
# *THE MEDICO-LEGAL REPORT, 2021*

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**Medico-Legal Society of Toronto**

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## EXECUTIVE SUMMARY

Physicians and lawyers should work together to ensure that full, frank and effective expert reports are created to assist in the fair adjudication of the claimant/client's claim for compensation in personal injury cases of many kinds.

In this process, lawyers must ensure that physicians who are asked to give expert opinion evidence are properly informed about the issues and the applicable legal principles governing the admissibility of their evidence. Physicians providing reports and giving expert testimony for use in legal proceedings must understand that their overriding duty, regardless of the person who is requesting and/or paying for their opinion, is to provide to the court or the tribunal fair, objective, non-partisan and reliable opinions on the issues in the case.

One major source of difficulty between the professions is the failure of both professions to communicate, at the outset, about the terms for providing a medico-legal report. Efforts should be made to communicate, in advance, the lawyer's needs, including the nature and purpose of and the issues to be discussed in the medico-legal report and the physician's ability and responsibility to address them within the context of the available data.

It is important to discuss the completion date of the medico-legal report, the method of calculating the fee, and the time frame for payment. Physicians and lawyers should also ensure that all the available information, including an up-to-date medical brief as well as surveillance evidence, is collected and considered prior to preparing a medico-legal report.

Steps should be taken to ensure that claimant confidentiality is respected and to obtain consent of the claimant to permit the release of medical information. Claimants, as well as physicians, should be made aware of the extent to which the medico-legal report may be disseminated.

Specific duties are imposed upon lawyers and physicians by their respective professional rules of ethics. The College of Physicians and Surgeons of Ontario (CPSO) requires the physician, who agrees to provide a report, to provide it within 60 days of a proper request being made, under ordinary circumstances. The rules of the Law Society of Ontario (LSO) for professional conduct require the lawyer to pay the physician for the report, unless the lawyer clearly indicates in writing that the obligation is not a personal one.

If the lawyer indicates in writing that he or she will not assume the personal obligation to pay for the report, the physician must seek payment from the claimant/client or other third party. A physician is entitled to a defined and secure payment agreement and should be entitled to receive payment generally within 60 days of completion of the report. Subject to certain exceptions, the physician is entitled to request and receive payment in advance of the delivery of an expert report[1].

Physicians and lawyers often seek guidance as to the appropriate amount of the fee for preparing third party medico-legal reports and for the copying of records and related charges.

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[1] See section below at p. 22 "The Agreement between Lawyer and Physician" and CPSO Third Party Report, Policy 34, para. 11.

With respect to the amount of the fee for preparation of medico-legal reports, the key to avoiding any misunderstanding is *advance communication and agreement* on the fee between the lawyer and the physician before the preparation of the medico-legal report. A proper fee should be fair and reasonable[2]. The Ontario Medical Association (OMA) has suggested various methods to arrive at appropriate fees.[3]

There are other factors which may be considered in setting the appropriate amount of the hourly fee. Factors such as the expertise and experience of the physician and the complexity of the case may affect the hourly rate to be charged and may justify an adjustment to a rate recommended by professional associations. Physicians may also want to consult with other professional organizations, such as the Canadian Society of Medical Examiners (CSME), on an appropriate approach to the amount of the fee.

The issue should be discussed and the amount of the fee should be the subject of advance agreement between the lawyer and the physician. The amount of the fee agreed upon should be documented by an exchange of correspondence so that there are no misunderstandings.

With respect to the amount of the fee for photocopying and related charges, the guidelines[4] of the OMA recommend that the appropriate cost of photocopying is to be derived by a formula which takes into account the cost of photocopying ($30 for the first 20 pages and $0.25 per page thereafter), plus the cost of disbursements plus the cost of the physician's time for review of the records at the physician's hourly rate (after the first 15 minutes). It should be noted however that the Information and Privacy Commissioner of Ontario (IPCO) takes a different approach[5]. This

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[2]The professional misconduct regulations (O. Reg. 856/93) of the Medicine Act, 1991, SO 1991, c.30, section 1(1) 21 and 22 provide:

*1. (1)The following are acts of professional misconduct for the purposes of clause 51 (1) (c) of the Health Professions Procedural Code:*

*21. Charging a fee that is excessive in relation to the services performed.*

*22. Charging a fee for a service that exceeds the fee set out in the then current schedule of fees published by the Ontario Medical Association without informing the patient, before the service is performed, of the excess amount that will be charged."*

Paragraph 22 refers typically to uninsured medical services but is a useful guideline in understanding the manner in which fee disputes should be avoided. In addition, although paragraph 22 refers to "informing the patient", lawyers for third parties and representatives of insurance companies should recognize the overriding objective of agreement on the amount of the fee in the interest of avoidance of controversies and misunderstandings.

[3]*Physician's Guide to Third Party and Other Uninsured Services, A Guide for Ontario Physicians, Ontario Medical Association, January, 2020 Edition,* pp. 13, 14.

[4]Physician's Guide to Third Party and Other Uninsured Services, A Guide for Ontario Physicians, Ontario Medical Association, January, 2020 Edition, pp. 3, 16-17.

[5]With respect to the cost of photocopying and related charges, the *Personal Health Information Protection Act, 2004, SO 2004, c 3. (PHIPA)*, sub-section 54(11) of PHIPA states:

(*11) The amount of the fee shall not exceed the prescribed amount or the amount of reasonable cost recovery, if no amount is prescribed. 2004, c. 3, Sched. A, s. 54 (11).*

The Information and Privacy Commissioner considers that the "amount of reasonable cost recovery" is to be governed by a draft regulation which has not yet been adopted. This draft regulation is complex. The IPCO approach can result in an approach which is less than the amount recommended by the OMA. At present, the OMA recommends following the IPCO approach pending the outcome of proceedings to resolve the controversy.

difference of approach has the potential for creating controversy. Lawyers and physicians should therefore try and agree on a fee which is acceptable to both in advance. Absent agreement, physicians should seek legal advice from the CPSO and other professional associations.

The key to cooperation between the professions is good communication and mutual respect.

# INTRODUCTION

## Overview

Physicians and lawyers share responsibility to see that full, frank and effective medico-legal reports are made available as required for the benefit of a claimant/client and in the interest of the proper administration of justice. Unfortunately, poor communication between lawyers and physicians regarding medico-legal reports can lead to misunderstanding and lack of cooperation.

The principles and guidelines set out in this document were formulated to clarify the roles and obligations of physicians and lawyers, and to suggest strategies to promote understanding and cooperation between the professions. Physicians and lawyers should review their own practice to ensure that they are consistent with the principles and guidelines set out in this document.

Subjects such as the agreement between physician and lawyer, use of surveillance evidence, confidentiality, consent, dissemination of information, physician's and lawyer's obligations, and the amount of a physician's fee are discussed in this document. For specific issues dealing with consent, confidentiality and dissemination of medical information, reference should also be made to the *Health Care Consent Act, 1996*, the *Substitute Decisions Act, 1992* and the *Personal Health Information Protection Act, 2004.*

The scope of this document is limited to personal injury cases in Ontario, which include injuries sustained in motor vehicle accidents, medical malpractice and other cases. The generic term "claimant" in this document may therefore be used to refer to a plaintiff in a civil action or an applicant in a proceeding before the Licence Appeal Tribunal (LAT).

While the recommendations in this document do not apply to criminal cases and the many other kinds of legal proceedings in which a physician may be asked for a medico-legal report in other circumstances (such as family court assessments, mental capacity proceedings, applications for life or disability insurance coverage, human rights proceedings, inquests, commissions of inquiry, etc.), this document may assist lawyers and physicians in understanding the principles of good practice in the process leading up to the preparation and presentation of reliable expert opinion. Both must understand the nature of the particular proceeding in issue and the issues and purpose of the requested medico-legal report. They should adjust their preparation to comply with the rules of the particular tribunal before which the expert opinion will be adduced in evidence. Therefore it is incumbent upon the instructing lawyer to ensure that the physician understands the nature of the proceeding and the issues to be addressed.

## History of This Document

Medico-legal reports have been the subject of study by the Medico-Legal Society of Toronto ("MLST") since 1971, when suggested guidelines and a detailed skeleton outline for the preparation of medico-legal reports were published in a letter from the then President. Between 1970 and 1977, another document was developed and entitled the "Inter-Professional Code of the Medico-Legal Society of Toronto". This document was a statement of principles governing some physician-lawyer relationships, and included topics such as "Subpoenas and Court Attendance", "The Medical Witness", "Medical Expenses" and "Consideration and Disposition of Complaints".

In 1982, the guidelines and outline for preparing medico-legal reports and the Inter-Professional Code were combined into a substantially expanded and updated document entitled "A Report on Medico-Legal Reports". This document included discussions on confidentiality, and the professional obligations of physicians and lawyers and an example of an appropriate consent form. It received endorsement by the College of Physicians and Surgeons of Ontario, the Ontario Medical Association, the Canadian Bar Association of Ontario, and the Advocates' Society. The "Medico-Legal Report" was updated and revised in 1990 to include discussions on the dissemination of reports and factors to be considered in setting fees for the preparation of a medico-legal report.

Significant changes in case law, consent and capacity legislation, automobile no-fault legislation, and the Canadian Medical Association Code of Ethics for physicians prompted a re-examination of the document in 1997. A committee of practicing lawyers and physicians was struck to contribute to the 1997 update and revision. New topics included the agreement between lawyer and physician, surveillance evidence and a discussion about hourly rates for the preparation of medico-legal reports.

The 1997 version of the document was approved by the Council of the MLST. Endorsements by other organizations were not requested for this document. In 2002, the document was reviewed for changes in legislation, and other source documents, and updated accordingly. The 2008 revision was prepared in order to reflect changes in legislation and case law and in order to consider the impact of updated reference materials.

In 2007 and 2008 a committee of Council was appointed to make submissions to the Honourable Coulter A. Osborne, QC, for the purpose of assisting Mr. Osborne in preparing his report to the Attorney General of Ontario on reforms of the civil justice system. Mr. Osborne accepted a number of the recommendations of the MLST in his report to the Attorney General. Mr. Osborne's recommendations formed the basis for amendments to the *Rules of Civil Procedure* with respect to the obligations of expert witnesses and the content of expert reports. The 2010 revision of this Report was prepared to reflect these amendments which were effective on January 1, 2010. In addition, the 2010 revision considered the effect of case law relating to pro bono arrangements made in the interest of supporting access to justice.

One of the most significant developments in the case law since the 2010 Report is the distinction drawn between physicians who are "participant experts" who have been asked by the claimant or the claimant's lawyer to provide a report on the care which they have provided to a claimant and physicians who are "litigation experts" who have been asked by one of the parties to provide a report containing an opinion on the issues raised in a civil action. Over the course of the last decade as well, there has been jurisprudence which has considered the scope of experts` duties. In addition, amendments to statute law dealing with the no-fault automobile insurance regime have occurred. This revision takes into account these developments.

A committee of Council members was appointed to prepare this 2020 revision. Those members are:

Dr. Arthur Ameis, MD, FRCP(C), FAAPMR, DMLE, CFE, (President, 2017-2018)
Dr. Harold Becker, MD, CCFP, FCFP (LM) (President, 2011-2012)

Joseph Caprara, BA, LL.B. (President, 2018-2019; Council Member, 2020-2022)
Joseph J. Colangelo, BA, LL.B. (President, 1997-1998)
Dr. Michael R. Corbett, Ph.D., LL.M., F-ABFT, FCSFS (First Vice-President, 2020-2021)
Patrick Hawkins, BA, LL.B., LL.M. (President, 2020-2021)
Dr. Karina Kowal, MD, DESS, CIME, LL.M., Q.Arb. (Council Member, 2020-2021)
Dr. Dale Robinson, MD, FRCP(C) (Council Member, 2020-2021)
Dr. Michael S. Ross, MD, FRCP(C), CMLE (Council Member, 2012-15 and 2020-2022)
Philippa G. Samworth, BA, LL.B. (President, 2008-2009; Council Member, 2020-2022)
Dr. Howard Seiden, MD, M.Sc., FCFP(C), FIAIME (Council Member, 2014-2018)

This revision was approved by Council on November 13, 2020.

The title of this document, "The Medico-Legal Report, 2020" reflects the history of its development and the focus of its content on the medical and legal professions. While its title could be more generic and refer to expert reports generally from all health care professionals, the traditional title has been maintained in the interest of consistency with past practice and so that the reader will understand its origins and focus. The term "medico-legal report" is therefore used in this document as it has a history in the jurisprudence which reflects the experience of the professions and the judicial system in the kinds of reports which are typically encountered. The more contemporary term "clinico-legal report" may be substituted where appropriate to reflect that the proposed expert may not be a physician.

The MLST has no statutory authority to prescribe the content of or the approach to the preparation of a medico-legal report. However, the MLST hopes that this Report will provide useful guidance on some of the rules and principles relating to the preparation of a good report and the presentation of expert evidence.

**Purpose of Appendices**

The appendices are practical documents for quick and easy reference. Some contain a more detailed discussion of a topic. For the sake of convenience, the remarks in the appendices repeat some of the comments in the main body of this document. The appendices include guidelines and an outline for medico-legal reports, sample consents/authorization forms for release of medical information and for the conduct of third-party examinations/assessments and the anatomies of a civil action and of an arbitration at the Licensing Appeal Tribunal (LAT).

**Use of Short-Forms and Explanation of Terms**

In this document, the following short-forms are used to identify organizations and other concepts:

Canadian Society of Medical Examiners (CSME)
College of Physician and Surgeons of Ontario (CPSO)
Information and Privacy Commissioner of Ontario (IPCO)
Licence Appeal Tribunal (LAT)
Ontario Medical Association (OMA)

Rules of Civil Procedure (Rules)
Statutory Accidents Benefits Schedule (SABS)
The Medico-Legal Society of Toronto (MLST)

Copies of this document are available to members of the MLST through its Executive Director, or by accessing the website at www.mlst.ca.

## THE MEDICO-LEGAL REPORT

Medico-legal reports are essential to the legal process of assessing and resolving claims for compensation for personal injury. A full, frank and clearly written medico-legal report will contribute significantly to the proper and just adjudication and/or resolution of a claim for personal injuries. It will expedite the process, reduce costs, and frequently preclude the need for a court appearance by a physician. A good medico-legal report is more likely to result when members of the legal and medical professions communicate and cooperate.

### 1. Basic Concepts for Lawyers and Experts

### (a) Purpose of the Medico-Legal Report

The medico-legal report in civil personal injury matters is intended to help a judge or jury decide issues of standard of care, causation and the appropriate amount of compensation for an injured person. In a motor vehicle injury case before the LAT, the purpose is to determine the entitlement of the claimant or claimants to certain no-fault benefits (called "statutory accident benefits" or SABS) including income replacement benefits, and medical and rehabilitation expenses.

It must be prepared in a credible and competent manner to withstand intense scrutiny upon cross-examination. The medico-legal report should be objective. The physician preparing it should not assume the role of advocate either for or against the claimant's position. The content should be confined to relevant professional matters and not include extraneous or subjective remarks.

As an expert, the physician has an overriding duty to assist the court or tribunal on matters within their expertise so that justice may be done between the parties according to law. This duty overrides any obligation to the lawyer instructing the expert or to the person paying their account. The physician's opinion as expressed in the report must therefore be complete, competent, independent, unbiased, fair, objective, balanced and within the physician's expertise. The test of independence is whether the expert would express the same opinion if given the same instructions by the opposing party.

A lawyer who requests a report and the physician who prepares the report have an obligation to ensure that the report will result from a process that demonstrates care, competence and integrity. To this end:

> 1. The expert must have the expertise to offer the opinion on the relevant issues. At the outset, the lawyer needs to define the area of expertise on which he or she will seek to have the court or tribunal accept the qualifications of the expert[6].

[6]For example, it is not enough to request that the expert be qualified in neurology. The lawyer needs to also define how the area of expertise of the proposed expert witness makes him or her qualified to opine on the specific issues in the case. For example, it may be necessary to qualify the expert as a neurologist with expertise in the diagnosis and treatment of major neurological diseases in adults such as meningitis in order to address the specific issues in the case.

2. The lawyer has an obligation to provide all documents that are relevant to the issues to be addressed in the report.

3. The lawyer must explain the overriding duty of the physician to assist the court or the tribunal on the matters within their expertise in an independent manner.

4. The lawyer must explain the purpose of the report, the manner in which it will be disseminated and the use to which it may be put at trial.

5. The lawyer should advise the physician of their obligation to attend the proceedings to give testimony.

6. The physician must understand that if they give a report, then there is an obligation to attend trial and give testimony as may be required.

7. In SABS cases, it should be remembered that it is considered an "unfair and deceptive act or practice" for an assessment to be conducted by a person whom the insurer or its representative knows or ought to know is not reasonably qualified to conduct the assessment based on training or experience.

8. The lawyer must provide complete instructions outlining the questions to be answered and the legal standard of proof applicable to these questions.

9. The physician must provide complete, clear and reasoned answers to the questions to be answered.

10. The lawyer must explain that the expert has an overriding duty to the court to provide an opinion which is fair, objective, non-partisan and reliable. This issue is addressed by the rules of court. It is incumbent on the expert to follow the requirement of Rule 4.1.01 (expert's duty to the court) and Rule 53.03 (2.1) (content of report) of the *Rules of Civil Procedure.*[7] An explanation of these Rules should be provided to the expert so that she/he is guided as to her/his duty to the court and the requirements of the court with respect to the contents of the report.

