
DECEMBER 5, 2024

Managing Legal & Regulatory Issues for Healthcare Professionals Supporting Clients with Acquired Brain Injuries

Toronto ABI Network

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What you need to know to avoid trouble

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Speakers



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Agenda

1. Introduction

2. Requests for Records

3. Writing Reports

4. Giving Evidence in Court/Tribunals

5. Challenges Faced by Healthcare Providers

6. Questions

Introduction



Introduction

- Health care providers provide support or treatment to clients with ABI through ongoing therapy, assessments, legal opinions, expert evidence, written reviews, etc.
- Supporting clients can result in legal/regulatory issues
 - Challenges to your opinion
 - Challenges to your policies
 - Complaints to your regulator
 - Lawsuits
- Most of these are not avoidable
- But you can put yourself in a position to handle and defend these issues

Introduction

- + Patients are seriously injured and likely litigious
 - Patients are at their lowest in terms of mental and physical health and struggling to feel better and recover
 - They are in litigation and seeking guidance from their legal counsel and make decisions about their health in the context of building their legal case
- + Acting as an expert or providing a written Opinion
 - When you act as an expert or provide a medical opinion, you may be questioned about your authority, expertise and/or impartiality
 - Your evidence and expertise will be challenged in court

Introduction

+ Possible regulatory/College complaint

- Any difficulty, conflict or pushback on your part could result in clients making a complaint to your regulatory college about the treatment they received
- Your assessment or steps taken may be perceived as unhelpful to their lawsuit and it is easy to launch a complaint against you in the hopes of discrediting you or exacting some type of revenge

+ Lawsuit for negligence

- Extreme cases
- Try to resolve the issue(s) and protect the professional reputation, relationships and business

Requests for Records



Requests for Records

Receiving a Request for a patient's record

- Need an individual's **express consent** to share or disclose his/her records (or personal health information) with a third party
- A "**third-party**" can be a non health information custodian outside the patient's circle of care (e.g. insurance provider or legal counsel)
- The individual's consent is not necessary if the health information custodian is complying with a summons or court order

Valid Consent

- The consent of the individual (or substitute decision maker if incapable)
- Knowledgeable
- Relate to the information that is being disclosed
- Not obtained through deception or coercion

Requests for Records

Who can provide consent

- A capable person, regardless of age can provide consent for the disclosure (sharing) of their own personal health information
- The capacity of a person is presumed unless the health provider has reasonable grounds to believe the person is incapable of consenting



Requests for Records

Determining Capacity

1. The ability to **understand** the information that is relevant to deciding whether to consent to the collection, use or disclosure; *and*
2. The ability to **appreciate** the foreseeable consequences of giving, not giving or withdrawing consent

Substitute Decision Makers

- The SDM can provide consent if an individual is found **incapable**
- Health providers can rely on the SDM's assertion that they are entitled to consent on a person's behalf unless it is unreasonable in the circumstances
- An individual who is found incapable of consenting may apply to the Consent and Capacity Board for a review of the determination

Writing Reports



Writing Reports

Who is the audience?

- The **party calling the expert** and the **court**
 - Informs them of your opinion on specific questions you have been asked
- The **opposing party**
 - Provides them with information on which to cross-examine
- You, **the expert**
 - Documents your opinion, how you arrived at the opinion and allows you to testify and to contribute to your overall professional reputation

Writing Reports

Before Getting Started

- + The purpose of the report/opinion should be set out in a **written contract** between the health care provider and the person retaining the health care provider
- + The purpose of the report/opinion should be **reiterated in the report** produced by the health care provider
- + Must be **clear** about instructions given, the process used to form opinions, and the information relied upon in doing so

Writing Reports

WHO

- Who are you?

WHAT (x3)

- What were you asked to do?
- What did you look at (facts & research)?
- What is your answer?

WHY

- Why is that your answer?

