



Medical Expert: Reports and Testimony

APPROVED BY COUNCIL:	December 2012
PUBLICATION DATE:	<i>Dialogue</i> , Issue 4, 2012
KEY WORDS:	Medical Expert, Expert Witness, Expert Opinion, Expert Report, Expert Testimony, Written Opinion, Oral Opinion, Legal Proceeding, Communication, Consent, Fees, Objectivity, Scope of Expertise, Transparency, Records, Access to Information
RELATED TOPICS:	The Practice Guide: Medical Professionalism and College Policies, Third Party Reports, Medical Records, Confidentiality of Personal Health Information
LEGISLATIVE REFERENCES:	See Back Page
REFERENCE MATERIALS:	See Back Page
COLLEGE CONTACT:	Public and Physician Advisory Service

Medical Expert: Reports and Testimony

INTRODUCTION

At times, physicians may be asked to participate in legal proceedings as medical experts.¹ A medical expert's role is to assist those involved in the legal proceeding to understand the medical evidence. A medical expert's opinion is relied upon to make important decisions that have a significant impact on all parties involved in the legal proceeding.

Medical experts may provide opinions in writing (i.e., a report) and/or orally (i.e., testimony). Physicians may provide opinions about an individual, or opine on broader topics, such as an area of medical practice, or a medical condition, provided that they have the expertise the matter requires. When physicians are asked to provide expert opinions about an individual, they may review personal health information provided to them about the individual, or information they obtain themselves (e.g., during a medical examination), to formulate their opinions.²

The reports medical experts write are considered 'third party reports' because they are being prepared for a third party process (e.g. legal proceeding), instead of for the purpose of the provision of health care. Physicians who write reports for any third party process can find general report requirements in the College's Third Party Reports policy. However, because the Third Party Reports policy does not contemplate the unique role of a medical expert, this policy articulates the College's expectations of physicians who provide expert reports and testimony.

This policy is not an exhaustive catalogue of the totality of requirements that may apply to experts who write reports and/or provide testimony. Specific requirements can include, but are not limited to, those found in the *Rules of Civil Procedure* or specific rules for various legal contexts (e.g., criminal, family, administrative³), or in the principles of solicitor-client and litigation privilege. Given that many different rules may govern a medical expert's conduct, and their applicability will often depend on the circumstances of the case, physicians are encouraged to obtain independent legal advice⁴ if they are unsure of their obligations in specific circumstances. This policy does not contain legal advice; the policy sets out professional expectations for physicians who act as medical experts.

SCOPE

This policy applies to all physicians who participate in any type of legal proceeding as medical experts, whether they provide their opinions in writing or orally. This policy does not apply to witnesses of fact.

PRINCIPLES

Trustworthiness, altruism and service are values which guide the medical profession.

When providing expert opinions, physicians embody these values and uphold the reputation of the profession by acting with the same high level of integrity and professionalism as they would when delivering health care.

1. "Expert witness" is another term commonly used to describe a physician who acts as an expert. Physicians acting as experts are different from witnesses of fact (testifying about events that they themselves have observed).

2. Where personal health information is reviewed or obtained, physicians may only collect, use and disclose personal health information with the consent of the individual to whom the personal health information relates, or as permitted or required by law.

3. Administrative proceedings can include the disciplinary processes of professional regulators (e.g., a hearing before the College of Physicians and Surgeons of Ontario's Discipline Committee or Fitness to Practise Committee).

4. From the Canadian Medical Protective Association (CMPA) or legal counsel.



POLICY

When acting as medical experts, the College expects that physicians will provide objective and impartial opinions on matters that fall within their scope of expertise.

Highlighted below are professional expectations for physicians who are asked to act as medical experts.

1. Accepting a Request to Act as a Medical Expert

Obligation to Act as a Medical Expert

Physicians do not have an obligation to act as medical experts. Physicians are typically asked to participate in a legal proceeding as medical experts.

Before agreeing to act as an expert, the physician must consider, among other things, whether he or she has the requisite expertise the matter requires, and whether any actual or potential conflicts of interest exist between the physician and the parties involved.⁵

Should the physician have any doubts as to whether acting as a medical expert is prudent, he or she should obtain independent legal advice before proceeding.

