

Third Party Medical Reports

Policies of the College of Physicians and Surgeons of Ontario (the “College”) set out expectations for the professional conduct of physicians practising in Ontario. Together with the *Practice Guide* and relevant legislation and case law, they will be used by the College and its Committees when considering physician practice or conduct.

Within policies, the terms ‘must’ and ‘advised’ are used to articulate the College’s expectations. When ‘advised’ is used, it indicates that physicians can use reasonable discretion when applying this expectation to practice.

Definitions

Third party processes: Processes that relate to insurance benefits, workplace issues, attendance in educational programs, legal proceedings, etc. Physicians participate in these processes by conducting independent medical examinations and providing third party medical reports and testimony.

Independent medical examinations (IME): Examinations which are conducted strictly for third party processes and *not* for the provision of health care. IMEs can include a file review¹ and/or examination² of the subject. IME findings are communicated by physicians in third party medical reports and/or testimony.

Third party medical reports and testimony: Information and/or opinions that are provided by physicians³ in writing and/or orally for a third party process and *not* for the provision of health care.

Subjects: Patients or individuals⁴ who are the subject of an IME, third party medical report and/or testimony.

¹ The file review could include reviewing medical records, reports, etc.

² The examination could be physical, psychological, functional, etc.

³ Both treating and non-treating physicians may provide third party medical reports and testimony. For example, treating physicians may complete forms on behalf of their patients, and non-treating physicians may report on the findings of the independent medical examinations they conduct on individuals.

⁴ The College will consider individuals who are the subject of an IME, third party medical report or testimony to be patients for the purposes of the sexual abuse provisions set out in the *Health Professions Procedural Code (Regulated Health Professions Act, 1991, S.O. 1991, c.18., Sched. 2)*.

23 **Medical experts:**⁵ Physicians who, by virtue of their medical education, training, skill
24 and/or experience, have specialized knowledge and expertise on medical issues.

25 **Policy**

26 1. Physicians **must** act with the same high level of integrity and professionalism when
27 participating in third party processes, as they would when delivering health care.

28
29 2. Physicians **must** comply with the expectations set out in this policy and any other
30 specific legal principles and requirements that may apply to the third party process.⁶

31 **Physician Participation in Third Party Processes**

32 3. When requested, treating physicians **must** provide third party medical reports about
33 their current and former patients in accordance with the 'Consent' section of this
34 policy, unless they no longer have an active certificate of registration.⁷

35
36 4. When requested or ordered (e.g., by subpoena or summons), treating physicians
37 **must** provide testimony about their current and former patients.⁸

38

⁵ 'Expert witnesses' and 'litigation experts' are other terms commonly used to describe physicians who are retained by a party in a legal proceeding to act as medical experts. This is different than treating physicians who may also be required to give evidence in a legal proceeding regarding the treatment they provided to their patients, symptoms their patients' reported etc., or regarding reports they prepared in their capacity as treating physicians (known as 'participant experts'). See the Advice to the Profession document for more information.

⁶ For example, this can include, but is not limited to: the principles of solicitor-client and litigation privilege; requirements found in the *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched A.(PHIPA), and the *Personal Information Protection and Electronic Documents Act, SC 2000*, c 5 (PIPEDA); requirements found in the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the *Insurance Act*, R.S.O. 1990, c. I.8, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.16, Sched. A., and the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1; and the relevant regulations enacted under these Acts. Physicians may want to seek independent legal advice regarding the specific legal principles and requirements that apply to the third party process they are participating in.

⁷ The College's [Closing a Medical Practice](#) policy states that "following a resignation, revocation, or suspension, physicians **must not**...prepare reports... Only administrative work required to finalize an outstanding report can be completed during the suspension period, or following resignation or revocation. Administrative work includes editing draft reports, summarizing conclusions or signing reports completed prior to resignation, revocation or suspension".

⁸ A subpoena or summons does not grant physicians the authority to speak to anyone about the patient or disclose their medical records without the patient's (or their substitute decision-maker's) consent, unless permitted or required by law (e.g., court order). For more information, see: Canadian Medical Protective Association. (2009). [Subpoenas-What are a physician's responsibilities](#).

- 39 5. Physicians are not obligated to conduct IMEs or act as medical experts, and **must**
40 only accept a request to conduct an IME or act as a medical expert if they:
41 a. currently have an active certificate of registration;
42 b. have the requisite scope of practice and area of expertise and have actively
43 practiced within that scope and area of expertise within the past two years;⁹
44 and
45 c. have disclosed to the requesting party any perceived or potential conflicts of
46 interest¹⁰ and the physician and requesting party determined no conflict
47 exists.¹¹
48
- 49 6. In discharging provision 5c, physicians **must not** disclose any personal health
50 information¹² about a patient without their consent, unless permitted or required by
51 law.¹³
52
- 53 7. Before participating in a third party process, physicians **must**:
54 a. know who the requesting party is (i.e., the third party that requested the IME,¹⁴
55 third party medical report, and/or testimony);
56 b. understand what they are being asked to do,¹⁵ and specifically, what
57 questions they are being asked to answer; and

⁹ Conducting IMEs and acting as medical experts reasonably require current or recent experience practicing in the requisite scope of practice and area of expertise.

