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MANITOBA PSYCHOLOGIST

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P.A.M. is legally constituted by the Psychologists Act (R.S.M. 1987) as the regulatory body for the practice of all branches of psychology in Manitoba.

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The events that have unfolded since my last column have been truly unprecedented. None of us has ever before had to adjust to the personal and professional changes that we have experienced over the past 7 months. At the same time it has been gratifying to see the response of PAM registrants to the ever-changing and unpredictable nature of this pandemic and the respect that they have shown for their colleagues and clients. From having to work from home through tele-psychology, to making changes in the way their workplaces function, to adopting hygiene and distancing practices, PAM registrants have risen to the challenge and carried themselves with professionalism, compassion, and integrity. Your PAM Council and I have been grateful for this, along with the appreciation you have expressed for our efforts to keep you informed of the changes as they have unfolded and of the requirements as pronounced by the Manitoba government. We are all hopeful that in the months to come we will find ourselves returning to some semblance of what we all once considered to be “normal.”

Because of the shift to online service delivery, PAM Council and I have tried to keep registrants abreast of issues around computer platform security requirements, in-office safety precautions, and outcomes of discussions between provincial regulators on ways to maintain continuity of care in these challenging times. As you all know, the 10 Canadian provinces and the Northwest Territories agreed earlier this year to facilitate tele-psychology practice into new jurisdictions, with existing clients, provided that service requirement arose as a result of a pandemic-related relocation. Again we have seen our profession rise to the challenge and communicate respectfully and appropriately with provincial regulators on these needs. As a result, in the vast majority of cases, services to clients have been able to continue relatively uninterrupted. In those situations where this pan-Canadian agreement could not be applied, registrants have been understanding and I thank you all for your cooperation and respect at those times. None of us could have foreseen the explosion of tele-psychology-based service delivery that arose as a result of this pandemic, and I am sure we will be experiencing the repercussions of this for years to come.

While we have all been swept up in these changes, PAM Council and I have continued to make progress with the Manitoba government towards bringing Psychologists under the RHPA. At present, the Manitoba government has final drafts of our general and practice regulations and we are expecting those to be returned to us in short order. Thereafter, a period of consultation with the membership and other stakeholders will be initiated. At that time I urge you to review the documents which will become available, and share your thoughts, perspectives, and concerns. Once that period of consultation has concluded, that feedback will undoubtedly be integrated into a final draft which will then be returned to government for proclamation. Once that takes place, PAM will enter into a transitional year, during which a tremendous amount of work will have to be undertaken. Practice advisories on a variety of issues will have to be created, a continuing competence program will have to be developed, regulations and rules around incorporating a professional practice will have to be developed, and a whole host of other projects will be launched. I am hopeful that when PAM Council calls on you to volunteer some of your time to assist in these initiatives, you will respond in the affirmative. While the amount of work which will be undertaken in this transition year will be considerable, with the efforts of as many registrants as possible, we will be able to see it through to completion and eventual full incorporation under the RHPA. When I took over as PAM president in 2005, the RHPA initiative was launched and it has obviously been a very long road. I am hopeful, however, that the end is in sight and like so many of you I look forward to the final transition of PAM to the College of Psychologists of Manitoba.

REGISTRAR'S COLUMN

I want to offer a heartfelt thank you to the many registrants who have reached out to express their good wishes to me upon the announcement of my resignation. Over the 24 years that I have volunteered with PAM and then served as your Registrar, I have tried my very best to always treat each registrant as I would have wanted to have been treated by my regulatory body. It was heartwarming for me to realize that in many cases those efforts were successful and I thank you all for that acknowledgment, and for the warm sendoff you have provided me. In the weeks to come, I anticipate that there will be announcements regarding a search for my successor. In the interim I have indicated to PAM Council and the Deputy Registrar (Ms. Lesley Phimister) that I will remain available to them for consultation as required.

I close this column with good wishes for all of you in your personal and professional lives. I hope that everyone stays safe and healthy, and continues to work together to assist PAM in its mandate to serve and protect the citizens of Manitoba.

