



THE MEDICO-LEGAL REPORT, 2008

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Medico-Legal Society of Toronto

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EXECUTIVE SUMMARY

Physicians and lawyers must work together to ensure that full, frank and effective medico-legal reports are created to assist in the fair assessment of the patient/client's claim for compensation in personal injury cases.

In Ontario, 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. 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 surveillance evidence, is collected and considered prior to preparing a medico-legal report.

Steps should be taken to ensure that patient confidentiality is respected and to obtain consent of the patient to permit the release of medical information. Patients, 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 professional rules of ethics. The College of Physicians and Surgeons of Ontario requires the physician to provide a medico-legal report within 60 days of a proper request being made, under ordinary circumstances. The Law Society of Upper Canada's rules for professional conduct require the lawyer to meet financial obligations incurred, unless the lawyer clearly indicates in writing that the obligation is not a personal one. A physician should be entitled to receive payment generally within 60 days.

Physicians and lawyers often seek guidance as to the appropriate amount of the fee for copying records and preparing medico-legal reports. In considering appropriate charges and fees, the physician should consult the current edition of the guidelines¹ published by the Ontario Medical Association with respect to billing for copying and third party reports. The Ontario Medical Association's approaches to establishing an appropriate the hourly rate result in suggested fees ranging between \$284 and \$453 per hour for the preparation of a medico-legal report. There are many factors to be taken into account in determining an appropriate 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. The key to avoiding any misunderstanding is communication and agreement on the fee between the lawyer and the physician in advance of preparing the medico-legal report.

The key to co-operation between the professions is good communication and mutual respect.

¹ *Physician's Guide to Third Party and Other Uninsured Services*, Ontario Medical Association, January, 2008, pp. 7 and 8

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 patient/client (hereinafter referred to as “claimant”) and for the administration of justice. Unfortunately, poor communication between lawyers and physicians regarding medico-legal reports can lead to misunderstanding and lack of co-operation.

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 co-operation 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 and 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 motor vehicle injury and medical malpractice cases. The recommendations in this document do not apply to criminal cases. While many issues discussed in this document are applicable to requests for medico-legal reports in other circumstances (such as family court assessments, mental capacity proceedings, applications for life or disability insurance coverage), a physician must understand the nature, issues and purpose of the requested medico-legal report prior to relying on this document.

History of This Document

Medico-legal reports have been the subject of study by the Medico-Legal Society of Toronto 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 doctor-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 version 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 Advocate’s

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 caselaw, 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 the Council of the Medico-Legal Society of Toronto. 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.

This revision was prepared in order to reflect changes in legislation and case law and in order to consider the impact of updated reference materials. A committee of council members was appointed to prepare this revision. Those members are:

R. Lee Akazaki, B.A., LL.B.
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Philippa G. Samworth, B.A., LL.B.

This revision was approved by Council on February 13, 2008.

Appendices

The appendices are practical documents for quick and easy reference. Some contain a more detailed discussion of a topic which may not be of interest to all readers. 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, a sample authorization form for release of medical information, an anatomy of a lawsuit, an anatomy of an arbitration at the Financial Services Commission of Ontario (FSCO).

Copies of this document are available to physicians and lawyers through the Medico-Legal Society’s 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 after personal injury. A full, frank and clearly written medico-legal report will contribute significantly to the proper and just 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 co-operate.

1. 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 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 Ontario Medical Association recommends that physicians seek agreement regarding their fees in writing, whenever possible. The physician or the lawyer may wish to 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 report²
- 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")
- 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

² 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.

- f) the obligation of the lawyer to show 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”).

2. Direction and Disclosure to the Physician

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 patient, all that may be required is a description of the injuries observed on examination, diagnosis, treatment and the patient's response to treatment.

The treating physician who happens to be familiar with the patient's medical history and continues to be involved in treatment may be asked to provide an opinion on the effect of injuries on the patient having regard to the patient'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 patient and, in particular, the effect on certain aspects of the patient'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 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 available medical information concerning the injuries. The lawyer should 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 patient. The physician should be provided with all relevant

medical information available, such as previous medical history, hospital records, original X-rays (original X-rays are preferred over X-ray reports or copies), ECG's, EEG's, laboratory reports, histology, and other material if required.

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 patient's health history. For example, pathology slides, radiological films, 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, to first learn 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 may be disclosed during the course of a trial.

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. 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 patient and the effect of these injuries on that patient's activities. This evidence may be in the form of videotapes (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 he or she is 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 his or her patient. The *treating physician* who has been asked to review surveillance evidence and comment or express an opinion on it should ask the person presenting the surveillance 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 patient 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 patient and the point in time during the DAC process that the video surveillance was reviewed.