¹⁰ An example of where a conflict of interest may arise is when physicians have a personal or professional relationship with one of the parties involved in the third party process. For more information on conflicts of interest, see the Advice to the Profession document.

¹¹ It may be possible to proceed notwithstanding a conflict if the following conditions are met:

- the conflict has been disclosed to all parties;
- all parties expressly waive the conflict; and
- the physician has determined the conflict would not affect their objectivity or impartiality.

¹² Even the fact that the physician has or had a treating relationship with a patient is considered personal health information.

¹³ See the College's [Protecting Personal Health Information](#) policy and [Mandatory and Permissive Reporting](#) policy for circumstances in which disclosures of personal health information are permitted or required by law.

¹⁴ Some examinations may be ordered. For example, see Rule 33 of the *Rules of Civil Procedure*, O. Reg. 194, enacted under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 for information regarding court-ordered examinations.

¹⁵ For example, this could include understanding the scope of the physician's role and responsibilities, such as whether the requesting party expects the physician will:

- conduct an IME;
- provide a third party medical report;

58 c. ensure any contracts with the requesting party (e.g., outlining scope, purpose,
59 timelines, fee arrangements, etc.) comply with the expectations set out in this
60 policy.

61 **Physician Role in Third Party Processes**

- 62 8. Physicians **must** understand and communicate the nature of their role in the third
63 party process to subjects^{16,17} they interact directly with, which includes that their
64 role:
- 65 a. is to *provide* information and/or opinions to the third party involved in the
66 process and not to *decide* the outcome¹⁸ of the third party process or provide
67 health care;
 - 68 b. may involve collecting, using, and disclosing personal information (which may
69 include personal health information)¹⁹ for a third party process; and
 - 70 c. if applicable, may involve conducting an examination for a third party process.

71 **Consent**

- 72 9. Physicians **must** ensure express²⁰ consent to collect, use or disclose the subject's
73 personal information for a third party process has been obtained from the subject,
74 unless physicians are permitted or required by law to collect, use and disclose that
75 information.²¹
- 76
- 77 10. Physicians **must** ensure express consent for conducting an examination for a third
78 party process has been obtained from the subject, which includes explaining the
79 purpose, scope, and rationale of the examination.

-
- clarify or expand on the information and/or opinions in the third party medical report after the report is submitted, if necessary; and/or
 - provide testimony.

¹⁶ Throughout this policy, where "subject" is referred to, it should be interpreted as "subject or substitute decision-maker" where applicable.

¹⁷ Patients may be confused about the nature of the physician's role in the third party process when it is their own treating physician that is involved in the process.

¹⁸ The final outcome (for instance, decisions regarding eligibility for benefits) is not determined by the physician but rather by the relevant decision makers in the third party process.

¹⁹ In most cases, physicians who participate in the third party processes will be subject to *PIPEDA*, the legislation which establishes requirements for the collection, use and disclosure of "personal information" about individuals in the course of commercial activities. "Personal information" is defined broadly as "information about an identifiable individual" and includes "personal health information".

²⁰ Express consent is direct, explicit, and unequivocal, and can be given in writing or orally.

²¹ Depending on the circumstances, consent requirements for collection, use and disclosure are contained in *PIPEDA* and/or *PHIPA*.

- 80
- 81 11. The consent process will vary depending on the circumstances of each case;
- 82 however, at minimum, physicians **must** ensure the following points are conveyed:
- 83 a. consent can be withdrawn at any time; however, this may prevent the
- 84 physician from completing the IME and/or third party medical report and
- 85 providing testimony;
- 86 b. limits may be placed on the information that physicians can disclose in
- 87 writing and/or orally; however, such limitations may prevent the physician
- 88 from participating in the third party process; and
- 89 c. if consent is withdrawn or limited by the subject, physicians may still be
- 90 permitted or required by law to collect, use and disclose the subject's
- 91 personal information or personal health information.²²

92 **Fees for Physician Participation in Third Party Processes**

- 93 12. Physicians **must** discuss any requirements or arrangements with respect to fees
- 94 (including cancellation fees for missed appointments) with the requesting party
- 95 before participating in third party processes.
- 96
- 97 13. Physicians **must** comply with any specific legal requirements in relation to fees for
- 98 their participation in third party processes.²³
- 99
- 100 14. In the absence of any specific legal requirements, physicians **must** ensure their fees
- 101 are reasonable in accordance with the College's [Uninsured Services: Billing and](#)
- 102 [Block Fees](#) policy and regulation.²⁴
- 103

²² See Division 1, Section 7 of *PIPEDA* for circumstances in which physicians are permitted or required by law to collect, use and disclose personal information, and the College's [Protecting Personal Health Information](#) policy and [Mandatory and Permissive Reporting](#) policy for circumstances in which disclosures of personal health information are permitted or required by law.

²³ For example, the regulations under the *Coroner's Act*, R.S.O. 1990, c. C.37, set out the fee payable for each day of attendance of an expert witness who has been summoned to provide evidence at an inquest, as well as the fees payable for conducting a *post mortem* examination. Depending on the context, different proceedings may have rules in place governing how the fees payable to witnesses for attendance at a hearing or to medical experts for the preparation of reports will be determined (e.g., in the regulations under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and regulations under the *Administration of Justice Act*, R.S.O. 1990, c. A.6.).

