MEDICO-LEGAL REPORT

This Report has been approved by the Medical Legal Society of Toronto. It was thought that it might be of general interest to the profession in all provinces.

Ce rapport a été adopté par la Medical Legal Society de Toronto. On a pensé que cela pourrait avoir un certain intérêt pour les praticiens dans toutes les provinces.

Introduction

In the Position Statement on Medico-Legal Reports published by the Council of the College of Physicians and Surgeons of Ontario in February 1981, it was stated:

> Where there is an obligation for a physician to produce a medico-legal report, there is an obligation to provide a professionally proper report. Among other things, such a report supplies "the information required to enable the patient to receive any benefits to which the patient may be entitled". (Code of Ethics adopted by the Council of the College of Physicians and Surgeons, November 1979, paragraph 9).

Medico-legal reports are essential to the legal process of adjudicating claims for personal injury. A good medico-legal report will contribute significantly to the proper and just resolution of a claim for personal injuries and expedite the process, reduce the cost, and frequently obviate the necessity of a court appearance by the physician.

In most instances it takes about the same amount of time and effort to prepare a good medico-legal report as a bad one. A good medico-legal report is more likely achieved when members of the legal and medical profession co-operate.

Medico-legal reports generate more direct contact between members of the two professions than any other area of activity. Thus, medico-legal reports afford one of the best opportunities for understanding and co-operation between physicians and lawyers. Unfortunately, they also afford an equal opportunity for misunderstanding, lack of co-operation, distrust and even utter contempt.

Medico-legal reports have been the subject of study by a number of associations and committees and in some instances the study involved the joint effort of members of the legal and medical professions. One such committee was a committee struck by the Council of the Medico-Legal Society under the chairmanship of the Honourable Mr. Justice Stewart in 1971. The committee prepared "Suggested Guidelines in the Preparation of Medico-Legal Reports for Presentation in Court" and a "Detailed Outline for Long Form Medical Reports".

The "Guideline" and "Outline" which have proven to be useful in the past have been amended and copies of each are attached to this report as Appendices "A" and "B". Additional copies are available to any member of the medical or legal profession through the offices of the Medico-Legal Society of Toronto or the Law Society of Upper Canada.

The "Guideline" was prepared to assist a physician who had previously treated or examined the patient and who lacked experience in the preparation of a medico-legal report. The "Guideline" may not be required by a specialist who frequently is asked to prepare medico-legal reports, but the specialist, as well as the inexperienced general practitioner, may find the "Outline" useful to have before him or her when preparing a report.

The Medico-Legal Report

1. *Direction and Disclosure to the Physician*

The lack of sufficient direction and disclosure from the lawyer requesting the medico-legal report was identified as a principal source of difficulty.

(a) *Direction*

If the lawyer were to provide the physician with clear and simple directions as to the matters to be addressed by the physician in the medico-legal report, it would greatly enhance the probability of the lawyer receiving a proper and useful medico-legal report. The lawyer should provide this direction in writing as part of the request for a medico-legal report.

Of necessity the direction that is appropriate will vary with the particular circumstances in each case and with the function of the physician from whom a medico-legal report is requested. In the case of a treating physician who is a general practitioner and who has not continued to treat the patient all that may be required is a description of the injuries observed on examination, the diagnosis, the treatment and the patient's response to the treatment. A treating physician who happens to be the family physician familiar with the patient's medical history and who continues to be involved in the treatment, may be asked to provide an opinion on the effect of the injuries on the patient having regard to the patient's previous medical history, occupation, hobbies and general lifestyle as known to the family physician.

If the treating physician is a specialist, the lawyer may wish a full opinion on the prognosis and the effect of the injuries on the patient and, in particular, the effect on certain aspects of the patient's activities.

If the physician is not a treating physician, the need for specific direction is even greater. A physician in such case should be apprised of the issues concerning the injuries to be addressed by the physician in the medico-legal report.

In each case the lawyer should clearly specify what it is he or she wants the physician to cover in the medico-legal report.

(b) *Full Disclosure*

A physician asked to provide a prognosis or opinion in a medico-legal report should be fully informed by the lawyer of all the available medical information concerning the injuries. A lawyer should not withhold relevant medical information and select the medical information to be disclosed to the physician simply because the information is perceived not to be favourable to the interest the lawyer represents. A physician asked for a prognosis or opinion should be fully informed of the allegations, the specific issues, the pertinent particular circumstances of the patient and provided with all relevant medical information in hand, such as previous medical history, hospital records, X-rays, ECG's, EEG's and laboratory reports.

