

RISKaware

The BMS Canada Risk Services Ltd. Risk Management and Liability Magazine for the Canadian Psychological Association and the Council of Professional Associations of Psychologists



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SOCIÉTÉ
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APNWT

Managing Changes to Psychology's Professional Liability Insurance Program



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National Practice
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As the Manager of the CPA/CPAP professional liability program, CPA is very glad to introduce you to the inaugural issue of BMS Canada Risk Services Ltd. (BMS Group's) RISKaware magazine for psychology. Resources such as this magazine all form part of the value-added services provided by BMS Group in conjunction with

CPA/CPAP's new insurance program enhancements. In it you will find articles written by CPA/CPAP program's service providers of brokers and legal advisors on issues and topics related to managing and insuring risk in psychology professional practice.

The CPA/CPAP professional liability program is available to members of CPA and/or members of the provincial and territorial associations of CPAP (Council of Professional Associations of Psychologists). As many of you will recall, it is a program that has been sponsored by CPA and CPAP for decades but which, in 2014, moved to a new broker, BMS Group. Under the stewardship of BMS Group, when the program renewed in June 2014, it was considerably enhanced, offering a new online seamless renewal process option, broader and deeper coverage at lower premiums than ever before. We believe it is the best such program on offer for psychologists in Canada and has been actuarially reviewed and supported to be the most sustainable.

The articles in this issue describe in some detail the kind of coverage the program affords and the issues and claims most likely to affect psychological practice. We are confident that the service providers who support our program come with a wealth of expertise and experience working in the health sector. Although I will leave it to them to speak for the program and its offerings, I thought I would take the opportunity of this inaugural issue to report on the queries and concerns related to insurance that crossed our managerial desk in the first year of our enhanced program.

First, as many of you know, the transition to our new broker and program came with a few unexpected bumps. During the first few months of the transition, calls to us focused on the confusion about which was the renewing program. Considerable information was shared through multiple mediums (i.e. website, phone calls, surface mail) assuring members of the CPA, and

members of provincial and territorial associations, that the program in which they had participated for decades was the CPA/CPAP program. The renewing program, with its new broker BMS Group, brought practitioners much better coverage and a lower price. We believe that Canada's psychology practitioners came to understand the value of the program enhancements which BMS Group has offered us. Enrollment in the CPA/CPAP sponsored program has increased when compared to this time last year, at over 7400 participants and growing every day!

Beyond **clarifying for program participants which was the renewing CPA/CPAP program**, a few other topics passed our desk. At every opportunity, we addressed these individually with members but also worked to make sure the topic was addressed through the Questions and Answers on the BMS Group website (www.psychology.bmsgroup.com). I would encourage all program participants to review these. They help participants understand the breadth and depth of coverage at the get go rather than only when a problem arises.

Some program advantages that stand out include **coverage for work in the United States**. The 2014/15 policy will automatically cover claims brought to a Canadian or U.S. court related to practice in the U.S., as long as that practice comprises no more than 20% of the practitioner's practice. Practitioners must advise BMS Group in advance that they maintain some practice in the U.S. and must have the regulatory authority to practice in the relevant jurisdiction.

Legal providers. The program's preferred legal provider is Gowlings. The advantage of a preferred provider is that it consolidates expertise and enhances service provider accountability. Twenty different lawyers acting singly on a case is likely to be more time consuming and costly than a single firm who handles sufficient cases to develop a depth and breadth of expertise of the claims arising within our profession. Further, our relationship with a preferred provider means we can better hold them accountable to the quality and cost of their service. Practitioners continue to have the option of seeking an alternative legal provider. However, when consolidated and accountable expertise leads to lower claims costs, everybody wins (think lower premiums, program enhancements).

Commercial general liability coverage, property coverage, entity coverage. Participants are not always clear on which of these coverages might be relevant to their practice and I encourage you to read the article on this topic in this issue. The article outlines

the differences between Commercial General Liability insurance, Office Contents insurance, Professional Liability insurance for clinics and others.

Coverage for employed practitioners. Those practitioners who are employed may be covered by their employer's liability insurance. However your employer's coverage does not typically extend to your legal expenses should a complaint be made against you to your regulatory body. Given that the majority of claims for psychology practitioners are related to disciplinary hearings before the regulatory body, and disciplinary hearings may require legal advice or representation, coverage for these costs are very important.

Coverage for non registered professionals.