It is a source of some confusion and frustration for both professions when lawyers fail to instruct experts on the proper standards of proof on issues of liability, causation and damages. In actions involving allegations of negligence against health care professionals, the expert should receive a clear and concise explanation of the standards of proof on the issues to be addressed. On these issues, the lawyer should explain the following:

1. On the issue of negligence, the issue is whether the health care providers in issue exercised the degree of care and skill of reasonably prudent and competent practitioners in similar circumstances. The expert should not couch his/her response to this question by expressing "concerns". The issue is whether the defendant fell below reasonable standards of medical practice.

[7]See Appendix D.

2. On the issue of causation, the issue is whether the alleged breach of the duty of the defendant on a balance of probabilities caused and/or materially contributed to the injuries suffered by the plaintiff.[8]

3. On the issue of damages, the determination of future care costs and future losses that may be suffered by the plaintiff is dependent upon whether such costs and losses are within the realm of real and substantial possibilities.

A physician may be asked to amend or expand upon a report to ensure completeness, clarity, accuracy or relevance. However, the lawyer should not propose and the physician should not accept a proposed amendment that distorts the accuracy of the expert's true opinion. If additional information results in a change of the opinion of the expert, an addendum to the initial report should be prepared and sent to the lawyer.

In providing an opinion, the expert should provide the factual basis of their opinion and should state any assumptions that he or she has been asked to accept as the foundation of the opinion. If a matter falls outside of his/her expertise, the expert should state so clearly so that the parties and the court will know the limitations of the opinion. If the expert has relied upon studies, authorities and other scientific material, they should provide references to these materials in the body of the report.

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[8]The law relating to causation is complex. Further, the test of causation noted above does not apply to cases of "informed consent"; in these cases, there is an entirely different test of causation and consultation with counsel is especially important.

Briefly, the legal principles relating to the law of causation with respect to the issue of negligence may be summarized as follows:

(a) The plaintiff bears the burden of proving on a balance of probabilities that the negligence of the defendant caused or contributed to the injuries;

(b) Scientific precision is not required to prove causation. The court is entitled to make the findings of fact on the issue of causation on a common sense, robust assessment of the evidence. The triers of fact, the judge or the jury, must take a robust and pragmatic approach and ask themselves whether they are persuaded on a balance of probabilities that it is more likely than not that the injuries were caused by the negligence;

(c) There is an alternate legal principle of causation, namely, the material contribution to the risk test, which is applicable in some circumstances. The material contribution test is an instrument of legal policy. It provides for a manner of considering the evidence with a less stringent approach than the balance of probabilities test where there is something inherently unfair in the evidentiary mix. For example, the defence may have destroyed evidence or multiple defendants may become embroiled in a complex exercise in finger-pointing. In these circumstances, the trier or triers of fact may become unduly challenged in coming to a conclusion on a balance of probabilities basis. If so, they may turn to the material contribution test.

The application of the law on causation to the particular facts of any given case typically gives rise to controversies of legal interpretation among the lawyers for the parties. Physicians and lawyers should have a full discussion about this issue as the complexities of the law on causation go far beyond this brief explanation. A complete listing of the relevant jurisprudence would be a challenge but some of the key authorities are: *Snell v. Farrell,* [1990] 2 S.C.R. 311; *Athey v. Leonati, [*1996] 3 S.C.R. 458 *Resurfice Corp. v. Hanke,* [2007] 1 S.C.R. 333, 2007 SCC 7 and *Clements v. Clements,* 2012 SCC 32, [2012] 2 S.C.R. 181.

It should also be noted that issues of causation in accident benefits/SABS cases before the LAT are beyond the scope of this document and are equally, if not more, complex than in civil actions. Therefore it is highly recommended that physicians and lawyers have an extensive discussion about the causation issues in LAT cases.

## (b) Admissibility of Expert Evidence: The Judge As "Gate-Keeper"

The overall trend of the jurisprudence has been to tighten the admissibility requirements of expert opinion evidence and to enhance the judge's "gatekeeping role" in determining the admissibility of this evidence.[9] Expert evidence is presumptively inadmissible[10]. Therefore, the burden of overcoming the presumption of inadmissibility lies on the party who is proposing to call the expert evidence. This burden should not be taken lightly by the lawyer and requires careful consideration of the relevant issues, proper selection and instruction of the expert and proper preparation for the trial/hearing.

There are two methods of getting the opinion evidence of medical experts before the court. The report itself may be admitted into evidence pursuant to a notice given in accordance with the provisions of s. 52 of the *Evidence Act.* However, the party responding to the party giving the notice may require that the expert be produced for cross-examination. In this instance, both the report and the cross-examination stand as the evidence of the expert.

Alternatively, the party offering the opinion of the expert may call the expert to give their opinion in person in court. In this case, the report is not admitted into evidence but rather is usually filed with the court as an aide to assist the trial judge in following the evidence. The evidence of the expert is the examination in chief, the cross-examination and the re-examination of the expert in open court. The report itself is not evidence in these circumstances.

Regardless of the method used to get the opinion evidence before the court, the party offering the opinion must establish the legal conditions which permit the admissibility of the expert's opinion. In *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC) ("*Mohan*"), the Supreme Court of Canada established four core requirements for the admissibility of expert evidence:

- relevance;
- necessity in assisting the trier of fact;
- absence of any exclusionary rule; and
- a properly qualified expert.

Leaving aside the issue of exclusionary rules, the requirements of three of the above primary requirements can be summarized as follows:

- *"Relevance requires the court to consider whether the evidence sought to be admitted tends to prove or disprove a fact in issue. It also requires the court to consider the facts upon which the opinion is founded. In short, does the evidence relate logically to the fact in issue?"*
- *"To be necessary, the evidence has to provide information that is likely to be outside the knowledge and expertise of the trier of fact. It must be more than helpful because "helpful sets too low a standard".*
- *"A properly qualified expert is one who has special or particular knowledge of their subject and the subject matter of their expertise is a legitimate area of study and meets the criterion*

[9] *White Burgess Langille Inman v. Abbott and Haliburton Co*., [2015] 2 SCR 182, 2015 SCC 23 (CanLII) at para. 20.
[10] *R v. Johnson*, (2019) 145 OR 3d 453 (CA) per Watt, JA at para. 48.

*of threshold reliability. It also requires an expert to be impartial, independent and unbiased."*[11]

The above test has been strengthened by subsequent case law, which confirms that even if all of the above criteria are met, the trial judge may exclude expert evidence on a cost-benefit analysis. In *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 SCR 182, 2015 SCC 23 (CanLII) at para. 19 ("*White*"), the Supreme Court of Canada added the requirement that the trial judge had *"a residual discretion to exclude evidence based on a cost-benefit analysis".* The court further explained at para. 20 of *White*, that *"the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects".*[12]

**(c) Expertise, Independence, Absence of Bias, "No Advocacy"**

There are also other important aspects of the decision in *White* which should be noted:

- A proposed expert's independence and impartiality is a precondition to admissibility. In other words, a proposed expert's independence and impartiality go to admissibility and not simply weight. Concerns related to an expert's duty of independence to the court should be addressed initially in assessing whether the expert is qualified. At para. 53, the court stated *"A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert."*

- The court also noted at para. 49, that if it is determined by the trial judge that the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence, then the expert's evidence should be excluded at the threshold stage.

- The court nonetheless found at para. 49 that the mere fact that a proposed witness has an interest in or connection to the matter will not necessarily render their evidence inadmissible.

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[11] *Children's Aid Society of London and Middlesex v. A.L.*, 2018 ONSC 5973 (CanLII), Tobin, J. at paras 100-104.

[12] The court in *White* summarized the test in the following way at paras. 23-24:

> "At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; *Lederman, Bryant and Fuerst*, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey (ONCA)*, at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see *D. M. Paciocco and L. Stuesser, The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283 (CanLII), 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611 (CanLII), 13 C.R. (7th) 396, at para. 72.
>
> At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76."

However, if, in the circumstances of the case, it is determined that the expert, because of interest or otherwise, is unwilling or unable to fulfil their fundamental duty to the court, the evidence will not be admitted. The court noted further that *"an expert who, in their proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court*".

- The court also stated that, if the expert is not found to be clearly unable or unwilling to fulfill their duty, any remaining concerns about impartiality and independence should be taken into account in the overall weighing of costs and benefits of receiving the evidence at the second, gatekeeping stage. Therefore, the issue of independence remains a consideration, even after the first stage of the admissibility analysis is complete and the trial judge may nonetheless exclude the evidence on the grounds of lack of independence at the second stage when they apply the discretionary tool of cost/benefit.

### (d) What an Expert Will Not Be Permitted to Testify About

Judges at the trial and appellate levels take the trial judge's "gate keeper" role seriously. Experts can expect that their credentials and objectivity will be challenged closely in cross-examination on a voir dire[13] when the expert is called to testify. Trial judges are especially concerned about the permissible testimony of an expert in jury trials in which there is a fear that the expert testimony may overwhelm jurors because of its content and complexity. Note that in a civil jury action, the jurors are not entitled to ask the witnesses, expert or otherwise, to clarify or explain an answer or a concept.

There are many examples in which experts have been limited in the scope of the testimony which they may give. It would be impossible to describe all cases in which this has occurred but some examples are instructive as follows.

A qualified expert may draw inferences and state their opinion. They may provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. However, if on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary and the opinion is inadmissible.[14]

An expert cannot provide an opinion which draws a conclusion of law. In one case, an expert report that contained legal opinion which was inseparable from the expert opinion was not admitted. In another, the court rejected an expert report, authored by several experts, which was full of overt and implied legal conclusions.[15]

Courts must be cautious to prevent undue reliance by the trier of fact on experts who speak in technical, scientific language and appear infallible. The concern expressed by the court in one case was that, dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive credentials and experience, the evidence was apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

[13]A hearing within the hearing to determine an issue such as the qualification of an expert, admissibility of evidence or other issues which the trial judge may want to consider in the absence of the jury.
[14]*R. v. Abbey*, 1982 CarswellBC 230, 1982 CarswellBC 740, [1982] 2 S.C.R. 24 at para. 44.
[15]Sea-Link Marine Services Ltd. v. Doman Forest Products Ltd., 2003 FCT 712 per Heneghan, J. at para. 115.

Therefore, the trial judge must be vigilant to ensure that the expert's testimony does not stray from the true area of the witness's expertise and into the fact-finding role of the jury.[16]

The courts have also noted that the improper receipt of expert evidence can result in tragedies caused by undue reliance on experts testifying outside their areas of expertise, overstating the evidence supporting their positions, and being less than impartial in their approach to the analysis.[17] Therefore, the court must consider not only the overall expertise of the expert, but also the extent to which their expertise is engaged on each question upon which they are asked to opine. The questions to be asked must be delineated and assessed in this light so that the trial judge ensures that the expert stays within the proper bounds of their expertise and that the content of the evidence itself is properly the subject of expert evidence.[18]

Therefore, it is important to be quite specific and clear about the area in which the expert is sought to be qualified. For example, in a product defect case, simply being an expert in consumer product testing may not qualify the expert to provide evidence on defects in photographic equipment, in the absence of specific expertise in camera design or lens mechanisms.[19] Therefore, in selecting an appropriate expert, it is preferable to identify a witness who was working in the field or was considered to be an expert "in the art" at the relevant time. For instance, while a university professor may be unbiased, in some fields, they may lack real-life experience. Courts may prefer to hear from someone has been actively engaged in the field at issue. For instance, in one case, the court suggested that a lay person who had day-to-day experience with fireworks, would be more qualified to provide testimony on the subject, than a professor of engineering with experience with explosives, but no specific knowledge of fireworks.[20]

In a similar vein, in cases where a person's education is not per se remarkable, it may be necessary to demonstrate significant work-experience in the field and post-education training and experience in order to qualify the expert. Therefore, in one case, the court excluded the opinion evidence of a child service worker because of lack of work experience. The proposed expert had taken three courses in psychology, two courses in sociology and individual courses in anthropology and religious studies, family communication, interviewing skills and crisis intervention. The court considered that these courses would not in itself provide sufficient training in the assessment of the needs of children and their parents, especially where, in their capacity as a children's service worker, the proposed expert had had only had about 33 cases and their early experience as a family enrichment worker was also brief (two years, with a relatively few cases that they worked intensively on).[21]

The opinion of an expert may be rejected, despite their extensive knowledge, training and experience, where their context is different from the context of the parties in the lawsuit. In one case, the court rejected the evidence of a highly trained and respected spine specialist at a large hospital in Ontario, responsible for a population of 2.2 million people. The court found that they

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[16]*R. v France*, 2017 ONSC 2040 (CanLII) per Molloy, J.at paras. 11-12.
[17]R. v France, 2017 ONSC 2040 (CanLII) per Molloy, J. at para. 15.
[18]*R. v France*, 2017 ONSC 2040 (CanLII) per Molloy, J. at para. 13.
[19]*Williams v. Canon Canada Inc.* 2012 ONSC 3692 (CanLII), (2012), 2012 CarswellOnt 8439 (Div. Ct.) per Pomerance, J. at paras. 13 to 17.
[20]*Brownlee v. Hand Firework Co.*, 1930 CarswellOnt 127, [1931] 1 D.L.R. 127, 65 O.L.R. 646 (CA).
[21]*Catholic Children's Aid Society of Hamilton-Wentworth v. S. (J.C.)*, 1986 Carswell Ont 619, [1986] O.J. No. 1866, 37 A.C.W.S. (2d) 437, 9 C.P.C. (2d) 265 at para. 10.

were not qualified to comment on the standard of care for a family physician in Lethbridge or on the standard of care of a physician who was trained as a family physician and who had specialized for one year in emergency medicine and then worked in a much smaller city at a hospital with fewer capabilities.[22]

The language of the expert report will be examined closely to assess the presence of bias. The court may exclude the evidence entirely or may narrow the scope of the evidence on which the expert may testify. In one recent case, the scope of an expert's testimony was narrowed on the grounds of bias because of the following factors:

- An expert strayed into "advocacy" where they saw their role as critiquing the Crown expert's opinion, as evidenced in the use of a heading in his report: "Critique of Rachelle Wallage's Report." In undertaking the critique, the expert stated that *"would like to take issue with a number of the points raised"* in the Wallage report and stated in their report that they would *"strongly argue"* for a certain point.

- The expert admitted that they had never authored an unfavourable report for someone who had retained them.

- The expert admitted that they had only spent 20 minutes with the claimant/accused and had relied largely upon two handwritten pages of notes they made during conversations with trial counsel to opine on the matter. That alone gave rise to concern about how much the expert actually knew before they were prepared to offer a definitive opinion.

- The expert crossed the line in expressing an opinion which was for the jury to decide. They opined that it was highly likely that the appellant/accused lacked the insight or awareness of his actions and could not form the intent to commit the offence. In the opinion of the court, this was not a simple crossing of the line. *"It was a giant leap across the expert line, clearly and unequivocally exposing the proffered expert as someone who did not understand the fundamental role of an expert".*[23]

### (e) Potential Pitfalls: Communications Between Lawyer and Expert Must Not Impair the Expert's Independence and Objectivity

The controversy about the propriety of communications between lawyers and experts was resolved by the Ontario Court of Appeal in *Moore v. Getahun.*[24] This is an issue which is often addressed in assessing the independence and bias of the expert. While it is essential that there be communication between the instructing lawyer and the expert, the courts have recognized that there is a delicate balance which must be struck between the assistance an expert must receive

[22]*Waters v Wong*, (2019) 2019 ABQB 51 (CanLII) per, Tilleman, J. at para. 309.

[23]*R v Herlichka* (2020) 150 OR 3d 734 (CA).

[24]*Moore v. Getahun*, (2015) 2015 ONCA 55.

from the instructing lawyer and the risk that such assistance might impair the independence of the expert. The lawyer has a duty to not interfere with the independence and objectivity of the expert.

