.13 codifies the practice of limiting direct examination of experts. If the expert's qualifications and opinion are admitted, the expert may only be called if he or she is also a fact witness, if admissible facts in the report are contested, or if justice requires that the expert testify on direct examination (R.55.13(2)).

If qualifications are contested, the party calling the expert must prove the report and limit the direct examination to qualifications (R.55.13(3)).

If the judge later determines that calling the expert was "clearly unnecessary," the party who caused the expert to be called may face costs consequences for doing so.

Miscellaneous Rules Pertaining to Experts

Rule 55.06 addresses expert evidence in applications, and R.55.07 allows for adverse parties to retain experts jointly. Rule 55.12 provides for court experts and replaces the previous R.23.

Practice Tip

The deadlines in R.55 are tight and will likely require negotiations about extensions on a frequent basis. Of particular note are the following deadlines: (a) the 3 month deadline for filing a rebuttal report in R.55.03(2), (b) the 30 day deadline to submit written questions after delivery of a report under R.55.11(2), (c) the 30 day window for the expert to respond in writing under R.55.11(5), and (d) the requirement to file a treating physician's narrative by the close of pleadings under R.55.14(a).

55.01 - **Scope of Rule 55**

(1) This Rule provides procedure about expert opinion, and it does each of the following:

(a) requires disclosure of an expert opinion to be offered on a trial or hearing;

(b) provides for exclusion of expert opinion evidence that is not disclosed as required;

(c) requires experts to make written representations to the court about the independence of the expert and the expert's participation in the proceeding;

(d) limits discovery of experts.

(2) This Rule does not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible.

(3) A party may offer an expert opinion as evidence, in accordance with this Rule.

55.02 - **Report required**

A party may not offer an expert opinion at the trial of an action or hearing of an application unless an expert's report, or rebuttal expert's report, is filed in accordance with this Rule.

55.03 - **Deadline for filing report**

(1) A party to an action who wishes to offer an expert opinion, other than in rebuttal of an expert opinion offered by another party, must file the expert's report no less than six months before the finish date, or by a deadline set by a judge.

(2) A party to an action who receives an expert's report stating an opinion the party contests, and who wishes to offer a rebuttal expert opinion, must file a rebuttal expert's report no more than three months after the day the expert's report is delivered to the party, or by a deadline set by a judge.

(3) A party to an application who wishes to offer an expert opinion, or a rebuttal expert opinion, must file an expert's report, or a rebuttal expert's report, before the deadline set by the judge who gives directions and appoints a date for the hearing of the application.

(4) Despite Rules 55.03(1), to (3), in a family proceeding reports must be filed at either of the following times, unless a judge directs otherwise:

(a) an expert's report, the day before a conference at which a judge appoints the date for the hearing of the proceeding;

(b) a rebuttal expert's report, no more than thirty days after the day of the conference.

Annotations

The plaintiff originally anticipated being in a position to obtain an expert opinion in July 2009. She could not be seen by the expert until February 2010. The report would not be ready to file until a week or two before trial. She moved to have the court set a filing deadline pursuant to Rule 55.03(1). *Held*, motion dismissed. Although there are new *Rules*, the case law concerning the admissibility of late experts' reports still applies. The burden is on the defaulting party to show: there are exceptional circumstances warranting its reception; the interest of justice merits its admission; and the issue of potential prejudice is addressed. Here, there was no evidence to show the value of the report outweighed the prejudice to the defendant. Although the plaintiff did not expect the delay, she likely knew long before now that she would be seeing the expert later than anticipated. There are no exceptional circumstances warranting admission.
Wareham v. Ross , 2010 NSSC 140

55.04 - **Content of expert's report**

(1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:

(a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;

(b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;

(c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;

(d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;

(e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

(2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:

(a) details of the steps taken by the expert in formulating or confirming the opinion;

(b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;

(c) the degree of certainty with which the expert holds the opinion;

(d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

(3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:

