



## College of Physicians and Surgeons of Ontario Draft Third Party Processes Policy

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Submitted to: **College of Physicians and Surgeons**

Submitted by: **Ontario Bar Association**



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The Ontario Bar Association (“OBA”) appreciates the opportunity to comment on the Draft Third Party Processes Policy (the “Policy” or the “Draft Policy”) produced by the College of Physicians and Surgeons of Ontario (“CPSO”).

## **The OBA**

As the largest legal advocacy organization in the province, the OBA represents over 17,000 lawyers, judges, law professors and law students in Ontario. OBA members practice law in no fewer than 37 different sectors. In addition to providing legal education for its members, the OBA has assisted government and professional regulators with countless policy initiatives - both in the interest of the legal profession and in the interest of the public.

Our busy Civil Litigation, Insurance Law, Criminal Law, Health Law and Family Law Sections have over 3500 members, including leaders in the areas of medical malpractice, professional ethics, child protection, professional discipline and the use of expert evidence in the civil and criminal contexts. Members of these sections would count among their clients virtually every relevant stakeholder on these issues, including plaintiffs, insurance companies, families, doctors and professional regulators. This submission was formulated with input from each of these key sections and it has had the benefit of review by all 37 of our practice sections.

## **Introduction**

As members of a self-regulating profession ourselves, OBA lawyers laud the CPSO’s determination to ensure professional ethics are respected in all services provided by physicians. In addition, as guardians of our justice system, we are pleased to see the CPSO is making efforts to ensure that the courts and other decision makers are provided with reliable, appropriate evidence.

Our comments and suggestions are designed to help ensure that the Policy recognizes the distinct legal and procedural rules and principles that apply to the various roles that physicians may play in legal processes. Guidance on professional standards should allow for the creation and articulation of a full and frank evidentiary record and dovetail with existing rules of evidence creation, retention and disclosure.

## **Distinguishing among Different Roles Physicians may Play in Legal Processes**

Physicians may play various roles in legal proceedings. They may be experts retained to provide an opinion or treating physicians who provide more factual background evidence. They may be retained as an expert by the subject of the opinion, by a more “neutral” party such as the subject’s insurer or by a party who is adverse in interest such as the defendant in a medical malpractice or motor vehicle accident case. They may be acting in an administrative law context, such as a statutory accident benefits case before the Financial Services Commission, in a civil motor vehicle or medical malpractice context, in a



child-protection case or a criminal case. Physicians may be appearing before a myriad of tribunals, many with their own distinct set of rules. We understand, for example, the Workplace Safety and Insurance Appeals Tribunal has provided a submission regarding concerns specific to it.

While the physician's obligations to provide information and opinions in forthright way, without personal bias remain constant regardless of the context in which he or she is retained, the distinct roles bring distinct rules that affect, among other things, the creation and disclosure of opinions and information as well as the retention of materials. The Policy seems in several instances to assume that the physician is acting in an independent medical examination or designated assessment context. Consequently, the Draft Policy fails to adequately deal with issues and rules that arise when the physician is acting in other contexts. The following are some examples.

### **Information Regarding Privilege**

While there is no privilege that protects against the disclosure of information revealed and opinions rendered in the context of an independent medical examination or designated assessment, there are situations in which: the fact that a physician has been retained as an expert; the opinions of that physician; and the physician's discussions with counsel and the parties will be privileged or otherwise un-disclosable. When a physician has been retained by the plaintiff in a personal injury case, by the defendant in a criminal case or by the respondent in a child-protection case, for example, the fact of their retainer and the material they produce will generally be covered by privilege or other legal principles that allow the party to keep the retainer itself and the opinion completely confidential unless they choose to rely on it in court. In these contexts, it is possible that the fact that a physician was retained and the opinion created will never be produced or revealed to the opposing side. The list of requirements that are applicable to the third party process (see page 1, line 30 and footnote #2), should include "the principles of solicitor client and litigation privilege". As the tenets of privilege are largely un-codified, it may be desirable to outline the basic principles in the Draft Policy. If the CPSO does determine that this is desirable, the OBA would be pleased to provide any necessary assistance.

The following elements of the Draft Policy fail to account for situations in which the physician's discussions with the parties and opinions are privileged.

#### **(i) Recommendations that Physicians Consult or seek guidance from the CMPA**

One manifestation of a failure to recognize privilege is the Policy's recommendations that physicians seek the advice or guidance of the Canadian Medical Protective Association ("CMPA"). We understand and support the need to be cautious and seek legal advice on conflict of interest and other ethical issues. However, in an existing or possible medical malpractice case, where the CMPA has retained and instructed, or will retain and instruct, defense counsel, there is a perceived potential for conflict of interest and breach of privilege if a prospective expert seeks guidance from the CMPA on:

- (a) Whether the physician has the requisite expertise or knowledge the matter requires or has a prohibitive conflict of interest (page 3, lines 100-110); and
- (b) His or her obligation to inform a patient of suspicious findings (page 9, line 320-335)



In seeking advice on these issues, the physician could be revealing: the fact that he has been or may be retained; that there is the potential for a claim to be brought (where no claim has yet been filed); the plaintiff's theories on where the standards were breached and causation; and information on symptoms or unrelated medical conditions suffered by a plaintiff (which could affect damage assessments or causation analysis). All of this information would be confidential and legally privileged and could affect settlement or other aspects of the case. While the conflict of interest and breach of privilege issues which exist on a theoretical level may, in fact, be controlled through CMPA policies and practice, this is not something over which CPSO has control.