²⁴ Section 1(1), paragraphs 21 and 22 of *Professional Misconduct*, O. Reg., 856/93, enacted under the *Medicine Act, 1991*, S.O. 1991, c. 30.

104 **Requirements for Independent Medical Examinations, Third Party Medical**
105 **Reports and Testimony**

106 15. Physicians **must** conduct IMEs and provide third party medical reports and
107 testimony that are:

- 108 a. within their scope of practice and area of expertise;
- 109 b. comprehensive and relevant;
- 110 c. fair, objective and non-partisan;
- 111 d. transparent;
- 112 e. accurate;²⁵
- 113 f. clear; and
- 114 g. timely.

115 Additional information relating to each requirement is set out below.

116 ***Within Scope of Practice & Area of Expertise***

117 16. Physicians **must**:

- 118 a. accurately represent their scope of practice and area of expertise, including
119 their qualifications in accordance with relevant College policy and
120 regulation;²⁶ and
- 121 b. restrict their IMEs, statements and/or opinions to matters that are within their
122 scope of practice and area of expertise.

123 ***Comprehensive & Relevant***

124 17. Physicians **must** take reasonable steps to obtain²⁷ and review all relevant clinical
125 information and opinions relating to the subject that could impact their statements
126 and/or opinions.

127
128 18. Physicians **must** clearly identify any limitations on the comprehensiveness of the
129 IMEs they conduct and the third party medical reports and testimony they provide,
130 including:

²⁵ Section 1(1), paragraph 18 of *Professional Misconduct*, O. Reg., 856/93, enacted under the *Medicine Act, 1991*, S.O. 1991, c. 30. states that signing or issuing, in the member's professional capacity, a document that the member knows or ought to know is false or misleading is an act of professional misconduct.

²⁶ College's registration policy on [Specialist Recognition Criteria in Ontario](#) (also see the [Cosmetic Surgery FAQ](#) and [Advertising FAQ](#)); and section 9(1) of *General*, O. Reg 114/94, enacted under the *Medicine Act, 1991*, S.O. 1991, c. 30.

²⁷ Indirectly via medical records or reports and/or directly via examination of the subject.

- 131 a. if they are unable to fulfil an element of the third party's request because the
132 information and/or opinion requested is beyond their scope of practice and
133 area of expertise;
134 b. if they are unable to obtain all relevant clinical information and opinions after
135 taking reasonable steps;
136 c. if they do not have enough information to arrive at a recommendation or
137 conclusion on a particular point;
138 d. if consent has been withdrawn; and
139 e. if limits have been placed by the subject on the information that can be
140 disclosed to the third party.

141
142 19. In discharging provision 18, physicians **must** clearly indicate what impact the
143 limitations have on the statements and/or opinions they provide in third party
144 medical reports and testimony.²⁸

145
146 20. Physicians **must not** deliberately leave out relevant information and/or opinions in
147 any third party medical reports and testimony they provide.

148
149 21. Physicians **must** only provide the third party with the information and/or opinions
150 that are relevant to the request and necessary for answering the questions asked.

151
152 22. Physicians **must not** make any unrelated or unnecessary comments during IMEs and
153 in third party medical reports and testimony.

154 ***Fair, Objective & Non-Partisan***

155 23. Physicians **must**:

- 156 a. provide statements and/or opinions that are reasonable, balanced, and
157 substantiated by fact, scientific knowledge and evidence, and sound clinical
158 judgment;
159 b. ensure the statements and/or opinions they provide are not influenced by
160 prejudice and bias²⁹, the party who requests or pays for their services, or the
161 potential outcome of the third party process; and
162 c. provide any additional assistance that a court or tribunal may reasonably
163 require.

²⁸ For example, if the limitation prevents them from arriving at a recommendation or conclusion on a particular point.

²⁹ Some types of bias include: implicit, affective, cognitive, framing, hindsight or outcome, and learned intuition.

164 **Transparent**

165 24. Physicians **must** be clear about who the requesting party was and what has been
166 requested of them (i.e., what questions they were asked to answer).

167

168 25. Physicians **must** clearly identify who assisted them in conducting the IME and/or
169 who contributed to the third party medical report.

170

171 26. For any third party medical reports and testimony provided, physicians **must**:

172 a. Describe the basis and rationale for their statements and/or opinions,
173 including:

174 i. the facts their statements and/or opinions are based on;

175 ii. what clinical information and opinions they obtained and reviewed and
176 who the source was; and

177 iii. any research or literature they relied upon.³⁰

178 b. Indicate where their statements and/or opinions stand in relation to the
179 profession (e.g., if there is a range of opinions on an issue, and if their
180 statements and/or opinions are contrary to the accepted views of the
181 profession).

182 **Accurate**

183 27. For any third party medical reports and testimony provided, physicians **must**:

184 a. ensure their statements and/or opinions are accurate; and

185 b. communicate any errors they become aware of, and any changes to their
186 statements and/or opinions to the third party in a timely manner.

187 **Clear**

188 28. Where possible, physicians **must** use language and terminology that will be readily
189 understood by the audience.

