July 15, 2010

Delivered by Fax #416-365-1876

Mr. Jeff G. Cowan
Weir Foulds LLP
1600 - 130 King Street West
Toronto, Ontario, Canada M5X 1J5

Dear Mr. Cowan:

RE: Audio or Video Recording of a Defence Medical/Submission of the Medico-Legal Society of Toronto to the Rules Committee

The Medico-Legal Society of Toronto (MLST) is a voluntary association of doctors and lawyers. It was founded in 1950 to promote medical, legal and scientific knowledge, cooperation and understanding between the medical and legal professions in the interest of justice and in the best interests of patients and clients.

The Medico-Legal Society of Toronto is pleased to respond to your request for comments on the questions that were raised by the Ontario Court of Appeal in their recent case of Adams v. Cook[1].

Please be advised that the Medico-Legal Society of Toronto is particularly qualified to comment on these issues as our Membership is made up of Plaintiff and Defence lawyers who work within the medical-legal field and physicians who are practitioners and assessors in the Medical-Legal context.

We are pleased to attach to this letter the list of the members who participated in this Committee and we would particularly ask you to note that the Committee membership included physicians who do routinely conduct psychiatric assessments and physicians who routinely conduct physical assessments. We also would ask you to note that a number of the medical Committee Members have had experience in either audio or video taping their assessments and we feel that their comments and concerns are particularly apt for review by the Rules Committee.

[1] Adams v. Cook, 2010, ON. C.A. 393 (April 22, 2010).

SUMMARY OF THE MEDICAL-LEGAL SOCIETY'S POSITION

The Medico-Legal Society of Toronto does not support any change from the present Rule relating to defence medicals. The Medico-Legal Society of Toronto believes that such a change is not warranted. Our concerns as to the negative effects that the proposed change may have particularly on the medical profession are outlined within the context of this letter.

The Medico-Legal Society of Toronto believes that the current Rules of Civil Procedure and Courts of Justice Act adequately set down the rules and direction that should be used with respect to defence medicals. It is the Society's position that there should be no general rule requiring the electronic recording of any expert medical-legal assessment and that instead this issue should continue to be dealt with as it has most successfully been in the past, on a strictly case by case basis. It is the Society's position that audio recording without video in the setting of potentially adversarial medical legal evaluation may be particularly open to inappropriate influence and conclusion.

1. Cost Issues

It was the universal experience of the physicians on our Committee who had conducted video taped medical-legal assessments that significant additional costs are inevitably incurred. The cost of a good high quality videographer is approximately $1,000 a day. For a psychiatric assessment, at least 5 to 6 hours is required of video time. This includes the equipment, the set up, recording time and preparation of copies. Less time may be required for a physical examination but it is still an additional cost that must be recognized.

The second concern expressed is that the physicians' offices are typically not of sufficient size or appropriate layout to permit adequate video assessments. Many of the physicians on our Committee when they have conducted these types of assessments have had to rent either hotel space or a separate examination room to accommodate the video equipment and the videographer. For example, if the space is too small the limited distance from the camera to the claimant will lead to difficulty in recording the full assessment. This again involves increased costs which will have to be borne by those individuals paying for the assessments.

Moreover, most physicians who carry out physical assessments prefer to carry out the interview portion of the assessment within their office where a large desk can accommodate voluminous documentation, permit comfortable note taking, and allow for access to a computer for data searches (unusual drug names etc). These physicians will then move with the claimant to an examination room, where the physical examination is conducted. From a practical perspective, video-recording of the physical assessment would therefore require disrupting the physician's office in advance of the assessment in order to set up two units of recording equipment, or else impose a delay between interview and examination to permit the videographer to carry out a second set up.

The next cost involves the lawyer time and also the assessor time necessary to reviewing the tape while preparing for Court (Examination in Chief or Cross-Examination). In one case anecdotally a lawyer has advised that he found it necessary to take many additional hours to prepare for a trial where he intended to make use of a video tape of a psychiatric assessment. The lawyer must review the video tape in its entirety. The experts who are being called to comment on other expert reports as well as the expert who prepared the report with the video recording must each review the video. There is then the additional court time that may be required for examination in chief or cross-examination with respect to the video recording.

It was the consensus of this Committee that the costs are prohibitive. If there is a general rule requiring that all medical-legal defence medicals and expert assessments are videotaped then each assessment will have these additional costs. One must keep in mind that only a very small percentage of these cases even reach trial and such a cost would not be warranted. The additional costs that will inevitably arise will ultimately become the burden of the litigants, and could contribute to increased costs for insurance, propositions that run directly contrary to recent initiatives to contain and rationalize the spiralling costs of litigation. Mandatory videotaping will have the further untoward effect of creating substantial costs that may be disproportionate to the issues in dispute in the litigation.

