



**Board of Canadian Registered
Safety Professionals**

**Conseil Canadien Des Professionnels
En Sécurité Agréés**



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BCRSP GUIDE TO ACTING AS AN EXPERT WITNESS

Introduction

The Board of Canadian Registered Safety Professionals (BCRSP) has produced these Expert Witness Guidelines to:

- Help Canadian Registered Safety Professionals (CRSPs) who may be called to act as expert witnesses to understand that role,
- Describe the process of being an expert witness, and
- Help members of the public understand what they can expect of a CRSP as an expert witness.

The Expert Witness Guidelines are not intended to prescribe the process or establish a standard for being an expert witness. Certificants should always exercise their professional judgement in providing occupational health and safety (OHS) expertise in any capacity.

These guidelines should not be interpreted as legal advice.

Different laws/principles may apply in different jurisdictions and it is highly recommended that certificants seek legal guidance from a lawyer qualified in the jurisdiction that one is being asked to be an expert witness in.

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Development of the Guidelines

These guidelines were developed by an Expert Witness Task Force with the following members:

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Once the initial guidelines were drafted, a consultation and peer review process was undertaken. This process included feedback from the following certificants:

- Shannon Bolger, CRSP, Benchmark Safety Inc.
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The BCRSP Governing Board will review this document at least every five years. Feedback on the Expert Witness Guidelines can be submitted to the BCRSP at info@bcrsp.ca.

Section 1: What Is an Expert Witness?

Most witnesses in court are called to testify based on their personal knowledge of the legal issue in question. Personal knowledge includes information the witness has obtained through their own observations, experiences or previous knowledge that is directly relevant to the legal issue. However, an exception is made for expert witnesses.

Understanding the Duties of an Expert Witness

Expert witnesses are called to provide a judge or jury (the “trier of fact”) with “ready-made inferences” that the trier of fact is unlikely to be unable to formulate because of the technical nature of the facts.¹ An expert witness’s opinion is admissible to provide the court with technical, engineering, medical and/or scientific information that is likely to be outside the experience and knowledge of the trier of fact.² For expert evidence to be admissible, the subject matter of the inquiry must be such that non-experts are unlikely to form a correct judgement about it without the help of people with special knowledge.³

It is an expert witness’s duty to provide an opinion that is impartial, independent, objective, free of bias⁴ and given with a view to assisting the trier of fact.⁵ The litmus test of objectivity is that the expert’s opinion would not change regardless of which party retained the expert services.⁶ In short, expert witnesses are servants of the court and not spokespeople, advocates or champions of the party who hired them. This standard is also in line with the BCRSP Code of Ethics & Professional Conduct for all CRSPs, which includes such conduct as competence, integrity and accountability.

It is an expert witness’s duty to provide an opinion that is impartial, independent, objective, free of bias and given with a view to assisting the trier of fact.

¹ *R v Abbey*, [1982] 2 SCR 24 [Abbey]

² *Ibid.*

³ See Delisle, *Canadian Evidence Law in a Nutshell*, Second Edition (Thomson Canada Ltd., 2002) p 112.

⁴ *White Burgess Langille Inman v Abbott*, 2015 SCC 23 at para 32 [Abbott].

⁵ *Mouvement Laïque Québécois v Saguenay*, 2015 SCC 16 at para 106.

⁶ *Abbott*, *supra* note 4.

The Exception to Exclusion of Opinions

Expert evidence is an exception to the general evidentiary rule that opinion is excluded from judicial proceedings. The justification for excluding opinions from testimony is based on the notion that personal opinions often cause confusion for the trier of fact and detract from their task of weighing the objective evidence to form their own conclusions. Despite this principle, judges have recognized the value of expert testimony in areas where the concepts in question are technical or scientific. As a result, experts are often used to aid the court. The inclusion of expert opinion testimony may augment the fact-finding function of the trier of fact. As justice Doherty wrote in *R v Abbey*,

A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential...