The court in *Moore* considered a draft report which had been provided to the defence lawyer in a medical malpractice case, and the discussion between the defence lawyer and the expert leading to the final signed report by the expert. In arriving at its conclusions, the court considered the history of expert testimony and its impact on the administration of justice. The court stated:

> *Consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert witness understands the duties reflected by Rule 4.1.01 and contained in the Form 53 acknowledgment of expert's duty. Reviewing a draft report enables counsel to ensure that the report (i) complies with the Rules of Civil Procedure and the rules of evidence, (ii) addresses and is restricted to the relevant issues and (iii) is written in a manner and style that is accessible and comprehensible. Counsel need to ensure that the expert witness understands matters such as the difference between the legal burden of proof and scientific certainty, the need to clarify the facts and assumptions underlying the expert's opinion, the need to confine the report to matters within the expert witness's area of expertise and the need to avoid usurping the court's function as the ultimate arbiter of the issues.*
>
> *Counsel play a crucial mediating role by explaining the legal issues to the expert witness and then by presenting complex expert evidence to the court. It is difficult to see how counsel could perform this role without engaging in communication with the expert as the report is being prepared.*
>
> *Leaving the expert witness entirely to their own devices, or requiring all changes to be documented in a formalized written exchange, would result in increased delay and cost in a regime already struggling to deliver justice in a timely and efficient manner. Such a rule would encourage the hiring of "shadow experts" to advise counsel. There would be an incentive to jettison rather than edit and improve badly drafted reports, causing added cost and delay. Precluding consultation would also encourage the use of those expert witnesses who make a career of testifying in court and who are often perceived to be hired guns likely to offer partisan opinions, as these expert witnesses may require less guidance and preparation. In my respectful view, the changes suggested by the trial judge would not be in the interests of justice and would frustrate the timely and cost-effective adjudication of civil disputes.*
>
> *For these reasons, I reject the trial judge's proclamation that the practice of consultation between counsel and expert witnesses to review draft reports must end. However, as I will discuss below, the trial judge's unwarranted criticism of the appellant's counsel on this basis did not, in my view, affect the outcome of the trial."*[25]

[25] *Moore v. Getahun*, (2005) 2015 ONCA 55 (CanLII) at paras. 54-66. The following passages from the decision of the court are also helpful in understanding the court's reasoning:

> *"The Inquiry into Pediatric Forensic Pathology in Ontario (Toronto: Ontario Ministry of the Attorney General, 2008), conducted by Justice Stephen Goudge, looked into the shocking miscarriages of justice brought about by biased expert evidence. At p. 48 of his report, Justice*

Finally, the court decided that draft reports and the notes and records of consultations between lawyers and experts and draft reports are subject to litigation privilege and are not automatically disclosable. However, disclosure will be ordered "*where the party seeking production of draft reports or notes of discussions between counsel and an expert can show reasonable grounds to suspect that counsel communicated with an expert witness in a manner likely to interfere with the expert witness's duties of independence and objectivity*" (para. 77).

### (f) Format and Organization

The report should be written in a clear, narrative style with sub-headings to address the issues and questions posed by the instructing lawyer. In addition, where the report is given by a litigation expert pursuant to Rule 53.03 (2.1), the headings should be presented in a manner which will enable the trial judge to readily understand that the requirements of the rule have been followed.

Experts should understand that trial judges are used to a style of writing which is concise and complete. There are several articles which are of assistance in understanding good legal writing[26]. These articles are helpful for experts in that they will understand how trial judges are used to receiving information. The concept of "point first" writing is often mentioned in order to ensure that the attention of the trial judge is focussed at the outset of each section of the report. Each sentence should express a separate concept or idea. A summary of the expert's opinions at the beginning or the end of the report is also helpful. Where the report is lengthy, an index is also helpful. A glossary of technical and scientific terms should be attached as an appendix. An

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> *Goudge stressed the importance of "[p]roperly prepared expert reports, along with a certification that the expert understands the duty to provide impartial advice to the court" in order to help ensure the reliability of expert evidence. Justice Goudge concluded, at p. 47, that proper communication with and preparation of expert witnesses was vital to enable them to communicate their opinions effectively to the court: "[C]ounsel, whether Crown or defence, should properly prepare forensic pathologists they intend to call to give evidence."*
>
> *While some judges have expressed concern that the impartiality of expert evidence may be tainted by discussions with counsel (see the cases cited below, at para. 72), banning undocumented discussions between counsel and expert witnesses or mandating disclosure of all written communications is unsupported by and contrary to existing authority: see Maras v. Seemore Entertainment Ltd., 2014 BCSC 1109 (CanLII), [2014] B.C.W.L.D. 4470, at para. 90 ("[c]ounsel have a role in assisting experts to provide a report that satisfies the criteria of admissibility"); Surrey Credit Union v. Willson (1990), 1990 CanLII 1983 (BC SC), 45 B.C.L.R. (2d) 310 (S.C.), at para. 25 ("[t]here can be no criticism of counsel assisting an expert witness in the preparation of giving evidence"). In Medimmune Ltd. v. Novartis Pharmaceuticals UK Ltd. & Anor, [2011] EWHC 1669 (Pat.), the court pointed out, at para. 110, that in some highly technical areas such as patent law, expert witnesses "require a high level of instruction by the lawyers" which may necessitate "a high degree of consultation" involving "an iterative process through a number of drafts."*
>
> *I agree with the submissions of the appellant and the interveners that 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."*

[26]Forget the Wind-Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums John I. Laskin, J.A., <https://www.ontariocourts.ca/coa/en/ps/speeches/forget.htm>.

electronic version of the report should also be provided in order to assist the trial judge in following the evidence and to make notes.

### (g) Too Many Experts: Too Much Information

Lawyers should be careful and particular in selecting the best experts. There are certain exclusionary rules which limit the number of expert witnesses which can be called. For instance, the *Canada Evidence Act* limits to five the number of experts each party can call (unless leave of the court has been granted to allow more). Likewise, the *Ontario Evidence Act* limits the number of experts to three, and the *Federal Courts Rules* sets a limit of five experts (unless leave of the court has been granted to allow more). This may require a careful selection of experts, especially because in some cases, it may be necessary to qualify several experts in sub-areas dealing with the same issue. For instance, a pharmacologist may be tendered as an expert on the general effects of a drug on the mind of a person, but a psychiatrist may be necessary, in order to provide an opinion on the actual level of awareness of a specific person who had taken those drugs.[27] This may result in several experts being necessary to assist in the determination of what is essentially a single issue. Thus, selectivity is important. In addition, the court has a discretion to refuse leave to allow more than three experts where it is satisfied that one or more experts have already dealt with the issue.

### (h) Education and Experience

Before a physician decides to become involved in giving expert evidence in a legal proceeding, it is recommended that they become familiar with the principles and practices regarding the preparation of expert reports and the giving of expert testimony before the courts or the tribunal which will consider the legal issues.

There are a number of options available to physicians. The selection of an option will obviously depend upon the time commitment which the physician may be able to devote to "expert witness education". The following options are described for the benefit of the professions:

1.The program in Insurance Medicine and Medico-Legal Expertise, offered by the Faculty of Medicine, Université de Montréal offers a micro-program, a more substantial certificate program and a very substantial diploma program. All are available online. The micro-program is a core introduction to medico-legal work. The certificate program is highly recommended. The diploma is a master class in medico-legal expertise and requires completion of a publish-quality research paper.

2.CSME regularly offers full day/multiday educational programs that provide practical education and practical skill development.

3.The MLST offers periodic programs on expert reports and testimony. In conjunction with this Report, these programs offer valuable and updated information on the approach of the courts to the issues.

[27] *R. v. Woods*, 1982 CarswellOnt 1240, [1982] O.J. No. 28, 65 C.C.C. (2d) 554, 7 W.C.B. 227.

4.The published literature has a number of references to articles on the issue of expert testimony. Some brief references are noted below to assist the reader.[28]

## 2. The Agreement Between Lawyer And Physician

The lawyer and physician should arrive at an understanding as to the terms upon which the physician is to provide a medico-legal report. These terms should be discussed in advance. This is especially important in complex matters. There should be a clear understanding between lawyer and physician as to the nature of the medico-legal report, its purpose and the issues in the proceeding. It is the responsibility of the lawyer to ensure that specific instructions are given to the physician to enable the physician to identify the issues to be addressed in the medico-legal report. The physician who is uncertain about the nature of their retainer and the instructions given should seek to clarify at the outset of the retainer and should inform the lawyer of any limitation which may affect their ability to meet the expected requirements of the lawyer.

The other essential elements which should be discussed and agreed upon in advance are the amount of the fee and the time for payment (this is discussed in more detail under the heading "The Physician's Fee). The OMA recommends that physicians seek agreement regarding their fees in writing, whenever possible. The physician and the lawyer should confirm some of the more important terms of their discussions in a letter, to ensure that the terms have been mutually understood.

The section, entitled "Elements of an Agreement Between Lawyer and Physician for Medico-Legal Reports", lists in more detail some of the topics which should be discussed in advance, including:

a) what is needed by the lawyer;
b) reasonable time lines for completion of various steps, including the completion of the medico-legal report;[29]
c) the obligation of the lawyer to pay for the physician's services, unless the physician is notified in advance, and in writing, that someone else will be responsible for the physician's fee (see "The Obligation to Pay"). It is permissible for the physician to require payment in advance unless there are exceptional circumstances;[30]

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[28]Ameis A and Zasler ND. The Independent Medical Examination *Phys Med Rehabil Clin N Am. 2002;13(2):259-286;* Eskay-Auerbach M. The physician as expert witness. *Phys Med Rehab Clin of N Am*. 2019;30(3):649-656; Lacerte M. Medicolegal expert core competencies and professionalism. *Phys Med Rehab Clin of N Am*. 2019;30:637-648; Lacerte M, and Forcier P. Medicolegal causal analysis. *Phys Med Rehab Clin N. Am*. 2002;13:371-408; Mangravatti JJ, Babitsky S, and Donovan NN. How to be a successful expert witness: SEAK's A-Z Guide to Expert Witnessing. SEAK. Falmouth, MA. 2015; Rondinelli RD and Eskay-Auerbach M. The independent medical examination: Necessary elements and reporting expectations of the physician examiner. *Phys Med Rehab Clin of N Am*. 2019;30(3):671-682.

[29]Lawyers are ill-advised to wait until the last minute to request medico-legal reports, especially from treating physicians. It is not in keeping with the tradition of mutual respect between the professions for lawyers to make unreasonable demands for medico-legal reports or copies of medical records on the eve of trial or hearing and then to threaten the physician with a witness summons if the physician is not able to respond on short notice.

[30]CPSO, Third Party Reports, Policy 34, para. 11 states:

*"11. While it is generally permissible for physicians to request receipt of payment in advance for reports and examinations, physicians are* ***advised*** *to refrain from doing so on compassionate grounds, when the claimant or*

d) the amount of the payment, or the method of calculating the fee;
e) the time frame for payment by the lawyer for the medico-legal report;
f) the obligation of the lawyer to provide a copy of the medico-legal report to the client if the client insists on seeing the medico-legal report (see "Dissemination of the Medical Information").

## 3. Direction and Disclosure to the Physician: Use of Surveillance, Recorded and Virtual Examinations

The lack of sufficient direction and disclosure by a lawyer when first requesting a medico-legal report is a principal source of difficulty between the professions.

### (a) Direction

The lawyer should provide the physician with clear, written directions as to the matters to be addressed by the latter in the medico-legal report.

The directions that are appropriate will vary with the particular circumstances in each case, and with the function of the physician from whom a medico-legal report is requested. For example, in the case of a treating physician who is a general practitioner and has not continued to treat the claimant, all that may be required is a description of the injuries observed on examination, diagnosis, treatment and the claimant's response to treatment.

The treating physician who happens to be familiar with the claimant's medical history and continues to be involved in treatment may be asked to provide an opinion on the effect of injuries on the claimant having regard to the claimant's previous medical history, occupation, hobbies and general lifestyle as known to the physician. The lawyer may also wish a full opinion on the prognosis and the effect of the injuries on the claimant and, in particular, the effect on certain aspects of the claimant's activities.

If the physician is not a treating physician, but is asked to provide an opinion, the need for specific direction is even greater. The physician in such a case should be apprised of the issues to be addressed concerning the injuries in the medico-legal report.

Good practice requires that the lawyer understand the limits of the physician's expertise. The physician must only provide an opinion that is within the scope of their expertise. The lawyer should be careful to formulate the specific questions on which the physician's opinion is sought without trying to suggest the answer that the physician ought to give. The lawyer must also take care to ensure that the physician's opinion is based on foundation facts that can be proved by admissible evidence to be given at trial or at the hearing.

### (b) Full Disclosure

The physician asked to provide a prognosis or opinion in a medico-legal report should be informed fully by the lawyer of all the relevant available medical information concerning the

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*examinee is responsible for payment directly, and the report relates to basic income and health benefits."(emphasis added)*

injuries. The lawyer must not withhold relevant medical information because the information is perceived to be unfavourable to the interest the lawyer represents. The physician asked for a prognosis or opinion should be informed fully of allegations, specific issues, and pertinent particular circumstances of the claimant. The physician should be provided with all relevant medical information available, such as previous medical history, hospital records, original diagnostic imaging and reports, ECG's, EEG's, laboratory reports, histology, and other material if required. Transcripts from examinations for discovery should also be provided. If the lawyer has difficulty deciding what information is relevant, then the lawyer should discuss with the physician what information should be sent for review.

The lawyer should be aware that clinical notes and records may not be the only documents available regarding the claimant's health history. For example, pathology slides, diagnostic imaging, etc. should be requested to describe the complete history. As medical technology advances and becomes more sophisticated, information may be stored in electronic databases, digitalized records, etc. The prudent lawyer should make inquiries about these other forms of data storage, in addition to clinical notes and records, to ensure that the physician is provided with all important information.

It can be most disconcerting when a physician is under cross-examination in court and first learns of relevant medical information that was available when the medico-legal report was requested but not provided to the physician. The opinion previously expressed by the physician, based on incomplete medical information, may be undermined. Relevant medical information is as important to the physician's opinion as relevant facts are to the lawyer's opinion.

One might question the wisdom and judgment of a lawyer who withholds relevant medical information. This creates a risk that such strategy or tactic will backfire should all relevant medical information subsequently become known. The lawyer should bear in mind that the instructions and information conveyed to the physician will likely be disclosed prior to trial if the expert is to be called to testify.

There may be cases in which the lawyer deems it appropriate not to disclose a previous medical opinion to a physician asked to provide a second opinion until after the second opinion is received. In some cases, the physician from whom a second opinion is sought may prefer not to be made aware of the previous opinion until after the second has been given. In others, the physician may want access to all prior information. Whether or not a second opinion is sought, and whether or not the previous opinion is disclosed in advance or sometime after receipt of the second opinion, are matters which a lawyer must decide based on the particular circumstances in each case and upon consultation with the physician. These remarks should not be interpreted as an endorsement of the practice, engaged in by some lawyers, of shopping around for a favourable opinion and disregarding all other opinions received. Such practice is to be discouraged.

### (c) Surveillance

Surveillance is often used in an effort to obtain objective evidence as to the extent of injuries sustained by a claimant and the effect of these injuries on that claimant's activities. This

evidence may be in the form of video (the most common form), photographs, film or oral testimony of the person who conducted the surveillance.

In civil actions, the admissibility of and the weight to be attached to any evidence obtained by surveillance ultimately will be determined by the court that hears the case. The court (judge and/or jury) will consider this type of evidence in conjunction with all other evidence presented.

A treating physician or an independent expert may be asked to review the results of surveillance and consider it as part of the information made available to the physician in arriving at an opinion. The physician will have to assess the extent to which the results of the surveillance are of assistance in formulating an opinion. If the physician is asked to formulate an opinion based solely on the results of the surveillance, the physician will have to assess the extent to which they are able to do so.

If the results of surveillance have not been reviewed and taken into account by the physician in formulating an opinion, the physician may be cross-examined by an opposing lawyer. The lawyer will attempt to discredit or minimize the weight of that opinion, given without taking into account the evidence obtained by surveillance.

A treating physician has a relationship of utmost trust and a duty of fidelity to their patient. The *treating physician* who has been asked to review surveillance evidence and comment or express an opinion on it should ask the instructing lawyer or the person making the request to discuss the request with the patient and to obtain the patient's specific consent to have the treating physician review the surveillance evidence with a view to commenting or expressing an opinion on it.

The use of and disclosure of surveillance evidence in claims for personal injuries remains an issue of controversy. Lawyers who intend to use such evidence are well advised to consider carefully the risks of withholding disclosure of such evidence until the last possible moment. Physicians who are asked to conduct medical examinations should not be placed in a position where they are expected to assess issues of credibility based on surveillance evidence produced late in the legal process. The trend of the law is towards early disclosure and early resolution of claims. Lawyers who consider that the "surprise" use of surveillance evidence is a helpful tactic may find that this does not yield the results intended.

Specific guidelines were created for the review of surveillance material and clinical assessments performed by Designated Assessment Centres (DACs) under the automobile no-fault legislation. However DACs were eliminated in March of 2006 and this guideline is only of assistance to determine if DAC assessments follow the correct procedure when their assessments were completed. Otherwise this guideline is no longer applicable under the automobile insurance scheme. The guideline provided that video surveillance must be received prior to a clinical assessment and the claimant must be given an opportunity to view the surveillance and to respond before the DAC reaches its final conclusion. The DAC was required to comment on the surveillance information in its report, and provide a rationale as to why the surveillance information was used or not used in forming the DAC opinion. In addition, the DAC report had to include information about who reviewed the video surveillance with the claimant and the point in time during the DAC process that the video surveillance was reviewed.

Cases involving statutory accident benefits since June 1, 2016 are being heard by the LAT. The LAT is governed by the Common Rules of Practice and Procedure. There is no provision in the Common Rules of Practice and Procedure with respect to when surveillance is to be produced or how surveillance is to be produced. The process at the LAT is very streamlined. A Case Conference is scheduled after the parties have exchanged an Application and a Response. At the Case Conference, surveillance will be discussed and orders may be made with respect to the production of surveillance. There is no guideline from the LAT that would assist an assessor as to when it is appropriate to review surveillance, comment on it in their report or provide addendums. Surveillance is admissible at the LAT and it has been relied upon where the surveillance is found to show inconsistencies between an applicant's impairments, alleged impairments and actual presentation. If there is any question as to whether one should review surveillance, whether it should be reviewed with the claimant that is being examined or whether it should be reviewed later with an addendum then the assessor should contact their college to see if they can provide any assistance or guidelines. For example, some colleges (psychologists) direct their members not to review surveillance in any circumstances and to not to comment on it. Other colleges (such as the occupational therapists) indicate that members can review surveillance in the medico-legal context but must do so by reviewing the report and any video surveillance and photographs in the company of the claimant so that they have an opportunity to provide comments.

