

## Carr Hatch

### Thomson, Rogers

Carr Hatch articulated at Thomson, Rogers and was named a partner at the firm in 2017. Carr conducts a trial advocacy practice where he has successfully represented clients at trials, inquests, and arbitrations before the Superior Court of Justice, the Financial Services Commission of Ontario, and the Licence Appeal Tribunal.

Carr's practice is dedicated to helping victims and their families across the province achieve the best possible results when they have suffered serious personal injuries. Carr regularly assists clients on cases involving historic sexual assaults, occupier's liability, facility negligence, medical malpractice, professional negligence, and motor vehicle cases.



# Ghost Writing and Expert Reports

**Carr Hatch**

**THOMSON ROGERS**

PERSONAL INJURY LAWYERS

## License Appeal Tribunal (LAT) Rules of Practice – Expert Witnesses (Rule 10)

- For the purpose of these Rules, an expert witness is a person who is qualified to provide professional, scientific, or technical information and opinion based on special knowledge through education, training or experience in respect of the matters on which he or she will testify.
- Must provide a signed statement (like Rule 53 in Tort).
- A signed report that sets out the instructions provided to the expert in relation to the proceeding, the expert's conclusions, and the basis for those conclusions on the issues to which the expert will provide evidence to the Tribunal.
- Requirements in the no fault system are now like the requirements in Tort.

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## What is Ghost Writing?

- “When an expert opinion is tendered that is attributable to one author but where the opinion contained is in fact the opinion, even in part, of people NOT named in the report.”



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## ***Kushnir v. Macari, [2017] O.J. No. 501***

- Plaintiff was a retired Queen's University Professor who suffered injuries when struck as a pedestrian by a motor vehicle.
- Defendant brought motion to have Plaintiff undergo independent medical examinations from Orthopedic Surgeon and Neuropsychologist.
- The Plaintiff insisted on a condition prohibiting ghost writing of the reports before attending the examinations.
- Defence took offence saying that the condition implicitly suggested an attack on the integrity of the doctors and the defence lawyer.
- The Plaintiff argued that this had nothing to do with attacking the integrity of anyone, as this was about trial fairness and protecting the plaintiff.

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## ***Kushnir v. Macari, [2017] O.J. No. 501***

- Plaintiff argued that ghost writing is becoming commonplace and problematic with expert reports.
- Defence argued that if the health practitioner signs their own name on the report, they adopt its contents as their own and are responsible for the opinion stated.
- Justice MacLeod-Beliveau agreed with the Plaintiff and allowed the condition preventing ghost writing.



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## ***Kushnir v. Macari, [2017] O.J. No. 501***

- “The parties pay substantial fees to experts for their reports and they have a right to expect those reports to be written by the author of the report. If the parties cannot rely on the reports being actually written by the author, it attacks the very foundation and purpose of the expert report in the first place, and frankly wreaks havoc with the litigation process.”

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## ***Kushnir v. Macari, [2017] O.J. No. 501***

- “The real danger is what about the cases that were settled based on the expert’s opinion as stated in the report without ever going to trial? The parties, counsel or the court at a pre-trial would never know if it was solely written by the author of the report or not...The issue has become serious enough that the litigation bar is now requiring that it be put into conditions of these assessments.”

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- “The report of the expert should be written solely by its author. To be clear, the expert report must be that of the expert and not a report written partly by administrative staff or other individuals employed by the agency through which the doctor provides expert services. This is what the parties and the courts expect and it is what the Rule (33.06) implies. I find ghost writing offends Rule 33.06.”



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## Cases Where Expert Report Were Not Accepted

- *Children’s Aid Society of London v. C.D.B.*, [2013] O.J. No. 2808.
- *Psychologist Report about teenaged boy*
- *Two Assessors signed report and testified that the Report was equally formulated and both assessors shared the opinions in the report.*
- *Team Approach used*
- *Numerous staff had input into various portions of the data collection*
- **Report Rejected**



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## ***Children's Aid Society of London v. C.D.B***

- “Although Dr. A stated that he would not sign off on something that he did not agree with, that in itself does not allow for a determination of how the opinions expressed in the report were arrived at.”
- “The opinions are so co-mingled by others that is not possible to sever them between how is it formed from the expert and non-expert.”

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## ***Children's Aid Society of London v. C.D.B***

- Plaintiff was shocked when he read the report because it did not reflect anything said to him in the feedback session after his assessment.
- An Executive Director played a key role in editing the report – She was called a “ghost writer” by the court, as she made significant contributions to the report.
- Counsel and the court could not deal with this type of evidence or test it via cross-examination.



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## ***Lavecchia v. McGinn, [2016] O.J. No. 1750***

- Plaintiff sought order for defence medical including: “Health records and information of the plaintiff were not to be disclosed to any other person or entity other than defence counsel.”
- The above was an indirect way to prevent ghost-writing.
- All parties agreed that an expert report must be the report of the expert and not a report partly written by administrative staff or other individuals.

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## ***Moore v. Getahun, 2015 ONCA 55***

- As an aside, Ghost writing cannot be confused with the working relationship lawyers have with experts.
- Court of Appeal for Ontario:  
*“It would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in the case.” - Justice Sharpe*
- Strategy & Consultation with experts is included in the above provided it does not interfere with independence and objectivity.

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# THANK YOU

Please feel free to call or email with questions.

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