...Experts take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a factual inference that should be drawn from that material. The trier of fact must then decide whether to accept or reject the expert's opinion as to the appropriate factual inference. Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases. Consequently, expert opinion evidence is presumptively inadmissible. The party tendering the evidence must establish its admissibility on the balance of probabilities.⁷

For these reasons, duties and obligations are imposed on expert witnesses. The courts have developed thresholds that must be met before expert opinion evidence can be admitted as evidence in a trial. In addition, judges have the discretion to exclude expert opinion evidence, even if the threshold requirements are met, where the interests of justice are at stake and the expert evidence would do more harm than good.

⁷ *R v Abbey*, 2009 ONCA 624 at para 62 & 71, leave to appeal refused, [2010] SCC No 125 (SCC) [*Abbey* #2].

Section 2: Where May an Expert Witness Give Evidence?

An expert witness is an individual “who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.”⁸ Because of this particular expertise, the expert is qualified and able to provide the trier of fact with ready-made inferences to assist with technical or scientific subject matter.⁹

Despite being hired by a party to the proceedings, an expert is intended to assist the trier of fact. Expert witnesses must follow a strict protocol to uphold the integrity and fairness of the litigation process, while providing fair and balanced support to the trier of fact.

Expert witnesses must follow a strict protocol to uphold the integrity and fairness of the litigation process...

The Importance of Scope

The importance of defining the scope of expert evidence and placing obligations on the expert was readily apparent following the Inquiry into Pediatric Forensic Pathology in Ontario (the Inquiry), which examined the conduct of Dr. Charles Smith, previously considered one of Canada’s leading experts in pediatric forensic pathology.¹⁰ Dr. Smith had minimal training and expertise in the field, and on numerous occasions when called to testify as an expert, he testified beyond his expertise. His actions contributed to serious miscarriages of justice. One tragic example was the case of William Mullins-Johnson, who was wrongfully convicted of sexually assaulting and killing his niece. Mr. Mullins-Johnson served 12 years in prison. His conviction was largely based on the expert opinion testimony provided by Dr. Smith.

The Inquiry determined that this error was not an isolated incident that could be remedied by removing Dr. Smith; rather, there was evidence of a systemic failing in the practice of pediatric forensic pathology in Ontario, particularly when engaging with the criminal justice system. The Inquiry led to amendments

⁸ *R v Mohan*, [1994] 2 SCR 9 at para 31 & 114 DLR (4th) 419 [Mohan].

⁹ Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed (Markham: LexisNexis Canada, 2018) at §12.86 [Law of Evidence].

¹⁰ The Honourable Stephen T. Goudge, *The Inquiry into Pediatric Forensic Pathology in Ontario* (1 October, 2008), online: Attorney General Ontario
<http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/li/pdf/Commissioners_Statement_oct1_08_en.pdf>

to Ontario's *Rules of Civil Procedure* (the "Rules"), which govern the use of expert witnesses in civil proceedings in Ontario. In 2010, the Rules were amended, and Rule 4.1 was added to outline the duties of an expert witness to the court.

The rule now states:

4.1.01(1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.¹¹

The Content of the Report

Rule 53.03, which addresses the content of an expert witness report, was also amended to ensure that expert reports include specific information, such as:

- The expert's name, address and area of expertise;
- Instructions provided to experts regarding the proceeding;
- The expert's qualifications, employment and education;
- Nature of opinion sought and issue it relates to; and
- Reasons for the opinion (research, assumptions, documents reviewed).¹²

These same principles would equally apply to all jurisdictions across Canada.

¹¹ *Rules of Civil Procedure*, RRO 1990, Reg 194, s. 4.1; Government of Ontario, *What's New? Changes to the Rules of Civil Procedure*, online: Ministry of the Attorney General
<http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp>.

¹² *Ibid* s 53.03; *Ibid*.