3. Confidentiality

This section addresses two aspects of confidentiality considered relevant to medico-legal reports. One is the need for the patient'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 patient and a 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 patient's condition or any professional services performed for a patient to any person other than the patient without the consent of the patient unless required to do so by law. Under The Code of Ethics of The Canadian Medical Association it is a fundamental principle of ethical behaviour of all physicians to protect a patient's right to confidentiality.

The 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 the consent. A written consent is not required by law but is preferred by physicians and hospitals, and is strongly recommended by the College of Physicians and Surgeons of Ontario and the Ontario Medical Association.

(b) Consent

Lawyers obtain consent from the patients to permit the release of medical information to them for use in a lawsuit. Often these consent forms are signed by the patient 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 patient, 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 patient, 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 patient (for example, Power of Attorney for Personal Care under the *Substitute Decisions Act, 1992*, or in the case of a deceased patient, the Last Will and Testament or Certificate of Appointment of Estate Trustee).

The consent process is not satisfied merely by having the patient sign a consent form. A common complaint by physicians is that lawyers do not adequately explain to patients 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. Patients often assert to physicians that they would never have started the lawsuit had they known the extent of medical information to be collected and disseminated. The lawyer should provide detailed information to the patient about the type of medical information which will be relevant, and who will be entitled

to the information so that the patient may make an informed decision before signing a consent to release medical information.

It is advisable that both lawyers and physicians also explain to patients, 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 patient 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 patient or the patient's representative.

In the section entitled "Medical Authorization" is an appropriate form of written authorization to be signed by a patient 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 patient. It is a well-recognized principle of common law that a lawyer is the patient'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 patient may be considered an adequate consent by the patient 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 patient but also with the written consent of the patient. The College strongly recommends that physicians obtain and retain a copy of the patient's written consent. This written consent should be retained by the physician in the record for the patient for a minimum period of 10 years. 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, including in some instances the patient who is subject of the medico-legal report. The information from the medico-legal report, or the medico-legal report itself, may be given to:

- the patient
- all or some of the patient's treating physicians
- other experts for the patient
- 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 patient's problems will be inhibited by the realization that the medico-legal report will be disseminated to a number of persons, including in some cases the patient. 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 patient.

i) Dissemination to the Patient

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

In preparing a claim, it is essential that the patient be aware of the opinions of the various health care professionals may be requested and obtained, whether they are involved with the patient's care and treatment or in the assessment of the patient. A patient's credibility can be seriously undermined if, at cross-examination, he or she is unaware of a certain opinion. For this reason, it is important that lawyers make an effort to make reports available to patients.

Lawyers should note the provisions commentary of subparagraphs 7, 8 and 9 of Rule 2.02(7) of the Law Society of Upper Canada's Rules of Professional Conduct which state:

"2.02 (7) 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

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 medical-legal report. which discussion will serve to inform the physician or

health professional of the lawyer's obligation respecting disclosure of medical-legal reports to the client.

2.02 (8) 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.

2.02 (9) Where a client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in subrule (8), 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 patient 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 the physician, he or she understands 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 patient if the patient insists, even though there is a fear that the medico-legal report might cause harm or injury to the patient.

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

Note the advice in the Commentary accompanying Rule 2.02(7) of the Law Society of Upper Canada, if the patient insists on seeing the medico-legal report against the advice of the physician, 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 patient, unless demanded by the patient, on the basis that the information might be detrimental to the patient's well-being.

ii) Dissemination to the Patient's Treating Physicians

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

iii) Dissemination to Other Experts for the Patient

A lawyer may consider it necessary to make the medico-legal report available to an 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.

iv) Dissemination to the Lawyers of Other Parties

The Rules of Civil Procedure (Rules) 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 relating 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 is 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 patient 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.

The Rules and the *Evidence Act* also set out specific requirements if a party intends to call an expert witness at trial. Rule 53.03 requires a party to serve an expert witness' medico-legal report on every other party no less than 90 days before the start of trial. Responses to expert medico-legal reports must be filed no less than 60 days before the trial starts. The medico-legal report must be signed by the expert and must set out the expert's name and address, the expert's qualifications and the substance of the expert's proposed testimony.

This document is not intended to be a comprehensive review of case law regarding the meaning of "substance of the expert's proposed testimony" within the meaning of the Rules. The expert witness' medico-legal report would be clearly insufficient if it merely listed the topics to which the expert witness proposed to testify at trial. On the other hand, the medico-legal report need not set out, word for word, the anticipated testimony of the expert witness at trial. 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. 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 essential to the opinion to be given by the expert. 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.³

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.