It can be most disconcerting to a physician to first learn of relevant medical information that was available when the medico-legal report was requested when the physician is under cross-examination in court. The opinion previously expressed by the physician on the incomplete medical information provided is undermined. Relevant medical information is as important to the physician's opinion as relevant facts are to a lawyer's opinion.

One might question the wisdom and judgment of a lawyer who withholds relevant medical information. This creates a risk that such strategy or tactic will backfire should all the relevant medical information become known. A lawyer should bear in mind that the instructions and information conveyed to a physician may be disclosed during the course of a trial.

There may be cases in which the lawyer deems it appropriate not to disclose a previous medical opinion to a physician asked to provide a second opinion until after the second opinion is received. In some cases a physician from whom a second opinion is sought may prefer not to be made aware of the previous opinion until after the second opinion has been given. Whether or not a second opinion is sought and whether or not the previous opinion is disclosed in advance or sometime after receipt of the second opinion are matters which a lawyer must decide based on the particular circumstances in each case. These remarks should not be interpreted as an endorsement of the practice, engaged in by some lawyers, of shopping around for a favourable opinion and disregarding all other opinions received. Such practice is to be discouraged.

2. *Confidentiality*

(a) *The Physician's Obligation to Maintain Confidentiality*

This Report does not attempt to deal with the broad question of confidentiality of health information, a question of considerable interest

and importance. This Report does address two aspects of confidentiality considered germane to medico-legal reports. One aspect is the need for consent of the patient to the release by the physician of medical information, and the other, the extent of the dissemination of the medical information received by the lawyer who requested the medical information.

The relationship between a patient and a physician is one of the highest confidentiality. Pursuant to paragraph 27.22 of Regulation 448 under the *Health Disciplines Act* it is "professional misconduct" to give information concerning a patient's condition or any professional services performed for a patient to any person unless required to do so by law. Under The Code of Ethics of The Canadian Medical Association it is a fundamental principle of ethical behaviour of all physicians to protect the patient's secrets.

A physician should therefore insist on being provided with a valid and adequate written consent to the release of medical information.

A physician should be entitled to rely on the representation made by the lawyer that he or she represents, or his or her firm represents a client as being true. It is a well recognized principle of common law that a lawyer is the client's authorized agent in all matters that may reasonably be expected to arise in the particular proceedings for which the lawyer has been retained.

The very request for medical information by the lawyer or a firm professing to be retained by the patient may be considered as an adequate consent of the patient insofar as the physician is concerned and the physician ought not to be required to go behind the request.

Nonetheless, it is more acceptable to physicians, for purposes related to their own governing bodies, that the lawyer requesting the information provide the physician not only with a clear statement as to the lawyer's or the firm's representation of the patient, but also with a valid and adequate consent of the patient. It is the lawyer requesting the information who should assume responsibility to obtain this valid and adequate consent and be made to answer to any allegation of breach of confidentiality consequent on the release of the medical information. The physician ought to be able to rely on the consent provided by the lawyer being a valid and adequate consent.

(b) *The Consent*

The lawyer should obtain a valid and adequate consent from the patient, spouse, parent, guardian or next of kin, whichever is the appropriate in the particular circumstances of the case.

Attached as Appendix "C" is a simple form of authorization we consider adequate.

A lawyer must recognize and discharge the duty to obtain a valid and adequate consent of the client. A lawyer who fails to do so and who obtains from a physician confidential medical information which should not have been obtained should answer for any alleged breach of confidentiality in the release of the medical information.

(c) *Dissemination of the Medical Information*

The practice realities involved in the conduct of litigation usually require the lawyer receiving medical information in a medico-legal report to disseminate the information, if not the medico-legal report itself.

The Rules of Civil Procedure require the disclosure of all documents relating to any matter in issue which are or have been within the possession, control or power of a party to the action. The Rules also require that every document which is intended to be used at trial, unless leave of the court is granted, be produced for inspection. Thus, the existence of a report is to be disclosed and the report may have to be produced to the other parties to the action.