Expert Testimony in Criminal Proceedings

The *Criminal Code of Canada* (the Code) governs the use of expert testimony in criminal proceedings. Section 657.3 states that an expert may present evidence where (1) the court is satisfied that the person is an expert; and (2) the party intending to produce the expert evidence provides the other party with a copy of an affidavit or solemn declaration setting out the qualifications of the expert along with a copy of the expert report.¹³ Further, the party intending to call the expert witness must give notice to the other party, in addition to providing:

- The expert's name;
- Sufficient description of the area of expertise of the proposed witness;
- Statement of qualifications;
- A copy of the expert report, if one exists, otherwise a summary of the expert's opinion; and
- The grounds (facts, statistics, studies) on which the expert opinion is based.¹⁴

Varying provincial/territorial jurisdictions across Canada govern the prosecution of strict liability in some criminal statutes. These jurisdictions may not set out any procedural rules for offering or using potential expert testimony in prosecutions under provincial/territorial statutes. This lack has led, from time to time, to confusion both about the procedural rules regarding expert evidence and about prosecutions under the *Occupational Health and Safety Act*, the *Securities Act*, the *Environmental Protection Act*, the *Workers Compensation Act* and other provincial statutes.

Trial justices who preside over prosecutions under provincial statutes have, from time to time, looked to both the Rules and the Code for direction on procedural rules and requirements for expert witnesses and prosecutions under provincial statutes.

¹³ *Criminal Code*, RSC 1985, c C-46 s 657.3(1).

¹⁴ *Ibid.* s 657.3(3).

Section 3: What Determines the Admissibility of Expert Evidence in Courts and Tribunals?

Compliance with the Rules and the Code does not guarantee that expert evidence will be admissible. Judges retain discretion to rule on the admissibility of expert evidence. In *R v Mohan*, the Supreme Court of Canada ruled that the admissibility of expert evidence depends on the following criteria, known as the Mohan criteria.

Relevance: In determining whether expert evidence is relevant, the court must consider both its logical and its legal relevance. Logical relevance addresses the requirement that the expert evidence be related to the fact at issue.¹⁵ Legal relevance requires that the expert evidence be valuable to the trier of fact.¹⁶ Legal relevance is addressed in greater detail below.

Mohan Criteria

- Relevance
- Necessity in assisting the trier of fact
- The absence of any exclusionary rule
- A properly qualified expert

Helpful to the trier of fact: Expert evidence must be helpful to the trier of fact in a proceeding. The evidence must provide information that is beyond the experience and knowledge of the trier of fact. An expert should be given the opportunity through questioning to assist the trier of fact in understanding technical, engineering, medical or scientific matters.¹⁷ However, the admission of expert evidence should not distort the fact-finding process or overwhelm or distract triers of fact from their duty.¹⁸

Absence of exclusionary rules: Expert evidence cannot be admitted if it does not meet the exclusionary rule of evidence. For example, in *R. v Morin*, the court excluded expert evidence because of a rule that prevents the Crown from introducing evidence that speaks to an accused's character unless the accused has placed his or her character at issue first.¹⁹

¹⁵ *Ibid* at para 18; Law of Evidence, *supra* note 9 at §12.51 and §12.53-12.54

¹⁶ *Ibid*; *Ibid*.

¹⁷ *Ibid* at paras 25-27; *ibid*

¹⁸ *R. v Johnson*, 2019 ONCA 145 at para 54

¹⁹ *R v Morin*, [1988] 2 SCR 345, SCJ No 80 at paras 89-100

Qualified expert: Finally, the court must consider the qualifications and knowledge of the expert and whether he or she is specialized in a subject area through study and knowledge.²⁰ Only an expert with that type of knowledge of the matter at issue will be permitted to testify.

Cost-Benefit Analysis of Expert Evidence

In addition to the Mohan criteria, the Ontario Court of Appeal added a “gatekeeper” analysis to be performed when considering whether to admit expert evidence.²¹ Once all four criteria have been met on a balance of probabilities, the judge must conduct a cost-benefit analysis to determine whether the benefit of the expert evidence outweighs the potential harm (“cost”) it may cause to the trial process. The consideration of benefits includes an assessment of the evidence’s ability to prove something and its importance to the issue it addresses.²² The consideration of costs requires the judge to address the “risks inherent in the admissibility of expert opinion evidence...[including] consumption of time, prejudice and confusion” it might cause.²³ The judge must protect a jury from being misled or fooled by “impressive credentials” and “well-presented evidence” that may disguise any shortcomings in the evidence during trial.²⁴

The Importance of Impartiality and Independence

In *White Burgess Langille Inman v Abbott and Haliburton Co.*,²⁵ the Supreme Court recognized the importance of an expert being impartial and independent and clarified that this is a requirement under the Mohan criteria. An assessment of the expert witness’s impartiality and independence is to be completed under the qualified expert stage of the Mohan criteria and again during the gatekeeper analysis.²⁶ To assist the trier of fact, an expert witness has obligations to the court when providing special knowledge and expertise. An expert witness cannot assume the role of an advocate; instead, the expert must act as a neutral party providing unbiased and objective information in relation to the matters that

²⁰ *Mohan*, *supra* note 8 at paras 27-28.

