



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

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

Submitted by: **Ontario Bar Association**



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## Table of Contents

The OBA .....	2
Introduction .....	2
Distinguishing among Different Roles Physicians may Play in Legal Processes.....	2
Information Regarding Privilege .....	3
(i) Recommendations that Physicians Consult or seek guidance from the CMPA.....	3
(ii) Distinguishing Independent Medical and Designated Assessments from Privileged First-Party Examinations.....	4
More Neutral Communication of Physician’s Role in Independent Examinations .....	5
Timelines where Physician Retained by Party (see pp. 8-9, lines 305-317).....	5
Information versus Opinion.....	6
Record Retention Requirements vary by Context.....	6
Other Issues .....	7
Neutral Language .....	7
Stating the Degree of Certainty.....	7
Level of Expertise .....	7
Conclusion.....	8



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

## **The OBA**

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

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

## **Introduction**

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

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

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

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



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

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

### **Information Regarding Privilege**

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

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

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

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

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



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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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



## Information versus Opinion

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

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

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

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

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

## Record Retention Requirements vary by Context

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





## Other Issues

### Neutral Language

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

### Stating the Degree of Certainty

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

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

### Level of Expertise

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

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

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





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

## Conclusion

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

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

# Appendix I

## Draft CPSO Third-Party Processes Policy with OBA Comments and Highlighted areas of Discussion

### Treating Physicians, Independent Medical Examiners, Medical Experts

#### Introduction

At times, physicians may provide health information or medical opinions for a third party process. Third party processes can include those related to eligibility for insurance benefits, workers' compensation, workplace arrangements and legal proceedings.<sup>1</sup>

While each type of third party process will have unique characteristics, they can be generally described as processes in which health information or medical opinions play a critical role, but whose ultimate outcome is not related to the provision of health care. Physicians' involvement in third party processes can take a variety of forms. Physicians may comment on a patient they are treating, or act as an independent medical examiner or medical expert. In doing so, physicians may discuss a specific patient or individual; the professional care and conduct exhibited by other physicians; or opine on broader topics, such as an area of medical practice, or a medical condition.

The way in which physicians provide information or opinions for a third party process may also vary. For example, physicians may complete forms created by third parties, write formal reports, conduct independent medical examinations and/or testify in a legal proceeding.

As physicians' roles in third party processes often differ from that in typical health care encounters, this policy sets out general expectations for physician conduct to ensure that physicians are able to maintain the same standards of professionalism and excellence they exhibit when caring for patients.

Physicians should be aware that this policy does not represent an exhaustive catalogue of the totality of requirements that may apply to specific third party processes. Consequently, in addition to consulting this policy, the College encourages physicians to keep informed of any additional requirements that may be applicable to the third party process with which they are involved<sup>2</sup> and to seek guidance in this regard where necessary, so they can ensure that they have complied with their obligations.

<sup>1</sup> This includes proceedings arising in civil, criminal, family, or administrative law (such as College proceedings).

<sup>2</sup> For instance, there may be requirements for third party processes that are specific to the insurance industry or to legal processes. These include, but are not limited to O.Reg 403/96, *Statutory Accident Benefits Schedule-Accidents on or after November 1, 1996* enacted under the *Insurance Act*, R.S.O. 1990, c. I.8, O.Reg 34/10, *Statutory Accident Benefits-Effective September 1, 2010*, enacted under the *Insurance Act*, R.S.O. 1990, c. I.8, O.Reg 438/08, *Rules of Civil Procedure* enacted under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, or other rules under the *Courts of Justice Act* and its regulations, rules enacted under the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22; [the rules of the relevant tribunal; the \*Child and Family Services Act\*; the \*Workplace Safety and Insurance Act\*; as well as the principles of solicitor/client and litigation privilege.](#)

# Appendix I

## Draft CPSO Third-Party Processes Policy with OBA Comments and Highlighted areas of Discussion

### Terminology

For the purposes of this policy, 'information' and 'opinions' will be used as follows:

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

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

### Principles

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

When providing information or opinions for a third party process, physicians embody these values and uphold the reputation of the profession by:

1. Treating individuals involved in the third party process with respect;
2. Communicating effectively and clearly about all elements related to the third party process;
3. Providing an opinion in an accurate and objective manner that is substantiated by fact and sound clinical judgement;
4. Conducting themselves within the limits of their knowledge, skill and judgement, and openly disclosing to third parties any deficiencies in knowledge or expertise that will prevent or limit their participation in the third party process;
5. Fulfilling requests for information or opinions in accordance with reasonable timelines.

