International Medicolegal Practice
Code of Conduct

Introduction

This proposed Medicolegal Practice Code of Conduct "the Code" is meant to complement the Canadian Medical Association Code of Ethics in areas of medicolegal practice that require special attention. When taking on a medicolegal mandate, the health care professional assumes a different role from that of a treating health care professional. Based on best practices and case law, the Code provides guidance to Canadian physicians and other regulated healthcare professionals who perform third party medicolegal evaluations and act as expert witnesses

Due to the relationship with their own employers, insurance or company physicians cannot be considered as third party evaluators, and their dual roles will not be considered in this paper. Similarly, given potential conflicts between the fiduciary duty to their patients and their duty towards the Court, the conduct of treating practitioners will not be addressed.

In the Code of Conduct, the terms "must" and "should" are used in the following ways:

- "Must" is used to denote an overriding duty or principle.
- "Should" is used to provide an explanation on how overriding duty will be met or where the duty or principle will not apply in all situations or circumstances, or where factors outside the control of the evaluator affect compliance with the Code.

When the term "Expert" is used in the Code, it refers to the medicolegal evaluator acting as an expert witness. The Code must not be interpreted as a declaration of evaluator or evaluee rights. The Code should **not** be construed as legal advice, but rather, it is an attempt to guide medicolegal evaluators facing ethical and legal dilemmas when conducting evaluations.

The Code of Conduct encompasses seven areas:

A. Fundamental Responsibilities
B. Responsibilities to Evaluee
C. Responsibilities to Society and the Court
D. Responsibilities to the Referring Party
E. Responsibilities to Other Experts and Treating Professionals
F. Responsibilities to Oneself

A. Fundamental Responsibilities

1. Must recognize the overarching duty of experts to the Court, Statutory and Regulatory Law and the common law decisions of the Courts.

2. Must demonstrate rigour and methodology.

3. Must understand that the evaluator's role must focus on the following:
    - Search for facts
    - Validation of the evaluee's complaint(s)
    - Performance of a quality clinical evaluation
    - Unbiased interpretation of relevant investigations and data
    - Formulation of a considered opinion

4. Must take reasonable steps to access and review all relevant evidence/documentation, and identify missing data and its importance.

5. Must objectively, accurately and impartially document, corroborate and use generally accepted methodology(ies) to critically review the data, facts and evaluee's health claim, injury/disease, impairment, activity limitation, social participation restriction, and contextual factors, among others.

6. Must demonstrate objectivity by:
    - Documenting relevant facts
    - Corroborating statements
    - Comparing the evaluee's reported loss with the available evidence (e.g., examination for discovery, observations made on direct examination, laboratory findings, tests, other evaluations, surveillance, etc.)

7. Must perform competent comprehensive quality history taking that includes relevant, precise and detailed information as reported spontaneously by the evaluee and in response to direct inquiry. Must supplement and contrast this history with existing documentary evidence, as necessary pursuant to the mandate.

8. Must perform a complete and detailed evaluation, including precise descriptions and measurements. Must report instruments, tools and methodology used. The appearance, length and width of scars along with its cosmetic and functional effects must be described in detail. Reporting of psychometric testing should comment on the reliability and validity of the data.

9. Must provide fair, objective and non-partisan data and opinion. Must not demonstrate complacent behavior, advocacy for the claimant or referring party, or overt skepticism or distrust.

10. Must be honest and trustworthy in all spoken and written statements throughout the medicolegal evaluation and expert testimony process.

11. Must take reasonable steps to verify the accuracy of signed reports, forms or documents. Must corroborate the information provided by the evaluee and provide comment if relevant information has been left out or discounted.

12. Must not allow views about any individual's age, colour, culture, disability, ethnic or national origin, gender, lifestyle, marital or parental status, race, religion or beliefs, sex, sexual orientation or social or economic status to prejudice the evidence.

13. Must use language and terminology readily understood by those requesting the expert opinion. Abbreviations, medical or other technical terminology should be defined and/or explained.

14. Must use plain, logical and fallacy-free fact-supported argumentation.

15. Must keep up-to-date in area of practice and adhere to the Laws, Civil Rules of Procedures and Regulatory Policies that affect third party assessments or expert witnessing.

B. Responsibilities to the Evaluee

i) General Responsibilities

16. Must introduce oneself to the evaluee and explain the nature, purpose and process of the evaluation, and provide the identities of the referring party and the recipient of the evaluation report.