### (d) Recorded Examinations

The issue of whether an examination should be recorded by audio-visual technology is the source of some controversy and debate.

In civil actions, the court has the jurisdiction to order a third-party examination under Rule 33 of the *Rules of Civil Procedure* and to establish methods and processes for the conduct of such examinations. Rule 33.05 provides that, unless there is a court order, the only persons who may be present at the examination are the examinee, the examiner and any person the examiner requires for the purpose of the examination. Other issues such as the recording of the examination and the presence of other persons should be resolved in advance by agreement between counsel for the parties. Absent an agreement, a court order setting out the details of the examination should be obtained.

The tendency of the jurisprudence is to not order audio-visual recording of an examination routinely[31]. Audio-visual recording of an examination should be seen as an exception to this general principle. If an exception is to be made out, evidence on the issue must be presented to the court.

For example, in one case[32], recording of the examination was ordered where the evidence demonstrated the efficacy and usefulness of a video recording and it did not appear that the recording of the examination would impair the ability of the examiner to conduct the examination.

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[31] *Bellamy v Johnson* (1992), 8 OR (3dd) 591 (CA).
[32] *Willits v. Johnston* (2003), 33 CPC (5th) 335 (SCJ, Quigley, J), leave to appeal to Div Ct. refused 38 CPC (5th) 75.

The technical and evidentiary issues regarding a recorded examination are evolving. A number of concerns have been considered and discussed. The following are recommended guidelines in the interest of accuracy of the recording and fairness:

1. Recordings are best performed by a professional videographer that the physician and the parties agree on. The videographer should be outside the room if possible.

2. The videographer should keep the original copy without editing for release to the parties by order of the court.

3. The videographer should make three (3) certified copies: The first should go to the physician as soon as possible (for potential use in reporting). The other copies should be released to the lawyers for the parties as the court may direct.

4. The camera should show a continuous timestamp display at all times throughout the examination recording from start to finish, including during breaks.

5. The camera should focus on the claimant's head and shoulders. It should be able to record the claimant standing and/or moving if at all possible.

The examining physician has the right to decline the examination if it is to be recorded. This issue should be addressed in advance of the examination in order to avoid controversy and out of respect for the physician.

There is some controversy about the physician's right to terminate the recording if it is compromising the examination. While it may not be possible to anticipate this problem in advance of the examination, the examining physician should be instructed that they should consult with the instructing lawyer if a problem arises. For example, if there are issues of safety or technical problems which arise during the course of a recorded examination, the examining physician should ask for an opportunity to consult with the instructing lawyer.

CSME has also provided some guidance to its members on the issue of recording examinations. CSME takes the position that it is generally undesirable and unnecessary and creates significant potential to invalidate the evaluation process[33]. CSME asserts that there are no absolute medical or other clinical expert indications to perform recorded examinations and no known benefit to the sensitivity or specificity of interview or testing, or otherwise to the accuracy of diagnosis, impairment or disability evaluation, causation analysis or determination of prognosis.[34]

However, CSME also notes that there may be circumstances in which it would be prudent for the expert evaluator to insist on a recording to safeguard against potential false allegations on what was said or done in the examination. In the latter, there are cases where the parties agree on (or where in the absence of agreement, the court orders) a recorded examination to balance between

[33]CSME Guidelines for Electronic Recording of Independent Expert Examinations, November, 2012.
[34]CSME Guidelines for Electronic Recording of Clinico-Legal Expert Evaluations, Revised, August 27, 2012.

one party's insistence on a particular expert and the other's allegation of clinician bias, or for other reasons[35].

Physicians who are asked to conduct independent medical examinations should be cautious. The CPSO warns about difficulties which give rise to complaints by the party examined about the conduct of the physician or of the examination itself. Therefore, the physician's demeanour and behaviour must be beyond reproach. The examination should comply with proper standards of care and the conclusions must be fair, objective and reasonable. In advance of the examination, if there are issues about consent or other matters (for example, need for a chaperone, persons who will receive the report, etc.), the issue should be raised by the examining physician with the instructing lawyer and the lawyers for the parties should agree on the issue or seek the advice of the court. Perhaps most importantly, the examining physician should make clear that they are not providing care to the examinee and are not assuming a traditional physician-claimant relationship.

### (e) **Virtual Examinations**

Medical examinations in situations where a physician provides their professional input based on interactions that do not take place in person are referred to as virtual examinations. These have taken many forms throughout the history of medicine. More recently, use of digital technology has offered an expanded range of services provided where distance and time considerations would otherwise prevent them. The recent COVID-19 pandemic led to greatly increased need for use and acceptance of virtual service delivery in medical, mental health and legal environments where it is now widely accepted as a standard of care suitable to the needs of claimants, physicians, lawyers, courts and others.

Physicians were recently advised that previously prohibited non-emergent in-person medical services may now be offered virtually where appropriate. Questions about whether this applies to those that are not medically necessary, and/or if they are prudent where alternatives are safe and available, remain in any case.

Virtual examinations may be advisable where one must consider issues of safety for claimants and examinees. In-person examination require at present strict precautions to protect claimants and service providers (single-use face masks, transparent visors, gloves, etc.). Even so, many have continued concerns about being in medical offices, and even more specifically, in medical buildings.

All these can interfere with fully-acceptable claimant-physician engagement. The use of masks may present particular problems in the mental health environment where verbal interactions, tone of voice and facial expressions are so important to appropriate empathy in and the proper understanding of these communications. In situations where an interpreter is needed as well, proper social distancing may not always be possible.

Balancing issues of safety and efficacy should be addressed in advance between the lawyer and the examining physician if a medico-legal assessment is to be conducted virtually. This is a new

[35]CSME Guidelines for Electronic Recording of Clinico-Legal Expert Evaluations, Revised, August 27, 2012.

and emerging practice for which both professions are developing experience. Members of both professions are well advised to keep abreast of emerging practice standards and jurisprudence as they continue to deal with this novel environment.

There are additional considerations to be addressed when contemplating the efficacy of a virtual/remote assessment. Lawyers and physicians should consider how to meet quality-assurance criteria. The following guidelines should be considered:

1. There should be a high quality duplex audio-visual communication link that affords full confidentiality and continuity during the assessment;

2. The examinee's cognitive, psychological and physical status will not be challenged or adversely affected by a virtual assessment;

3. The examiner must be confident that the absence of direct clinical interaction (such as the absence of physical examination) will not materially impact the quality of the assessment;

4. All parties must be in agreement that the examiner will be able to address the specific issues by way of virtual assessment.

5. The claimant/examinee should be in an environment where confidential communication will not be impaired;

6. The examination will not be recorded except if ordered by the court or agreed to in advance by the parties.

If any of these issues give rise to concerns about the validity of the assessment, they should be addressed and/or resolved fully in advance by the parties or as determined by the court.

The risks and benefits of a remote/virtual assessment should be considered in light of the disadvantages and advantages which are engaged by use of this tool. There may be circumstances in which remote assessment might provide distinct advantages for evaluation outcome such as:

1. Remote assessment may significantly reduce the difficulty, discomfort or stress associated with an examinee's need to travel significant distances to the clinician's office.

2. Remote assessment may provide an opportunity for a broader choice of expert examiners, such as clinicians who might otherwise be situated at too great a geographic distance or whose schedule might preclude travel.

3. Remote assessment removes the element of weather as an obstacle to attendance.

4. Remote assessment may reduce the time between booking and assessment date, or facilitate assessments when deadlines impose urgency.

5. Remote assessment provides opportunity for sequential visits for periodic monitoring of progress. This issue may be the subject of legal controversy. Lawyers may take the position that only one third-party assessment is permissible at law. If periodic monitoring is proposed, it should be dealt with by prior agreement.

6. Remote assessment provides opportunity to appreciate the examinee in their normal domestic environment, and/or to concurrently interview a caregiver or family member. Lawyers may take the position that interviews of caregivers and/or family members are not permissible at law in the case of third-party assessments. These issues should be dealt with by prior agreement.

7. Remote assessment eliminates any risk that may be associated with direct assessment (e.g. during COVID-19, or when an examinee has a history of violent behaviour, or a fear of abuse)

Notwithstanding all of the above, it is important that the examiner cancel, or terminate any in-progress remote assessment, immediately upon identifying a circumstance in which the quality of the assessment and/or consequent conclusions/recommendations can be reasonably expected to fall below initial expectations, such as when the audio or visual signal quality is sufficiently compromised, privacy is not assured, or it becomes apparent that a direct assessment is required.

## 4. Confidentiality

This section addresses two aspects of confidentiality considered relevant to medico-legal reports. One is the need for the claimant's consent for the release of medical information by the physician, and the other is the extent of the dissemination of the medical information received by the lawyer who requested the medical information.

### (a) Physician's Obligation to Maintain Confidentiality

The relationship between a claimant and a treating physician is one of a high degree of confidentiality. Pursuant to section 1(1)10 of Ontario Regulation 856/93 made under the *Medicine Act, 1991*, it is "professional misconduct" to give information concerning a claimant's condition or any professional services performed for a claimant to any person other than the claimant without the consent of the claimant unless required to do so by law.

The treating physician should insist on being provided with a valid and adequate written consent for the release of medical information. It is the responsibility of the lawyer to provide the physician with a consent which is satisfactory to the physician. If there is some doubt about the issue, the lawyer and the physician should speak in advance and settle the terms of the consent. A written consent is strongly recommended. In third party assessment, a valid consent is also highly recommended.

## (b) Consent

Lawyers obtain consent from the claimants to permit the release of medical information to them for use in a lawsuit. Often these consent forms are signed by the claimant in blank at the beginning of the lawsuit, well before the issues are clearly defined.

The lawyer should obtain a valid and adequate written consent from the claimant, or the substitute decision-maker (for example, spouse, parent, guardian or power of attorney), as may be appropriate in the particular circumstances of the case. If the person signing the consent is not the claimant, this should be clearly indicated on the consent form, and appended thereto should be a copy of the document providing authority to the person to sign on behalf of the claimant (for example, Power of Attorney for Personal Care under the *Substitute Decisions Act, 1992*, or in the case of a deceased claimant, the Last Will and Testament or Certificate of Appointment of Estate Trustee).

The consent process is not satisfied merely by having the claimant sign a consent form. A common complaint by physicians is that lawyers do not adequately explain to claimants the extent of information to be collected and to whom medical information may be disseminated when consent forms to release information are signed at the start of the lawsuit. The lawyer should provide detailed information to the claimant about the type of medical information which will be relevant, and who will be entitled to the information so that the claimant may make an informed decision before signing a consent to release medical information. Regardless, it is always incumbent for physicians to obtain medically valid consent by discussing the issue of consent with the claimant having due regard to all the data available to them when they examine the claimant, and to appropriately record the process and outcome of their interactions with the claimant to that end.

It is advisable that both lawyers and physicians also explain to claimants, who attend for independent medical examinations under the no-fault regime of the Statutory Accident Benefits Schedule (SABS) of the *Insurance Act*, the following matters:

- the nature of the examination;
- a medico-legal report will be provided to the insurance company or other agency commissioning it, and neither the substance of the medico-legal report nor the report will be given to the claimant by the physician;
- when an independent medical examination is requested by an insurance company under the SABS, a copy of the medico-legal report will be forwarded to the claimant or the claimant's representative.

In Appendix C, "Medical Authorizations", there is an appropriate form of written authorization to be signed by a claimant or substitute decision-maker. In cases involving the Statutory Accident Benefits (SABS) for automobile accidents there are pre-approved forms that an insurer is required to have the insured complete to access records (Form OCF-5) or to have the insured consent to undergo an independent medical assessment under s.42 of the SABS.

The physician is entitled to rely on the truth of a representation made by the lawyer that the lawyer (or the firm) represents a certain claimant. It is a well-recognized principle of common law that a lawyer is the claimant's authorized agent in all matters that may reasonably be expected to arise in the particular proceedings for which the lawyer has been retained.

The very request for medical information by the lawyer (or a firm) professing to be retained by the claimant may be considered an adequate consent by the claimant insofar as the physician is concerned, and the physician ought not to be required to go beyond that request. However, for purposes related to their own governing body, a physician should insist that the lawyer requesting information provide the physician with not only a clear statement as to the lawyer's (or the firm's) representation of the claimant but also with the written consent of the claimant. The CPSO strongly recommends that physicians obtain and retain a copy of the claimant's written consent. This written consent should be retained by the physician in the record. It is the lawyer requesting information who should assume responsibility to obtain a written consent which is valid and adequate, and to answer to any allegation of breach of confidentiality consequent on release of medical information. The physician ought to be able to rely on the consent provided by the lawyer as being both valid and adequate.

### (c) Dissemination of Medical Information

The practical realities involved in the conduct of litigation usually require a lawyer receiving medical information in a medico-legal report to disseminate the information, if not the medico-legal report itself.

A physician must, therefore, realize that the medico-legal report will be disseminated to a number of persons. The information from the medico-legal report, or the medico-legal report itself, may be given to:

- the claimant;
- all or some of the claimant's treating physicians;
- other experts for the claimant;
- the lawyers representing the other parties (participants) in the lawsuit;
- the other parties in the lawsuit or their experts.

There is always the risk that candid and conscientious evaluation, and full and frank discussion of the claimant's problems will be inhibited by the realization that the medico-legal report will be disseminated to a number of persons, including the claimant. The ethical physician will respond prudently, honestly, and not omit proper and valid information which should be contained in the medico-legal report as relevant to the assessment of injuries and the effect of the injuries on the claimant.

### (i) Dissemination to the Claimant

It is the view of some physicians that some medico-legal reports, requested by a claimant's lawyer, should not be made available by the lawyer to the claimant who is the subject of the medico-legal report. Although the medico-legal report is obtained on the claimant's behalf by the lawyer, it is in effect the claimant's medico-legal report since the claimant pays for it. It would not be practical or proper for the lawyer to refuse the claimant access to the medico-legal report.

In preparing a claim, it is essential that the claimant be aware that the opinions of the various health care professionals may be requested and obtained, whether they are involved with the claimant's care and treatment or in the assessment of the claimant. A claimant's credibility can be seriously undermined if, at cross-examination, he or she is unaware of these opinions. For this reason, it is important that lawyers ensure that all reports are made available to claimants subject to the LSO's Rules of Professional Conduct concerning circumstances in which the examining physician recommend that the report not be shown to the claimant is discussed below.

Lawyers should note the provisions and commentary of Rules 3.2-9.1 to 3.2-9.3 of the LSO's Rules of Professional Conduct which state:

> *3.2-9.1 A lawyer who receives a medical-legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.*
>
> *Commentary*
>
> *[1] The lawyer can avoid some of the problems anticipated by the rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medico-legal report, which discussion will serve to inform the physician or health professional of the lawyer's obligation respecting disclosure of medico-legal reports to the client.*
>
> *3.2-9.2 A lawyer who receives a medical-legal report from a physician or health professional containing opinions or findings that if disclosed might cause harm or injury to the client shall attempt to dissuade the client from seeing the report, but if the client insists, the lawyer shall produce the report.*
>
> *3.2-9.3 Where a client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in Rule 3.2-9.2, the lawyer shall suggest that the client attend at the office of the physician or health professional to see the report in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical-legal report.*

Problems can be avoided if there is discussion between the lawyer and the claimant and between the lawyer and the physician in advance of any examination and report. The claimant will be properly informed, if as a result of prior discussion with their physician and lawyer, they understand that a potentially harmful report is anticipated. Such discussions will allow the

lawyer to anticipate problems and to take steps to obtain specific instructions to deal with the issue.

A physician should also be aware that a lawyer is duty bound to give the medico-legal report to the claimant if the claimant insists, even though there is a fear that the medico-legal report might cause harm or injury to the claimant.

If the claimant insists on seeing the medico-legal report, then the lawyer must make it available since it is the claimant's medico-legal report and paid for by the claimant. These are, however, matters that should be discussed between lawyer and claimant and resolved as part of the understanding and confidence a claimant places in the lawyer's management of the case. In some cases, a claimant may not wish to see the medico-legal report and it may serve no valid purpose if they do see the report.

Note the advice in Rule 3.2-9.3 of the LSO that, if the claimant insists on seeing the medico-legal report against the advice of the lawyer, this should be permitted with the physician present in order that the significance of the conclusions contained in the medico-legal report may be explained.

There is nothing to prevent a physician in appropriate circumstances from suggesting to a lawyer that the medical information and opinions expressed in the medico-legal report not be conveyed to the claimant, unless demanded by the claimant on the basis that the information might be detrimental to the claimant's well-being.

### (ii) Dissemination to the Claimant's Treating Physicians

When a lawyer proposes to have a claimant examined by another physician who has not previously examined or treated the claimant, the lawyer should consider, as a matter of professional courtesy, advising or discussing it with the treating or primary care physicians in advance, if possible. In a case where treating or primary care physicians continue to be involved in the medical treatment of the claimant, the lawyer should consider sending a copy of the medico-legal report to the treating or primary care physicians. The lawyer should discuss this with the claimant/client before communicating with treating physicians.