²¹ *Abbey #2*, *supra* note 7 at para 76.

²² *Ibid* at para 87.

²³ *Ibid* at para 90.

²⁴ *Ibid*.

²⁵ *Abbott*, *supra* note 4.

²⁶ *Ibid* at paras 53-54.

fall within his or her area of expertise.²⁷ In supporting this objective, an expert must abide by certain obligations, which include the following:

- Expert evidence should be, and should be seen to be, the independent product of the expert uninfluenced by the pressures and form of litigation;
- The expert should provide independent, unbiased and objective opinions and should not assume the role of an advocate;
- The expert should state the facts or assumptions on which the opinion is based and should not ignore facts that detract from that opinion;
- The expert should identify questions and issues that fall outside of the expert's expertise; and,
- The expert should identify opinions that are not sufficiently supported owing to lack of data.²⁸

Concerns with the impartiality of an expert used to be addressed by assigning less weight to less-objective expert opinions, once admitted. Now, the independence, impartiality and objectivity of an expert witness must be addressed as part of the admissibility analysis.²⁹ This idea is consistent with the expert witness's duty to provide fair, objective and non-partisan evidence.³⁰ The foundation of this duty is based on three concepts, described by the Supreme Court:

An expert witness ... must act as a neutral party providing unbiased and objective information in relation to the matters that fall within his or her area of expertise.

The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another's.³¹

²⁷ *Prairie Well Servicing Ltd. v Tundra Oil and Gas Ltd.*, [2000] MJ No 232 (MCQB) at para 25 [*Prairie*]; *R v INCO Ltd.* (2006), 80 OR (3d) 594 at para 41 (Ont CA) [*INCO*].

²⁸ See *INCO*, *ibid* at paras 41-42.

²⁹ *Abbott*, *supra* note 4 at para 34.

³⁰ *Ibid* at para 2.

³¹ *Ibid* at para 32.

Addressing independence at the threshold level is not an onerous task: the court will require that the expert witness testify and accept, under oath, the duty of an expert.³² The onus is on the opposing party to demonstrate that the expert witness fails to comply with this duty.³³ Failure to comply will be triggered only in the most obvious circumstances and not simply because there is some relationship between the expert and the party relying on the expert's evidence. The following are examples of lack of independence:

- A family tie exists between the party and the expert,
- The expert has become an advocate for the party relying on the expert opinion, or
- The expert has a financial interest in the outcome of the litigation.³⁴

Those concerns not captured by the threshold requirements will then be considered by the judge when conducting the gatekeeper analysis in determining admissibility.

The Expert's Obligations

A number of decisions have considered issues of impartiality and independence of expert witnesses. In *Fellowes, McNeil v Kansa General International Insurance*,³⁵ the plaintiffs, a law firm, objected to the admissibility of expert evidence by a partner at the firm representing the defendants. In deciding that the expert opinion was inadmissible, the court reiterated the importance of ensuring objectivity in expert testimony because an expert is an aide to the court and must fulfill certain obligations in carrying out this role. The court described such obligations as:

- An expert witness cannot become an advocate and must assist the court in matters that require special knowledge or expertise;
- Expert evidence should be, and should be seen as, the independent product of the expert, uninfluenced by the form or pressures of litigation; and
- Expert evidence should be objective, unbiased and within the scope of the expert's specialization.³⁶

³² *Ibid* at paras 47-48.

³³ *Ibid* at para 48.

³⁴ *Ibid* at para 49.

³⁵ *Fellowes, McNeil v Kansa General International Insurance Co.*, (1998) 40 OR (3d) 456 (Gen Div) [*Fellowes, McNeil*].

