

Rules of Civil Procedure
Late service of experts' reports: Proposed rule amendments developed by the Subcommittee on Expert Evidence
 (July 2021)

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PART 1: COMPARISON OF EXISTING AND PROPOSED RULES

Current RCP Rule	Current Wording	Description of Proposed Changes and Notes	Proposed Wording in Draft Regulation (Bold text = proposed addition; black line = proposed deletion)
N/A	<i>Note: On the day subsection 11 (1) of Schedule 3 to the Accelerating Access to Justice Act, 2021 comes into force, the Regulation is amended by striking out “case management master” and “a case management master”, as the case may be, wherever they appear and substituting in each case “associate judge” and “an associate judge” respectively. (See: O Reg. 383/21, s. 15)</i>	<p>Note: The present draft uses “case management master” throughout. If this proposal is approved and filed before the “associate judge” amendments come into effect, then the changes made by this proposal will be subject to those amendments in due course as part of the RCP.</p> <p>If this proposal is not approved before the “associate judge” amendments, the draft regulation will be revised to replace the references to “case management master” before being put forward for approval.</p>	[N/A]
33.01	<p>MOTION FOR MEDICAL EXAMINATION</p> <p>33.01 A motion by an adverse party for an order under section 105 of the Courts of Justice Act for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party.</p>	<p>Provides a time limit on the notice of a motion for a defence medical examination.</p>	<p>MOTION FOR MEDICAL EXAMINATION</p> <p>33.01 A motion by an adverse party for an order under section 105 of the Courts of Justice Act for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party given no later than 60 days after the trial record is filed.</p>

Current RCP Rule	Current Wording	Description of Proposed Changes and Notes	Proposed Wording in Draft Regulation (Bold text = proposed addition; black line = proposed deletion)
33.06(2)	<p>MEDICAL REPORTS</p> <p><i>Preparation of Report</i></p> <p>33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.</p> <p><i>Service of Report</i></p> <p>(2) The party who obtained the order shall forthwith serve the report on every other party.</p>	<p>Amends subrule (2) to indicate that r. 53.03 applies to medical reports and simultaneously conveys that medical reports are experts' reports.</p>	<p>MEDICAL REPORTS</p> <p><i>Preparation of Report</i></p> <p>33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.</p> <p><i>Service of Report</i></p> <p>(2) The party who obtained the order shall forthwith serve the report on every other party as soon as possible after receiving it and, in any event, no later than the time by which other experts' reports are required to be served under subrule 53.03 (1).</p>
36.01	<p>36.01 [...]</p> <p><i>Expert Witness</i></p> <p>(4) Before moving for leave to examine an expert witness under subrule (2), the moving party shall serve on every other party the report of the expert witness referred to in subrule 53.03 (1) (calling expert witness at trial) unless the court orders otherwise.</p>	<p>Revises a cross-reference to r. 53.03 to reflect headnote change.</p>	<p>36.01 [...]</p> <p><i>Expert Witness</i></p> <p>(4) Before moving for leave to examine an expert witness under subrule (2), the moving party shall serve on every other party the report of the expert witness referred to in subrule 53.03 (1) (calling expert witness at trial) (expert evidence) unless the court orders otherwise.</p>
39.01	<p>EVIDENCE BY AFFIDAVIT</p> <p><i>Generally</i></p> <p>39.01 [...]</p> <p><i>Expert Witness Evidence</i></p> <p>(7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1).</p>	<p>Revises a cross-reference to r. 53.03 to reflect new numbering.</p>	<p>EVIDENCE BY AFFIDAVIT</p> <p><i>Generally</i></p> <p>39.01 [...]</p> <p><i>Expert Witness Evidence</i></p> <p>(7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1) (3).</p>
48.04	<p>48.04 [...]</p> <p>(2) Subrule (1) does not,</p> <p>(a) relieve a party from complying with undertakings given by the party on an examination for discovery;</p> <p>(b) relieve a party from any obligation imposed by,</p> <p>(0.i) rule 29.1.03 (requirement for discovery plan),</p> <p>(i) rule 30.07 (disclosure of documents or errors subsequently discovered),</p> <p>(ii) rule 30.09 (abandonment of claim of privilege),</p> <p>(iii) rule 31.07 (failure to answer on discovery),</p> <p>(iv) rule 31.09 (disclosure of information subsequently obtained),</p>	<p>Revises a cross-reference to r. 53.03 to reflect headnote change.</p>	<p>48.04 [...]</p> <p>(2) Subrule (1) does not,</p> <p>(a) relieve a party from complying with undertakings given by the party on an examination for discovery;</p> <p>(b) relieve a party from any obligation imposed by,</p> <p>(0.i) rule 29.1.03 (requirement for discovery plan),</p> <p>(i) rule 30.07 (disclosure of documents or errors subsequently discovered),</p> <p>(ii) rule 30.09 (abandonment of claim of privilege),</p> <p>(iii) rule 31.07 (failure to answer on discovery),</p> <p>(iv) rule 31.09 (disclosure of information subsequently obtained),</p>