Rather than specifying that physicians "consult" or seek "guidance" or "advice" from the CMPA, it should be suggested that physicians *seek independent legal advice*. The OBA recognizes that the CMPA may play a role in arranging or funding that advice and it is assumed that the CMPA has sufficient controls in place to prevent the sharing of information between the lawyer providing independent legal advice to a prospective expert and the lawyer defending the case on which that expert may be retained. However, the fact remains that what the doctor requires is independent legal advice and how or through whom that advice is arranged should not be the subject of the Policy.

It should also be noted that the recommendation in the Draft Policy regarding the provision of access to medical records (page 10, lines 370-380) needs to be clarified. A request for records from a lawyer may indicate a potential claim and quite properly prompt a call by the physician to the CMPA. However, the Policy should be clear that, where no suit has been filed and where the request for records is made by, or on behalf of, the patient (who consents to the release), the patient's entitlement to the records is governed by the *Personal Health Information Protection Act*.

#### **(ii) Distinguishing Independent Medical and Designated Assessments from Privileged First-Party Examinations**

Some elements of the Draft Policy are inaccurate as they assume an absence of privilege. For example, the list of things that a physician should "at a minimum" advise the examinee in order to get informed consent includes:

- Personal health information will be disclosed to the third party (page 5, line 180);

Where the physician is providing an expert opinion to the plaintiff or to a defendant in a criminal case, the information provided by the examinee and the physician's opinions will not be automatically revealed by the physician to any party other than the client's own lawyer. It will be up to that lawyer and the client to determine if it will be disclosed further. The suggestion that information will be disclosed to "a third party" may create unnecessary concerns and interfere with free and frank disclosure by the examinee to the physician. It may be that in referring to a "third party" the Policy meant to include the examinee's own lawyer but there should be some distinction drawn between a client's own lawyer and a true third party.



### **More Neutral Communication of Physician's Role in Independent Examinations**

Even in the case of true third-party examinations (such as independent examinations of an insured) where there is no privilege relationship, the suggested explanation of the physician's role (see particularly page 4 lines 130-135), portrays what is an independent, neutral role as an almost-adversarial role. The suggested explanation contemplates only releasing information that is "not in the patient's best interest" that is "disadvantageous" and that would "negatively affect" the patient's entitlements to benefits. Making the physician's explanation overly negative may raise unnecessary suspicion of the physician and impede the desirable frank exchange of information between doctor and examinee. The following language is suggested for neutral, independent assessments:

- 130 Physicians should indicate that their role is not to treat the patient but to provide a neutral assessment, without taking sides, and that they may have to release information about the individual to a third party. Patients should understand that this information may be released whether it is advantageous or disadvantageous to the individual and that the released information may assist the individual or negatively affect the individual's position.

### **Timelines where Physician Retained by Party (see pp. 8-9, lines 305-317)**

In some instances, such as requests for patient records, it may be appropriate to have default timelines for physicians to follow. However, where physicians have been retained privately by a party to a legal proceeding, it is more appropriate for the parties to agree on appropriate timelines. Accordingly, the following changes are recommended at pages 8-9, lines 305-317:

In some instances, the timelines on which the information or opinions must be provided to the third party will be set out in legislation. Physicians are expected to comply with any timelines that may be prescribed by law.

Where a physician is retained as an expert by a party to litigation or other legal proceeding, the physician and the party retaining him or her should agree to the timelines for provision of reports and other materials. The physician should respect the times lines to which the parties have agreed.

Absent a specific legal requirement or agreement with the retaining party, the College expects that physicians will provide information or opinions for the third party process within sixty days.

If, in rare circumstances, physicians are not able to comply with the applicable timelines, either due to the complexity of the issue, or for another appropriate reason, physicians should discuss the matter with the third party and reach an agreement for a reasonable extension.



## Information versus Opinion

The definitions of “information” and “opinion” (see page 2, lines 40-46) need to be more precise such that they assist in dividing the instances in which a treating physician may be providing information as a factual witness from those in which the physician is acting as a retained expert to provide an opinion.

Concepts such as evaluation, diagnosis and prognosis may, of course, involve both facts and opinion but whether they are information or opinion in the context of a legal proceeding is what should be addressed by the definitions in the Policy. If a diagnosis or evaluation was done as part of the physician’s role as a treating doctor, independent of any request made in relation to the legal proceeding, it should be considered information. If the physician is requested to make the diagnosis, prognosis or evaluation in the context of the legal proceeding, he should be considered an expert providing an “opinion”. It is recommended, therefore, that the definitions be changed as follows:

***Information:*** includes factual details about an individual’s medical condition and general health, including, without limitation, evaluations, prognoses and diagnoses that the physician made in his or her capacity as a treating or consulting physician, prior to, or otherwise independent of, a legal proceeding or other third-party process.