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 the report, then the physician is required to attend the proceeding, the report is marked as an exhibit and stands as his or her evidence in chief and the physician is then cross-examined viva voce 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 viva voce. 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

³ *Marchand v. Public General Hospital Society of Chatham* (2000), 51 O.R.(3d) 97 (C.A.)

parties often reach agreement that the report be given to the trial judge as an aide to assist him or her 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 he or she will understand the context of the presentation of the medical evidence.

At the FSCO, 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. FSCO 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 doctor is called he or she 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 doctor called is subject to cross examination.

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 his or her client will usually have to provide the report to his or her 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 patient'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.

⁴ *Marchand v. Public General Hospital Society of Chatham* (2000), 51 O.R.(3d) 97 (C.A.)

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

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

The College of Physicians and Surgeons of Ontario 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 College of Physicians and Surgeons of Ontario in assessing professional conduct.

ii) The Obligation to Provide a Medico-Legal Report

Generally, physicians have an obligation to provide copies of a patient's notes and records, or to provide a medico-legal report, when a proper request is made by the patient or the patient'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. The Code of Ethics (2004) of the Canadian Medical Association, sets out the responsibility of the ethical physician as follows:

"Recognize the profession's responsibility to society in matters relating to public health, health education, environmental protection, legislation affecting the health or well-being of the community and the need for testimony at judicial proceedings." (Section 42)

Furthermore, the Code of Ethics states:

“Upon a patient’s request, provide the patient or a third party with a copy of his or her medical record, unless there is a compelling reason to believe that information contained in the record will result in substantial harm to the patient or others.” (Section 37).

If a physician is properly requested to provide a medico-legal report, which information the physician believes will result in substantial harm to the patient, or others, then the physician should advise the lawyer requesting the medico-legal report of the basis for this belief, and refer the lawyer to this section of the Code of Ethics. This type of communication will allow the lawyer to seek an order from the court to handle the sensitive information in a restricted fashion to prevent harm to the patient or others.

iii) Timeliness of the Medico-Legal Report

It is the position of the College of Physicians and Surgeons of Ontario 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 patient/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 patient or his or her authorized representative within a reasonable time after the patient or his or her 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 College of Physicians and Surgeons of Ontario. Before lodging a complaint, a lawyer should advise the physician of the intent to do so and afford the physician an opportunity to respond.

The complaint must, in accordance with the regulations, be made in writing identifying the physician and setting out the circumstances of the complaint. It should be directed to:

Registrar
The College of Physicians and Surgeons of Ontario
80 College Street
Toronto, Ontario
M5G 2E2

When such a complaint is received, a copy of the letter of complaint is forwarded to the physician with the request that he or she respond, setting out any explanation or representation he or she has 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 College of Physicians and Surgeons of Ontario has been that where lawyers make such complaints, resolution of the matter without discipline is achieved in most cases.

If the physician continues his or her refusal to provide the medico-legal report, without alleging any just cause, the matter is forwarded to the Complaints Committee of the College of Physicians and Surgeons of Ontario, which consists of physician members and representatives of the public. The Complaints Committee has the power to dismiss the complaint, warn the physician concerning this conduct or refer the complaint to the Discipline Committee for hearing.

Where the complaint is dismissed by the Complaints Committee, the complainant may have recourse to the Health Professions Appeal Board (HPARB). HPARB conducts a review of the investigation conducted by the Complaints Committee. It may exercise all the powers of the Complaints Committee. It also has the power to refer the complaint back to the Complaints Committee for further investigation and consideration.

Where the matter is referred to the Discipline Committee a hearing is held in accordance with the Notice of Hearing. The Discipline Committee is entitled to discipline the physician as provided in the *Regulated Health Professions Act, 1991*. Penalties include a reprimand, a fine, suspension of licence, attachment of terms and conditions to the licence to practice or revocation of the licence to practice.

(b) Legal

i) The Governing Body

The Law Society of Upper Canada is given the mandate to uphold the standards of professional conduct of lawyers in Ontario, which includes a professional duty to meet financial obligations.

The Law Society of Upper Canada's Rules of Professional Conduct is referred to in assessing professional conduct.

The Canadian Bar Association is a national, voluntary lawyers' association which provides programs and services to promote intellectual and ethical advancement of members of the legal profession. The Canadian Bar Association has adopted a Code of Professional Conduct (July, 2006) that guides lawyers regarding appropriate professional conduct. Although the Association is not the governing body for lawyers, its views are likely to be considered as persuasive by the Law Society of Upper Canada.

ii) The 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.