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	<p>(v) rule 51.03 (duty to respond to request to admit), (vi) rule 53.03 (service of report of expert witness); or (vii) Revoked: O. Reg. 131/04, s. 13. (c) preclude a party from resorting to rule 51.02 (request to admit facts or documents).</p>		<p>(v) rule 51.03 (duty to respond to request to admit), (vi) rule 53.03 (service of report of expert witness) (expert evidence); or (vii) Revoked: O. Reg. 131/04, s. 13. (c) preclude a party from resorting to rule 51.02 (request to admit facts or documents).</p>
N/A	[none]	<p>Creates entirely new rule to introduce certificate of readiness and case conference procedure for actions.</p> <p>Subrule (1) establishes the requirement to serve and file a certificate of readiness at least 60 days before the pre-trial conference in order to provide information on the status of intended experts' reports.</p> <p>Subrule (2) clarifies the timing requirement.</p> <p>Subrule (3) provides for a case conference to address delayed experts' reports or missing certificates of readiness, at party request.</p> <p>Subrule (4) requires parties to give reasons for their intended late service at the case conference.</p> <p>Subrule (5) clarifies the bindingness of the new or amended timetable established at the case conference.</p> <p>Subrule (6) prohibits trial adjournment under this rule.</p> <p>Subrule (7) allows for rescheduling of the pre-trial conference provided that it does not impact trial scheduling.</p> <p>Subrule (8) sets out the factors to be considered in determining whether to reschedule the pre-trial conference</p> <p>Subrule (9) provides that consequence for late service that have already materialized under r. 53.03(12) are not avoided if the pre-trial conference is rescheduled under this rule.</p> <p>Subrule (10) provides for an order for costs at the case conference under this rule.</p> <p>Subrule (11) prohibits rescheduling and adjournment of the pre-trial conference on the grounds of a late expert's report where parties have failed to avail themselves of the case conference mechanism in this rule.</p>	<p>CERTIFICATE OF READINESS TO BE FILED (ACTIONS)</p> <p>50.03.1 (1) At least 60 days before a pre-trial conference in an action, each party shall deliver a certificate of readiness (Form 50A) indicating whether the party has served or intends to serve a report of an expert witness to which subrule 53.03 (1) or (2) applies and, if so,</p> <p>(a) whether, in the case of any such report that has not already been served, the party intends to serve the report by the date by which a pre-trial conference brief must be filed under rule 50.04; and</p> <p>(b) if the party does not intend to serve a report by the date referred to in clause (a), the reason why.</p> <p><i>Application</i></p> <p>(2) Subrule (1) applies regardless of any extension made in accordance with rule 53.03 of the time to file the report or of any request in accordance with subrule 53.03 (8) for a case conference, but, for greater certainty, if a pre-trial conference is rescheduled for the purposes of accommodating an extension of time for service of a report, subrule (1) applies with respect to the rescheduled pre-trial conference.</p> <p><i>Request for Case Conference</i></p> <p>(3) If a party fails to comply with subrule (1) or indicates in a certificate of readiness that the party does not intend to serve a report by the time referred to in clause (1) (a), the party or any other party may request a case conference under rule 50.13 in order to establish or amend a timetable for service of the report.</p> <p><i>Requirement to Provide Reasons</i></p> <p>(4) At the case conference, the party who indicated in a certificate of readiness that the party does not intend to serve a report by the time referred to in clause (1) (a) shall explain the reason why.</p> <p><i>Timetable may not be Amended on Consent</i></p> <p>(5) A timetable established or amended at the case conference may not be amended by the parties under subrule 3.04 (1) or (2).</p> <p><i>Trial may not be Adjourned</i></p>

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			<p>(6) Despite rule 52.02, the judge or case management master shall not adjourn the trial for the purposes of accommodating the timetable.</p> <p><i>Pre-Trial Conference may be Rescheduled</i></p> <p>(7) The judge or case management master may, for the purposes of accommodating the timetable, order that the pre-trial conference be rescheduled to a later date, as long as doing so does not require an adjournment of the trial.</p> <p><i>Factors to Consider</i></p> <p>(8) In determining whether to reschedule the pre-trial conference, the judge or case management master shall take into account,</p> <ul style="list-style-type: none"> (a) the implications of a report not being available at the pre-trial conference; and (b) any prejudice that a rescheduling of the pre-trial conference may cause to a party. <p><i>Application of R. 53.03 (12) not Affected</i></p> <p>(9) Neither the establishment or amendment of a timetable at a case conference referred to in subrule (3) nor a rescheduling of a pre-trial conference under subrule (7) affects the operation of subrule 53.03 (12) in relation to a failure to comply with subrule 53.03 (1) or (2) that has already occurred.</p> <p><i>Costs of the Case Conference</i></p> <p>(10) The judge or case management master may fix a party's costs of the case conference on a substantial indemnity basis and order the party to pay them promptly, if,</p> <ul style="list-style-type: none"> (a) the party has not obtained an extension of the time for service of a report; and (b) the judge or case management master is satisfied that the party, <ul style="list-style-type: none"> (i) is not prepared to serve the report by the time referred to in clause (1) (a), and (ii) has no reasonable explanation for the failure to comply with the requirements of rule 53.03. <p><i>If no Case Conference</i></p> <p>(11) If a party fails to comply with subrule (1), or indicates in a certificate of readiness that the party does not intend to serve a report by the time referred to in clause (1) (a), but a case conference is not requested, the pre-trial conference shall not be rescheduled or adjourned on the basis that a report has not been served.</p>