Respectfully submitted,

Alan Slusky, Ph.D., C. Psych.
Registrar

ANNOUNCEMENTS

Council & Committee Updates:

PAM council, committee members and staff would like to extend their utmost appreciation to Dr. John Arnett, C.Psych, for his outstanding volunteer commitment and leadership as PAM council President from 2010-2020.

John's leadership these past ten years has been instrumental in helping PAM work towards coming under the RHPA. His strength of leadership, commitment to the profession of psychology and his great respect and adherence to the mandate of a regulatory body has served PAM stakeholders well. We wish John a much-deserved break and we wish him all the best in his future endeavours. We welcome and thank Dr. Sonia Marrone, C.Psych for taking on the role of PAM council President.

Finally, we would like to thank Dr. Maxine Homqvist, C.Psych, for her organization and sound judgement as chair of the PAM examinations committee.

We hope to announce the new chair of the examination committee very soon.



Notice of Voluntary Surrender of Registration:

Dr. Gary Shady was subject to an interim suspension of his certificate of registration by PAM in October 2018. He subsequently pled guilty to a charge of possessing child pornography and was sentenced to a period of incarceration. Dr. Shady has not been practicing psychology since October 2018 and has voluntarily surrendered his license and registration with PAM as a result of the criminal proceedings.

Consistent with PAM practice in such situations, notice of Dr. Shady's interim suspension and subsequent voluntary surrender of his registration has been provided to the ASPPB Disciplinary Databank.

Grey Areas

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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Trying to Make Sense of the Use of Social Media by Practitioners

by Julie Maciura

October 2020 - Issue no. 250

The Canadian regulatory world has waited impatiently for the decision of the Saskatchewan Court of Appeal in the case of *Strom v. Saskatchewan Registered Nurses' Association*. The decision finally came down this week. It provides some guidance but leaves many questions unanswered.

In that case nurse Strom posted comments on Facebook about the care that her grandfather had received during his final days at a care home in Saskatchewan. The comments did not identify any specific staff at the home and recognized some, again unidentified staff, for their compassionate care. However, the comments indicated that her grandfather had received “subpar” care that was not “up to date” and lacked compassion. The posting urged others to raise any concerns about the care of their loved ones with the facility. Ms. Strom also tweeted a link to the posts to “the provincial Minister of Health and the provincial Leader of the Opposition” which made them much more public.

Ms. Strom was disciplined for harming the reputation of the nursing staff at the home and undermining the public confidence in the staff at that facility. In part the tribunal was concerned that Ms. Strom had failed to adequately ascertain the facts, relying instead on reports from other family members. In addition, she had not attempted to raise the concerns through proper channels. Also, she identified herself as a registered nurse in one of the posts and made them generally available to the public, undermining the argument that the posts were a private matter.

The Court of Appeal held that the discipline panel failed to take a “contextual” approach in assessing whether this off-duty conduct was unprofessional and whether the finding was a proportional response to the infringement of Ms. Strom’s freedom of expression under the Canadian Charter of Rights and Freedoms.

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The Court summarized some of the contextual factors as follows:

Ms. Strom posted as a granddaughter who had lost one grandparent and was concerned for the future of another. That fact was front and center for a reader of the posts. Although she identified as a nurse and an advocate, she was not and did not purport to be carrying out her duties as a nurse. She was on maternity leave and spoke to the quality of care provided by a distant facility with which she had no professional relationship. The private aspect of the posts was made clear and was significant. Further, and as has been noted, the posts have not been shown to be false or exaggerated and, on the face of it, would appear to be balanced.

The Court did not accept the discipline panel's contention that Ms. Strom should have followed formal channels of communicating concerns in the circumstances of this case. It was a disproportionate limitation on the freedom of expression to prevent practitioners from choosing "their means of communication and audience".

In setting aside the misconduct finding, the Court was careful to not extend its reasoning too far:

It is entirely legitimate for a professional regulator to impose requirements relating to civility, respectful communication, confidentiality, advertising, and other matters that impact freedom of expression. Failing to abide by such rules can be found to constitute professional misconduct.