***Opinions:*** refer to expert opinions provided in a legal proceeding, along with formal opinions that may be required in a third party report, including prognoses, diagnoses and other evaluations that are rendered as a result of a request made in the context of a legal proceeding or other third-party process.

The distinction may be crucial in assisting physicians in understanding their obligations- while there is, in some contexts, an obligation to provide information, there is rarely an obligation to form and provide an opinion.

## Record Retention Requirements vary by Context

The Policy’s requirement that physicians retain copies of opinions and background documentation is not appropriate for all circumstances under which physicians may act as experts. In a criminal case, for example, where personal information forms part of the Crown disclosure, both Crown and defense may be expected to get all of the information back from their experts. In fact, counsel may have given his or her personal undertaking to do so. In the civil context, there are also a complex set of permutations and interpretations concerning whether documents, such as drafts, should be kept and by whom, particularly where an expert wrote a report that was ultimately not produced to the other side. Rather than attempting to cover all circumstances or providing general guidance that may be misapplied in some circumstances, it is recommended that the Policy advise physicians to familiarize themselves with the legal requirements applicable to the specific context in which they are providing their opinions. This can be accomplished in conversation with the lawyer who retained the physician or, where necessary, through independent legal advice. Alternatively, a more complete and specific guidance document could be created.



## Other Issues

### Neutral Language

While the requirement to provide an objective opinion free from bias is key to the physician's role in the legal process, the Draft Policy is unduly restrictive in requiring the physician to use "neutral" language (page 6, line 232). This may restrict the accuracy of the evidence in certain cases. For example, where the fact is that an examinee is severely injured or otherwise falls into an extreme category, the requirement to use neutral language may inhibit the accurate portrayal of the issues. The remaining requirements in that paragraph (objectivity and freedom from preconceived notions or bias) provide adequate protections for the integrity of physicians and the legal process.

### Stating the Degree of Certainty

The requirement that physicians state the "degree of certainty" they have in a given conclusion (see page 8, lines 278-279) may be inappropriate in the context of a litigation matter, especially if it is stated in percentage terms. Particularly in the case of a jury trial, the expert stating his degree of certainty on a given issue may create confusion with the standard of proof that the jury is required to apply to the whole of the case.

It is not clear what ethical or professional difficulty is meant to be addressed with this particular recommendation in the Draft Policy, so it is difficult to suggest alternative wording. It would seem that any potential issues regarding over-stating an opinion have been addressed elsewhere in the Draft Policy and it is sufficient to recommend that the physician provide the range of possible conclusions and the reason for choosing the one he did. We would be happy to have further discussions on this issue if that would assist.

### Level of Expertise

The Draft Policy appears to require that a physician restrict his or her opinions to areas in which they have "sufficient" expertise (see page 7, lines 245-250). "Sufficiency" of expertise is not a concept that has any particular meaning in the legal process or other guidelines. The question of whether your expertise is "sufficient" could have a host of meanings (such as whether or not you will be qualified by a judge as an expert at trial or even whether or not your opinion will be accepted by the court over others etc.). Rather than introducing the vague concept of "sufficiency", it is suggested that the Policy mirror the requirements of the *Rules of Civil Procedure*<sup>1</sup> and the CMPA's document on Effectively Testifying, both of which require that an expert stay within his or her scope of expertise. The following change is suggested:

The College is aware that third parties may ask physicians to answer questions or to provide opinions that are beyond their expertise or experience, or which require access to

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<sup>1</sup> See *Rules of Civil Procedure*, Ontario Regulation 194 (as amended), rule 53.03 and Form 53 – *Acknowledgement of Expert's Duty*



information they do not have. Should this occur, the College advises physicians to discuss the matter with the third party, and explain that they may not be able to answer every question asked, or provide the opinion sought. If the third party will not amend their request, or is otherwise unresponsive to the concerns expressed, physicians must restrict their statements to matters that are within their area of expertise and about which areas in which they have sufficient information ~~and expertise or experience~~. Physicians should also indicate clearly the reasons for which they are unable to fulfill all the elements of the third party's request.

## Conclusion

Attached, as Appendix I, please find a reproduction of the Draft Policy on which we have identified the areas of concern discussed above and have red-lined some specific suggested wording changes. We have not provided specific amended language for every recommended change but we would be happy to assist further in that regard if necessary.

Once again, the OBA appreciates the opportunity to comment on the Policy and welcomes any opportunity to work collaboratively with the CPSO on issues that intersect our respective professions. Please do not hesitate to contact us if the OBA can be of further assistance in providing guidance that more specifically addresses the many distinct roles physicians play in legal proceedings.