### Scope

This policy applies to all physicians who provide information and opinions for a third party process. This includes treating physicians, independent medical examiners and medical experts.

### Policy

The College expects that when providing information or opinions for a third party process, physicians will act with the same degree of integrity and professionalism as they would when delivering healthcare.

Highlighted below are some of the issues physicians may encounter when providing information or opinions for a third party process. Professional expectations for physician conduct are set out for each stage of the process.

# Appendix I

## Draft CPSO Third-Party Processes Policy with OBA Comments and Highlighted areas of Discussion

### 1. Preliminary Considerations

#### Obligation to Provide Information or Opinions

When receiving a request to participate in a third party process,<sup>3</sup> physicians must first consider whether they are obligated to participate or whether their involvement is elective.

Physician participation is obligatory in two circumstances: when they are asked to provide **information** about individuals with whom they have a treating relationship; and when they have a legal requirement<sup>4</sup> to provide **information or opinions**. If neither of these circumstances apply, physicians are not required to participate in the third party process; however, they may elect to do so.

When physician involvement is elective, the College expects physicians to exercise sound professional judgement and determine whether their participation is prudent. This will require a consideration of whether physicians can deliver the information or opinions sought in a manner that accords with the expectations set out in this policy. In doing so, physicians may wish to consider, among other things, whether they have the requisite expertise or knowledge the matter requires, and whether any actual or potential conflicts of interest exist between the physician and the parties involved.<sup>5</sup>

Should physicians have any doubts as to whether participating in the third party process is prudent, the College advises physicians to err on the side of caution, and either decline the request, or at minimum, obtain guidance from the Canadian Medical Protective Association (CMPA) or legal counsel before proceeding.

#### Communication

It is imperative that physicians discuss their role in the third party process and their practices with respect to fees with the third party and where applicable, with the subject of the third party process.

<sup>3</sup> Requests can be made by any individual involved in a third party process. This may include a patient, an insurer, an employer, a lawyer or the like.

<sup>4</sup> This includes, but is not limited to, situations in which physicians are subpoenaed or summonsed to provide information or opinions in the context of a legal proceeding.

<sup>5</sup> 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 relationship with any of the parties involved (Canadian Medical Protective Association, 2009. "Acting as an expert in medico-legal proceedings". Available at: [https://www.cmpa-acpm.ca/cmpapd04/docs/resource\\_files/infosheets/2009/pdf/com\\_is0998-e.pdf](https://www.cmpa-acpm.ca/cmpapd04/docs/resource_files/infosheets/2009/pdf/com_is0998-e.pdf)). To manage conflicts of interest effectively, the College advises physicians to disclose the existence of the potential conflict before accepting a request to provide information or opinions. An open discussion of the situation will allow all parties to consider whether objectivity will be a concern in the specific circumstances.

# Appendix I

## Draft CPSO Third-Party Processes Policy with OBA Comments and Highlighted areas of Discussion

### *a) Physicians' role*

When providing information or opinions for a third party process, physicians might interact directly with the individual who is the subject of the process. It will be important for physicians to be clear with individuals about the unique role physicians play in the third party process.

In doing so, physicians should convey to the individual that in providing information or opinions, they are complying with the request or requirements of the third party and that while they are involved in the third party process, the outcome of the process, such as the final decision regarding eligibility for benefits, or entitlement to legal remedies is not made by the physician.

Physicians should also indicate ~~that in providing information or opinions to the third party, they may have to release information that may not be in the individual's best interests, or that may prove disadvantageous; for instance, it may negatively affect an application for insurance benefits or lead to an unfavourable outcome in a legal proceeding that their role is not to treat the patient but to provide a neutral assessment, without taking sides, and that they may have to release information about the individual to a third party. Patients should understand that this information may be released whether it is advantageous or disadvantageous to the individual and that the released information may assist the individual or negatively affect the individual's position.~~

Communicating the above at the outset will serve to ensure that all parties have a clear understanding of the physician's role, the nature of the third party process and the ways in which the physician encounter may differ from a typical appointment for health care.

### *b) Fees*

For some third party processes, requirements for physicians' fees will be set out in law.<sup>6</sup> Absent specific legal requirements, the College acknowledges that physicians may adopt their own practices with respect to fees.