Technical Concerns

There are some technical issues that a physician must address when conducting an assessment by way of videotape. Any outcome other than a full and accurate recording is unacceptable. A camera that is static without a videographer to operate it will not allow for that. An assessment is not a static process. Whether it is a physical or psychiatric assessment, the claimant may want to get up and move around the examining room. Somebody must be there to allow the camera to record that entire event. The often-cited and used approach ordered in *Willits v Johnston*[2] called for ongoing use of a professional videographer to deal with such issues and any other technical problems that might occur during such examinations, as well as to ensure that the recording was not edited.

The physicians who conduct physical examinations commented that their whole approach to conducting a physical examination would have to be changed if it was being videotaped. The physician would always have to be concerned when doing a physical assessment of the claimant that the examination is actually captured by the camera. This would mean the physicians would have to position themselves differently than they would normally. The physicians would be very aware of the camera and feel that it would not add but would in fact detract from the assessment process. They would, in effect, in many ways have to be the "director of their own movie" when they should be concentrating on listening to the claimant and conducting the assessment. It is also foreseeable that most claimants would not consent to being physically exposed in the manner required by some aspects of the examination process.

[2] Willits v. Johnston, (2003), 121 A.C.W.S. (3d) 827 (Ont. S.C.)

The cases that have allowed videotaping have made some very specific rules with respect to how the videotaping should take place. One of the requirements has been that it is a continuous running tape and that the assessment process is continuously displayed. The physicians raise the question as to when the assessment commences. If there were to be a general rule about videotaping then would the camera/taping begin from the minute the claimant entered the office, throughout the history taking process and throughout the assessment process (which may take place in two different rooms) and then continue on until the claimant has left the office door. The physicians on the Committee will suggest that for them their assessment commences the minute they first encounter the claimant and does not end until the moment that the claimant leaves, which begs the question of whether a camera would need to be stationed in the waiting room, the interview room, the hallway, and the examination room.

Will the assessment process both for the claimant and the physician be changed due to the presence of the camera? What measures will be necessary to ensure that the behaviour of the claimant and/or the physician will not change significantly from what they would have been if the examination were not recorded? How will the issue of whether a physician is appropriately trained and experienced in the use of recording of examinations be determined? There are many such questions to which there are no clear and reliably researched answers or solutions.

The physicians on the Committee also have great concern about their ability to halt recording if in their medical opinion it were undermining the examination process. They also would expect to be able to declare the examination medically invalid in certain cases. What safeguards and processes would be in place in relation to these issues? The medical and scientific literature is not particularly helpful in these matters.

Privacy Issues

Whether in the psychiatric or physical area of assessment, the claimant is being asked to give personal information. In some cases it is information that the individual will not want to share with his/her family. There are some cases in which such information has never been shared with anyone (e.g. extra marital affairs, minor legal transgressions etc.) and may, in fact, be harmful or dangerous to the claimant if revealed. The claimant may also provide very personal information about others although they have not asked for permission to do so. The claimant's privacy and the privacy of such others must be protected. If there were to be any general rule with respect to videotaping defence medicals and/or medical-legal assessments then in each case a sealing order would be warranted requiring that the video tape could not be used for any other purposes. This is of particular concern for women of some cultures where seemingly innocuous information (such as casual, premarital flirtation) could cause serious harm if made available to the others and would raise concern on the part of the physician about their ethical and legal responsibilities should harm come to the claimant as a result of that process. In the absence of a recording a physician can always find a way of conveying relevant information while safeguarding privacy.

Copyright Issues

Neuropsychological and psychological examinations include use of formal tests where copyrights apply. The test results are interpreted as are the examinee's approaches, behaviours and emotional responses. Recording of these clinically significant aspects of such examinations is not likely permissible.

The Effect of a Rule Change on the Availability and Timing of Expert Assessments

All the physicians on the Medico-Legal Committee confirmed that it was their view that if a general rule was put into place requiring all assessments to be video taped then the result would be a serious loss of qualified assessors to complete medical-legal assessments. It is believed that most experts who presently do such assessments will choose to decline this work. This relates to cost, timing and concerns that the video tape could be used for more aggressive and unwarranted complaints to the College and would be used to detract from their reputation through lectures and seminars they would only learn of after the fact and would have no opportunity to respond. While the sealing order as noted above may be some response to this concern it may not go far enough.