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50.04	<p>MATERIALS TO BE FILED</p> <p>50.04 At least five days before a pre-trial conference, each party shall file with proof of service a pre-trial conference brief containing concise statements, without argument, of the following matters:</p> <ol style="list-style-type: none"> 1. The nature of the proceeding. 2. The issues raised and the party's position. 3. In the case of an action, the names of the witnesses that the party is likely to call at the trial and the length of time that the evidence of each of those witnesses is estimated to take. 4. The steps that need to be completed before the action is ready for trial or the application is ready to be heard, and the length of time that it is estimated that the completion of those steps will take. 	<p>Makes administrative change to the headnote.</p> <p>Note: By drafting convention, this change does not appear in the draft regulation itself (<i>below</i>), but will be made by the Office of Legislative Counsel as an administrative change.</p>	<p>MATERIALS PRE-TRIAL CONFERENCE BRIEF TO BE FILED</p> <p>50.04 At least five days before a pre-trial conference, each party shall file with proof of service a pre-trial conference brief containing concise statements, without argument, of the following matters:</p> <ol style="list-style-type: none"> 1. The nature of the proceeding. 2. The issues raised and the party's position. 3. In the case of an action, the names of the witnesses that the party is likely to call at the trial and the length of time that the evidence of each of those witnesses is estimated to take. 4. The steps that need to be completed before the action is ready for trial or the application is ready to be heard, and the length of time that it is estimated that the completion of those steps will take.
50.07	<p>POWERS</p> <p>50.07 (1) If the proceeding is not settled at the pre-trial conference, the presiding judge or case management master may,</p> <ol style="list-style-type: none"> (a) establish a timetable and, subject to the direction of the regional senior judge or a judge designated by him or her, fix a date for the trial or hearing; (b) order a case conference under rule 50.13 if it is impractical to establish a timetable; and (c) make such order as the judge or case management master considers necessary or advisable with respect to the conduct of the proceeding, including any order under subrule 20.05 (1) or (2). <p><i>Order Binds Parties</i></p> <p>(2) An order made under this rule binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustice.</p> <p><i>Copy of Order</i></p> <p>(3) A copy of any order made under this rule shall be placed with the trial or application record.</p>	<p>Adds three new subrules:</p> <p>Subrule (1.1) gives the judge or case management master presiding at the pre-trial conference the power to “cure” the consequences of a late expert’s report under certain conditions, in the sense that the report is rendered not inadmissible by reason of late service for the purposes of r. 53.03 (12).</p> <p>Subrule (1.2) provides that the trial judge may not override such a “cure”.</p> <p>Subrule (1.3) clarifies that subrule (1.2) only has effect where an order respecting service made by the pre-trial conference judge or case management master is complied with.</p>	<p>POWERS</p> <p>50.07 (1) If the proceeding is not settled at the pre-trial conference, the presiding judge or case management master may,</p> <ol style="list-style-type: none"> (a) establish a timetable and, subject to the direction of the regional senior judge or a judge designated by him or her, fix a date for the trial or hearing; (b) order a case conference under rule 50.13 if it is impractical to establish a timetable; and (c) make such order as the judge or case management master considers necessary or advisable with respect to the conduct of the proceeding, including any order under subrule 20.05 (1) or (2). <p><i>Admissibility of Expert Evidence</i></p> <p>(1.1) The presiding judge or case management master may, despite subrule 53.03 (12), order that expert evidence is not inadmissible at trial on the basis of a failure to serve the report of an expert witness within the time specified by that subrule, if,</p> <ol style="list-style-type: none"> (a) the report was served before the pre-trial conference; or (b) the report is served by a date that the presiding judge or case management master specifies in the order. <p><i>Effect of Order under Subrule (1.1)</i></p> <p>(1.2) The trial judge may not order that expert evidence that is the subject of an order under subrule (1.1) is inadmissible, except for a reason unrelated to the late service of the report.</p> <p>(1.3) In the case of a report that was required to be served by a date specified in an order made under subrule (1.1), subrule (1.2) applies only if the party complied with the order.</p>

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			<p><i>Order Binds Parties</i></p> <p>(2) An order made under this rule binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustice.</p> <p><i>Copy of Order</i></p> <p>(3) A copy of any order made under this rule shall be placed with the trial or application record.</p>
50.12	<p>COSTS OF PRE-TRIAL CONFERENCE</p> <p>50.12 At the pre-trial conference, the presiding judge or case management master may make an order for costs of the conference, but in the absence of such an order the costs shall be assessed as part of the costs of the proceeding.</p>	<p>Adds a new subrule (2), which provides for new cost powers at a pre-trial conference in relation to late experts' reports.</p>	<p>COSTS OF PRE-TRIAL CONFERENCE</p> <p>50.12 (1) At the pre-trial conference, the presiding judge or case management master may make an order for costs of the conference, but in the absence of such an order the costs shall be assessed as part of the costs of the proceeding.</p> <p>(2) Despite subrule (1), the judge or case management master may fix a party's costs of the pre-trial conference on a substantial indemnity basis and order the party to pay them promptly, if,</p> <p style="padding-left: 40px;">(a) the party did not serve the report of an expert witness by the date by which the pre-trial conference brief was required to be filed under rule 50.04, after having,</p> <p style="padding-left: 80px;">(i) filed a certificate of readiness (form 50a) that stated that the party intended to serve the report by that date, or</p> <p style="padding-left: 80px;">(ii) been ordered by the court to serve the report by that date; and</p> <p style="padding-left: 40px;">(b) the judge or case management master is satisfied that the party has no reasonable explanation for the failure.</p>
53.03	<p>EXPERT WITNESSES</p> <p><i>Experts' Reports</i></p> <p>53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).</p> <p>(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).</p> <p>(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:</p> <ol style="list-style-type: none"> 1. The expert's name, address and area of expertise. 2. The expert's qualifications and employment and educational experiences in his or her area of expertise. 	<p>Reframes the focus of the rule to be on expert evidence, rather than expert witnesses. Remakes most provisions and renumbers those that remain, as follows:</p> <p>Subrules (1) and (2) are revised to refer to the tendering of expert evidence rather than the calling of expert witnesses.</p> <p>Current subrule (2.1) is renumbered as subrule (3)</p> <p>Current subrule (2.2) is renumbered as subrule (5) and the word "schedule" is replaced with the defined term "timetable".</p> <p>Current subrule (3) is split into three distinct provisions:</p> <ul style="list-style-type: none"> • a new subrule (4) setting out the deadline for service of 	<p>EXPERT EVIDENCE WITNESSES</p> <p><i>Experts' Reports</i></p> <p>53.03 (1) A party who intends to tender expert evidence call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report of the expert witness, signed by the expert, containing the information listed in subrule (2.1) (3).</p> <p>(2) A party who intends to tender expert evidence call an expert witness at trial to respond to the expert witness evidence of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report of the expert witness, signed by the expert, containing the information listed in subrule (2.1) (3).</p> <p>(2.1) (3) A report provided for the purposes of subrule (1) or (2) shall contain the following information:</p> <ol style="list-style-type: none"> 1. The expert's name, address and area of expertise.

