

April 1998

This Bulletin is forwarded to every medical practitioner in the province. Decisions of the College on matters of standards, amendments to Regulations, guidelines, etc., are published in Bulletins. The College therefore assumes that a practitioner should be aware of these matters.

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At its meeting on April 3rd, 1998, Council considered the following matters:

COMPLAINTS:

A patient attended a family physician seeking a therapeutic abortion. The family physician, along with a consultant, allegedly advised her that one could not be provided unless she also agreed to a tubal ligation. She reluctantly did so. She now claims that she was improperly coerced. In response, both physicians stated that the patient had freely agreed to both procedures. In reviewing the matter, the Complaints Committee could find no clear evidence that the patient had been improperly coerced. If that had been the case, it would clearly have been improper. The *Code of Ethics* requires physicians to:

Respect the right of a competent patient to accept or reject any medical care provided.

Under the circumstances, the Committee noted that the patient was clearly in a period of stress at the time. To that end, it would appear appropriate for physicians in similar circumstances to provide exceptional documentation regarding the patient's willingness for a procedure such as sterilization.

Furthermore, under the circumstances, it may have been reasonable to offer the procedures in sequence rather than simultaneously in order to avoid questions being raised later.

There was a complaint that a psychiatrist had improperly relied on information provided from the family of a patient in order to support her involuntary admission. In reviewing the matter, the Committee noted that under the circumstances, it was completely reasonable to accept evidence from family members regarding the individual's need for treatment and the potential danger they may pose to themselves or others. To that end, the Committee could find no fault with the care provided.

A patient attended an emergency department with abdominal pain. The diagnosis at the time reached was that of a threatened abortion. The emergency room physician consulted with a gynecologist who agreed. The problem was that the patient was about to leave on a trip

and questioned whether she should proceed. She was advised that there were no clear reason not to do so. Nevertheless, while out of province, her condition deteriorated and she subsequently required surgery for an ectopic pregnancy, at considerable expense. In reviewing the matter, the Committee felt that the care provided was appropriate. Such a situation is fraught with difficulties. Physicians, out of an abundance of caution, could recommend that the patient not travel. There could be a similar risk of the decision being questioned later. All the physician can do under the circumstances is present a clear discussion of the facts, and risks, to the patient, leaving it for them to make their own decision.

A patient had undergone an orthopedic procedure and suffered a rather prolonged recovery. The patient subsequently found that alternative procedures were possible for the same condition. The patient therefore complained

that he was not properly advised of these possibilities. In response, the physician stated, that, in his opinion, the patient was well informed regarding the possible approaches to take. The rather prolonged recovery was a known risk under the circumstances. In reviewing the matter, the Committee could find no particular fault with the care provided. In this situation, particularly where there may be alternative approaches, physicians should do everything possible to document the information that they provide to the patient. This can avoid questions being raised later.

A patient complained that a pelvic examination had been done in an improper fashion. In reviewing the matter, the Committee noted that a nurse had been present throughout the examination. The patient was appropriately draped, but this was not the patient's usual physician. Further evidence suggests that the approach taken by the physician was quite appropriate, although different from that with which the patient was familiar. This evidently contributed to the patient's perception of events. Given all of these facts, the Committee did not feel that the matter could be pursued.

The Committee also referred three matters to the Review Committee for further study.

REVIEW COMMITTEE:

At its recent meeting, the Committee approved, in principle, an agreement with a physician concerning monitoring for a potential substance problem.

The Committee refused an appeal from the decision of Council rejecting a complaint against two physicians.

The Committee reviewed a complaint against a physician from the family member of a patient who alleged that the patient had not been properly advised that a biopsy performed by a physician had shown the presence of an incompletely excised melanoma. As a result, appropriate treatment was allegedly delayed. In response to the complaint, the physician asserted that the patient had been appropriately advised, but had stated that he was now seeing another physician who would take care of the matter. On review, the Committee could not find that the physician had acted improperly. Nevertheless, the matter is of considerable import and the procedures involved in retrieving laboratory reports and communicating them to patients should be reviewed by all physicians. A recent court case in another province held a physician completely liable for failing to communicate a positive pathology report to a patient. This was notwithstanding that the physician saw the patient in a hospital setting and had relied on hospital procedures for the return of the report. The court held that the physician had complete responsibility for tracking reports, and seeking them out if they had not been returned. No liability was found on the part of the hospital. This would appear to represent a high, but reasonable, standard of care. (Arguably, the same standard could apply to consultants who only rely on the referring physician to communicate results.) Physicians should review their office procedures, as well as those provided in hospital settings. If there is any question, as there may have been in this complaint, that the patient could deny receiving information later, the communication with the patient should be clearly documented. In

some circumstances, it may be useful to write a letter directly to the patient, retaining a copy, should any questions be raised later.