190 a. When physicians use abbreviations and medical or technical terminology,
191 they **must** explain the meaning.

192

193

194

195

³⁰ If acting as a medical expert, see Rule 53.03(2.1) of the *Rules of Civil Procedure*, O. Reg. 194, enacted under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 for specific information required in an expert report.

196 **Timely**

- 197 29. Absent a specific legal requirement,³¹ physicians who are not acting as medical
198 experts **must** conduct IMEs and/or provide third party medical reports in a timely
199 manner,³² but no later than:
- 200 a. 60 days after receiving the request to conduct an IME and report on the
201 findings; and
 - 202 b. 45 days after receiving the request to provide a third party medical report.
- 203
- 204 30. If physicians are not able to meet the timeframes set out in provision 29, physicians
205 **must** discuss the matter with the requesting party and reach an agreement for a
206 reasonable extension.³³
- 207
- 208 31. Physicians who are acting as medical experts in the context of a legal proceeding
209 **must:**
- 210 a. reach an agreement with the requesting party regarding the timeframe for
211 providing third party medical reports;
 - 212 b. reach an agreement with the requesting party for a reasonable extension if
213 they are not able to meet the original timeframe; and
 - 214 c. provide third party medical reports within the agreed upon timeframe.
- 215
- 216 32. Physicians **must** respond to any requests or orders (e.g., subpoenas or summons) to
217 provide testimony in a timely manner.

218

219

³¹ There may be specific timelines for providing third party medical reports set out in legislation. For example, see section 68.1 of the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10, enacted under the *Insurance Act*, R.S.O. 1990, c. I.8, together with sections 32.1 and 42 of the *Statutory Accident Benefits Schedule – Accidents on or after November 1, 1996*, O. Reg. 403/96, enacted under the *Insurance Act*, R.S.O. 1990, c. I.8.

³² What is considered timely will depend on the nature of the request, taking into consideration the complexity and urgency of the request. For example, third party medical reports that relate to income or the necessities of life would need to be completed urgently.

³³ Section 1(1), paragraph 17 of O. Reg. 856/93, *Professional Misconduct*, enacted under the *Medicine Act*, 1991, S.O. 1991, c.30 states it is an act of professional misconduct to fail, without reasonable cause, to provide a 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 authorized representative has requested such a report or certificate.

220 **Independent Medical Examinations**

221 ***Presence of Observers & Audio/Video Recordings***

222 33. Physicians **must** comply with any legal requirements regarding the presence of
223 observers³⁴ and recordings that apply to the examination being conducted.

224

225 34. In the absence of any legal requirements, physicians **must** ensure:

226 a. any arrangements with respect to observers or recordings are mutually
227 agreeable to all the parties involved; and

228 b. consent with respect to observers or recordings has been obtained from all
229 the parties involved.³⁵

230

231 35. If an observer is present, physicians **must** inform the observer that they cannot
232 interfere or intervene in any way during the examination.

233 ***Clinically Significant Findings***

234 36. If physicians are conducting an IME and become aware of a clinically significant
235 finding³⁶ that may not have been previously identified, they **must** determine if the
236 subject is at imminent risk of serious harm and requires urgent medical intervention.

237 a. If yes, physicians **must**:

238 i. disclose the finding to the subject; and

239 ii. if the subject has a primary health-care provider, communicate the
240 finding to them³⁷ after obtaining the subject's consent to do so and
241 determine who will be responsible for providing any necessary care
242 and follow-up; or

243 iii. if the subject doesn't have a primary health-care provider,

244 (a) provide any necessary care that is within the physician's scope
245 of practice and coordinate the provision of any follow-up; or

³⁴ For example, for court-ordered examinations, Rule 33.05 of the *Rules of Civil Procedure*, O. Reg. 194, enacted under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 states that observers shall not be present during examinations, unless the court orders otherwise.

³⁵ For more information on observers and recordings, see the Advice to the Profession document.

³⁶ An unexpected clinically significant finding, a condition which raises serious concern, or a symptom or condition which requires essential intervention. This includes, but is not limited to, undiagnosed conditions and conditions for which immediate intervention is required.

³⁷ Physicians must use their professional judgment to determine how to communicate the finding to the primary health-care provider (e.g., by phoning them directly or sending a written note), taking into consideration the nature of the finding.

- 246 (b) direct the subject to another health-care provider that is
247 available to provide any necessary care and follow-up.
- 248 b. If no and the IME is not being conducted in the context of a legal proceeding
249 or the subject hired the physician to conduct the IME,³⁸ physicians **must**:
250 i. disclose the finding to the subject; and
251 ii. if the subject has a primary health-care provider, communicate the
252 finding to them³⁹ after obtaining the subject's consent to do so and
253 determine who will be responsible for providing any necessary care
254 and follow-up; or
255 iii. if the subject doesn't have a primary health-care provider, advise the
256 subject to see a health-care provider for any necessary care and
257 follow-up.
- 258 c. If no and a third party (not the subject) hired the physician to conduct the
259 IME,⁴⁰ physicians **must**:
260 i. seek independent legal advice regarding the disclosure of the finding;
261 and
262 ii. consult with the third party to determine whether the third party waives
263 any impediment to disclosure.
264

265 37. If the clinically significant finding is disclosed, physicians **must** only provide clinical
266 information that is directly relevant to the finding.