It was also believed that many physicians who are presently in a clinical practice and who otherwise might have some interest in doing medical-legal work will likely not pursue that line of work if there is to be mandatory videotaping. It is axiomatic that making videotaping mandatory will not act as an inducement to recruiting experienced physicians currently uninterested in assisting the courts, or in attracting physicians who have no experience with medicolegal work. Given the aversion to videotaping widely expressed by those physicians who do give of their time and talents to the court system, it can be reasonably anticipated that mandatory videotaping would lead to fewer experts and still fewer highly experienced and qualified experts continuing to offer their services. Those who did choose to continue providing medical-legal assessments would inevitably do fewer of them because of the enormously increased time demands of each assessment. Moreover, since the distribution of currently participating experts is uneven across the province, with least availability outside the Greater Toronto Area, it can be reliably anticipated that any reduction in the current 'pool' of available assessors will have a particularly critical effect in areas of marginal availability if not active regional shortages. For those who wish to make use of medical-legal assessors there will be a longer wait to secure assessment times from fewer physicians, in addition to the added costs.

It is the Society's view that if there is to be a mandatory rule with respect to video taping assessments then there will have to be an educational component to ensure that assessors have the appropriate experience, training and expertise to handle video taped assessments. It is considered to be a different process. This begs the questions of who will provide such education, who will remunerate physicians for their training time and what will be the extent to which the physicians will be prepared to participate?

Evidence

The one question that kept reverberating through our Committee's deliberation was "Where is the evidence to support the premise that videotaping defence medicals or medical-legal assessments generally will result in a better process?" While the Committee is prepared to accept that from time to time there may be a case in which a video taping is warranted there is no evidence to support a general rule. It is the Committee's respectful submission that the present Rule has worked well and permits a review of the necessity for videotaping an assessment on a case by case basis where appropriate evidence is presented to support that in those specific circumstances there is a good reason to require video taping. There is no evidence to support the proposition that every medical-legal assessment should be videotaped and that such a process would result in fairer or more effective assessments and reports.

Fairness

The proposal to have a general rule requiring all medical-legal assessments to be videotaped does not recognize the fact that many claimants are initially and sometimes throughout the claim assessed only by their treating practitioners. It is more common these days for the Plaintiff/claimant to secure reports from their regular treating physicians and consultants rather than from the medical-legal assessors. No family physician, treating neurologist or treating psychiatrist will be willing to conduct their assessments and treatment processes with the claimant by way of a videotape. This would mean that there would be no opportunity to present a more balanced and fair approach as has been suggested if the general rule were to require that all medical-legal assessments were conducted, whether Plaintiff or Defence. Within that context, where and when does the medicolegal assessment (process) actually begin? It could still mean that potentially at a trial the only video recording assessments would be from the defence side with the potential prejudice that that would result particularly in the case of a jury trial. A further question is whether physicians retained by the Plaintiff could elect to share the attending-caregiver's exemption from videotaping by the simple act of 'blurring the lines', through declaring a physician-claimant relationship, which defence physicians cannot ethically do.

Summary

It is the overwhelming consensus of the Medico-Legal Society of Toronto through its Committee and Executive that it is not appropriate to make any amendments to the present Rules of Civil Procedure to establish a broad requirement that all medical-legal assessments and/or defence medicals be recorded by way of videotape. Moreover, the Society sees the suggestion that audiotapes be used as a substitute for videotaping as potentially more open to abuse and more harmful in fact than video- recording.

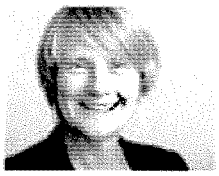
The Society appreciates the opportunity to provide you with their comments and would be happy to respond to any further questions or address the Rules Committee directly.

Should the Rules Committee decide (contrary to the recommendations herein) to consider a mandatory rule with respect to video-taping medical legal assessments then this Society would request an opportunity to outline their views with respect to the parameters of such a rule. This letter raises numerous issues with respect to how such medical-legal assessments could be videotaped and we would appreciate and opportunity to make submissions with respect to the protocols to be incorporated in such a rule to ensure, if possible, a fair, useful and cost reduced process.

Yours very truly,

Philippa G. Samworth
(Chair Medico-Legal Society of Toronto Committee
with respect to video taping Medical-Legal Assessments)
PGS/av

Committee Members (see attached CVs):
Philippa G. Samworth
Stephen Firestone
Dr. Xenia Kirkpatrick
Dr. Michael Ross
Dr. Arthur Ameis
Dr. Harold Becker
Dr. Michael Ford



Philippa G. Samworth is a partner at Dutton Brock and her area of practice is exclusively insurance defence with a specialty in Accident Benefits. Miss Samworth has a number of achievements and was retained by the Ministry of Finance of Ontario as a consultant to provide analysis and technical advice to the Ministry on its preparation and drafting of the new Automobile Insurance Legislation: Bill 59 and its regulations.

