

BC ASSOCIATION OF CLINICAL COUNSELLORS STANDARDS OF PRACTICE CLINICAL COUNSELLING REPORTS

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1) Introduction

Clinical counsellors with the appropriate competencies can be asked to produce a range of reports. Some of these can be presented in Court, usually as an expert report, or used by administrative tribunals like the Workers Compensation Board or the Insurance Corporation of BC in a similar fashion. A common example is a custody and access report that a counsellor may be ordered by the Court to prepare pursuant to section 15 of the *Family Relations Act* (FRA). But counsellors can also be asked to prepare any number of other counselling reports, such as a clinical assessment for the purposes of a personal injury claim or a workers' compensation file.

Several years ago, the BCACC recognized that there was a need to establish standards of professional practice concerning the range of reports that counsellors are commonly asked to produce. The standards set out in this document reflect the Association's guidance and expectations in relation to all counselling reports, except custody and access reports or similar reports filed pursuant to the FRA. In a separate set of standards of practice, *Child Custody and Access Assessment and Reports*, the Association has provided detailed guidance on how counsellors should assess and report on custody and access issues under the FRA. Counsellors should refer to those separate standards if they intend to produce those particular types of expert reports.

1.1) Effect of the New Rules

On July 1, 2010, a new set of Rules of Court came into force; one set for general civil proceedings (*Supreme Court Civil Rules*¹) and another parallel set of rules for family law proceedings (*Supreme Court Family Rules*²), which apply to proceedings that are conducted under the federal *Divorce Act*³ or BC's *Family Relations Act*.⁴ These will be referred to in this Standard as the Civil Rules and the Family Rules, respectively, and collectively as the New Rules.

The expert report provisions of the New Rules replaced the 1990 version of Rules 32A and 40A of the *Supreme Court Rules*,⁵ but they also added many new requirements.

With the coming into force of the New Rules, the BCACC decided that it would replace the 2000 *Standards for Writing Court ordered Reports* with more comprehensive information to help counsellors better understand how they should prepare their reports and their role as experts, in particular because those functions that are now specified under the Civil Rules. In addition, the BCACC will update the 2005 standards on *Child Custody and Access Assessment and Reports* to reflect the Family Rules. Changes to both sets of standards of practice are necessary because the New Rules contain a number of new and important provisions that all counsellors should be

¹ B.C. Reg. 168/2009, effective July 1, 2010 via O.C. 302/2009.; herein "the Civil Rules".

² B.C. Reg. 169/2009, effective July 1, 2010 via O.C. 303/2009; herein "the Family Rules".

³ R.S.C. 1985, c. 3 (2nd Supp.).

⁴ R.S.B.C. 1996, c. 12.

⁵ Supreme Court Rules, B.C. Reg. 221/90 (as amended); pursuant to the *Supreme Court Act*, R.S.B.C. 1996, c. 443; herein "the Old Rules".

aware of before they start to prepare any sort of report or give evidence in support of their filed expert reports.

1.2) Role of the Courts and the BCACC

The Courts and administrative tribunals play a significant role in supervising the quality of the expert reports they order as well as expert reports that the parties may submit to a Court or tribunal without an order. As such, the BCACC Board of Directors has adopted a separate policy that explains when the Association will investigate public complaints against clinical counsellors concerning their expert reports that have been or will be considered by the Courts or a tribunal.

In brief, the Inquiry Committee will not investigate a complaint against a counsellor concerning an expert report that the counsellor prepared pursuant to a Court or tribunal order or that was otherwise submitted to the Court or tribunal by one of the parties, unless the Committee is also provided with evidence that the Court or tribunal which ordered or received that report was critical of either the counsellor's assessment process or the resulting report.

Notwithstanding the effect of the Inquiry Committee's "screening" policy, the standards set out in this document can be used by the BCACC, the Courts, tribunals and others to assess the quality of the custody and access assessments that are undertaken by clinical counsellors and their resulting reports. Most importantly, counsellors can use these standards as a guide to maintain their skills in this growing area of clinical practice.

1.3) Standards reflect minimum requirements

The standards set out in this document reflect the minimum level of competency and practice that is expected of a counsellor when undertaking a clinical or counselling assessment, other than those concerning custody and access. While these standards articulate the requirements for counsellors who prepare non-FRA reports, counsellors should also be aware of and apply the more general guidance that is provided to counsellors within the BCACC Bylaws and Code of Ethics, in particular if there is an aspect of practice that is not covered in these standards.

1.4) Counsellors should avoid role confusion

These standards have been prepared with the understanding that the counsellor will be acting as an assessor for the purposes of preparing an expert report or a follow-up report for consideration by a Court or tribunal. While acting as an assessor, a counsellor should avoid multiple roles, such as also acting as a therapist, a consultant, a mediator, an arbitrator or a critic or advisor for the same client. It is expected that a counsellor, when acting as a clinical assessor, will clearly differentiate between these different professional roles and avoid role confusion.

