Law Society of New Brunswick

College of Physicians and Surgeons of New Brunswick

New Brunswick Medical Society

Canadian Bar Association, New Brunswick Branch

Interaction Between Lawyers and Physicians in Litigation

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Doctors learn that once they enter the court, they are in someone else's operating room.

DR. DONALD CIAGLIA, NEW YORK TIMES, 1986

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Foreword

The medical and legal professions are two of the original professions that have always had the right and obligation to self-regulate, that is to establish standards for admission, as well as standards of moral and ethical behavior of a member of the profession, and to discipline their members for failure to adhere to required standards, all in the interest of protection of the public.

If the medical or legal profession fails to discipline members who violate those ethical codes, or fails to insist its members practice to an appropriate standard, they fail in their obligations to the public.

Professional interaction between medicine and law has become a fact of life. Patients who have legal remedies need the cooperation and assistance of medical practitioners. Lawyers require the cooperation, assistance and advice of physicians in order to properly represent patients who become their clients.

The medical profession recognizes that beyond providing medical treatment, the opinions of physicians are necessary in order that patients are treated fairly and equitably when redress is required to protect a patient's interests.

It was in this context that the College of Physicians and Surgeons of New Brunswick, the Law Society of New Brunswick, the New Brunswick Medical Society and the New Brunswick Branch of the Canadian Bar Association have approved these guidelines that recognize each profession's obligations to patients and clients, as well as to each other.

This document "Interaction Between Physicians and Lawyers" is a product of extensive discussion and cooperation between these four bodies recognizing that their primary obligation, as self-governing professions, is to protect the public interest. The College of Physicians and Surgeons of New Brunswick and the Law Society of New Brunswick, with the support of the two other bodies, have each adopted a requirement that its members adhere to these guidelines.

The document represents how both professions continue to strive to ensure the independence and dependability required of those who enjoy the privilege of practicing medicine or law.

College of Physicians and Surgeons of New Brunswick
Law Society of New Brunswick
New Brunswick Medical Society
Canadian Bar Association (New Brunswick Branch)

January 2002

Introduction

A good relationship is based on sound communication, mutual respect, trust, and understanding. It is hoped that this publication, a product of the College of Physicians and Surgeons of New Brunswick, Law Society of New Brunswick, the New Brunswick Medical Society and the New Brunswick Branch of the Canadian Bar Association, will assist in fostering such a relationship between our respective professions.

Lengthy consultations with the Government of New Brunswick also made possible the drafting of the guidelines.

The guidelines were adopted to New Brunswick as per a document entitled *Interaction Between Lawyers & Physicians in Litigation* as prepared by the Joint Medical – Legal Committee of the College of Physicians and Surgeons of Alberta and the Law Society of Alberta. Rose M. Carter with the participation of G. McCuaig, Q.C. and B. Fraser, Q.C., prepared the guidelines for the Province of Alberta.

The primary focus of these guidelines is the interaction between lawyers and physicians during lawsuits arising as a result of claims for personal injuries. This publication covers the litigation process in New Brunswick, criminal proceedings, and other matters such as requests for the general release of medical records. These guidelines have been written for members of both professions and are approved by the College of Physicians and Surgeons of New Brunswick, the Law Society of New Brunswick, the New Brunswick Medical Society and the New Brunswick Branch of the Canadian Bar Association.

This booklet is divided into two sections, **Civil Proceedings** and **Criminal Proceedings**.

An example of civil proceedings for personal injuries in New Brunswick is where parties have been involved in a motor vehicle accident and an injured party sues. The term criminal proceedings applies to cases where a law has

been broken and charges have been laid, for example, where charges are laid by the police as a result of an assault. In both examples injuries were sustained and it is highly likely that physicians will be involved in treating the individuals. Following treatment, the physicians will usually be requested to provide medical reports and could later be served with a Summons to Witness to give evidence in relation to treatment they provided to the injured parties.

Lawyer-Physician Interaction in a Civil Action

I. Notice of Action with Statement of Claim

A lawsuit is commenced by filing, with the Clerk of the Court, a document entitled a Notice of action with statement of claim [(1)]. The person commencing the action is called the Plaintiff and the person being sued is called the Defendant. (Plaintiff and Defendant may also be known as "the parties" or "opposite parties".) Following filing, the Notice of action with statement of claim is served on the Defendant. The Defendant files with the Clerk of the Court a Statement of Defence. Following filing, the Statement of Defence is served on the Plaintiff. A filed document will bear the stamp of the Clerk of the Court denoting the date it was filed.

II. Production of Documents

Parties on both sides are required to swear an affidavit of documents disclosing all documents which are or have been in their possession or control and which relate to the action. Documents include recordings of sound, photographs, films, X-rays, charts, graphs and records of any kind. Medical records kept by physicians are considered documents for purposes of litigation and physicians can expect to be required to disclose and may be required to produce them.

