

# Interprofessional Code for Physicians and Attorneys



## I. INTRODUCTION

The Medical/Legal Interprofessional Committee of the Louisiana State Medical Society and Louisiana State Bar Association ("Committee") serves to promote understanding between physicians and attorneys and to resolve conflicts which may arise between them. In our society, physicians and attorneys frequently are drawn into close association with each other while serving the interests of a common patient/client. This association sometimes leads to misunderstanding and conflict, all to the detriment of the patient/client and the public. In a continuing effort to promote interprofessional harmony and to provide a mechanism for the resolution of disputes which may nevertheless arise, the Committee has established this Interprofessional Code ("Code"). It has several features:

- it recognizes that the interests of the patient/client are primary and often require the services of both physicians and attorneys.
- it recognizes that the legal rights of the patient/client often must be resolved in courts and administrative tribunals, and it explains the differing roles of physicians and attorneys in our legal system: attorneys advocate the legal rights of the client, physicians do not; attorneys present the medical evidence to the court, physicians testify as to medical facts and opinions and are subject to crossexamination; attorneys often are compensated on a contingent basis, physicians are compensated without regard to the outcome of any legal claim.
- it establishes guidelines for professional time and expense demands for the payment of bills for professional services, and for effective communication between physicians and attorneys as to the nature, scope, and scheduling of professional services to be performed by physicians.

The Code is not legally binding on physicians or attorneys and it does not create a standard of professional care. It is intended only as a guideline by which physicians and attorneys can serve the patient/client and the public effectively and with a minimum of conflict.

Members of both professions are vested with high responsibilities and privileges for the purpose of serving the public with honor, dignity and effectiveness. Each profession has the duty to develop a enlightened and proper understanding of the other, as each profession is essential to the preservation of society. This code is established in furtherance of that duty.

## II. MEDICAL EXAMINATIONS

### A. GENERAL

The medical examination performed by a physician when treating his patient is not undertaken from an adversarial viewpoint. The physician\*s attention is focused on diagnosis and treatment and not on the courtroom. Nevertheless, information from that medical examination, including patient history, may later become the subject matter of incourt or deposition testimony by the physician. In the medical examination performed in connection with litigation, the focus is on diagnosis, prognosis, and causation, all of which may directly affect the outcome of the litigation.

### B. CONFIDENTIALITY

The content of a medical examination, including patient history, generally is protected from disclosure in Louisiana by the health care providerpatient privilege. However, there are two important exceptions to this privilege:

- when a patient asserts a personal injury, workers\* compensation, or other claim based on medical condition.
- when a medical examination is ordered by a court.

## C. RESPONSIBILITIES AND RIGHTS OF ATTORNEYS AND PHYSICIANS

Both physicians and attorneys share responsibility for:

- clear communication with respect to their mutual roles in serving the interests of the patient/client.
- good faith efforts to keep scheduled appointments for examinations, conferences, depositions, and court testimony.

Attorneys requesting medical examinations are responsible for:

- scheduling the time of examinations with physicians.
- notifying physicians of the scope of the examination, the form of the requested report, and any time constraints.
- providing physicians with copies of prior medical records and reports of treating and examining physicians, which may be relevant to the requested examination.

Attorneys representing patient/clients are responsible for:

- making a "best effort" to provide (1) the attendance of the patient/client for the scheduled medical examination and (2) at least 24 hour notice to physicians if it becomes impossible to keep appointments.
- providing examining physicians with an appropriate written authorization by the patient/client so as to eliminate any concern as to unauthorized disclosures. Examining physicians are responsible for:
- performing, subject to any limitations agreed upon by the attorneys or ordered by the court, the requested medical examination, by taking a history and performing such examinations and testing necessary to make an informed opinion as to the nature and extent of the patient/client\*s medical condition, the cause or causes of that condition, and its prognosis.

Attorneys requesting such examinations have a right to know, in advance, the costs for such examinations and reports.

Physicians conducting such examinations have a right to know, in advance, the person responsible for payment of costs.

## III. MEDICAL REPORTS

A well written medical report or narrative which satisfies the request of the attorneys or the court and which focuses on the issues of diagnosis, prognosis, and causation plays an important role in any legal claim asserted by the patient/client. It assists attorneys in evaluating the merits of the claim and defense and, thus, promotes settlement of the claim. It assists the court and jury in understanding and deciding the medical and legal issues. And, it may eliminate — or substantially reduce the time required for — deposition or court testimony by physicians. Because the written report serves such an important function in litigation, examining physicians should cooperate with attorneys or the court so that (1) prior medical reports for the relevant period are evaluated, (2) the written report is in the requested format, and (3) all time constraints are met. Physicians should communicate with attorneys if delays are encountered or other questions arise as to the nature and scope of the requested examination and report.