The Court's reasons suggest that so long as a contextualized approach is taken by regulators in scrutinizing social media posts by practitioners, findings of professional misconduct would likely be upheld.

The Court's decision will soon be available on www.canlii.org.

Even while the Strom case was pending, there have been a number of other developments on the issue of practitioners using social media.

Backlash Against Narrow View of Professionalism

This past summer a scholarly paper entitled "Prevalence of unprofessional social media content among young vascular surgeons" was posted by the Journal of Vascular Surgery. It characterized various forms of unprofessional posts on social media that it suggested could cause difficulties for the practitioners later in their career. Two of the categories of "potentially unprofessional" conduct included pictures taken while wearing swimwear and holding alcoholic drinks. The response was viral with hundreds, if not thousands, of health practitioners posting pictures of themselves in swimwear holding drinks. See:

<https://www.cnn.com/2020/07/25/cnn10/medbikini-backlash-and-apologies-trnd/index.html>.

The Journal retracted the paper. See: [https://www.jvascsurg.org/article/S0741-5214\(19\)32587-X/fulltext](https://www.jvascsurg.org/article/S0741-5214(19)32587-X/fulltext).

Serious Consequences in Serious Cases

The proposed sanction in Strom did not involve a suspension. It does appear that suspension is not the usual sanction for inappropriate social media posts. For example, recently a teacher in British Columbia was reprimanded, without a suspension, for "intemperate and insulting comments about religion" on an open Facebook post. The teacher "agreed his conduct constituted professional misconduct and conduct unbecoming a teacher." He also agreed that his posts "could undermine his efforts to provide an inclusive learning environment for his students." See:

<https://www.timescolonist.com/news/local/b-c-teacher-reprimanded-for-posting-insulting-comments-about-islam-1.24084516>.

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Similarly, in the UK a barrister was recently reprimanded and fined £1000 for a sexually and racially offensive tweet in the context of a debate over the colonial nature of the curriculum at English universities. See: <https://www.bailii.org/ew/cases/EWHC/Admin/2020/467.html>.

However, suspensions are available in serious cases. For, example, an Ontario physician was suspended for one month for using “a slang term for female genitalia” in reference to two physicians during an intra-professional dispute. See: <https://lfpres.com/news/local-news/local-surgeon-suspended-over-tweet-as-regulatory-body-starts-eyeing-online-decorum>.

Similarly, a UK physician was suspended for four weeks for numerous highly offensive posts on race, pedophilia and terrorism. Those posts were made before the physician was registered. See: <https://lfpres.com/news/local-news/local-surgeon-suspended-over-tweet-as-regulatory-body-starts-eyeing-online-decorum>.

Thus highly inappropriate social media posts can result in significant consequences.

Evidence of Incapacity

Some social media posts can be so bizarre or disturbing as to suggest that a practitioner is suffering from a mental illness. For example, an Australian psychiatrist who posted bizarre “alt-right” conspiracy theories about President Trump and the “Deep State” on his practice website had his registration revoked. He called his regulator a “pedophile protection agency”. A psychiatric assessment, to which he brought 600 pages of documents to prove the accuracy of his views, concluded that he suffered from paranoia. See: <https://www.theguardian.com/australia-news/2020/feb/07/psychiatrist-struck-off-for-posting-bizarre-qanon-conspiracy-theories>.

Duty to Report Colleagues

Further complicating the issue, there may be circumstances where a practitioner observing the social media posts of a colleague may have a professional obligation to report them to the regulator. For example, the College of Nurses of Ontario describes a scenario where this duty to report might arise on a social media post by a colleague who says he needs to have a drink before facing work. The duty to report could arise from Principle 4 of their Code of Conduct: “Nurses work respectfully with colleagues to best meet patients’ needs.” See webcast on Principle 4 at: <http://www.cno.org/code-of-conduct-webcast#principle4>.

