

Medical Examinations by Non-Treating Physicians (NTMEs)

Related Standard of Practice: Non-Treating Medical Examinations

The College of Physicians & Surgeons of Alberta (CPSA) provides advice to the profession to support physicians in implementing the *CPSA Standards of Practice*. This advice does not define a standard of practice, nor should it be interpreted as legal advice.

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Definition and Preamble

Unquestionably, Independent Medical Examination (IME) is familiar terminology in widespread use, including credentials issued by certifying agencies (e.g. ABIME, CIME). NTME is cumbersome, but is chosen because it says what we mean. In this advice document, the person being examined will be called the “claimant,” and the person requesting the NTME will be called the “third party.”

An NTME is a clinical examination performed by a physician for legal, financial or insurance reasons. The examination commonly includes a review of clinical data (history, physical examination and test results). The examiner often is required to answer questions concerning diagnosis, impairment and causal linkage. One must distinguish an NTME from a medical report to a third party by a patient’s treating physician (e.g., driver’s medical report). A medical examination by a non-treating physician means the physician has not been involved in the patient’s care previously and will not be involved actively in the care afterward.

The NTME requires the physician to be impartial, ideally through having no involvement at any time in the claimant's medical care; in other words, separation from the claimant being examined. If there had been a therapeutic relationship in the past, this should be disclosed when contracting to do the NTME. That disclosure might be seen as disqualifying the physician. There also should be no relationship between the physician and the third party except on a fee-for-service basis; where one does exist, it must be declared openly to the claimant and in the report.

The NTME physician should be wholly objective and impartial. This does not mean the physician is to be professionally "unsympathetic," brusque or indifferent to the claimant's concerns or complaints. A truly professional physician can be helpful and supportive to the claimant, as well as objective and impartial in commenting on such issues as diagnosis, causation and prognosis.

There are several types of NTMEs, including:

- An examination by a Certified Examiner under the Minor Injury Regulation (available at www.qp.alberta.ca/documents/Regs/2004_123.pdf),
- An examination under Rule 5.41 of the Alberta Rules of Court (available at www.qp.alberta.ca/documents/rules2010/rules_vol_1.pdf),
- An examination under clause 38(1) of the *Workers' Compensation Act* (available at <http://www.qp.alberta.ca/documents/Acts/W15.pdf>), and
- An examination under a contract of disability insurance.

A physician should have a full understanding of the requirements and obligations associated with the type of NTME being undertaken. Reviewing the contractual terms, the Minor Injury Regulation or Rules 5.41 to 5.44 is a minimum requirement for the physician undertaking the NTME. Additionally, in order to undertake an NTME under the Minor Injury Regulation, a physician must be an approved Certified Examiner.

As an NTME physician is asked to provide a professional opinion based on their training and experience, this role could lead to the NTME physician being asked to testify in Court as an expert witness. In Alberta, all expert witnesses carry a number of duties and responsibilities, being:

- Expert evidence should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- An expert witness should provide independent assistance by way of objective unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

- An expert witness should state the facts or assumption upon which their opinion is based. They should not omit to consider material facts which could detract from their concluded opinion.
- An expert witness should make it clear when a particular question or issue falls outside their expertise.
- If an expert's opinion is not properly researched because they considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth, and nothing but the truth without some qualification, that qualification should be stated in the report.
- If, after exchange of reports, an expert witness changes their view on a material matter having read the other side's expert report or for any other reason, such change of view should be communicated to the other side without delay and when appropriate to the Court.
- Where expert evidence refers to photographs, plans, calculations, analysis, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

Purpose

This advice document is intended to serve as an aid to physicians who do NTMEs in the hope that its principles may be helpful and reduce the chance of dissatisfaction with the examination.

