

A photograph of a medical form with a stethoscope and a pen resting on it. The form contains text such as "OTHER CONDITIONS", "Does the applicant suffer from any disease not mentioned above, which is likely to interfere with the sufficient discharge of his or her duties as a driver, or to cause driving by him or her on a vocational license to be a source of danger to the public?", and "If YES, please specify".

# EXPERT REPORTS AND HOSPITAL RECORDS – BEST PRACTICES

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## JURIES TYPICALLY DECIDE CIVIL CASES IN ONTARIO

“The public do not know enough to be experts, but know enough to decide between them.”

Anonymous

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## WHO IS AN EXPERT

- Special skill, knowledge, training or experience
- Observations and opinions will assist the Court
- No limited to any field of science or otherwise it is anyone who offers opinion evidence to the Court
- Judge has discretion to admit the evidence if its is: Relevant, necessary in assisting trier of facts and the expert is properly qualified.

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### 3 TYPES OF REPORTS

1. Report of treating physician
  - for your patient
2. Independent defence medical examination
  - requested by lawyer on behalf of an insurance company
  - you will examine patient and report on current status, limitations, prognosis
3. Expert Opinion
  - Requested by either side to provide report regarding issues, which can include negligence (standard of care), causation, damages.

### ARE YOU OBLIGATED TO PREPARE A REPORT?

As per CMPA:

“You are under a professional obligation to provide a report on your own client’s medical condition. You should insist that the request be in writing and specify the purpose for which the report is requested. You should also insist on a written authorisation, signed by the patient for the release of this information to the person requesting it.”

“You are entitled to a reasonable fee for the preparation of this report.”

It is your personal judgment whether to prepare defence medical examinations or expert opinions.

## HOSPITAL RECORDS AND MEDICAL CHARTS

### Where business records admissible

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. R.S.O. 1990, c. E.23, s. 35 (2).

1. Made in ordinary and usual course
2. It is in ordinary and usual course for doctors and health practitioners to make written records of events when seeing patients and in hospital
3. Record need to be made within a reasonable period of time thereafter

## ARE YOU OBLIGATED TO PROVIDE RECORDS

Yes, according to the Supreme Court of Canada.

Patient is entitled for a reasonable fee to obtain a copy of any records concerning his/her medical treatment in the physician's chart.

According to CMPA –

“Upon receipt of such a request and an appropriate written authorisation form the patient, you should forward copies of the relevant records unless there is a valid concern that information in the records may cause harm to the patient or a third party, or if another exception provided by privacy legislation applies.”

## DUTY OF AN EXPERT

### Duty of Expert 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. O. Reg. 438/08, s. 8.

## THE EXPERT REPORT MUST CONTAIN – RULE 53

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.
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 his or her 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 him or her 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. O. Reg. 438/08, s. 48. [Emphasis added.]

## FORM 53

### ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is ..... (name). I live at .....  
(city), in the ..... (province/state) of  
..... (name of province/state).
2. I have been engaged by or on behalf of .....  
(name of party/parties) to provide evidence in relation to the above-noted court proceeding.
3. I acknowledge that it is my duty to provide evidence in relation to this proceeding as follows:
  - (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 my area of expertise; and
  - (c) to provide such additional assistance as the court may reasonably require, to determine a matter in issue.
4. I acknowledge that the duty referred to above prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

Date ..... Signature

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## YOUR REPUTATION IS ON THE LINE

"My assessment of Dr. Edwards was that of a sensible, not easily-fooled practitioner who would have no patience either for exaggerators or malingerers. I found Ms. Dunn an honest witness who, without exaggeration, described the problems she had. I prefer the evidence of Dr. Edwards to that of Dr. Rathbun. Dr. Edwards' evidence struck me as objective and balanced. On the other hand, Dr. Rathbun was handicapped by a failure to bring his notes and by a lack of any memory of this particular plaintiff. His failure to admit that a back injury would be exacerbated during pregnancy is typical of Rathbun's unwillingness to even admit the potential for chronic pain in this patient. In the circumstances of this case, the superior opportunity of the plaintiff's physician to observe Ms. Dunn persuades me that Dr. Edwards' opinion is the more accurate."