Further, Rule 31.06(3) of the Rules of Civil Procedure mandates that a party to the action may obtain on discovery the disclosure of the findings, opinions and conclusions of an expert, as well as the expert's name and address, unless the findings, opinions and conclusions were made or formed in preparation for litigation and for no other purpose *and* there is an undertaking not to call the expert as a witness at the trial. Thus, if the physician is to be called at trial *or* if the findings, opinions and conclusions were not formed solely in preparation for litigation, the substance of the report, if not the report itself, must be disclosed.

Under Section 52 of the *Evidence Act*, the medico-legal report is admissible in evidence, and the lawyer receiving it is under an obligation to give notice and to produce the report to all other parties failing which the lawyer may not, except by leave of the court, call the physician who wrote the medico-legal report to give evidence at trial touching upon the examination conducted by the physician which is the subject matter of the physician's medico-legal report.

A lawyer may consider it necessary to make the medico-legal report available to an expert retained to give advice or an opinion. Thus, a lawyer may provide the medico-legal report of one physician to another physician, or to an expert in the field of rehabilitation or to an expert in the field of vocation or to an occupational therapist, etc. It is the view of some physicians that it is preferable that a medico-legal report not be made available by a lawyer to the patient who is the subject of the medico-legal report. Since it is the patient who pays for the medico-legal report and it is in effect the patient's medico-legal report, although obtained on the patient's behalf by the lawyer, it would not be practical or proper, for a lawyer to refuse the patient access to the medico-legal report.

In this regard Rule 26 of the Law Society of Upper Canada's "Professional Conduct Handbook" entitled: "Medical-Legal Reports" is particularly relevant. The Rule reads:

1. A lawyer who receives a medico-legal report from a physician that is accompanied by a proviso that it not be shown to the client, shall return the report immediately to the author unless the lawyer has received specific instructions to accept the report on this basis.
2. A lawyer who receives a medico-legal report from a physician containing opinions or findings which if disclosed might cause harm or injury to the client, should attempt to dissuade the client from seeing the report but, if the client insists, the lawyer is duty bound to produce it.

Neither the Rule, nor the Commentary which accompanies the Rule, states that a lawyer must show the report to the client. If the client insists on seeing the report, then the lawyer must make the report available since it is the client's report and paid for by the client. These matters are, however, matters that should be discussed between the lawyer and the client and resolved as part of the understanding and confidence the client places in the lawyers's management of the case. In many cases a client may not wish to see the report and it may serve no valid purpose for the client to see the report.

The Commentary accompanying the Rule suggests that a full and frank discussion between the physician and the lawyer informing the physician of the lawyer's obligations may avoid problems as to the limitations a physician may place on the use of the report. It is also suggested by the Commentary that where the client insists on seeing the report, this should be permitted with the physician present in order that the significance of the conclusions contained in the report may be explained.

There is nothing to prevent a physician in the appropriate circumstances from suggesting to the lawyer that the medical information and opinions expressed in the medico-legal report not be conveyed to the patient, unless demanded by the patient, on the basis that the information might be detrimental to the patient's well-being.

A lawyer who obtains a medico-legal report on a patient who is not a client will usually have to provide the medico-legal report to the client who is obliged to pay for the medico-legal report and, quite frequently, to other persons retained by the client to assist the lawyer in the conduct of the litigation.

A physician must, therefore, realize that the medico-legal report will be disseminated to a number of persons, including in some instances the patient who is the subject matter of the report.

There is always the risk that candid and conscientious evaluation and full and frank disclosure will be inhibited by the realization that the medico-legal report will be disseminated to a number of persons, including in some cases the patient, but the ethical physician will respond prudently

and honestly and not omit proper and valid information that should be contained in the report as relevant to the assessment of the injuries and the effect of the injuries on the patient.

As a matter of professional courtesy, consideration should be given by a lawyer who proposes to have a client examined by another physician who has not previously examined or treated the client to advising the treating or family physician and, if opportune, discussing it with the treating or family physician in advance. In a case where the treating or family physician continues to be involved in the medical treatment of the client, the lawyer should consider sending a copy of the medico-legal report to the treating or family physician.