1.5) Application of the Personal Information Protection Act

The requirements of the *Personal Information Protection Act*⁶ (PIPA) apply to the information a counsellor in private practice collects, uses or discloses while undertaking any sort of assessment or preparing an expert report. Therefore, when undertaking a clinical assessment and reporting on the results, a counsellor should be aware of and follow the requirements of this Act, as well as these standards. The BCACC's guideline, *A Counsellor's Template for Client Personal Information Protection Policies and Procedures*, provides further information on this legislation.⁷

These standards have been written with reference to the PIPA. If a counsellor who is not in private practice is relying on these standards, that counsellor or the employing agency may be required to comply with either that Act or the earlier *Freedom of Information and Protection of Privacy Act*⁸ (FOIPPA). If the FOIPPA applies, a counsellor should substitute a reference in these standards to the PIPA with a reference to FOIPPA.

Where there is a conflict between these custody and access standards and the requirements of either PIPA or FOIPPA, the privacy legislation takes precedence over these standards.

1.6) Application of other standards

If a counsellor is preparing an assessment report for an administrative tribunal, such as the Workers Compensation Board of BC or the Insurance Corporation of BC, the counsellor must be aware of and apply the standards for specific types of reports as may be required by tribunals like the WCB or ICBC. If the tribunal does not have its own standard, the counsellor should apply these Standards.

For the purposes of these Standards, a reference to the Court should be considered to be a reference to an administrative tribunal if the circumstances so warrant.

1.7) Legal Commentary on Expert Reports

Counsellors should also read a legal commentary prepared by the BCACC legal counsel, George Bryce, titled *Legal Commentary on Expert Reports*. In that Commentary, Mr. Bryce explores the impact of the New Rules and the common law on the role of counsellors who prepare any type of expert reports. A copy of this Legal Commentary is available at the BCACC website under the link Continuing Competency – Legal Issues.

1.8) Sources

This revised set of standards is based upon the following:

⁶ S.B.C. 2003, c.63.

⁷ The PIPA guidelines are posted at the BCACC website; reference: http://www.bc-counsellors.org/files/PIPA_AcounsellorsGuideOctober2004.pdf

⁸ R.S.B.C. 1996, c.165.

- 2000 edition of the *Standards for Writing Court ordered Reports*;
- a draft of the new *Child Custody and Access Assessment and Reports*
- the recent *Legal Commentary on Expert Reports*.

In addition, the BCACC has considered the guidance offered in reported cases where the BC Courts have considered or commented on expert reports that have been prepared by counsellors and other mental health practitioners.

1.9) Replace previous standards

The BCACC Board of Directors approved these standards pursuant to section 30(1)(b) of the BCACC Bylaws on the date noted on the front page. These standards replace the earlier *Standards for Writing Court Ordered Reports*, originally approved by the Board of Directors on March 4, 2000.

2) Guiding Principles for Report Writing

As with all other tasks within the scope of practice of a clinical counsellor, when preparing and writing counselling reports a counsellor must adhere to the ethical principles of respect, informed consent, competence, confidentiality, and integrity.

- Take a strengths-based perspective. Assessment reports by necessity may require that concerns be documented. However, a strengths-based perspective requires that the counsellor include only as many negative statements about a party as is necessary to make the point, and not to use inflammatory language.
- Preserve the dignity and privacy of the parties. An assessment report may require the disclosure of information that may be hurtful to significant relationships. Where possible, that is, where the integrity of the report can be preserved, counsellors should try and avoid damaging significant relationships. One means by which this could be achieved is for the counsellor to show respect for the collaterals and their relationship with the parties.
- Add constructive comments to the report. Comments and recommendations that counsellors make should contribute positively to the situation being assessed.
- Hold a broad theoretical and practical base. Counselling assessment reports should carefully guard against prescribing particular points of theory that are likely to become obsolete due to the evolving nature of the scientific knowledge and professional practice to which they refer.
- Avoid making absolute predictions. Counselling reports represent the best current knowledge of the profession and represent criteria for informing decisions that are superior

to other alternatives. This limitation applies to both content and recommendations.

3) Terminology

The following definitions will be used throughout these Standards:

- “Adult” means a person 19 year of age or older who is interviewed during the assessment or report-writing process.
- “Child” means a child who is the subject of a custody and access assessment undertaken by or a report prepared by a counsellor. If the context so requires, a reference to a child in these standards applies to two or more children, and also to an adopted child, a stepchild or a foster child, unless otherwise noted.
- “Court ordered report” means a custody and access or any other type of assessment report that has been ordered by the Court pursuant to the Civil Rules.
- “Counsellor” means a person registered with the BC Association of Clinical Counsellors who is authorized to use the title Registered Clinical Counsellor pursuant to the Bylaws.
- “Private report” means a custody and access or any other type of assessment report that has been requested by one or both of the parents, but without a court order, whether or not that report is later submitted by one or both parents as an expert report.

These standards recognize that, while there are certain minimum requirements a counsellor must follow when doing a clinical assessment or writing a report, there are also areas of practice where the counsellor has options and should exercise his or her best clinical judgment. To reflect the difference between a mandatory requirement and a suggested or recommended practice, these standards will use two different sets of verbs.

- The use of “shall” or “must” denotes an action or event that a counsellor must perform as a mandatory or minimum requirement.
- The use of “should” or “may” denotes an action or event that it is recommended or suggested a counsellor should perform, but is not necessarily a mandatory or minimum requirement.

4) General Requirements

The following are the general principles that a counsellor is expected to apply or consider while undertaking any sort of clinical or counselling assessment and preparing a resulting report. Specific requirements and recommendations are set out in later Parts.