Conclusion

While social media posts have many similarities with other inappropriate verbal or written comments, there is something unique to them as well. Societal (and perhaps generational) views about the use of such media to express personal views can conflict with some traditional professional expectations. In addition, the more experience regulators have with social media postings, the more unanticipated issues may arise.

FOR MORE INFORMATION:

This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Tel: 416-626-6897, E-Mail: info@sml-law.com

Guiding Practitioners on their Privacy and Confidentiality Obligations during COVID-19

by Bernie LeBlanc
April 2020 - No. 245

Regulating the protection of client privacy / confidentiality is now a shared responsibility between professional regulators and privacy commissioners. In recent years privacy commissioners have taken the lead in this area by providing more detailed guidance to practitioners and by operating well-known and comprehensive enforcement mechanisms. This is not to say that professional regulators have no role at all. As recently noted in our blog, in *Dagenais c. Nurses (Professional Order of)*, 2020 QCTP 11, <http://canlii.ca/t/j54cs> a nurse was disciplined by her professional regulator for revealing information about a patient to a journalist.

How then should these separate agencies provide guidance about addressing privacy and confidentiality concerns during the COVID-19 crisis? In particular, are standards relaxed when providing essential services by practitioners who may be unexpectedly practising electronically from their homes using equipment and programs that have not been set up using the usual safeguards?

The Information and Privacy Commissioner of Ontario, who oversees privacy by health care practitioners, offers the following guidance:

Should organizations tell staff who are working at home to avoid accessing and collecting personal information of patients/clients? Home computers may not have the same level of security as the devices in the office, which are on a secure network.

We understand that these are exceptional circumstances and it may not be possible for service providers to meet the same standards for security and privacy protection that they normally do. Many organizations are striving to manage service disruptions and continue to provide essential services, especially in the health and child and family services sectors.

If your organization believes that staff (or agents working on the behalf of the organization) should be allowed to handle personal information from home, in order to provide necessary services in an effective and efficient way, you should permit them to do so. You should guide any staff working from home on how to do their work within as privacy-protective an environment as they can, given the realities of our current situation.

In a public health crisis, it is also understandable that service professionals, especially in the health and child protection sectors, may need to send or receive information by phone, text, email or other messaging services. The above applies to the use of technologies not normally used for business, during this crisis.

We remain available to public organizations for consultation and discussions on access and privacy matters during this time.

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The Information and Privacy Commissioner of Ontario goes on to say:

Tips for Working from Home

We understand that these are exceptional circumstances and it may not be possible for you to meet the same standards for security and privacy protection that you normally do. Many organizations are striving to manage service disruptions and continue to provide essential services, especially in the health and child and family services sectors.

Here are some tips for dealing with personal information when working from home:

Mobile devices

- password protect your device
- lock your device when not in use
- if using portable storage devices, such as USBs and portable hard drives, if possible, ensure they are encrypted and password protected
- keep your software up-to-date

Emails

- if possible, use work email accounts rather than personal ones for work-related emails involving personal data
- before sending an email, check that you're sending it to the correct recipient, particularly for emails involving personal data

Paper copies and files

- only remove personal information from the office if it is necessary to carry out your job duties
- securely store any paper files when not in use – lock files away and do not leave files in your car

Most non-health professions in Ontario fall under the jurisdiction of the federal *Personal Information Protection and Electronic Documents Act (PIPEDA)*. The Information and Privacy Commissioner of Canada has also issued guidance relating to COVID-19. However, while helpful, this guidance is more legalistic and, perhaps, less practical than that from Ontario.

PIPEDA allows organizations to collect, use or disclose information only for purposes that a reasonable person would consider appropriate in the circumstances (subsection 5(3)). Organizations are required to obtain the knowledge and meaningful consent of the individual for the collection, use, or disclosure of their personal information (Principle 3). Consent is only valid if it is reasonable to expect that the individual understands the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting (section 6.1).

