CPSO draft policy on Third Party Medical Reports

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I have had the opportunity to review the CPSO's draft policy on Medical Expert: Reports and Testimony and wish to offer some comments and suggestions. I am a lawyer with more than 3 decades of experience representing patients with medical malpractice claims.

As you know, expert advice, reports and testimony are vital to both the prosecution and defence of medical malpractice cases. Affected patients, medical practitioners sued, and our courts rely significantly on the opinions of qualified and independent medical practitioners. I will preface my comments on the draft policy with a review of the role of experts in medical malpractice cases.

"Litigation experts", as you refer to them in footnote 5 of the draft policy, are people who possess certain knowledge that will assist a judge or jury in evaluating complex or scientific evidence. The evidence of these experts is admitted in court because the judge or jury needs assistance in evaluating this evidence in order to reach a just verdict. The evidence of these experts is admissible because the experts are in a unique position to "help" the trier of fact.

The ability of a litigation expert witness to help the trier of fact and the admissibility of the expert's testimony are based entirely on the expert's qualifications and credentials, together with the absence of bias. In considering whether a litigation expert can discharge this helping function in a probative way, the court is concerned with the expert's education, training and experience.

The admissibility, value and importance of expert reports and testimony have nothing to do with whether the expert has an active certification or registration. Therefore, it is my view that paragraphs 5(a) and 5(b) of the draft policy should be removed. In addition to the explanation above, there is further justification for my position which I will describe.

It is not unusual for litigation to proceed years after an adverse event. In the case of persons under disability, there may be no applicable limitation period. For other cases, discoverability of the negligent conduct might be delayed. Parties to the litigation will generally seek medical experts that were in practice at the time the adverse event occurred. Those practitioners are best positioned to comment on the then applicable standard of care. It may well be that the expert was active at the time of the adverse event, but has given up certification or registration subsequently. This must not preclude the expert's involvement in a given case.

Importantly, a distinction must be made between experts conducting IMEs and experts providing advice to parties regarding standards of care. The training, education and experience of standard of care (or causation) medical experts will survive their certification or registration. They are no less qualified to act as standard of care experts in litigation by virtue of the fact that they are no longer certified or registered.

It is my view that, at least for standard of care and causation experts who do not perform physical examinations of patients, the provisions in section 5 of the draft policy unfairly and inappropriately limit free speech.

As well, there is no public interest in limiting the participation of litigation experts in litigation. On the contrary, there is a public interest in ensuring that any qualified expert, whether certified or registered with the CPSO or not, is accessible to the public for these important matters. For the patient, access to qualified experts can be challenging and it is not uncommon to find that there is a greater willingness on the part of retired physicians to be more willing to participate in litigation, often because there are fewer professional demands for their time.

The suggested restrictions on retired physicians providing new reports for third party processes (line 42 and following) is, in my view, an inappropriate restriction. The lack of a certificate of registration does not diminish the importance or relevance of an opinion formed at the time the physician was in active practice. A court is likely to permit the expression of such an opinion in testimony based on the adequacy of the qualifications of the witness, but the witness may be precluded from doing so if first not expressed in a report.

Precluding retired physicians from acting as medical experts (Physician Participation and Role in Third Party Processes, line 48) is, as described above, entirely inappropriate, unfair, and unduly limiting of free speech. I would suggest that the drafters of this proposed policy spend a bit more time examining the underlying principles affecting the role of expert witnesses, with greater emphasis on the way in which courts apply the criteria for admissibility. The approach used in our courts is far more principled and less arbitrary than that proposed in the new draft. Those criteria are covered in lines 110 to 115, with none of the factors including the currency of registration. Criteria are further described in reference to two decisions from the Supreme Court of Canada (Mohan and White Burgess), where, notably, the court does not have current registration as a condition for expressing an opinion in court for a litigation expert.

Communications between Litigation Experts and lawyers are protected by privilege. The recommendations in the guideline have failed to adequately heed the advice from the Ontario Court of Appeal in Moore v. Getahun. The requirement for objectivity and the absence of bias is not undermined by any collaboration between experts and those instructing them, provided ethical guidelines are adhered to. Once again, the distinction between IMEs and third party medical reports merits further examination and better analysis. The former clearly require additional disclosure, whereas the latter are cloaked with privilege. The legal analysis of the duty is critical for more precisely describing the medical practitioner's obligations and duties. In this regard, the policy needs to be re-drafted in my view.

With respect to timing, set out in paragraph 29 of the draft policy, I find the wording confusing. It seems to apply only to physicians “not” acting as medical experts, yet imposes time constraints on physicians who “provide third party medical reports”. If paragraph 29 is intended to impose rules for the timing of delivery of reports from litigation experts in medical

malpractice cases, the requirements are unduly onerous and completely unnecessary. There is no “one size fits all” for the timing of the delivery of reports. While it is important to ensure that timely reports are delivered, the circumstances and terms of a retainer vary widely. This should be no more than a recommendation, allowing that other time intervals may apply depending on the case. While paragraph 30 allows for this flexibility, that section mandates additional time and effort for extending the timeframe that may be a waste of time in many cases. I would suggest that paragraph 31 be amended to merely state that the physician and the requesting party should identify a mutually agreeable timeframe, subject to change were circumstances justify an extension.

With regard to the distinction between a “participant expert” and a “litigation expert”, the draft policy is in error in suggesting that the all the terms apply equally to both. There is a very important distinction to be made between a participant expert and a litigation expert. Regard must be had to two important decisions from the Ontario Court of Appeal (see Westerhof v. Gee as well as Moore v. Getahun). In my view, it is crucial that the policy accurately describe the capacity and obligations of these different witnesses. The litigation expert has a special duty to the court under the rules, while the participant expert does not. The former has an overriding duty to the court as a “helping” expert, requiring a special form to be signed acknowledging that duty. The latter is not subject to the same terms and is not required to fill out the form. This important distinction is at the very core of the rule that is imprecisely called the “Opinion Evidence Rule”. Only litigation experts are caught by the opinion evidence rule. In my view, the draft policy has inaccurately described the duty of experts at various points, failing to make the important distinction between the obligations of litigation experts compared to participant experts.

I would be happy to elaborate further on this issue should I be called upon to do so.