III. Examinations for Discovery

After the Notice of action with Statement of Claim and Statement of Defence are filed and served, an Examination for Discovery is conducted where the lawyer representing the Defendant has an opportunity to question the Plaintiff under oath. At the conclusion of the examination of the Plaintiff,

(1) Actions for personal injuries must, as a general rule, be commenced within six years although in certain circumstances this delay may be greater. Personal injury actions arising out of motor vehicle accidents must usually be commenced within 2 years of the date of accident. Section 67 of the *Medical Act* (1987, c.87, s.67) provides that lawsuits against physicians for negligence or malpractice must be commenced within two years from the date when the professional services terminated. Again, in some circumstances, such as delayed discovery of a problem, it is one year.

the lawyer representing the Plaintiff has an opportunity to question the Defendant under oath. Any evidence given at an Examination for Discovery may be transcribed and used at the trial of the action. At the Examination for Discovery, the documents relied upon by the parties are usually entered as exhibits and may be used at trial.

IV. Undertakings

The parties may be asked during their respective examinations to give undertakings. An undertaking is a promise by either party to seek answers to questions and provide the acquired information to the lawyers. Parties are often asked, by way of undertakings, to request medical records secured from a former or treating physician or from a hospital or other health professionals and to provide copies to the requesting party. The cost of such endeavour will usually be borne by the requesting party.

V. Use of Discovery Evidence

With certain very limited exceptions, Discovery evidence cannot be used for any purpose other than in the action for which the Discovery evidence was given. For example, the use of Discovery evidence obtained in a lawsuit cannot be used in hearings before the College of Physicians and Surgeons of New Brunswick or in proceedings before a hospital committee.

VI. Witnesses

There are two kinds of witnesses. Ordinary witnesses can only testify as to the fact which they know while expert witnesses can also offer opinion evidence.

– *The Physician as a Witness*

In New Brunswick, physicians generally testify as expert witnesses. There are three ways that a physician may testify as an expert.

First of all, the physician may be testifying regarding the care provided to his own patient. His testimony will involve the diagnosis and treatment provided and may also require the physician to offer an opinion regarding prognosis, as well as prior health problems.

Physicians may also see a patient at the request of one or the other lawyers involved. Such a physician provides no treatment, but usually physically examines the patient and reviews the record.

Both of these types of witnesses can be compelled to testify with a Summons to Witness.

The third way that a physician may testify is when one of the lawyers asks the physician to review the records. The physician does not directly interact with the patient. Arrangements for testimony such as this may be made between the physician and the lawyer involved.

A. Ordinary Witnesses

(i) Generally

Where a party requires a person in New Brunswick to attend as a witness at a trial, including a medical doctor, the party may serve the witness with a Summons to Witness, and such summons may require the witness to produce at the trial everything in his possession, custody or control relating to the matters in question in the action. Witnesses, including physicians, are generally asked to give evidence as to facts within their personal knowledge as opposed to personal or expert opinion as explained below. Even though medical doctors may be summoned as general witnesses and not as experts, they may sometimes be qualified as experts and also required to provide expert opinion on specific issues with the Court's permission.

(ii) Service of Summons to Witness

Physicians who are to be called to testify should expect to be served with a Summons to Witness along with attendance money and witness fees as provided by the Rules of Court.

(iii) Discussion Prior to Issuing Summons to Witness

It is recommended that the lawyer always contact the physician prior to trial scheduling to determine the physician's availability. The physician should be advised of the date in question once the lawyer is aware of the specific date where the physician is to testify. Once served with a Summons to Witness, the physician must attend court to give evidence or risk a civil contempt charge. Physicians so served should note, on reviewing the Summons to Witness, the instruction to bring to court documentation in their possession relating to the lawsuit. For a physician testifying regarding a patient, that means all medical records pertaining to that patient in the possession of the physician.

(iv) Patient Confidentiality

As a general rule, patient confidentiality is not an issue when physicians give evidence in court.

(v) Briefing Physicians for Court Attendance

Lawyers are reminded that the courtroom is foreign to most non-lawyers and it is of assistance to physicians to be thoroughly briefed and prepared by the lawyers calling them prior to their attendance in court. Physicians should be advised they may be subjected to vigorous cross-examination, in light of the adversarial nature of the Common Law system.

(vi) Physicians Subpoenaed to Give Evidence out of Province

Unless a Summons to Witness is received and adopted by the Court of Queen's Bench of New Brunswick, a physician need not attend to give evidence out of province. If the subpoena is adopted by the Court, it will be accompanied by the prescribed witness fees and travelling expenses. If the physician is uncertain about the process, it is recommended that the Canadian Medical Protective Association be contacted for advice.

B. Expert Witness

(i) Defined

Expert witness are often called upon to give evidence in both civil and criminal proceedings. Expert witnesses are those who either through education or specialized experience have superior knowledge on a subject enabling them to form an accurate opinion or, when presented with facts, are able to offer opinions to the Court.

(ii) Retaining Expert Witnesses

During the course of a lawsuit it is not unusual for one or more parties to retain expert witnesses. Expert witnesses retained may include physicians, other health professionals, actuaries, economists, accountants, statisticians or others whom the lawyers believe would assist the Court.

(iii) Documentation to Assist Expert Witnesses

Individuals retained as expert witnesses usually base their expert opinion on documentation provided to them by the lawyers retaining them.

