



Practice Notes:

Meeting Professional Obligations and Protecting Clients' Privacy: Disclosure of Information Without Consent

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Practice Notes is designed as an educational tool to help Ontario social workers, social service workers, employers and members of the public gain a better understanding of recurring issues dealt with by the professional practice department and the Complaints Committee that may affect everyday practice. The notes offer general guidance only and members with specific practice inquiries should consult the College, since the relevant standards and appropriate course of action will vary depending on the situation.

Protecting the confidentiality of clients' information is a professional, ethical, and legal obligation, and a central value in social work and social service work practice. Although College members recognize that they must maintain the confidentiality of client information, they are sometimes confused by the various exceptions that apply to their practice. They may wonder how much they should disclose, under which circumstances, to whom and for what purpose. They may also be uncertain about what is meant by their "duty to warn" or "duty to report", and thus lack clarity when communicating the limits of confidentiality of information to clients.

Situations involving the disclosure of information without consent are among the most challenging, complex and sensitive faced by members. This article discusses some common practice scenarios related to confidentiality and the disclosure of information. All such scenarios require consideration, based not only on case-specific details, but also on the requirements of legislation and other law relevant to the case. For this reason, members seeking direction may require an opinion from an appropriately-qualified lawyer.

While this article cannot provide members with a comprehensive outline of all reporting obligations, it is intended to help members understand relevant principles in the standards of practice and some of the applicable legislation, and to understand the steps involved in making a decision, even (or especially) when under pressure. These Practice Notes are not, however, intended as legal advice, and members should always consider obtaining a legal opinion to help them sort through the legal complexities

related to the dilemmas they face. Members may also wish to refer to earlier Practice Notes called "Confidentiality and Disclosure of Client Information Without Client Consent", available under the Resource Room tab on the College website at www.ocswssw.org.

DUTY TO REPORT

The standards of practice require members to hold "in strict confidence all information about clients".¹ The College's Professional Misconduct Regulation also prohibits the disclosure of client information without consent, subject to certain exceptions. In particular, it provides that it is an act of professional misconduct for a member to:

11. [Give] information about a client to a person other than the client or his or her authorized representative except,
 - i. with the consent of the client or his or her authorized representative,
 - ii. as required or allowed by law, or
 - iii. in a review, investigation or proceeding under the Act in which the professional conduct, competency or capacity of the member is in issue and only to the extent reasonably required by the member or the College for the purposes of the review, investigation or proceeding.²

When considering whether to disclose client information on the basis that such disclosure is "required or allowed by law", it is necessary for members to assess whether there is any duty to disclose or report under legislation (i.e. statute law). Members may have a **duty to report** (an obligation to disclose certain confidential client information without consent) under various pieces of legislation, such as (for

example) the *Child and Family Services Act, 1990* (CFSA).³ Members may also have a common law duty to disclose in some circumstances, as discussed further below. Consider the following scenario:

A member working in a community agency providing home visits contacted the Professional Practice Department about an elderly client who disclosed financial and physical abuse by her son. The member was very concerned because the client, who lived with her son and his wife, was afraid to call the police as she feared retaliation. Because of the risk to his client, the member wanted to contact the police despite the client's reluctance to do so. He wondered if he had a "duty to report".

The member was aware that as a member of the College, he must "comply with any applicable privacy and other legislation ... (and) obtain consent to the ... disclosure of client information ... unless otherwise permitted or required by law."⁴ Similarly, he could not "disclose the identity of and/ or information about a person who has consulted or retained [him] unless the person consents ... (or unless)... the disclosure is required or allowed by law".⁵ The member was also required to "inform clients early in their relationship of the limits of confidentiality of information."⁶

In this case, the member had been unable to be fully transparent with the client about his reporting obligations because he himself was uncertain. In consultation with the Professional Practice Department, the member discussed the standards above. He was advised to obtain a legal opinion and/or to consult with a risk manager (or someone in a similar position) within his agency to determine if any legislation applied under the circumstances. For example, it was necessary to consider whether there were any statutory reporting requirements which might apply and also whether any other legislation (such as, for example, the *Personal Health Information Protection Act* ("PHIPA") might affect or limit disclosure of personal health information.