- Opinions must be **fair, objective & non-partisan**
- Tone should be **factual and professional**, not adversarial
- Assume professional responsibility for the opinion
- Assume you will be asked about every part of the report
- Assume the opposing party has a copy of everything you have ever published

Writing Reports

Acts of Professional Misconduct

- It is an act of **professional misconduct** to:
- + Fail to maintain the standards of the profession;
 - + Sign or issue a false or misleading report or another document;
 - + Act while in a conflict of interest;
 - + Misrepresent the practice carried on by the professional member;
 - + Fail to act fairly and impartially; and
 - + Act in a manner that would reasonably be regarded by members of the profession as disgraceful, dishonorable and unprofessional

Writing Reports

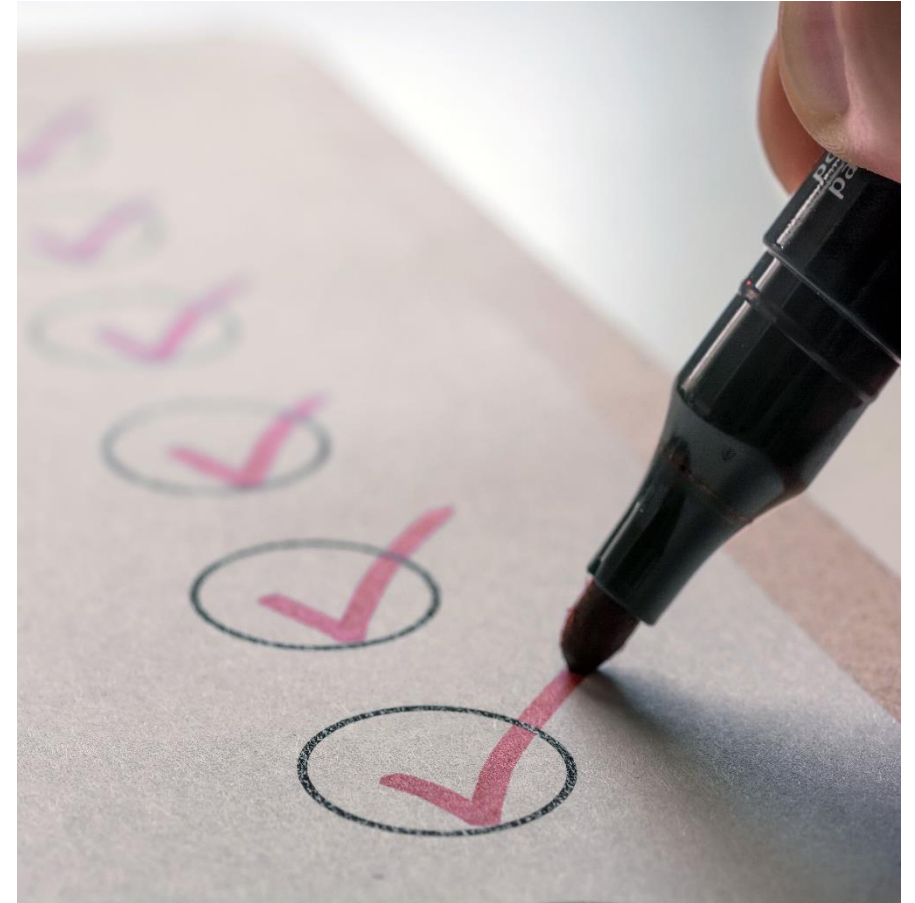
Example of Professional Misconduct

- Social Worker provided clinical support to a woman going through a divorce.
- That same social worker acted as a mediator in their custody dispute
- With custody disputes, the issues were contentious and acrimonious
- Social worker made a custody schedule where the children would reside with their mother majority of the week
- Complaint made about the social worker for being biased in her assessment and for “favouring” one parent over the other (the ex-wife).

Writing Reports

Tips on Preparing Written Reports

- Assume the report will be filed in evidence
- Let counsel know your opinion before you write it down
- If delegating a portion of report writing, you are still responsible for every word, calculation or choice
- Do not plagiarize
- Avoid absolutes like “never” or “always”
- Keep the tone fact-based, objective, fair and professional
- Fees should be commensurate with services



Giving Evidence



Evidence in Court or Tribunals

Administrative Context

- Tribunals are not bound by the rules of evidence that apply in courts (though similar)
- Wide latitude to hear and admit evidence
- Less formal, less expensive and more timely hearing
- Standard is the **balance of probabilities**
- Some administrative tribunals have their own rules regarding expert evidence
- E.g. Criminal Injuries Compensation Board, Landlord Tenant Board, WSIB, discipline hearings