Psychologists working within university systems, and those practicing in areas like industrial-organizational psychology, whose services are not health-related are eligible to purchase insurance through the BMS-brokered program. This coverage includes their delivery of a psychology-related service(s), or the supervision of a psychology-related service(s). Registration with a regulatory body of psychology will not be required as long as the activity is not one for which registration is normally required or as long as the activity being supervised is not one for which the psychologist would need to be registered were he or she to conduct the activity him or herself. Non registered psychologists and those who are self-employed may also need to consider whether they need additional coverage to protect their property and their incorporated business.

Retirement coverage. Coverage purchased for retirement under the old program prior to 2008 may well have provided an unlimited tail – meaning that you may have secured insurance to respond to potential future claims arising from prior incidents and exposures that occurred during your past psychology practice as long as you continue to be retired. After 2008, there appeared to be different policies sold so best to check the policy you purchased and confirm with BMS Group if you are unsure of your current retirement coverage.

As of the 2014/2015 policy period, renewing members are now eligible to purchase unlimited extended retirement coverage (tail coverage) for a one-time cost of \$150 that provides unlimited protection while retired.

If program participants have any concerns or questions about any of the above topics, or about any aspect of their liability insurance coverage, I encourage you to contact BMS Group at 1-855-318-6038 or psy.insurance@bmsgroup.com

by Karen Cohen



Andrea Piotrowski,
PhD, CPsych,
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The Council of Professional Associations of Psychologists (CPAP) is pleased to join with the Canadian Psychological Association (CPA) in sponsoring Professional Liability Insurance through BMS Canada Risk Services Ltd. (BMS Group) to qualifying members of provincial and territorial psychology associations and/or CPA.

Being a regulated health professional brings with it an important responsibility and obligation to clients and to the profession. There are already several requirements in the training and regulation of psychologists that are intended to mitigate risk. Regulated psychology practitioners and psychology students, take courses in ethics and must abide by the Code of Ethics for Psychologists. In most jurisdictions, psychology regulatory boards require applicants to pass the EPPP (Examination of Professional Practice of Psychology) exam, oral exam, and a jurisprudence exam in order to be registered as a psychologist or, in some cases, a psychological associate. To maintain registration, psychologists and other providers of psychological service must complete a required number of hours of continuing education credits each year.

Managing risk in the provision of psychological services is an ongoing process throughout one's academic studies and career. This edition of RISKaware is intended to educate and remind psychology providers of risk management issues specific to the profession. Increased awareness of potential risk in one's practice and taking action to decrease this risk can reduce complaints and claims. Members who purchase liability insurance from BMS Group also have access to pro bono legal advice from Gowlings, a legal defence firm that specializes in medical defence. With these and other upcoming risk management learning opportunities, it is mutually beneficial for both members of the program and the public served by members.

by Andrea Piotrowski



About BMS Canada Risk Services Ltd. (BMS Group)



Brian Gomes
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BMS Canada Risk Services Ltd. headquartered in Ottawa, is part of the Specialty Risk division of BMS Group, a Lloyd's of London broker. Their team of industry experts provides unparalleled risk management and brokerage services while offering a comprehensive range of insurance products and resources to Canadian associations and their members. BMS Group is the official and exclusive broker for the CPA/CPAP insurance program.

In partnering with BMS Group, CPA and CPAP have joined the Healthcare Professionals Insurance Alliance (HPIA), a new insurance model dedicated to providing associations with the tools required to mitigate practice risk and reduce claims. As a participant in the CPA/CPAP professional liability insurance program, you have joined over 250,000 Canadian healthcare professionals who are benefiting from the innovative HPIA model. Learn more here: <http://www.psychology.bmsgroup.com/>

Please note that the articles appearing in this magazine are provided for general information purposes only and do not constitute professional legal or broker advice. Please speak with a CPA/CPAP program representative at BMS Group to discuss any questions you may have about your existing insurance coverage or to seek advice on your specific insurance needs.

CPA/CPAP Insurance Program Renewal

Your 2015/2016 professional liability and business insurance policy renewal date is **June 1st**.

Fast, secure, and convenient: CPA/CPAP program participants can purchase or renew coverage online at the dedicated program website at www.psychology.bmsgroup.com. A certificate will be generated and emailed to you within minutes of your transaction.

To facilitate the 2015 renewal, BMS Group will also email you a unique renewal link that can be used to renew coverage online. Follow this link to your pre-populated insurance application to process your renewal within minutes.

You can also download a hard copy of the forms if you prefer a paper transaction (forms can be found here: www.psychology.bmsgroup.com). If you have questions about which coverage is best for you, please call BMS Group at 1-855-318-6038, or email us at psy.insurance@bmsgroup.com.

Note that only active members of CPA, and/or active members of participating provincial and territorial associations are eligible for coverage.