Communication Regarding the Physician's Role

When acting as a medical expert, the physician may find it necessary to interact directly with the individual⁶ who is the subject of the legal proceeding. In these circumstances, it is important that physicians are clear about the nature of their role as medical experts.

Physicians should explain that they have been asked to act as medical experts, which means that their role is not to treat the individual, but to provide objective and impartial opinions to assist the adjudicative body (e.g., court) involved in the legal proceeding. This may involve obtaining, using and disclosing personal health information about the individual to the person instructing them (e.g., lawyer), in the context of providing an expert opinion. This information or expert opinion may also be shared with others involved in the legal proceeding, if the lawyer decides to use it in the proceedings. Where required, consent for obtaining, using and disclosing personal health information will be obtained.⁷ Physicians are also encouraged to convey that the final outcome of the legal proceeding is not determined by the physician, but rather by the adjudicative body involved in the legal proceeding.

Consent

Obligations with respect to consent will differ depending on whether physicians are asked to provide opinions about a specific individual, or whether physicians have been asked to comment on more general matters, such as a specific area of medicine, or a medical condition.

Where physicians are providing opinions on more general matters and no information about a specific individual has been obtained or will be disclosed, consent is likely not required.⁸

Where physicians are asked to review the personal health information of a specific individual, they must ensure that proper consent has been obtained

5. Examples of situations where physicians could have a conflict of interest are as follows: the physician acted as the opposing party's treating physician, the physician had previously discussed the case with another party, or the physician had a personal or professional relationship with any of the parties involved. To manage conflicts of interest effectively, the College advises physicians to disclose the existence of the potential conflict before accepting requests to act as medical experts. However, when disclosing potential conflicts of interest involving a patient or former patient, physicians must not disclose any personal health information about that patient without their consent, unless permitted or required by law. A discussion of the potential conflict will allow all parties to consider whether objectivity will be a concern in the specific circumstances.

6. For the purposes of the provisions of the *Health Professions Procedural Code*, Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18, concerning sexual abuse of a patient, the College will consider individuals to be patients.

7. For more information on consent, please see the 'Consent' section below.

8. Where information does not identify an individual or where it is not reasonably foreseeable in the circumstances that the information could be utilized, either alone or with other information, to identify an individual, consent is not required to collect, use or disclose the information.

Medical Expert: Reports and Testimony

to use and disclose that information in their report and/or testimony, unless they are permitted or required by law to use and disclose that information.⁹ If physicians are asked to conduct a medical examination on a specific individual, consent for the examination must be obtained.

If physicians are uncertain about their consent obligations for any reason, the College encourages them to err on the side of caution and obtain independent legal advice before proceeding.

Fees

Physicians should discuss fees for acting as medical experts with those who are instructing them. In addition to any attendance fees that may be set for specific proceedings,¹⁰ some organizations (e.g., the CMPA) have set fees for physicians who are retained as medical experts by that organization. Physicians must ensure the fee they charge for acting as medical experts are reasonable.^{11,12,13}

Presence of Observers & Audio/Video Recording

Physicians may conduct medical examinations in the context of their role as medical experts. If physicians are conducting a medical examination for the purposes of a legal proceeding and one or more parties wish to have an observer present and/or record the examination, they should discuss the matter with the person instructing them, as specific rules may apply. For example, for court-ordered examinations, the *Rules of Civil Procedure* indicate that observers shall not be present during examinations

unless the court orders otherwise.¹⁴

Instructions

Before providing expert opinions, physicians must ensure that they understand what they are being asked to do, and specifically, what questions they are being asked to answer. If the instructions are unclear, inadequate or conflicting, physicians should seek clarification from those instructing them.

2. Acting as a Medical Expert

Objectivity & Impartiality

When physicians provide expert opinions, their duty to the adjudicative body prevails over any obligation to the person who is instructing or paying them. Physicians acting as medical experts must assist the adjudicative body by providing objective and impartial opinions;¹⁵ physicians must not advocate for any party involved in the legal proceeding. Physicians must be honest, objective and impartial. They must ensure that the opinions they provide are reasonable, fair, balanced, and substantiated by fact, scientific evidence¹⁶ or experience, and sound clinical judgment. Physicians must not allow personal bias to prejudice the expert opinions they give.