(a) the expert's relevant qualifications, which may be provided in an attached resumé;

(b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;

(c) reference to all publications of the expert on the subject of the opinion;

(d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;

(e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

Annotations

The defendant sought an advance ruling on whether an expert medical report complied with Rule 55.04(3). *Held*, the report complies with Rule 55.04(3); the expert has: (a) given references to any literature and publications; (b) & (c) given information on tests and experiments, if any; and (d) set out a statement of the documents used to prepare his opinion. Its admissibility and any qualifications will be for the trial judge to decide.
Wareham v. Ross , 2010 NSSC 142

55.05 - **Content of rebuttal expert's report**

A rebuttal expert's report must be signed by the expert and provide all of the following:

(a) representations and information required in an expert's report;

(b) the name of the expert with whom the rebuttal expert disagrees and the date of that expert's report;

(c) a quotation of the statement of opinion with which the rebuttal expert disagrees;

(d) a statement that the rebuttal opinion is strictly confined to the same subject as the quoted opinion;

(e) the rebuttal opinion and no further opinion.

55.06 - **Reports in an application**

(1) An expert's report may be filed in an application as an exhibit to the expert's affidavit, or as a judge directs.

(2) The affidavit and report stand as the entire direct evidence of the expert, except that in an application in which qualification is not admitted by the other party the judge may permit the party who files the affidavit to ask supplementary questions on qualification.

(3) The party who files an expert's report in an application must arrange to have the expert present at the hearing if another party gives notice that the party disputes qualification or requires cross-examination.

55.07 - Expert jointly retained by adverse parties

(1) Parties who are adverse to one another in a proceeding may agree to jointly retain an expert, and jointly file the expert's report.

(2) The parties may agree that they will admit to the opinion when it is delivered, and, if they agree to make such an admission, the opinion may be proved against a party as an admission.

(3) Parties who file a joint expert's report may not file the report of another expert on an issue about which an opinion is given in the joint report, unless a judge permits.

(4) Despite the deadline for filing a report provided in Rule 55.03(1), a party to an action may file a joint expert's report anytime before the finish date.

55.08 - Consequential disclosure

(1) A party who files an expert's report or a rebuttal expert's report must disclose, by supplementary affidavit of documents or the applicable method of disclosing electronic information, a document or electronic information considered by the expert that is in the control of the party.

(2) The disclosure must be made no later than the day the report is filed.

(3) The party must also disclose any real or demonstrative evidence considered by the expert that is in the control of the party.

(4) The expert must provide a copy of the document or electronic information, or provide disclosure of another thing, that was considered by the expert and is in the control of the expert but not the party.

55.09 - How expert proposed to be qualified

A party who files an expert's report, or a rebuttal expert's report, must also file a statement of the qualification to be sought from the court at the trial or hearing, which statement may take the form, "[name of party] will ask that [name of expert] be found to qualify as an expert in the field of [field], capable of giving opinion evidence on the subject of [describe the subject of the opinion]."

55.10 - Objection to report and advance ruling

(1) A party who receives a report and who wishes to have the opinion evidence excluded at the trial or hearing on the basis that the report does not sufficiently conform with this Rule must, in a reasonable time, notify the party who delivers the report of the deficiency.

(2) A party may make a motion for an order determining whether a report sufficiently conforms with this Rule to permit the purported expert to testify at a trial or hearing.

(3) An order under this Rule is binding at the trial of an action or hearing of an application only on the issue of conformity with Rule 55.04 or 55.05.

55.11 - Questioning expert in writing

(1) A party may not obtain a discovery subpoena for or deliver interrogatories to an expert witness, but a party may interview or discover an expert if the expert and the party who delivers the expert's report agree.

(2) A party who receives an expert's report, or a rebuttal expert's report, may, no more than thirty days after the day the report is delivered, deliver to the other party written questions to be answered by the expert.

(3) The questions may only call for information that is not privileged and is relevant to one of the following:

(a) the expert's qualifications;

(b) a factual assumption made by the expert;

(c) the basis for an opinion expressed in the expert's report.