Whether or not a member has a duty to report, there may be ongoing clinical obligations toward the client. For example, in the above scenario, even if the member determined (after obtaining legal advice) that there was no duty to report, the member would still have an obligation to work clinically with the client in her best interests, facilitating self-determination and respecting her choices, while communicating his concerns about the risks she faced. The member would need to carefully consider various clinical approaches to this challenging situation to ensure that he intervened competently by consulting with other community resources (including those specializing in working with elder abuse), seeking supervision within or outside his agency, and working with his client and with her support system to develop a safety plan among other

interventions. He realized that these interventions included "acting as (a) resource(s) for ... (her so that she could)... decide which problems ... to address as well as how to address them."⁷ In evaluating reporting obligations and appropriate clinical approaches, members are encouraged to document their decisions and course of action, including the fact of having consulted with the College and their supervisor, and having obtained legal advice.

All members must ensure that they "maintain current knowledge of policies, legislation, programs and issues related to ... their areas of practice",⁸ yet meeting this professional and ethical obligation can be extremely challenging. As discussed in the scenario above, obtaining legal advice is key to making sound decisions. Because it can be difficult for some members to obtain a legal opinion through their agency (or because at times their individual professional obligations might differ from the duties of the agency), it is advisable for members to consider how they might access a legal opinion before they are faced with an urgent dilemma. Members are also encouraged to review relevant legislation at www.e-laws.gov.on.ca.

In addition to consulting with the College and obtaining a legal opinion, members may also expand their knowledge by consulting with colleagues, supervisors and/or managers regarding relevant legislation and policies. Members may also want to look for educational opportunities within agencies or sectors which may be provided when new legislation is introduced or when existing legislation is amended. All of these strategies can assist members in keeping abreast of relevant legislative changes both within and outside their areas of practice.

ILLEGAL ACTIVITY AND THE DUTY TO WARN

Members may also be faced with situations in which clients are engaged in illegal activity or are behaving in a manner that puts others at risk. Consider the following scenario:

A member of the College working in an outpatient mental health setting in a hospital called the College because a client had disclosed to her during a session that he had been driving with a suspended license. The member also learned that the client had lost his license due to a conviction for impaired driving. The member wondered if she was required to inform the police.

As in the previous scenario, this member would not be allowed to disclose information about the client unless permitted or required to do so by law. Therefore, the member would have to consider and obtain legal advice regarding whether there were any applicable statutory reporting obligations, or other legal duties to report client information. The existence of such duties might be affected by the particular circumstances of the client and the context in which the member works. For example, in this scenario, the member would need to consider whether the client was

impaired or using alcohol at the time of the session with the member, and whether he was planning to drive upon leaving the hospital. If this was the case, and the member believed that the client posed an immediate risk, she would need to consider (and obtain legal advice regarding) whether she had a common law “duty to warn” or whether provisions in the *Personal Health Information Protection Act, 2004* (PHIPA) applied to the case and permitted the disclosure of personal health information without consent. During her consultation with the Professional Practice Department, the member was encouraged to consider the possibility that others on her interprofessional team might have a duty to report as a result of information she shared with them. The physician on that team, for example, could have different reporting obligations than the member under legislation (e.g. *Highway Traffic Act*). As highlighted in the previous scenario, “when social work service or social service work service is delivered in the context of supervision or multi-disciplinary professional teams, College members (should) explain to clients the need for sharing pertinent information with supervisors, allied professionals and paraprofessionals” and others on the team early in the relationship.⁹

Members may in some circumstances have a common law “duty to warn” or a “duty to protect”. The “common law” refers to the law developed by judges on a case-by-case basis, through legal precedents or decisions, rather than requirements arising from statutes or legislation.¹⁰ A **duty to warn** or a **duty to protect** may exist when there is information suggesting that: the client poses a risk to an identifiable person (including him or herself) or group of people; the risk of harm includes bodily injury, death or serious psychological harm; and the risk is imminent.¹¹ In order to meet this threshold, the risk must be real, severe, and imminent. Again, this is a determination that a member would have to make with legal advice, since the existence of a duty to warn is a question of law.