Rules 6.01 and 6.02 (and their Commentaries) of the Rules of Professional Conduct of the Law Society of Upper Canada provide:

6.01 (1) *A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.*

Commentary

Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.

Meeting Financial Obligations

6.01 (2) *A lawyer shall promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy when properly called upon to do so.*

Commentary

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, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one.

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, nevertheless, if it is reasonably possible to do so, the lawyer should help in making satisfactory arrangements for payment.

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.

The CBA Code of Professional Conduct, Chapter XIX, "Avoiding Questionable Conduct" states:

"The lawyer should observe the rules of professional conduct set out in this Code in the spirit as well as in the letter."

Paragraph 7 of the Commentary under this Rule provides as follows:

"The lawyer has a professional duty, quite apart from any legal liability, to meet financial obligations incurred or assumed in the course of practice when called upon to do so. Examples are agency accounts, obligations to members of the profession, fees or charges of witnesses, sheriffs, special examiners, registrars, reporters and public officials as well as the deductible under a governing body's errors and omissions insurance policy."

iii) Failure to Pay

Just as lawyers may complain to the College of Physicians and Surgeons of Ontario if a physician fails to provide a medico-legal report, physicians may file a complaint with the Law Society of Upper Canada 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.

The physician may send a short letter, outlining the facts and including a copy of the account and a copy of the lawyer's letter in which the medico-legal report was requested, to:

The Law Society of Upper Canada
Complaints Department
130 Queen Street West
Toronto, Ontario
M5H 2N6

When such a complaint is received by the Law Society of Upper Canada, 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 his or her 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 Law Society of Upper Canada will try to help the physician and lawyer resolve their differences. It is the experience of the Law Society of Upper Canada that, in a very large percentage of the cases, this is successful. Where this does not succeed, the Law Society of Upper Canada may recommend non-binding mediation provided by the Ontario Medical Association.

The physician may sue for payment of the account in the courts, however, if court proceedings are started, the Law Society of Upper Canada will not interfere and will await the outcome of the lawsuit. Court proceedings can be lengthy and expensive. Resolution of the dispute through the Law Society of Upper Canada or by mediation is likely a better alternative..

2. Problems In Practice

a) Lawyers Disclaiming Responsibility for Payment

It has become the practice of a significant number 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 he or she is 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 Law Society of Upper Canada, and the College of Physicians and Surgeons of Ontario 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 8-02² of the College of Physicians and Surgeons of Ontario provides that advance payment can be negotiated by non-treating physicians. 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 patient of the fee in advance. Doctors 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 patient, 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 patient may be satisfied with the patient'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 patient, is required for purposes more closely aligned with the interests of the patient 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.

² College of Physicians and Surgeons of Ontario, Policy 8-02, *Third Party Reports*, Table, "Fees" and footnote #2.

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 litigation (either upon settlement of the case or after the trial). In these circumstances, the physician who has previously examined or treated the patient would be obliged to provide a medico-legal report, and receive payment of the fee upon conclusion of litigation. If litigation is unsuccessful, the patient would still have an obligation to pay the physician's fee; however, an impecunious patient may be unable to do so.

The 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.

The issue of whether a physician should defer payment of his or her 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 his or her 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 may be appropriate for a physician to defer payment of his or her fee until the conclusion of the litigation in order to lessen the economic burden to a claimant. In a case where a physician, out of a sense of sympathy for his or her patient or for the plight of the claimant, volunteers to defer payment of his or her 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 his or her fee. Although, deferral of the payment of the physician's fee until the conclusion of litigation can be 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.

c) Cost Limitations Under SABS

Under the SABS certain reports have cost limitations. If a doctor is hired by an insurer to conduct an assessment under s.24 then the cost of the report is negotiable between the parties. However the completion of certain forms, a medico legal report under s.24 or a rebuttal report under s.42.1 may be subject to fixed costs payable by the insurer. They are as follows:

1. S.24: Disability Certificates, Treatment Plans, Assessments of Attendant Care, Assessments of Catastrophic Impairment: the insurer is obliged to pay "reasonable fees."

2. S.42.1 Rebuttal Report:

- a. Non-Catastrophic Loss:
 - i. For a paper review only, the maximum payable is \$450.00;
 - ii. For an assessment where the assessment is by one or more members of a health profession and at least one of the assessors is a physician legally authorized to practice in a medical specialty other than family medicine, the maximum charge is \$900.00;
 - iii. If the assessment is completed only by members of a health profession, maximum charge is \$775.00.
- b. Catastrophic Loss: There is no cost limit irrespective of the type of the assessment other than reasonableness.

d) The Importance of Inter-Professional Communication and Co-operation

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 co-operation between lawyers and physicians, most practical problems may be resolved to advance the patient's best interests.