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	<p>3. The instructions provided to the expert in relation to the proceeding.</p> <p>4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.</p> <p>5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.</p> <p>6. The expert's reasons for his or her opinion, including,</p> <p style="padding-left: 20px;">i. a description of the factual assumptions on which the opinion is based,</p> <p style="padding-left: 20px;">ii. a description of any research conducted by the expert that led him or her to form the opinion, and</p> <p style="padding-left: 20px;">iii. a list of every document, if any, relied on by the expert in forming the opinion.</p> <p>7. An acknowledgement of expert's duty (Form 53) signed by the expert.</p> <p><i>Schedule for Service of Reports</i></p> <p>(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1), (2) and (3), unless the court orders otherwise.</p> <p><i>Sanction for Failure to Address Issue in Report or Supplementary Report</i></p> <p>(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,</p> <p style="padding-left: 20px;">(a) a report served under this rule;</p> <p style="padding-left: 20px;">(b) a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or</p> <p style="padding-left: 20px;">(c) a responding supplementary report served on every other party to the action not less than 15 days before the commencement of the trial.</p> <p><i>Extension or Abridgment of Time</i></p> <p>(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,</p> <p style="padding-left: 20px;">(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or</p> <p style="padding-left: 20px;">(b) by the court, on motion.</p>	<p>supplementary and responding supplementary reports;</p> <ul style="list-style-type: none"> • a new subrule (12) setting out the consequences for failure to serve an expert's report on time; and • a new subrule (13) setting out the consequences for failure to address an issue in an expert's report. <p>Current subrule (4) regarding extensions and abridgments of time for service of experts' reports on a motion or at a conference is revoked and replaced with a new subrule (6) modifying r. 3.02 with the effect that extensions can be requested only by case conference up to the deadline to file a pre-trial conference brief or up to trial commencement (in the case of supplementary and responding supplementary reports), and not by motion. Note that the continued availability of consent under r. 3.02(4) is implied.</p> <p>New subrule (7) provides that consent to an extension cannot be considered a ground to reschedule a pre-trial conference or adjourn trial.</p> <p>New subrule (8) provides that a case conference to request an extension under this rule must be brought by the service deadlines under (1), (2), or (4).</p> <p>New subrule (9) provides that where time to serve a report is extended, the time to serve a responding report is automatically extended by the same amount of time or an amount of time otherwise specified by the presiding judge or case management master.</p> <p>New subrule (10) prohibits adjournment of trial to accommodate an extension of time for service of a report.</p> <p>New subrule (11) provides that the pre-trial conference shall be rescheduled to</p>	<p>2. The expert's qualifications and employment and educational experiences in his or her area of expertise.</p> <p>3. The instructions provided to the expert in relation to the proceeding.</p> <p>4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.</p> <p>5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.</p> <p>6. The expert's reasons for his or her opinion, including,</p> <p style="padding-left: 20px;">i. a description of the factual assumptions on which the opinion is based,</p> <p style="padding-left: 20px;">ii. a description of any research conducted by the expert that led him or her to form the opinion, and</p> <p style="padding-left: 20px;">iii. a list of every document, if any, relied on by the expert in forming the opinion.</p> <p>7. An acknowledgement of expert's duty (Form 53) signed by the expert.</p> <p><i>Supplementary Reports</i></p> <p>(4) A supplementary report of an expert witness may be served by a party in accordance with the following rules:</p> <p style="padding-left: 20px;">1. A party who served a report under subrule (1) may, not less than 45 days before the commencement of the trial, serve on every other party a supplementary report, signed by the expert.</p> <p style="padding-left: 20px;">2. If a supplementary report is served under paragraph 1 on a party who served a report under subrule (2), the party may, not less than 15 days before the commencement of the trial, serve on every other party a responding supplementary report, signed by the expert.</p> <p><i>Schedule Timetable for Service of Reports</i></p> <p>(2.2) (5) Within 60 days after an action is set down for trial, the parties shall agree to a schedule timetable setting out dates for the service of experts' reports in order to meet the requirements of subrules (1), (2) and (3), unless the court orders otherwise.</p> <p><i>Sanction for Failure to Address Issue in Report or Supplementary Report</i></p> <p>(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,</p> <p style="padding-left: 20px;">(a) a report served under this rule;</p> <p style="padding-left: 20px;">(b) a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or</p> <p style="padding-left: 20px;">(c) a responding supplementary report served on every other party to the action not less than 15 days before the commencement of the trial.</p>