³⁶ *Ibid* at p 4.

Given that the proposed expert in the case was involved in the solicitor negligence claim against the plaintiffs, he was seen as an advocate for the defendant's position.

Similarly, in a case involving a contract dispute, the court held that the expert evidence of the general manager of the defendant was inadmissible on the basis that his position with the company and the evidence to be presented led to the inference that he was an advocate for the defendant.³⁷

In another example, *R. v Payette*, the Crown wanted to cite the expert evidence of an investigator employed by the insurance company in an arson case. If the accused were convicted, the insurance company would be free from its liability under the insurance policy. After conducting a preliminary examination of the witness, the court determined that the expert was not independent or objective because the investigator:

- Had a personal interest in establishing arson,
- Admitted that the purpose of the investigation was to establish a reason to avoid payment under the policy,
- Was evasive and defensive when his opinions were challenged, and
- Personally met with the Crown attorney to convince him that the charges against the accused were warranted.³⁸

³⁷ See *Prairie*, *supra* note 28 at paras 22-30.

³⁸ *R. v Payette*, 2010 MBQB 73 at para 7-8, 10, 12-15, 28-31, 253 [*Payette*].

Section 4: How Should an Expert Witness Act?

CRSPs do not have an obligation or duty to act as expert witnesses. Should a CRSP choose to act as an expert witness it is important to understand the following requirements.

Selecting and Understanding the Question of Law

OHS law issues are, for the most part, statute driven. It is therefore important to clearly understand what statutory requirement must be established (or disproved) and what expert evidence may be available to help meet that burden of proof.³⁹

Ensuring Qualification as an Expert⁴⁰

The potential CRSP witness must be qualified to answer at an expert level the legal question at issue. That is, it is not enough that the CRSP be an expert in his or her field.⁴¹ It is incumbent on the potential witness to be an expert in the precise discipline or area of knowledge with respect to the legal question at issue.⁴²

Relevant Assumptions – Scope of Expertise

CRSPs must clearly understand the assumptions on which their expert testimony is premised. An opinion based on a set of assumptions may be completely rejected if the assumptions underlying the opinion are not proven.⁴³ In this way, the CRSP can properly assess the boundaries inside which their expertise applies to the legal question at issue.

Avoiding Conflict of Interest

CRSPs must understand the importance of impartiality and the consideration of any potential conflict of interest in carrying out their duties as expert witnesses. This duty includes assessing any personal or professional involvement that creates an incompatibility, either perceived or real, between the expert evidence being provided to clients, other parties and the trier of fact. The CRSP has a duty to disclose any potential conflict of interest, even if the potential conflict may not prejudice their expert evidence. A

³⁹ Gary Letcher & Andrea Akelaitis, “An Overview of Expert Evidence in Canada: A Symposium on Environment in the Courtroom: Evidentiary Issues in Environmental Prosecutions and Hearings”, online: University of Calgary https://cirl.ca/files/cirl/gary_lethcher_and_andrea_akelaitis-en.pdf at page 2 (Website accessed March 1, 2019). [Letcher]

⁴⁰ Mohan, *supra* note 8

⁴¹ Letcher, *supra* note 40 at p 2.

⁴² *Ibid* at p 2.

⁴³ *Ibid.* at page 2.

cornerstone of acting as an expert witness is ensuring that no one will question the independence of one's expert evidence.

Maintaining Confidentiality

CRSPs retained as expert witnesses must consider any information provided to them, either written or verbally, to be confidential and/or privileged. This includes any expert opinion they have submitted to legal counsel and/or the CRSP's client. However, there are limitations, including being directed to disclose by law or by legal counsel or with the consent of their client. Further limitations extend to information relevant to the CRSP's expert opinion when submitted to a trier of fact.

CRSPs retained as expert witnesses must consider any information provided to them, either written or verbally, to be confidential and/or privileged.

An expert witness giving assurances that they will not disclose any confidential or privileged information in relation to their expert opinion does not preclude disclosure to a trier of fact. CRSPs retained as expert witnesses may be required to disclose the source or nature of their information even if they have given assurances of confidentiality or to protect privileged information.