A narrative medical report to the requesting attorney should include the following in the absence of specific instructions to the contrary:

- how, when and where the patient/client was first seen;
- name of any referring party;
- the case history (i.e., chief complaint, date and circumstances of injury, previous evaluations or treatments rendered, any significant preexisting conditions and prior injuries)
- initial general review of symptoms;

- any pertinent (positive or negative) past history;
- dates and places of subsequent office visits, outpatient procedures, and hospitalizations;
- the treatment rendered and the effect of such treatment on the injury or condition;
- a statement as to whether the condition is stable and whether the patient/client continues under treatment or has been discharged;
- information received from consultants or other health care providers;
- description of the examination(s) conducted and tests performed;
- any laboratory, consultation or test results;
- therapeutic progress since initial evaluation, including present condition and limitations;
- diagnosis;
- opinion as to any connection between injury and condition diagnosed;
- opinions as to prognosis, future therapy, tests, and estimated costs, including an evaluation of future impairment or disability, the need for surgery, the expected period of convalescence, and any aggravation of a preexisting condition;
- the dates or periods of time during which the patient/client was unable to perform past usual work or was impaired or disabled from performing specific life functions;
- an itemization, if specifically requested, of the physician's treatment charges to date and an estimate of the cost of future medical care;
- separate bill to attorney for rendering the narrative report if not previously paid;
- copy of curriculum vitae if expected to be used as an expert witness.

Supplemental medical reports may be requested.

When a medical record, medical report or patient information is requested, the attorney must provide the physician from whom such report, record, or information is being sought, with the patient's authorization, specifying the attorney or other persons to whom the patient's medical records, reports, or information may be released. If there are any doubts as to the validity or the intent of the authorization, this doubt should be resolved through discussion or correspondence between the attorney and physician in advance of the issuance of the report. Only Louisiana Statutory Law can alter the requirement for an authorization before medical records can be released, and there is currently an exception regarding the release of medical records in medical malpractice cases.

#### **IV. PHYSICIAN/ATTORNEY CONFERENCES**

As an essential element of case preparation, attorneys routinely confer with both fact witnesses and expert witnesses prior to deposition or trial. Such practice enables attorneys to determine the substance of the witness' expected testimony, assess the witness' credibility, and better evaluate the merits of the claims. It enables the witness to understand the scope of the questioning.

Physicians should make candid disclosures of medical information to attorneys, whether favorable or unfavorable to the patient/client's claim. A candid discussion of the medical information enables physicians to anticipate — and prepare for — direct and cross-examination. It enables both attorneys and physicians to develop and discuss the use of hypothetical questions.

Conferences should be scheduled at a mutually convenient time with at least two weeks advance notice whenever possible and should be confirmed in writing with all concerned persons. The attorney and physician should provide the other with the name of those authorized to make arrangements. In some instances, it may be appropriate (with the physician's prior authorization) for the patient/client to be present at the conference. Conferences may be conducted by telephone, and physicians should take the necessary steps to verify the identity of the party with whom they are conversing.

Notification of cancellation of a conference, whether by the attorney or the physician, should be communicated as early as possible to all concerned persons.

An attorney or physician who realizes that a delay will occur in the starting time of a deposition should promptly notify the other and make reasonable efforts toward coordinating with the other's office to

minimize the impact of the delay upon the attorneys, physician, court reporters, or others who may be affected. The length of the conference and the amount of the physician charges should be agreed upon in advance. The attorney requesting the conference must provide the physician with a written authorization from the patient/client in order to obviate the physician's concerns about unauthorized disclosures.

## **V. DEPOSITIONS**

### **A. DEPOSITION DEFINED**

A deposition is a proceeding authorized by law whereby any person, including a physician, may be examined under oath, outside of court by attorneys representing parties to litigation. Physicians may be required by subpoena or by consent of the patient or his representative to produce records at the deposition and to permit copying of such records.

### **B. TIME AND PLACE OF DEPOSITIONS**

The time and place of deposition should be agreed upon by attorneys and physicians and should be scheduled with at least two weeks notice whenever possible. Preferably, depositions should be conducted at physicians' offices. Attorneys and physicians should be ready to proceed with depositions at the agreed upon time. Notification of cancellation of a deposition, whether by the attorney or the physician, should be communicated as early as possible to all concerned persons. The attorney and the physician may agree in advance as to appropriate compensation in the event of cancellation without adequate notice.