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		<p>accommodate an extension of time to serve a report, provided that doing so does not necessitate a trial adjournment.</p> <p>New subrule (12) (which, as noted above, is a splitting off of current subrule (3)) provides that if an expert's report is served late, their evidence generally (both their testimony and the report itself) shall be inadmissible at trial except with leave of the trial judge.</p> <p>New subrule (13) (which, as noted above, is a splitting off of the current subrule (3)) provides that an expert may not testify to an issue unless the substance of their testimony on the issue was captured in their report, except with leave of the trial judge.</p>	<p><i>Extension or Abridgment of Time</i></p> <p>(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,</p> <p>(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or</p> <p>(b) by the court, on motion.</p> <p><i>Extensions</i></p> <p>(6) Subrules 3.02 (1) and (2) apply with the following modifications respecting the extension of a time prescribed under subrule (1), (2) or (4) for service of a report:</p> <ol style="list-style-type: none"> 1. The court may extend the time under subrule 3.02 (1) only by an order made at a case conference requested in accordance with subrule (8). 2. Parties may not request the extension by motion, despite subrules 3.02 (1) and (2). <p><i>If Extended on Consent</i></p> <p>(7) The court shall not consider any extension of time prescribed under subrule (1), (2) or (4) for service of a report by the parties on consent under subrule 3.02 (4) in determining whether to order that the pre-trial conference be rescheduled or the trial be adjourned.</p> <p><i>Request for Case Conference</i></p> <p>(8) A party who wishes to extend a time prescribed under subrule (1), (2) or (3) for service of a report other than on consent shall, before the time expires, request a case conference under rule 50.13 for an order extending the time.</p> <p><i>Automatic Extension of Subsequent Deadline</i></p> <p>(9) If the time for service of a report under subrule (1) or paragraph 1 of subrule (4) is extended by the judge or case management master, the time for service by any party of any responding report is extended by the same period or by such other period as may be specified by the judge or case management master.</p> <p><i>Trial may not be Adjourned</i></p> <p>(10) Despite rule 52.02, the judge or case management master shall not adjourn the trial for the purposes of accommodating an extension of time for service of a report.</p> <p><i>Effect of Extension on Pre-Trial Conference</i></p> <p>(11) If an extension of time for service of a report by a judge or case management master or under subrule (9) would result in a deadline for service that is later than the date of the pre-trial conference, the judge or case</p>

Current RCP Rule	Current Wording	Description of Proposed Changes and Notes	Proposed Wording in Draft Regulation (Bold text = proposed addition; black line = proposed deletion)
			<p>management master shall order that the pre-trial conference be rescheduled to a date following the last deadline for service, but shall not reschedule the pre-trial conference to a date that would require an adjournment of the trial.</p> <p><i>Failure to Serve Report in Time</i></p> <p>(12) Except as provided in subrule 50.07 (1.1), if a report by an expert witness is not served within the time prescribed or ordered under this rule or consented to by the parties under subrule 3.02 (4), as the case may be, then the expert evidence shall not be admissible at trial except with leave of the trial judge.</p> <p><i>Failure to Address Issue in Report</i></p> <p>(13) Except with leave of the trial judge, an expert witness may not testify with respect to an issue unless the substance of the expert’s testimony with respect to that issue is set out in a report under this rule.</p>
53.08	<p>EVIDENCE ADMISSIBLE ONLY WITH LEAVE</p> <p>53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.</p> <p>(2) Subrule (1) applies with respect to the following provisions:</p> <ol style="list-style-type: none"> 1. Subrule 30.08 (1) (failure to disclose document). 2. Rule 30.09 (failure to abandon claim of privilege). 3. Rule 31.07 (failure to answer on discovery). 4. Subrule 31.09 (3) (failure to correct answers on discovery). 5. Subrule 53.03 (3) (failure to serve expert’s report). 6. Subrule 76.03 (3) (failure to disclose witness). 	<p>Replaces the reference in subrule (2) to failure to serve an expert’s report (current r. 53.03(3)) with a reference to the new r. 53.03(13) regarding failure to address an issue in a report.</p> <p>Creates a new subrule (3) setting out a test to be applied by the trial judge in relation to r. 53.03(12) requests, i.e. leave to admit expert evidence where the expert’s report was served late.</p>	<p>EVIDENCE ADMISSIBLE ONLY WITH LEAVE</p> <p>53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.</p> <p>(2) Subrule (1) applies with respect to the following provisions:</p> <ol style="list-style-type: none"> 1. Subrule 30.08 (1) (failure to disclose document). 2. Rule 30.09 (failure to abandon claim of privilege). 3. Rule 31.07 (failure to answer on discovery). 4. Subrule 31.09 (3) (failure to correct answers on discovery). 5. Subrule 53.03 (3) (failure to serve expert’s report). 5. Subrule 53.03 (13) (failure to address issue in report). 6. Subrule 76.03 (3) (failure to disclose witness). <p>(3) In the case of a leave under subrule 53.03 (12) (failure to serve report in time), leave may be granted if the trial judge is satisfied that,</p> <ol style="list-style-type: none"> (a) there is a reasonable explanation for the failure to serve a report within the time specified by that subrule; and (b) granting the leave would not, <ol style="list-style-type: none"> (i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or (ii) cause undue delay in the conduct of the trial.