CONFIDENTIALITY:

In the last Newsletter, physicians were asked to provide background on any circumstances in which they had felt some obligation to breach confidentiality in order to avoid harm to others. After reviewing the responses, and considering the possibility of a formal statement, Council determined that such would not be appropriate. Each case must be judged on its own merits. Under these circumstances, the best advice seems to be that contained in the *Code of Ethics*, with commentary, which obligates physicians to:

22. Respect the patient's right to confidentiality except when this right conflicts with your responsibility to the law, or when the maintenance of confidentiality would result in a significant risk of substantial harm to others or to the patient if the patient is incompetent; in such cases, take all reasonable steps to inform the patient that confidentiality will be breached.

Physicians must have some discretion in cases such as potential suicidal or homicidal behaviour or failure to inform sexual partners of HIV status. Physicians should be aware that breaking confidentiality, unless explicitly required by law, may be illegal in some jurisdictions, even though it may be an ethical responsibility.

PHYSIOTHERAPY ACT:

The Act governing physiotherapists in New Brunswick was recently amended. It now clearly allows patients to have direct access to services of a physiotherapist without a referral from a physician or even a medical

diagnosis. This initiative follows the trend undertaken in other provinces over the last several years.

The significant difficulty for physicians is that many insurance providers still require a referral, or approval, by a physician in order for a patient to obtain coverage for physiotherapy services. There are similar requirements for other services, including those provided by unregulated practitioners, such as massage therapists.

This clearly presents many difficulties for physicians.

Going back to first principles, the following items are considered potential forms of professional misconduct:

18. signing or issuing, in the member's professional capacity, a document that the member knows or ought to know is false or misleading;

19. failure, without reasonable cause, to provide a report or certificate relating to an examination or treatment performed by the member to the patient or their authorised representative within a reasonable time after the patient or their authorized representative has requested such a report or certificate;

40. interfering, either directly or indirectly, with the patient's freedom of choice of a physician or a patient's right to consult another physician or other professional;

Thus, reading the situation narrowly, physicians are not obligated to provide any recommendation for treatment with which they disagree. Nevertheless, there will clearly be pressure from some patients to have a physician approve the benefit to which the patients feel they are entitled. This may include treatments which are already commenced, or have at least been recommended, by a physiotherapist or other practitioner.

Physicians have expressed to the College the need for further guidance on these matters. Prior to developing a policy in this area, Council would appreciate hearing from physicians regarding their views. This could lead to a more detailed description of a physician's obligations. For example, it could be stated that a physician should never be obligated to agree with a treatment plan which has already commenced. It could be stated that a physician is never obligated to agree with the treatment plan undertaken by an unregulated practitioner. Exceptions would be where the physician is of the clear opinion that the patient would benefit from the treatment in question. Comments on these issues are appreciated. The College would also appreciate receiving copies of the kind of documentation physicians have been asked to provide by various insurers. It may require direct contact with the insurers in order for an acceptable approach to these issues being developed.

RELEASE OF RECORDS TO LAWYERS:

Several physicians have expressed difficulty with the kind of information they have been asked to provide to lawyers under the authority of a release signed by their patients. Patients frequently do not understand that their entire record may be forwarded. By chance, the following item was recently included in a Newsletter from the College in Manitoba. Council has approved it as useful advice for physicians in this context:

In 1992 the Supreme Court of Canada in its reasons for decision in *McInerney v. MacDonald* recognized that patients have a right of access to their medical records including

consultant reports. Prior to this decision, physicians commonly provided narrative reports to patients and their lawyers. Generally, they did not release photocopies of their records. Since *McInerney*, physicians are required to provide their patients with access to and copies of medical records. Increasingly, patients and their legal counsel request photocopies of medical records rather than narrative reports.