Physicians should discuss any such requirements or arrangements (including cancellation fees for missed appointments) with the third party and with the subject of the third party process (as required) before proceeding. Physicians should refer to the Ontario Medical Association's *Guide to Third Party and Other Uninsured Services* for the recommended schedule of fees.<sup>7</sup>

While it is generally permissible for physicians to request receipt of payment in advance of providing the information or opinion, the College encourages physicians to refrain from doing so on compassionate grounds, when the fee is being paid directly by the individual who is the subject of the third party process, and the information or opinion being provided relates to basic income and health benefits.

### **Consent**

Obligations with respect to consent will differ depending on whether physicians are asked to provide information or opinions about a specific individual or whether

<sup>6</sup> For instance, see *Workplace Safety and Insurance Act, 1997*, S.O. 1997 c. 16, Sched. A., s.37(5).

<sup>7</sup> <https://www.oma.org/Economics/billing/ThirdPartyGuide.pdf>

# Appendix I

## Draft CPSO Third-Party Processes Policy with OBA Comments and Highlighted areas of Discussion

physicians have been asked to comment on more general matters, such as a specific area of medicine, or a medical condition.

Where physicians are commenting on more general matters and no information about a specific individual has been relied upon or will be disclosed, consent might not be required.

When physicians are commenting on a specific individual, they may need to disclose the individual's personal health information and in some instances, may also have to conduct a medical examination. Consent is generally required in these instances.<sup>8</sup>

If physicians are uncertain about their consent obligations for any reason, the College encourages them to err on the side of caution and to contact the CMPA or their legal counsel for guidance before proceeding.

While the specific information relayed in the context of the consent process will likely vary depending on the circumstances of each case, at minimum; physicians should ensure the following points are conveyed to the individual:

- Personal health information will be disclosed to the third party;**
- Personal health information will otherwise be kept confidential unless physicians are permitted or required by law to disclose the information;
- Individuals can withdraw consent at any time, however this will prevent the physician from providing information or an opinion for the third party process;
- Individuals are entitled to place limits on the personal health information that physicians can disclose, however such limitations may prevent physicians from proceeding with the third party's request for information or opinions;
- Where applicable, the purpose of the medical examination, and what it will entail;<sup>9</sup>
- Physicians' obligations to be truthful when providing information and forming opinions.

The College advises physicians to document that consent for the disclosure of personal health information and/or the medical examination (if conducted) has been obtained.<sup>10</sup>

<sup>8</sup> Consent requirements for the disclosure of personal health information are contained in *Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched A., *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5. Obtaining consent for a medical examination is a requirement. Should physicians be uncertain whether consent has been properly obtained or will authorize specific use of information, the College advises them to seek the guidance of the CMPA.

<sup>9</sup> This includes an indication of what areas of the body will be examined, what functional capabilities the physician will be testing, and what types of questions the physician may have to ask.

<sup>10</sup> This can be documented in the notes or records physicians keep in relation to the examination and/or report.

# Appendix I

## Draft CPSO Third-Party Processes Policy with OBA Comments and Highlighted areas of Discussion

### **Presence of Observers & Audio/Video Recording**

When a medical examination is conducted as part of a third party process, the College is aware that one or more of the parties involved may wish to have an observer present during the examination, or may request that the examination be recorded by transcription, audio and/or video equipment. Whether this type of request can be entertained will depend on the specific circumstances of each case, and the College advises physicians to discuss the matter with the parties involved before the examination proceeds.

Where the third party process is related to a legal proceeding, physicians should be aware that specific rules relating to observers may apply.<sup>11</sup> Physicians should seek the guidance of the lawyer involved in the third party process, and where necessary, the advice of the CMPA or their own legal counsel.

If the third party process is not related to a legal proceeding, the College advises that although physicians are not obligated to conduct an examination in the presence of an observer or to record an examination, they are permitted to do so if they wish.

Any arrangements with respect to observers or recording must be mutually agreeable to the parties involved. Should the parties disagree over whether the examination will be recorded, or will be conducted in the presence of an observer, the College recommends that the examination be postponed until these matters can be discussed with the third party and a resolution reached.

## **2. Providing Information or Opinions**

### **Objectivity & Impartiality**

The distinct nature of a third party process can, in some instances, give rise to claims that the information or opinions provided are biased.<sup>12</sup> To avoid such claims, the College expects physicians to provide information or opinions in an objective and impartial manner.