17. Must inform, whenever necessary, that it is solely the evaluator's prerogative to allow or exclude other person(s) in the evaluation, including a chaperone, unless directed otherwise by contractual agreement or the Court.

18. Must take reasonable steps to address any perceived inconsistencies in the documentation with the evaluee. Reviewing documentation prior to the evaluation is deemed as best practice.

19. Must act with integrity, civility and professionalism and must demonstrate respect for the evaluee's dignity. This includes the evaluee's right to privacy during dressing/undressing and upon examination.

20. Must endeavor to provide a healthy and safe environment for the evaluee, office personnel and oneself. Must not engage in hostile behaviour, physical or verbal abuse, violence and/or harassment of any kind. The evaluation must be terminated if any such behaviour by any of the parties involved occurs.

21. Must communicate effectively and clearly about all elements related to the medicolegal evaluation and report process. Must warn the evaluee of any testing that may elicit pain or discomfort and document it when it occurs.

22. Must bring the evaluee's attention any serious medical health condition not previously diagnosed and advise the evaluee to seek appropriate medical attention. In the case of a medical emergency, reasonable steps must be taken to inform the treating physician. Said information should be included in the report to the requesting party.

23. Must avoid any comments irrelevant to the mandate.

24. Must prepare an addendum report to correct any material factual or legal errors.

25. Must provide reasonable accommodation for persons with a disability, language or communication barrier. Interpretation services should preferably be provided by a professional having no relationship with the evaluee.

ii) Initiating an Evaluee-Evaluator Relationship

26. Must explain the nature and extent of the evaluator's responsibility to the referring source or the Court. Must underscore the absence of a treating relationship.

27. Must warn the evaluee that any information provided can be included in the report to the referring party.

iii) Communication and Consent

28. Should obtain oral or written informed consent to perform the evaluation and release the report(s) to the referring party. Must act under Civil Rules of Procedures or follow any order of a Court or other adjudicative body.

29. Must explain that the report will be submitted to the requesting party and that unless duly specified, a copy of the report can only be obtained from the party the report belongs to. Must provide to the referring party a compelling reason not to disclose the report[1] to the evaluee if such disclosure could result in harm to the evaluee or others.

30. Must obtain specific authorization from the evaluee to take pictures or make an audio and/or video recording of the evaluation.

[1] This is generally encountered with psychiatric reports where a risk of violence or harm to self or others has been identified.

31. Must explain to the evaluee that withdrawing or not providing consent can negatively impact the evaluee's benefits status and/or compensatory awards.

iv) Privacy and Confidentiality

32. Must explain to the evaluee that any personal health information can and may be disclosed to the requesting party and will otherwise be kept confidential unless a legal requirement permits or requires disclosing any such information to another party.

33. Must take all reasonable steps to maintain integrity and security of all health records and legal evidence.

C. Responsibilities to Society and the Court

34. Must prepare a report compliant with the relevant rules of Court or adjudicative body.

35. Must accurately describe the evaluator's education, training, skills, experience, qualifications, positions and responsibilities.

36. Must make clear the limits of the evaluator's knowledge or competence. Should make clear during expert testimony when a particular question or issue falls outside the scope of practice or expertise.

37. Must understand and follow the rule of evidence regarding the admissibility of scientific expert testimony. Should be familiar with the principles outlined in the decisions of Supreme Court of Canada: R. *v.* Mohan, [1994] 2 S.C.R. 9 and R. *v.* J.-L.J., [2000] 2 S.C.R. 600.

38. Must state that the opinion is merely provisional or qualified in situations where there is missing or insufficient important (material) data.

39. Must render such additional assistance as the Court or adjudicative body may reasonably require when determining a matter in issue. The expert's duty to the Court or adjudicative body overrides the obligation to the retaining party.

40. Must provide a rationale and explanation for all opinions and conclusions and state supporting facts or assumptions including relevant clinical and/or scientific references.

41. Must provide a balanced opinion, and state the supporting facts or assumptions. Should summarize the range of opinion and explain how one's view was arrived at and reject alternative views by providing relevant facts, clinical and/or scientific

references. Must consider all material facts which do not support the concluded opinion.

42. Must correctly apply the civil standard of proof to both factual and opinion evidence. This means there is more than 50% chance (i.e., on the balance of probabilities) that the accident or adverse event caused the injuries or loss complained of. Must understand that "but for" is the prevailing test for causation in both one cause and multi-cause cases.

