

## **THE THIRD INTERPROFESSIONAL CODE OF CONDUCT and PRACTICE<sup>1</sup>**

The Third Interprofessional Code of Conduct and Practice was adopted by the Delaware State Bar Association and the Medical Society of Delaware in 2017

### **PREAMBLE**

In order to best protect the interest of the public, who are patients of physicians of medicine<sup>2</sup> and clients of attorneys-at-law, there should be the utmost cooperation between the two professions to avoid both financial and emotional hardships to the patient client and to minimize financial and time expenditures by the members of either profession.

It is recognized by both professions that their primary concern and obligation is to serve the best interests of the patient client. Any personal biases by members of either profession should not intrude upon their professional relationship in a particular matter.

Physicians of medicine and attorneys-at-law, as members of two professions possessing close personal relationships with the members of the public they serve, have established canons and principles of ethics consonant with the traditions and requirements of their respective callings. Nothing herein contained is intended to affect the established codes of ethics governing the two professions.

This Interprofessional Code of Conduct and Practice constitutes recognition that, with the growing interrelationship of medicine and law, it is inevitable that physician and attorney shall be drawn into steadily increasing association. This statement of principle is intended to be a guide for interprofessional conduct and practices of physicians of medicine and attorneys-at-law. It will

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<sup>1</sup> The First Interprofessional Code and Practice was adopted by the Medical Society of Delaware and the Delaware Bar Association in 1957. The Second Code was adopted in 1996. Since that time, it has been the primary instrument in the successful resolution of historic annoyances between medicine and law in our state. Although, basically sound in structure and content, an increased climate of cooperation between doctors and lawyers now allows for revision and expansion of the original document.

<sup>2</sup> The use of the terms physicians, physicians of medicine and doctor(s) relate both the M.D.'s and D.O.'s.

serve its purpose if it promotes the public welfare by improving the practical working relationships of the two professions.

## I. THE ADVERSARY SYSTEM AND THE ATTORNEY'S FUNCTION WITHIN THIS SYSTEM

Legal proceedings in this country are conducted under the "adversary system." Under this system, the attorney occupies a dual position: an advocate for his or her client's interests, and at the same time, an "officer of the court." The attorney cannot ethically represent both sides of a dispute. As an advocate for the client, the attorney is bound to present the case most favorable to the client through direct examination, and through the effective use of cross-examination, exposing any weaknesses in the adversary's case. Some neutral person or panel of persons then weighs the opposing claims and decides which has the most merit.

### The Physician's Function in the System

The physician should accept the responsibility of explaining medical facts in such a manner that the attorney understands them and can determine their relationship to the case.

The physician determines the medical facts pertaining to the patient's condition. The attorney determines how and under what circumstances such facts are to be presented within the context of the case.

The physician may be asked to state an opinion on matters that relate to the medical condition of the patient. Opinions should be limited to subjects within the field of the physician's competence and may include such matters as the existence or likelihood of permanent impairment, injury and loss of function, and the degree thereof, the probable need of the patient for present and future medical care, and the estimated cost thereof, or similar judgments. based upon their professional knowledge of the patient's condition. Opinions should not be based on absolute certainty as to the existence of a fact or the likelihood of a fact occurring, but should be predicated on the reasonable medical probability that said fact exists or will occur in the future.

A physician should never advise on the amount of damages a patient should seek to recover. A physician should not advise upon trial techniques or technical rules of legal liability or of evidence.

## II. CONFERENCE

The physician and the attorney, when either considers it desirable, should confer on the common problems presented in a particular case. Such conferences should be arranged in advance of the hearing, at their mutual convenience, recognizing that, to each profession, time is of the utmost importance. No physician or attorney should be required to spend unnecessary time in arranging or attending such a conference.

In most situations, it is unfair to the client, the physician and the cause of justice to present a medical witness who has not first conferred with the attorney and who therefore, may not be aware of the significance to the case of the evidence the physician is being asked to give. Likewise, the attorney is less able to represent the full interest of the client where the attorney has not had the advantage of advance conference with the physician. Adequate preparation for testifying is an essential and mutual obligation of the medical witness and the attorney calling the witness. The unprepared attorney or physician may do great disservice to the patient and to the administration of justice.

