



Physiotherapy Alberta
College + Association

A Guide to Common Legal Processes for Alberta Physiotherapists

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This guide provides information for physiotherapists on commonly encountered legal processes including providing medical-legal reports and expert reports, acting as a lay or expert witness in court and what you need to know about subpoenas, summons and notices to attend.





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Physiotherapy Alberta regulates and leads the practice of physiotherapy in Alberta. We developed this guide to common legal process to help support Alberta physiotherapists.

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Introduction

This guide provides information for physiotherapists on commonly encountered legal processes including providing medical-legal reports and expert reports, acting as a lay or expert witness in court, and what you need to know about subpoenas, summons and notices to attend.

Written Reports

1. Medical-legal reports

On occasion, physiotherapists may be asked to provide a written medical report for a patient that is pursuing a form of legal action. This report is known as medical-legal report and typically consists of a summary of a physiotherapy clinical record that references the assessment, treatment and prognosis of a patient.

Medical-legal reports serve to provide information and can provide an opinion, as long as the physiotherapist formulated that opinion in the course of the clinical treatment. A medical-legal report is considered an extension of a physiotherapy clinical record and there is a corresponding obligation to facilitate a written request for medical-legal report, often from a lawyer, as long as it is accompanied by an authorization from the patient.

Failure to provide a medical-legal report within a reasonable period of time, or by the date specified in the written request, may constitute unprofessional conduct. If a medical-legal report cannot be provided within a specified or reasonable period of time, the physiotherapist should contact the party requesting the medical-legal report to advise them the report will be delayed and when a response might be expected.

Physiotherapists must ensure they have a clear understanding of what is required in the medical-legal report. A request may be for dates of treatment and the nature of the treatment provided or a request for the clinical opinion that was formulated by the physiotherapist in the course of clinical treatment on the cause of a condition, the severity of a condition, the functional implications on lifestyle and the likely prognosis for recovery.

Key factors to keep in mind upon receiving a request for a medical-legal report:

- Ensure the request is in writing and the questions and expectations are clearly outlined.
- Only agree to provide a medical-legal report for your own patient.

- If questions or expectations are not clear, seek further information in writing before authoring the medical-legal report.
- Obtain an original signed consent from the patient authorizing the release of information.
- Do not provide an opinion over the phone.
- Have an informal discussion with the lawyer about the information that will be contained in the medical-legal before authoring it in order to determine if the lawyer wishes to proceed with a written report.
- Agree in writing to any fees for preparation of the medical-legal report.¹

When preparing a medical legal-report:

- Answer only the questions that are contained in the written request
- Try to use plain language (if a technical term must be used, provide an explanation)
- Keep the sentences short, straightforward and avoid the use of ambiguous language
- Keep statements objective, based on clinical observations and avoid any speculation or inferences that would be difficult to support
- If a fee has been agreed upon, issue an invoice for the medical-legal report but a physiotherapist may not demand payment prior to releasing the report

Other things to consider:

- Avoid commenting on issues that were not a component of the clinical treatment provided to the patient.
- Avoid making inferences on causality based on the presumed biomechanics of the injury.
- If asked to provide a clinical opinion, state “in my opinion” or “in my experience.”

¹ The Rules of Professional Conduct of the Law Society of Alberta provide that a lawyer is personally responsible for any expenses incurred on behalf of a patient unless the lawyer has expressly disclaimed responsibility to the relevant party beforehand.

Medical-legal reports continued...

- Be prepared to support statements and arguments with clinical observations and scientific evidence.
- Do not revise the facts, if correct, or the opinions contained in a medical-legal report at the request from a lawyer or patient
- If asked to include a comment on prognosis or causation, insure that your comment is properly qualified, e.g. reference the probability or use terms such as likely or possibly.
- If asked to comment on the level of functioning, only reference what has been observed or tested and qualify the statement.
- Be cautious when offering an opinion on prognosis, for example whether the patient will develop arthritis or a chronic pain syndrome.
- Avoid making non-clinical statements as to the character or personality of the patient.
- If asked to comment on a pre-existing physical/functional condition indicate if you had any knowledge of such a condition prior to the accident.
 - » Identify and report any known pre-existing condition or injury, indicating if the patient had any physiotherapy treatment for the condition and if the patient's functional abilities were affected prior to the accident.
 - » Stick to the facts. If the patient's complaints after the accident are similar to the preexisting complaints, document if the complaints have been exacerbated by the accident.
 - » Report only what is known or has been clinically observed.