An attorney or physician who realizes that a delay will occur in the starting time of a deposition should promptly notify the other and make reasonable efforts toward coordinating with the other's office to minimize the impact of the delay upon the attorneys, physician, court reporters, or others who may be affected.

### **C. DUTY TO TESTIFY**

The physician has an obligation to give testimony regarding the patient as to the medical condition of that patient. If subpoenaed, the physician must respond just as any other citizen.

### **D. SUBPOENAS**

The attendance of physicians or the production of medical records may be directed by subpoenas issued by the court. Subpoenas specify the time and place of the deposition, the name of the person whose attendance is required, and the records to be produced. Reasonable notice should be given.

A subpoena must not be ignored by physicians, because the court may impose legal sanctions for noncompliance.

Attorneys should act responsibly when requesting subpoenas and maintain awareness that compliance with trial subpoenas disrupts physicians' medical practices.

Where attendance creates a hardship to the physician, the physician should contact the attorney who issued the subpoena, and both should work to solve the problem. If the problem cannot be resolved, the physician may contact his personal counsel.

Subpoenas may require both the presence of physicians and the production of medical records. When the production of only medical records is sought, subpoenas may be served either on physicians or record custodians. If the physician is named in a subpoena requesting only records, the physician and attorney may agree that the physician's personal attendance is not necessary and that the records may be produced by a records custodian or by a certified true copy of the records delivered to the requesting attorney's office by or before the due date on the subpoena.

To obtain a patient's records without an authorization, Louisiana procedural law requires that attorneys who issue subpoenas for production of medical records must provide the physician from whom the records are requested with an affidavit confirming (a) the patient's status as a litigant and (b) that a copy of the subpoena has been mailed to the patient or the patient's representative at least (15) days prior to the required production date. Unless notified to the contrary by the patient or the patient's representative, the physician may rely on the subpoena and affidavit for authority to release the records.

E. RIGHT TO READ AND SIGN

Under both the Federal and State Rules of Civil Procedure, any witness including an expert witness, has the right to read and sign the deposition. When the witness reads a deposition and finds an inaccuracy in recording an answer, a typographical mistake, or other matters that need to be clarified, the witness may make corrections listing the page number and the line number of the deposition and spelling out what changes the witness desires to be made in the transcript. The corrections sheet will then be forwarded to the court reporter and attached to the deposition.

VI. PHYSICIAN TESTIMONY AT TRIAL

A. DUTY TO TESTIFY

Physicians have an obligation to give testimony regarding the medical condition of the patient. If subpoenaed, physicians must respond just as any other citizen.

B. COURT APPEARANCES

Attorneys should provide reasonable notice of the intention to call physicians as witnesses and should take into account the professional demands upon their time. Arrangements should be confirmed in writing. Attorneys and physicians should provide the other with the names of those authorized to make arrangements. Physicians should respect the process of law and the time of others by being punctual and prepared, and should promptly notify attorneys of any expected delay.

Attorneys may subpoena medical witnesses because of circumstances in a particular case, protection of the client, or as a basis for postponement if the witness fails to appear. Physicians should not take offense at being served with a subpoena.

C. CONDUCT IN COURT

The function of physicians in the legal system is to enlighten the court as impartial witnesses. Physicians are providers of fact and opinions, not advocates.

Physician witnesses should be fully familiar with the patient's case and records before their court appearance and prepared to respond with all relevant facts and opinions regarding the patient.

The function of attorneys is to place before the court all proper evidence favorable to the client's case. Cross examination is intended to test the qualifications, competence, credibility and opinions of medical witnesses within the framework of proper legal procedure. Attorneys should never harass or abuse physician witnesses.

The touchstones for both professions must be a sense of service to the person who relies on both, mutual respect for each other's profession, mutual consideration, and mutual courtesy.

VII. COMPENSATION TO PHYSICIANS

A. FOR EXAMINATIONS, REPORTS, CONFERENCES, AND EXPERT TESTIMONY IN DEPOSITIONS OR TRIAL

1. General. Physicians are entitled to compensation for time spent for examinations, reports conferences, consultations, testing, expert testimony by deposition or in court, and other requested services. "Time spent" includes time for the review of records, telephone conferences, and travel.
2. Fees. Physician fees should be reasonable in light of the time required, the complexity of the task, and the skill involved. Fees should not be punitive or designed to discourage use of the physician in the litigation process. Rates may differ for review of records, research, reports, during office hours conferences, in office depositions, out of office depositions, travel, photocopies, or court appearances. Fees may be based on an hourly rate or a flat rate, and may be calculated on the physician's normal average hourly office income. Attorneys and physicians should agree, in advance, preferably in writing as to the fees for such services. If agreement cannot be reached and the judge is required to set fees, physicians should inform the judge of all

professional time and effort expended.