(4) The party who receives written questions must deliver them to the expert immediately.

(5) The expert must fully answer the questions in writing, sign the answer, and deliver it to each party no more than thirty days after the day the questions are delivered to the expert.

(6) A party may not submit supplementary questions, unless the parties agree or a judge allows otherwise.

(7) A party who receives written questions may make a motion to set aside or limit the questions.

(8) The opinion of an expert who fails to answer questions in compliance with this Rule 55.11 is inadmissible, and the party who asks the questions may make a motion for an order that the opinion is inadmissible on that ground.

55.12 - Court expert

(1) A judge who is satisfied on both of the following may appoint a person to formulate an opinion, and report the opinion to the court:

(a) the person is qualified to give the opinion;

(b) the opinion is likely to be admissible.

(2) An order appointing an expert may contain any of the following terms:

(a) the appointment and a statement of the subjects about which an opinion is required;

(b) a requirement that the expert prepare an expert's report;

(c) directions to the expert on the contents of the report and whether the expert must answer written questions;

(d) a requirement that the expert file the report and immediately deliver a copy to each party;

(e) a deadline for filing the report;

(f) permission for a party to question the expert in writing or a direction that there will be no questions before the expert gives evidence;

(g) terms for payment of the expert by a party or the parties, which may provide for payment of fees for a custody or access assessment in accordance with the *Costs and Fees Act* ;

(h) any other term the judge requires.

(3) Questions under an order that permits questioning of a court appointed expert must be asked and responded to in accordance with all of the following, unless the order provides otherwise:

(a) a party to whom the court appointed expert's report is delivered may, no more than thirty days after the day the report is delivered, submit questions directly to the court appointed expert;

(b) the expert must answer the questions in writing, sign the answer, and deliver it to each party as soon as possible;

(c) a party may not submit a supplementary question, unless all parties and the expert agree, or a judge permits.

(4) A party may not obtain a discovery subpoena for a court appointed expert, deliver interrogatories to the expert, or obtain an order for discovery of the expert.

(5) The court must arrange for a court appointed expert to be called for cross-examination by a party who gives reasonable notice that the party wishes to cross-examine the expert.

55.13 - **Testimony by expert**

(1) A party to whom an expert's, or rebuttal expert's, report is delivered must determine whether to admit or contest the proposed qualification, and the admissibility of the opinion, by no later than the finish date.

(2) A party may not call an expert whose qualifications, and the admissibility of whose opinion, are admitted, unless one of the following applies:

(a) the expert is also a fact witness and the direct examination is confined to the facts;

(b) the party is notified, before the finish date, that another party requires the expert to be called for cross-examination;

(c) the presiding judge is satisfied that justice requires that the expert testify.

(3) A party must call an expert whose qualifications are contested, prove the report through the expert, and conduct any supplementary direct examination on qualifications.

(4) A party must call an expert the admissibility of whose opinion is contested, prove the report through the expert for the purpose of obtaining a ruling on admissibility, and conduct no further direct examination unless the presiding judge permits.

(5) A judge who determines that calling an expert was clearly unnecessary may order the party who caused the expert to be called to indemnify another party for the expenses caused by the expert being called.

N.S. Gaz. Pt. 1, 03/04/09

55.14 - **Treating physician's narrative**

(1) A party who wishes to present evidence from a physician who treats a party may, instead of filing an expert's report, deliver to each other party the physician's narrative, or initial and supplementary narratives, of the relevant facts observed, and the findings made, by the physician during treatment.

(2) A narrative, or initial and supplementary narratives, must be delivered within the following times:

(a) no more than thirty days after the day pleadings close in an action, if the treatment occurs before the action is started;

(b) within a reasonable time after treatment is provided during the course of an action and no later than the finish date;

(c) as directed by a judge in an application.

(3) A party who receives a narrative, initial narrative, or supplementary narrative expressing a finding may, within a reasonable time, file a rebuttal report that conforms with Rule 55.05.