In May 1997, Philippa was appointed to the Minister's Committee for Designated Assessment Centres as Chair from September 1998 - September 2000, and again from December, 2001 to February 2004.

In 2000, she was asked by the Government of Ontario to Chair on Advisory Committee to make recommendations regarding the definition of Catastrophic Impairment. In March of 2004 Miss Samworth was again retained by the Minister of Finance to conduct stakeholder consultations and provide advice and recommendations on proposals to replace the DAC system.

In October of 2007 Philippa was inducted into the American College of Trial Lawyers.

Education

Philippa received her B.A. and LL.B. from Queen's University and was called to the Bar of Ontario in 1979. In 1990, she was certified by the Law Society of Upper Canada as a Specialist in Civil Litigation. In October of 2007, Miss Samworth was inducted into the American College of Trial Lawyers.

Awards

In 2002 Philippa was the first recipient of the prestigious Canadian Defence Lawyers' Lee Samis award for excellence.

On April 27, 2006 she became the first recipient of the OBA Award of Excellence in Insurance Law. Philippa is also recognized in "2008 Best Lawyers in Canada".

STEPHEN E. FIRESTONE

Stephen E. Firestone was admitted to the Ontario Bar in 1988. He is a member of the Law Society of Upper Canada, a past director of the Advocates' Society and past president of the Ontario Trial Lawyers Association. He was appointed on December 1, 1997 by the provincial government to the Minister's Committee on the Designated Assessment Centre System established under the *Automobile Insurance Rate Stability Act 1996* and was appointed Chair of that Committee in October 2000 for a one-year term. On June 26, 2000, he was appointed by the provincial government to the Catastrophic Impairment Advisory Panel. He was a member of the PAF Advisory Committee. He is the author of *Ontario Motor Vehicle Insurance Law and Commentary*, co-author with the Honourable A.M. Linden of *Ontario Motor Vehicle Insurance Practice Manual* and consulting editor of *Personal Injury Practice Manual*, published by LexisNexis Canada Inc. He is a published contributor to the 2008 Law Society of Upper Canada Special Lectures on Personal Injury Law and has been a guest lecturer at Osgoode Hall Law School and The University of Windsor Faculty of Law. He has been a guest speaker for the Advocates' Society, Ontario Bar Association and Ontario Trial Lawyers Association.

Xenia R. Kirkpatrick, M.Ed., M.D., F.R.C.P.C.

Brief Biographical Summary

Dr. Xenia R. Kirkpatrick has been qualified as a psychiatrist since 1982 and has experience in clinical, academic, occupational and medical legal environments. She has undertaken approximately 1500 medical legal assessments, plaintiff as well as defense, over 20 years and has been qualified as an expert witness in Ontario. Her medical legal experience focuses primarily on the psychiatric effects of personal injury but also includes employment law and medical malpractice. Dr. Kirkpatrick maintains an active clinical practice in addition to her medical legal and consultation work.

HAROLD BECKER PhD, MD, CCFP, FCFP

Dr. Harold Becker is an Assistant Professor in the Faculty of Medicine, University of Toronto. He obtained his doctorate (PhD) in Medical Biophysics in 1971 and completed his MD degree in 1975. He presently holds Certification as well as Fellowship from the College of Family Physicians of Canada.

As the OMA representative on the Minister's DAC Committee from 1997 through 2001, Dr. Becker chaired the Catastrophic DAC Guidelines subcommittee that re-wrote the Catastrophic DAC Guidelines in April 2001. Dr. Becker's extensive involvement with catastrophic assessments included participation on the Minister's Advisory Panel to re-define Catastrophic Impairment for the review of Bill 59 in 2000. He presently operates Omega Medical Associates where he directs independent multidisciplinary assessments of catastrophic impairment for the auto insurance industry as well as lawyers from plaintiff and defence bars.

Dr. Becker has been a frequent speaker at numerous medical and legal conferences on auto insurance legislation and has also addressed the Ontario Trial Lawyers Association, The Advocates Society, The Canadian Bar Association, Osgoode Hall Law School, The Medicolegal Society of Toronto, and The Law Society of Upper Canada.

Dr. Michael S. Ross

I am a duly qualified physician licensed to practice in Ontario and a Fellow of the Royal College of Physicians and Surgeons of Canada with Specialist Certification in Psychiatry. I have over thirty years of clinical psychiatric experience in which I regularly examine and treat patients with various forms and degrees of mental illness, impairment and disability.