THE PHYSICIAN'S FEE

1. 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")

The physician may take into account some of the following factors in considering accepting payment by installments, a reduced fee or a deferred payment:

- whether the patient'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.

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

The College of Physicians and Surgeons permits the charging of reasonable fees for copying records. For transfers of medical records, the Ontario Medical Association recommends a charge of \$36.31 for the first 5 pages of the chart and \$1.41 for each page thereafter.⁵

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 decision⁶ of the Supreme Court of Canada, it was recognized that the patient 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 X-ray 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 patient, or harm to a third party then disclosure of the records may be refused.

3. 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 "professional misconduct" to include "charging a fee that is excessive in relation to the services performed." The Code of Ethics of The Canadian Medical Association provides that the ethical physician "*in determining professional fees to patients for non-insured services, consider both the nature of the service provided and the ability of the patient to pay, and be prepared to discuss the fee with the patient*" (Section 16). Neither the *Medicine Act, 1991* nor the Code of Ethics define the limits of 'excessive fees'.

In considering appropriate charges and fees, the physician should consult the current edition of the guidelines published by the Ontario Medical Association with respect to billing for copying and third party reports. The Ontario Medical Association's approaches to establishing an appropriate the hourly rate result in suggested minimum fees ranging between \$284 per hour (for

⁵ *Physician's Guide to Third Party and Other Uninsured Services*, Ontario Medical Association, January, 2008, p. 9. Where the records include services are of a psychiatric nature, the recommended charge is \$48.57 for the first 5 pages and \$1.95 for each page thereafter.

⁶ *McInerney v. MacDonald* [1992] 2 S. C.R. 138

a physician without overhead expenses) and \$453 per hour (for a physician with overhead expenses).⁷

The physician ought to be prepared to disclose the hourly rate he or she proposes 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, the Medico-Legal Society suggests that, 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.;
- his or her 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 Ontario Medical Association, than he or she should make this known to the lawyer, and in advance, resolve the basis upon which the fee is to be determined.

Under the SABS, for s.42.1 rebuttal reports, the expense is payable 30 days after the insurer receives the invoice. There is no set time for the payment of s.42 independent insurer exams. Note that under the SABS, the fees payable do not preclude a private arrangement as between the lawyer/insurer and the examining doctor to pay fees in excess of the SABS limits. The SABS rules preclude the charging of fees to an opponent (usually the insurer) in excess of the SABS limits.

⁷ Physicians should consult the OMA's publication, Physician's Guide to Third Party and Other Uninsured Services (January 2008 Edition) for a detailed description of the method of calculation of an appropriate hourly rate.

4. 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 FSCO or whether it proceeds through the civil court system. See the section “Expert Witness Fees Permitted by the Financial Services Commission” for the specific amounts (or tariffs) allowed for experts involved in automobile insurance cases under arbitration at the FSCO.

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 \$53 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. Generally, a daily rate below the hourly rate is agreed upon for travel time, preparation and attendance at court.

Requests to a treating physician for further examinations, diagnostic testing, an opinion about the patient’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 \$53 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 patient is not under the same ethical obligation to respond to a request to conduct an examination and provide a medico-legal report. The Ontario Medical Association 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. The physician in these circumstances is free to refuse the request or to insist on suitable arrangements being resolved for the payment of a fee at the outset.

At the FSCO, the Dispute Resolution Code limits the court fees for an expert report to \$1,500.00 per report. The maximum amount that may be awarded for the attendance of an expert witness is \$200.00 per hour of attendance up to a maximum of \$1,600.00 per day. The maximum amount of expenses that may be paid to an expert witness for preparation for a hearing at which the witness testified is a maximum of \$500.00. However, individual fees may be negotiated between the expert and the lawyer who calls the expert to testify.

CONCLUSION

The equitable resolution of personal injury and benefits claims is in the public interest, as well as the private interest of individual patients. 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

This section was prepared to assist the physician who has previously treated or examined a patient 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 FSCO but not for criminal court matters.

(a) Purpose of the Medico-Legal Report

The medico-legal report in civil personal injury matters is to help a judge or jury decide issues of liability, causation and the appropriate amount of compensation for an injured person. In a motor vehicle injury case before the FSCO the purpose is to determine the entitlement of the patient or claimant to certain benefits (called “statutory accident benefits”) including income replacement benefits, and medical and rehabilitation expenses.