Acquiring Insurance

CRSPs should consider holding two forms of insurance when acting as an expert witness:

- **Professional Liability Insurance:** Errors & Omissions Insurance generally covers the cost, charges, and expenses in the event of litigation against an insured member due to the commitment of, or an alleged, "wrongful act" or unintended mistake. The term "cost, charges, and expenses" includes, but is not limited to, legal, accounting, adjusting or investigating expenses, incurred for the defence of actions, suits, or proceedings and appeal, attachment and similar bonds, as well as payment of a court awarded settlement against the insured.
- **Commercial General Liability Insurance:** This coverage is also known as Comprehensive Business Liability or Operational Liability Insurance. It covers your general business activities such as visits and meetings with customers, libel and slander, advertising, etc. and should be considered as the foundation of your Liability insurance. Most contracts with Governments and

large corporations now require that you have this coverage in place and the trend is increasing rapidly.

Signing a Contract Before Providing Services

CRSPs retained as expert witnesses should have a written contract for the engagement of services prior to the start of work. The contract should clearly set out the following:

- Rates of pay for services rendered, including a retainer, if applicable;
- Arrangements for payment and the time in which the payment must be received, including progress payments for lengthy matters;
- A statement that fees are not contingent on the outcome of the legal matter;
- Confirmation that the CRSP will remain neutral, fair, impartial and objective at all times;
- Confirmation that the CRSP is bound by the BCRSP Code of Ethics & Professional Conduct;
- The scope of the engagement; for example, whether it is to include:
 - Investigation
 - Research
 - Preliminary opinion
 - Expert report
 - Rebuttal to opposing side's expert
 - Response to questions
 - Preparation for court, tribunal, arbitration, etc.
 - Testimony in front of the trier of fact

It is important to update all documentation whenever the scope of engagement changes. Lastly, to ensure contracts are accurate and complete, certificants can consider engaging legal counsel and a certified accountant to review their contract.

Section 5: What Is the BCRSP Code of Ethics & Professional Conduct?

A certificant acting as an expert witness must consider the BCRSP Code of Ethics & Professional Conduct (the Code), which all certificants must adhere to. In particular, the certificant should consider the following requirements.

Obligation to Protect Confidentiality

Under the Code, certificants are “obligated to protect the confidentiality of all acquired information.”⁴⁴

As discussed in section 4, an expert witness giving assurances that they will not disclose any confidential or privileged information in relation to their expert opinion will not preclude disclosure to a trier of fact. Certificants retained as expert witnesses therefore may be required to disclose the source or nature of their information even if they have given assurances that they would protect confidential or privileged information. This should be clearly stated in the agreement phases of how information will be provided.

The fact that a document is marked confidential will not prohibit its exposure in court. The certificant (and their counsel) should consider the following:

- a) How was the information obtained and is it confidential or proprietary information belonging to a client or employer?
- b) Is it appropriate to discuss potential exposure of confidential or proprietary information with the client or employer in advance of the disclosure occurring?
- c) If a certificant acting as an expert witness excludes some information on the basis of keeping it confidential, are they fulfilling their ethical obligation to act with honesty and integrity?

Certificants must act with integrity, including admitting errors, refraining from false pretenses and advising clients truthfully. A professional should use caution in making promises because failure to deliver on promises jeopardizes integrity.⁴⁵

⁴⁴ Board of Canadian Registered Safety Professionals “Code of Ethics & Professional Conduct” online: <<https://www.bcrsp.ca/about-us/code-ethics-professional-conduct>> [BCRSP Code of Ethics & Professional Conduct].

⁴⁵ Peter Strahlendorf, “BCRSP Law and Ethics Study Guide” [Study Guide]

Avoiding Conflicts of Interest

Under the Code, certificants are required to “avoid circumstances where compromise of conduct or conflict of interest may arise.”⁴⁶ For more information on Conflicts of Interest under section 4.

Understanding Scope of Practice

Under the Code, a certificant is required to “recognize their limitations and perform only those services that may be handled competently based on [their] training and experience” and to “represent their qualifications and experience accurately and not knowingly make false or misleading statements.”

The example of Dr. Charles Smith (refer to Section 3) highlights the risk of testifying beyond one’s expertise, which also has ethical implications.