How much do you know about Professional Liability and your rights and responsibilities as a Psychologist?

Take the Quiz and find out!

1. You receive a request for a client's chart from a lawyer representing the client. Before you release the chart, what should you do?

- a) Confirm that they are willing to pay for a copy, then send a copy to the lawyer
- b) Make sure there is an executed authorization permitting you to release the chart and confirm they will pay for a copy before sending
- c) Ignore it
- d) Make a copy and send it to the lawyer, no questions asked

2. You and two other psychologists that you work with at your office are named as defendants in a lawsuit. The office manager wants to have a meeting with the three of you to discuss what happened. How should you respond?

- a) Decline to attend the meeting until you have received legal advice
- b) Go to the meeting
- c) Speak to the other two psychologists to develop a strategy for the meeting and then attend the meeting
- d) Review the chart and then prepare a summary in writing for your manager to review at your meeting

3. As a psychologist, you are faced with various exposures throughout your daily practice. Some of the areas where legal proceedings may be initiated include:

- a) Practicing beyond your scope of practice
- b) Improper record keeping
- c) Lack of consent
- d) All of the above

4. You receive a letter from a lawyer who is acting on behalf of a current client of yours. The lawyer then calls you and wants to know your opinion on the effects of the care and treatment previously provided to your client by another psychologist. How do you respond?

- a) Tell the lawyer why the previous psychologist failed in her/his approach to therapy
- b) Advise the lawyer to set the questions out in writing in addition to the terms and conditions of this retainer for a psychological opinion
- c) Respond to the lawyer's telephone request with a written opinion and then bill the client for your opinion
- d) Ignore it - advise your client that any more calls from his/her lawyer will be grounds for termination of your treating relationship

Answers to Quiz: 1. b, 2. a, 3. d, 4. b

Do you have expertise to contribute? If you wish to have your psychology-related risk or liability article published in RISKaware, please contact BMS Group at psy.insurance@bmsgroup.com.

Get Protection with Professional Liability Insurance

The Canadian Psychological Association (CPA), in partnership with the provincial and territorial association members of the Council of Professional Associations of Psychologists (CPAP) have offered a member-exclusive liability insurance program for decades.

Last year, CPA and CPAP conducted a thorough process of investigation and consultation into the insurance program available to psychology practitioners. As a result, CPA and CPAP moved the policy to BMS Canada Risk Services Ltd. (BMS Group). In making this change, CPA and CPAP were able to secure a number of significant coverage enhancements and premium reductions for members of the national and provincial/territorial associations. Members were provided with access to increased coverage at a much lower cost than that historically offered to the psychology profession. As a result, participating psychologists are protected today like never before.

CPA and CPAP continue to work together to offer the most comprehensive, cost-effective, and sustainable professional liability insurance program available for psychological practitioners in Canada. In 2014/15, the CPA/CPAP program became the largest insurance program for psychologists, with over 7400 participants across the country. In addition, the CPA/CPAP program is designed with the input of psychologists and your association, and offers exclusive access to value-added resources to help manage practice risk based on the psychology profession's claim history.

Before taking a closer look at the CPA/CPAP insurance program, it may be helpful to review the

definition and purpose of Professional Liability Insurance.

As a regulated healthcare professional, you can be found legally responsible (or "liable") for the professional errors, omissions and negligent acts associated with your practice of psychology. This is why you require Professional Liability Insurance (PLI), which provides coverage to respond to claims that may arise out of your professional practice. If a claim is brought against you, PLI protects you by ensuring that your legal defence is coordinated and paid for. Your PLI also covers the cost of any client compensation, or damages. This means that your clients' interests are also protected because comprehensive PLI, with adequate limits, offers your clients timely access to compensation for valid claims.

If a claim is brought against you, you want assurance of the best coverage and defence available to protect your reputation, livelihood, and finances. CPA and CPAP have undertaken significant efforts to ensure that the new BMS program available to members includes the coverage limits and enhancements needed to give you peace of mind. These include:

Comprehensive and Cost-effective Coverage

All CPA/CPAP insurance policies now offer the most comprehensive PLI (also referred to as malpractice errors and omissions liability) coverage available, meeting and exceeding all regulatory requirements. Members are provided with two options for coverage limits:



- \$7 million per claim and \$10 million aggregate per policy period; or
- \$10 million per claim and \$10 million aggregate per policy period.

These coverage limits are higher than what has historically been available to the profession. Today, a psychologist can purchase \$7 million of coverage for less than the cost of \$1 million of coverage under the old program.