43. Must understand that the application of the "material contribution principle" can be applied in only very limited circumstances (i.e. the "but for" test is relaxed). The most common application is in the field of occupational diseases. The material contribution test is generally applied to a claim in which there are two or more potential defendants liable to the claimant for the cumulative exposure to a toxin or harmful substance. Three important distinguishing factors are present in **all** cases where the material contribution causation test should be applied[2]:

    a) the agent responsible for causing the disease or condition is the same in each of several periods of exposure;

    b) the mechanism by which that agent is applied to the claimant is the same; and

    c) medical science cannot prove which period of exposure caused the injury.

44. Must develop an evidentiary threshold for damages based upon the concept of material and measurable risk as described by the Court of Appeal for Ontario in M.B. v. 2014052 Ontario Ltd. (Deluxe Windows of Canada), 2012 ONCA 135. Must apportion damages when presented with a claim where there is pre-existing or intervening condition(s) and/or claim(s).

45. Must use the following terms when addressing causation: probable (more than 50%), not probable or possible (less than 50%), certain (100%) and impossible (0%). Terms such as plausible, likely and conceivable should be avoided.

46. Must understand the distinction in the medicolegal use of the terms: injury, symptoms, effects/limitations and consequences/sequelae.[3]

Injury	the physical/psychological trauma suffered
Symptoms	the physical/psychological manifestations of the injury
Effects/ Limitations	the physical/psychological limitations experienced by the claimant as a result of the injury/symptoms
Consequences/ Sequelae	the restrictions on the activities of daily living, now and for the future, that result from the injury/symptoms/effects

[2] *(Eyre, Giles and Alexander, Lynden, Writing Medico-Legal Reports in Civil Claims: an essential guide Professional Solutions Publications, London, UK, p. 123*
[3] Ibid

47. Must understand the difference between the words “Exacerbation”, “Acceleration” and “Aggravation” in the medicolegal context. The word “Exacerbation” refers to a time limited increase in symptoms of a pre-existing condition following an event. The word “Acceleration” applies to a condition where the level of symptoms of a pre-existing condition has been brought forward in time. The word “Aggravation” refers to a new permanent injury or additional loss where there is already a pre-existing condition.

48. Must adduce evidence addressing not only what the consequences of an injury on the evaluee’s capabilities are, and will be, but also what would have occurred in the evaluee’s life in the absence of the injury sustained. Must describe the possibility of complications (preferably using percentages) following an injury to assist the estimation of future damages. Must also apply the reasonable foreseeability principle to current and future damages.

49. Must apply the legal test of “real and substantial possibility” for considering future care (medical cost projections or life care plans). In Graham v. Rourke, 1990, 40 OAC 301, the Court of Appeal for Ontario indicated that the possibility must be “realistic as opposed to a speculative possibility”. The future care need must also be shown to be “reasonably necessary on the medical evidence”. This means that an objective analysis of each individual item must be conducted to determine whether the item is medically justified, reasonably necessary and not merely beneficial.

50. Must apply the proper standard of proof for future pecuniary costs which is “a real and substantial risk” or a “substantial possibility” of pecuniary loss.

51. Must employ a clear methodology when addressing a causal relationship.

    - Must perform a specialized inquiry to establish the evaluee’s pre-existing health, functioning and disablement state (Status quo ante) and validate it with the available evidence. The presence of a condition that meets the “thin or crumbling skull theory” should be identified.
    - Must identify the presence of co-existing and intervening factors or events (novus actus) contributing to the evaluee’s current health, functioning and disablement.
    - Must take into consideration the natural history of the disease or injury, the known complications and associated disablement.
    - Must validate the reality, nature and severity of the trauma or disease.
    - Must address the mechanism of injury and disablement.
    - Must address the delay of onset of the symptoms, disease and disablement.
    - Must address the continuity and progression of the complaints.
    - Must evaluate congruency between the site of injury, impairment and disablement.

52. Must follow the CMA Policy regarding **The Physician's Role in Helping Patients Return to Work After an Illness or Injury**: *"Prolonged absence from one's normal roles, including absence from the workplace, is detrimental to a person's mental, physical and social well-being. Physicians should therefore encourage a patient's return to function and work as soon as possible after an illness or injury, provided that return to work does not endanger the patient, his or her coworkers or society."* Must describe the nature, duration and seriousness of the specific hazard(s) or risk(s) that justifies a medically required work absence or restriction.