“It is unethical to misdescribe your abilities so as to mislead others. It is unethical to undertake work that you do not have the expertise for. This statement can refer to falsifying or lying on your resume or CV or in your marketing materials,”⁴⁷ and this certainly extends to providing an opinion as an expert witness. Certificants must ensure that they describe their expertise accurately and provide expert witness testimony within the limits of that expertise.

Recognizing the Work of Peers

Under the Code, certificants are “required to recognize and respect the original work, integrity and ability of their peers.”⁴⁸

“Recognizing and respecting the integrity and ability” of fellow OHS professionals means demonstrating such ethical behaviour as:

- Not insinuating that others are less ethical than they are,
- Vouching for the integrity and ability of peers when appropriate,
- Not unfairly criticizing the work of others,
- Not misdescribing the abilities of others,

⁴⁶ BCRSP Code of Ethics & Professional Conduct, *supra* note 45.

⁴⁷ Study Guide *supra* note 46.

⁴⁸ BCRSP Code of Ethics & Professional Conduct, *supra* note 49.

- Not making unfair comparisons, and
- Giving others the benefit of the doubt.”⁴⁹

Certificants should be aware of their ethical obligations to fellow safety professionals and other professionals under the Code. A certificant should avoid maligning other professionals in the course of acting as an expert witness.

Providing an Opposing Opinion (Rebuttal)

The adversarial nature of our judicial systems means that on occasion a certificant will be engaged to provide an opposing opinion or rebuttal of another expert witness. The role of objecting to an expert witness’s report, qualifications and admissibility belongs to counsel; it does not belong to an opposing expert witness. These objections and challenges will normally arise in either a pre-trial communication between opposing counsel or during cross examination.

An opposing expert witness’s role is generally limited to providing an opinion in opposition to another expert witness. An ideal opposing opinion is prepared based either on facts or assumptions that undermine the opposing expert witness opinion. Generally, it is best to speak to the opinion or published report and not directly about the other expert.

The role of objecting to an expert witness’s report, qualifications and admissibility belongs to counsel; it does not belong to an opposing expert witness.

Facts can include:

- Calculations (measured or indirect); scientific or arithmetic such as time weighted average exposure, force, heat
- Information outside of the opposing opinion such as published studies, regulatory publications, and relevant jurisdictional differences

⁴⁹ BCRSP Law and Ethics Study Guide.

- Scope of the facts can be narrowed or expanded, such as average tensile strength of nylon against the tensile strength of a particular manufacture's equipment

Assumptions generally include:

- Exposed hours as a portion of worked hours, when calculating exposure
- Retention of occupational training, general workplace knowledge or practice
- Scope of assumption, such as what an average person would do, versus what actions a professional driver could be expected to take

Section 6: What Best Practices Should an Expert Witness Follow?

A certificant acting as an expert witness should adhere to the following best practices.

Be Frank About Qualifications

Have ready for submission with any reports a resume or CV specifically indicating an expert level of knowledge and experience as a health and safety professional. This information should be summarized in the opening of the report and be attached to any submitted reports.

Present an Unbiased Report

Experts are to assist the court by preparing reports and opinions; experts cannot favour any particular party in the preparation of their submissions or testimony. A statement to this effect should be included in the report. The expert's role is not to provide advice, judgement or resolution.

Be Transparent about Scope

Include a statement of who retained you and the scope of the engagement with any reports or submissions; generally, this will be in the form of an instruction letter attached to the report. The instruction letter is a critical document for the expert as it outlines the specific questions to be answered and assumptions to be made within the report.

Delineate Factual Information and Opinion

Structure reports to differentiate between factual information and the interpretation of the information as opinion. Expert opinion and interpretation should be identified as such throughout the report and in any subsequent testimony.

Best Practices for Expert Witnesses

- Be frank about your qualifications
- Present an unbiased report or opinion
- Be open and transparent about retention and scope
- Delineate factual information and opinion in submissions or testimony
- Use clear, concise, consistent language throughout reports or testimony
- Maintain professionalism throughout the engagement
- Disclose documentation and references
- Clearly identify any assumptions and show all work
- Keep reports and testimony brief and concise
- Be prepared to provide oral testimony
- Avoid rebuttal

Use Clear, Concise, and Consistent Language

Reports should be written in a way that a lay person can clearly understand. People, property and other subjects should be identified the same way the court or law firm that hired the expert identifies them. Avoid using acronyms, jargon, slang and overly technical language as much as possible.