4.1) Competencies

Before undertaking a clinical or counselling assessment and preparing the requested report, the counsellor must have knowledge, skills and abilities that relate to the issues or problems that the counsellor has been asked to assess.

If a counsellor identifies an issue either before or during the assessment for which the counsellor does not have sufficient competencies concerning that issue or cannot obtain those competencies before completing the report, the counsellor should consult with another counsellor or health professional who can advise the counsellor on that issue. A counsellor should note that consultation in the report.

Recognizing that the acquisition of competencies is an on-going process, counsellors who undertake clinical assessments should continue to learn and augment their current skills by undertaking continuing competency programs that are relevant to this service.

4.2) Counsellor's duty

In undertaking an assessment or in preparing an expert report, a counsellor must act in a balanced, fair and impartial fashion, in keeping with the counsellor's ethical and legal duties.⁹

When undertaking a clinical or counselling assessment and in writing the subsequent report, a counsellor should

- (a) exercise his or her best clinical judgment, and
- (b) employ clinical assessment and reasoning skills in a creative but balanced fashion.

If a counsellor recognizes that professional objectivity and impartiality is impossible or has become compromised during the course of an assessment, the counsellor should withdraw from the assessment process and so advise the client or Court.

4.3) Reference to an order or agreement

If a counsellor has been named by the Court to prepare a report or named in any agreement flowing from an order, when the counsellor first initiates communications with someone to be interviewed, the counsellor should

- (a) refer to the order, or
- (b) provide a copy of the order, or any agreement flowing from that order, to the person being interviewed,

unless the counsellor knows that the person being interviewed is already in possession of a copy of the order or the subsequent agreement.

⁹ COMMENT: The *Legal Commentary on Expert Reports* provides a detailed discussion of the law as it applies to a counsellor's duty as an expert preparing any sort of report. The Commentary also summarizes reported cases where counsellors and others have failed to meet this duty.

If the parties have agreed without a court order that the counsellor should prepare an expert report, the counsellor should refer to that agreement when initiating communications with persons to be interviewed, unless the counsellor knows that the person being interviewed is already in possession of a copy of the agreement.

4.4) Avoiding dual relationships

Because a counsellor can provide a wide range of counselling and therapeutic services to parents and their children, a counsellor who has been ordered or contracted to undertake a clinical or similar assessment should make every effort to ensure that his or her role as an assessor is understood by those who will be involved, whether or not the counsellor has provided counselling, therapeutic or similar services to the identified persons in the past.¹⁰

A counsellor who has been ordered by the Court or contracted by one or more of the parties to prepare an assessment report must not, while performing the assessment or preparing the report, provide any counselling, therapeutic or similar services to those who are the subjects of that assessment or report, unless

- (a) the Court so orders, or
- (b) the parties give their informed consent to the counsellor also providing those counselling services.

A counsellor who is providing counselling, therapeutic or similar services to those who are the subjects of the assessment must not, while providing those services, also undertake an assessment or prepare a clinical report, or make any recommendations concerning the issues, unless

- (a) the Court so orders, or
- (b) the parties give their informed consent to the counsellor also providing the assessment service.¹¹

If a counsellor has had prior contact with a person who is a subject of the assessment, the counsellor must disclose the nature of that contact to the Court prior to

- (a) undertaking an assessment or preparing a report, or
- (b) testifying in Court or before the tribunal, and

the counsellor must not undertake the assessment or prepare a report, or testify in Court or before the tribunal unless the party so consents or the Court so orders.¹²

¹⁰ COMMENT: It is recommended that the counsellor hold an “expectations meeting” with the person being assessed before the assessment begins, as this can help that party to understand the process they are about to be engaged in and allows the counsellor to deal with any potential concerns about dual relationships.

¹¹ COMMENT: A counsellor who is providing counselling, therapeutic, or similar services to a client may produce a letter of advocacy on the request of the client and / or the lawyer, but such a letter should not make recommendations regarding the issues being assessed.

¹² COMMENT: For example, if the counsellor works or resides in a small community, prior contact between the subject and the counsellor may be unavoidable. In such cases, the counsellor should disclose that prior contact and the party should consent to or the Court or tribunal may approve the counsellor’s continued involvement.

If a counsellor has had a prior personal relationship with one of the lawyers involved in the dispute, other than in a professional capacity, the counsellor should disclose that relationship to the Court, tribunal or party (or parties) before accepting the appointment.

4.5) Contracting

If a counsellor is undertaking an assessment or writing an expert report pursuant the request of any party in a legal dispute, a counsellor should enter into a written contract with the requesting party (or parties) before beginning the assessment.

As explained in the Legal Commentary, Civil Rules 11-3(2) & 11-3(6) require that, if the counsellor has been appointed by the parties as their joint expert, the counsellor and the parties in the dispute should enter into a separate written agreement, and that this agreement must also be signed by the counsellor and the parties.

Establishing such a contract is important because, as Civil Rule 11-3(7) goes on to state, the counsellor who was appointed by the parties as their joint expert is deemed to be the only expert who may later give expert opinion evidence in the legal matter on the issues to be assessed.