It is essential that the report be full and frank. It must be prepared in a credible and competent manner to withstand intense scrutiny upon cross-examination. The medico-legal report should be objective. Therefore, the physician preparing it should not assume the role of advocate either for or against the patient’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 on the matters within his or her expertise so that justice may be done between the parties according to law. This duty overrides any obligation to the lawyer instructing them or to the person paying his or her account. The physician’s opinion as expressed in the report must therefore be complete, competent and independent. 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.
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 on the matters within his or 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 his or her obligation to attend the proceedings to give testimony.

6. The physician must understand that if he or she gives 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 standard of proof applicable to these questions.

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

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 to be reasonable expected of reasonably prudent and competent practitioners in similar circumstances. The expert should not couch his response to this question by expressing "concerns". The issue is whether the defendant fell below reasonable standards of medical practice.

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 or, in appropriate circumstances, whether the breach of duty materially contributed to the injuries suffered by the plaintiff.

3. On the issue of damages, the determination of future care costs and future losses that may be suffered by the plaintiffs is dependant 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 his or her 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 or 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, he or she should provide references to these materials in the body of the report.

(b) 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. Usually, an additional fee is not charged as long as the discussion is reasonably brief and is related to the initial request. 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 following are the minimum requirements:

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. It is most desirable that the report contain a statement of the physician's qualifications such as year of graduation, fellowships, specialties, etc. 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 patient 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 patient 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 unreported court decisions the 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, otherwise the physician (or some other physician) may be called to court to explain it.
7. In SABS cases it is important to demonstrate an understanding of the applicable policy wording.

(c) **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.

The Medico-Legal Society suggests that the following outline be used as a checklist for most medico-legal reports in civil court lawsuits or arbitrations at the FSCO:

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 patient). 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 patient'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.
 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 patient 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 permanent impairment.

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

(d) Having regard to the individual and his or her 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 Medical-Legal Reports:

1. The physician's qualifications (if the physician has not already submitted them in an earlier medico-legal report dealing with this patient). 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. a. The date, place and reason for the examination(s).

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

4. The history of current difficulties and symptoms related by the patient, 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 patient has recovered, or not). (Details of symptoms that are outside of a specialist physician's area of expertise may be omitted.)

5. Current symptoms and treatment.
6. Current activities including activities of daily living and occupational activities, and the claimant's perception of barriers, if any, to resumption of usual activities.
7. Relevant developmental history including family experiences, peer relationships and schooling and marital, sexual and occupational history.
8. Past psychiatric history.
9. Past medical and surgical history.
10. Where appropriate, legal history including arrests, convictions and outstanding charges and past civil litigation and the outcome(s) thereof.
11. 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.
12. Listing and critical 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 critical 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.

13. Surveillance evidence, and the extent to which it was or was not of assistance in formulating the opinion.
14. 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 IV (TR) multi-axial 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.
15. The causal connection(s) between the incident and the patient'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.
16. 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 FSCO, recommendations for any other future treatment or rehabilitation.
17. 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 patient 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.
18. 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 his or her 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 patient, 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 patient, and subsequently advise the physician, whether the physician may disclose any information or opinions to the patient.

APPENDIX C

MEDICAL AUTHORIZATION

This is an example of an appropriate, written consent to be signed by the patient, or substitute decision-maker for the production of medical records and medico-legal reports.

To: Dr.

This is to authorize you to furnish my solicitors, MESSRS. (**name of law firm**), with all 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**) and your full cooperation with my solicitors is respectfully requested.

DATED at (**city**) , this day of 19 .

Witness

SIGNATURE of Patient

OR

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

DATED at (**city**) , this day of 19 .

Witness

SIGNATURE of Substitute Decision-Maker

PRINT NAME of Substitute Decision-Maker

APPENDIX D

**RULES OF CIVIL PROCEDURE REGARDING
MEDICO - LEGAL REPORTS**

In this section, the Rules of Civil Procedure regarding the production of medico-legal reports prior to trial are discussed in more detail. These Rules bind lawyers and parties involved in the civil lawsuit.

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).”

This Rule requires that a party to the lawsuit disclose, if demand is made at the examinations for discovery, the findings, opinions and conclusions of an expert, as well as the expert's name and address, unless the findings, opinions and conclusions were made or formed in preparation for litigation and for no other purpose and there is an undertaking not to call the expert as a witness at the trial. Thus, if the physician is to be called at trial or if the findings, opinions and conclusions were not formed solely in preparation for litigation, the findings, opinions and conclusions of the expert, whether or not contained in a medico-legal report, must be disclosed.