267 **Documentation, Retention and Access**

- 268 38. Physicians **must** document the following for all professional encounters or services
269 provided for a third party process, where applicable:
270 a. identification of the subject and their contact information;
271 b. identification of the requesting party;
272 c. date of professional encounter or service;
273 d. consent that has been obtained for the collection, use and disclosure of
274 information;
275 e. consent that has been obtained for examinations;

³⁸ If the subject (or their representative) hired the physician to conduct an IME in the context of a legal proceeding, there are no impediments to disclosure (such as legal privilege).

³⁹ See footnote 37.

⁴⁰ If a third party (not the subject) hired the physician to conduct an IME in the context of a legal proceeding, legal privilege may apply and may be an impediment to disclosure when the subject is not at imminent risk of serious harm and does not require urgent medical intervention. The purpose of seeking independent legal advice is to determine to whether any such impediment to disclosure exists in the circumstances.

- 276 f. information regarding the IMEs that have been conducted;
277 g. consent that has been obtained with respect to the presence of observers
278 and/or recordings of examinations; and
279 h. any clinically significant findings and any action taken with respect to the
280 findings.

281

282 39. Physicians' documentation of the information in provision 38 **must** be:

- 283 a. legible;
284 b. accurate;
285 c. complete and comprehensive;
286 d. identifiable, containing a signature or audit trail that identifies the author;
287 e. written in either English or French; and
288 f. organized in a chronological or systematic manner.

289

290 40. In addition to documenting the information in provision 38, physicians **must** retain
291 any related materials including, where applicable:

- 292 a. contracts with the requesting party (e.g., outlining scope, purpose, timelines,
293 fee arrangements, etc.);
294 b. clinical information or opinions not created by the physician, which the
295 physician relied upon;
296 c. audio or video recordings of examinations; and
297 d. third party medical reports.

298

299 41. Physicians **must** retain and provide access to the information and related materials
300 in provisions 38 and 40 in accordance with the legal requirements that apply to the
301 specific circumstances.⁴¹

⁴¹ For example, retention requirements would depend on whether or not the information or related materials are retained as part of a patient's medical record, and access requirements would depend on whether the examination/report was conducted for a commercial purpose and is subject to *PIPEDA*, or a health-care purpose and is subject to *PHIPA*.

Advice to the Profession: Third Party Medical Reports

Advice to the Profession companion documents are intended to provide physicians with additional information and general advice in order to support their understanding and implementation of the expectations set out in policies. They may also identify some additional best practices regarding specific practice issues.

Physicians play an important role when participating in third party processes by conducting independent medical examinations (IMEs) and providing third party medical reports and testimony. Expectations regarding this role are set out in the College's *Third Party Medical Reports* policy. This document is intended to help physicians interpret their obligations in this policy and to provide guidance around how these obligations may be effectively discharged.

What is the difference between a 'participant expert' and an 'litigation expert' in a legal proceeding? And does the policy apply to both?

Yes, the policy applies to participant and litigation experts as they both provide information and/or opinions for a third party process.

Participant experts are treating physicians who have personal, first-hand knowledge about the matter at issue and who form expert opinions based on their participation in the underlying events. The participant expert forms their opinions in the ordinary exercise of their skill, knowledge, training and/or experience while observing or participating in the underlying events.

Participant experts may be asked or ordered (e.g., by subpoena or summons) to provide information, including the opinions they formed, in a legal proceeding. This may include factual information, such as: what symptoms the patient reported, what examinations were undertaken, and what observations the physician made, and may include opinions, such as: what the diagnosis was, and what advice or treatments were offered. In some cases, participant experts may be examined and cross-examined under oath about the information recorded in their medical records and/or provided in third party medical reports.

Litigation experts are engaged by or on behalf of a party to provide opinion evidence in relation to a legal proceeding. They are independent and would not have had a prior involvement in the underlying events at issue. The opinion may be about an individual, or about broader topics within their scope of practice and area of expertise, such as an area of medical practice, or a medical condition. The purpose of the opinion is to assist those involved in the legal proceeding understand the medical issues.

36 Litigation experts can provide opinions in writing (i.e., third party medical report) and/or
37 orally (i.e., testimony). Litigation experts may also be examined and cross-examined
38 under oath about information they provided in third party medical reports.

39 **Physician Participation and Role in Third Party Processes**

40 ***Can I participate in a third party process if I am retired?***

41 It depends.

42 If treating physicians are retired and no longer have an active certificate of registration,
43 they cannot start preparing new reports for third party processes. However, retired
44 physicians may provide the third party with a copy or summary of the patient's medical
45 record with the patient's (or their substitute decision-maker's) consent, as this would
46 likely be administrative in nature.

47 Retired physicians who no longer have an active certificate of registration cannot
48 conduct IMEs and/or act as medical experts.

49 However, all physicians may still be required to testify even if they no longer have an
50 active certificate of registration. This may occur in circumstances where the physician
51 has an active certificate of registration and conducts an IME and/or provides a third
52 party medical report, then retires and is called to testify on that report months or years
53 later.