PHIPA provides that personal health information **may** be disclosed without consent by a health information custodian (HIC) (as defined under PHIPA) if the HIC “believes on reasonable grounds (that) the information is needed to eliminate or reduce a significant risk of serious bodily harm to the client, another individual or a group of persons”.¹² Members must determine if PHIPA applies to their practice, and then assess the client and the situation carefully to ensure that they do not disclose a client’s personal health information without consent unless permitted or required by law.

Neither the common law duty to warn nor PHIPA specifies to whom information may be disclosed. This should be determined on a case-by-case basis, depending on the circumstances. It may be appropriate to disclose the information to more than one person. It is also critical for members to be aware that if they do decide that there is a need to disclose information without consent, their

obligations do not necessarily end after the initial report or disclosure. Rather, members should continue to monitor the situation to determine if further intervention is required.¹³

DISCLOSING INFORMATION FROM THE RECORD

Even experienced members can feel intimidated when faced with pressure from someone in a position of authority to disclose information from a client’s record. Consider the following:

A member in private practice called the College to say that the police had contacted her asking for a client’s record. The member had just become aware through a telephone call from a family member that the client had been murdered. The member was unsure whether she could share the client’s file. The member understood that she needed specific documentation before sharing information with the police, but felt under pressure given the urgency of the investigation and the tone of the police contact. The member also wondered whether deceased clients had the same right to privacy as those who are living.

According to the standards of practice, members may only “disclose information from the record to third parties without the client’s consent ... if disclosure is required or allowed by law.”¹⁴ Although she may feel pressured by the police, the issue which must be addressed by the member is whether disclosure of the information to the police is “required by law” in the circumstances of the particular case. This may depend, in turn, on whether the police provide a warrant, subpoena or court order.¹⁵ Under PHIPA, personal health information can be disclosed without consent by a HIC to a “person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or by or under [PHIPA] or any other Act of Ontario or an Act of Canada for the purpose of complying with the warrant or for the purpose of facilitating the inspection, investigation or similar procedure.”¹⁶

As with the other scenarios, the member will need to obtain legal advice to determine whether the requested information must be supplied to the police and whether the documentation supplied (if any) is sufficient. In this scenario, the member decided to seek a legal opinion immediately. She also decided to inform the police that she wanted to cooperate with their investigation, but was first required to ensure that she met her professional and legal obligations by seeking legal advice and/or consultation before responding.

When there is no legislation which requires or allows a member to disclose information from the record without the client’s consent, and when none of the other exceptions in that regard apply, the member must obtain written consent

from “clients or their authorized representatives” in order to “disclose information from the record to third parties”.¹⁷ Under PHIPA, “where a client is deceased, the deceased estate’s trustee or the person who has assumed responsibility for the administration of the deceased’s estate, if the estate does not have an estate trustee, may give consent for the ... disclosure of personal health information.”¹⁸

This article has discussed some specific scenarios related to members’ duty to report and duty to warn, as well as the standards of practice which relate to the disclosure of information without consent. Keeping current and informed about this vast and complex aspect of practice is challenging. In order to meet their ethical, professional and legal obligations, members are strongly encouraged to identify readily-accessible resources for information, consultation and legal advice, while continually striving to maintain and expand their own knowledge in this area. Any disclosure of client information without consent must come only after members have carefully considered all relevant issues, standards and legislation, have consulted appropriately and have documented the process and rationale for their decision.

CHECKLIST: DISCLOSING CLIENT INFORMATION WITHOUT CONSENT

- Have I reviewed relevant standards in the Code of *Ethics and Standards of Practice Handbook, 2nd Edition*? (Principles IV: The Social Work and Social Service Work Record and V: Confidentiality are especially relevant)
- Have I considered relevant legislation, including PHIPA? (Ontario legislation can be accessed at www.elaws.gov.on.ca)
- Have I consulted appropriately? (Colleagues, supervisors, managers, risk managers and the College are all useful resources)
- Should I get a legal opinion? (It’s important to consider where a legal opinion might be obtained **before** being faced with an urgent situation. This approach is key when obligations aren’t clear, or when served with a court order, warrant or subpoena)
- Have I documented appropriately? (Any actions taken -including consultation - as well as a rationale for decisions, should be documented)

This article has discussed some of the professional and ethical issues which members in private practice should consider. Further review of the Code of Ethics and Standards of Practice, 2nd Edition is strongly advised.