If a lawyer represents a party in a legal dispute, the counsellor may contract with that party through the lawyer unless the party or lawyer otherwise advises. But if a lawyer does not represent a part, the counsellor should contract directly with that non-represented party.¹³

If the counsellor is acting pursuant to a court order, the counsellor does not have to enter into a formal, written contract with one or all parties, as the counsellor would be then acting pursuant to that order, which is also binding on the parties. There should be no need for the counsellor to establish a separate agreement with the parties named in the court order. However, if practical issues such as fee for services, allocation of costs, and payment schedules are not addressed in the order, a counsellor should set out such matters in a separate written agreement with the parties.

Civil Rule 11-5(4) provides that, if a counsellor is approached to be a court-appointed expert, the counsellor should be asked directly by the Court if he or she would consent to the appointment. At that time, the counsellor should ensure that all of the essential terms of the court ordered appointment, including financial arrangements, are spelled out in the order.

4.6) Terms of a contract

Subject to the applicable Civil Rules, the counsellor should ensure that the following subjects are addressed in the contract or agreement:

¹³ COMMENT: To ensure that a party is aware of his or her legal rights, a counsellor who deals with a part who is not represented by a lawyer should encourage that party to seek independent legal advice. This should also help the counsellor avoid becoming embroiled in a subsequent dispute with a disappointed party.

- (a) an outline of the process and procedures to be followed, and the areas to be covered during the assessment process;
- (b) scope of the assessment or general nature of the report, including whether it was ordered by the Court or not;
- (c) access to records;
- (d) estimated duration of the assessment process, including any deadline for submitting the report set out in a court order;
- (e) disclosure and distribution of the report;
- (f) whether recommendations will be made in the report;
- (g) registration and credentials of the counsellor;
- (h) confidentiality and the exceptions (see section 4.3, *Confidentiality and Exceptions*, below);
- (i) consent for the release of information;
- (j) financial arrangements for paying the counsellor (see section 3.7, *Financial Arrangements*, below);
- (k) dealing with any potential conflicts of interest (see section 1.4, *Counsellors Should Avoid Role Confusion*, above)
- (l) arrangements for consulting with other professionals;
- (m) if the counsellor was not appointed pursuant to a court order, what steps a party may take if that party has a question or concern regarding the professional work of the counsellor;
- (n) the counsellor's membership with the BCACC.

In addition, the counsellor may include the following subjects in the written contract:

- (o) an assessment timetable, such as who will be interviewed, when and where;
- (p) use of any screening or assessment tools;
- (q) requesting or using written collateral reports;
- (r) the responsibilities of the counsellor and each of the parties.

If a Court orders the counsellor to prepare a clinical report pursuant to the Civil Rules, the counsellor need not itemize in a contract those items that are specified in the order itself. However, the counsellor should refer to or attach a copy of that order to the written agreement.

4.7) Financial arrangements

Whether or not a counsellor is appointed directly or indirectly by the Court, the counsellor must advise the party (or parties) who hired the counsellor about the financial arrangements with respect to the counsellor's statement of account, including:

- (a) the counsellor's fees and disbursements for undertaking the assessment and preparing the report, including an estimate of the total costs and the possibility of any additional or unanticipated fees or disbursements that may occur;
- (b) daily amount for attending Court to be examined on the report;
- (c) any taxes that may be applied to the fees or disbursements;

- (d) the nature of the services that the fees cover, including attending Court;
- (e) who will pay the counsellor's statement of account;
- (f) when the statement of account will be paid;¹⁴
- (g) what options the counsellor may pursue for obtaining payment on an unpaid statement of account.

Civil Rule 11-5(9)(a) gives the Court the authority to fix the amount of remuneration to pay the counsellor who the Court appoints. However, the counsellor who is to be appointed by the Court should agree to that amount *before* agreeing to the appointment. The counsellor should also agree to the other financial arrangements, as described in this section, and those terms should also be set out in the court order. If they are not, they should be documented in the subsequent agreement.

If the parties will not share equally in paying the counsellor's statement of account (because, for example, the Court has ordered that one party pay for the assessment, or one party has agreed to cover the costs of the assessment), the counsellor should

- (a) discuss fees and financial arrangements with the paying party before the counsellor begins the assessment, and
- (b) specify in the contract the allocation of the costs between the parties.

A counsellor should document in the contract the terms of the financial arrangements, as recommended in section 3.6 above. The counsellor should also keep clear and accurate record of the time he or she has spent interviewing, writing the report, etc. All recorded work should be necessary to allow the counsellor to express the requested opinion.

If the total costs for completing the report will exceed those estimated in the contract, the counsellor must inform the paying party (or parties) of this as soon as practical and explain the reasons for the additional fees. If practical, the counsellor should negotiate a new or further arrangement with the party (parties) for the payment of the additional costs.

5) Gathering Information

5.1) Consulting the requesting party re: scope

The counsellor must determine the scope of a custody and access assessment in conjunction with the party who is requesting the assessment, taking into consideration any directives given in a court order or a referral question, if any.

If, after consulting with the requesting party, the scope of a particular assessment needs to be limited or broadened as determined by the counsellor, the counsellor should communicate such

¹⁴ COMMENT: It may help to safeguard the counsellor's role as an impartial assessor if the counsellor collected all or part of the agreed fee prior to or at the start of the assessment, or prior to release of the final report.

changes to the requesting party, or the Court if applicable, in a timely manner, and be prepared to justify such needed change.