Maintain Professionalism

Present all submissions, reports and testimony as a representative of the BCRSP and in accordance with the CRSP Code of Ethics & Professional Conduct. Maintain a level of professionalism consistent with the role of expert witness at all times. Sign and seal (if utilized) all reports and communications.

Disclose Documentation and References

Clearly identify reference documentation, consultations and examined materials in all submissions. All materials do not need to be included in reports as appendices, but they need to be identified and submitted on request.

Maintain a level of professionalism consistent with the role of expert witness at all times.

Identify Assumptions and Show Work

List any assumptions made in the course of the report and why the assumptions are both reasonable and necessary. When constructing opinion, outline how the opinion was reached and clearly lay out any analytical or statistical source or analysis conducted. The court or law firm engaging you should provide or instruct you on specific assumptions to be made.

Keep Reports and Testimony Brief

Avoid overly long or technical reporting. Brief, concise and clear reporting of an interpretation and subsequent opinion should be the goal. Avoid drafts of the report where possible; ideally, submit only a single, final report.

Prepare for Oral Testimony

Be ready to both present and defend your report and derived opinion in a legal setting, with sworn testimony. Generally, expert reports are used in a pre-trial setting, but you may be called upon to provide verbal testimony. Consider obtaining specific training in courtroom procedures and providing oral testimony so as to gain a better understanding and confidence in helping the court. Avoid executive summaries.

The report will likely be the only evidence you present. Unless your client specifically directs you to provide an executive summary, avoided doing so and follow the report structure recommend on the following pages.

Avoid Rebuttal

Generally, an opposing opinion will also be presented as a report and reviewed in a pre-trial setting. When preparing one, you will likely be reviewing and providing a report on another expert's opinion; as a general rule, do not directly challenge the opposing expert or refer to the other expert in your report. Use their report as reference only and provide your distinct opinion with a clear chain of facts and assumptions that is opposition, as you would constructing an opinion as expert witness; do not make arguments or objections in your report.

Sample Report Template

Address To:

Subject: _____

Address From:

Introductory Statement and Scope:

I, _____, (CRSP/PSAC, other credentials) have been retained as an expert witness on behalf of _____ in the matter of _____.

This report provides my expert opinion in regards to _____ as outlined in the attached Letter of Instruction (Appendix A).

Qualifications (Summary):

List of relevant publications, education and credentials; include full resume or CV as Appendix B

Statement of Obligation:

I understand that I am required to present an unbiased opinion to the court on the matter of _____.
_____. I am prepared to present this report and my expert opinion as
oral or written testimony in accordance with this obligation and in compliance with the BCRSP Code of
Ethics & Professional Conduct.

Instructions:

I have been engaged to address the following question(s) by _____ in the matter of
_____.

Q1 _____

Q2 _____

Q3 _____

Assumptions:

The assumption(s) I have been directed to make in accordance with the Letter of Instruction (Appendix A)
in constructing my expert opinion and the answers to the previous question(s) are as follows:

A1 _____

A2 _____

A3 _____

Reference Materials:

List any publications, tools, studies or other resources that you used, then attach the specific tool / resource or material as appendices C onwards; this can become exhaustive and you may want to seek guidance from your client.

The materials I used for reference in researching my response and constructing my opinion to the above question(s) are as follows:

R1_____

R2_____

R3_____

Answers and Opinion:

My expert answer(s) to the question(s) asked in the Letter of Instruction (Appendix A) and my opinion on them are as follows:

E1_____

E2_____

E3_____

This report has been prepared and written to the best of my expert ability and represents a factual interpretation of the question(s), assumption(s) and reference material. I confirm that this report represents an unbiased, factual interpretation and expert opinion developed in accordance with the BCRSP Code of Ethics & Professional Conduct.

NAME

DATE

SIGNATURE

SEAL (if utilized)