### (iii) Dissemination to Other Experts for the Claimant

A lawyer may consider it necessary to make the medico-legal report available to another expert retained to give advice or an opinion. Thus, the lawyer may provide the medico-legal report of one physician to another expert, for example, to an expert in the field of rehabilitation or vocation, or to an occupational therapist, etc. The lawyer should discuss this with the client, so that they are aware of the experts being retained and the information being provided to each expert.

### (iv) Dissemination to the Lawyers of Other Parties

The *Rules of Civil Procedure* made pursuant to the *Courts of Justice Act* govern the conduct of people involved in a civil lawsuit and dictate when medico-legal reports, or certain medical information, must be disclosed. A more detailed discussion about these Rules is found in

Appendix D, "Rules of Civil Procedure Regarding Medico-Legal Reports". The philosophy of the Rules is that trial by ambush is not permitted and that parties must disclose information in advance of trial.

Unless a document or a medico-legal report is subject to a proper claim to privilege, the Rules require disclosure of all documents relevant to any matter in issue which are or have been within the possession, control or power of a party to the action. The Rules also require that every document to be used at trial be produced to the other party for inspection. Thus, the existence of a medico-legal report to be used at trial must be disclosed to all other parties to the action.

Further, Rule 31.06 requires that, at the examinations for discovery (when each party are asked questions under oath by the other party's lawyer), each side must disclose the names and addresses of their experts and their experts' findings, opinions and conclusions, unless an undertaking (i.e., a promise) is made not to call the expert as a witness at the trial and the expert was retained only for the purposes of this litigation.

If the physical or mental condition of a claimant is in question, the defendant may request that the court order an examination of the claimant by a physician selected by the defendant under Rule 33.04(2). The report must be prepared promptly following the examination and must be sent immediately to the defendant's lawyer. The defendant must send the expert's medico-legal report to every other party to the proceeding, pursuant to the Rules. No claim to legal privilege may be asserted over a Rule 33 report.

### (v) Dissemination to Other Parties in the Lawsuit or their Experts

The lawyer who obtains a medico-legal report about a person who is not their client will usually have to provide the report to their client who is obliged to pay for it and, quite frequently, to other persons retained by the client to assist the lawyer in the conduct of the litigation. For example, a defence lawyer who obtains a medico-legal report from the claimant's lawyer will be obliged to provide a copy to the client (for example, an insurance company) and to experts retained to assist with protecting the interests of the insurance company.

## 5. Duties of the Expert: To Advise the Court/Tribunal Fairly: No Advocacy

Rule 4.1.01 defines the duty of an expert witness who is an expert retained to provide an opinion for the purpose of addressing the issues in the litigation, a so-called "litigation expert". The essential elements of this duty are fairness and objectivity. The Rules provide:

> *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.*

In addition to this duty, it is incumbent upon the lawyer instructing the expert to assist the expert in understanding the need to provide opinion evidence which is relevant, credible and reliable.

While the reliability of expert opinion may not necessarily be the subject of controversy in every case, it is important for the expert to be aware of their obligation to inform the court of areas of controversy, especially in new and emerging areas of scientific study. The principles guiding experts and the courts on the reliability of expert testimony, especially in novel areas of scientific inquiry, may be briefly stated as follows:

(1) whether the theory or technique can be and has been tested:

(2) whether the theory or technique has been subjected to peer review and publication:

(3) the known or potential rate of error or the existence of standards; and,

(4) whether the theory or technique used has been generally accepted.[36]

The one other point is that in order to carry significant weight, or alternatively, to even be admitted using a cost-benefit analysis, the expert should follow accepted principles or procedures that have become generally accepted in the professional community from which they originate.

## 6. Requirements for Expert Medico-legal Reports: The Litigation Expert Witness

Rule 53.03 sets out specific requirements if a party intends to call an expert witness at trial. The purpose of the Rule is to ensure the quality of the disclosure of the information by the expert and that the expert identifies any areas of controversy. Further the Rule requires that the expert acknowledges their duty of objectivity and fairness and to provide for the early disclosure of expert reports in advance of pre-trial. This Rule also prevents an expert from testifying about an issue that it is not disclosed in the report unless the permission of the trial judge is obtained.

Rule 53.03 provides:

*53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).*

*(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).*

[36] *R. v. J.-L.J.* [2000] 2 S.C.R. 600 at para. 33 per Binnie, J.

*(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:*

1. *The expert's name, address and area of expertise.*
2. *The expert's qualifications and employment and educational experiences in their 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 their 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.*

*(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1), (2) and (3), unless the court orders otherwise.*

*(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of their testimony with respect to that issue is set out in,*

*(a) a report served under this rule;*

*(b) a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or*

*(c) a responding supplementary report served on every other party to the action not less than 15 days before the commencement of the trial.*

*(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,*

*(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or*

*(b) by the court, on motion.*

Under Section 52 of the *Evidence Act*, the medico-legal report is admissible in evidence and the physician may be called to give evidence about the matters discussed in it only if it is given to the other parties in advance. The purpose of Section 52 is to permit the party relying on the report to admit the report in evidence instead of calling the physician to testify. If the opposing party wishes to cross-examine on the report, then the physician is required to attend the proceeding, the report is marked as an exhibit and stands as their evidence in chief and the physician is then cross-examined by the opposing party. In a civil action, each party is limited to calling three expert witnesses, unless the court orders otherwise.

If the party relying on a report intends to call the physician to give testimony, then the report is not marked as an exhibit and the physician gives his evidence in chief and is cross examined by the other party in court. Current rules of evidence prohibit the tendering of the report in evidence and the calling of the physician to give evidence in chief. The practical purpose of section 52 is to permit the report to stand as a substitute for the evidence in chief of the physician. However, the report is available for cross-examination and may be referred to in the course of cross-examination to challenge the author. In practice, especially in cases where there is a trial by judge alone, the parties often reach agreement that the report be given to the trial judge as an aide to assist them to follow the evidence of the expert. It is recommended that the lawyer offering the report in evidence or calling the author of the report explain these rules of evidence to the witness so that they will understand the context of the presentation of the medical evidence.

At the LAT, the Dispute Resolution Code limits either party to calling two expert witnesses unless leave is given by the Arbitrator. If a party intends to file a medical report or call the expert as a witness, then the expert's curriculum vitae and their report must be served at least 30 days prior to the hearing date. LAT Arbitrators generally limit the hearing time to a total of four days. The parties are encouraged to file medical reports and not call medical experts. The general rule is that if a physician is called they should not just repeat what is in their report but, in their evidence in chief, they should either supplement or extend on the information in the report only. The physician called is subject to cross examination.

Disputes often arise in the midst of trial as to the scope of the expert's testimony and whether an issue has been covered in the report. In a recent case, the court refused to allow an expert to testify on a particular issue (causation in that case) where the report contained only a "broad brush statement … without any particularity". The requirements of the Rule are not met where the report merely states a conclusion. The report must set out the opinion and the reasons behind the opinion: "The rule is not complied with if after reading the statement of opinion, the court is left guessing about what the expert means."[37]

The following guidelines are suggested for lawyers and physicians in ensuring that proper disclosure is made:

1. The expert witness' medico-legal report would be clearly insufficient if it merely listed the topics upon which the expert witness proposed to testify at trial.

[37] *Peller v. Ogilvie-Harris*, (2018) 2018 ONSC 725, D. Wilson, J.

2. On the other hand, the medico-legal report need not set out, word for word, the anticipated testimony of the expert witness at trial.

3. Essentially, the medico-legal report should disclose any assumptions or factual bases for the opinion, as well as the opinion and conclusions of the expert.

4. As the purpose of the Rules is to avoid taking an opponent by surprise at trial, a reasonable rule of thumb is that the medico-legal report should contain any point or matter which is key or essential to the opinion to be given by the expert.

5. The physician should be guided by the instructing lawyer as to the amount of information to be given in a medico-legal report so that the medico-legal report complies with Rule 53.03.

6. The report may not simply state conclusions. The reasoning or the basis of the opinion must be set out. An expert will be permitted in testimony to expand upon issues that are latent or touched upon in the report but will not be permitted to testify about matters that open up a new field of inquiry not mentioned in the report and that would not have been anticipated from reading the report.

7. The report should set out the basis to establish that any underlying data has been accurately observed or established. The expert's reasoning process from the underlying data to the ultimate opinion should be set out clearly and comprehensibly. The reasoning process from premise to conclusion must be logical.[38]

## 7. Requirements for the Treating Physicians: The Participant Expert

Treating physicians may be called as witnesses to provide evidence about their treatment of the claimant. Depending on the nature and extent of their treatment of the claimant, and the treating physician's expertise or specialty, they may also be asked to provide opinions on topics such as the prognosis for and the cause of the claimant's conditions (e.g. whether and to what extent that condition is connected to the negligence in issue). Treating physicians as expert witnesses are referred to by the courts as "participant experts", in contrast to "litigation experts" who are retained for purposes of the litigation to provide expert opinion evidence.

Participant experts (treating physicians) may give expert opinion evidence without complying with the requirements of Rule 53.03 above, where the opinion is based on the physician's observation of or participation in the treatment of the claimant and the opinion was formed as part of the ordinary exercise of the physician's skill, knowledge, training and experience while observing or participating in the treatment. If the treating physician's opinion extends beyond these limits, then the physician must comply with Rule 53.03.[39]

[38] *"Civil Justice Lessons From An Inquiry",* The Honourable Stephen T. Goudge, 2009 The Advocates' Journal (Spring 2009), p.12.
[39] *Westerhof v. Gee*, (2015) 2015 ONCA 206 at paras. 59-64.

The precise limits on a participant expert's evidence without the need to comply with Rule 53.03 are determined on a case-by-case basis. As a participant expert, testimony is typically provided on things such as the history provided by the claimant, observations and examinations made, treatment provided, diagnosis, prognosis and further treatment recommendations. Opinions on causation (e.g. whether the accident led to the presenting symptoms) may or may not be permitted as part of a participant expert's evidence depending on whether the opinion was formed during and as part of the treatment of the claimant or only subsequently for the purposes of the litigation.[40]

While participant experts are not required to produce an expert report that complies with Rule 53.03, the opinions, clinical notes and records of the participant expert can be obtained by the opposing party through the discovery process from the party who intends to call the expert. That party (usually the plaintiff) is required to produce all relevant records from their treating physicians as part of their affidavit of documents in the litigation.[41] The court retains a gatekeeper role respecting the admission of expert testimony and can limit the testimony of a participant expert to the extent that the opinions are not adequately disclosed in the clinical notes and records.

## 8. Medical Examinations on Behalf of Defendants/Respondents

If the physical or mental condition of any party is in question, an adverse party may request that the court order an examination of that party by a physician selected by the adverse party. This typically involves a request by a defendant for an examination of the plaintiff.

Section 105 of the *Courts of Justice Act* provides:

> *Where the physical or mental condition of a party to a proceeding is in question,*
>
> *the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.*

This provision is used by defendants to have a plaintiff examined by physicians to provide opinions on the plaintiff's condition, damages and prognosis. The procedure regarding the examination and the resulting medico-legal report are governed by the special, detailed requirements of Rule 33. See Appendix D.

Paragraph 2 of Rule 33.04(2) is designed to ensure that the examining physician receives full disclosure of the past relevant medical history of the plaintiff, at least seven days before the examination. Unless some legal privilege is claimed over the documents (see italics below), this includes a copy of:

> a) any medico-legal report made by a health practitioner who has treated or examined the person, *other than a practitioner whose medico-legal report was made in preparation for*

[40]See the analysis of the various treating experts in *Westerhof*, supra; see also *Imeson v. Maryvale*, (2018) 2018 ONCA 888.
[41]*Westerhof*, supra at para. 85

*contemplated or pending litigation (whom the person undertakes not to call as a witness at the hearing);* and,

(b) any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the person, *other than a document made in preparation for contemplated or pending litigation (regarding which the person undertakes not to call evidence at the hearing).*

Pursuant to Rule 33.06, after conducting the examination, the examining health practitioner shall prepare a medico-legal report setting out:

- their observations
- results of any tests made
- their conclusions
- diagnosis
- prognosis.

The physician must prepare the medico-legal report promptly and must send it immediately to the defendant's lawyer. The defendant lawyer is required to send a copy of the medico-legal report immediately to every other party to the proceeding.

Physicians should be aware that under Rule 33.05, the only persons entitled to present at the examination are the physician, the person to be examined and any assistant whom the physician requires for the examination, unless the court orders otherwise. In recent years, disputes have arisen when lawyers request that others be present at the examination or that the examination be videotaped or audiotaped. These sorts of issues should be addressed in advance of any examination and should not be raised at the last minute or on the date of the examination. Lawyers have an obligation to deal with these issues promptly and fairly so that any delay, inconvenience or embarrassment is avoided. If the physician is confronted with these sorts of issues, they should consult with the lawyer requesting the examination and the lawyer should consult with opposing counsel and seek agreement or obtain a court order to deal with the issues[42]. In addition, if the examiner is going to request that the examinee complete questionnaires, participate in testing, etc., these issues must be dealt with and agreed upon in advance by the lawyers. Absent agreement, the direction of the court must be sought.

Like other expert reports and expert evidence, the examining physician who prepares a Rule 33 report is subject to the duties of fairness and impartiality applicable to all expert witnesses and must prepare a report which complies with Rule 53.03 (2.1). This point was discussed by the Court of Appeal for Ontario in *Bruff-Murphy v. Gunawardena,* (2017) 138 OR (3d) 584, 2017 ONCA 502, leave to SCC refused [2018] SCCA No. 37742. In this case, a psychiatrist was asked by the defence to conduct an independent medical examination pursuant to Rule 33. The appeal court allowed an appeal and directed a new trial because of the failure of the trial judge to

[42]This issue is also discussed above at pp. 31 to 35, supra.

fulfill their "gatekeeper" function with respect to this expert. The appeal court felt that the evidence of this expert should have been excluded as the risks of permitting the expert to testify far outweighed any potential benefit from the proposed testimony. The appeal court was critical of the approach of the psychiatrist who became an advocate for the defence, treated the plaintiff unfairly and made findings of credibility. From the court's analysis of the errors which the psychiatrist made, the following guidelines are recommended:

1. The examining physician should never become a partisan advocate for the party who retained him or her.

2. The examining physician should review the plaintiff's medical records before the examination. If there are inconsistencies between the medical records and the information obtained on the examination, the examining physician should raise them with the plaintiff who should be given an opportunity to explain any inconsistencies during the examination. The examining physician should raise any issue relating to inconsistencies in a non-confrontational manner and explain to the plaintiff that this is part of their duty to be fair as required by law.

3. The examining physician must not make findings of credibility, comment adversely on the character of the plaintiff or suggest that the plaintiff had misled their physicians.

4. The examining physician must not comment adversely on the qualifications or the character of the plaintiff's treating health care practitioners.

In addition to considering the clinical history and physical examination, the examining physician should be careful to identify facts which corroborate or refute their findings independently[43]. As noted above, the plaintiff/examinee should be asked to explain any inconsistency in a non-confrontational manner.

[43]Bourbonnais, R., et al. Validity of self-reported work history. *Br J Ind Med* 1988;45(1): 29-32; Don AS and Carragee EJ. Is the self-reported history accurate in patients with persistent axial pain after a motor vehicle accident? *Spine J*. 2009;9(1):4–12; Kikuchi, H., et al. Reliability of recalled self-report on headache intensity: investigation using ecological momentary assessment technique. *Cephalalgia, 2006;26*(11), 1335-1343; Lees-Haley, P. R., et al. Response bias in self-reported history of plaintiffs compared with nonlitigating patients. *Psychol Rep, 1996;79* (3 Pt 1), 811.

## THE PHYSICIAN'S OBLIGATION TO PROVIDE A MEDICO-LEGAL REPORT AND THE LAWYER'S DUTY TO PAY THE PHYSICIAN'S FEE

### 1. Codes of Ethical Conduct

The rules of ethics of the medical and legal professions impose general, and sometimes specific, ethical duties on physicians and lawyers which are applicable to medico-legal reports.

### (a) Medical

#### (i) The Governing Body: CPSO

The CPSO is given the mandate to uphold the standards of professional conduct of physicians in Ontario, which includes acts or omissions that would reasonably be regarded by physicians as disgraceful, dishonourable, unprofessional, or as constituting behaviour unbecoming a physician. Its role is clearly set out in the *Regulated Health Professions Act, 1991*.

The Canadian Medical Association is a national, voluntary physicians' association which accepts responsibility for delineating the standard of ethical behaviour expected of Canadian physicians. Although it is not the governing body for physicians, its Code of Ethics is likely to be considered as persuasive and worthy of consideration by the CPSO in assessing professional conduct.

#### (ii) The Obligation to Provide a Medico-Legal Report

Generally, physicians have an obligation to provide copies of a claimant's notes and records, or to provide a medico-legal report, when a proper request is made by the claimant or the claimant's representative.

Physicians should be mindful that justice depends on the willingness of citizens to assist the courts and that this public duty applies particularly to those with special training and experience as possessed by physicians.

If a physician is properly requested to provide a medico-legal report, which information the physician believes will result in substantial harm to the claimant, or others, then the physician should advise the lawyer requesting the medico-legal report of the basis for this belief. This type of communication will allow the lawyer to provide advice to the claimant and take the steps required by LSO Rules 3.2-9.1 to 3.2-9.3 noted above or seek direction from the court in order to prevent harm to the claimant or third parties.