(4) A party may not obtain a discovery subpoena for, deliver interrogatories to, deliver written questions to, or obtain an order for discovery of a treating physician who provides a narrative rather than an expert's report.

(5) A party who calls a treating physician at a trial, or presents the affidavit of a treating physician on an application, may not advance evidence from the physician about a fact, finding, or treatment not summarized in a narrative or covered in an expert's report.

(6) A judge who presides at the trial of an action, or the hearing of an application, or who makes a determination under Rule 55.15 must exclude expert opinion evidence of a treating physician who provides a narrative instead of an expert's report, unless the party offering the evidence satisfies the judge that the other party received information about the opinion, and about the material facts upon which it is based, sufficient for the party to determine whether to retain an expert to assess the opinion and prepare adequately for cross-examination of the physician.

Annotations

The defendant moved for an advance ruling on a physician's narrative under Rule 55.15, which requires that the court be satisfied that the other party has sufficient information about the facts upon which the narrative is based so they can prepare to deal with it at trial. Here the report originally came from the plaintiffs. The plaintiff felt the defendant should get his own expert. *Held*, the report can be admitted. It is an objective, pre-litigation report, coming from the plaintiff, and consistent with what is intended by Rule 55.14. The limits on the report and its use are set out in the *Rules*. Although an unusual situation, it is in keeping with the spirit and intent of Rule 55.14, and the *Rules* in general.
Wareham v. Ross , 2010 NSSC 141

55.15 - **Advance ruling on physician's narrative**

(1) A judge may determine whether a narrative, initial narrative, or supplementary narrative contains sufficient information to permit a treating physician to testify to an opinion stated in the narrative without delivering an expert's report.

(2) A judge who determines the sufficiency of a narrative may give directions on either of the following:

(a) the conditions that must be fulfilled before a party may advance evidence from a treating physician about a subject mentioned in the narrative;

(b) the redactions that must be made to the narrative before an opinion expressed in the narrative may be offered as evidence.

(3) A determination that a narrative contains or does not contain sufficient information, and a direction that a condition must be fulfilled or a redaction must be made, is binding at a trial or hearing in which the expert opinion is offered.

(4) Nothing in a determination or direction under this Rule 55.15 implies either of the following, and both are to be determined by the judge who presides at a trial or hearing in which the expert opinion is offered:

(a) the qualification of a physician to express an opinion stated in a narrative;

(b) the admissibility of the opinion as an exception to the rule of evidence against admitting opinions.

Rule 56 - Commission Evidence

Educational Notes

This Rule allows parties to call evidence from witnesses who do not personally attend court. The evidence is introduced in one of two ways: by transcript, or simultaneously by video conference. Rule 56 replaces the previous R.32 and supplements ss.70-73 of the *Evidence Act*, R.S.N.S. 1989, c.154. In many respects, it parallels ss.709-714 of the *Criminal Code*.

Sun Alliance Insurance Co. v. Thompson (1981), 57 N.S.R. (2d) 226 (T.D.) limited commission evidence to situations where the witness was unwilling to attend and not compellable. Rule 56 replaces those requirements with a 9-factor balancing test in R.56.03(3) permitting an order in much broader circumstances than previously. One major use will be convenience to witnesses who would otherwise have to travel. Once the court's video-conferencing technology is in place, a witness could testify from Yarmouth or Helsinki at a trial in Sydney, in appropriate circumstances. The Rule is also broad enough to allow the parties to supply their own video conferencing equipment.

The other major change to this Rule is that the previous R.32.01(3) allowed for commission evidence without an order if the witness was ill or about to leave the jurisdiction. Under R.56 an order is always required.

56.01 - Scope of Rule 56

(1) This Rule provides for obtaining evidence from a witness who does not personally attend court.

(2) The evidence is obtained by a commission to do either of the following:

(a) take the evidence and deliver a transcript to the court;

(b) transmit the evidence to the court by video conference while the court is in session.