Evidence in Court or Tribunals

Fact Evidence

- Witness testifies about what was seen or heard
- Gives knowledge of the facts of the case (first-hand)
- Participant experts provide facts
- E.g. doctor giving evidence about a person's injuries and diagnosis

Opinion Evidence

- Experts in a field with special knowledge who can draw inferences and opinions that do not need to be based on first hand knowledge
- Their inferences are due to the technical nature of the facts which the decision maker is unable to make because it is beyond their knowledge and experience
- E.g. orthopedic surgeon providing an opinion on the likelihood a person can fully regain control over their leg

Evidence in Court or Tribunals

Expert's Duty

- + Aware of their duty to the court and willing to carry it out
- + Expected to be fair, **neutral** and objective when giving evidence
- + Assist the trier of fact (judge, jury, tribunal) and not bolster the arguments of the person who hired them (opinion should not change depending on who hired)
- + The fact that an expert is generally sought, retained, instructed and paid by one party should not undermine impartiality, independence and absence of bias

Evidence in Court or Tribunals

Qualifying an Expert

- Specify the area of expertise and determine whether they are qualified to offer an opinion on a particular subject matter
- **Review expert's CV** with the court and talk about qualifications, publications, experience, relevant teaching, research, etc.
- **Goal** is to satisfy the decision maker that the expert has special skills, sufficient knowledge or experience to give their opinion to the court/tribunal
- Expert witness can be **disqualified completely** if
 - the witness lacks expertise;
 - the area of expertise is novel or junk science; or
 - The expert is unable or unwilling to fulfill their duty to the court.

Evidence in Court or Tribunals

Examination in Chief

- Teach adjudicators the area of expertise and help them understand the evidence being asked to accept (expect them to know nothing)
- **Open-ended questions: (Who, what, where, when, why, how)**

Cross Examination

- Questions about the expert's character, position, professional background, previous positions, opinions, testimonies, or papers written, etc.
- **Leading (closed-ended) questions:** often ask witness to agree with counsel's idea, theory or proposition
- Questions are designed to elicit reluctant agreement without explanation, expose the expert's bias, destroy facts upon which their opinion is based, or get the expert to defer to the other party's expert

Evidence in Court or Tribunals

Tips on how to prepare to be a witness

- Be prepared to be challenged on your experience and expertise
- Know your expertise (CV) and how to explain it plainly and simply
- Think about areas where you will be challenged and how to address such concerns
- Familiarize yourself with court or tribunal rules
- Review and be familiar with your own opinions and the underlying materials, all previous reports and addendums and those of the opposing party's expert
- Meet with counsel to better understand the questions that will be asked
- Rehearse succinct and clear responses to open ended questions
- Know the case

Evidence in Court or Tribunals

Tips on how to be a good witness

- Speak directly to the judge or jury or panel
- If counsel objects to a question, do not interfere or interject
- Think about the question and reflect on whether you agree
- Take your time
- Think about what you are agreeing to before answering affirmatively
- Do not debate or advocate
- Avoid half truths or exaggerations
- Make concessions where appropriate

Challenges Faced by Healthcare Providers



Challenges Faced by Health Care Providers

Tips for Avoiding Complaints/Investigations

- Be mindful and aware of regulatory obligations
- Pay attention to privacy breaches, inadequate security, or recordkeeping shortcomings
- Be careful not to be in a conflict of interest, act in a biased or non-objective way
- Be transparent with assessments and report writing
- Document conversations with patients

Tips for Responding to Complaints/Investigations

- Seek assistance (manager, superior, legal assistance, professional insurance).
- Get assistance of experienced counsel
- Do not speak to the person complaining or their counsel or put anything in writing without getting advice

Challenges Faced by Health Care Providers

Challenges with Insurers

- Dealing with insurers can present additional scrutiny
- Health care providers' recommendations for treatment may be challenged or questioned by insurers
- This can lead to significant consequences for alleged improper billing



Challenges Faced by Health Care Providers



Tips on dealing with insurer

- Keep good records
- Document conversations with patients, observations, assessments and any other steps taken in treatment that justify billing the insurance company
- Understand billing obligations
- Provide treatment that is necessary
- When dealing with insurer, keep the communication helpful and insightful and not combative or defensive
- Seek assistance if needed

QUESTIONS



For more information

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