Specialized Legal Services

Participants in the CPA/CPAP program have access to the expertise of one of the most highly recognized legal defence firms in medical defence and professional liability in the country. Legal representation is provided at no cost and without having to pay a deductible or any fees. In changing to BMS Group and the Healthcare Professionals Insurance Alliance (HPIA), subscribers to the CPA/CPAP insurance program have access to the program's preferred legal provider, Gowling Lafleur Henderson LLP (Gowlings), for legal representation and services. Gowlings represents a large number of Canada's professional groups such as physicians and optometrists. They will work with you to achieve the best possible outcome for all involved.

In the event you do not wish to use Gowlings, or if the case has a conflict, you will be able to retain alternative legal counsel. The advantage of retaining Gowlings and the reason that the program has appointed them as a preferred provider is due to their expertise as Canada's leader in the area of health practice and malpractice. Retaining counsel with specialized expertise is of paramount importance for members because it helps ensure excellent representation and protection in the event of a claim.

Enhanced coverage

Coverage has been enhanced based on the recognized needs of our members. The following provides a few examples of coverage enhancements:

Are you looking towards retirement? CPA/CPAP's PLI policy now automatically includes 12 months of extended coverage in the event you retire or discontinue practice and decide not to renew your insurance coverage. You are also able to purchase unlimited coverage for a nominal fee upon retirement. With this protection in place, your policy will automatically extend to respond to any claim made against you for insured incidents that occurred before retirement. Having unlimited extended coverage means that an eligible claim filed ten years from the period of retirement would still be covered under the policy.

Are you teaching or participating in a course?

Your policy will cover you for a claim arising in the workplace, but will also cover you when teaching or participating in a course, or when providing advice to someone outside of the employment setting. CPA/CPAP's policy offers coverage that follows you 24 hours a day, seven days a week, and is not limited by province or place of work.

Are you considering starting or growing your family?

Your CPA/CPAP policy offers continuous coverage for members on maternity or parental leave. You are now automatically covered for up to 12 months while on temporary leave. This means that you are protected against claims arising from incidents or exposures that occurred while you were in active practice (but that are reported while you are on leave).

Are you worried about security of client information?

Your 2015/2016 CPA/CPAP professional liability insurance now includes \$50,000 of Cyber Privacy Liability coverage. Members will also be able to secure additional cyber coverage insurance for greater protection against increased exposures related to potential data security and privacy breaches.

Guaranteed Limits of Liability and Policy Coverage

As the largest professional liability insurance program for psychologists in Canada, funds are in place to provide clients with appropriate compensation for valid claims in a timely manner. Coverage for damages is comprehensive, which is particularly relevant for clients who claim financial loss not resulting from an injury, but instead due to some other action (often related to wording in a psychologists' written report).

Enhanced Risk Management Materials and Education

We care about client safety and professional practice. Risk management, insurance, and legal professionals use psychology-specific data to develop evidence-informed advice and resources to better advance the delivery of safe and professional client care across Canada.

Let Canada's leading healthcare professional liability specialists at BMS Group along with CPA and CPAP help you manage the professional risk associated with psychology practice. Learn more about how CPA/CPAP's Professional Liability program protects you, your clients and the profession at psychology.bmsgroup.com, or contact the risk and insurance professional staff at BMS Group, psy.insurance@bmsgroup.com or 1-855-318-6038.

What an Ounce of Prevention can do for your Practice

As a psychologist, you require professional liability insurance in order to register with your regulatory College. We all know that. But when you purchase your coverage, do you think about why you need it, and how important it really is to the future of your practice? Do you know the details of the insurance you are purchasing? Are you sure you are adequately covered and that you have the appropriate limits in place to respond to a claim?

Insurance and liability are complex subjects as are the offerings and policies that support them. It is important that you understand the differences between the different insurance options available in order to identify the most appropriate coverage for your practice circumstances. Although insurance is something we hope we never need, it is important to ensure we have the right coverage in place before we actually need it.

Professional Liability Insurance (PLI):

Professional liability Insurance (PLI) provides coverage against claims that may arise from the practice of psychology. Regulatory bodies of psychology require that every licensed psychologist

who provides care, whether in a paid or volunteer capacity, be covered by professional liability insurance. PLI protects psychologists by ensuring that your legal defence is coordinated and paid for if a claim is made against you. Your PLI also covers the cost of any client compensation, or damages. This means that your clients are also protected; because having PLI means that money is in place to compensate them for valid claims.

Professional Liability Insurance for Clinics:

PLI for Clinics protects your business assets in the event that your business name is included in a statement of claim or lawsuit. In the event of an incident, the client will most likely name not only the individual provider, but also your clinic as the larger provider of services. Think of this coverage as malpractice insurance for your business name.