The Physician's Obligation to Provide a Medico-Legal Report and the Physician's Fee

1. *Code of Ethics*

The Rules of Ethics of the medical and legal profession impose general ethical duties on the physician and the lawyer applicable to medico-legal reports. Under certain circumstances specific obligations are imposed on the physician and the lawyer.

(a) *Medical*

The responsibilities of an ethical physician to the patient stated in The Code of Ethics issued by the Canadian Medical Association in September 1982 include the following:

> An ethical physician will, on the patient's request, assist him by supplying the information required to enable the patient to receive any benefits to which the patient may be entitled (Section 9).

The ethical obligation is reinforced by the provisions of Section 27.27 of Ontario Regulation 448 made under the *Health Disciplines Act* which defines professional misconduct to include:

> Failing to provide within a reasonable time and without cause any report or certificate requested by a patient or his authorized agent in respect of any examination or treatment performed by the member.

The meaning of certain phrases in this Regulation are clarified in a Position Statement published by the Council of the College of Physicians and Surgeons in an interim report to the members of the medical profession in Ontario in February of 1981. Under the caption of "Within a reasonable time" the Position Statement stated as follows:

> This requirement can usually be judged best in the type and detail of the information requested and the other professional commitments of the requested physician. Under ordinary circumstances, however, it is reasonable to expect that a medico-legal report normally will be provided within two months after the examination or the receipt of the request whichever occurred last. The lawyer requesting the report should be notified of any unavoidable delay beyond this two months' period.

A lawyer who does not receive a medico-legal report within a reasonable period of time as defined from a physician who has previously examined or treated the client and has been provided with a proper authorization for the release of the information may complain to the College of Physicians and Surgeons. The College of Physicians and Surgeons is the regulatory body of the medical profession, akin to the Law Society of Upper Canada which governs barristers and solicitors of Ontario. Before lodging a complaint a lawyer should advise the physician of the intention to do so and afford the physician an opportunity to respond.

The complaint must, in accordance with the regulations, be made in writing and directed to the Chief Complaints Officer at the College. It should identify the physician and set out the circumstances of the complaint.

When such a complaint is received, a copy of the letter of complaint is forwarded to the physician with the request that he or she answer, setting out any explanation or representation he or she is to make with respect to the matter within a fixed and brief period of time. Subsequent to that, the response of the physician, if any, is brought to the attention of the complainant unless the physician complained of forbids the College to do so. The Complaints Officer makes every attempt to resolve the issue at that stage, and in most cases this results in a report.

If the physician continues in his or her refusal to provide the report, without alleging any just cause, the matter is considered by the Complaints Committee of the College consisting of physician members and representatives of the public. The Complaints Committee has the power to dismiss the complaint, warn the physician concerning this conduct or refer the matter complained of to the Discipline Committee for a hearing.

Where the matter is referred to the Discipline Committee a hearing is held, pursuant to a Notice of Hearing issued, and the Discipline Committee is entitled to discipline the doctor as provided in the *Health Disciplines Act*, ranging from reprimand to fine, suspension, attachment of terms and conditions to the licence and revocation of the licence.

Where the complaint is dismissed by the Complaints Committee, the complainant may have recourse to the Health Disciplines Board which hears the matter de novo and may exercise all the powers of the Complaints Committee. The experience of the College has been that where lawyers draw matters of this kind to the attention of the Complaints Officers, resolution of the matter without discipline is effected in the vast majority of cases.

(b) *Legal*

On August 25th, 1974, the Council of the Canadian Bar Association adopted a Code of Professional Conduct prepared by a Special Committee

on Legal Ethics. Chapter XIX of this Code entitled "Avoiding Questionable Conduct" sets out the following Rule:

> The lawyer should observe the rules of professional conduct set out in this Code in the spirit as well as in the letter.

Paragraph 7 of the Commentary under this Rule provides as follows:

> The lawyer has a professional duty, quite apart from any legal liability, to meet financial obligations incurred or assumed in the course of his practice when called upon to do so. Examples are agency accounts, obligations to members of the profession, fees or charges of witnesses, sheriffs, special examiners, registrars, reporters and public officials as well as the deductible under a governing body's errors and omissions insurance policy.

Rule 13 of the Law Society of Upper Canada's Professional Conduct Handbook, entitled "Responsibility to the Profession Generally", provides:

> The lawyer should assist in maintaining the integrity of the profession and should participate in its activities.