Rule 33: Medical Examination of Parties

Rule 33 states:

“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. R.R.O. 1990, Reg. 194, r. 33.01.

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. R.R.O. 1990, Reg. 194, r. 33.02 (1).*

(2) *The court may order a second examination or further examinations on such terms respecting costs and other matters as are just. R.R.O. 1990, Reg. 194, r. 33.02 (2).*

33.03 *The court may on motion determine any dispute relating to the scope of an examination. R.R.O. 1990, Reg. 194, r. 33.03.*

33.04 (1) *Subrule 30.01 (1) (meaning of “document”, “power”) applies to subrule (2). R.R.O. 1990, Reg. 194, r. 33.04 (1).*

(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. R.R.O. 1990, Reg. 194, r. 33.04 (2).

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. R.R.O. 1990, Reg. 194, r. 33.05.*

33.06 (1) *After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order. R.R.O. 1990, Reg. 194, r. 33.06 (1).*

(2) *The party who obtained the order shall forthwith serve the report on every other party. R.R.O. 1990, Reg. 194, r. 33.06 (2).*

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. R.R.O. 1990, Reg. 194, r. 33.07.*

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. R.R.O. 1990, Reg. 194, r. 33.08.”

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.

The procedure regarding the examination and the resulting medico-legal report are governed by the special, detailed requirements of Rule 33. 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 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:

- his or her observations
- results of any tests made
- his or her 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, he or she 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.

Rule 53.03: Expert Reports

Rule 53.03 states:

“53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony. O. Reg. 348/97, s. 3.

(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 commencement of the trial, serve on every other party to the action a report, signed by the expert setting out his or her name, address and qualifications and the substance of his or her proposed testimony. O. Reg. 348/97, s. 3.

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

(a) a report served under this rule; or

(b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial. O. Reg. 348/97, s. 3.

(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. O. Reg. 570/98, s. 3.”

This Rule requires a party to serve (send a copy to all other lawyers in the case) a copy of the medico-legal report of any expert to be called to give evidence at trial not less than 90 days before the start of the trial. The report of any responding expert must be served no less than 60 days before the start of trial. It is possible for the proponent of the first report to provide a reply report by serving a supplementary report no less than 30 days prior to the start of trial.

In all cases, Rule 53 reports must be signed by the expert, and must set out the following:

- expert’s name and address
- expert’s qualifications
- substance of the expert’s proposed testimony.

This Rule 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.

Disputes often arise in the midst of trial as to whether an issue has been covered in the report, i.e., has the expert properly disclosed the “substance of the expert’s proposed testimony”. This document is not intended to be a comprehensive review of the case law regarding the meaning of “substance of the expert’s proposed testimony”, however the following guidelines are suggested for lawyers and physicians:

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.
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.

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.

The actual civil trial can take place between two and six years after the lawsuit is first commenced. With complex cases, the time frame to trial is on the longer side.

2. The Process

The first step is for the plaintiff (the person commencing the lawsuit) to have his or her 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 his or her lawyer have a short period of time in which to 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 asked questions under oath, orally or in writing. 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 his or her 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 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 negligence. The patient 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 2008 is approximately \$320,000.
- 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 patient 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 his or her 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 patient and for compensation for time spent in providing nursing, homemaking and other services to the patient.

APPENDIX F

ANATOMY OF AN ARBITRATION AT THE FINANCIAL SERVICES COMMISSION OF ONTARIO (FSCO)

This section highlights the differences between a civil court lawsuit and an arbitration for no-fault benefits arising out of an automobile injury.

1. The Arbitration

An arbitration involves a dispute between the claimant (usually the injured person) and the automobile insurance company regarding the entitlement of the injured person to a number of “no-fault” benefits. These benefits are legislated by the government. The FSCO and the civil court system are charged with resolving disputes under the automobile no-fault legislation. The claimant may choose whether to go through the civil court system or to arbitration at the FSCO.

Since 1990, there have been several changes to the law governing no-fault benefits, and presently there are several separate systems of no-fault benefits depending on the year of the automobile accident. The physician should be very careful to have the correct date of the accident, and then must be familiar with the section of legislation that gives entitlement to the claimant. It may be helpful to seek clarification from the lawyer or the representative of the insurer who has requested the medico-legal report about the applicable legislative regime.

At the FSCO, the person deciding the matter is an arbitrator, and not a judge. Arbitrators have the same powers as judges, and the process of presentation is similar to the process in lawsuits (as outlined in “Anatomy of a Civil Lawsuit”).