5.2) Informed consent

If a counsellor has been ordered by the Court to undertake an assessment and prepare a report, the following requirements do not apply.

A counsellor must obtain the informed consent of each adult to their participation in the assessment process.

Before commencing an assessment of a child, a counsellor must obtain the informed consent of the parent(s) of the child to participate in the assessment.

If the child is a mature minor, the counsellor can rely on the consent of the mature minor for the purposes of interviewing that child, to the extent of that child's capacity for understanding based on the child's developmental level and ability to give or express consent.¹⁵

If a requested participant refuses to cooperate or give consent, the counsellor will so inform that person of the probable consequences of their lack of cooperation with the assessment process. And if that person continues to refuse to cooperate, the counsellor must then inform that person that a lack of cooperation can be documented in the final report.

A counsellor should obtain the consent in writing, but if the consent is given orally or it can be implied, the counsellor should make a note in the file documenting that oral or implied consent.

5.3) Confidentiality and exceptions

At the commencement of an interview, the counsellor must advise each person to be interviewed that personal information will be collected, used, disclosed and given security in accordance with the provisions of the *Personal Information Protection Act*.

In addition, the counsellor must advise all participants, including collateral references, that if the final report is later submitted in court:

- (a) the information they provide during the assessment is not privileged and may become part of the public record;
- (b) they may be required to provide corroborative evidence in Court under oath.

5.4) Gathering information

A counsellor must make every effort during an assessment to obtain or gather all relevant

¹⁵ COMMENT: For further guidance on obtaining consent from children, see Bryce, G. "Obtaining Consent from Children" 12:2 *Insights* (Summer 2000), which has been posted at <http://www.bc-counsellors.org/files/consentchildren.pdf>.

information from the best sources available, and personally conduct all interviews necessary for the assessment.

Notwithstanding the generality of the above, a counsellor may have

- (a) a counselling student undertake the information gathering tasks, so long as the counsellor supervises that student, and
- (b) an assistant gather factual information such as school and medical records, as authorized and directed by the counsellor.

If someone other than the counsellor had a role in gathering information and preparing the report, the counsellor must so advise the requesting party and clearly explain that person's role and the form of supervision exercised by the counsellor, and do so either in a contract with or a letter to the parties, as well as in the final report.

Counsellors should seek as many sources as reasonable to corroborate the information they have gathered from third parties.

5.5) Collateral sources of information

The counsellor may interview persons as collateral sources of information, including people who the requesting party may view as significant.

Before interviewing a collateral source of information, the counsellor must

- (a) obtain the requesting party's consent, preferably in writing (in the form of a release), to allow a collateral reference to provide the counsellor with personal information about that person,
- (b) ask the requesting party to tell their collateral references that they may be contacted by the counsellor, and
- (c) advise the requesting party that a collateral reference will be contacted if the counsellor decides it would be beneficial to do so.

The counsellor must also advise each collateral that, if the final report is later submitted in court:

- (a) they may be subpoenaed to a hearing to give evidence on the information or observations they have provided to the counsellor, and
- (b) pursuant to the *Personal Information Protection Act*, the information or observations they have provided to the counsellor may, on the written request of a parent or a reference, be released to that requestor.

5.6) Consulting and cooperating with other professionals

A counsellor may consult other professionals with specialized training and expertise in the subject area of the report, and if the counsellor so consults, that consultation should be documented in the final report.

During a consultation with another professional, the counsellor may disclose otherwise confidential information about a party to the extent such disclosure is permitted in the written contract or as may be required for the purpose of that consultation.

5.7) Recording interviews

Every person has the right to record that person's interview with the counsellor.

If a person exercises this right, the counsellor may also record the interview.

If the counsellor elects to record an interview, the counsellor may be required to provide a copy of that recording in a later legal proceeding or at the request of the party who was recorded.

5.8) Maintaining records

Because any notes and records a counsellor prepares during a clinical assessment are subject to review by the parties on request or during a legal proceeding, a counsellor should ensure that the information and records obtained during an assessment are well maintained and reflect the process of the assessment.

A counsellor should create a separate record of each meeting and contact with all persons interviewed, and all other sources of information, and note the location, date, length of meeting, individuals in attendance, and substance of the meeting.

In preparing notes or records, the counsellor must distinguish between the first hand information provided to or observed by the counsellor, and the counsellor's subsequent reflections on that information.

A counsellor should ensure his or her notes are concise but also provide enough detail to ensure accurate recall.

A counsellor in private practice is reminded that all personal information the counsellor collects during an assessment is subject to the provisions of the *Personal Information Protection Act*.

6) Writing the Report

When preparing an expert report, the counsellor should frame that report in accordance with the Civil Rules.

6.1) Writing style

When writing the report, the counsellor should

- (a) use clear language;
- (b) avoid overly-technical language and the use of legal or psychological jargon;

- (c) use the active voice;
- (d) use gender-neutral language whenever possible;
- (e) convey an attitude of respect for all of the individuals involved;
- (f) preface an opinion with a phrase like “In my opinion...”.