2. Expert reports

An expert report is a document created in accordance with a specific format pursuant to Rule 5.34 of the Alberta Rules of Court and must contain at a minimum the expert's name and qualifications, the information and assumptions on which the expert's opinion is based and a summary of the expert's opinion.

An expert report is different from a medical-legal report, as it contains opinions that were not formulated in the course of providing clinical treatment; rather, it contains opinions based on factual assumptions and hypothetical situations that arise in litigation. Expert reports are not restricted to causation and prognosis and often provide an opinion on whether the care provided by another physiotherapist met the requisite standard of care.

Physiotherapists are under no obligation to act as an expert or provide an expert report. It is a matter of choice.

See being an expert witness for additional information.

Being a Witness

In the course of clinical practice a physiotherapist might be required to attend before a Court or an administrative body in order to provide evidence under oath. The evidence will likely either relate to the clinical treatment of a client; an expert opinion on the causal underpinnings of an injury; or an expert opinion on whether treatment received by an individual met the requisite standard of physiotherapy care.

Being a witness in a legal proceeding can sometimes be a stressful and confusing experience. As such it is important to understand some basics about being a witness.

1. The nature of the evidence

In a general sense, a physiotherapist can either provide evidence as a 'lay witness' or an 'expert witness.' The distinction between these two roles is particularly important in the context of civil litigation and is often the subject of legal debate. The following is a basic guideline to assist physiotherapists in making a distinction between the two separate roles.

2. Lay witness

A lay witness generally testifies about an event or observations that they experienced first-hand. For instance, a physiotherapist that is subpoenaed to testify about providing clinical treatment to a client is, generally speaking, testifying as a lay witness (despite having obvious clinical expertise). The physiotherapist is providing factual evidence about his or her role in treating the client, which might include: the reported clinical history, the nature and purpose of the treatment provided, and the response to treatment.

Lay witness evidence is strictly factual evidence about the assessment, observations and diagnosis that occurred contemporaneous with the attendance on the client. Factual evidence generally excludes speculation, opinions based on hypothetical questions or requests for

a physiotherapist to formulate opinions about treatment with the benefit of hindsight.

In short, if a physiotherapist has not been asked to author an expert report pursuant to Rules 5.34 or 5.44(3) of the Alberta Rules of Court it is probable that the physiotherapist is being called as a lay witness.

Lay witnesses are generally entitled to be paid a nominal amount of conduct money for their attendance in Court, including travel costs where applicable. The amount of conduct money is established by legislation and must be provided to the physiotherapist when the legal document is served.

3. Expert Witness

Expert witnesses are retained to provide the court with expert opinion evidence that assists the 'trier of fact' (judge or jury) in drawing conclusions about issues at the trial that are beyond the scope of common knowledge. Expert witnesses are bound by their professional and ethical integrity and are not meant to be advocates for a party in the action.

Physiotherapists are never under a compulsion to act as an expert witness and are at liberty to decide whether they want to engage in this process. The paramount consideration is whether the physiotherapist has the confidence, requisite experience and expertise to provide the opinion evidence in a certain area.

Expert witnesses are generally retained by legal counsel and are asked to author an expert report pursuant to Rule 5.34 of the Alberta Rules of Court. Expert reports are disclosed to all parties in advance of trial in order to avoid surprises at trial and to encourage resolution of litigation.

An expert witness must possess sufficient experience, knowledge, and skill in order to provide expert opinion evidence. Generally, expert witnesses are asked to

provide an opinion on whether another practitioner met the requisite standard of care (being mindful that the standard is ‘reasonableness’ not ‘perfection’); whether an injury is causally related to the treatment provided by another practitioner; or the future care needs of a Plaintiff and the associated costs.

There is an evidentiary process engaged in at trial in order to determine if a witness is “qualified” to provide expert evidence. This typically involves reviewing the curriculum vitae of the witness, a “voir dire” [trial within a trial] with questioning and argument about expertise, and a determination by the court as to whether it will accept the witness as an “expert” and any parameters on the scope of the expertise.

In some situations, a physiotherapist may be retained by one of the parties involved in litigation to provide a Rule 5.41(1) “medical examination”. In this situation, the physiotherapist conducts a clinical assessment [possibly in the presence of another appointed “expert”] and documents the factual findings, excluding opinions pertaining to issues in the litigation [these opinions generally become a component of a 5.34 Expert Report]. The factual findings are provided forthwith to opposing legal counsel. This process can be complicated and, if retained, physiotherapists should seek direction from the retaining legal counsel.