Current RCP Rule	Current Wording	Description of Proposed Changes and Notes	Proposed Wording in Draft Regulation (Bold text = proposed addition; black line = proposed deletion)
55.02	<p>55.02 [...]</p> <p><i>Expert Witnesses</i></p> <p>(14.1) Rule 53.03 (expert witness) and rule 53.08 (evidence admissible only with leave) apply, with necessary modifications, to the calling of an expert witness on a reference.</p>	<p>Revises a cross-reference to r. 53.03 to reflect headnote change.</p>	<p>55.02 [...]</p> <p><i>Expert Evidence Witnesses</i></p> <p>(14.1) Rule 53.03 (expert evidence witness) and rule 53.08 (evidence admissible only with leave) apply, with necessary modifications, to the calling of an expert witness on a reference.</p>
76.09.1	<p>EXPERT AFFIDAVITS</p> <p>76.09.1 (1) A party who intends to call expert evidence at the trial of the action shall comply with rule 53.03.</p> <p>(2) an expert report served under rule 53.03 shall be appended to an affidavit of the expert in which the expert adopts the report for the purpose of giving it as evidence in the action.</p>	<p>Replaces “call” with “tender” for consistency.</p>	<p>EXPERT AFFIDAVITS</p> <p>76.09.1 (1) A party who intends to tender call expert evidence at the trial of the action shall comply with rule 53.03.</p> <p>(2) an expert report served under rule 53.03 shall be appended to an affidavit of the expert in which the expert adopts the report for the purpose of giving it as evidence in the action.</p>
76.10	<p>PRE-TRIAL CONFERENCE</p> <p><i>Notice</i></p> <p>76.10 (1) A pre-trial conference shall be scheduled in accordance with rule 50.02.</p> <p><i>Parties’ Proposed Trial Management Plan</i></p> <p>(2) At least 30 days before the pre-trial conference, the parties shall agree to a proposed trial management plan that contains the following:</p> <ol style="list-style-type: none"> 1. a list of every witness, including every expert witness, whose evidence a party intends to adduce at trial. 2. a division of time between the parties, the total of which shall not exceed five days, that sets out the allotted times for each party for, <ol style="list-style-type: none"> i. opening statement, ii. the presentation of evidence in chief by affidavit and under rule 31.11, iii. cross-examination of deponents, iv. re-examination of any deponents who are cross-examined, and v. oral argument. <p>(3) Revoked: O. Reg. 438/08, s. 58 (1).</p> <p><i>Documents</i></p> <p>(4) Despite rule 50.04 (materials to be filed before pre-trial conference), at least five days before the pre-trial conference, each party shall,</p> <ol style="list-style-type: none"> (a) file, <ol style="list-style-type: none"> (0.i) a copy of the parties’ proposed trial management plan, 	<p>Updates a cross-reference in subrule (4).</p>	<p>PRE-TRIAL CONFERENCE</p> <p><i>Notice</i></p> <p>76.10 (1) A pre-trial conference shall be scheduled in accordance with rule 50.02.</p> <p><i>Parties’ Proposed Trial Management Plan</i></p> <p>(2) At least 30 days before the pre-trial conference, the parties shall agree to a proposed trial management plan that contains the following:</p> <ol style="list-style-type: none"> 1. a list of every witness, including every expert witness, whose evidence a party intends to adduce at trial. 2. a division of time between the parties, the total of which shall not exceed five days, that sets out the allotted times for each party for, <ol style="list-style-type: none"> i. opening statement, ii. the presentation of evidence in chief by affidavit and under rule 31.11, iii. cross-examination of deponents, iv. re-examination of any deponents who are cross-examined, and v. oral argument. <p>(3) Revoked: O. Reg. 438/08, s. 58 (1).</p> <p><i>Documents</i></p> <p>(4) Despite rule 50.04 (materials to be filed before pre-trial conference) (pre-trial conference brief to be filed), at least five days before the pre-trial conference, each party shall,</p> <ol style="list-style-type: none"> (a) file,

Current RCP Rule	Current Wording	Description of Proposed Changes and Notes	Proposed Wording in Draft Regulation (Bold text = proposed addition; black line = proposed deletion)
	<p>(i) a copy of the party's affidavit of documents and copies of the documents relied on for the party's claim or defence,</p> <p>(ii) a copy of any expert affidavit, other than a supplementary expert affidavit, and</p> <p>(iii) any other material necessary for the conference; and</p> <p>(b) deliver,</p> <p>(i) a statement, not exceeding three pages, setting out the issues and the party's position with respect to them, and</p> <p>(ii) a trial management checklist (form 76d).</p> <p><i>Trial Planning</i></p> <p>(5) The pre-trial conference judge or case management master shall,</p> <p>(a) fix the number of witnesses, other than expert witnesses, whose evidence each party may adduce at trial;</p> <p>(b) fix dates for the delivery of any witness affidavits, including any outstanding expert affidavits;</p> <p>(c) fix a date for trial, subject to the direction of the regional senior judge; and</p> <p>(d) approve the parties' proposed trial management plan, with any changes to the order or time of presentation, or any other changes, that the pre-trial conference judge or case management master may specify, subject to the requirement that the duration of the trial not exceed five days.</p>		<p>(0.i) a copy of the parties' proposed trial management plan,</p> <p>(i) a copy of the party's affidavit of documents and copies of the documents relied on for the party's claim or defence,</p> <p>(ii) a copy of any expert affidavit, other than a supplementary expert affidavit, and</p> <p>(iii) any other material necessary for the conference; and</p> <p>(b) deliver,</p> <p>(i) a statement, not exceeding three pages, setting out the issues and the party's position with respect to them, and</p> <p>(ii) a trial management checklist (form 76d).</p> <p><i>Trial Planning</i></p> <p>(5) The pre-trial conference judge or case management master shall,</p> <p>(a) fix the number of witnesses, other than expert witnesses, whose evidence each party may adduce at trial;</p> <p>(b) fix dates for the delivery of any witness affidavits, including any outstanding expert affidavits;</p> <p>(c) fix a date for trial, subject to the direction of the regional senior judge; and</p> <p>(d) approve the parties' proposed trial management plan, with any changes to the order or time of presentation, or any other changes, that the pre-trial conference judge or case management master specify, subject to the requirement that the duration of the trial not exceed five days.</p>
Table of Forms		Prescribes a new Certificate of Readiness form to be used under the new r. 50.03.1.	<p>[New form to be added to Table of Forms]</p> <p>Form 50a – Certificate of Readiness</p>

PART 2: TEXT OF THE DRAFT REGULATION

Caution:

This consultation draft is intended to facilitate dialogue concerning its contents. Should the decision be made to proceed with the proposal, the comments received during consultation will be considered during the final preparation of the regulation. The content, structure, form and wording of the consultation draft are subject to change as a result of the consultation process and as a result of review, editing and correction by the Office of Legislative Counsel.