There is one major difference in presenting medical evidence at arbitrations before the FSCO. The Arbitrators have made strong comments in guidelines and decisions not to encourage oral evidence from expert witnesses but to file medico-legal reports instead of calling physicians to give testimony. Thus, the medico-legal report for an arbitration will have to be carefully drafted to ensure that the opinion is clearly set out, since there will be fewer opportunities to expand upon the medico-legal report with testimony. If the physician is called to give evidence in the rare case, then the physician will be examined by the lawyer who arranged for the opinion (called an “examination in chief”) followed by a cross-examination by the opposing lawyer, just as in a civil court case.

Arbitration hearing dates are designated for a specific date and start on the appointed day. The maximum time for a hearing is four days. This is in contrast to unlimited time for presentation of evidence and argument in civil court cases.

2. The Process

The claimant must start an arbitration or court process within two years of the date of the refusal to pay benefits.

The first step of the claimant is to request a Mediation which is held at the FSCO. This is a process designed to try to settle the issues with all parties present....The Mediation lasts between one and three hours and both parties must be present. It can be held over the phone or in person.

If the mediation is unsuccessful in resolving the issues, then the claimant must elect whether to pursue the matter in the civil court system, or to apply for an arbitration at the FSCO or agree on a private arbitration. .

If the claimant (the applicant) elects arbitration to resolve the dispute about benefits, an application must be filed with the FSCO. The insurance company (the respondent) then has 30 days in which to respond.

Next, a pre-hearing date will be assigned, usually within 3 months, depending on the backlog. The parties must also be present at the pre-hearing. The two sides are encouraged to exchange all documents or productions prior to the pre-hearing date, or disputes about documents may be dealt with at the pre-hearing.

At the pre-hearing, the following steps are taken:

- identify the issues of dispute
- identify the witnesses to be called
- deal with issues regarding documents
- set a date for the arbitration
- undertake an extensive settlement discussion (like a second mediation).

If the pre-hearing is unsuccessful, then the next step is the arbitration, which takes place between one and eight months after the pre-hearing. The arbitrator has the power to impose a decision on the parties if they are still unable to come to an agreement, similar to the power of a judge in the civil court system. There is a right of appeal from that decision on an issue of law only to the Director of Arbitrations and thereafter an appeal to the Divisional Court for judicial review.

3. The Burden of Proof

As in the civil court system, the claimant has the responsibility of proving his or her entitlement to no-fault benefits. There is never a jury in an arbitration. The arbitrator must be satisfied that the claimant has proven his or her case on a balance of probabilities, as in civil court cases.

4. The Decision

The Arbitrator is unlikely to give his or her decision at the end of the Arbitration hearing. The Arbitrator will reserve the decision which means that he or she will write detailed reasons for their conclusion and generally release it within three to six months after the hearing.

5. Address of the Financial Services Commission of Ontario

The Financial Services Commission is located on the subway line at North York Centre station, between Sheppard Avenue and Finch Avenue. FSCO's address and contact information are:

Financial Services Commission
Dispute Resolution Services Branch
5160 Yonge Street
PO Box 85, 14th Floor
Toronto, Ontario M2N 6L9

Dispute Resolution Services
Tel: 416 250 6714
Toll free: 1 800 517 2332
Fax: 416 590 7077

Mediation Services
Tel: 416 590 7210
Toll free 1 800 517 2332, extension 7210
Fax; 416 590 7077

Arbitrations
Tel: 416 590 7202
Toll free: 1 800 517 2332, extension 7202
Fax: 416 590 842

Appeals
Tel: 416 590 7222
Toll free: 1 800 517 2332, extension 7222
Fax: 416 590 7077

website address: www.fSCO.gov.on.ca

APPENDIX G

EXPERT WITNESS FEES PERMITTED
BY THE DISPUTE RESOLUTION CODE OF
THE FINANCIAL SERVICES COMMISSION OF ONTARIO

The following witnesses and traveling fees for expert witnesses are permitted by the Financial Services Commission Dispute Resolution Code as amended May 31, 2001.

- the maximum amount that may be awarded for the attendance of an expert witness is \$200 per hour of attendance, up to a maximum of \$1,600 per day
- the maximum amount of expenses paid to an expert witness for preparation for a hearing (at which the witness testified) is \$500
- the maximum amount of expenses for the preparation of a medico-legal report is \$1,500
- travelling expenses of 30 cents per kilometre if the hearing takes place within 300 kilometres of the person's residence
- maximum amount for overnight expenses and meals is \$150 per night.