Documents usually include, but are not limited to, the following:

(1) Notice of action with Statement of Claim;
(2) Statement of Defence;
(3) Relevant parts of the Discovery Transcripts; and
(4) Documents provided either in the Affidavit of Documents of each party or in response to undertakings (including medical records such as X-rays, business documentation, etc.)

(iv) Rule 52 of the Rules of Court of New Brunswick (Expert Witness Governing Rule)

Rule 52 is a rule of court that governs the use of expert witnesses at trials in civil proceedings. A copy of Rule 52 appears as Appendix "A."

Where a lawyer intends to call a medical expert witness at trial, he shall serve on every other party a copy of the expert's signed report which shall contain, or be accompanied by, a statement containing the expert's name, address and qualifications and the substance of his proposed testimony. As seen by Appendix "A", the substance of the medical expert's testimony is to be included in the Rule 52 report. For example, it is not sufficient to only append the physician's notes.

Physicians should be aware that:

(1) They may be called by the opposing lawyer as a witness at the trial of the action;
(2) Opposing counsel will be relying on the contents of the report in any pre-trial settlement discussion;
(3) Physicians can expect to be subjected to vigorous cross-examination by the opposing lawyer and possible questioning by the trial judge;
(4) Physicians should be advised that parties opposite may retain expert witnesses to rebut their opinions.

(v) Qualification of Proposed Expert Witnesses

When a party proposes to rely on the expert opinion of a physician at trial, the party calling the physician must offer the proposed expert witness to the Court and satisfy the Court that the proposed expert witness has expertise in the areas in which testimony will be offered. The Court is then asked to rule on

whether or not the proposed expert witness is qualified to give opinion evidence in specified areas. Once qualified, the expert witness will be allowed to give opinion evidence to assist the Court in understanding topics beyond the understanding of the average lay person. In some circumstances the medical expert report may, with leave of the court and without contrary request from the opposite party, be admitted in evidence without proof of qualifications of the medical practitioner and without his attendance at trial.

(vi) Fees for Expert Witnesses

Physicians retained as expert witnesses are entitled to be paid as expert witnesses and it is expected that lawyers will enter into contracts with such physicians. Lawyers retaining physicians to act as expert witnesses will ascertain the hourly fee to be charged by physicians for preparing expert reports and attendance at trial. Lawyers will advise clients of the expected costs for retaining expert witnesses and secure authorization letters from clients. Physicians will advise lawyers, in writing, of their agreement to act as expert witnesses, their hourly fees for preparing expert reports and for any ensuing discussion with retaining lawyers, and expected costs for their attendance in court. Parties who request attendance from expert physicians should beware of Rule 52.03(3). Should the court be of the opinion that the physician's evidence could have been introduced as effectively by way of a medical report, the court may order the party who required the attendance of the medical practitioner to pay the costs of his attendance.

It is in the interest of all parties that a clear understanding of the role of expert witnesses and the ensuing financial burden for each party be clearly understood prior to the undertaking of any contract. The Law Society of New Brunswick, the College of Physicians and Surgeons of New Brunswick, the New Brunswick Medical Society and the New Brunswick Branch of the Canadian Bar Association strenuously recommend that physicians and lawyers negotiate, in advance, physician fees when physicians are asked to be expert witnesses. (See Appendix "B" for a suggested form letter as well as Appendix "C" for suggested compensation for Court Attendance as Expert Witness.)

(vii) Notice of Medical Expert Testimony

Service of the medical expert's report and qualifications is to be made as soon as practicable and no later than the Motion's Day at which the trial date is set by the Court.

VII. Medical Assessments and Litigation

A. Assessments Done for Medical Reasons

(i) Referrals from Physicians for Treatment

Referrals from one physician to another physician for an assessment are made in the best interest of the patient's health. The College of Physicians and Surgeons of New Brunswick stresses that referring physicians receive a consultation report from consulting physicians, not a medical legal report. The purpose of these reports from consulting physicians is for treatment purposes, not for use in litigation. If a lawyer wishes to have a client undergo a physical examination for the purpose of a legal action, those must be specifically requested so that the most appropriate assessment is done.

It is recognized that when treating practitioners refer patients to specialists for medical opinions for diagnoses and treatment purposes, whether at the request of lawyers or patients, medical reports so generated are accessible to the patient. (*McInerney v. MacDonald* [1992] 2 S.C.C. 138).

(ii) Referrals for Medical Legal Purposes

Physicians must be advised when examinations requested by patients are solely for medical legal purposes. The *Medical Services Payment Act*, R.S.N.B. 1973, c. M-7 does not cover medical examinations done solely for the purpose of litigation. For lawyers to suggest to clients that they ask practitioners for referrals to specialists under the guise the referrals are for medical reasons when the real intention is to obtain independent medical specialist reports, paid for by Medicare New Brunswick for the purpose of litigation, could be seen as a fraud on the health system.

NOTICE TO LEGAL PROFESSION

Concerns have been raised with regard to lawyers advising their clients in personal injury matters to attend at their family physician and obtain a referral to a specialist, when that referral is not necessary for the patient's health. The sole purpose of the request is to obtain a medical legal report, at the expense of New Brunswick Medicare. This practice is unacceptable. If the lawyer wishes a medical legal report from a specialist, the lawyer should request such consultation himself.