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¹ *Code of Ethics and Standards of Practice Handbook, Second Edition 2008, Principle V: Confidentiality*

² *Ontario Regulation 384/00, s. 2.11*

³ *The CFSA requires anyone, including someone who “performs professional or official duties with respect to children” to report to a Children’s Aid Society if they have reasonable grounds to suspect that a child has suffered, or is at risk of suffering, physical or emotional harm (including neglect), or has suffered, or is likely to suffer, sexual molestation or exploitation. The Long Term Care Homes Act, 2004 (LTCHA) and the Retirement Homes Act, 2010 (RHA) are examples of other statutes which contain various statutory reporting obligations. Members, particularly those working with the elderly, should familiarize themselves with recent changes to these pieces of legislation, which can be accessed at www.e-laws.gov.on.ca.*

⁴ *Code of Ethics and Standards of Practice Handbook, Second Edition 2008, Principle V: Confidentiality, interpretation 5.1*

⁵ *Code of Ethics and Standards of Practice Handbook, Second Edition 2008, Principle V: Confidentiality, interpretation 5.3.6*

⁶ *Code of Ethics and Standards of Practice Handbook, Second Edition 2008, Principle V: Confidentiality, interpretation 5.4*

⁷ *Code of Ethics and Standards of Practice Handbook, Second Edition 2008, Principle I: Relationship with Clients, interpretation 1.3*

⁸ *Code of Ethics and Standards of Practice Handbook, Second Edition 2008, Principle II: Competence and Integrity, interpretation 2.1.3*

⁹ *Code of Ethics and Standards of Practice Handbook, Second Edition 2008, Principle V: Confidentiality, interpretation 5.4*

¹⁰ *Regehr, C. and K. Kanani, Essential Law for Social Work Practice in Canada. Second Edition. Don Mills, ON: Oxford University Press, 2010, page 155. The authors refer to Carlisle’s 1996 article, which discussed the fact that there are no provincial or federal statutes, except in Quebec, which require or permit therapists to report clients who threaten to seriously harm a member of the public (Carlisle, J. “Duty to Warn: Report from Council”, Members’ Dialogue, Canadian Medical Association, 1996)*

¹¹ *Regehr and Kanani, p. 154-155. The authors explain that in Canada, the common law duty to warn has a much shorter history*

than in the United States. Members may have learned about the 1976 Tarasoff case while completing their social work/social service work education.

¹² *Privacy Toolkit for Social Workers and Social Service Workers, Guide to the Personal Health Information Protection Act, 2004 (PHIPA), Ontario College of Social Workers and Social Service Workers, 2005, page 30*

¹³ *Regehr and Kanani, p. 155, refer to Appelbaum's approach (Appelbaum, P. "Tarasoff and the Clinician: Problems in Fulfilling the Duty to Protect", American Journal of Psychiatry, 52 (6):397-402, 1985)*

¹⁴ *Code of Ethics and Standards of Practice Handbook, Second Edition 2008, Principle IV: The Social Work and Social Service Work Record, interpretation 4.4.1*

¹⁵ *Members are advised to have court orders, subpoenas or warrants reviewed by legal counsel to determine what (if any) information can be released. For example, a subpoena does not provide legal authority to disclose information, but instead requires members to appear in court with the required documents.*

¹⁶ *PHIPA Toolkit, p. 28. As in the previous scenarios, the member must ensure that PHIPA applies to her practice.*

¹⁷ *Code of Ethics and Standards of Practice Handbook, Second Edition 2008, Principle IV: The Social Work and Social Service Work Record, interpretation 4.4.1*

¹⁸ *PHIPA Toolkit, p. 34*