Numerous professional activities that resemble NTMEs differ in ways that make it inappropriate to apply all of the principles in this document to them. The document is not intended to address:

- Occupational health examinations and fitness for work assessments; even though frequently undertaken by non-treating physicians, these differ from NTMEs in that:
 - Disclosure of clinical findings and opinions (regarding prevention, diagnosis or treatment) to the job candidate or employee is usual and proper, as is appropriate communication with the treating physician;
 - Disclosure to the employer (as the third party) is usually limited to fitness for job demands and does not usually include clinical details or opinions; and
 - Occupational health examinations provide a health benefit to the job applicant or employee; for example, education about job hazards, identification of individual risk factors and assessment of work-related health effects.
- File reviews: these are done without explicit consent from, or direct contact with, the claimant. Such reviews call for extra caution, especially when commenting about the appropriateness of past medical care.
- Notwithstanding these differences, the principles of disclosure, consent and conduct of the examination (as outlined in this advice document) are still applicable.

Potential for Conflict and Dissatisfaction

There often exists, prior to arranging the NTME, an adversarial relationship between the claimant and the third party. Because of this adversarial relationship, the claimant may be predisposed to disagree with the NTME physician's report when it impacts unfavorably on the claim for damages, benefits or pension. This disagreement may concern the presentation of facts, diagnosis, causation, prognosis, recommendations concerning treatment, rehabilitation efforts, complementary therapies and/or return to work, disability, impairment and/or accuracy of medical history. It may simply be based on a misunderstanding of the role or impact of the NTME physician's opinion.

Questions and complaints arise when a physician provides services for third parties, such as NTMEs, at a greater rate than most other types of service provided by the physician. Provision of NTMEs tends to attract complaints; our statistics show that this practice type is over-represented among physicians with multiple complaints. This observation is not specialty-specific other than to the extent that certain specialty groups tend to be asked to do NTMEs more commonly than members of other specialties.

The CMPA also has observed that physicians who do NTMEs are at a higher risk for complaints to the College. These complaints touch on a number of specific issues including:

- Timeliness of reporting.
- Content of report; inaccuracies of findings and interpretations.
- Perceived conflict of interest.
- "Hired gun" perception; perceived bias.
- Ownership of report.
- Responsibility to pay for report.
- Adequacy of consent process
- Discomfort with the perceived "power" of the examining physician.
- Opinion outside the limits of the physician's perceived expertise.

Arranging the NTME

The NTME physician should:

- Provide the third party and the claimant with clear directions as to the location and appointed time for the NTME. This will be useful to assist the claimant in finding the correct location at the correct time.
- Understand the purpose of the NTME and discuss that understanding with the claimant.
- Confirm with the third party the time lines requested, the fees and expenses payable and by whom. A fee may be included for cancellation with short notice or no show where there is not an adequate reason.



- Confirm the third party will pay for any new or repeat testing (lab, x-ray, etc.), if necessary.
- Adhere faithfully to the contractual terms and instructions.
- Never accept a fee where there is an expectation, direct or indirect, that the physician will write a report favourable to the third party in this matter or generally.
- Consider providing a sample consent form so the claimant can consider it and, perhaps, review it with a lawyer. This will avoid delay at the physician's office.
- Understand that an NTME conducted under the Alberta Rules of Court (Rule 5.41) does include the right of the claimant to have a health care professional of their choice in attendance at the NTME. That health care professional has no right to participate actively or interject in the NTME: their role is that of observer. You should be aware that the observing health care professional may be required to comment upon the NTME report, recording their observations as to the physician's manner, technique, tests conducted, etc.
- Understand also that an NTME conducted under the Alberta Rules of Court (Rule 5.41) includes the claimant's right to choose to make an audio or video recording of the NTME. The NTME physician is entitled to receive, as soon as is practicable, a copy of the claimant's recording before the NTME physician is obligated to finalize their report following the NTME.

Informed Consent

Although the third party may have the power to require an NTME, thus needing no consent to refer, the NTME physician for their own protection should obtain fully informed consent to the NTME. In procuring proper informed consent from the claimant for the NTME, it is important to:

- Make reasonable effort to communicate using plain language and in such a way that information exchanged is understood. Do not be casual in demeanor or language, and remain professional in the face of strong emotional reactions.
- Give information required for informed consent in both oral and written forms.
- Inform the claimant that consent may be withdrawn at any time prior to completion of the examination.
- Be clear the claimant understands the nature and extent of the NTME physician's responsibility to report to the third party.
- Answer the claimant's questions, including those about the physician's role in NTMEs, the consent process and the procedure for reporting the findings and opinions. Do not engage in discussion about correctness of diagnosis, adequacy of care, prognosis, etc.
- Describe, in general terms, the medical questions to be explored and body systems to be examined and the reasons for them.