### III. WRITTEN REPORTS AND PATIENT INFORMATION

Physicians should appreciate the importance of promptness in providing attorneys with information. Attorneys should appreciate that the doctor must be given not only adequate time to prepare a report (30 days), but also be provided with sufficient legal guidance to enable the preparation of a report that adequately addresses the medical-legal issues involved.

The proliferation of the internet, cell phones, and email have created an expectation among professionals, clients, and patients that communications will be answered at previously-unheard of speeds. Physicians should appreciate that attorneys have clients wish to have their matters resolved at a modern pace and should reasonably accommodate. Attorneys should appreciate that physician hours are best spent seeing patients with undivided attention and plan accordingly.

Matters may often be settled out of court to the mutual satisfaction of the parties involved. Undue delay in providing medical response or patient information may prejudice opportunity for settlement or other disposition of the matter and thus create further expense, worry, and even the loss of important testimony.

In the absence of a court order, when a report or patient information is requested by someone other than the patient or the patient's attorney, the doctor must receive written authorization from the patient before giving the report or patient information.

### IV. COURT ARRANGEMENTS

Physicians and attorneys must be in court on time. Timing is not only important for the orderly and advantageous presentation of the case, but also for the convenience of the court, other witnesses, the jury, the attorneys and the litigants. Attorneys should appreciate, however, that physicians have continuing and often unpredictable responsibilities to their patients. It should therefore be anticipated that, at times, courtroom procedures must give way to humanitarian considerations and the physician be permitted to testify "out of turn."

Unless impossible or inimical to the client's interests, lawyers should make such advance arrangements for the attendance of doctors as witnesses as will have due regard for professional

demands upon the doctor's time. Similarly, the attorney should minimize, insofar as practicable, the time required for the physician to remain in court.

It is the attorney's responsibility to advise a doctor as promptly as possible of a resolution or other occurrence, such as a continuance, which either obviates the necessity for the doctor's appearance or requires a resetting of the time for the doctor's appearance. It is the doctor's responsibility to do their best to revise their schedules to accommodate such necessary timing changes.

Where a continuance or a settlement occurs at such time that the doctor's time is lost, then the doctor may properly make a reasonable charge for the actual time lost and not otherwise professionally spent.

## V. THE PHYSICIAN WITNESS

Simplicity and brevity are cardinal virtues of the medical witness.

It is possible for medical testimony to be worded so technically that its meaning is entirely lost upon a jury or is so completely misunderstood that the jury, because of failure to comprehend the true import of the testimony, makes an erroneous finding.

To make their professional testimony clear, physician witnesses may first express their findings and opinions in medical terms. Whenever they do so, however, they should translate those terms as accurately as possible into language intelligible to the court, the attorneys and the jury.

The purpose of the physician's testimony is to explain and enlighten the court as to the truth of the matter. If it does not help explain and does not clarify the issues of a particular case, it has failed.

Both professions should understand the function of direct examination and cross-examination in the adversary system. While the physician understands that his or her status as an expert must be set on the record and that it may be challenged, it is beneath the dignity of the attorney and is equally in violation of the dignity of the physician for an examining attorney to subject the physician witness to abuse in order to test competence or credibility.

## VI. RESPONSIBILITY FOR MEDICAL FEES AND EXPENSES RELATIVE TO LITIGATION

### A. Patient-Requested and Physician Ordered Services

Both professions recognize that a doctor is free to accept or decline treatment of any patient. If a doctor accepts the treatment of a patient, the doctor may do so on any terms (including guarantees for payment) that he or she may negotiate with the patient.

Any physician services that are requested by the patient or ordered by the doctor are the sole responsibility of the patient to pay. Payment of medical fees for patient-requested or physician-ordered services cannot be guaranteed by the attorney. Such a guarantee would be the equivalent of underwriting litigation and would violate the attorney's code of professional responsibility. However, the attorney should advise the client that payment for these medical services, regardless of any outstanding litigation, are due when services are rendered and that the patient is obligated to pay for services received, regardless of the outcome of the litigation.