CONSULTATION DRAFT

ONTARIO REGULATION

to be made under the

COURTS OF JUSTICE ACT

Amending Reg. 194 of R.R.O. 1990

(RULES OF CIVIL PROCEDURE)

Note to draft: All references in the Rules of Civil Procedure to “case management master” are to be replaced with “associate judge” on the day subsection 11 (1) of Schedule 3 to the Accelerating Access to Justice Act, 2021 comes into force.

1. Rule 33.01 of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by adding “given no later than 60 days after the trial record is filed” at the end.

2. Subrule 33.06 (2) of the Regulation is revoked and the following substituted:

Service of Report

(2) The party who obtained the order shall serve the report on every other party as soon as possible after receiving it and, in any event, no later than the time by which other experts’ reports are required to be served under subrule 53.03 (1).

3. Subrule 36.01 (4) of the Regulation is amended by striking out “(calling expert witness at trial)” and substituting “(expert evidence)”.

4. Subrule 39.01 (7) of the Regulation is amended by striking out “subrule 53.03 (2.1)” at the end and substituting “subrule 53.03 (3)”.

5. Subclause 48.04 (2) (b) (vi) of the Regulation is amended by striking out “(service of report of expert witness)” and substituting “(expert evidence)”.

6. The Regulation is amended by adding the following rule:

CERTIFICATE OF READINESS TO BE FILED (ACTIONS)

50.03.1 (1) At least 60 days before a pre-trial conference in an action, each party shall deliver a certificate of readiness (Form 50A) indicating whether the party has served or intends to serve a report of an expert witness to which subrule 53.03 (1) or (2) applies and, if so,

- (a) whether, in the case of any such report that has not already been served, the party intends to serve the report by the date by which a pre-trial conference brief must be filed under rule 50.04; and
- (b) if the party does not intend to serve a report by the date referred to in clause (a), the reason why.

Application

(2) Subrule (1) applies regardless of any extension made in accordance with rule 53.03 of the time to file the report or of any request in accordance with subrule 53.03 (8) for a case conference, but, for greater certainty, if a pre-trial conference is rescheduled for the purposes of accommodating an extension of time for service of a report, subrule (1) applies with respect to the rescheduled pre-trial conference.

Request for Case Conference

(3) If a party fails to comply with subrule (1) or indicates in a certificate of readiness that the party does not intend to serve a report by the time referred to in clause (1) (a), the party or any other party may request a case conference under rule 50.13 in order to establish or amend a timetable for service of the report.

Requirement to Provide Reasons

(4) At the case conference, the party who indicated in a certificate of readiness that the party does not intend to serve a report by the time referred to in clause (1) (a) shall explain the reason why.

Timetable may not be Amended on Consent

- (5) A timetable established or amended at the case conference may not be amended by the parties under subrule 3.04 (1) or (2).

Trial may not be Adjourned

(6) Despite rule 52.02, the judge or case management master shall not adjourn the trial for the purposes of accommodating the timetable.

Pre-Trial Conference may be Rescheduled

(7) The judge or case management master may, for the purposes of accommodating the timetable, order that the pre-trial conference be rescheduled to a later date, as long as doing so does not require an adjournment of the trial.

Factors to Consider

- (8) In determining whether to reschedule the pre-trial conference, the judge or case management master shall take into account,
- (a) the implications of a report not being available at the pre-trial conference; and
 - (b) any prejudice that a rescheduling of the pre-trial conference may cause to a party.

Application of R. 53.03 (12) not Affected

(9) Neither the establishment or amendment of a timetable at a case conference referred to in subrule (3) nor a rescheduling of a pre-trial conference under subrule (7) affects the operation of subrule 53.03 (12) in relation to a failure to comply with subrule 53.03 (1) or (2) that has already occurred.

Costs of the Case Conference

(10) The judge or case management master may fix a party's costs of the case conference on a substantial indemnity basis and order the party to pay them promptly, if,

- (a) the party has not obtained an extension of the time for service of a report; and
- (b) the judge or case management master is satisfied that the party,
 - (i) is not prepared to serve the report by the time referred to in clause (1) (a), and
 - (ii) has no reasonable explanation for the failure to comply with the requirements of rule 53.03.

If no Case Conference

(11) If a party fails to comply with subrule (1), or indicates in a certificate of readiness that the party does not intend to serve a report by the time referred to in clause (1) (a), but a case conference is not requested, the pre-trial conference shall not be rescheduled or adjourned on the basis that a report has not been served.

Note to draft: the headnote for R. 50.04 would be changed from "Materials to be Filed" to "Pre-Trial Conference Brief to be Filed". A consequential amendment is made to r. 76.10 (4), below.

7. Rule 50.07 of the Regulation is amended by adding the following subrules:

Expert Evidence

(1.1) The presiding judge or case management master may, despite subrule 53.03 (12), order that expert evidence is not inadmissible at trial on the basis of a failure to serve the report of an expert witness within the time specified by that subrule, if,

- (a) the report was served before the pre-trial conference; or
- (b) the report is served by a date that the presiding judge or case management master specifies in the order.

Effect of Order under Subrule (1.1)

(1.2) The trial judge may not order that expert evidence that is the subject of an order under subrule (1.1) is inadmissible, except for a reason unrelated to the late service of the report.

(1.3) In the case of a report that was required to be served by a date specified in an order made under subrule (1.1), subrule (1.2) applies only if the party complied with the order.

8. Rule 50.12 of the Regulation is amended by adding the following subrule:

(2) Despite subrule (1), the judge or case management master may fix a party's costs of the pre-trial conference on a substantial indemnity basis and order the party to pay them promptly, if,

- (a) the party did not serve the report of an expert witness by the date by which the pre-trial conference brief was required to be filed under rule 50.04, after having,
 - (i) filed a certificate of readiness (Form 50A) that stated that the party intended to serve the report by that date, or
 - (ii) been ordered by the court to serve the report by that date; and
- (b) the judge or case management master is satisfied that the party has no reasonable explanation for the failure.