#### (iii) Timeliness of the Medico-Legal Report

It is the position of the CPSO that a medico-legal report normally should be provided within a reasonable time.

The meaning of "within a reasonable time" was clarified in the College's Policy Statement on Third Party Reports which provides:

> *Reports to third parties are requested for a variety of reasons: disability compensation, access/custody matters, return to work assessments, etc. In order to avoid unnecessary delays in process, which often have significant impact for the claimant/individual, reports should be provided to third parties within 60 days, unless other arrangements are made. If additional time is required to prepare an appropriate report, due to complexity or other appropriate reasons, this should be discussed with the third party.* [emphasis added].

This ethical obligation is reinforced by paragraph 17 of section 1.1 of Ontario Regulation 856/93 made under the *Medicine Act, 1991*, which defines "professional misconduct" to include:

> *Failing without reasonable cause to provide report or certificate relating to an examination or treatment performed by the member to the claimant or their authorized representative within a reasonable time after the claimant or their representative has requested such a report or certificate.*

#### (iv) Failure to Comply with a Request

A lawyer who does not receive a medico-legal report within a reasonable period from a physician may complain to the CPSO. Before lodging a complaint, a lawyer should advise the physician of the intent to do so and afford the physician an opportunity to respond.

When such a complaint is received, a copy of the letter of complaint is forwarded to the physician with the request that they respond, setting out any explanation or representation they have to make with respect to the matter, within a fixed and brief period of time. Subsequently, the response of the physician, if any, is usually brought to the attention of the complainant. The assigned investigator makes every attempt to resolve the issue at this stage, and in most cases this results in the physician producing the requested medico-legal report.

The experience of the CPSO has been that where lawyers make such complaints, resolution of the matter without discipline is achieved in most cases.

### (b) Legal

#### (i) The Governing Body: LSO

The Law Society of Ontario (LSO) regulates the standards of professional conduct of lawyers in Ontario. Its Rules of Professional Conduct include the obligation of lawyers to meet their financial obligations. Failure to do so may result in charges of professional misconduct.

#### (ii) The Lawyer's Obligation to Pay

A physician who provides a medico-legal report to a lawyer is entitled to expect the lawyer to pay the physician's fee for the report within a reasonable period. A physician is entitled to enquire from a lawyer requesting a medico-legal report when and by whom payment of the fee will be made. As a general rule, a physician should receive payment within sixty days of providing the medico-legal report from the lawyer requesting it.

If the lawyer requesting the report is not prepared to meet this obligation, the physician should be clearly advised in writing at the time a request is made. LSO Rule 7.1-2 (Meeting Financial Obligations) states:

> *7.1-2 A lawyer shall promptly meet financial obligations incurred in the course of practice on behalf of clients unless, before incurring such an obligation, the lawyer clearly indicates in writing to the person to whom it is to be owed that it is not to be a personal obligation.* [Amended - January 2009]
>
> *Commentary*
>
> *[1] In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed, or undertaken on behalf of clients unless the lawyer clearly indicates otherwise in advance.* [Amended - January 2009]
>
> *[2] When a lawyer retains a consultant, expert, or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided, and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.*
>
> *[3] If there is a change of lawyer, the lawyer who originally retained a consultant, expert, or other professional should advise him or her about the change and provide the name, address, telephone number, fax number, and e-mail address of the new lawyer.*

### (iii) Failure to Pay

Just as lawyers may complain to the CPSO if a physician fails to provide a medico-legal report, physicians may file a complaint with the LSO if a lawyer fails to pay the fee within a reasonable time. This process, however, may be a lengthy one. Before lodging a complaint a physician should advise the lawyer of the intention to do so and afford the lawyer an opportunity to respond.

When such a complaint is received by the LSO, a copy of the letter of complaint is forwarded to the lawyer with the request that he or she answer, setting out any explanation or representation he or she is to make with respect to the matter, within a fixed and brief period of time. Subsequent to that, the response of the lawyer is sent to the physician for their comments. An unsatisfactory explanation (particularly coupled with continued nonpayment) may lead to disciplinary proceedings against the lawyer.

If the lawyer acknowledges his liability to pay the account but takes the position that it is excessive, the officer at the LSO will try to help the physician and lawyer resolve their differences. It is the experience of the LSO that, in a very large percentage of the cases, this is successful.

The physician may sue for payment of the account in the courts; however, if court proceedings are started, the LSO will not interfere and will await the outcome of the lawsuit. Court

proceedings can be lengthy and expensive. Resolution of the dispute through the LSO or by mediation is likely a better alternative.

## 2. Problems In Practice

### (a) Lawyers Disclaiming Responsibility for Payment

It has become the practice of some of lawyers to routinely disclaim any responsibility for payment of a physician's fee for preparing a medico-legal report. This practice is to be discouraged. The physician asked to provide a medico-legal report regarding an examination or treatment performed by the physician is put in a difficult position when they are obliged to provide a proper medico-legal report within a reasonable time without any clear understanding regarding the payment of the physician's professional fee.

It is the position of the LSO and the CPSO that the lawyer who requests a medico-legal report is personally responsible to pay the physician's fee for the preparation of a medico-legal report, unless the lawyer specifically disclaims responsibility in advance. Previous experience of non-payment by a lawyer who requests a medico-legal report may constitute justification for the physician demanding payment in advance. Policy 34 of the CPSO provides that, while it is generally permissible for physicians to request receipt of payment in advance for reports and examinations, physicians are advised to refrain from doing so on compassionate grounds, when the claimant or examinee is responsible for payment directly, and the report relates to basic income and health benefits. Treating physicians can likewise arrange for payment in advance, as long as the assessment or report is not for the purpose of obtaining the necessities of life, including income and health care benefits. Treating physicians must also inform the claimant of the fee in advance. Physicians have a duty not to charge excessive fees to conduct examinations and prepare reports for third parties. Clarification of the amount and timing of payment is therefore highly desirable. In some instances, physicians have accumulated outstanding fees in many thousands of dollars which eventually have to be written off as bad debts. There are tax implications that affect the physician who sends out an account for the preparation of a medico-legal report and then does not receive payment in the tax year in which the account is rendered.

There is also an obligation on the claimant, who has become the client of the lawyer, to pay the physician's fee for the preparation of a medico-legal report. The physician who has previously examined or treated the claimant may be satisfied with the claimant's obligation to pay the fee; however, the physician is not obliged to accept this arrangement. The medico-legal report which is usually requested by a lawyer, albeit on behalf of a claimant, is required for purposes more closely aligned with the interests of the claimant which the lawyer serves and for which the lawyer anticipates a fee. In most cases, the lawyer can and usually does make adequate arrangements in advance for the payment of disbursements and fees. The physician should make an effort to clarify the terms of payment, and who will be responsible for payment when the initial request for a medico-legal report is made.

### (b) Deferral of Payment by Lawyers Until Settlement

Another common practice amongst lawyers is to inform the physician that they will see to it that the physician's fee is "protected" and paid out of the proceeds, if any, of the lawsuit (either upon

settlement of the case or after the trial). A physician ought not to be compelled to accept this arrangement, bearing in mind that the physician has no control over the litigation nor any direct participation in the conduct of litigation. A physician who has previously treated the claimant is to provide a medico-legal report and is entitled to receive payment of the fee.

The issue of whether a physician should defer payment of their account for a medico-legal report is a matter of controversy and debate. On the one hand, an additional financial burden might be imposed on a claimant, who has suffered a serious disabling injury, if the claimant is required to pay fees for medico-legal reports before any compensation for injury is received. On the other hand, a physician who agrees to an arrangement that makes payment of their fee contingent upon the outcome of the litigation is at risk of creating a conflict of interest that is contrary to the objectivity and impartiality that is to be expected of a physician as an expert, especially when preparing reports for third parties. An appropriate balance between these interests can be achieved in exceptional circumstances. It is appropriate for a physician to defer payment of their fee until the conclusion of the litigation in order to lessen the economic burden to a claimant (especially where the claimant is also the patient of the physician). In a case where a physician, out of a sense of sympathy for their patient or for the plight of the claimant, volunteers to defer payment of their account, the physician ought not to be criticized if he or she chooses to do so. It should be noted that legal aid is now severely restricted, and can no longer be relied upon to provide a source of funds to pay for medico-legal reports or lawyers' fees. However, the physician is under no legal obligation to defer payment of their fee. Although deferral of the payment of the physician's fee until the conclusion of litigation is appropriate, arrangements that make payment of the fee or the quantum of the fee contingent upon the result of the litigation are fraught with risk for the physician and the instructing lawyer[44].

Case law on the issue of costs awarded in legal proceedings has identified the interest of access to justice as an important value in the exercise of court's discretion in making an award of legal costs in favour of a successful litigant. This case law suggests that a lawyer may be entitled to make a claim for costs if he or she has taken on a case on a pro bono basis. In *1475778 Ontario Inc. v. 1122077 Ontario Inc.* (Ont. C.A., October 25, 2006), Feldman, J.A. stated at para. 34:

> *It is clear from the submissions of the amici representing the views of the profession, as well as from the developing case law in this area, and I agree, that in the current costs regime, there should be no prohibition on an award of costs in favour of pro bono counsel in appropriate cases. Although the original concept of acting on a pro bono basis meant that the lawyer was volunteering their time with no expectation of any reimbursement, the law now recognizes that costs awards may serve purposes other than indemnity. To be clear, it is neither inappropriate, nor does it derogate from the charitable purpose of volunteerism, for counsel who have agreed to act pro bono to receive some reimbursement for their services from the losing party in the litigation.*

[44]Modern commercial practices often see physicians providing expert reports through the intermediary of a medical assessment service provider. Physicians should be careful to review their contractual arrangements which these service providers to ensure that these arrangements do not impair their duty of impartiality and objectivity.

The case law raises an issue as to whether it is also appropriate for a physician to make a similar pro bono arrangement when considering if they will agree to provide a medico-legal report and act as an expert witness.

Access to justice is an important issue in modern litigation. Claimants may not be able to secure legal services unless lawyers are prepared to take on cases on a pro bono basis. The courts have held that it is appropriate for lawyers to make a claim for legal fees and expenses if the claimant is successful even though there was no expectation of payment from the client because of the pro bono nature of the relationship. The case law has not yet considered whether it is appropriate for a physician to make a similar pro bono arrangement with the lawyer and his client.

The value of access to justice is of great concern to the system of justice and society in general. In these circumstances, it is appropriate for a physician to agree to provide a medico-legal opinion and to provide expert opinion evidence to the court at the request of a claimant on a pro bono basis. However, it should be noted that the physician is under no obligation to do so and that any award made by the court that provides for the payment of the physician's fee is entirely within the court's discretion. In pro bono arrangements, the physician should keep appropriate records of time spent so that the court will have a basis for the making of an appropriate award of compensation. Physicians must understand that a pro bono arrangement is not and may not be a contingency arrangement with the claimant and that regardless of the outcome of the litigation, the physician may not receive any compensation for their professional time. The issue of payment (both as to whether it will be made and the amount of the payment) is entirely within the discretion of the court and may be subject to matters over which the physician may have no control. The following principles and guidelines are recommended in a pro bono arrangement governing a physician who agrees to provide expert opinion:

1. A pro bono arrangement is not improper for an expert.

2. A pro bono arrangement with an expert recognizes the importance of the emerging value of access to justice.

3. Such an arrangement must not be structured in a manner that would cause it to be misconstrued as a contingency fee arrangement.

4. The expert must be clear that the payment of any fee, either as to quantum or otherwise, is not assured. The issue must be left entirely to the discretion of the court.

5. The expert should keep proper dockets or records of time spent and expenses incurred.

### (c) Cost Limitations Under the SABS and at the Licence Appeal Tribunal

A number of years ago amendments were made to the Statutory Accident Benefit Schedule (SABS) which limits the cost of a report requested by either the insured or the insurer pursuant to Section 25 of the Statutory Accident Benefit Schedule to be limited to a maximum of $2,000.00 plus HST. This limitation only applies if the assessment is being requested by the insurance company under Section 44 or is the subject matter of an OCF-18 (Treatment and Assessment

Plan) submitted by the insured. If a physician is hired by an insured to complete a medico-legal report outside of the SABS, this cost limit does not apply.

In addition the SABS do provide limits and fixed costs with respect to other forms that a physician or occupational therapist may be requested to complete for a client who has been injured in a motor vehicle accident. These include the following:

- Disability Certificates;
- Treatment plans;
- Assessments of attendant care;
- Assessments of catastrophic impairment.

There are guidelines and provisions under the SABS as to the cost of these but generally it is $2000.00. It is important to note that this also applies to assessments and reports where the issue of catastrophic impairment is being examined. While there can be multiple assessments with multiple assessors for the purpose of securing a multi-disciplinary expert opinion each assessment is still limited to $2,000.00 plus HST.

There is quite a common practice amongst the plaintiff's bar to have catastrophic reports prepared and submitted with a request for an OCF-18 to have the insurer pay for the cost of the reports up to the maximum available limits under the SABS. That does not mean that an assessor cannot reach an agreement that more can be charged for the report. However, that would not be paid for by the insurer but would have to be arranged to be paid for through the lawyer's office and/or by the individual being assessed.

It is important to ensure that arrangements for payment of your account are made. The LAT does not provide payments for costs or disbursements even to the successful party at the Tribunal. There are some limited provisions for costs to be payable under Rule 19 of the Common Rules of Practice and Procedure. It provides:

> *Where a party believes that another party in a proceeding has active unreasonably, frivolously, vexatiously or in bad faith, that party may make a request to the Tribunal for costs.*

However, Section 19.6 provides that the costs will not exceed $1,000.00 for each full day of attendance at a motion, case conference or hearing. There is no provision to pay expert witnesses to attend a hearing. There is no provision for any reports generated either prior to or for the purpose of the hearing to be paid for as a disbursement.

### (d) The Importance of Inter-Professional Communication and Cooperation

There is the practical consideration that a physician may not be inclined to make the effort to prepare a proper medico-legal report when he or she feels unfairly compelled to prepare the report without any satisfactory arrangements in advance for payment of a reasonable fee within a reasonable period.

Unless the problems that arise concerning a physician's fee are resolved at the outset, they will continue to be the cause of considerable aggravation between lawyers and physicians. A lawyer

should accept responsibility to make arrangements acceptable to the physician for payment of the physician's fees.

With appropriate, timely communication and cooperation between lawyers and physicians, most practical problems may be resolved to advance the claimant’s best interests.

## THE PHYSICIAN'S FEE

### 1. Prior Agreement for the Amount of Physician's Fee for Medico-Legal Reports

The key to a successful relationship between physician and lawyer is an understanding at the outset regarding all details of the referral and an agreement about completion of the medico-legal report, timelines for payment, the fee and all related matters. The section entitled "Elements of an Agreement between Lawyer and Physician for Medico-Legal Reports" has been prepared to provide an outline of the topics which should be discussed in an open and frank manner and then agreed upon by both parties. A physician and a lawyer should communicate clearly and directly on these matters, in writing if necessary, to avoid misunderstandings.

Physicians may also wish to review guidance from their other organizations, like CSME or seek input from relevant lawyers' groups. They likely will also consider matters such as case complexity, timing and any need to use an interpreter, travel, obtain a professional recording of their medical examination and so forth.

The mutual interests of physicians and lawyers are best served by full frank discussion and agreement on these matters in advance. This will avoid potential future difficulties.

### 2. Time Frame for Payment of Physician's Fee

A physician is entitled to receive a reasonable fee for the preparing a medico-legal report within a reasonable time. What constitutes a reasonable time will vary considerably in the particular circumstances of each case. As a general rule, a physician should be entitled to receive payment within sixty days of providing the medico-legal report.

A physician who believes that the circumstances of a particular case warrant a period less than sixty days should contact the lawyer, inform the lawyer of the relevant circumstances and negotiate the period within which the fee is to be paid.

If a lawyer deems the circumstances appropriate to extend the period of time beyond the sixty days, he or she should notify the physician, inform the physician of the relevant circumstances and settle the period.

In a particular case, a physician may be prepared to accept payment by installments, agree to a reduced fee or agree to a deferred payment. In certain cases, where the lawyer has received a retainer but the retainer is not sufficient to cover all expenses, then the physician may agree to be paid by installments on an agreed upon timetable, or agree to reduce the fee. Alternatively, the physician may agree to accept an undertaking by the lawyer to pay the fee within a reasonable time of settlement of the case; that is, the lawyer would undertake to hold the settlement monies in trust until the physician's fees are paid. (For a more detailed discussion see also "Deferral of Payment by Lawyers Until Settlement")

While there is no obligation on the physician to accept a reduced fee, payment by installment or deferred payment, the physician may want to take into account some of the following factors in considering this issue in order to minimize the risk of non-payment:

- whether the claimant's case is jeopardized if the full fee is required to be paid immediately;
- whether there are monies held by the lawyer in trust;
- whether there is a retainer held by the lawyer, and the lawyer is prepared to make an arrangement for paying a portion of the physician's fees in the interim;
- whether there is a commitment to periodic communication between the physician and the lawyer as to progress of the case, and anticipated outcome.

## 3. Amount of Physician's Fee for Providing a Copy of Medical Records

The CPSO permits the charging of reasonable fees for copying records. The issue of the amount of the appropriate fee is discussed above.

