

COLLEGE OF PHYSICAL THERAPISTS OF BRITISH COLUMBIA

ADVISORY STATEMENT

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Preparing a Physical Therapy
Legal Report)

PREPARATION OF EXPERT OPINION REPORTS

Preparing a Report for Use in Litigation

Physical therapists, who frequently assess and treat patients who have suffered some kind of injury, may be called upon to provide evidence for use in legal proceedings, usually in support of the claim being made by the injured person whom they are treating.

In the context of litigation, there are essentially three types of evidence that the physical therapist may be requested to provide.

1. Factual Evidence

The first is factual evidence. This usually consists of the clinical records which are documentary evidence of the dates and times of assessment and treatment provided by the physical therapist to the patient. These records are admissible in law in a trial and may be relied upon for the truth of their contents. In other words, it should not be necessary for the physical therapist to provide factual evidence regarding the information that is already contained in the clinical record.

2. Opinion Evidence

The second kind of evidence is opinion evidence. In order to give this kind of evidence the person giving it must be accepted by the court as a qualified 'expert'. The purpose of opinion evidence is to provide the court with the necessary technical or scientific basis upon which to properly assess the factual evidence. It is therefore important that the expert be properly qualified in the specific area for which the opinion is sought. For example, there are many areas of physical therapy practice which require varying degrees of focused knowledge, special training or experience in order to acquire proficiency or competency.

An expert cannot provide an opinion which is outside of the scope of their particular expertise. It is therefore important that the specific areas of expertise about which the physical therapist is to be asked to provide an opinion to the court should be clearly spelled out. The nature of the opinion being sought should be set out in a letter from instructing counsel. It is the responsibility of the physical therapist to determine whether or not she has the expertise to provide the opinions that are requested.

If legal counsel is seeking your expert opinion as a physical therapist then you are entitled to be compensated appropriately for providing the service. You cannot be compelled to provide an expert opinion whereas you may be subject to a subpoena that requires you to provide the court with your clinical records.

It is often the case that the physical therapist will be asked to provide an expert opinion with regard to the clinical facts. More often than not those facts will be found in the clinical records of the physical therapist. However, it remains important that the physical therapist know precisely the nature of the opinion that is being sought and that these be set out in writing.

There are common law legal rules that govern what is an acceptable expert opinion. There are also rules that are found in sections 10 and 11 of the *Evidence Act*, R.S.B.C. 1996, chapter 124, that govern the evidence of experts.

Elements of an Opinion Report

- The qualifications of the expert.
- The specific areas of expertise of the expert.
- A statement that reflects the specific opinions that have been sought.
- A statement of the opinion or opinions.
- Reference to the specific facts which form the basis for the opinion or opinions.

What the Report Should Not Contain

The report should contain no opinions outside of the scope of the specific areas of expertise previously identified.

The report should contain no gratuitous opinions or comments about the credibility of the patient or of their temperament, their attitude towards the litigation, or about any other areas that are not within the stated areas of professional expertise.

3. Opinions Upon an Opinion

The third category of evidence is an opinion about an opinion. This will occur when legal counsel, either for the claimant or for the defendant, decides it is in his client's interests to seek to challenge the expert opinion of the other side.

Generally speaking, what is being sought in this kind of opinion is an assessment as to whether or not the first expert opinion was properly grounded in the known science and accepted practice of the profession.

The danger to avoid in providing an opinion on an opinion is that of inappropriately criticizing one of your peers and in particular, failing to keep the criticism focused on the basis of the opinion and instead resorting to criticisms that are directed to the client, or reputation of the other expert, such as making disparaging remarks about the other expert's training, experience and practice.

Complete Disclosure

Until the time of trial, the expert's notes, communications with legal counsel, and any other materials which have been relied upon or referred to by the expert may remain privileged. However, once an expert takes the witness stand then all of the notes, correspondence and communications with counsel and everything else that forms the "expert's file" is subject to disclosure to the Court, and to cross-examination by opposing legal counsel.

Directions from Legal Counsel to the Expert

An expert is not a "hired gun" to do the bidding of legal counsel. The first duty of an expert is to the court and not to the person who retained them. While it is appropriate for legal counsel to provide the expert with information about the specific issues for which an opinion is sought, it is not appropriate for legal counsel to suggest changes or modifications to the opinion itself once the opinion has been rendered.