3. Payment of fees. Both the amount of physician fees and agreements as to payment of fees should be clearly set forth in writing.

Physicians have a right to know, in advance, the person responsible for payment of fees for services. Agreements as to payment should, in all cases, including those where payment is deferred until the conclusion of the case, state whether payment is to be made by the attorney, the patient/client, or both.

Any agreement not in writing at the time a deposition is taken may be read into the deposition record, if counsel consent.

Physicians may:

- require advance payment for services;
- agree to defer payment until performance of services; or
- agree to defer payment until the conclusion of the case, provided that the amount of the fees is specified in advance and is not dependent on the outcome of the litigation.

Attorneys may:

- personally guarantee payment of services;
- agree to pay for the services in advance; or
- guarantee payment out of the proceeds of the litigation, provided that payment is not contingent on the outcome of the litigation.

#### B. FOR TREATMENT

Fees for medical services provided during the course of treatment are the responsibility of the patient. The patient's attorney may guarantee payment.

Attorneys and physicians may agree that payment for rendered medical services be made from the proceeds of the litigation, provided payment is not contingent on the outcome of the litigation.

Because the proceeds of litigation may be inadequate to cover the cost of medical services, agreements between physicians and attorneys should provide for this contingency.

Physicians may require payment for prior treatment before agreeing to provide additional treatment of other services requested by attorneys.

Physicians may not impose such a condition (1) on the performance of professional services ordered by the court, (2) on the giving of courtordered testimony by deposition or in court, or (3) in the case of an indigent patient, unless the attorney requesting such services had referred the patient for those past medical services, had agreed to pay for the services, and had not made payment.

#### C. COPYING COSTS

Louisiana laws provide guidance and controls for charges related to the copying of medical records. (See Appendix A.)

### VII. MEDICAL/LEGAL INTERPROFESSIONAL COMMITTEE

The Medical/Legal Interprofessional Committee of the Louisiana State Medical Society and Louisiana State Bar Association ("Committee") serves to promote understanding and harmony between physicians and attorneys and to resolve conflicts which may arise between them. The purpose of this Committee is to receive and make recommendation on complaints from members of the Louisiana State Medical Society and the Louisiana State Bar Association relative to physician/attorney relationships or problems and to recommend appropriate suggestions or remedies to resolve the dispute.

It is further the purpose of this Committee to work strictly within the membership of the two professional associations and not serve as a vehicle for public access concerning medical/legal issues or conflicts. The Committee encourages members of both professions to appropriately cooperate for the overall benefit of the patient/client. If conflicts arise, the Committee then attempts to resolve them.

### IX. DEFINITIONS

1. SUBPOENA AD TESTIFICANDUM (sometimes simply referred to as a SUBPOENA) A written order of court directing a person, including a physician, to appear at a certain time and place to give testimony upon a certain matter.
2. SUBPOENA DUCES TECUM A written order of court directing a person, including a physician, to produce at a certain time and place, documents, office records, or objects in the possession or control of the person.
3. FACT WITNESS Any person, including a physician, who has had contact with a patient or has knowledge of the facts and circumstances surrounding the patient's condition and treatment.
4. EXPERT MEDICAL WITNESS Any person, including a physician, who, based on professional qualifications, is permitted by the court to express medical opinions as to diagnosis, prognosis, causation, rehabilitation, anticipated cost of future treatment, and other similar medical subjects. An expert medical witness is entitled to compensation for such testimony.
5. CANCELLATION The elimination or continuance (postponement) of the scheduled conference, deposition or court appearance.
6. MEDICAL TREATMENT Medical services which would be provided to a patient regardless of the existence of litigation.
7. EXPERT MEDICAL SERVICES Professional litigation-related services provided by a physician at the request of attorneys or by order of court.

## **APPENDIX A**

The Louisiana Legislature passed Act No. 205 on 26 June 1989 which amends La.R.S. 40:1299.96. This act establishes the right of a patient or his legal representatives to obtain a copy of his record upon furnishing a signed authorization and upon payment of:

1. A reasonable copying charge, not to exceed \$1.00 per page for the first 25 pages,
2. \$.50 per page for 26-500 pages,
3. \$.25 per page thereafter,
4. A handling charge not to exceed \$5.00,
5. Actual postage.

The copy of this record must be provided within 15 days following receipt of the request and written authorization, unless the physician concludes that the information therein could be injurious to the health or welfare of the patient or endanger the life or safety of another person.