54 ***Do treating physicians have an obligation to provide third party medical reports and***
55 ***testimony about patients in circumstances when they know patients won't be successful***
56 ***in the third party process?***

57 At times, physicians may suspect their patients may not meet the eligibility criteria for a
58 third party process, or may be unsuccessful in their claim for a third party process.
59 However, treating physicians still have an obligation to provide the third party medical
60 report and testimony because their role is to *provide* information and/or opinions to the
61 third party involved in the process, and not to *decide* the outcome of the third party
62 process.

63 ***Do family physicians have an obligation to provide third party medical reports and***
64 ***testimony about patients when the information relates to care provided by a specialist?***

65 If the third party is requesting information about care provided by a specialist, the family
66 physician may not have the information, or the information may be outside of the family
67 physician's scope of practice and area of expertise. As such, family physicians would

68 only be obligated to provide the third party with the relevant information they have, and
69 the information that is within their scope of practice and area of expertise.

70 In these circumstances, it may be in the patient's best interest for the family physician
71 and specialist to discuss how to proceed with the request. Providing the requested
72 information may require some collaboration between the family physician and
73 specialist: the family physician may be able to provide some of the information, and the
74 specialist may provide the rest of the information.

75 ***What if the specialist's consultation report back to the family physician specifically says***
76 ***that the report is not to be shared with a third party? Does the family physician have an***
77 ***obligation to provide information regarding the consultation report to the third party***
78 ***despite the specialist's instructions?***

79 At times, specialists may indicate on their consultation reports back to family
80 physicians that the report is not to be shared with a third party. Specialists may do this
81 because if a third party is requesting information about care provided by a specialist,
82 the specialist may want to provide that information directly to the third party.

83 In these circumstances, family physicians may need to contact the specialist to tell
84 them that a third party has requested information regarding the consultation report and
85 the family physician and specialist can discuss how to proceed with the request. As
86 treating physicians, both family physicians and specialists have an obligation to
87 respond to these types of requests.

88 ***What knowledge and expertise is required to conduct an IME or act as a medical expert?***
89 ***What qualifies a physician to act as a medical expert?***

90 The specific knowledge and expertise required to conduct an IME or act as a medical
91 expert would vary and depend on the nature of the case. As stated in the policy,
92 physicians must only act within their scope of practice and area of expertise, and it is
93 important that they have proficient knowledge of the relevant clinical practice guidelines
94 in place at the material time.

95 In a legal proceeding, an expert is someone with demonstrated specialized knowledge
96 beyond that of the ordinary person. Specialized knowledge may be gained through
97 academic study, professional qualification, training and/or experience. Whether or not a
98 physician qualifies as a medical expert in general terms may depend on a number of
99 factors, including:

- 100 • the education and training they have completed (e.g., residency, fellowship
101 training, including specialty and subspecialty training, etc.);

- 102 • any additional qualifications they hold (e.g., certification by national professional
103 association or other relevant clinical society, etc.);
- 104 • the experience and proficiency they have in performing the relevant aspects of
105 their practice (e.g., number of times they have completed a relevant procedure);
- 106 • the length of time they have been actively practicing in the requisite scope of
107 practice and area of expertise;
- 108 • teaching roles they have held;
- 109 • the relevant research, articles, and/or textbooks they have published and
110 presentations they have given;
- 111 • the awards or other recognition they have received;
- 112 • the uniqueness of their scope of practice and area of expertise (e.g., they are the
113 only physician who treats a rare condition);
- 114 • the complaints and/or discipline history they have with the College; and
115 • the civil and/or criminal actions against them.

116 The above factors would have to be applied to the specific circumstances of the
117 physician and the matter at issue in the legal proceeding. For example, physicians' lack
118 of experience may be a factor in qualification, or may impact the weight that is attached
119 to their opinion. However, there may be some circumstances where a physician has
120 practiced for a limited period but is one of the only physicians with experience
121 performing a new procedure or treating a rare condition. As such, this physician may be
122 qualified to act as a medical expert, and significant weight may be attached to their
123 opinion.

124 Physicians who act as medical experts in the context of a legal proceeding must be
125 qualified as an 'expert' by the adjudicative body using the *Mohan/White Burgess*
126 framework¹ before they are permitted to offer opinion evidence in the legal proceeding.
127 If the physician is qualified as an expert, the adjudicative body will typically set
128 parameters on the scope of the expert opinion that is admissible in the legal
129 proceeding.

130 ***What kind of situations would constitute a conflict of interest?***

131 Examples of situations where conflicts of interest arise include:

- 132 • the physician is currently treating one of the parties involved in the third party
133 process;

¹ R. v. Mohan, [1994] 2 S.C.R. 9 and White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23 (CanLII), [2015] 2 SCR 182.

- 134 • the physician acted as a treating physician to one of the parties involved in the
135 third party process;
- 136 • the physician has a personal interest in the case;
- 137 • the physician previously discussed the case with another party (depending on the
138 circumstances); or
- 139 • the physician has or had a personal or professional relationship with any of the
140 parties involved (depending on the circumstances).