This said, there are some circumstances under which organizations may collect, use, or disclose personal information without the consent of the individual, including:

- If the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way (paragraph 7(1)(a)), such as if an individual is critically ill or in a particularly dangerous situation, and needs help.
- If the collection and use is for the purpose of making a disclosure required by law (paragraphs 7(1)(e), 7(2)(d) and 7(3)(i)). For instance, this would include where a public health authority has the legislative authority to require the disclosure.
- If the disclosure is requested by a government institution under a lawful authority to obtain the information and the disclosure is for the purpose of enforcing or administering any law of Canada or a province (subparagraphs 7(3)(c.1)(ii)-(iii)). Again, this would include instances where a public health authority has the legislative authority to require the disclosure.

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- If the disclosure is made on the initiative of the organization to a government institution, which has reasonable grounds to believe that the information relates to a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed (paragraph 7(3)(d)(i)). This would include if an organization believes an individual is in contravention of an invoked quarantine order.
- If the use or disclosure is for the purpose of acting in respect of an emergency that threatens the life, health or security of an individual (paragraphs 7(2)(b) and 7(3)(e)), such as if an individual requires urgent medical attention, and they are unable to communicate directly with medical professionals.

The federal guidance does not appear to address whether the usual privacy safeguards can be relaxed at this time other than to say:

All organizations must continue to operate with lawful authority and exercise good judgment. Government institutions will need to apply the principles of necessity and proportionality, whether in applying existing measures or in deciding on new actions to address the current crisis

Regulators will undoubtedly be asked by practitioners about their privacy and confidentiality obligations during this crisis. Since most regulators of professions define the privacy and confidentiality duties broadly, they probably have greater flexibility in issuing general guidance indicating that all of the circumstances will be taken into account if a complaint comes in. Of course, more detailed guidance is possible and will likely be welcomed. Regulators may also wish to ensure that their messaging is, where possible, consistent with that issued by the applicable Information and Privacy Commissioners.

Some Canadian regulators of professions have given some carefully worded guidance about recognizing that the exceptional circumstances might result in practitioners adopting procedures that might not generally be considered appropriate. For example, the regulator for registered nurses in Alberta has said: CARNA supports the use of virtual care platforms that are recommended and supported by the employer. We recognize that in highly challenging circumstances an NP may need to depart from established procedures in order to care for clients and people using health-care services. It is reasonable that if the employer is supporting temporary use of unregulated communication technologies based on the principle of matching intervention to need, then CARNA would also support this use as the Practice Standards for Regulated Members state that the RN and NP follow policies relevant to their practice setting.

Similarly, the legal regulator in Ontario has provided guidance on a number of issues, including proffering an interpretation of requirements for commissioning affidavits that is clearly driven by COVID-19: Commissioning is governed by the *Commissioners for Taking Affidavits Act* and is not regulated by the Law Society. Although the law is evolving in this area, the best practice for commissioning documents remains for the lawyer or paralegal who is acting as a commissioner to be in the *physical presence of the deponent* to commission the document(s). For more information, please review the Law Society's Virtual Commissioning resource.*

However, as a result of COVID-19, until further notice:

- The Law Society will interpret the requirement in section 9 of the *Commissioners for Taking Affidavits Act* that “every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public” as not requiring the lawyer or paralegal to be in the physical presence of the client.
- Rather, alternative means of commissioning such as commissioning via video conference will be permitted.
- If lawyers and paralegals choose to use virtual commissioning, they should attempt to manage some of the risks associated with this practice as outlined below

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The guidance went on to provide safeguards to ensure that the client fully understands the nature of the document and the significance of commissioning it

and to ensure that the client was not experiencing undue influence.

The guidance documents referred to above can be found at:

- <https://www.ipc.on.ca/newsrelease/ipc-closure-during-covid-19-outbreak/>
- https://www.priv.gc.ca/en/privacy-topics/health-genetic-and-other-body-information/health-emergencies/gd_covid_202003/
- <https://nurses.ab.ca/about/what-is-carna/news/news-story/updates-on-novel-coronavirus-covid19>
- <https://lso.ca/news-events/news/corporate-statement-re-covid-19 - can-a-lawyer-or-paralegal-use-virtual-commissioning-in-the-context-of-covid-19--5>

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