November 16, 2020

Dr. Nancy Whitmore
Registrar
College of Physicians and Surgeons of Ontario
Via email: thirdpartyexpert@cpso.on.ca

Dear Dr. Whitmore:

Re: Draft Policy: Third Party Medical Reports

Thank you inviting the Medico-Legal Society of Toronto ("MLST") to comment on the Draft Policy on Third Party Medical Reports.

The MLST offers the following comments and submissions in order to assist the College in finalizing the Draft Policy. In order to prepare these comments and submissions, Council of the MLST also appointed a special sub-committee to consider the Draft Policy. The members of the sub-committee are:

[redacted]

For almost 50 years, the MLST has produced a paper in order to guide both the medical and legal professions in the collaboration required to produce a proper medico-legal report. The MLST has recently undertaken an extensive revision of this paper in order to take into account the changes in the law and the developments in the jurisprudence over the past 10 years. I enclose for your consideration a confidential pre-publication draft of the paper called, The Medico Legal Report 2020 ("the 2020 Report"), which was approved by Council of the MLST on November 13, 2020. A final published version of the document will follow. The 2008 version of the MLST Report is referenced in the current Advice to the Profession. The MLST believes that the 2020 Report is similarly a valuable resource and would be honoured if the College would refer to it in the

250 Consumers Rd, Suite 301
Toronto, ON M2J 4V6
Phone: 416-494-1440, Fax: 416-495-8723

Draft Policy and its attachment “Advice to the Profession: Third Party Medical Reports, Resources” lines 292 to 316.

1. The MLST also offers the following specific comments on the text of the Draft Policy:

   (i) “Physician Participation in Third Party Processes”, Lines 32 to 34. The MLST submits that it is important at the outset to point out to physicians that the issues to be settled in an engagement requiring a third party report are essentially a matter of prior agreement between the physician and the requesting lawyer or third party (typically an insurer). Therefore, from the outset, the physician should settle with the requesting lawyer or third-party issues such as:

   (a) Purpose of the report and issues to be addressed
   (b) Timing of the report
   (c) Fees
   (d) Timing of payment of the physician’s fee
   (e) Responsibility for payment of the physician’s fee
   (f) Whether an examination will be required
   (g) Whether the examination will be conducted virtually
   (h) Whether the examination will be audio-visually record.
   (i) Dissemination of the report.
   (j) Costs of photocopying and other reproduction costs

(ii) “Definitions: Medical Experts”, Line 23, Footnote 5. The footnote should be amended to refer to the discussion on this issue in the 2020 Report which contains further detailed information.

(iii) “Physician Participation in Third Party Processes”, Paragraph 5(b), Lines 31 to 44 and Footnote 9. The Draft Policy uses the word “must” in order to direct physicians on the requisite scope of practice, area of expertise and the extent of active practice (“past two years”). The MLST believes there are important clinical and legal concerns worth considering regarding the word “must” in that section.

From a clinical perspective, given maintenance of certification requirements and practices, it is reasonable to expect physicians to remain knowledgeable in their areas of practice and/or expertise and to be realistically and responsibly able to determine those in which provision of their opinion continues to meet professional standards. This is an individual consideration rather than a bright line at two years as the Draft Policy suggest.

One might also readily identify circumstances in which a lack of current (“two years”) practice would not be out of date. For example, basic theories/practices related to stress and pain management relaxation therapies

have changed very little for many decades. In contrast with situations that require knowledge of moment-by-moment best practices (such as recently-developed medications), opinion on modalities such as progressive muscular relaxation, relaxation in imagination and the like would not require such recent exposure.

From a legal perspective, the MLST questions the correctness of the assertion that a physician conducting an IME or acting as an expert witness must have *"actively practiced within that scope and area of expertise within the past two years*". The use of the word "must" in the Draft Policy on this issue should be considered carefully in this context as the College, as the regulator of the profession in the public interest, will be seen to be setting a standard for the qualification of expert witnesses which may not have support in the law. The MLST is not aware of any legal principles or jurisprudence which supports the two-year rule. This issue is most likely a matter for the discretion of the trial judge as "gate-keeper". The extent of the past experience of the proposed expert may go to admissibility or weight or both but an automatic disqualification of the expert based on a "two year" rule is unlikely to be followed by the courts. If the College is aware of some authorities for the "two year" rule, the MLST would be pleased to consider them and offer further input. If there is no such authority, then the College might wish to consider either removing the limitation or modifying so that it is "advised" only.

(iv) It should be stated and emphasized that unless the lawyer or third-party requestor specifically disclaims responsibility for payment of the physician's fee, the expectation is that the lawyer or third-party requestor is personally responsible for the payment of the fee.

(v) "Comprehensive & Relevant", Lines 124-126. The Draft Policy notes that the physician should take reasonable steps to obtain all relevant clinical information. In this context, the 2020 Report notes the increasing use of surveillance as part of the information which physicians are asked to review. Without repeating the details of the guidance offered by the MLST in the 2020 Report, it may be advisable to point out in the Draft Policy that physicians should inquire whether they will be asked to review surveillance. The timing of such review, the way in which the patient is asked about it and how the physician should address it are matters of some importance and should be dealt with carefully.

(vi) "Timely", Paragraph 29, Lines 197 to 201, Footnote 31. The Draft makes reference to the Statutory Accident Benefits Schedule (SABS). The two Schedules to which the Draft refers are out of date. In amendments to the SABS, for accidents after June, 2016, there are fact no timelines for delivery of the report. In practice, timelines are proposed by the IME doctor conducting the assessment or the requesting party (typically the insurer)

will ask for some specific timelines if there are time limits or deadlines pending. Once again, the issue should be the subject of agreement between the physician and the person requesting the report in the interest of cooperation and avoiding misunderstanding.

(vii) At some point in the Draft Policy, it is worth mentioning that the duty of objectivity of the physician as expert has developed in conjunction with the increased importance of the trial judge or the tribunal as the case may be as the "gate-keeper" of admissible expert evidence. This issue is discussed at length in the 2020 Report. In addition, the function of an expert witness in judicial and quasi-judicial proceedings has entered a new era of scrutiny. A physician who is contemplating giving expert testimony is well advised to take a practical course in how to conduct herself or himself as an expert in these proceedings. The 2020 Report makes reference to papers and courses on this issue. Of particular note, the 2020 Report makes reference to jurisprudence in which the testimony of physicians has been rejected because she/he makes findings of credibility about an examinee, another physician or another expert which impaired the appearance of her/his objectivity. Physician acting as experts are entitled to disagree with the statements or opinions of others but such disagreement must be and appear to be respectful and professional. The admonition that ``one can disagree without being disagreeable` is apt; there must be a rational basis for any disagreement without ad hominem comment.

(viii) Virtual Examinations: The Draft should refer to and discuss the emerging issues relating to virtual examinations and the challenges which they pose. The 2020 Report discusses this issue at pages 32 and following. You are welcome to reference the text.

It has been an honour and a pleasure for the MLST to offer these comments.

250 Consumers Rd, Suite 301
Toronto, ON M2J 4V6
Phone: 416-494-1440, Fax: 416-495-8723