Comments that are *unrelated to the expert opinion* are inappropriate and must not be provided. In addition, physicians must not make any unprofessional comments or criticisms regarding the other experts or individuals involved in the legal proceeding.¹⁷

9. Consent requirements for the disclosure of personal health information are contained in the *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Schedule A (hereinafter *PHIPA*), and the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5.

10. In some instances, financial arrangements for witnesses are established in law. If a physician has been summoned to testify in court as a witness/medical expert, the daily attendance is set in the rules that regulate the procedures of that particular trial or hearing. This can include the *Rules of Civil Procedure*, the *Family Law Rules*, etc.

11. Section 1(1), paragraph 21 of *Professional Misconduct*, O. Reg., 856/93, enacted under the *Medicine Act, 1991*, S.O. 1991, c. 30 (hereinafter *Medicine Act, Professional Misconduct Regulation*).

12. Physicians can refer to the Ontario Medical Association *Physician's Guide to Uninsured Services* for guidelines, available at: <https://www.oma.org/Member/Programs/Billing/Pages/default.aspx>, and/or other guidelines prepared by relevant organizations (e.g., Canadian Society of Medical Evaluators), as appropriate.

13. Physicians should be aware that it is professional misconduct to charge "a fee for a service that exceeds the fee set out in the then current schedule of fees published by the Ontario Medical Association without informing the patient, before the service is performed, of the excess amount that will be charged," under Section 1(1), paragraph 22 of the *Medicine Act, Professional Misconduct Regulation*.

14. *Rules of Civil Procedure*, O. Reg., 438/08, enacted under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (hereinafter *Courts of Justice Act, Rules of Civil Procedure*). Rule 33.05 states: "No person other than the person being examined, the examining health practitioner and such assistants as the practitioner requires for the purpose of the examination shall be present at the examination unless the court orders otherwise."

15. See for example the duties of experts set out in Section 4.1.01 of the *Courts of Justice Act, Rules of Civil Procedure*.

16. Scientific evidence includes scientific theory and technique. The trier of fact (i.e., judge, jury, etc.) must determine the reliability of the scientific evidence that the expert's opinion relies upon.

17. For additional information on professionalism, refer to the College's Practice Guide.



Scope of Expertise

Physicians must accurately represent their scope of expertise. When providing expert opinions, physicians must restrict their statements to areas in which they have expertise. If a particular question or issue falls outside the physician's area of expertise, the physician must clearly state this and decline to answer.¹⁸

Comprehensiveness & Accuracy

The expert opinions physicians provide must be comprehensive and accurate.¹⁹ Physicians must ensure that all relevant information has been considered,²⁰ and that the information they rely on to form their expert opinions is accurate.²¹

If physicians do not have enough information to arrive at a conclusion on a particular point, or their opinions are otherwise qualified, this must be clearly expressed. If physicians change their opinions, they must communicate this to the person instructing them in a timely manner.

Transparency

Physicians must be transparent about the instructions they have been given, the process they use to form their opinions, and the information they rely upon in doing so.²²

Physicians must be clear about what has been requested of them (e.g., the questions they were asked to answer). The physician's reasoning process, from the underlying data to the ultimate opinion, must be clear and comprehensible. Physicians must

state all factual assumptions on which the expert opinions are based, and describe any research they conducted and any documents or records they relied upon in forming their opinions.

Clarity

To allow for optimal clarity, physicians must use language and terminology that will be readily understood by lay persons. Physicians should explain any abbreviations and medical or other technical terminology used.

Timeliness

If physicians are acting as medical experts, they must provide written reports and/or testimony without unreasonable delay.²³

3. Final Considerations

Suspicious Findings

When acting as medical experts, physicians may review the personal health information of an individual whom they are not treating, or they may examine that individual. In either situation, a physician may become aware of a suspicious finding, including an unexpected significant clinical finding or condition which raises serious concerns, or which the physician perceives will require essential intervention.²⁴

Discovering a suspicious finding in these circumstances is unique, in that physicians are reviewing the medical record or conducting the examination in their role as medical experts, and not as treating

18. Canadian Medical Protective Association, *Effective Testifying* (CMPA, 2008).

19. Section 1(1), paragraph 18 of the *Medicine Act, Professional Misconduct Regulation*.

20. As articulated in the College's Third Party Reports policy, physicians should ensure that they have obtained and reviewed all relevant information.