Paragraph 6 of the Commentary under this Rule provides in part as follows:

> In order to maintain the honour of the Bar, members have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients unless, before incurring such an obligation the lawyer clearly indicates in writing that the obligation is not to be a personal one.

Thus, a physician who provides a medico-legal report to a lawyer is entitled to expect the lawyer to pay the physician's fee for the medico-legal report within a reasonable time unless the lawyer indicates in writing at the time the request is made that he or she is not prepared to meet this obligation personally. Physicians may file a complaint with the Law Society of Upper Canada in the event that a lawyer fails to pay the fee within a reasonable time.

A physician is free to enquire from a lawyer requesting a medico-legal report when and by whom payment of the fee will be made.

2. *The Problems In Practice*

It has become the practice of a significant number of lawyers to routinely disclaim any responsibility for payment of the physician's fee for the preparation of a medico-legal report. The legal codes of ethics permit, or one might conclude they invite, lawyers to make such a disclaimer. The physician asked to provide a medico-legal report in respect of an examination or treatment performed by the physician is put in the position where he or she is obliged under the medical code of ethics to provide a proper medico-legal report within a reasonable period of time without any understanding or protection in regard to the payment of the fee.

Another common practice amongst lawyers is to inform the physician that they will see to it that the physician's fee is paid out of the proceeds, if any, of the litigation. The physician who had previously examined or treated the patient is obliged to provide a report, and payment of the

fee is contingent on the litigation. The physician ought not to be compelled to accept this arrangement, bearing in mind that the physician has no control over the litigation or any direct participation in the conduct of the litigation. In many instances it is a lawyer with whom the physician has had previous experience of non-payment who disclaims any personal responsibility for payment of the fee or makes payment contingent on the outcome of litigation.

It is the position of the College of Physicians and Surgeons of Ontario that the lawyer who requests a medico-legal report is personally responsible to pay the physician's fee unless the lawyer specifically disclaims responsibility in advance. Previous experience of non-payment by a lawyer who requests a report may, according to the policy of the College, constitute justification for the physician demanding payment in advance. In some instances physicians accumulated outstanding fees in many thousands of dollars, which eventually had to be written off as bad debts. There are tax implications that affect a physician who sends out an account for a fee for the preparation of a medico-legal report and then does not receive payment of it in the tax year in which the account is rendered.

There is an obligation on the patient, who has become the client of the lawyer, to pay the physician's fee for the preparation of the medico-legal report. Should the physician who has previously examined or treated the patient be satisfied with the patient's obligation to pay the fee?

The patient is also the client of the lawyer. The medico-legal report which is usually requested by a lawyer, albeit on behalf of a client, is required for purposes more closely aligned with the interests of the client/patient which the lawyer serves and for which the lawyer anticipates a fee.

The lawyer can and usually does make adequate arrangements in advance for the payment of disbursements and fees. It does not seem appropriate that a lawyer should be able to ignore payment of the physician's fee in the arrangements made with a client, demand a medico-legal report disclaiming responsibility for payment of the physician's fee or make payment contingent on the litigation and place the physician who has previously examined or treated the patient in a position where the physician is obliged to provide a report without any satisfactory understanding or protection in regard to the payment of a fee. A physician placed in this position may be one who has previously examined or treated the patient on one or two occasions in an emergency situation or at the request of another physician and has not had, nor is likely to have, any further contact or relationship with the patient.

It is recognized that an additional financial burden might be imposed on a patient who has suffered a serious disabling injury if the patient were required to pay fees for medico-legal reports before any compensation for the injury is received. The physician ought to recognize an obligation to

support the patient in litigation to recover compensation, and be aware that without this support a heavy strain could be imposed on the patient and upon a lawyer engaged extensively in the practice of personal injury litigation on behalf of plaintiffs. A physician should be prepared in certain circumstances to support the patient in litigation and defer payment of the fee for the preparation of the medico-legal report.

Legal aid is now available, and while legal aid may not provide a source of funds in advance, it does provide for the payment of expenses incurred from time to time as the litigation progresses. Fees for the preparation of appropriate medico-legal reports are included in these expenses.

There is the practical consideration that a physician may not be inclined to make the effort to prepare a proper medico-legal report when the physician feels that he or she is unfairly being compelled to prepare the report without any satisfactory arrangements in advance for payment of a reasonable fee within a reasonable period of time.

