

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.

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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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