If you are not incorporated and/or you do not employ other professional staff, your CPA/CPAP individual PLI policy will automatically extend to cover your business name.



Commercial General Liability Insurance (CGL):

Commercial general liability (CGL) insurance protects you against claims arising from injury or property damage that you (or your business, including your staff) may cause to another person as a result of your operations and/or premises. For example, a client may fall and injure themselves on a wet floor in your office (i.e. bodily injury as a result of your premises); that's why CGL is so commonly referred to as "slip and fall" insurance. CGL is also the policy that would respond if you or your staff accidentally damage a client's property while providing treatment in their home (i.e.: property damage as a result of your operations).

Your CPA/CPAP individual PLI policy automatically includes individual CGL coverage. Individual CGL insurance protects you but does not extend to protect your employees. If required, members can secure additional stand-alone CGL coverage.

While your regulatory body requires that you hold professional liability insurance, there are also other factors to consider: Are you a business owner? Do you have employees? Do you have contents to protect? Are you working out of your home? If so, you should consider supplementing your individual Professional Liability Insurance with other coverage to protect your business name, property and contents.

Office Contents, Crime Insurance and Office Package:

Office Contents and Crime Insurance protects your office and the contents within from losses associated with property damage (such as fire) and crime. Office Contents coverage protects against damage to property, including professional equipment, and loss of revenues caused by an interruption of business activities arising from an insured loss.

Crime Insurance protects against financial loss due to dishonesty, fraud, or theft of money, securities or other property owned by the office/clinic.

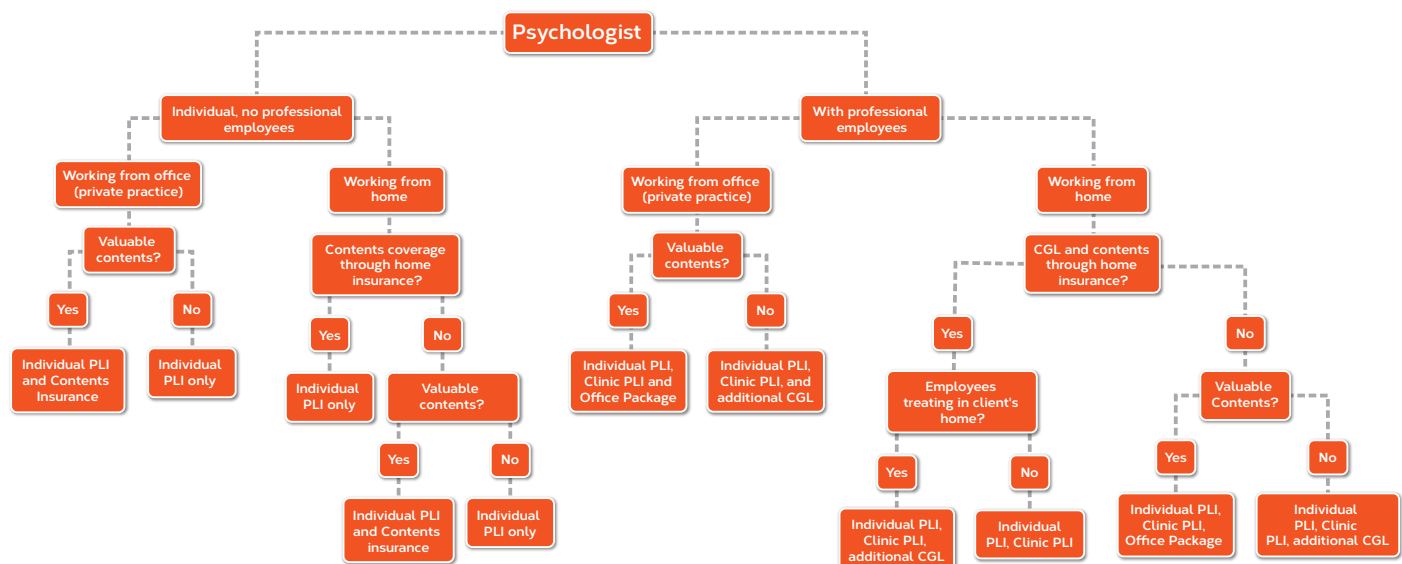
The CPA/CPAP program offers an Office Package (Clinic/Business Package), which includes Office Contents, Crime Insurance, and additional CGL coverage. Alternatively, members are able to purchase stand-alone Office Contents insurance.