(iii) Independent Medical Examinations Pursuant to the Rules of Court of New Brunswick

(a) Documentation

During the course of a lawsuit, the Defendant may wish to have the Plaintiff undergo an independent medical examination. This may be agreed upon by the parties or ordered by the Court. To assist the physician performing the independent medical examination, the lawyer representing the Defendant must provide the physician performing the independent medical examination, referred to as the examining medical practitioner, with a copy of every report made by every medical practitioner who has treated the party to be examined in respect to the mental or physical condition in issue, at least 2 days before the day appointed for the examination.

(b) Agreement or Order for Independent Medical Examinations

Prior to the Plaintiff undergoing an independent medical examination, the Defendant's lawyer should provide the Agreement or Order in question to the medical practitioner. The lawyers may, by agreement, dispense with the need for a Court Order. If so, the Plaintiff must consent in writing to undergo the examination. When performing independent medical examinations, physicians may ask to be provided with a copy of the agreement or the Court Order.

(c) Conduct of the Testing at Independent Examinations

The parties shall agree to the scope of the testing and shall communicate such to the examining medical practitioner. If the examining medical practitioner intends to subject the Plaintiff to further testing beyond the intended scope, the examining medical practitioner should advise the retaining lawyer of the need for these procedures. That will enable lawyers to include procedures in the agreement or Court Order. Examining medical practitioners will therefore not be put in a position where patients refuse to undergo certain procedures which the examining medical practitioner deems necessary for a complete medical examination.

Where authorized to do so by an agreement or a Court Order, the examining medical practitioner may:

(1) examine hospital records and X-rays previously made or taken in respect of the party being examined;

(2) have samples taken of blood and other body fluids and cause analyses to be made; and
(3) cause any other test recognized by medical science to be made including, without restricting the generality of the foregoing, X-rays, electrocardiograms, electroencephalograms and psychological tests; but a party shall not be required to submit to any test which is unduly painful or potentially dangerous.

(d) Independent Medical Examination Reports

An examining medical practitioner conducting an independent medical examination must provide a written report and opinion to the retaining lawyer. Once the Plaintiff agrees to undergo an independent medical examination, confidentiality is waived. These reports may include information or documentation such as test results as well as the examining medical practitioner's conclusions therefrom, his diagnosis and prognosis. The examining medical practitioner may be required to provide copies of such documentation taken at the examination. Examining medical practitioners should be advised that the independent medical examination report will be provided to the Plaintiff's lawyer. Examining medical practitioners are also obligated to provide the reports to the Plaintiff on request.

However, correspondences between the defendant's solicitor and the examining medical practitioner prior to examination are not to be disclosed.

(e) Court Attendance by Examining Medical Practitioner

If the matter proceeds to trial, the physicians performing independent medical examinations may be required to attend in court to give evidence. Physicians giving evidence should expect to be subjected to cross-examination by lawyers representing the Plaintiff.

(f) Physicians Cannot Be Both Independent Medical Examiners and Treating Physicians

When a physician performs an independent medical examination, such a physician is acting as an independent contractor. For the purpose of independent medical examinations, physicians are not treating physicians. The examining medical practitioner's focus is as an independent assessor of the party's condition. The focus is not ongoing medical care for the party being examined, such as the case when patients are referred to physicians by other

physicians. A treating physician cannot accept an appointment with respect to an independent medical examination for their own patient. Subsequently, an examining medical practitioner having conducted an independent medical examination cannot assume the role of a treating physician without the consent of all parties involved.

An examining medical practitioner who discovers, during such examination, a significant medical condition requiring treatment is responsible for ensuring that this be disclosed to the patient, with a recommendation to seek treatment.

(g) Role of the Examining Medical Practitioner

Physicians who perform independent medical examinations should be mindful of the special physician/patient relationship which this entails. They should inform patients regarding the special nature of this form of assessment.

Furthermore, beyond the provision of the report to the retaining party, the physician's relationship with such patient remains governed by the usual legal and ethical principles.

(h) Billing for Independent Medical Examinations

Independent medical examinations are not covered by Medicare New Brunswick. Prior to the physicians performing independent medical examinations, physicians and lawyers should agree to a payment schedule.

B. Medical Legal Reports from Treating Physicians

(i) Request for Medical Legal Reports

Often lawyers request physicians provide a report, commonly called a "medical legal report", commenting on matters which occurred during the time a physician was providing care to a patient or a former patient. The requirement to provide reports does not terminate with the conclusion of the patient/physician relationship.

(ii) Reports from Physicians Providing Ongoing Care

When the physician preparing a medical legal report is the Plaintiff's ongoing treating physician and is therefore familiar with the medical history, the physician may be asked to provide an opinion on the effect of the injuries on the Plaintiff having regard to the previous medical history, occupation, work

history, recreational activities and other relevant information known to the treating physician. The lawyer may request a physician's opinion regarding prognosis and long term effect of injuries on the Plaintiff from a work and recreational point of view.