Unless the problems that arise concerning the physician's fee are resolved, the physician's fee will continue to be the cause of considerable aggravation between lawyers and physicians. To resolve the problems that arise under the present provisions of the Codes of Ethics and the practice, it is necessary that there be an obligation to pay a reasonable fee to the physician for the preparation of a medico-legal report within a reasonable period of time concomitant with the obligation imposed on the physician to provide a medico-legal report in respect of an examination or treatment performed by the physician. The lawyer should accept the responsibility to make arrangements acceptable to the physician for payment of the physician's fees for the preparation of a medico-legal report. The physician should recognize that due consideration must be given to the circumstances of each individual case. For example, in the case of an impecunious client, the physician ought to be prepared to support the patient in litigation, particularly if the patient continues to be a patient of the physician, and defer payment. The lawyer should assume the obligation to bring the particular circumstances to the attention of the physician.

3. *Time for Payment of the Physician's Fee*

A physician should be entitled to receive a reasonable fee for the preparation of a medico-legal report within a reasonable period of time. What constitutes a reasonable time will vary considerably in the particular circumstances of each case. As a general rule a physician should be entitled to receive payment within sixty days of providing the medico-legal report.

A physician who believes that the circumstances of a particular case warrant a period less than sixty days should contact the lawyer, inform the lawyer of the relevant circumstances and settle the period of time within which the physician's fee is to be paid. It is difficult to envisage circumstances

that would warrant payment in advance unless perhaps the exceptional circumstance where the physician has had a previous experience of non-payment involving both the lawyer and the patient. The invidious practice of demanding payment in advance should, except on very rare occasions and because of exceptional circumstances, cease.

If the lawyer deems the circumstances appropriate to extend the period of time beyond the sixty days, he or she should notify the physician, inform the physician of the relevant circumstances and settle the period of time.

4. *Amount of the Physician's Fee*

Regulation 448 under the *Health Disciplines Act*, paragraph 27.9, defines "professional misconduct" to mean "charging a fee that is excessive in relation to the services performed". The Code of Ethics of The Canadian Medical Association provides as a general principle of ethical behaviour for all physicians that the physician "be responsible in setting a value on the physician's services". The same Code of Ethics provides under the section entitled "Responsibilities to the Patient" that an ethical physician "in determining his fee to the patient, will consider his personal service and the patient's ability to pay and will be prepared to discuss his fee with his patient".

The Ontario Medical Association Schedule of Fees suggests that the fee for a medico-legal report "should reflect fairly the difficulty of the matter, the experience and the expertise of the doctor, the nature and the complexity of the report and the time required to prepare it."

In some instances physicians have charged a fee that, in the circumstances, was exorbitant, and could only be properly characterized as "gouging".

The most significant factor should be the total time spent in the preparation of a medico-legal report, including time spent on the examination, on reviewing pertinent information and medical texts and in writing the report. The time spent must also be measured against and balanced with the work product in order to arrive at a final determination as to the fairness of the hourly rate being charged by a particular physician.

In assessing the appropriate fee to be charged, the fee should take into account the following factors:

(i) amount of time spent;
(ii) the expertise and experience of the particular doctor;
(iii) the complexity of the case;
(iv) whether an examination was done;
(v) whether the report is repetitious of previous work already done;
(vi) whether the report is a follow up on an earlier report;
(vii) whether the report discloses relatively routine attendances and observations;
(viii) the number of documents reviewed.

The Ontario Medical Association considered whether it might establish a listing in the Ontario Medical Association Schedule of Fees for medico-legal reports. The matter was considered by the Central Tariff Committee and it was felt that the wide spectrum of medico-legal reports and the varying qualifications of the physicians writing these reports would create a very diverse listing, and that it was preferable that the fee for a medico-legal report remain an item of "independent consideration".

If the physician in the circumstances of a particular case deems it appropriate that the fee not be limited to the fee that would result if the general rule were applied, he or she should make this known to the lawyer and resolve the basis upon which the fee is to be determined.

A physician ought to be prepared to disclose, upon request, the hourly rate he or she proposes to charge for preparation of a medico-legal report.