Now that you are familiar with the professional liability and business insurance options available, you can use the following hierarchy chart to assist in identifying the insurance coverage that may best suit your practice circumstances.

Please note that this chart provides an outline of common practice scenarios only and does not include all possible professional and business structures. It provides an initial framework for decision-making but should not be considered comprehensive broker advice, nor should it be relied upon as such. **You should always speak with an insurance professional at BMS Group to determine the most appropriate coverage for your specific practice circumstances.**

Do you have more questions surrounding your professional liability and business insurance protection? That's a good thing!

Professional liability protection and insurance can be unfamiliar areas to those without regular exposure to the industry. This is why we invite you to contact BMS Group at 1-855-318-6038 or psy.insurance@bmsgroup.com if you have any questions about the CPA/CPAP insurance program, or to discuss your individual liability or business protection needs. Find out more about the different insurance coverages here: www.psychology.bmsgroup.com.



Top Five Calls to the Pro Bono Legal Advice Hotline

When CPA and CPAP made the decision to change insurance brokers to BMS Canada Risk Services Ltd. (BMS Group) and to join the Healthcare Professionals Insurance Alliance, they were also provided additional services from Gowling Lafleur Henderson LLP (Gowlings) as the preferred legal provider for the program. Program participants faced with an actual or potential professional liability insurance claim have access to the pro bono legal advice service offered by Gowlings.

Gowlings maintains a log of all calls received to the pro bono hotline as well as the nature of the calls and the advice provided. The following provides an overview of the top five calls made by psychologists to the pro bono legal advice hotline throughout the first year of this service offering:

1. Record Keeping or Charting Questions

Questions related to a members' record keeping or charting obligations. Calls typically concerned requests made by third parties (clients or insurance companies) for disclosure of records.

2. Questions about Acting as an Expert Witness or Being Subpoenaed

Questions about acting as an expert witness or preparing expert reports for court. The member may also have had questions about being subpoenaed.

3. College Complaint (actual or potential)

The member contacted Gowlings regarding an actual or potential College complaint made against him or her.

4. Reporting Obligations

The member had questions regarding their reporting obligations. A typical example would include a client telling the member that they have done something illegal and

the member wanting to know if they are required to report it.

5. Private Practice Questions

The member had questions on the operation of their private practice. An example of this type of call would include questions regarding setting up a partnership or a lease of office space.

The information gathered from these calls allows the insurance program partners to identify current legal or practice trends affecting the profession. The information can also be used to prepare publications, educational presentations, and practice updates on topical subjects that can be disseminated to members via appropriate knowledge translation strategies to influence practice and effect optimal client care. The first of such publications is featured in this issue and is entitled "Trends in Psychology: Disclosure of Records to Third Parties".



Trends in Psychology: Disclosure of Records to Third Parties

The protection of a client or patient's personal health information is a key element of a successful professional practice. The purpose of this article is to provide some guidance as to what steps a healthcare professional should take in response to a third party request for the disclosure of confidential client information in order to ensure that there is no breach of client privacy.

Most regulators of healthcare professions have specific privacy protection requirements for their respective licensees and members. In addition, federal and provincial/territorial privacy legislation sets standards that must be met, with the potential consequence of legal action if there are breaches.

Failure to properly protect a client's confidential information can result in complaints to, and investigations by, a member's regulator as well as the applicable privacy commissioner. Further, it can expose a member to independent civil liability under common law and privacy legislation. A failure to properly protect a client's confidential information has the potential to interrupt a professional's practice and affect his or her professional reputation.

Private Information and the Law

In Canada, personal health information is almost always considered sensitive personal information subject to privacy law.ⁱ The collection, use and disclosure of personal health information requires the informed consent of the client and requires that the information only be collected, used and disclosed for the purposes consented to by the client. The requirement for consent is ongoing and if a new use or disclosure becomes necessary but has not been consented to, the healthcare professional must obtain consent from the client for that new use or disclosure, unless inappropriate to do so.ⁱⁱ

Federal and provincial/territorial privacy legislation sets parameters for the proper collection, use and disclosure of personal health information by private organizations and individuals. The federal statute governing personal information is the Personal Information Protection and Electronic Documents Act ("PIPEDA").ⁱⁱⁱ Some provinces/territories have privacy legislation and PIPEDA is exempt from application where provincial/territorial legislation is declared "substantially similar".^{iv} In some provinces/territories, legislation governing personal health

information is not yet declared substantially similar to PIPEDA.^v In addition to federal and provincial/territorial legislation, a common law right to privacy is now also recognized by some Canadian courts.^{vi} Therefore, ensuring compliance with privacy law may require consultation with legal counsel.