(3) A judge may issue a commission to take evidence, and the prothonotary or a judge may compel attendance before the commissioner, in accordance with this Rule.

56.02 - Rules of evidence and procedure on commission

(1) The rules of evidence apply to evidence taken or transmitted by commission.

(2) A witness who gives evidence by commission must answer a question to which an objection is made, unless one of the following applies:

(a) the appointment of a commissioner who takes evidence, or a provision in an order, provides otherwise;

(b) the questioner withdraws the question;

(c) the evidence is being transmitted and the presiding judge rules that the question is not to be answered;

(d) the commissioner is taking evidence to be transcribed, and the witness or a party claims that the information called for by the question is privileged.

(3) The presiding judge must rule on the admissibility of an answer given to a question objected to, but answered, at a commission.

(4) The rules for order of examinations, and all other rules of trial procedure or procedure on a hearing, apply when evidence is taken or transmitted by commission, unless a judge orders or the parties agree otherwise.

56.03 - Commission

(1) A judge may, before the start of a trial or hearing, grant an order appointing a commissioner and authorizing the commissioner to take evidence.

(2) A judge assigned to preside at a trial or hearing may, before or during the trial or hearing, grant an order appointing a commissioner and authorizing the commissioner to transmit evidence by video conference of such quality that the witness is as good as present in the courtroom, or by other teleconference.

(3) A judge who decides whether to grant an order for commission evidence must consider each of the following:

- (a) the convenience of the person to be examined;
- (b) the chances that the person will not be available to testify in the courtroom;
- (c) the chances that the person will be beyond the ability of the court to compel attendance and will not attend voluntarily;
- (d) the expense of bringing the person to the trial or hearing, or the expense, if the person is in Nova Scotia, of bringing the trial or hearing to the person;
- (e) the apparent importance of having the person’s testimony;
- (f) the difficulty of assessing credibility of transcribed or recorded testimony;
- (g) the quality of proposed sound or visual transmission and the opportunity the transmission will afford for assessing the testimony;
- (h) the possibility of convening court where the witness is located, if that place is in Nova Scotia;
- (i) the possibility of appointing the judge to take evidence under commission, if the witness is outside Nova Scotia and there is no jury.

(4) A party who makes a motion for a commission to take evidence in, or transmit evidence from, a place outside Nova Scotia must include brief references to the applicable laws of that place in the brief filed in support of the motion.

56.04 - Content of order for commission

(1) An order for evidence to be taken under commission must appoint a commissioner, authorize the commissioner to administer an oath or affirmation to the witness to be examined, state how the testimony is to be recorded, provide instructions for carrying out the commission and for reporting the evidence, and provide that the appointment is conditional on the acceptance of the instructions.

(2) The instructions may be provided in a separate document authorized by the order.

(3) The order must name the witness to be examined and provide the time, date, and place for the examination under commission or provide a method by which the party conducting the direct examination, or the commissioner, gives adequate notice of the time, date, and place of the examination.

(4) The order for commission may be in Form 56.04.

Forms

Order for Commission(56.04).

56.05 - Instructions for taking evidence

(1) Instructions to a commissioner for taking evidence in Nova Scotia may explain that the appointment of the commissioner is conditional on the instructions being accepted and may include instructions on each of the following subjects:

(a) impartial taking, and accurate recording, of the evidence;

(b) administering an oath or affirmation;

(c) the order of examinations;

(d) objections and the need for the witness to answer all questions including those objected to;

(e) the need to mark an exhibit;

(f) appointing, and swearing or affirming, a translator or signer;

(g) the requirement to cause a transcript to be prepared of everything said during the proceeding;

(h) the requirement that the commissioner certify that the transcript accurately transcribes the evidence and all else that was said during the proceeding;

(i) the requirement to deliver to the court a report, the original transcript, and each exhibit.