I served for many years on Ontario Medical Association bodies including the OMA Council, its Committee on Work and Health and the Executive of its Section on Occupational and Environmental Medicine of which I was the Vice-Chair for four years. This experience increased my awareness/knowledge of many of the issues related to appropriate population-based models of health care and the effective, efficient delivery of medical services to individuals.

I also served for many years on the Executive of the Canadian Society of Medical Evaluators, was its President and now Chair its Single Joint Assessor Committee and Pilot Project.

I have a special interest in occupational and organizational psychiatry with a focus on individual health and workplace productivity and frequently provide IMEs in this realm. I provide IMEs of employees, primarily at the request of occupational physicians and nurses for employers that include major corporations, small businesses and health care facilities. I also receive referrals and conduct IME's at the requests of unions, employee assistance programs and professional associations.

In the medicolegal portion of my practice, I provide IMEs at the requests of plaintiff and defence counsel. I have been accepted as a court-qualified expert in psychiatry in both civil and criminal matters.

I have significant experience in conducting professionally video-recorded IMEs including those ordered in ***Willets and Johnston*** where I testified at trial.

Further details of my training and experience are noted in my attached curriculum vitae.

MDAC

3200 Dufferin Street, Suite 500, Toronto, Ontario, M6A 3B2
Tel (416) 256-3922 ** Fax (416) 256-4730 ** Toll-Free (877) 563-2437

A. AMEIS
MD, FRCPC, DABPMR (Physiatry)
Medical Director

N. AMEIS
BA, BSc PT, C.C.L.P.
Director: Life Care Planning

D. WAILES
RTNM (NCT/EMG)
Coordinator

B. SHUKEN
BA, LLB
Administrator

G. McPHEE
BA, Administration
Office Manager

Assessor Professions

MEDICINE

- ENT
- Geriatrics
- Gastroenterology
- Neurology
- Physiatry
- Respirology

SURGERY

- Orthopaedic Surgery
- Neurosurgery
- Urology
- Vascular Surgery

PSYCHIATRY/PSYCHOLOGY

- Psychiatry
- Clinical Psychology
- Neuro-Psychology

LIFE CARE PLANNING

- Life Care Plans
- Critiques of Life Care Plans

ALLIED HEALTH SCIENCES

- Chiropractic
- Kinesiology
- Occupational Therapy
- OT Home Modification
- Physiotherapy
- Massage Therapy
- Optometry
- Speech Language Pathology

DENTAL SCIENCES

- Oral & Maxillofacial Surgery

IN ASSOCIATION WITH

- Impairment Resources LLC
- Architectural Services Inc.
- NRVMS

July 5, 2010

Philippa Samworth
Dutton Brock

Dear Ms. Samworth

In indicating to you my strong opposition to a general Rule requiring the electronic recording of all medicolegal evaluations, I wear four 'hats'.

Firstly, as a current member of the Board and former President of the Canadian Society of Medical Evaluators (CSME), which represents Canadian physicians who make a commitment towards excellence in carrying out medicolegal evaluations, whether for plaintiff or defense.

Secondly, as a member of the Executive of the Section on Physical Medicine and Rehabilitation of the Ontario Medical Association (OMA), which represents the Physiatrists of Ontario.

Thirdly, as Medical Director of the Multi-Disciplinary Assessment Centre (MDAC), which is a facility that arranges for and coordinates both single discipline and multi-disciplinary medicolegal assessments at the request of either plaintiff or defense, across the Province and through either direct or remote assessment (telemedicine): this position provides me with a particular and informed perspective with respect to practical issues of cost, facilities, and expert availability and willingness to participate in medicolegal evaluations in general, and videotaped examinations in particular, across the broad spectrum of medical specialties, circumstances and locations of practice.

Finally, as a Physiatrist with subspecialty certification in Pain Medicine, practicing for over 30 years, with experience in carrying out medicolegal evaluations for both plaintiff and defense for 25 years. It may be relevant to add that I served as the OMA representative and as Vice-Chairman of the Minister's Committee on the DAC System, and participated in the MedicoLegal Society of Toronto (MLST) presentation to Justice Osborne. It may also be relevant to note that I have not only coordinated electronically recorded medicolegal evaluations by assessors retained by MDAC, but also I have personally performed several electronically recorded medicolegal evaluations. Moreover, in the past 3 years I have acquired experience in applying audiovisual telemedicine to medicolegal evaluations.

Arthur Ameis MD FRCPC DABPMR [Subsp Cert Pain Medicine]
Physiatrist
Medical Director, MDAC