A physician who has not previously treated or examined a claimant is not under the same ethical obligation to respond to a request to conduct an examination and provide a medico-legal report. A physician in these circumstances is free to refuse the request or to insist on suitable arrangements being resolved at the outset for the payment of a fee. The equitable resolution of personal injury claims is in the public interest, as well as the private interest of individual claimants. The evidence and opinions of medical specialists are essential to the equitable resolution of personal injury claims. Physicians who have not previously examined a claimant should recognize an obligation to society to respond to reasonable demands on their time to conduct an examination and provide a medico-legal report in return for a reasonable fee paid within a reasonable period of time. There are no circumstances which justify other than a reasonable fee to be paid within a reasonable period of time.

Physicians should be mindful that justice depends on the willingness of citizens to assist the courts and that this public duty applies particularly to those with special training and experience as possessed by physicians. The Code of Ethics of the Canadian Medical Association sets out the responsibility of the ethical physician as follows:

> The complete physician is not a man apart and cannot content himself with the practice of medicine alone, but should make his contribution, as does any other good citizen, towards the well-being and betterment of the community in which he lives.

The distinction between a physician who previously examined or treated a patient and one who did not warrants a separate general rule as to the time within which the physician's fee is to be paid or a separate guideline in determining the amount of the fee. A physician who has previously examined or treated the patient may have a very tenuous relationship with the patient. For example, the physician may have responded to an emergency situation and, but for one occasion, was never again involved in the patient's medical treatment. The fact that the physician

has not previously examined or treated the patient should be a factor to be considered in determining whether a departure from the general rule and guideline is warranted.

5. *Mediation*

Physicians are free to file complaints with the Law Society of Upper Canada in the event that a lawyer fails to pay the fee for preparation of the medico-legal report within a reasonable period of time.

A non-binding mediation service provided by the Ontario Medical Association and the Law Society of Upper Canada is available to assist in the resolution of the fee disputes in medico-legal matters.

Conclusion

Physicians and lawyers share a responsibility to see that good medico-legal reports essential to the administration of justice in personal injury cases are made available as required, and at a reasonable cost. The principles and guidelines set out in this Report were formulated to promote a more co-operative and harmonious relationship between physicians and lawyers who must work together to provide medico-legal reports. Physicians and lawyers should review their practice to ensure that it is consistent with the principles and guidelines set out in this Report.

APPENDIX "A"
SUGGESTED GUIDELINES IN THE PREPARATION OF MEDICAL REPORTS FOR PRESENTATION IN COURT

Dear Doctor:

A good medico-legal report need take no more time and effort than a poor medico-legal report. A good medico-legal report will maximize the possibility of a resolution of the claims without the necessity of your personal appearance in court. The following are the minimum requirements as to the form of your report:

1. It should indicate that you are a "duly qualified medical practitioner licensed to practice" within a stated part of Canada. While not legally obligatory it is most desirable for your report to contain a statement of your qualifications, such as year of graduation, fellowships, specialties, etc. It might be convenient if you were doing a significant amount of medico-legal work to photocopy a curriculum vitae which could be referred to in your report and appended to it.
2. It must be signed by you personally. You cannot rubber-stamp it or have it signed by your secretary on your behalf.
3. Never give information bearing on the question of liability. *Do not*, for example, say that the patient was stopped at a red light for ten seconds when he was suddenly hit from behind by a vehicle proceeding at a high speed. You *should* say that the patient stated that he was involved on a given day in a motor vehicle collision. You *may* say (if it is relevant) that his car was hit from behind. This does not preclude our obtaining, as part of your history, information so as to understand the mechanism of the injury or stating in your report those aspects of the mechanism of the injury relevant to your assessment of the injury.
4. You should touch upon *each* examination to date. In a number of unreported county court decisions the medical reports were not accepted because they only dealt with some of the examinations.
5. Consider your words carefully. You *may* be cross-examined upon it. Therefore, avoid vagueness and uncertainty when legitimately possible.
6. Use medical terminology so that your report is precise, but then explain this in language which would be understood by the jury. Without this, you or some other physician may be called to court to explain it.

Send in your report as quickly as possible after receiving the request to do so. Settlement of the case is not possible unless your report can be circulated well before trial to the opposing parties. Remember that if you have not presented a report you are not, except by leave of the court, permitted to give evidence. This could seriously affect your patient's case and subject you to the criticism of the presiding judge.