(iii) Reports from Physicians Who Have Only Attended with Plaintiffs on One Occasion

Where a physician has only attended with the Plaintiff on one occasion all that may be required is a description of injuries observed on examination, diagnosis, treatment and Plaintiff's response to treatment.

(iv) Time Frame for Responding to Requests for Medical Legal Reports

As a guideline, it is suggested that substantive compliance to most requests for reports, or a copy of records, would occur within 45 days. In case of extenuating circumstances such as vacation, or an especially complex matter, an effort would be made to respond within 45 days, outlining why the report will take longer.

Where the patient depends upon such report for immediate financial support pursuant to no-fault insurance benefits, statutory advance payment provisions or other similar support program, physicians are obligated to respect urgent yet reasonable requests for material.

C. Fees for Medical Legal Reports

(i) Responsibility of Lawyers

Lawyers requesting medical legal reports from physicians are reminded that the Code of Professional Conduct imposes a professional duty, quite apart from any legal liability, to meet financial obligations incurred in the practice of the lawyer. It is also stated that if the lawyer incurs an obligation on behalf of a client which the lawyer is not prepared to pay personally, the lawyer should make it clear in writing to the physician at the time the obligation is initially incurred.

(ii) What Physicians Should Charge Lawyers

When the service is requested, it is also essential that the lawyer be fully aware of the charges to be expected. It is suggested that physicians, in assessing the appropriate fee to be charged, take into account the following:

(1) whether request is urgent or non-urgent;
(2) amount of time spent;
(3) expertise and experience of physician;
(4) complexity of case;
(5) whether report is repetitious of previous work already done;
(6) whether the report is a follow-up to an earlier report;
(7) complexity and number of documents reviewed.

(iii) Disclosure by Physicians of Hourly Rates

Physicians should be prepared to disclose the hourly rate they propose to charge for preparation of a medical legal report. To assist in fostering good relationships the fee to be charged should be communicated to lawyers prior to writing the report.

Suggested guide to physicians when considering appropriate charges for release of information appears as Appendix C.

(iv) When and How Payments are Made to Physicians

It is recommended physicians ascertain the mode of payment of their fees prior to commencing work on medical legal reports. It is important physicians provide accounts for independent examinations or medical legal reports to requesting lawyers as soon as possible, preferably at the time they render medical legal reports.

Once that account is received, the lawyer has a professional duty, pursuant to the Code of Professional Conduct, quite apart from any legal liability to meet this financial obligation. This obligation is no different from lawyers' other obligations with respect to fees or charges of witnesses, transcript from court reporters and various other disbursements which will occur and are legally and professionally responsible to pay. Lawyers are not permitted to delay payment of such accounts until the ultimate resolution of the case.

Lawyers are not permitted to indicate that the account is the responsibility of the client unless the lawyer puts in writing at the time that he requests the said medical report that the obligations are incurred on behalf of the client, informs the client by providing the client with a copy of the letter and makes it very clear to the physician that the lawyer is incurring no obligation.

Double billing for identical reports by a physician is improper. Excess billing

beyond normal administrative time and expense for an earlier consultation report by a physician is improper conduct.

Physicians are not permitted to demand payment before releasing reports or records.

D. Complaints by Lawyers to the College of Physicians and Surgeons of New Brunswick

(i) Why Complain

Lawyers who do not receive medical legal reports within a reasonable period of time from physicians who have previously examined or treated their clients and have been provided with proper authorization for release of information, may complain to the College of Physicians and Surgeons of New Brunswick. That regulatory body is similar to the Law Society of New Brunswick which governs barristers and solicitors.

Before lodging complaints, lawyers should advise physicians of the intention to do so and afford physicians an opportunity to respond.

(ii) How to Complain

In accordance with the regulations, complaints are to be made in writing and directed to the Registrar of the College of Physicians and Surgeons of New Brunswick. The physicians should be identified and circumstances of the complaints specified.

(iii) How Complaints are Handled

Upon receipt, letters of complaint are forwarded to physicians with the request that they answer, setting out any explanation with respect to the matter, within a fixed and brief period of time. Subsequently, responses of physicians are brought to the attention of the complainants. The Registrar makes every attempt to resolve the issue at that stage and, in most cases, this results in reports being forwarded to requesting lawyers.

If physicians continue to refuse to provide reports, without just cause, the matter is considered by the College of Physicians and Surgeons of New Brunswick's Complaints Committee which has the power to dismiss the complaints, or refer the matter on for further investigation, or a disciplinary inquiry.

E. Complaints by Physicians to the Law Society of New Brunswick

Similarly, physicians may complain to the Law Society of New Brunswick concerning the conduct of lawyers. Before lodging complaints, physicians should advise lawyers of their intention and afford lawyers an opportunity to respond.

(i) Why Complain

As indicated above, physicians are legitimately entitled to file a complaint against a lawyer for the lawyer's failure to reimburse the physician for the time incurred in preparation and writing the medical report provided. The lawyer under his Code of Professional Conduct has both a professional duty and a legal liability to meet his financial obligation. Unless the lawyer advises the physician at the time of requesting the report that the lawyer is not prepared to pay it personally, the obligation is incurred.