6.2) Presentation of information

When preparing a report, a counsellor must

- (a) present information that is based on direct observation;
- (b) state clearly if the view of another person is being relied on;
- (c) disclose any bias the counsellor may hold against any person named in the report;
- (d) ensure the report
 - (i) is objective and based on facts,
 - (ii) is balanced and does not engage in linguistic advocacy, and
 - (iii) avoids making predictions but makes comments on current status.

If the counsellor presents information that is not based on direct observation but on the observations of another person, the counsellor should identify who made the observation and its circumstances.

Where possible, that is, where the integrity of the report can be preserved, counsellors should try and avoid damaging significant relationships.

A counsellor should cross-check all statements made in a report, and must be able to substantiate each reported statement under cross-examination.

A counsellor should avoid reporting an irrelevant fact, which is a fact that has no bearing on or contributes nothing to understanding the identified issues.

A counsellor must not only disclose the facts, information, documents, etc. that were considered, but also include information about those facts and any assumptions upon which the final opinion is based, including any deficiencies or errors in the disclosed facts.

A counsellor should point out in the report where the counsellor was unable to obtain sufficient information on a particular issue, or to explain where there are facts reported in the report that might conflict with each other, in particular conflicts in relation to major issues.

A counsellor must not introduce new factual information in the assessment and recommendation section of the report that is not already set out in the summary of facts section.

Appendix A contains a recommended template for an expert report.

6.3) Analysis

The counsellor must:

- (a) identify or disclose any assumptions made before rendering an opinion or offering a conclusion;
- (b) disclose any biases in analyzing the gathered information;
- (c) review impartially and consider all data collected in formulating the analysis;
- (d) explicitly state or disclose the data used in reaching a conclusion or making a recommendation.

A counsellor should avoid considering or applying an irrelevant fact (e.g. a fact that has no bearing on or contributes nothing to understanding the identified issues).

A counsellor should avoid using information that has little probative value (e.g. information that does not prove the truthfulness or accuracy of something), and should also avoid overstating the probative value or certainty of information in the report. Counsellors should avoid seeing certainty in situations where it may not actually exist.

A counsellor should disclose any errors in reported facts that the counsellor later identifies while writing the report or preparing any conclusions.

If two or more reasonable, alternative explanations present themselves, a counsellor should discuss each one and not avoid presenting different conclusions.

A counsellor should avoid making a diagnosis that is beyond that counsellor's expertise, and should also avoid offering legal conclusions, in particular the counsellor should not comment on the legal issue that the Court has been or may be asked to adjudicate.

6.4) Reporting allegations

A counsellor should not provide an opinion in the report about the veracity of any outstanding criminal allegations against person.

A counsellor may present in the report any unproven criminal allegation, but only as a hypothesis relating to the issues the counsellor has been asked to assess.

6.5) Recommendations

If a counsellor intends to make a recommendation to the Court, the counsellor should acknowledge that the Court has the sole jurisdiction to make the final decision.

If a counsellor makes a recommendation, it must be

- (a) supported by reasons that are based in the evidence collected during the assessment, and
- (b) specific, clear, and practical, and

(c) tentative, rather than absolute, regarding predictions and outcomes.

If no recommendation is made, the counsellor must explain why in the report.

If a counsellor can only offer a provisional conclusion or interim opinion because the counsellor has not yet obtained all the required facts or been able to complete all the necessary analysis, then the provisional or interim nature of the counsellor's conclusions should be made clear.

6.6) Reviewing the recommendations

If a counsellor was appointed by the Court to prepare the report or if a counsellor anticipates that the report will be presented in Court, the counsellor should not discuss the progress of the assessment, recommendations and reasons with the parties or disclose a draft of that report to a party, unless the Court expressly approves such a discussion or disclosure.

If a counsellor was not appointed by the Court and the final report is not likely to be presented in Court, and if the counsellor determines it would be appropriate and useful to do so, the counsellor may discuss the progress of the assessment, recommendations and reasons for them with the requesting party and, if requested, with that party's lawyer, or disclose a draft of that report. The counsellor may use the party's response to the proposed recommendations as a source of additional information for the final report.

7) Distributing the Report

7.1) Distributing court ordered expert reports

When a counsellor has been ordered by a Court to prepare an expert assessment report pursuant to the Civil Rules, the counsellor must follow the reporting requirements of that provision or as communicated to the counsellor by the Court or the lawyers. If such instructions are not provided, the counsellor should apply the following.

If it is a court ordered report ordered under Civil Rule 11-5(1), then - applying Civil Rule 11-5(12)(a) - the counsellor must send a copy of that report to the applicable Court Registry, and to each of the parties, and within the timeframes that the Court should specify in the order.

Civil Rule 11-5(12)(a) allows the counsellor to send the reports to the Court and the parties by ordinary post. But if the Court specifies in the originating order some other form of distribution, the counsellor should follow that directive.

If the Court has not addressed distribution in the order, then instead of mailing the report to the Court and parties, the counsellor may want to file a copy of the report with the Court Registry¹⁶ and serve a copy of the report on the parties.¹⁷

If the Court has ordered an assessment report and stated in the order that copies are to be sent to various third parties, the counsellor does not need to obtain a party's consent to that ordered distribution.