141 **Consent**

142 ***Can I rely on consent obtained by someone else? Can I rely on pre-signed consent*** 143 ***forms?***

144 Consent to collect, use or disclose the subject's personal information, or consent to
145 conduct an examination, may be obtained by someone else (e.g., a lawyer, employer,
146 insurer, etc.). In addition, physicians can rely on pre-signed consent forms if they are
147 satisfied that the consent applies to and authorizes the full spectrum of acts they will
148 conduct in order to prepare the third party medical report (e.g., to collect, use and
149 disclose personal information, to conduct an examination).

150 If physicians have any doubts as to the validity or scope of the consent obtained by
151 someone else or the pre-signed consent form, they can raise their concern with the
152 requesting party and consider obtaining consent from the subject directly.

153 ***Is consent time-limited? Do I need to ensure consent has been obtained again if some*** 154 ***time has passed since consent was first obtained?***

155 Consent does not expire after a certain period of time, but it can be withdrawn.² Some
156 third party processes may take a long time and it is recommended that physicians make
157 a reasonable effort to ensure that the consent obtained at the beginning of the third
158 party process is still valid and hasn't been withdrawn.

159 For example, if physicians are asked to provide an addendum report some time after the
160 initial third party medical report was provided, they may want to confirm whether
161 consent is required for the physician to use and disclose the subject's personal
162 information in the addendum report, and if so, confirm whether there consent to do so.

163

² Clause 4.3.8, Schedule 1 of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 and section 19, of the *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched A.

164 **Fees**

165 ***What requirements and considerations are there when charging for third party medical***
166 ***reports?***

167 As per the College's [Uninsured Services: Billing and Block Fees](#) policy, physicians must
168 consider the patient's ability to pay when charging for uninsured services. Providing
169 third party medical reports is considered an uninsured service.

170 When patients are paying out-of-pocket for the third party medical report, physicians
171 may want to consider the type of report they are being asked to provide when
172 determining fees and whether prepayment is required. For example, if the report is
173 related to income or the necessities of life, it may be a financial burden for the patient to
174 pay for the report, particularly if payment is required before they receive any benefits.
175 Physicians may want to discuss this with patients to help them determine the patient's
176 ability to pay for the third party medical report.

177 **Requirements for Independent Medical Examinations, Third Party Medical**
178 **Reports and Testimony**

179 ***What steps do I have to take to obtain and review all relevant clinical information and***
180 ***opinions relating to the subject?***

181 What steps are reasonable would depend on the specifics of the case, but could include
182 something as simple as asking the third party what relevant clinical information and
183 opinions they are expected to obtain and review. The third party may provide the
184 physician with a copy of the medical records and that may be sufficient. If, however,
185 physicians notice that something relevant is missing (e.g., test results or a consultation
186 report is missing from the medical record), physicians could raise this with the third
187 party and take reasonable steps to obtain a copy.

188 Alternatively, taking reasonable steps to obtain and review relevant clinical information
189 and opinions could include the physician directly getting this information by examining
190 the subject themselves and reviewing it in the context of preparing the third party
191 medical report.

192 ***What does it mean to be fair, objective and non-partisan?***

193 Being fair, objective and non-partisan means not being influenced by your personal
194 feelings, prejudices or biases, or by the party who retains or pays you. It means the
195 statements and/or opinions provided in third party medical reports and testimony are
196 based on facts and would not change regardless of who retained or paid you for your

197 services. The statements and/or opinions you provide are not directed at securing or
198 obtaining a certain result in the third party process. Physicians cannot be “hired guns”
199 for any party in a third party process.

200 Even though physicians may be asked to be medical experts by a party involved in the
201 legal proceeding (e.g., Crown prosecutor in a criminal case), medical experts are not
202 advocates for either side. Their duty is solely to the adjudicative body. A medical
203 expert’s role is to assist the adjudicative body by providing a fair, objective and non-
204 partisan opinion.

205 Any medical expert called in a civil proceeding under the Rules of Civil Procedure³ must
206 complete a form⁴ acknowledging their duty to provide evidence in relation to the
207 proceeding as follows:

- 208 • To provide opinion evidence that is fair, objective and non-partisan;
- 209 • To provide opinion evidence that is related only to matters that are within their
210 area of expertise; and
- 211 • To provide such additional assistance as the court may reasonably require to
212 determine a matter in issue.

213 Further, medical experts must acknowledge that the duty referred to above prevails over
214 any obligation which the expert may owe to any party by whom or on whose behalf they
215 are engaged.

216 ***How quickly do IMEs and/or third party medical reports need to be completed?***

217 The policy states that when physicians are not acting as medical experts, they must
218 conduct IMEs and/or provide third party medical reports in a timely manner and specific
219 maximum timeframes are set out for both.

220 What is considered timely will depend on the nature of the request, taking into
221 consideration the complexity and urgency of the request. For example, third party
222 medical reports that relate to income or the necessities of life would need to be
223 completed urgently.

224 Non-urgent IMEs and/or third party medical reports must be completed no later than the
225 maximum timeframes set out in the policy. However, if it is a fairly simple and

³ *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, enacted under the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

⁴ Form 53 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, enacted under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 - Acknowledgement of Experts Duty.

226 straightforward third party medical report that does not require an IME, physicians may
227 want to consider whether they can provide it sooner than 45 days.

228 ***What should I do if the requesting party does not give me a reasonable extension?***

229 If the requesting party does not provide a reasonable extension for an IME, physicians
230 could decline to conduct the IME.