Further, lawyers are not entitled to delay payment of such an account for a medical report until the ultimate resolution of the case, or to submit that the account must be paid by the client, unless the physician has been advised of same in advance of preparation of the report and agrees to that understanding.

(ii) How to Complain

Complaints should be in writing and directed to the Registrar of complaints of the Law Society of New Brunswick. The lawyers should be identified and circumstances of the complaints set out.

(iii) How Complaints are Handled

Upon receipt, letters of complaint are forwarded to lawyers with a request for a response, setting out any explanation with respect to the matter, within a brief fixed period of time. The Registrar of Complaints makes every attempt to resolve the issue at that stage. The Registrar of Complaints has the power to either dismiss the complaint or refer to the Complaints Committee.

F. Retention of Medical Records

(i) Length of Time Medical Records must be Retained

A direction from the College of Physicians and Surgeons of New Brunswick

is that physicians keep records for a minimum of ten years. If the patient is a minor, it is recommended that two years be added to the age of majority (19 in New Brunswick) for retention of medical records.

(ii) "Incompetent" Patients

The College of Physicians and Surgeons of New Brunswick recommends that for the incompetent patient, it may be necessary to keep medical records indefinitely. For the purpose of this recommendation, whether or not the patient is incompetent is based on the judgment of the treating physician.

G. Production of Medical Records

(i) Requests for Hospital Records

Medical records, such as hospital charts (which include X-rays, ultrasound films, ECG reports, etc.) or office charts, are legal documents. Requests for hospital charts should be made directly to the hospital instead of treating physicians.

(ii) Requests for Medical Records not Medical Legal Reports

Often all that is requested from the physician is a copy of the patient's treatment record. Unless requested to do so, it is not expected that a physician will prepare a medical legal report, decipher notes on the patient record or give an explanation of the contents of the record.

(iii) Why Medical Records are Requested

Physicians may sometimes wonder why medical records are requested and question the relevance of treatment rendered years before circumstances give rise to the present lawsuit for personal injuries. Lawyers understand and respect the desire of physicians to maintain confidentiality of information provided by patients as required by the Code of Ethics, but lawyers involved in personal injury litigation also have obligations to clients.

Lawyer obligations include being aware and having access to all available medical information and having such put forward throughout the litigation process to expert witnesses and the courts. Lawyers also deal in confidentiality and it is not their intention to put forward irrelevant information. A court will determine relevancy of medical information to lawsuits.

(iv) Lawyers' Obligations to Clients upon Requesting Medical Records

Lawyers will explain to clients why medical information is needed and what purpose such information serves. Clients recognize that in the litigation process, there can be a requirement for disclosure of past and present medical information. Release of medical information is ultimately the decision of clients and they must provide a consent for this to their lawyer for presentation to physicians. The ultimate decision regarding production of medical information belongs to the Court.

In a personal injury claim one party is requesting the party opposite to pay monies for injuries suffered. Generally speaking, when a claim is made the opposing party is entitled to production of the patient's entire relevant medical history. For a proper assessment of damages, it is essential that relevant medical history of patients be produced. The patient's lawyer and physician each owe a duty to protect the medical records of their client or patient which are not relevant.

Neither the patient nor the patient's lawyer should provide medical consent authorizations to opposing parties and/or counsel to access their client's medical records.

(v) Confidentiality

By bringing a personal injury action, a patient does not bring into issue every possible medical treatment experienced, some of which may be irrelevant to the injury and could be prejudicial to the patient. In such circumstances the records should usually be sent to the patient's lawyer who can decide which portions are relevant.

Member physicians should be advised that the safest course is to insist upon express consent of the patient or a Court Order before discussing any aspects of the patient's health with any other person.

(vi) Why Lawyers are Interested in Reviewing Medical Records

Medical records are invaluable because they are made contemporaneously by objective observers such as physicians. Therefore, contents of medical records are a trustworthy source of information for parties involved in lawsuits. They assist patients in validating claims and opposing parties in refuting the validity of these claims for compensation for injuries allegedly sustained.

(vii) *McInerney* - Right of Patients to their Records

The Supreme Court of Canada has recognized the right of patients to gain access to their medical information. The court recognized that physicians are owners of the records but information contained in those records is to be used by physicians for the benefit of their patient.

Patients are entitled, upon request, to inspect and copy all information in their medical records which their physicians have considered in administering advice or treatment. Therefore, the physical copies of the complete medical records must be available to the patient. Correspondence from physicians to treating physicians such as consultation reports, referral letters, laboratory reports, x-ray reports, or correspondence in which physicians provided advice or suggestions for treatment must be produced upon presentation to the physician of a consent for release of information.

This does not apply to situations where the physician has no patient contact and offers an opinion based on pre-existing records.

(viii) Format for Requesting Medical Records

There is an appropriate structure for requesting medical records. It is recommended, when appropriate, that lawyers state why they are seeking copies of medical records and who is going to pay physicians for photocopying. It is recommended that lawyers state in a covering letter to physicians the name of the party they represent; why they are asking for medical records; if they wish a complete copy of the medical records rather than a synopsis or a medical legal report; and that they will pay reasonable photocopying charges for production of the record. The request must be accompanied by a currently dated, signed and witnessed authorization of the patient advising which medical records are to be provided.

