

The trouble with experts...

Today, there are no regulatory requirements in place for forensic experts. Anyone can call themselves an investigative accountant or pathologist, and become a target for opposing counsel in court. That may soon change with the recent release of draft standards for investigative accounting and forensic pathology. **By Judy Van Rhijn**

When your whole case rides on the shoulders of your forensic expert, knowing they have to comply with a minimum standard of practice may soon relieve you of sleepless nights. The introduction of proposed standards for forensic pathologists and investigative accountants should help counsel weed out wanna-be experts. The practising bar welcomes it, but some think stronger measures are needed to rein in experts who cause more trouble than they're worth.

While standards of professional conduct are commonplace in most professions, in the forensics they are sadly lacking. Horror stories abound of wrongful convictions and lives ruined by unscrupulous or incompetent experts. The difficulties of standardizing and policing expert witnesses are at last being tackled on a number of fronts.

Pathology standards

First is the Office of the Chief Coroner in Ontario, which has formulated guidelines on autopsy practice for forensic pathologists involved in criminally suspicious cases and homicides. The guidelines cover general considerations on the role of forensic pathologists, advice on how best to take evidence and includes checklists for the most appropriate examinations, samples, testing and reporting for different crimes and causes of death. They emphasize the need to meet legal requirements of disclosure and the importance of avoiding speculative determinations of the cause of death.

Michael Pollanen, medical director and forensic pathologist at the Toronto Forensic Pathology Unit, says impetus for the project was the general international



trend to codify medical practice, but it is generally understood they respond to pressure from the defence bar and Crown's office in the wake of allegations against Dr. Charles Smith, former head of the pediatric forensic pathology unit at the Hospital for Sick Children in Toronto.

The chief coroner is reviewing 40 cases of suspicious deaths in which Smith did the autopsy or provided an opinion. Many parents appear to have been wrongfully charged with infanticide because of Smith's opinions, leading to incarceration, removal of their other children, financial ruin and immeasurable misery.

Cindy Wasser, a criminal lawyer with Wasser McArthur LLP and a director of the Association in Defence of the Wrongly Convicted, was prompted by her experience cross-examining Smith to call the Coroner's office. She proposed the establishment of the Forensic Services Advisory Board and forensic pathologist guidelines. "When I cross-examined Smith, I was shocked to learn there were no guidelines. There was an autopsy form, but it was not official by any means and anyone could do up their own. Smith's were never the same. I wanted to make sure that another Dr. Smith could never appear again."

Wasser considers Smith an anomaly in the Coroner's office — "one big bad apple" who should not necessarily taint the rest. Smith was so disorganized that a search of his office during an audit turned up forensic samples that were once considered lost. These included a hair found on the body of a child, which had been in his desk drawer for five years, and tissue samples that could exonerate a man convicted of killing his four-year-old niece 12 years ago.

"What we learned from Smith was that he could develop that way because there were no safeguards in place," says Wasser. There is no system for accrediting forensic pathologists in Canada and, until recently, no formal education advocacy program for pathologists nor oversight. "No one was formally critiquing the pathologists. No one watched them in court. They were hoping they were doing the right thing without knowing what the right thing was."

Wasser has since organized an advocacy program for pathologists that has been enthusiastically embraced by the profession. "There was a fear there would be too much work and accountability in following the guidelines, but now we hear them say: 'If this is all I have to do to save my butt and have no one criticize me, I'll do it.'"

They were particularly relieved when told their role is to present scientific evidence without being advocates for either side. "We taught them that they are not cops in white coats. They should let the evidence fall where it may," she says.

So far, the guidelines have not been rubber-stamped by the Forensic Services Advisory Board. Nevertheless, the guidelines are in use by all the regional forensic pathology units in Ontario and are available to police and lawyers as well as any doctor performing a medico-legal autopsy.

Investigative accounting standards

The Canadian Institute of Chartered Accountants (CICA) has orchestrated a Canada-wide initiative of a similar nature. On December 15, 2005 it released *Draft standards for investigative and forensic accounting engagements*, intended to enhance the usefulness of expert evidence given by chartered accountants and investigative forensic accountants (IFAs).

The guidelines apply to activities that require investigative accounting skills and an investigative mindset in the context of a potentially litigious dispute or a fraud case. They have been drafted to follow the sequence of an investigation, covering: ini-

tial engagement acceptance; planning and scope of work standards; information collection and analysis standards; file documentation standards; reporting standards; and expert testimony standards.

At the moment, there are no regulatory or legislative requirements for investigative accountants. "Anyone could put themselves up as an expert if they can find a party or legal counsel to hire them," says Ivor Gottschalk, president of Gottschalk Forensic Accounting & Valuations Inc. and chair of the CICA standards committee. "Of course they have to be qualified as part of the court's admission process as an expert."

The standards go beyond mere qualifications and address the expert's believability. Gottschalk thinks the reporting requirements in particular will have a real impact on court proceedings. IFAs must identify the documents and sources of information relied upon to prepare their report. "There is a real frustration in litigation when you are unable to determine the specifics of what the expert did. Court motions can take years to get answers or refusals.