- Clearly declare qualifications (training, credentials) and perform NTMEs only within one's area of expertise. Many medical conditions cross specialty lines; thus, the examining physician may be asked to explain their role, especially when dealing with subjects that may not appear to be within their specialty.
- Clarify the NTME is occurring at the request of a third party and identify that person or agency.
- Notify the claimant that they generally have no direct right to a copy of the report from the physician, as in the case of an NTME under the Rules of Court or an insurance contract. It may, however, be obtained directly from the third party who owns it. If the claimant's lawyer obtains the NTME, the claimant owns the report, but should obtain it from the lawyer, not directly from the NTME physician. If the NTME is under the Workers Compensation Act, the NTME physician sends the report to WCB, and the claimant can obtain a copy from WCB. An exception to this general rule is an NTME under the Minor Injury Regulation, which includes the obligation on the physician to provide a copy of their report directly to the claimant and the third party. Explain that the claimant may or may not agree with the report's contents and/or recommendations. The NTME physician may wish to clarify that they do not control the manner in which the report may be used.
- Indicate the contents of the report may be used to formulate decisions about overall disability, rehabilitation, benefits or disposition of the claim, but that the NTME physician's opinion is only one part of the information upon which the third party will assess the claim.
- In the case of an NTME under the Minor Injury Regulation, indicate the regulations require that the report must address a number of issues and questions, which are listed in Form MI-3 (available at www.finance.alberta.ca/publications/insurance/forms/mi-3.pdf).
- No ongoing or therapeutic patient/doctor relationship will be established, and no involvement in medical care of the claimant will result. Do not purport to be an independent examiner *and* the claimant's treating physician as well. (It might be acceptable to treat the individual in the distant future for an unrelated condition or, in extraordinary circumstances, for the same condition on referral by the claimant's treating physician.)
- It is permissible to do NTMEs for more than one third party on the same individual, again provided this is disclosed at the time of being recruited. Exercise caution, so as not to act for parties with competing interests.

Conduct of NTME

- Introduce yourself to the claimant. This is extremely important.
- Consider first the wellbeing of the claimant. Avoid roughness or abrasiveness.
- Review the entire person; maintain objectivity and do not focus only on the injury/disability. An underlying general medical condition may put the presenting problem in an entirely different perspective.
- Offer appropriate time, comfort, and privacy. Allow, or sometimes insist on, a chaperone. Employ proper gowns and draping.
- Children, if brought along, should have a caregiver so that the NTME can occur in an atmosphere that is quiet and stress-free for both the claimant and the NTME physician.

- Treat all claimants with respect. Avoid demeaning or judgmental comments. Allow the claimant to tell his/her story.
- Make an audio or video recording of the NTME only with the claimant's knowledge and permission in advance. Its use is strongly recommended.
- The claimant may wish to purchase a copy, or to make his/her own audio or video recording of the NTME. It is permissible, but not mandatory for a physician conducting An NTME under an insurance contract or the Minor Injury Regulation, to agree to such requests. AN NTME under Rule 5.41 of the Alberta Rules of Court gives the claimant the right to choose to make an audio or video recording of the NTME.

Termination of the NTME

The physician must terminate the NTME before completion in the following circumstances:

- The claimant's refusal to provide consent.
- The claimant's withdrawal of consent previously provided.

It is reasonable, and may be best for all concerned, for the physician to terminate or at least interrupt the NTME before completion in the following circumstances:

- The claimant's expression of significant physical or emotional discomfort during the NTME.
- The claimant's lack of cooperation, perceived sexual behaviour, extreme rudeness or aggressive behaviour, bribery or coercion before or during the NTME.