If a counsellor is unable to complete and distribute the final court ordered report by the prescribed date, because of a delay due to injury, illness or other reason, the counsellor must as soon as practical, advise the appointing judge in writing

- (a) that there will be a delay in finalizing the report,
- (b) a summary of the reasons for the delay, and
- (c) the new date when the counsellor expects to be able to deliver the final report.

If the counsellor so advises the appointing judge of a delay in completing and delivering the final report, the counsellor should provide a copy of that letter to each party in the proceeding.

7.2) Distributing private reports

When a counsellor has been hired by one or more of the parties to prepare an expert assessment report without direction from the Court, the counsellor must follow the reporting requirements as should be set out in the originating request or the resulting agreement.

Unlike the case for court ordered reports, the counsellor does not have to provide a final private report to the Court. Instead, Civil Rule 11-6(3) set 84 days before the scheduled trial as the minimum amount of time that an expert's private report must be served on every party in a proceeding. However, the parties in the proceeding or their legal counsel, not the counsellor, shoulder this responsibility. And whether or not the Court would accept the counsellor's private report as an expert report is also an issue that the requesting party would have to pursue separately.

If the requesting party agrees, the counsellor may provide a copy of the private report to third parties specifically named or approved by the requestor. If the requesting party is not the client or an agent of the client, the counsellor should obtain the consent of the requesting party (client) to release a copy of the report to any third party.

¹⁶ To file a copy of the report with the Court, the counsellor should deliver two copies of the report (in person or by agent) to the Registry for the Court that issued the original directive. The Registry clerk should then date-stamp the filed reports, and put them in the Court file. Alternatively, the filing could be done by registered mail or courier, with a proof of receipt of the package by a Registry official in the form of a signature card.

¹⁷ To serve a report on a party, the counsellor should personally (or by agent) deliver a copy of the report to the lawyers representing the parties in the proceeding or, if a party is not represented by a lawyer, to that non-represented party. If the counsellor does not serve personally (or by agent), the counsellor could arrange delivery by registered mail or courier, with a proof of receipt in the form of a return signature card. A counsellor should not simply mail the report to the parties by standard post.

If a counsellor is unable to complete and deliver the final private report by the original agreed date, because of a delay due to injury, illness or other reason, the counsellor must as soon as practical, advise the requesting party(parties) in writing

- (a) that there will be a delay in finalizing the report,
- (b) a summary of the reasons for the delay, and
- (c) the new date when the counsellor expects to be able to deliver the final report.

8) After Distributing the Report

8.1) Post-distribution meetings

If a counsellor was appointed by the Court to prepare the report or if a counsellor anticipates that the report will be presented in Court or before a tribunal, the counsellor should not meet with the requesting party (parties), either separately or jointly out of Court, to discuss the results of the assessment, etc., unless the Court expressly approves such a meeting.

If a counsellor was not appointed by the Court and the final report is not likely to be presented in Court or to a tribunal, a counsellor may meet with the requesting party (parties), either separately or jointly after the distribution of the report, and do one or more of the following:

- (a) discuss the results of the assessment;
- (b) provide an explanation of the process and a rationale for each finding or recommendation;
- (c) allow the party to ask questions.

8.2) Discussion with lawyer(s)

If the lawyer for one party wants to discuss the filed report with the counsellor prior to a pre-trial settlement or a hearing, the counsellor should ensure that the counsellor's information is equally available to both parties and their counsel. The counsellor should therefore advise the requesting counsel that both parties and their counsel must be invited to attend any discussion of a completed report.

8.3) Disclosure of notes

In the event that a party or a reference requests that the counsellor's notes and background material be disclosed to them, the counsellor must advise the requestor orally or in writing that:

- (a) notes may not be a verbatim record of the interview or observation;
- (b) notes were taken to assist the counsellor in recollecting the interview for the purpose of giving evidence at a court hearing, and that it is preferable to have the counsellor address the notes in Court at the time of hearing of the custody or access matter;
- (c) due to the complex and sensitive nature of the information gathered, notes and background materials are not disclosed in response to an informal request, but that a formal written request for disclosure can be made under the *Personal Information Protection Act*.

The counsellor must ensure that information contained within the report notes will be evaluated and disclosed in accordance with the *Personal Information Protection Act*, and the counsellor's own privacy policy, as also required by the PIPA.

8.4) Cross-examination

Any party in the legal proceeding may require the counsellor who prepared an expert report to attend Court and be cross-examined on the filed report (see Civil Rule 13-4(6)).

The requesting party must give the counsellor sufficient advanced notice to attend Court to be cross-examined. (For filed reports, such as a private report, Civil Rule 11-7(3) requires 21 days advanced notice to the counsellor.)

If a counsellor who prepared a filed, court ordered report and has been served with a notice to attend Court, that counsellor must not refuse a request to appear, but must attend to be cross-examined at the date, time and location set out in the notice.

Prior to attending the hearing for cross-examination, the counsellor should review the filed report and notes, and should index this material for easy reference.

A counsellor should be aware that any party (or his or her lawyer) is entitled to see the counsellor's assessment notes, etc. in Court, and – if so requested – the counsellor must bring the original of those notes, but should ensure a copy is retained in the counsellor's file.

A counsellor is allowed to charge the requesting party a fee for his or her time in preparing for and attending Court to be cross-examined on the filed report. A counsellor should ensure that this further service is covered in an agreement.