The proposed standards on expert testimony emphasize transparency in decision-making and impartiality in testimony. Criminal lawyer John Rosen of Toronto-

based Rosen and Company laughs that he has seen experts list so many limitations that you start to question the value of their opinion. He also notes that going beyond your expertise is one of the grounds of appeal you often see in the Court of Appeal: "It creates a lot of pain and suffering."

There has been no scandal yet like that of Dr. Smith's forcing standards on CAs and other accountants. Lou Frapporti, a commercial litigator in the Hamilton office of Gowlings, thinks most accounting experts are not exhibiting the bad habits that these standards are trying to correct.

Even so, Gottschalk believes there has been an indirect call for standards from the legal community. "Judges and lawyers have been asking experts, what standards have you met? Now, the Court does not have to come up with standards itself, but will be able to rely on general standards adopted by the professional bodies or recognized by the courts."

The CICA guidelines have been 15 years in the making, slowed by the opposition of those who believe the rigours of cross-examination are enough to expose unprofessional advisors — a theory Rosen distrusts. "In the criminal area, a lot of wrongful convictions arise because opinions

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are not well-challenged in court," he says. "The most dishonest expert can come across in a very glib way and be difficult to expose. Juries give a lot of weight to experts because... they're the expert!"

Cross-examination with a well-thumbed copy of professional standards in hand may be another matter, however. Frapporti says it is not uncommon for an expert to be asked the manner in which they gathered materials, their instructions and if there are any standards they complied with. "These standards, if accepted, will be fodder for cross-examination," he suggests.

Rosen also believes the autopsy guidelines will be waved around the courtroom "when the right case comes along." Pollanen says he would welcome the practice of cross-examining pathologists using the guidelines but, as yet, none of the suspicious deaths that have occurred since the guidelines went into circulation have reached the courts. "We hope the guidelines will improve the role of the forensic pathologist," says Pollanen. "It is very important the expert's opinion is balanced and their decisions transparent."

Standards are double-edged

Despite all the plaudits, skepticism rings eternal in the legal mind. "Standards are one more assurance that the experts are bona fide over and above their qualifications," says Rosen, "however, they are not a panacea for all the problems."

This sentiment is echoed by Vern Krishna, counsel at Borden Ladner Gervais LLP in Ottawa. "The standards are all very good and exactly as they should be. If you were to write a blueprint for standards, this is the way you should do it. My only concern is not what should be, but what is. We need to address the real issue, that money can taint an opinion. It's a human nature problem — a natural tendency that needs to be counteracted."

Krishna is all too aware of cases that have become a battle of

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dueling experts and he does not see the standards will change this. "The standards are so amorphous and loose in some places that it would be difficult to expect the professional body to enforce them."

Rosen is also concerned with bias, but does not attribute it solely to the financial dynamic. "It's not so much who's paid by whom, but that when experts are consulted, they get married to their theory. It can act to the detriment of the party calling the witness. An intransigent expert won't admit the obvious and will lose credibility in the judge or jury's eyes.

Krishna has suggested a number of possible solutions that could save time and money. "The court could hire the expert and the parties pay. This would inject a form of neutrality. Alternatively, the parties could have to disclose all opinions, whether positive or negative, and whether they are intending to rely on them or not." He is quick to identify a strong objection to this proposal. "It infringes the doctrine of privilege — a very important doctrine you don't want to circumvent without some other safeguards in place."

His third suggestion calls on the experience of other countries: "Set up an impartial registry of experts with a history of their testimony — a databank you could look up

to find out how many times they have appeared for the plaintiff and how many times for the defendant. This would be one way of detecting bias." He cites the case of Dallas psychiatrist Dr. James Grigson, who has given so much unfavourable testimony on the probability of individuals engaging in future violent acts (a factor in determining the death penalty) that he has been nicknamed Dr. Death.

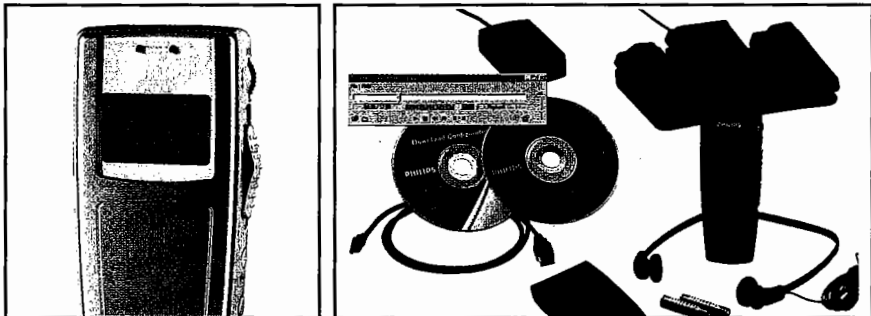
Krishna refers to the Expert Witness Institute, Academy of Experts and Society of Expert Witnesses in Britain as useful examples of registries, but stresses Canada needs to come up with a homegrown solution. "First of all, we don't need three. Once you have three, you have a division of views. And, we don't need 14 different databanks, one for each province or territory. That's not helpful. The problems of expert witnesses in British Columbia are not different to the problems in Newfoundland."

Meanwhile, the debate over standards seems to have been settled. The Smith case has shown that what many people thought could go without saying, does need to be said. Enshrining standards in the forensic area may be one modest step toward getting experts on the straight and narrow. **Q1**

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