The Medico-Legal Society suggests that the following skeleton outline be used as a check list for most reports:

1. Statement of physician's qualifications.
2. Date, place and reason for the examination(s).
3. The history, and symptoms as related by the patient. If you are consulted as a specialist you may confine yourself to matters relevant to the condition upon which you are reporting.
4. Statement of the patient's previous health, where this is known and where it is relevant.

5. Physician's findings which corroborate or do not corroborate each of the complaints, or which indicate the results of an injury which has not been noticed.
6. Physician's diagnosis of each of the symptoms complained of (and of any other symptoms).
7. The causal connection between the accident and the complaints.
8. The treatment.
9. Degree of disability at the time of the examination.
10. Your prognosis.

Attached is such a detailed skeleton of a long-form report. Many physicians will find it more detailed than their customary report. They may feel its preparation would make undue demands on their time. The Society feels that the use of such a report (at least by way of final report) will not only increase the chance of settlement but that it will also greatly reduce the number of times the doctor is called upon to give oral evidence in court. If a doctor can hope to avoid three hours in court, an extra hour spent in preparation of the report is obviously worthwhile. In any event, both lawyer and patient recognize that a superior report involves considerable time, for which they will be quite prepared to pay, particularly as a good report may make a trial unnecessary or at least considerably reduce the time and expense incurred at trial.

APPENDIX "B"
DETAILED SKELETON OUTLINE FOR LONG-FORM MEDICAL REPORTS

1. Your qualifications (if you have not already submitted them in an earlier report dealing with *this* patient).
2. The patient's name (preferably as stated in the pleadings).
3. Date, place and reason for the examination.
4. History as related by the patient:
   (a) The patient's version of what he believes caused his condition (i.e. the mechanics of the injury—how it was caused, not who was at fault).
   (b) A complete list of the injuries or conditions complained of by the patient (whether these seem significant and relevant or not and whether the patient has recovered or not). If consulted as a specialist, confine yourself, if you think it appropriate, to matters relevant to the topic to be reported on.
5. Your findings which do (or do not) corroborate *each* of these items of complaint, or which indicate the results of an injury which have not been noticed.
   (a) Physical corroboration (spasm, limitation of movement, etc.) of complaint A, of complaint B, etc.
   (b) Diagnostic corroboration (x-rays, EEG, etc.) of complaint A, of complaint B, etc.
6. Diagnosis:
   (a) A description of diagnostic procedures undertaken by you or by others with respect to each symptom or condition.
   (b) Your conclusions.
7. Causal connection with the accident—consider and give your professional opinion of the precipitating factor or "cause" of the patient's condition. The court must know if the injury or condition for which damages are claimed was probably caused, aggravated or accelerated by the accidents or events complained of.
8. Treatment:
   (a) The treatment you recommended for symptom A, for symptom B, etc.
   (b) Whether or not your recommended treatment has been followed. If not, why not, and the probable result.
9. Degree of disability:
   (a) The extent of impairment of function at the time of your examination which (i) should be treated and (ii) cannot be treated (this is most important if it exists), (iii) is unlikely to improve spontaneously, and (iv) will probably improve spontaneously.
   (b) The pain, suffering, inconvenience and discomfort which you would expect (i) the patient has suffered and (ii) will *probably* suffer (or not) in the future.
10. Prognosis:
    (a) Your opinion as to the probability of future recovery.
    (b) Your opinion as to the probable nature of permanent impairment.
    (c) The probable time within which maximum recovery can be expected.
    (d) Having regard to the individual and his personal activities, the extent to which his activities should or will be curtailed.

NOTE: Avoid throughout your report vague expressions such as "it is possible that". Express the matter in terms of percentages if you can (e.g. "there is a 10% chance of recurrence within five years"). Throughout, use technical medical terms for the sake of precision and then follow these by a description couched in ordinary lay language.

[Signature of the reporting doctor]

APPENDIX "C"
MEDICAL AUTHORIZATION

TO: Dr.: _____

This is to authorize you to furnish my solicitors, _____ _____, with all information, opinions and reports which they may request from you from time to time regarding the physical condition and treatment of _____ and your full cooperation with my solicitors is respectfully requested.

DATED at , this day of 19 .

_____ _____

Witness