53. Must immediately report to the referring party and/or the Court any issues of duress when the evaluator is subjected to or threatened with violence, legal action, constraints or other action by another party.

54. Must be able to identify the set of criteria used to render a specific diagnosis.

55. Must be familiar with the known or potential error rate of the methods or tests relied upon to formulate an opinion.

56. Must address situations where exaggeration, deception, simulation, fabrication or malingering is suspected.

57. Must address issues of non-compliance with treatment recommendations and/or use of accommodation.

58. Should indicate when a treatment regime is outside the generally accepted norms or is potentially harmful (e.g., National Opioids Guidelines).

59. Must not use the concept of benefit of the doubt (This concept is reserved for the trier of fact).

60. Must not address the liability question except in cases of "breach of duty" or when specifically required by Statutes.

61. Must understand the medicolegal principles that apply to other legal proceedings (e.g. clinical negligence claims, criminal matters).

D. Responsibilities to the Referring Party

62. Must declare any real, potential or perceived direct or indirect conflict of interest with the evaluee and request direction from the referring party.

63. Must adopt clear conflict-of-interest and disclosure policies regarding physicians and insurance companies or law firms.[4]

[4] Ethical implications of healthcare professionals' interaction with the insurance industry and law firms and believe that a transparent relationship, guided by ethics, benefits evaluators, evaluees and society.

64. Must disclose prior any prior treating relationship with the evaluee. Information obtained in the course of the treating relationship should not be used in third-party assessment without the patient's consent.

65. Must provide without unreasonable delay any report, form, document, signature or evidence the evaluator has agreed to.

66. Must ensure that the mandate and questions are clear and seek clarification if the instructions are unclear, inadequate or conflicting. In the case of unclear instructions, an expert opinion should not be provided.

67. Must ensure that all questions posed by the requesting party have been addressed.

68. Must deal only with matters within the limits of professional's expertise, direct experience and competency and decline those outside the area of expertise or for which there is insufficient information. Should indicate clearly the reasons for which a particular matter(s) was not addressed. You should be aware of the standards of care and nature of practice at the time of the incident.

69. Must understand that acceptance of a medicolegal mandate implies a willingness to act as an expert witness.

70. Must provide to the referring party reasonable and customary fees for the nature, duration and complexity of the service rendered, in advance. Must not accept contingencies fees or enter into fee-splitting arrangements. Retainer fees are permissible. The evaluator should provide a reasonable explanation or breakdown that allows the referring party to understand the invoice.

71. Must explain any limitations when providing an opinion about an individual without the opportunity to consult with or examine them.

72. Must identify relevant non-medical issues but refrain from commenting on these if outside the field of expertise. Should recognize that health can be best assessed using a biopsychosocial approach or model.

73. Must inform the referring party without delay if facts or opinions have materially changed.

74. Must inform the requesting party of any unforeseen delay in providing an opinion or a report.

E. Responsibilities to Other Experts and Treating Professionals

75. Must avoid disparaging comments relative to other healthcare professional's treatments, opinions or reports.

76. Must identify assessments or treatment interventions that do not meet standard of care or may be fraudulent.

77. Must not engage in personal attacks in the context of commenting on another expert's divergent opinions or views.

78. Must provide detailed and balanced argumentation based on facts and scientific evidence to qualify another expert opinion.

79. Must uphold the Code of Conduct for one-self and others.

F. Responsibilities to One-Self

80. Must keep up-to-date in the chosen field of expertise and specialized knowledge.

81. Must maintain competence and proficiency in the medicolegal field by participating in continuing professional education and peer review.

82. Must advocate for the development and safeguard of the highest medicolegal standard of practice.

83. Must seek assistance from colleagues and/or appropriately qualified professionals when experiencing difficulties that might adversely affect services to the evaluee, the referring party, society, the profession or one-self.

84. Must resist any influence or interference that could undermine your professional integrity.

85. Must recognize the evaluator's physical and emotional health and well-being can impact the medicolegal practice.

Conclusion

It is hopeful that this paper will generate discussions and lead to the development and adoption of Canadian Medicolegal Practice Standards. Please do not hesitate to contact the Université de Montréal Insurance Medicine and Medicolegal Expertise Program with any suggestions, assistance or guidance. This document is expected to evolve over time as our role in the medicolegal field gets better defined.

References

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