(2) Instructions to a commissioner for taking evidence outside Nova Scotia may inform the commissioner of the effect of Sections 2 and 67 of the *Evidence Act*, include the instructions required for an examination in Nova Scotia, and provide that the commissioner is authorized to do each of the following:

(a) take steps to ensure that the laws of perjury of the place where the examination is conducted apply to the taking of evidence;

(b) follow instructions given by the judicial authority of the place of the examination as a condition of compelling attendance.

(3) Instructions to a commissioner for an out-of-court examination may be in Form 56.05.

Forms

Instructions to Commissioner for Taking Evidence(56.05).

56.06 - Instructions for transmitting evidence

(1) Instructions to a commissioner for transmitting evidence by video conference of such quality the witness is as good as present in the courtroom may include instructions on each of the following subjects:

(a) impartial taking, and careful simultaneous transmission, of the evidence;

(b) administering an oath or affirmation, unless the judge determines the witness may only testify on a promise to tell the truth;

(c) following the directions of the presiding judge;

(d) describing on record at the beginning of the conference the room in which the witness is situate and the persons present;

(e) reporting on anything unusual that happens in the room, unless it appears in the transmission;

(f) communicating with the court if the transmission fails;

(g) the subjects referred to in Rule 56.05(2), if the examination is outside Nova Scotia;

(h) the need to mark exhibits as directed by the judge and to deliver them to the court.

(2) Instructions to a commissioner for transmitting evidence by any other kind of teleconference may include additional instructions on both of the following subjects:

(a) the need to keep the witness from communicating with others during the examination and from looking at a note or other thing containing information, except as directed by the examining party or the judge;

(b) showing the witness an exhibit and stating, for the record, that is being done.

(3) The instructions to a commissioner to transmit evidence may be in Form 56.06.

Forms

Instructions to Commissioner to Transmit Evidence (56.06).

56.07 - Judge as commissioner

The judge presiding, or assigned to preside, at a trial or hearing may be appointed a commissioner to take evidence outside Nova Scotia.

56.08 - Compelling attendance before commissioner

(1) A witness is compelled to attend a commission in Nova Scotia in accordance with Rule 50 - Subpoena.

(2) A party may make a motion for a letter of the court requesting an appropriate judicial authority to require attendance for examination under a commission to be held outside Nova Scotia, and the party must do all of the following:

(a) satisfy the judge that, under the law of the other jurisdiction, the judicial authority has the power to compel the attendance;

(b) inform the judge of the method used to compel attendance, the existence or otherwise of a perjury offence, the penalty for perjury, and the oath, affirmation, or other prerequisite in the law of perjury of the other jurisdiction;

(c) satisfy the judge that the request is in the interests of justice.

(3) The letter may contain the heading of the proceeding, be entitled “Letter of Request”, be addressed to the other judicial authority by its proper name, be issued by the prothonotary, and include all of the following information and requests:

(a) a description of the proceeding;

(b) a record of the judge’s finding that the examination is in the interests of justice;

(c) a description of the commission, including whether it is to take or transmit evidence;

(d) a request that the authority permit the commission to proceed in accordance with the instructions, modified as required by the laws of the other jurisdiction;

(e) the request to compel attendance, including any requirement to bring a document;

(f) a reference to reciprocity (see Rule 50.03(2) of Rule 50 - Subpoena, Sections 70 to 72 of the *Evidence Act*, and Rule 56.09).

(4) The letter of request may be in Form 56.08.

Forms

Letter of Request(56.08).

56.09 - Conduct of commission for another jurisdiction

For the purpose of Section 72 of the *Evidence Act*, a commission authorized by a judge at the request of the court of another jurisdiction may be conducted in accordance with the following procedures:

(a) procedures directed by the authorizing judge;

(b) procedures in the appointment or other instrument of the requesting jurisdiction, unless otherwise directed by the judge;

(c) procedures provided in this Rule for the conduct of a commission in Nova Scotia, unless they are inconsistent with the direction of the judge or procedures in the appointment or other instrument of the requesting jurisdiction.