(ix) Need for Written Consent of Patients

Physicians are obliged not to divulge confidential information without receiving consent from the patient. Lawyers requesting the information are responsible for obtaining a valid and current authorization from the patient and providing the same to the physicians.

H. Time Frame for Releasing Medical Records

As provided in section **VII. B. (iv) Time Frame for Responding to Requests for Medical Legal Reports**, it is suggested that substantive compliance to most requests for reports, or a copy of records, would be provided within 45 days.

In case of extenuating circumstances such as vacation, or an especially complex matter, an effort would be made to respond within 45 days, outlining why the report will take longer.

Physicians should respect urgent and reasonable requests for material, when time is of the essence.

I. Refusal to Release Medical Records

In *Mclnerney,* the Supreme Court of Canada stated that refusal by physicians to release medical records when requested must be exercised using proper principles and not in an arbitrary fashion. Refusal to release medical records can only arise if the physician is concerned that disclosure will harm the patient or a third party. Should access be denied by the physician it is incumbent upon the physician to satisfy the courts that non disclosure is necessary to prevent potential harm either to the patient or a third party.

J. Disclosure of Medical Records

Upon receipt of medical records the lawyers may have to provide medical records to lawyers representing the opposite parties. It is also possible patients will receive a copy of the medical records from their lawyers. Prior to complying with a request from an insurance company, adjuster or lawyer representing the patient, physicians are justified in contacting the patient and confirming the patient's authorization of such release.

Lawyer-Physician Interaction in Criminal Proceedings

Many of the previous matters apply to criminal proceedings and are therefore not reproduced. Usually in criminal proceedings the Crown calls a physician by subpoena to give evidence on behalf of a victim to whom medical attention was rendered.

I. Attendance in Court by Physicians

Given the nature of many criminal cases, attendance in court of treating physicians is often required. The Crown Prosecutors' office encourages prosecutors to avoid calling physicians to give evidence unless absolutely necessary. Prosecutors will attempt to accommodate schedules of physicians by having them give evidence at the onset of court proceedings.

II. Retaining Expert Witnesses

During the course of criminal proceedings, it is not unusual for expert witnesses to be retained by prosecutors and defence counsel. Expert witnesses retained may include medical physicians or others whom they deem would be of assistance.

In criminal proceedings, all "relevant evidence" must be disclosed by the Crown to defence counsel. Thus, in most cases when the Crown hires expert witnesses, either intending to call them to give evidence at the trial or for reports alone, the Crown must disclose such to defence counsel.

On the other hand, defence counsel is under no obligation to disclose expert reports or any information regarding expert witnesses they may intend to call to give evidence at trial. In other words, the Crown often does not know that the defence will be calling an expert until the Crown has closed its case and the defence puts its case forward, which may include calling an expert or expert witnesses.

Unlike in civil proceedings, communication between the Crown and an expert is not privileged. Thus, it is assumed that whatever an expert tells a prosecutor, it will be disclosed to defence counsel.

If prosecutors or defence counsel wish to have an attending physician also give expert opinion, that physician must be properly advised in advance. A physician should not be asked to give a written expert opinion without an explanation to that physician of the ramifications of doing so.Before agreeing to be an expert or providing an expert opinion, physicians should obtain an explanation of the process; discuss and agree to retainers; discuss the substance of their opinions and review their Curriculum Vitae with those wishing to retain their services.

III. Fees Paid by the Crown

Recommended fee schedule for payment by the Crown to physicians is included as Schedule C.

Should physicians encounter any difficulties arising from the above they should contact The Director of Public Prosecutions in Fredericton at 506-453-2784.

Appendix A

Rule 52 — Expert Witness

52.01 – Condition Precedent to Calling Expert Witness at Trial

(1) Where a party intends to call an expert witness at trial, he shall serve on every other party a copy of the expert's signed report which shall contain, or be accompanied by, a statement containing the expert's name, address and qualifications and the substance of his proposed testimony. Service shall be made as soon as practicable and no later than the Motions Day at which the trial date is fixed.

(2) Where a party intends to call an expert witness at trial but cannot obtain from him a report, or where, because of the nature of the proposed evidence, the expert is not required by the party to submit a written report, the party may comply with paragraph (1) by serving on every other party a report signed by the party or his solicitor which sets out the name, address and qualifications of the expert and the substance of the evidence which he is expected to give.

(3) A party who has not complied with this sub-rule shall not call an expert witness without leave of the court.

(4) Where a report has been served under paragraph (1) or paragraph (2), on motion the court may order that any records, documents or other materials on which the report is based be produced for inspection and copying.

(5) On consent of all parties, the court may receive in evidence at the trial a report served under paragraph (1) without requiring the expert to attend and give oral evidence.

52.02 – Examination of Expert Witness Before Trial

(1) Where it is impractical or inconvenient for an expert witness to attend the trial, the party intending to call the witness may, with leave of the court or the consent of all parties, examine that witness before the trial for the purpose of having his evidence available for use at the trial.

(2) Before applying under paragraph (1) to the court for leave, the applicant shall comply with Rules 52.01(1) or 52.01(2).