The general rule is that original physical medical records are the property of the person who prepared them, that is, the physician. However, in a decision[45] of the Supreme Court of Canada, it was recognized that the claimant has a right, upon request, to have access to all of the information contained in the records in the possession of the physician from whom information is requested. Such information would include: all written material; consultation reports; laboratory and diagnostic imaging reports; records from previous treating physicians; hospital summaries, etc.

If a physician considers that there is a significant likelihood of a substantial adverse effect on the physical, mental or emotional health of the claimant, or harm to a third party, then disclosure of the records may be refused.

The issue of the amount of the physician's fee for copying and other related services is discussed above at pp. 22-23.

## 4. Amount of Physician's Fee for Medico-Legal Reports

The key to a successful relationship between physician and lawyer is an agreement at the outset regarding the fee, the time for payment, times lines for completion of the medico-legal report, etc. The section entitled "Elements of an Agreement between Lawyer and Physician for Medico-Legal Reports" has been prepared to provide an outline of the topics which should be discussed in an open and frank manner, and then agreed upon by both parties. A physician and a lawyer should make every effort to communicate on these matters to avoid misunderstandings.

It is professional misconduct for physicians to charge excessively for their services. Pursuant to section 1.21 of Ontario Regulation 856/93 made under the *Medicine Act, 1991,* defines

[45] *McInerney v. MacDonald* [1992] 2 S. C.R. 138.

"professional misconduct" to include "charging a fee that is excessive in relation to the services performed." The Code of Ethics and Professionalism of The Canadian Medical Association provides that the physician should *"Discuss professional fees for non-insured services with the patient and consider their ability to pay in determining fees."* (Section 26).

In considering appropriate charges and fees, the physician should consult the current edition of the guidelines published by the OMA with respect to billing for uninsured services. The OMA has suggested a number of methods in setting appropriate rates[46]. Other organizations, such as CSME, whose members are active in the medico-legal realm have also commented on this issue.

The physician ought to be prepared to disclose the hourly rate they propose to charge for preparation of a medico-legal report. The amount of the fee and the time of payment of the fee should be agreed upon at the outset between physician and lawyer. Good legal practice over many years has shown that agreement on the fee and the time for payment, at the outset, tends to avoid misunderstandings and complications as the case progresses.

In guiding both physicians and lawyers as to the appropriate fee for the preparation of a medico-legal report, and in assessing the appropriate fee to be charged, the physician should take into account the following factors:

- amount of time spent, including reviewing documents, conducting the examination, preparing the medico-legal report, etc.;
- their expertise and experience;
- the complexity of the case;
- complexity of the history and examination;
- whether the medico-legal report is a repetition of previous work already done;
- whether the medico-legal report is a follow-up on an earlier medico-legal report.

The physician should use judgment in determining the fee in each case, depending on the factors listed above. If the physician, in the circumstances of a particular case, decides that the hourly rate will be greater than the range recommended by the OMA, then they should make this known to the lawyer, and in advance, resolve the basis upon which the fee is to be determined.

## 5. The Court Fees of the Treating Physician and the Expert Witness

The fees for attendance to give evidence will differ whether the case is an automobile insurance case under arbitration at the LAT or whether it proceeds through the civil court system. See the section "Expert Witness Fees Permitted by the Licensing Appeal Tribunal" for the specific

[46] *Physician's Guide to Third Party and Other Uninsured Services, A Guide for Ontario Physicians, Ontario Medical Association, January, 2020 Edition, pp. 13, 14.*

amounts (or tariffs) allowed for experts involved in automobile insurance cases under arbitration at the LAT.

In the civil court system, the boundary between a treating physician and a retained expert witness occasionally becomes blurred. The treating physician may be subpoenaed or summoned to attend court, and receive the standard witness fee of approximately $50 per day plus travel allowance. Expert witnesses, however, are usually contacted in advance of the court proceeding, and thus have an opportunity to negotiate the fee for their time and expenses. For time spent attending in court or at hearings, it is common practice for the lawyer and the expert to agree on a daily rate for travel time, preparation and attendance at court. The expert witness/physician is not obliged to accept this practice and may require that their hourly rate be accepted.

Requests to a treating physician for further examinations, diagnostic testing, an opinion about the claimant's recovery, or a more extensive medico-legal report should be considered to be services from an expert witness. If the lawyer requests that the treating physician attend court to give testimony, the physician should request compensation as an expert witness. The physician should consult, in advance, with the particular lawyer requesting attendance in court to arrive at a mutually agreeable attendance fee. It may be that the physician will only receive the minimum payment of approximately $50 per day for attendance in court, pursuant to a summons or subpoena; however, the physician would be entitled to payment for any medico-legal reports prepared in the matter.

The physician who has not previously treated or examined a claimant is not under the same ethical obligation to respond to a request to conduct an examination and provide a medico-legal report. The OMA encourages physicians who are asked to be expert witnesses to negotiate a fee in advance for medico-legal reports, time spent in the courtroom, travel time and other expenses incurred. In these instances, the expert witness will rarely receive a subpoena or summons to attend court, since he or she has agreed to act as an expert in advance and has secured satisfactory remuneration. A physician who has not previously treated or examined a claimant is free to refuse the request to be an expert consultant. If the physician agrees to be an expert, they should insist on suitable arrangements being resolved for the payment of a fee at the outset.

## CONCLUSION

The equitable resolution of personal injury and benefits claims is in the public interest, as well as the private interest of individual claimants. The written opinions and oral testimony given by physicians are essential to the equitable resolution of these claims.

Physicians should recognize an obligation to society to respond to reasonable demands on their time to conduct an examination and provide a full and frank medico-legal report in return for a reasonable fee paid within a reasonable period. Lawyers should recognize the important contribution of physicians to the legal process, and honour the time they spend by facilitating payment of their accounts.

## APPENDIX A
## GUIDELINES AND DETAILED OUTLINE FOR MEDICO - LEGAL REPORTS

### A. Outline for General Medico-legal Reports

This section was prepared to assist the physician who has previously treated or examined a claimant and who lacks experience in preparing a medico-legal report. It also contains a detailed outline of a medico-legal report recommended for civil court matters or arbitrations at the LAT but not for criminal court matters. See Section B for additional guidelines in cases requiring a psychiatric evaluation.

### (a) Guidelines on the Form of the Medico-Legal Report

A physician should submit the medico-legal report within 60 days after receiving a request to do so, under normal circumstances. Settlement of a case is not possible unless the medico-legal report is circulated to opposing parties well before trial. The physician should also be prepared to discuss any subsequent questions or clarifications about it with the lawyer. If the lawyer feels that a follow up conference or a supplementary report is required, then it is appropriate for the physician to charge for the additional time. Remember that if a physician has not prepared a medico-legal report then he or she is not permitted to give evidence, except in special circumstances and by leave of the court.

The form and content of the medico-legal report for a litigation expert should be guided by the provisions of Rule 53.03 (2.1) as amended[47]. ***The report must contain the following elements and should identify each element by a sub-heading in the report:***

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in their 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 their 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.

[47] See Appendix D.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.[48]

The following additional requirements are recommended:

1. Physician's qualifications: The report must indicate that the physician is a duly qualified medical practitioner holding a certificate authorizing practice within the province of Ontario or such other province or territory of Canada in which the physician has a licence to practice. The report should include a statement of the physician's qualifications including year of graduation, fellowships, specialties, specialty training and experience as an expert witness. A copy of the expert's current curriculum vitae should be referred to in the report and appended to it.

2. Date and signature: It must be dated, and signed by a physician *personally*. It cannot be stamped or signed by an assistant on the physician's behalf.

3. Comments on liability: If specifically requested to comment on issues of liability, for example, where asked about the standards of medical practice in a medical malpractice case, then it is appropriate to do so.

   However, in motor vehicle injury cases, it is unwise to give information bearing on liability. The physician should not, for example, state that the claimant was stopped at a red light for ten seconds when he was suddenly hit from behind by a vehicle proceeding at a high speed. Rather, the physician may say that the claimant stated that he was involved on a given day in a motor vehicle collision. The physician may say (if relevant) that the car was hit from behind. This does not preclude the physician obtaining, as part of the history, information to help understand the mechanism of injury or stating those aspects relevant to assessing injury.

4. Discussion of each examination to date: In a number of court decisions, medico-legal reports were not accepted because they only dealt with some examinations.

5. Careful use of words throughout the report: Vagueness and uncertainty must be avoided when legitimately possible. Avoid vague expressions such as "it is possible that." Express the matter in terms of percentages if possible (for example, "there is a 10% chance of recurrence within five years").

6. Use medical terminology for precision; however, explain these terms in language which would be understood by judge or jury. Also, concepts unfamiliar to the general public should be explained.

7. In SABS cases, it is important to demonstrate an understanding of the applicable policy wording.

[48]See Appendix H.

## (b) Detailed Outline for Medico-Legal Reports

Many physicians may find this outline more detailed than the medico-legal reports they customarily submit. Although the preparation of a detailed report may require significant time and effort, a detailed medico-legal report will not only increase the chance of settlement but also greatly reduce the number of physicians' court appearances. If a physician can avoid three hours at court, an extra hour spent in preparing the medico-legal report is obviously worthwhile. In any event, both lawyer and claimant recognize that a superior medico-legal report involves considerable time, for which they will be prepared to pay. A well-written report may make a trial unnecessary or at least considerably reduce the time and expense incurred at trial.

In addition to the requirements of Rule 53.03 (2.1) for civil court lawsuits for litigation experts, the MLST suggests that the following outline be used as a checklist for most medico-legal reports for use in civil court lawsuits or arbitrations at the LAT. This checklist is especially applicable to physicians who are participant experts who have provided care to the claimant and who are asked by the lawyer to provide a report on the care provided and the opinion of the treating physician on diagnosis and prognosis.

### A. Outline for Surgical and Internal Medicine Medico-Legal Reports:

1. The physician's qualifications (if the physician has not already submitted them in an earlier medico-legal report dealing with this claimant). Enclose a copy of a current curriculum vitae.

2. The claimant's name (preferably as indicated in the Statement of Claim).

3. The date, place and reason for the examination(s).

4. The history and symptoms related by the claimant. If a physician is consulted as a specialist, then the medico-legal report should be confined to matters relevant to the condition upon which he or she is asked to report:

   (a) The claimant's version of what he or she believes caused the condition (i.e., the mechanics of the injury, how it was caused, not who was at fault).

   (b) A complete list of the injuries or conditions complained of (whether they seem significant and relevant, or not, and whether the claimant has recovered, or not).

5. Where known and relevant, a statement of the claimant's previous health.

6. The physician's findings which do (or do not) corroborate each of the items of complaint, or which indicate the results of an injury which has not been noticed:

   (a) Physical examination and corroboration (spasm, limitation of movement, etc.) of complaint A, complaint B, etc.

   (b) Diagnostic examinations that corroborate complaint A, complaint B, etc. (for example, X-rays, EEG's).

(c) Surveillance evidence, and the extent to which it was or was not of assistance in formulating the opinion.

7. The physician's diagnosis of each symptom complained of (and any other symptoms):

(a) A description of any diagnostic procedures undertaken by the physician or others with respect to each symptom or condition.

(b) Conclusions regarding diagnosis.

8. The causal connection(s) between the incident and the claimant's complaints, which includes a professional opinion on the precipitating factor or "cause" of the condition, if this is within the expertise of the physician. The court must know if the injury or condition for which damages are claimed was probably caused, aggravated or accelerated by the events complained about.

9. The treatment:

(a) Treatment recommended for symptom A, symptom B, etc.

(b) Whether or not any recommended treatment had been implemented. If not, why not, and the probable result.

(c) When requested, for example when an automobile insurance case is before the Financial Services Commission, recommendations for any other future treatment or rehabilitation.

10. The degree of disability at the time of the examination:

(a) The extent of impaired function which (i) should be treated, (ii) cannot be treated (this is very important if it exists), (iii) is unlikely to improve spontaneously, or (iv) will probably improve spontaneously.

(b) The pain, suffering, inconvenience and discomfort which the physician expects (i) the claimant has suffered and (ii) will probably suffer (or not) in the future.

11. The prognosis:

(a) An opinion as to the probability of future recovery.

(b) An opinion as to the probable nature of any on-going or permanent impairment.

(c) The probable time within which maximum recovery can be expected.

(d) Having regard to the individual and their personal activities, the extent to which the latter should or will be curtailed.

12. In SABS cases, due to the *Unfair and Deceptive Practice Act*, it is important for the assessor to include in the report a comment on the legal test that is to be applied and to demonstrate knowledge of that legal test and how it relates to the facts.

**B. Outline for Psychiatric Medico-legal Reports**[49]:

1. The physician's qualifications (if the physician has not already submitted them in an earlier medico-legal report dealing with this claimant). Enclose a copy of a current curriculum vitae.

2. The claimant's name (preferably as indicated in the Statement of Claim) and a brief statement of relevant background demographic data.

3. The date, place and reason for the examination(s).

4. Documentation of discussion of the nature and purposes of the examination and of the claimant's written consent.

5. The history of current difficulties and symptoms related by the claimant, including a description of the claimant's health and psycho-social circumstances directly prior to the illness or injury. If a physician is consulted as a specialist, then the medico-legal report should be confined to matters relevant to the condition upon which he or she is asked to report:

   (a) The claimant's version of what he or she believes caused the condition (i.e., the mechanics of the injury -- how it was caused, not who was at fault unless the claimant's perception of fault is directly relevant to the claimant's mental status).

   (b) A complete list of the injuries or conditions complained of (whether they seem significant and relevant, or not, and whether the claimant has recovered, or not). (Details of symptoms that are outside of a specialist physician's area of expertise may be omitted.)

6. Current symptoms and treatment.

7. Current activities including activities of daily living and occupational activities, and the claimant's perception of barriers, if any, to resumption of usual activities.

8. Relevant developmental history including family experiences, peer relationships and schooling and marital, sexual and occupational history.

9. Past psychiatric history.

[49]See also the CSME Report-Writing Guidelines for Psychiatric and Psychological Impairment, Revised, November, 2012.

10. Past medical and surgical history.

11. Where appropriate, legal history including arrests, convictions and outstanding charges and past civil litigation and the outcome(s) thereof.

12. The physician's clinical findings which describe the claimant's current presentation and the extent to which these do (or do not) corroborate each of the items of complaint, or which indicate the results of an injury which has not been noticed:

    (a) Mental status examination

    (b) Diagnostic examinations that do or do not corroborate complaints (for example, psychometrics, MRI's EEG's). The practitioner should be able to demonstrate that any psychometric tests employed are standardized for use in medical legal situations and that the claimant being examined is representative of the normative group on which the test was standardized (i.e. language, education, cultural background etc.) and that the practitioner has the necessary experience, training and knowledge to administer a specific test.

13. Listing and analytical review of relevant documentation. (The documents provided may be listed in a separate appendix.) The purpose of this section is not to summarize the medical brief but to provide a review of psychiatrically relevant information and opinions expressed by others. Discrepancies among reports and between reports and information provided to the physician by the claimant should be identified and addressed in the physician's opinion. The examining physician should address the opinions of others in a manner which is professional, objective and respectful. If the examining physician disagrees with the opinions of others, she/he should explain her/his reasons clearly and completely.

14. Surveillance evidence, and the extent to which it was or was not of assistance in formulating the opinion.

15. The physician's summary and diagnostic formulation of the available information. This will normally include integration of all known and relevant biopsychosocial factors and a DSM V multiaxial diagnosis. Where it is evident that relevant information may be missing, the physician should request that it be obtained and stipulate that additional information may necessitate revision of opinions expressed in his/her report.

16. The causal connection(s) between the incident and the claimant's complaints, which includes a professional opinion on the precipitating factor or "cause" of the condition. The court must know if the injury or condition for which damages are claimed was probably caused, aggravated or accelerated by the events complained about.

17. If treatment recommendations are requested:

(a) Treatment recommended for symptom the disorders identified.

(b) Whether or not any previously recommended treatment(s) have been implemented. If not, why not, and the probable result.

(c) When requested, for example when an automobile insurance case is before the LAT, recommendations for any other future treatment or rehabilitation.

18. The degree of impairment at the time of the examination:

(a) The extent of impaired function which (i) should be treated, (ii) cannot be treated (this is very important if it exists), (iii) is unlikely to improve spontaneously, or (iv) will probably improve spontaneously.

(b) The pain, suffering, inconvenience and discomfort which the physician expects (i) the claimant has suffered and (ii) will probably suffer (or not) in the future.

If appropriate, impairment can be described in terms of the criteria established in the American Medical Association Guides to the Evaluation of Permanent Disability.

19. The prognosis:

(a) An opinion as to the probability of future recovery.

(b) An opinion as to the probable nature of any permanent impairment.

(c) The probable time within which maximum recovery can be expected.

(d) Having regard to the individual and their personal activities, the extent to which the latter should or will be curtailed.

The individual psychiatrist's personal writing style will determine how the suggested content is presented. There is no expectation that the order or headings shown above will be followed exactly.

## APPENDIX B
## ELEMENTS OF AN AGREEMENT BETWEEN LAWYER AND PHYSICIAN FOR MEDICO - LEGAL REPORTS

The essential elements of an agreement between lawyer and physician for preparation of a medico-legal report should be discussed in advance. Physicians and lawyers should seek agreement on the fees to be paid to the physician in advance whenever possible and the terms of such agreement should be confirmed in writing by the lawyer.