#### B. Attorney-Requested Services

In the course of litigation, the attorney may request services of the physician, such as reports, exams, records, testimony and the like. Payment of medical fees for attorney-requested services is the responsibility of the attorney. The medical fee for any attorney-requested services may be billed directly to the attorney, and the doctor may look to the attorney for payment. Payment by attorneys for attorney-requested services should be made when billed and not at the end of the litigation.

#### C. Responsibility for Determining the Charges for Litigation Fees and Expenses

In connection with litigation, the treating doctor will charge a fee that is reasonable and is reflective of fees charged to patients; lost practice time including time involved in preparation for testifying, conference, and in traveling to and from the site of depositions and/or court and administrative proceedings; practice overhead; and the experience that the individual brings to the case.

The doctor is entitled to be paid for services rendered in connection with litigation by the person who engages the doctor to render those services, and the doctor may request payment in advance. If asked to do so the doctor will advise the person engaging such services the basis and amount of the doctor's charges at the time of the engagement.

Guidance on this point has been adopted in conjunction with this document.

### VII. THE SUBPOENA

The doctor may be subpoenaed solely as a precaution to assure a postponement by the court if the doctor fails to appear. The attorney's duty to the client may require such precaution.

The physician must answer to a subpoena like any other citizen, except where an emergency prevents doing so. An emergency can never be a matter of mere convenience to the physician. It must

always involve genuine professional needs of a patient and the physician takes the risk of convincing the court that the emergency was sufficient to justify ignoring the court order.

Attorneys should issue subpoenas promptly so that there may be the maximum possible time for the doctor's preparation to respond.

## VIII. INTERPROFESSIONAL DISPUTES

This Code is intended to resolve issues that might arise because of fees, expenses, scheduling of physician testimony and other matters dealing with the relationship between the two professions. The physician and the attorney should use every effort to reasonably and promptly resolve any issues that arise between them.

Where a dispute arises involving these matters which the physician and attorney cannot resolve, either may refer the matter to the Joint Grievance Committee. The Joint Grievance Committee shall take such action as is necessary to dispose of the matter. The Joint Grievance Committee shall have no jurisdiction over allegations or claims of professional malpractice.

### A. Interdisciplinary Physician/Attorney Procedure for Resolving Disputes

The purpose of this procedure is to set forth a speedy mechanism whereby attorney physician disputes may be resolved in a quick and fair manner.

A rotating committee shall be established composed of physicians and attorneys who have voluntarily agreed to serve as panelists, without pay and on relatively short notice, to resolve disputes between the professions.

A physician and an attorney who are in charge of contacting panelists and arranging times for scheduling these informal procedures shall be appointed by the Medical Society of Delaware and the Medical-Dental Legal the Delaware State Bar Association. The terms of their appointment shall be determined by their respective professional organizations.

When a dispute arises, a panel of three shall be convened to resolve that particular dispute.

If the complaining party is a physician, the panel shall be comprised of two attorneys and a physician with the physician chairing the panel. If the complaining party is an attorney, the panel shall be comprised of two physicians and an attorney with the attorney chairing the panel.

The function of the panel will be advisory and its decision will have no legal and binding effect, the panel will not have any subpoena powers. The panel shall not be bound by formal rules of evidence. Parties to the procedure may or may not call witnesses on their behalf and may or may not submit written documents in support of their position.

## **SUMMARY**

Each profession has the duty to develop an enlightened and tolerant understanding of the other. The aims of the two professions are parallel in their service to society; this necessitates understanding and cooperation by each profession with respect to the other in the best interests of the public.

Each profession is obligated to respect the calling of the other. Neither the fact nor the appearance of incompetence, dishonesty or unethical conduct on the part of members of either profession shall be tolerated. It follows, then, that each profession must vigorously support within its own ranks, as well as in the ranks of the other, those ethical concepts which each has found necessary to adopt in the public good.