(3) Where possible, an examination under paragraph (1) shall be conducted before the trial judge.

(4) Unless ordered otherwise or provided by this rule, the procedure prescribed by Rule 33 shall apply to the examination of a witness under this rule.

(5) On the examination of a witness under this rule, he may be examined, cross-examined and reexamined in the same manner as a witness at trial.

(6) An order for, or consent to, the examination of a witness under this rule may provide that the examination be recorded by videotape or other similar means either in addition to or substitution for a typewritten transcript.

(7) Where the evidence on an examination under paragraph (1) has been transcribed, the party whose witness has been examined shall serve every party who attended or was represented on the examination, with a copy of the transcript, free of charge unless ordered otherwise.

(8) A transcript, videotape, or any other recording of evidence taken under this Rule may, as far as it is admissible, be tendered in evidence at the trial by a party to the action, and such parties shall be responsible for providing the equipment required to tender such evidence if it is not otherwise available in the courtroom.

(9) Where the evidence of an expert witness has been taken under this sub-rule, he shall not be called to give evidence at the trial, except with leave of the trial judge or unless the trial judge requires his attendance at the trial.

52.03 – Medical Expert

(1) Where, under Rule 52.01(1), a party has served a report of an expert who is a medical practitioner as defined in Rule 36.01 the report may, with leave of the court, be admitted in evidence without proof of signature or qualifications of the medical practitioner and without his attendance at trial.

(2) When an opposite party, within 10 days after service of a report of a medical practitioner under Rule 52.01(1), serves notice in writing requiring the attendance of the medical practitioner at trial, the report shall not be received in evidence unless the medical practitioner is called as a witness.

(3) Where a medical practitioner is required to attend and give oral evidence at or before trial and the court is of the opinion that his evidence could have been introduced as effectively by way of a medical report, the court may order the party who required the attendance of the medical practitioner to pay the costs of his attendance.

Appendix B

Suggested Form Letter to Confirm Arrangements with a Lawyer in Advance

Dear _____ :

As discussed on ___(date)___ your request for a ___(e.g. report)___ for ___(patient's name)___ has been received in our office on ___(date)___ . My fee for this will be ___$X.00___ .

Other associated costs which may be incurred are listed below:

Court time, per hour $X.00
Waiting and/or travel time, per hour $X.00
Photocopying, per page $X.00

My payment schedule for the above services is as follows:

(1) Payment for the above services will be expected within two weeks of receipt of the completed request.
(2) In the event that payment is not received on time an additional X% will be added each month for overdue accounts.

Please acknowledge your acceptance of the stated fees by signing a copy of this request and returning it by mail or by fax ___(your fax #)___ .

Sincerely,

_____ *MD*

_____ *Date*

_____ *Signature*

Appendix C

Suggested Tariff for Medical-Legal Services

It is important to understand why a lawyer is asking for a medical report or a medical legal opinion and specifically what information is required. If the lawyer's request is unclear, the physician should contact the lawyer to seek clarification. If payment for the report is not assured, the lawyer should be contacted prior to responding to the request.

Under the Code of Ethics, and the Professional Misconduct Regulation of the College, acceptable billing practices for physicians are prescribed. For example, physicians are precluded from "stipulating, charging or accepting any fee that is not fully disclosed, fair, and reasonable". Fees may also not be "excessive in relation to the service performed". In most cases, it is also not acceptable to charge a fee for any service which is not performed.

With regard to billing in medical legal matters, the following examples are excerpted from the New Brunswick Medical Society's Physicians' Guide to Direct Billing, 1998:

- Medical legal report,
  with opinion extended or complicated — $100 – $400
  I/C *(independent consideration)*
- Medical legal office briefing by arrangement between physician and lawyer (*not involving court appearance*) — $200/hr *or part thereof*
- Court appearance on behalf of a party or as an expert witness — $200/hr *or part thereof*
- Copying of file on request of lawyer — $50 + $0.50/pg

When the services of a physician are requested by the Office of Attorney General:

The above suggested fees are applicable to situations where the services of a physician are requested by the Office of Attorney General, with the following additions:

- All reasonable expenses with respect to meals and accommodations will be reimbursed upon presentation of receipts.
- Travel expenses will be reimbursed at the prevailing government rate.
- A cancellation fee of $200 will be applicable for failure to give notification of adjournment or cancellation to the practitioners' offices by noon of the work day prior to the date of the scheduled court appearance.

Appendix D

Consent to Release Medical Information

TO WHOM IT MAY CONCERN:

The law firm of _____ *are my legal representatives.*

This document is my consent to provide and release all and any medical information in your possession including, but not limited to, hospital records, charts, nurses notes, X-rays, laboratory results, consultation reports and any other documents forming part of my medical records and forward same to _____ ,
Barristers & Solicitors, _____ , *New Brunswick.*

Patient's Name: _____

Patient's Signature: _____

Address: _____

Telephone: _____

Medicare No.: _____

DOB: _____

Witness Name: _____

Witness Signature: _____

DATED at _____ , *New Brunswick*
this _____ *day of* _____, *20*____.

This consent is limited in time to ____*(month or years)*____.