The essential elements of this agreement should include:

a) an agreement on the hourly rate to be paid to the physician for preparation of the report and an estimate by the physician of the fee based on the hourly rate and the estimated time to prepare the medico-legal report;

b) promise by the physician to prepare the medico-legal report within an agreed upon, reasonable time;

c) agreement by the lawyer to pay the physician's reasonable fee for the services rendered in preparing the medico-legal report, within a reasonable time (for example, 60 days), failing which interest is to be charged on the fee at an agreed upon rate from the date the fee was to have been paid;

d) agreement by the lawyer to pay the physician's reasonable fee for preparation and attendance in court to give evidence, if necessary, and the estimated daily rate to be charged;

e) any arrangement to defer payment of the physician's fee.

Whether the physician is requested to prepare a medico-legal report as a treating physician or to undertake an independent assessment of the claimant, a signed consent form should be forwarded by the lawyer to the physician before the physician begins preparing the medico-legal report.

The lawyer should also discuss with the claimant, and subsequently advise the physician, whether the physician may disclose any information or opinions to the claimant.

## APPENDIX C
## MEDICAL AUTHORIZATION

This is an example of an appropriate, written consent to be signed by the claimant/patient, or substitute decision-maker for the production of medical records and medico-legal reports. In the case of third party reports, the consent should also ensure that the claimant understands that the examiner is entitled to send the report to the lawyer asking for a third party assessment. The execution of a consent for the purpose of a third party assessment should not come as a surprise to the claimant who is attending for the assessment; any issues regarding the execution and content of the consent should be resolved between the lawyers for the parties or as between the insurer requesting the assessment and the lawyer in advance so that there is no controversy on the date of the assessment. In addition, if a third party assessment is to be audio-video recorded or conducted virtually, the consent should be amended to explain this.

### Sample Consent from Claimant/Patient to Their Own Lawyer

To: Dr.

This is to authorize you to furnish my solicitors, Messrs. (Name of Law Firm), with all documents, information, opinions and medico-legal reports which they may request from you from time to time regarding the physical condition and treatment of (Name of Patient). Your full cooperation with my solicitors is respectfully requested.

I understand that you will act impartially and that you acknowledge that it is your legal duty to provide evidence in relation to the legal proceedings in which I am a claimant/plaintiff in the following manner:

(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 your area of expertise;

(c) to provide such additional assistance as the court or tribunal (as the case may be) may reasonably require, to determine a matter in issue, and

(d) this duty referred to prevails over any obligation which you may owe to the my lawyer.

Date_____

_____

Claimant/Patient

_____

Witness

OR

I sign this document by the authority given to me as (relationship to patient) as set out in (nature of document), attached hereto.

Date_____

_____

Substitute Decision-Maker

_____

Witness

**Sample Consent from Claimant to Third Party Examiner/Assessor**

To: Dr. (Name of Third Party Examiner/Assessor)

I, (Name of Claimant) hereby consent to an examination and assessment of my physical and/or mental condition which you will conduct on behalf of (Name of Defendant or Third Party Requesting the Examination or Assessment).

I understand that you will provide a report to the (Lawyer for the Defendant or the Third Party Requesting the Examination or Assessment) and I consent to the release of a report together with all other documents, information, opinions and medico-legal reports which you may review for the purpose of your assessment to the (Lawyer for the Defendant or the Third Party Requesting the Examination or Assessment) and that the (Lawyer for the Defendant or the Third Party Requesting the Examination or Assessment) will forthwith provide a copy of your report(s) and all other documents, information, opinions and medico-legal reports which you may review for the purpose of your assessment to me or my lawyer, as the case may be. I acknowledge that the report will be your property.

I understand that you will act impartially and that you acknowledge that you acknowledge that it is your legal duty to provide evidence in relation to the legal proceedings in which I am a claimant/plaintiff in the following manner:

(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 your area of expertise;

(c)to provide such additional assistance as the court or tribunal (as the case may be) may reasonably require, to determine a matter in issue, and

(d)this duty referred to prevails over any obligation which you may owe to the (Lawyer for the Defendant or the Third Party Requesting the Examination or Assessment) who has engaged you.

Date_____

_____

Claimant/Patient

_____

Witness

OR

I sign this document by the authority given to me as (relationship to patient) as set out in (nature of document), attached hereto.

Date_____

_____

Substitute Decision-Maker

_____

Witness

**APPENDIX D**
**RULES OF CIVIL PROCEDURE**
**REGARDING EXPERT REPORTS**

**Rule 4.1.01: Duty of Expert**

Rule 4.1.01 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.*

**Rule 31.06(3): Disclosure of Expert Opinions on Examination for Discovery**

Paragraph 3 of Rule 31.06 states:

> *(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,*
>
> *(a) the findings, opinions and conclusions of the expert relating to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and*
>
> *(b) the party being examined undertakes not to call the expert as a witness at the trial. R.R.O. 1990, Reg. 194, r. 31.06 (3).*

**Rule 33: Medical Examination of Parties**

> ***33.01*** *A motion by an adverse party for an order under section 105 of the Courts of Justice Act for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party*
>
> ***33.02*** *(1) An order under section 105 of the Courts of Justice Act may specify the time, place and purpose of the examination and shall name the health practitioner or practitioners by whom it is to be conducted.*
>
> *(2) The court may order a second examination or further examinations on such terms respecting costs and other matters as are just*

***33.03*** *The court may on motion determine any dispute relating to the scope of an examination.*

***33.04*** *(1) Subrule 30.01 (1) (meaning of "document", "power") applies to subrule (2).*

*(2) The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least seven days before the examination, a copy of,*

*(a) any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and*

*(b) any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which the party to be examined undertakes not to call evidence at the hearing.*

***33.05*** *No person other than the person being examined, the examining health practitioner and such assistants as the practitioner requires for the purpose of the examination shall be present at the examination, unless the court orders otherwise.*

***33.06*** *(1) After conducting an examination, the examining health practitioner shall prepare a written report setting out their observations, the results of any tests made and their conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order.*

*(2) The party who obtained the order shall forthwith serve the report on every other party.*

***33.07*** *A party who fails to comply with section 105 of the Courts of Justice Act or an order made under that section or with Rule 33.04 is liable, if a plaintiff or applicant, to have the proceeding dismissed or, if a defendant or respondent, to have the statement of defence or affidavit in response to the application struck out.*

***33.08*** *Rules 33.01 to 33.07 apply to a physical or mental examination conducted on the consent in writing of the parties, except to the extent that they are waived by the consent.*

**Rule 53.03: Expert Reports**

***53.03*** *(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).*

*(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other*

*party to the action a report, signed by the expert, containing the information listed in subrule (2.1).*

*(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:*

1. *The expert's name, address and area of expertise.*
2. *The expert's qualifications and employment and educational experiences in their 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 their 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.*

*(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1), (2) and (3), unless the court orders otherwise.*

*(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of their testimony with respect to that issue is set out in,*

*(a) a report served under this rule;*

*(b) a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or*

*(c) a responding supplementary report served on every other party to the action not less than 15 days before the commencement of the trial.*

*(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,*

*(a) by the judge or case management master at the pre-trial conference or at any conference under Rule 77; or (b) by the court, on motion.*

# APPENDIX E
# ANATOMY OF A CIVIL LAWSUIT

This section contains a brief introduction for physicians to the process of a lawsuit in the civil court system, including a discussion of the burden of proof and the method of calculating compensation for the plaintiff (the person claiming compensation in the lawsuit).

## 1. The Lawsuit

Civil litigation involves disputes between people, corporations, or other legal entities. The time between the alleged incident and the last allowable day for the initiation of the lawsuit (the limitation period) varies with the type of case. Most cases involving medical reports are based on "tort" such as injuries sustained as a result of motor vehicle accidents or medical malpractice. Tort claims are based on the allegation that the defendant was negligent, that is, he or she did not meet the standard of care required in the circumstances and that the defendant's actions caused harm to the plaintiff.

The actual civil trial can take place a number of years after the lawsuit is first commenced, typically at least two years for simple cases and often longer with complex cases.

## 2. The Process

The first step is for the plaintiff (the person commencing the lawsuit) to have their lawyer issue a document called a "Statement of Claim" with the court. This Statement of Claim is then personally served on the defendant (the person responding to the lawsuit). The defendant and their lawyer then file a "Statement of Defence" answering the allegations in the statement of claim.

The next step in the lawsuit is the further investigation and preparation of the case by the plaintiff and the defendant. During this period, "examinations for discovery" are held. In this, each of the parties (plaintiffs and defendants) are required to produce all relevant documents (e.g. medical records) and asked questions in a formal examination under oath, orally or in writing. This is called an "examination for discovery". Many questions which are not able to be answered at the time of the examination are provided later, and are referred to as "undertakings".

Before the parties are given a trial date, they appear before a judge for a pre-trial conference. The judge's responsibility is to try to resolve or settle some or all of the contentious issues. Alternate dispute resolution, likely in the form of mediation, is also undertaken to assist in the resolution of some or all of the issues. If this is not successful, then the parties set a date for a trial

## 3.The Burden of Proof

The standard of proof in a civil negligence lawsuit is the "balance of probabilities". This means that the court (be it judge and jury, or judge alone) must be satisfied that the plaintiff has proven their case on a greater than 50% probability ("more likely than not").

The plaintiff must prove the following elements in a negligence claim:

1. The defendant owed a duty of care to the plaintiff.

2. The defendant did not meet the standard of care required in the circumstances.

3. The breach of the standard of care caused and/or materially contributed to the loss or injury.

4. The plaintiff suffered some loss or injury.

## 4.Evaluating a Plaintiff's Claim

Damages refer to the sum of money required to place the plaintiff in the same position he or she would have been, but for the defendant's negligence. The claimant has the responsibility of quantifying the claim being made against the defendants.

Claims that may be made include any or all of the following:

a) General Damages: For pain and suffering, loss of enjoyment of life, and permanent disability. This amount is presently limited by three 1978 decisions of the Supreme Court of Canada. The maximum amount for any one person who has suffered personal injuries, in 1978, was set at $100,000. This amount increases with inflation, and in 2020 is approximately $360,000.

b) Past Loss of Income: This amount is calculated from the date of the injury to the date of the settlement or trial, based on information obtained from prior employers, income tax returns filed, and similar documentation.

c) Out-of-Pocket Expenses: These are amount for items such as medications, mileage, special equipment and supplies, attendant care, etc. which would not have been incurred but for the negligence of the defendant. This does not include any expenses related to the lawsuit.

d) Subrogated Interests: In medical malpractice cases, the Ministry of Health and Long-Term Care is entitled pursuant to the *Health Insurance Act* to asset a claim to recover funds spent by the Ontario Health Insurance Plan (OHIP) to provide past and future treatment to the plaintiff that is required to deal with the consequences of the negligence of the physician or hospital.

e) Prejudgment Interest: This amount is prescribed by statute and is calculated on the past expenses, listed as a, b, c and d above. The calculation will be determined by the rules of court of each province or territory.

e) Future Loss of Income: This is usually an actuarial calculation of the present value of a fund required to replace the projected income which the claimant will not be able to earn due to the injury.

f) Future Costs for Care and Other Expenses: This is usually an actuarial calculation of the present value of a fund required to provide future services and goods (such as

attendant care, nursing care, homemaker expenses, medication costs, special equipment costs, etc.) reasonably required to enable the injured person to cope with their disabilities resulting from the injury.

g) Claims of Family Members: In some jurisdictions, family members are permitted to make claims for compensation for care, guidance and companionship that they have lost from the claimant and for compensation for time spent in providing nursing, homemaking and other services to the claimant.

## APPENDIX F
## ANATOMY OF A HEARING AT THE LICENCE APPEAL TRIBUNAL (LAT)

This section highlights the difference between a civil court lawsuit and an Arbitration for statutory accident benefits arising out of an automobile injury. In regards to the latter the only judicial authority having jurisdiction to hear disputes for statutory accident benefits is the Licence Appeal Tribunal (LAT). Effective June 1, 2016 a person injured in an accident has no recourse to the courts. The Financial Services Commission no longer exists for the purposes of any new disputes. All disputes now proceed to the LAT.

The claimant must start a LAT Application within two (2) years of the date of refusal to pay the benefits or within two (2) years of the date that they could reasonably discover that their injury was such that they may be entitled to a benefit.

There is no longer any requirement for a mandatory mediation. The claimant files an Application at the LAT. It sets out the issues that are in dispute.

Once the LAT receives the Application, it is processed by a Case Manager and the insurer is asked to file a Response. The insurer's Response has to be filed within a certain period of time and will outline the insurer's position with respect to the issues in dispute. Both sets of documents are required to outline what expert reports they rely upon and whether they have been exchanged between the parties.

Sometime thereafter the LAT will arrange for a Case Conference. These are always by phone. The purpose of the Case Conference is to do the following:

- Identify the issues in dispute;
- Discuss settlement;
- Deal with production issues;
- Prepare witness lists;
- Set down timelines for various pre-arbitration activities;
- To set a date for the hearing.

The LAT moves much more quickly than did the Financial Services Commission or a court. It is expected that your case will be set down for a hearing and heard within a year or less of the filing of the LAT Application. Therefore it is very important before a claimant files the LAT application that they already have all the expert reports that they want to rely upon.

If the matter does not settle it will proceed to a hearing which can be in person, by phone, in writing or a combination. Recently the LAT announced that effective September, 2020 it will have video conferencing available for hearings. An adjudicator presides over the hearing and has the power to impose a decision on the parties if they have not been able to come to an agreement similar to the power of a judge in a civil court system with some limitations. There are rights of appeal and reconsideration.

As with the court system, the claimant has the burden of proof to establish their entitlement to the benefits being claimed. The adjudicator must be satisfied that the applicant has proven their case on a balance of probabilities.

The time for rendering the decision is extremely variable. The adjudicator does not give oral reasons at the end of the hearing but will provide written reasons which can take up to a number of months.

There are rules at the LAT with respect to expert witnesses. These would include physicians. There are rules with respect to when the expert witness' report must be filed, and what the report must contain. More importantly an expert witness under Rule 10.2 must provide a signed Statement in the Tribunal's required form acknowledging their duty to provide opinion evidence that is fair, objective and non-partisan, that only relate to matters within their expertise. Attached is a copy of the form that the LAT requires an expert witness to sign and one of these should be attached to any report completed by the expert witness whose evidence is intended to be presented at the LAT whether the report is filed or whether oral evidence is sought.

There are rules for challenging an expert's qualifications, reports or statements. Under Rule 10.4 a party who intends to challenge an expert's qualifications, report or statement must give notice with reasons of the challenge at least ten (10) days before any hearing. Therefore an expert witness in the medical field will know in advance whether their qualifications are being challenged and hopefully rulings are made in advance of the hearing.

One of the major differences in presenting expert medical evidence at a tribunal as opposed to a court is that more often than not the written report is filed even if the expert is coming to give oral evidence. The LAT encourages the filing of reports and technically does not allow any more than two expert witnesses to be called although orders are often made varying that number. However, the LAT strictly reviews the proposed number of expert witnesses and strongly encourages parties to file their reports rather than call the witnesses to give oral evidence. Therefore it is most important that a medico-legal report for the purposes of a LAT hearing is carefully drafted to ensure that the opinion is clearly set out together with the facts relied upon, any scientific literature or studies that are relied upon and a clear basis for the opinion that is set out.

If the expert witness is called to give oral evidence then, as in the court room, there is a right to examination in chief, cross-examination and reply.

## APPENDIX G
## COSTS AND EXPERT WITNESS FEES BEFORE THE LICENSING APPEAL TRIBUNAL (LAT)

The LAT does not provide for the payment of expert witness fees nor does it set out a fee schedule. Payment for the cost of an expert report or attending to give expert evidence should be arranged directly with the lawyer calling the expert.

It is important to note that generally no costs are awarded at the LAT except in very limited circumstances. In the majority of cases, the cost of the expert (both report and attendance) will be paid by the person calling the expert without reimbursement by the other side even if the successful at the hearing.

**APPENDIX H**
**ACKNOWLEDGEMENT OF EXPERTS DUTY IN CIVIL ACTIONS**

**FORM 53**

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 _____(*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* _____

**NOTE:** This form must be attached to any report signed by the expert and provided for the purposes of subrule 53.03(1) or (2) of the *Rules of Civil Procedure*.

**APPENDIX I**

**ACKNOWLEDGEMENT OF EXPERTS DUTY IN PROCEEDINGS BEFORE THE LICENSING APPEAL TRIBUNAL (LAT)**

Date (yyyy/mm/dd)_____

Tribunal File Number_____

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits

Between:

Name of Applicant(s) (Insured)

And

Name of Respondent(s) (Insurer)

As Required By Rule 10. 2(B) of the Licence Appeal Tribunal (LAT) Rules of Practice and Procedure

1. My name is

_____

(name)

2. I reside in the_____

(city/town)

in the

_____(provin

ce)

in the_____

(country)

2. I am an expert in the field of

_____

(name of field)

3. I have been engaged by or on behalf of

_____

(name of party/parties)

to provide evidence in relation to the above-noted proceeding before the Licence Appeal Tribunal.

4. 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 Tribunal may reasonably require, to determine a matter in issue.

5. 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 (yyyy/mm/dd) Signature

**Note:** This form must be attached to any expert report and any opinion evidence provided by an expert witness on a motion or application

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