- Chadwick J. in *Dunn v City of Mississauga*

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## YOUR REPUTATION IS ON THE LINE

"[122] Dr. B was not a credible witness. He failed to honor his obligation and written undertaking to be fair, objective and nonpartisan pursuant to R. 4.1.01. He did not meet the requirements under R. 53.03. The vast majority of his report and testimony in chief is not of a psychiatric nature but was presented under the guise of expert medical testimony and the common initial presumption that a member of the medical profession will be objective and tell the truth."

- *Kane J. in Bruff-Murphy v Gunawardena*

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## EXPERT'S DUTY

"When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client. Courts require more. The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and conclusion."

- *Gold Financial Corp v Puslinch - Ontario Court of Appeal*

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## HELPFUL Language for the Patient

“Balance of Probabilities” – 51%

- ➔ Probably
- ➔ Likely
- ➔ More Likely Than Not
- ➔ Will
- ➔ Real and Substantial Possibility or Risk (Future)
- ➔ Materially Contributed to (No-Fault Benefits)

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## UNHELPFUL Language for Patient

- ✗ May
- ✗ Possibly
- ✗ Unlikely
- ✗ Could
- ✗ Can
- ✗ Perhaps
- ✗ A Chance That
- ✗ Lost Opportunity

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## PREPARING REPORTS – TIPS

- Set out your credentials
- Ensure you have reviewed all relevant information (diagnostic imaging, photographs, charts)
- Interview the patient
- Ensure you have up to date information from the lawyer
- Consider other expert evidence in file
- Cite any supporting documentation or literature for your opinion
- Ensure you have sufficiently explained the rationale for your opinion

## COMMON PROBLEMS WITH MEDICAL REPORTS – ACCORDING TO CMPA

- Avoid using phrase “dictated but not read” – read the report and sign it
- Avoid mentioning your fee in the report – reports are filed with the Court
- Avoid making statements that make conclusion on patients credibility – this is for Court to decide
- Avoid references to insurance – juries are not supposed to know about this
- Avoid lengthy and repetitive reports
- Avoid making corrections at the patients requested unless you are sure it is warranted
- Remember that medical standards of proof are different that legal standards and you must be willing to weight in legal tests like “balance of probabilities”

## RESPONDING TO OTHER SIDES EXPERT

- Point out any limitations in credentials
- Explain flawed reasoning
- Set out any bias
- Where expert has done testing or relied on a theory that is invalid, point it out
- Where expert has mistaken evidence, point it out
- Highlight any literature that rebuts experts opinion
- Point out if expert has gone beyond his/her expertise.

## INTERACTION BETWEEN EXPERTS AND LAWYERS

According to the Ontario Court of Appeal in *Moore v Getahun*:

*“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 a case.”*

## INTERACTION BETWEEN EXPERTS AND LAWYERS

According to the Ontario Court of Appeal in *Moore v Getahun*:

- Consultation and collaboration between counsel and expert witnesses is essential
- Reviewing a draft report enables counsel to ensure the report complies with the *Rules*, is relevant and is comprehensible
- Leaving the expert entirely to his or her own devices would result in delay and increased costs
- Counsel must be able to meet with experts, test hypotheses and edit draft reports under an umbrella of protection

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## INTERACTION BETWEEN EXPERTS AND LAWYERS

According to the Ontario Court of Appeal in *Moore v Getahun*:

- Draft reports need not be disclosed
- Notes and records of consultations between experts and counsel need not be disclosed
- Inquiries about draft reports will not be permitted, but . . .

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## INTERACTION BETWEEN EXPERTS AND LAWYERS

The Court will **NOT** permit improper conduct:



Counsel must not persuade or attempt to persuade an expert to give an opinion that the expert does not genuinely believe;



Counsel cannot interfere with the expert's independence or objectivity; and



Counsel must remain alive to the expert's duty to remain objective and impartial.

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## PREPARATION FOR TRIAL

- Meet with lawyer for extensive briefing
- Create an outline of questions
- Review other sides expert opinions to have sense of types of questions you will receive on cross examination
- Visual aids should be discussed and reviewed
- Review your file
- Review your report
- Make sure to retain your file, it may need to be brought to Court

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## TESTIFYING IN COURT

- Respond to the Summons – if delivered, call the lawyer. Figure out logistics.
- Focus on your role as an expert – you are there to help the Court
- Become an educator – you are there to teach the judge or jury
- Avoid becoming evasive or argumentative while testifying
- Speak in BASIC terms (remember the jury is 6 people off the street)

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## THANK YOU

Please feel free to call or email us with questions.

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