21. As articulated in the Third Party Reports policy, if physicians rely on information which they cannot substantiate independently, physicians should note the source of the information and the fact that it has not been independently confirmed.

22. See for example Section 53.03(2.1) of the *Courts of Justice Act, Rules of Civil Procedure*.

23. Section 1(1), paragraph 17 of the *Medicine Act, Professional Misconduct Regulation*.

24. This includes, but is not limited to, undiagnosed conditions and conditions for which immediate diagnostic intervention is required.

Medical Expert: Reports and Testimony

physicians. Accordingly, physicians may have different responsibilities concerning the disclosure of the suspicious finding to the individual, as specific legal obligations may apply.

It will be crucial for physicians to seek guidance based on the circumstances of each case; however, the College offers the following as general guiding principles.

For those circumstances in which the suspicious finding is such that it does not suggest that the individual is at immediate risk of harm and urgent medical intervention is required, physicians must seek independent legal advice regarding the disclosure of the suspicious finding to the individual.

In situations where the suspicious finding suggests the individual is at imminent risk of significant harm and immediate medical care is required, physicians may not have time to seek independent legal advice, and must exercise their professional judgment to determine whether the patient's current clinical status is urgent enough to warrant immediate disclosure to the individual.²⁵ If the suspicious finding is disclosed, physicians must only provide clinical information that is directly relevant to the finding.

Records Retention & Access

Generally speaking, physicians are required to maintain records²⁶ and provide access to that information with appropriate consent, where applicable.²⁷

However, when acting as a medical expert, a physician's obligations may differ depending on the rules governing the legal proceeding and the specific circumstances of the case. As such, the College advises physicians to familiarize themselves with the legal requirements applicable to the specific context in which they are providing their expert opinions and/or obtain independent legal advice regarding their obligations to retain records and/or provide access to the information.

25. When physicians notify an individual of suspicious findings, physicians should emphasize the importance of obtaining timely medical attention and should seek the individual's consent to share these findings with his or her primary care provider. When consent is obtained, the College recommends that physicians convey the findings in written form to the primary care provider to facilitate appropriate medical follow-up.

26. Sections 18 and 19 of the *General, O. Reg., 114/94*, enacted under the *Medicine Act, 1991*, S.O. 1991, c. 30.

27. For information on medical record-keeping requirements, refer to the College's Medical Records policy. For more information on the disclosure of personal health information, see *PHIPA*.



MEDICAL EXPERT: REPORTS AND TESTIMONY

- LEGISLATIVE REFERENCES:** *Courts of Justice Act*, R.S.O. 1990, c. C. 43.
Family Law Rules, O. Reg., 114/99.
Rules of Civil Procedure, O. Reg., 438/08.
Health Professions Procedural Code, Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18.
Medicine Act, 1991, S.O. 1991, c. 30.
General, O. Reg., 114/94.
Professional Misconduct, O. Reg., 856/93.
Personal Health Information Protection Act, 2004, S.O. 2004, c.3, Schedule A.
Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5.

- REFERENCE MATERIALS:** Canadian Medical Protective Association, *Acting as an Expert in Medico-Legal Proceedings* (CMPA, 2009).
Canadian Medical Protective Association, *A Medico-Legal Handbook for Physicians in Canada* (CMPA, 2010).
Canadian Medical Protective Association, *Avoid Pitfalls when Preparing Medico-Legal Reports* (CMPA, 2008).
Canadian Medical Protective Association, *Effective Testifying* (CMPA, 2008).
Canadian Medical Protective Association, *Preparing Medico-Legal Reports: Suggestions for Physicians* (CMPA, 2008).
Medico-Legal Society of Toronto, *Medico-Legal Report* (MLST, 2010).
Ontario Medical Association, *Physician's Guide to Uninsured Services* (OMA, 2012).



COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

80 COLLEGE STREET, TORONTO, ONTARIO M5G 2E2