Physiotherapists that act as expert witnesses are entitled to charge a fee for the services that they provide. The fees charged should be reasonable, and should be agreed upon between the physiotherapist and the person retaining the expert services in advance of any services being provided. It is important to be mindful of the fact that should the matter proceed to trial, the time required to testify could have an impact on a clinical practice.

What you need to know about Subpoenas, Summons + Notices to Attend

What are the legal documents that compel a witness to attend a proceeding to provide evidence?

There are three types of legal documents used to compel attendance of a witness in a criminal matter, a civil proceeding, or an administrative process.

1. **Subpoena**—is a court order issued in accordance with the Canadian Criminal Code and compels the attendance of a witness in criminal proceedings.
2. **Summons**— is generally used in administrative processes or inquiries.
3. **Notice to attend**—is issued in a civil matter such as personal injury litigation or regulatory matters.

These legal documents technically require personal service on a witness in order to compel their attendance and should contain the following information pertaining to the logistics of the attendance:

- Identify the time and place where the physiotherapist must attend to provide evidence;
- Advise whether a physiotherapist is expected to bring health records in their possession or control relating to the treatment of a client. **Note:** If there are particular issues pertaining to privacy or the disclosure of sensitive information in the health records, those issues can be raised with the Court and will likely be the subject of legal argument.

There is a good argument that the administrative and printing costs associated with disclosing the health records should not be an expense incurred by the physiotherapist. An invoice representing this cost should be presented to the party that issued the legal document. If there are any disputes about the cost, the matter may be dealt within Court.

A person who is the subject of a legal document is entitled to a witness fee in the amount of \$10.00 per day, and if appropriate, transportation expenses. These costs must be provided to the physiotherapist at the time the legal document is served.

It is often preferable for physiotherapists to be compelled to provide evidence pursuant to a subpoena, Summons or notice to attend, as it permits the physiotherapist to disclose health information or personal information without necessarily requiring the consent of the client.

Health Information Act, RSA 2000 c. H-5 at s. 35(1)(i).

Personal Information Protection Act, SA 2003 c. P-6.5 at s. 20(e).

Is a subpoena from another province valid in Alberta?

In certain circumstances a physiotherapist might be obligated to comply with a subpoena or a court order from another Canadian province if the party seeking the subpoena has complied with the provisions of the relevant intra-provincial legislation.

For instance, if a party who has commenced a lawsuit in British Columbia seeks to subpoena records from a physiotherapist practices in Alberta, the party must obtain a Certificate from a British Columbia court confirming that the appropriate requirements for issuing the subpoena have been met. The party must then hire an agent to apply for an order from the Alberta Court adopting the extra-provincial subpoena.

If all of these steps have been taken, the subpoena from out of province will arguably be valid and enforceable in Alberta.

Is a subpoena from another country valid and enforceable in Alberta?

Similarly, a party who commences a lawsuit in another country might obtain a subpoena or court order compelling a witness or documents from a physiotherapist in Alberta. The process is; however, extremely complicated. For example, if a party who has commenced a lawsuit in Connecticut is seeking documents from a physiotherapist in Alberta, the party must first obtain a subpoena from the Court in Connecticut. The party must then also obtain a document called a Letter of Request from a U.S. Diplomatic Officer. The officer specified in the bilateral agreement between Canada and the U.S. must then serve the Letter of Request and subpoena upon the physiotherapist.

If appropriate steps have been taken, a foreign subpoena is valid, and a physiotherapist is required to comply. Given the complexity of the international process, it would be prudent to seek independent legal advice in the event you are served with an international subpoena or court order.

What are the consequences of non-compliance?

The failure to comply with a valid Subpoena, Summons or Notice to Attend could result in a physiotherapist being found in contempt of a Court Order. The penalty for contempt typically involves fines and, in extreme circumstances, can result in imprisonment. Accordingly, it is essential that physiotherapists treat these legal documents seriously, seek independent legal advice if required and take all necessary steps to insure that they are in compliance with the terms of the legal documents.

For further information contact by e-mail at professionalpractice@physiotherapyalberta.ca or by phone at 780 438-0338 or 1 800 291 2782



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