If necessary, the Court can order one or more parents to pay the expert, or even order that they file a security with the court to cover those fees (see Civil Rule 11-5(10)).

The Court may impose a penalty on the requesting party if it becomes clear that the counsellor should not have been called to Court to be cross-examined (see Civil Rule 11-7(4)).

Appendix A - Template for a Clinical Counselling Expert Report

COMMENTS: This template is based upon the framework for expert reports as required by the Civil Rules and reflects a more detail discussion of legal issues as provided in the Legal Commentary on Expert Reports.

Those elements of this template that may not apply to a report that was requested by one of the parties, or a report that was not prepared pursuant to a Court or tribunal order, are noted by underlined text. Depending on the circumstances, these could be optional elements to include in such reports.

Title page

In the Provincial/Supreme Court of British Columbia (state city)

Court File #:

Between: Applicant/Plaintiff

And: Respondent/Defendant

Counsel for the Applicant/Plaintiff

Counsel for the Respondent/Defendant

Type of Report

Name of counsellor and contact information (address, phone number, etc.)

Date the report was completed

Expertise and Qualifications

Civil Rules 11-6(1)(a) and (b) require disclosure of the counsellor's area of expertise, as well as qualifications, employment and educational experience in his or her area of expertise. A copy of a counsellor's more detailed resumé can be included as an appendix to the report.

A counsellor's previous experience as a recognized expert in Court can also be noted here, along with references to past cases.

It is not necessary to include copies of degrees, diplomas or certificates, but those should be available if later requested by the Court or either party.

Authority

Pursuant to the Order made by the Hon. Judge/Master/ Hon. Justice _____
filed on the _____ day of _____ 20____, with respect to [summary of purpose of order]

If the report was ordered by a Court, that information should be reflected in this section. A copy of the court order can be included as an appendix to the report.

Instructions and Purpose

Civil Rule 11-6(1)(c) requires that an expert report must include "the instructions provided to the expert in relation to the proceeding." And Civil Rule 11-6(1)(d) requires that an expert report must include a description of "the nature of the opinion being sought and each issue in the proceeding to which the

opinion relates.”

If the report was requested by one or more parties and, in particular, if it was not prepared pursuant to a court order, that fact should be so noted here, along with any specific instructions that were provided to the counsellor. A copy of any detailed instructions can be included as an appendix to the report.

Relationship to the Parties

If the counsellor had no previous relationship with any of the parties in the dispute, that fact should be so noted here.

If the counsellor had a previous relationship with one or more of the parties, that past relationship should be disclosed here. If both parties consented to the counsellor playing a dual role, then it should be noted that the parties gave their consent. A copy of any written consents should be included in the report as an appendix.

Summary of Facts

Civil Rule 11-6(1)(f)(i) requires the counsellor to set out in the report “a description of the factual assumptions on which the opinion is based.” Only relevant facts that are material to the later conclusions or recommendations should be set out here.

Test results can be included in this section, or set out under a separate heading.

Persons Interviewed

The names of all persons the counsellor consulted can be listed under this heading, using the following wording:

That, in carrying out this assessment, I have interviewed (indicate by telephone or in person interview) the following persons (state relationship to child or children and/or clients):

(sample)

- Name/Relationship: Telephone/In Person
- Name/Profession or Title: Telephone/In Person

If this is an alphabetical list by last name, and not a list according to when each person is first mentioned in the report, that organization should be so noted.

List of Documents

Civil Rule 11-6(1)(f)(iii) requires a counsellor to set out in his or her report “a list of every document, if any, relied on by the expert in forming the opinion.” The following wording is proposed:

That, in carrying out this assessment, I have reviewed the stated documents (list specific reports).

(sample)

- Name/Profession or Title: Type of Report

This section could list the books, publications, etc. that the counsellor also consulted.

It would be acceptable to combine the Persons Interviewed and the List of Documents under a single heading titled Sources.

Conclusions or Recommendations

Civil Rule 11-6(1)(e) requires the counsellor to state in the report “the expert’s opinion respecting each issue and, if there is a range of opinions given, a summary of the range and the reasons for the expert’s own opinion within that range.” These should reflect the issues that were summarized in the Instructions and Purpose section and they should also be supported by the information in the Summary of facts section, as noted above.

This section should include an assessment of information already presented.

Recommendation should be clearly outlined based on the counsellor’s assessment.

If a recommendation is not made, the reason(s) why must be clearly stated in the report.

Certification/Signature

Civil Rule 11-2(2) requires the counsellor to state in the report that he or she is aware of the general duty in Rule 11-2(1), has made the report in compliance with that duty, and will give testimony in conformity with that duty if so requested. Therefore, at the end of the report and accompanied by the counsellor’s signature, the following statement should appear:

In submitting this report, I hereby certify that I am aware of my duty under Rule 11-2(1) of the Supreme Court Civil Rules [or if the report is for a family law matter: “Rule 13-2(1) of the Supreme Court Family Rules”] to assist the Court and not to be an advocate for any party in a legal proceeding where this report may be used, and that I have made this report in conformity with that duty. Further, if called upon to give oral or written testimony, I will give that testimony in conformity with my legal duty to the Court.

Signature

(Print name of counsellor)

Date (if different than the date on the title page)