Patients who are aware of the contents of their records potentially are better able to give an informed consent if asked to release their medical records to a third party. Unfortunately, in practice, many patients sign authorizations directing physicians to disclose complete medical records in circumstances in which they are unaware of what is contained in the records. This has given rise to significant concerns in the medical community about the erosion of patient confidentiality.

Lawyers have an ethical duty to ensure that any authorization presented to a client for signature is appropriate. If lawyers do not understand what may be contained in a medical record and the problems which can result from release of the record, they are less likely to properly advise patients with respect to the appropriateness of a particular authorization.

Medical records often contain significant information about an individual patient and other persons. In many large clinics as well as in institutions, a single record is maintained regardless of the number of attendances or individuals involved in patient care. Although it is not a recommended method of keeping medical records, some physicians maintain one record for an entire family.

Medical records often contain significant information about your patients which is irrelevant to the purpose for which the record is

often sought. The College has heard from patients who have signed consents for release of information and subsequently complained that they did not know or did not understand the extensive personal information which would be released as a result. One patient signed an authorization for release of her record by a physician whom she had attended since she was a teenager. The woman was shocked to discover that a therapeutic abortion performed when she was an adolescent was noted in the record which was made available to her employer. In other cases, information regarding post-partum depression, testing for sexually transmitted disease, adoptions and many other personal matters have all been unnecessarily disclosed.

Unnecessarily broad authorizations result in disclosure of personal, confidential information which may have no value to the person seeking it but which may have an adverse impact on the doctor/patient relationship. This is especially true when psychiatric records are disclosed. Unnecessary disclosure can negatively interfere with the physician/patient alliance and therapy.

Lawyers should ensure that their clients give an informed consent. Consents should be limited to a specific problem and/or time period or, alternatively, the client should review the record at the physician's office prior to determining if the consent will be given. Patients should understand the implications of an authorization and should not be subjected to undue pressure to give the authorization because of fear of loss of benefit or some other right.

Members should be aware that a model policy previously developed by Manitoba Health Organizations recommended that the authorization state reasons for the request including the potential for legal action. Further, only information which is specifically referred to in the patient's written authorization will be

released. The College of Physicians and Surgeons recommends that blanket authorizations be discouraged.

If the authorization is one which requires the release of an entire record without a stated purpose, disorder, or a time period, it is prudent to contact the patients to ensure they understand the type of information which will be released. This is particularly indicated if you know that the information may be harmful. If your patient has any doubts or concerns about what is in the record, explain it. Don't be afraid of questioning the authorization your patient has signed. By checking with your patient, you can assess if an informed consent has actually been given.

If the patient directs you to send less than the signed authorization allows, be sure to mention this restriction when you release the information. You must take care not to mislead the recipient about the extent of the record being disclosed.

INFINITY²

This is a position approved by the Council of the College of Physicians and Surgeons of New Brunswick.

The College has been concerned about the potential relationship of its members with the marketing scheme developed by Infinity² of Mesa, Arizona, as well as other similar schemes developed through other entities.

One element of the scheme developed through Infinity² is the alleged "assessment" of health care problems by means of "live blood cell analysis". It is the opinion of the College that this technique, as propagated by Infinity² and its agents, is without known scientific

basis. Practitioners of this technique appear incapable of the diagnostic claims which they claim. Thus, until evidence is advanced to the contrary, the providing of opinion or advice based on live blood cell analysis is not compatible with professional standards.

The second element of the arrangement of physicians with Infinity², and similar entities, concerns the payment of a commission, or similar benefit, to members on the basis of orders placed by patients to Infinity² for various alleged health and nutritional products. Furthermore, if the physician recruits others as distributors, a further benefit flows to the original physician. It is the opinion of the College that this multi-level marketing scheme is incompatible with professional standards. The receipt of a commission, often hidden, on the basis of recommendations by the physician, represents a significant conflict of interest. Such a conflict is not compatible with proper professional conduct.

This statement is provided to alert physicians to potential complaints, and disciplinary action, which may flow from their involvement with such schemes as outlined.

THE ANNUAL ANNOUNCEMENT

With this Newsletter, physicians in New Brunswick received 2 copies of the Annual Announcement. They are encouraged to distribute the second copy where it will be of most value. Physicians are also encouraged to check the accuracy of their entry and forward any changes, or additional information, on the enclosed card.