Disclosure to Third Parties

The requirement to disclose personal health information to third parties can arise in a wide variety of circumstances. A common circumstance is where a healthcare professional determines the need to refer a patient/client to a regulated health professional, for consultation or further treatment. In this instance, privacy laws deem that the consent to share information with the healthcare professional for a referral is covered by implied consent of the client for the provision of health care, unless the client has expressly withheld or withdrawn his or her consent.^{vii}

However, it is not uncommon for requests for disclosure of client information to third parties to arise outside of the strict provision of health care. In these circumstances, it is important for healthcare professionals to carefully consider whether informed consent to disclose the information has been obtained, or is required in the circumstances. For example, when the client is a minor or has a disability, the consent to disclose personal health information may require a written consent of a parent or legal guardian.^{viii} In contrast, if the request for disclosure to a third party is required by law (for example, pursuant to a court order), then the informed consent of the client is not required under privacy law.

The Information and Privacy Commissioner of Ontario's guidelines provide a good example of how competing interests can make consent to disclosure a potential mine field for healthcare professionals.^{ix} Consider that a fourteen year old teen comes for psychological treatment, accompanied by her father who has right of access under a child custody arrangement with the mother, who has custody of the teen. Prior to psychological treatment, the teen was seen by a social worker who the father wishes the psychologist to contact with private information about the psychological treatment. Can the psychologist disclose private information on the request of the father alone?

The short answer in this circumstance is most often 'no'. For minors under privacy law, the right to consent on their behalf generally only rests with a substitute decision-maker. Parents with custody of the minor, not parents with mere access rights, generally hold the authority necessary to consent to disclosure on behalf of the minor. However, even minors who have themselves made the decision to consent to treatment can also provide consent to disclose personal health information to third parties, provided that consent is informed and expressed.^x

Questions for health professionals to consider in determining whether informed consent is obtained to permit disclosure of personal health information to a third party are:

- who gave the initial consent to gather the personal health information of the client?
- does that individual who originally provided consent still have authority to consent?
- is the initial consent still ongoing and did the initial consent provide for disclosure to a third party in a circumstance such as this?
- what other substitute decision-makers have authority to provide consent?

Healthcare professionals must always remember to inform, preferably in writing, the individual providing the informed consent and the third party receiving the information of the purpose for which the information is being disclosed and any conditions on its disclosure. Record should always be kept by the health professional of the informed consent, the disclosure itself, and the purposes and conditions of the disclosure to the third party. In addition, where the information that was disclosed changes or is discovered to be incorrect, the healthcare

professional may be under an obligation to update the third party of such changes or corrections and provision for that scenario should be made express in the client consent to disclose to the third party.^{xi}

Informed consent is a baseline requirement for the provision of health care, and is also the baseline requirement for the use and disclosure of personal health information. Health professionals who are conscientious of their client's privacy rights and their professional duty to protect privacy will obtain informed consent to disclose information to third parties, and will systematically document those disclosures in accordance with the standards of the professional regulator.

- see page 13 for endnotes

Please note that this commentary is not, nor should it be considered, legal advice and should not be relied upon as such. Should you have any questions regarding patient/client privacy rights as it relates to your practice, please contact your association, your regulator and/or consult legal counsel.

The preceding was prepared and written by Joel H. Reinhardt, a litigation lawyer in the Gowling Lafleur Henderson LLP (Gowlings) Ottawa office. If you are participating in the CPA/CPAP Professional Liability Insurance Program and a professional liability claim (actual or potential) has been made against you, you are eligible for 30-minute pro bono and inclusive professional liability claims defence services from Gowlings, one of the largest and most highly-recognized legal firms in medical defence and professional liability in Canada.



“WHAT IF”: RISK IS OUT THERE, HOW TO RESPOND

1. I am being Sued

- Contact Maltman Group International (Maltmans), your insurance adjuster, and speak in confidence to an insurance professional for advice.
- Your insurance adjuster will take down details of the complaint, confirm coverage, and assign you legal counsel, as necessary.
- Work with your legal counsel to prepare a statement of defence which will need to be submitted to the court within a specified period.
- Never alter a client's record after a legal action is initiated.

2. I am the subject of a College Complaint

- Contact Maltman Group International (Maltmans), your insurance adjuster, and speak in confidence to an insurance professional for advice.
- Your insurance adjuster will take down details of the complaint, assist you in determining what the College is asking you to do, and assign you legal counsel, as necessary.
- Work with your legal counsel to draft your response to the College. Your response should reflect what happened, your interactions with the client and your rationale behind your care or conduct.
- Maintain a respectful tone throughout your response and show empathy as the College expects you to remain professional.
- Never alter a client's record after learning of a complaint or legal action.