9. Rule 53.03 of the Regulation is revoked and the following substituted:

EXPERT EVIDENCE

Experts' Reports

53.03 (1) A party who intends to tender expert evidence at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report of the expert witness, signed by the expert, containing the information listed in subrule (3).

(2) A party who intends to tender expert evidence at trial to respond to the expert evidence of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report of the expert witness, signed by the expert, containing the information listed in subrule (3).

(3) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in their area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for the opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led them to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

Supplementary Reports

(4) A supplementary report of an expert witness may be served by a party in accordance with the following rules:

1. A party who served a report under subrule (1) may, not less than 45 days before the commencement of the trial, serve on every other party a supplementary report, signed by the expert.
2. If a supplementary report is served under paragraph 1 on a party who served a report under subrule (2), the party may, not less than 15 days before the commencement of the trial, serve on every other party a responding supplementary report, signed by the expert.

Timetable for Service of Reports

(5) Within 60 days after an action is set down for trial, the parties shall agree to a timetable setting out dates for the service of experts' reports, unless the court orders otherwise.

Extensions

(6) Subrules 3.02 (1) and (2) apply with the following modifications respecting the extension of a time prescribed under subrule (1), (2) or (4) for service of a report:

1. The court may extend the time under subrule 3.02 (1) only by an order made at a case conference requested in accordance with subrule (8).
2. Parties may not request the extension by motion, despite subrules 3.02 (1) and (2).

If Extended on Consent

(7) The court shall not consider any extension of a time prescribed under subrule (1), (2) or (4) for service of a report by the parties on consent under subrule 3.02 (4) in determining whether to order that the pre-trial conference be rescheduled or the trial be adjourned.

Request for Case Conference

(8) A party who wishes to extend a time prescribed under subrule (1), (2) or (4) for service of a report other than on consent shall, before the time expires, request a case conference under rule 50.13 for an order extending the time.

Automatic Extension of Subsequent Deadline

(9) If the time for service of a report under subrule (1) or paragraph 1 of subrule (4) is extended by the judge or case management master, the time for service by any party of any responding report is extended by the same period or by such other period as may be specified by the judge or case management master.

Trial may not be Adjourned

(10) Despite rule 52.02, the judge or case management master shall not adjourn the trial for the purposes of accommodating an extension of time for service of a report.

Effect of Extension on Pre-Trial Conference

(11) If an extension of time for service of a report by a judge or case management master or under subrule (9) would result in a deadline for service that is later than the date of the pre-trial conference, the judge or case management master shall order that the pre-trial conference be rescheduled to a date following the last deadline for service, but shall not reschedule the pre-trial conference to a date that would require an adjournment of the trial.

Failure to Serve Report in Time

(12) Except as provided in subrule 50.07 (1.1), if a report by an expert witness is not served within the time prescribed or ordered under this rule or consented to by the parties under subrule 3.02 (4), as the case may be, then the expert evidence shall not be admissible at trial except with leave of the trial judge.

Failure to Address Issue in Report

(13) Except with leave of the trial judge, an expert witness may not testify with respect to an issue unless the substance of the expert's testimony with respect to that issue is set out in a report under this rule.

10. (1) Paragraph 5 of subrule 53.08 (2) of the Regulation is revoked and the following substituted:

5. Subrule 53.03 (13) (failure to address issue in report).

(2) Rule 53.08 of the Regulation is amended by adding the following subrule:

(3) In the case of a leave under subrule 53.03 (12) (failure to serve report in time), leave may be granted if the trial judge is satisfied that,

- (a) there is a reasonable explanation for the failure to serve a report within the time specified by that subrule; and
- (b) granting the leave would not,
 - (i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or
 - (ii) cause undue delay in the conduct of the trial.

11. Subrule 55.02 (14.1) of the Regulation is amended by striking out “(expert witness)” and substituting “(expert evidence)”.

12. Subrule 76.09.1 (1) of the Regulation is amended by striking out “to call” and substituting “to tender”.

13. Subrule 76.10 (4) of the Regulation is amended by striking out “(materials to be filed before pre-trial conference)” in the portion before clause (a) and substituting “(pre-trial conference brief to be filed)”.

14. The Table of Forms to the Regulation is amended by adding the following row:

50A	Certificate of Readiness	TBD
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Commencement

15. [Commencement]

PART 3: PROPOSED FORM 50A (CERTIFICATE OF READINESS) MOCK-UP

FORM 50A

Courts of Justice Act

CERTIFICATE OF READINESS

(General heading)

CERTIFICATE OF READINESS

The pre-trial conference in this proceeding is scheduled to be held on *(date)*.
The pre-trial conference brief of each party is to be filed at least 5 days before the pre-trial conference, i.e. *(date)* (Rule 50.04).

CERTIFICATE

I CERTIFY that:

Part A I do not intend to tender any expert evidence at trial.
Go to Part D

OR

I intend to tender expert evidence at trial.
Go to Part B

Part B I intend to serve every expert's report (other than supplementary reports) on the other party *(or parties)* by the date on which the pre-trial conference brief is to be filed.
Go to Part D

OR

I do not intend to serve one or more experts' reports (other than supplementary reports) on the other party *(or parties)* by the date on which the pre-trial conference brief is to be filed.
Go to Part C

Part C The reason(s) I do not intend to serve one or more experts' reports by the date on which the pre-trial conference brief is to be filed is/are: *(choose all that apply)*

I have filed a consent of the other party *(or parties)* to serve the report(s) by *(date)*.

I have been granted an extension by the court to serve the report(s) by *(date)*.

Other: *(provide details) (Add supplementary pages as necessary)*

Part D Date (Signature)

(Name, address, telephone and e-mail address of lawyer or party giving notice)