In these four circumstances, the NTME physician should notify the third party and discuss appropriate billing for work done and time committed. Some form of report should follow in writing.

Documentation

The NTME physician should retain for ten years:

- Informed consent document.
- Contract (if it exists in written form) outlining scope, purpose, timeliness and fee arrangements.
- Notes of history.
- Notes of physical examination.
- Audio and video recording, if made, or copies received from the claimant.
- A list of sources of ancillary information, including medical reports, records and any surveillance conducted by others.



Report

- The report should be completed as soon as feasible after all necessary information is available. Specific timelines should be included in the contract. The third party should be alerted to necessary delays if they arise.
- A report from an NTME under the Minor Injury Regulation must be produced within 30 days of the NTME.
- Be unambiguous, organized and logical. Exercise care to avoid factual errors and unsupported assumptions.
- Provide relevant qualifications. These may simply be shown on the letterhead or in an appendix to the report.
- Limitations concerning availability of information or extent of examination should be noted in the report to the third party. The manner and degree to which this limits the NTME physician's ability to form supportable opinions should be stated clearly in the report. Note information sources missing, unavailable, withheld or outdated.
- Acknowledge source of request for NTME or referral of claimant. Indicate purpose(s) of the NTME.
- Review history—present, past, psychosocial (if relevant) and occupational. Respect the claimant's request to withhold sensitive personal information if irrelevant (e.g., if there were elective abortions in past not relevant to "whiplash," say "a number of surgical procedures with no bearing on injuries at hand").
- May choose to dictate history and examination in presence of claimant. If that is done, it should be noted in the report. Record positive and negative physical findings. Document how measurements were done, comment on the reliability of the observations and draw comparisons with any prior measurements on record.
- Do not disparage other professionals (physicians or non-physicians) or their opinions on a personal level, but explain why one's opinion differs from that of another professional.
- Summarize additional investigations or information obtained or required.
- Conclude with formulation and opinion with recommendations as requested re: diagnosis, causation, impairment, disability profile, prognosis with/without interventions, medical restrictions and further treatment recommendations with time frames as appropriate. Impairment is a medical determination of measurable loss of function in an organ system. Disability includes non-medical considerations as well as medical and may be defined on a legal contractual basis.
- State the clinical criteria used in arriving at the diagnosis.
- It is very important to list criteria used if one finds "total impairment."
- Do not offer an opinion as to continuation or termination of claim benefits/payments. That decision must be made by the third party.
- If a significant medical condition requiring treatment is found, the NTME physician is responsible to ensure its disclosure to the claimant with a recommendation to seek treatment.
- Any opinion should be supported by best scientific evidence whenever possible, not based on the NTME physician's personal belief systems alone. Where there is more than one school of thought on an issue, that

should be acknowledged, and the NTME physician should indicate the reasons for their viewpoint. Likewise, An NTME physician who holds a view that would be seen as a “minority” opinion should openly acknowledge that.

Issue of Probability

In determining the cause of a claimant’s complaint, the questions of correct diagnosis and causation are paramount. The physician should, so far as it is possible, address these matters in the report, remembering that the courts interpret probability in the legal sense, whereas physicians take the (often different) medical view. The medical model typically is to call a diagnosis “probably” correct if it seems more likely than several other possible diagnoses. The view in law is that, to be probable, a particular diagnosis must be likely to the extent of 50% + 1. This is referred to as proof on a balance of probabilities. This is not to say the physician should adopt a legal model when addressing causation; that is the role of the Court. Expressed another way, a physician might report that there are three possible causes for a certain thing, but they feel one cause is the more or most probable “for the following reasons ...”.

In the Courts, the general, but not conclusive, test for proof of causation is that the event or result (i.e., an injury) would not have occurred “but for” the act or omission of a person. While causation may not be determined with scientific precision in the Courts, being answered best in that arena by applying ordinary common sense, the physician should apply sound medical principles in forming his/her opinion. The legal criteria expected to be applied should be stated clearly to the NTME physician by the third party at the time of requesting the examination.