231 If the requesting party does not provide a reasonable extension for a third party medical
232 report and physicians do not have an obligation to provide the third party medical report
233 (i.e., they are not treating physicians), they could decline to provide the third party
234 medical report.

235 If physicians do have an obligation to provide the third party medical report (i.e., they are
236 treating physicians), they could consider whether they are able to provide a 'preliminary'
237 report within 45 days, as long as they are clear about the nature of the report, its
238 limitations, and that their statements and/or opinions could change in the final report.

239 **Independent Medical Examinations**

240 ***Who are possible observers in an examination?***

241 In the absence of any legal requirements with respect to observers,⁵ possible observers
242 in an examination include the following:

- 243 • The subject of the examination may wish to have an observer present, which may
244 include the subject's friend, family member or lawyer.
- 245 • The requesting party may wish to have an observer present, which may include
246 the third party's representative.
- 247 • The physician may require assistants or may have of practice of employing
248 chaperones in examinations.

249 ***When might an observer be present during an examination? When might the***
250 ***examination be recorded?***

251 In the absence of any legal requirements with respect to observers,⁶ physicians may
252 want to consider having an observer present and/or recording the examination in
253 circumstances where the subject is particularly vulnerable (e.g., if they are cognitively
254 impaired or are a child) and consent has been obtained.

⁵ See footnote 34 in the policy.

⁶ See footnote 34 in the policy.

255 ***What should I do if an agreement with respect to observers and/or recordings cannot be***
256 ***reached?***

257 If the physician disagrees about whether a court-ordered examination is recorded, the
258 physician could decline to conduct the examination and a different physician could be
259 sought to conduct the examination.

260 If the parties disagree about whether an examination that is not court-ordered will be
261 conducted in the presence of an observer, or whether it will be recorded, physicians can
262 postpone the examination until these matters can be discussed further so that a
263 resolution can be reached. If a resolution can't be reached after further discussion, the
264 physician could decline to conduct the examination and a different physician could be
265 sought to conduct the examination.

266 To prevent possible disagreements that may delay the examination, physicians may
267 want to consider making arrangements with respect to observers and/or recordings in
268 advance of the examination. This would give all parties an opportunity to consider the
269 matter and if necessary, discuss it with someone (e.g., family member, friend, lawyer,
270 etc.) before the subject attends the examination.

271 ***Is it appropriate to form a physician-patient relationship with an individual who is the***
272 ***subject of an IME?***

273 It depends.

274 Physicians may want to wait until after the third party process concludes to form a
275 physician-patient relationship with the individual, as forming a physician-patient
276 relationship could compromise the physician's independence and may disqualify them
277 from participating in the third party process. However in some cases, it may be
278 appropriate to begin treating the individual before the third party process concludes if
279 no other physician is available. In these cases, it is recommended that the physician
280 notify the requesting party of any change in status of their relationship with the
281 individual's consent.

282 Regardless of whether or not a treating relationship is formed, it is important for
283 physicians to clearly communicate with the individual what the nature of the physician's
284 role will be (e.g., if they will solely do an IME and/or will form a treating relationship).

285

286

287 **Documentation, Retention and Access**

288 ***Do I need to document if the subject is not a patient?***

289 Yes. As stated in the policy, physicians must document information for all subjects
290 (patients and individuals).

291 **Resources**

292 There are a number of different resources to assist physicians who participate in third
293 party processes. Please see the following for more information:

294 **Canadian Medical Protective Association (CMPA):**

295 CMPA. (2019). [*Treating physician reports, IME reports, and expert opinions: The way*](#)
296 [*forward.*](#)

297 CMPA. (2018). [*Providing access to independent medical examinations.*](#)

298 CMPA. (2018). [*Testifying-What it involves and how to do it effectively.*](#)

299 CMPA. (2016). [*Medical-Legal Handbook for Physicians in Canada.*](#)

300 CMPA. (2012). [*eLearning Modules.*](#)

301 CMPA. (2012). [*Overcoming bias in medical practice.*](#)

302 CMPA. (2011). [*Independent Medical Evaluations: Be prepared.*](#)

303 CMPA. (2009). [*Subpoenas-What are a physician's responsibilities.*](#)

304 **Canadian Society of Medical Evaluators (CSME):**

305 CSME. (2013). [*Guide to Third Party Medical Evaluation.*](#)

306 There are also some other resources regarding bias and using professional and
307 inclusive language when communicating. Please see the following for more
308 information:

309 Canadian Public Health Association. (2019). [*Language Matters-Using respectful*](#)
310 [*language in relation to sexual health, substance use, STBBIs and intersecting sources*](#)
311 [*of stigma.*](#)

312 National Institute for Health and Care Excellence. (2019). [*NICE style guide: Talking*](#)
313 [*about people, including deaf and blind, age, faith, family origin, gender.*](#)

314 O'Sullivan, E.D., & Schofield, S.J. (2018). Cognitive bias in clinical medicine. *Journal*
315 *of the Royal College of Physicians of Edinburgh*, 48(3), 225-
316 232. https://www.rcpe.ac.uk/sites/default/files/jrcpe_48_3_osullivan.pdf

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