3. I need Legal Advice

- If you are participating in the CPA/CPAP Professional Liability Insurance Program and a professional liability claim (actual or potential) has been made against you, you can access

pro bono legal advice from Gowling Lafleur Henderson LLP (Gowlings).

- Members can take advantage of this complimentary service for questions related to issues such as:
 - Privacy and confidentiality
 - Conflicts of interest
 - Responses to requests for information from third parties
 - Inquiries from your regulatory body
 - Responses to subpoenas
 - Professional misconduct
 - Ethical obligations
 - Professional obligations
- When you make this call, you will hear a recording asking you to leave a detailed message. Please be prepared to provide the following information:
 - Name, telephone number and address
 - Certificate and policy number
 - A brief summary of the issue
- A lawyer will return your call and provide you with free, confidential legal advice in order to help avoid or reduce the probability of a claim or complaint.

4. I need to report a Property or Business Interruption Claim

- Contact Aviva Canada (Aviva), your property insurer, to report property or business interruption claims, including claims related to fire, theft, vandalism or weather-related damage and speak in confidence to an insurance professional for advice.
- Your Claims Care Advisor will take down details of the claim and will confirm coverage.
- Work with your Claims Care Advisor to identify the services you need to return your business to normal as quickly as possible.

Helpful contacts:

You don't have to do this on your own. CPA/CPAP's insurance program partners are here to help.

BMS Group:	1-855-318-6038 or psy.insurance@bmsgroup.com
Maltman Group International (Maltmans):	1-800-699-0914 or claims@maltmans.com
Gowlings pro bono legal advice program:	1- 855-441-4424
Aviva:	1-866-692-8482

Personal Information Protection and Electronic Documents Act, SC 2000, c 5, Sched 1, s 4.3.4 [PIPEDA].

^vThe Model Code for the Protection of Personal Information under PIPEDA states that: "In certain circumstances personal information can be collected, used, or disclosed without the knowledge and consent of the individual. For example, legal, medical, or security reasons may make it impossible or impractical to seek consent. When information is being collected for the detection and prevention of fraud or for law enforcement, seeking the consent of the individual might defeat the purpose of collecting the information. Seeking consent may be impossible or inappropriate when the individual is a minor, seriously ill, or mentally incapacitated. In addition, organizations that do not have a direct relationship with the individual may not always be able to seek consent. For example, seeking consent may be impractical for a charity or a direct-marketing firm that wishes to acquire a mailing list from another organization. In such cases, the organization providing the list would be expected to obtain consent before disclosing personal information."

^{vi}PIPEDA, Sched 1, supra note i.

^{vii}Provincial statutes declared "substantially similar" to PIPEDA by the federal government are: Personal Information Protection Act, SBC 2003, c 63; Personal Information Protection Act, SA 2003, c P-65; Personal Health Information Protection Act, 2004 SO, c 3; An Act respecting the protection of personal information in the private sector, RSO, c P-39.1; Personal Health

Information Privacy and Access Act, SNB 2009, c P-705; Personal Health Information Act, SNL 2008, c P-701.

^{viii}Those provinces and health information statutes not declared "substantially similar" to PIPEDA include: Personal Health Information Act, CCSM c P335; Personal Health Information Act, SNS 2010, c 41; The Health Information Protection Act, SS 1999, c H-0.021.

Provinces and territories with general privacy legislation not declared

"substantially similar" to PIPEDA include: Access to Information and Protection of Privacy Act, RSY 2002, c 1; Freedom of Information and Protection of Privacy Act, RSPEI 1988, c F-15.01; Access to Information and Protection of Privacy Act, SNWT (Nu) 1994, c 20.

^{ix}It appears that the courts will allow liability at common law for breach of privacy in the medical context to coexist with liability under provincial health information legislation: see *Hopkins v Kay*, 2014 ONSC 321 applying *Jones v Tsige*, 2012 ONCA 32.

^xSee Information and Privacy Commissioner of Ontario, "A Guide to the Personal Health Information Protection Act" (December 2004) at 12, online: Information and Privacy Commissioner ><https://www.ipc.on.ca/images/resources/hguide-e.pdf> < [Guide to PHIPA].

^{xi}Guide to PHIPA, *ibid* at 13.

^{xii}Guide to PHIPA, *ibid* at 14.

^{xiii}Guide to PHIPA, *ibid* at 13-14.

^{xiv}PIPEDA, Sched 1, supra note i, s 4.9.5.

NOTES



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