Any findings or opinions contained in a report must be stated objectively, using neutral language, free from preconceived notions or personal bias.

11 O.Reg 438/08, *Rules of Civil Procedure* enacted under the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Rule 33.05 states: "No person other than the person being examined, the examining health practitioner and such assistants as the practitioners requires for the purpose of the examination shall be present at the examination unless the court orders otherwise." Rule 33.08 states that Rule 33.05 also applies to examinations conducted with the consent of both parties, unless one party elects to waive the Rule.

12 Claims of this sort typically arise as a result of two key factors: the third party has paid for the report, and the report is used to support a decision that affects the patient or individual directly (e.g. denial or suspension of insurance benefits).



# Appendix I

## Draft CPSO Third-Party Processes Policy

### with OBA Comments and Highlighted areas of Discussion

Personal comments that are unrelated to the information or opinion, or that are extraneous to the third party's stated objectives, are inappropriate and should not be included.

#### **Scope of Expertise & Knowledge**

The College is aware that third parties may ask physicians to answer questions or to provide opinions that are beyond their expertise or experience, or which require access to information they do not have.

Should this occur, the College advises physicians to discuss the matter with the third party, and explain that they may not be able to answer every question asked, or provide the opinion sought. If the third party will not amend their request, or is otherwise unresponsive to the concerns expressed, physicians must restrict their statements to matters that are within their area of expertise and about which areas in which they have sufficient information ~~and expertise or experience~~.<sup>13</sup> Physicians should also indicate clearly the reasons for which they are unable to fulfill all the elements of the third party's request.

#### **Comprehensiveness & Accuracy**

The College expects physicians to ensure that the information or opinions they provide are comprehensive and accurate.

##### *a) Comprehensiveness*

Physicians must take reasonable steps to ensure that they have obtained and reviewed all relevant clinical notes, records, opinions and other relevant resources that could impact the information or opinion the physician has been asked to provide.

If despite reasonable efforts physicians have not been able to obtain all relevant resources, they should explicitly note this fact and clearly indicate that the information provided or opinion reached is based on the resources available to them.

##### *b) Accuracy*

Physicians must ensure to the best of their abilities that the information or opinions provided for the third party process are accurate.

If, in fulfilling the third party's request, physicians have consulted resources which they have been unable to substantiate independently, physicians should note this fact, indicating both the origin of the resource and the fact that its veracity has not been independently confirmed.

<sup>13</sup> The CMPA advises physicians to avoid answering questions they can't answer or that are outside the scope of their expertise. For more information, refer to the CMPA's document on Effective Testifying at: [https://www.cmpa-acpm.ca/cmpapd04/docs/resource\\_files/infosheets/1999/com\\_is9908-e.cfm](https://www.cmpa-acpm.ca/cmpapd04/docs/resource_files/infosheets/1999/com_is9908-e.cfm).

# Appendix I

## Draft CPSO Third-Party Processes Policy with OBA Comments and Highlighted areas of Discussion

In forming an opinion, there may be times when physicians find that the factual analysis or relevant clinical information points to more than one conclusion. When this occurs, and through the exercise of clinical judgment physicians have settled on one conclusion, physicians should indicate the degree of certainty they have in the conclusion reached.

### **Clarity, Relevance & Timeliness**

Information or opinions must be presented in a clear manner, contain relevant information, and be provided to third parties within a reasonable timeframe.

#### *a) Clarity*

When providing information or opinions, physicians should use language that is appropriate for the intended audience. This may require physicians to avoid using medical short forms, or jargon. Where this is not possible, physicians should include, in addition to technical medical terminology, more colloquial terms or explanations to ensure the information or opinions can be understood by a lay audience.

When providing information, physicians must indicate the resources they have relied upon in the process.

When providing opinions, physicians must ensure that their reasoning process used in reaching the opinion is clear. In doing so, physicians must also indicate the information or observations on which they have relied in forming that opinion.<sup>14</sup>

#### *b) Relevance*

In participating in a third party process, physicians should only provide information or opinions that are relevant to the third party process, and which satisfy the elements of the third party's request.

#### *c) Timeliness*

Information or opinions must be provided to third parties in a timely manner.

In some instances, the timelines on which the information or opinions must be provided to the third party will be set out in legislation.<sup>15</sup> Physicians are expected to comply with any timelines that may be prescribed by law. Where a physician is retained as an expert by a party to litigation or other legal proceeding, the physician and the party retaining him or her should agree to the timelines for provision of reports and other materials. The physician should respect the times lines to which the parties have agreed. Absent a specific legal requirement or agreement with the retaining party, the College expects that physicians will provide information or opinions for the third party process within sixty days.

<sup>14</sup> Where the third party request involves the completion of a form, the information provided may be less detailed.

<sup>15</sup> For example, see sections 32 and 42 of O.Reg 403/96, *Statutory Accident Benefits Schedule-Accidents on or after November 1, 1996* enacted under the *Insurance Act*, R.S.O. 1990, c. I.8. There are also specific timelines set out in legislation for physicians who provide information or opinions for a legal proceeding.

# Appendix I

## Draft CPSO Third-Party Processes Policy with OBA Comments and Highlighted areas of Discussion

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

### **Suspicious Findings: Obligation to Inform**

As part of a third party process, physicians may be required to examine an individual whom they are not treating, or to review that individual's medical record or other personal health information.

Physicians are not obligated to treat individuals in these circumstances.

If a physician becomes 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,<sup>16</sup> physicians will have an obligation, in most circumstances, to inform the individual of this fact.<sup>17</sup> **Physicians must note however, that where the third party process is a legal proceeding, different obligations may apply. Physicians should seek the guidance of the CMPA or their legal counsel as to how to proceed.**

## **3. Final Considerations**

### **Retention of Reports, Notes and Documents**

The College expects physicians to retain a record of the information or opinions they have prepared for a third party process, along with related documents, in accordance with their legal obligations. This may include any reports prepared, along with supporting notes or documents the physician reviewed. Both the length of retention periods and the information required to be retained may be specified in law.<sup>18</sup> Physicians should familiarize themselves with the specific obligations that are applicable to their circumstances.

In addition to information that physicians are required to retain by law, the College advises physicians to retain the following:

<sup>16</sup> This includes but is not limited to undiagnosed conditions and conditions for which immediate diagnostic intervention is required.

<sup>17</sup> When physicians notify individuals 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 in a timely manner, to facilitate appropriate medical follow-up.

<sup>18</sup> For instance, timelines for retaining reports, documents and notes are set out in the regulations under the *Medicine Act, 1991*, S.O. 1991, c.30, along with regulations enacted under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

## Appendix I

### Draft CPSO Third-Party Processes Policy with OBA Comments and Highlighted areas of Discussion

- Consent obtained, where applicable;
- Contract with the third party, outlining scope, purpose, timelines and fee arrangements;
- Audio or video recording of the examination, where applicable, if the recording was made by the physician;
- Documents, or information not created by the physician, which the physician relied upon;
- A list of sources of ancillary information, and any surveillance conducted by others.<sup>19</sup>

With respect to ancillary information, the College is aware that in the absence of a specific statutory retention requirement, physicians may be inclined to return this information to third parties, or to destroy their own copies for practical reasons such as storage issues. The College advises that physicians take these steps only if they are satisfied that this information will be retained by others, and will be available for their 365 own review should they be required to discuss the matter in the future. As an alternative, the College encourages physicians to consider options to address storage concerns such as retaining information electronically in a secure manner.

#### **Access to Information or Opinions**

Physicians should be aware that after they have provided the third party with information or an opinion, the individual who is the subject of the third party process may contact physicians directly to request a copy of the information, opinion, or the resources consulted.

Physicians must comply with any legal obligations they may have to provide access to information, opinions and resources in the context of a third party process.<sup>20</sup> Should physicians be uncertain how to respond to a request for access, or what obligations they may have, the College advises them to seek the guidance of the CMPA or legal counsel.

<sup>19</sup> Taken From 'Medical Examinations by Non-Treating Physicians (NTMEs) – College of Physicians and Surgeons of Alberta Guideline – June 2000.

<sup>20</sup> This includes but is not limited to applicable obligations under Ontario and Canadian privacy legislation, (*Personal Health Information Protection Act, 2004*, S.O. 2004, c.3, Sched A., *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5.), O.Reg 438/08, *Rules of Civil Procedure* enacted under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, or other rules under the *Courts of Justice Act* and its regulations, and rules enacted under the *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22.