

June 27, 2019

*Via Mail and E-mail*

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College of Physicians and Surgeons of Ontario  
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## **Re: General Consultation – Policy on Disclosure of Harm**

The Canadian Medical Protective Association (“CMPA”) appreciates the opportunity to participate in the consultation being conducted by the College on its updated draft *Policy on Disclosure of Harm*. We have also provided comments in respect of the updated draft *Policy on Boundary Violations* under separate cover.

As you know, the CMPA delivers efficient, high-quality physician-to-physician advice and assistance in medical-legal matters, including the provision of appropriate compensation to patients injured by negligent medical care. Our evidence-based products and services enhance the safety of medical care, reducing unnecessary harm and costs. As Canada’s largest physician organization and with the support of our nearly 100,000 physician members, the CMPA collaborates, advocates and effects positive change on important healthcare and medical-legal issues.

### **Terminology**

As you know, the CMPA has a longstanding role in educating physicians about ethical, professional, and legal obligations to disclose information to patients about harm experienced from the delivery of health care. One of the tools the CMPA relies upon the most to educate physicians on this important topic is our publication, [\*Disclosing harm from healthcare delivery: Open and honest communication with patients\*](#).

The CMPA updated this publication in 2015 to, amongst other things, reflect the current terminology used in patient safety and disclosure, including by the World Health Organization and the Canadian Patient Safety Institute. We expect the use of this more current terminology in the updated Policy will promote clarity and consistency in patient safety discussions.



**Disclosure of Personal Health Information**

To ensure consistency with the requirements under the *Personal Health Information Protection Act (PHIPA)*, we recommend that the draft Policy specify that disclosure should generally be restricted to the patient’s estate representative. If there is no estate trustee, disclosure should generally be limited to the person who has assumed responsibility for the administration of the patient’s estate.

As currently written, the language in the draft Policy requires all physicians to disclose harm to the patient’s estate trustee and to the substitute decision-maker, if any.

We recognize that subsection 2(4) of Regulation 965 under the *Public Hospitals Act* requires disclosure of critical incidents to a person lawfully authorized to make treatment decisions on behalf of the patient immediately prior to the patient’s death, or who would have been so authorized if the patient had been incapable. However, Regulation 965 applies only to physicians who work in a hospital setting. Subsection 2(4) is also disjunctive in that it provides that disclosure to a substitute decision-maker is only one of two options to satisfy the disclosure obligation, the other, and arguably preferred, option being to the estate trustee or person assuming responsibility for the administration of the estate.

The CMPA appreciates that disclosure discussions in practice can occur with a deceased patient’s substitute decision-maker in certain circumstances. We understand the College received feedback from Ontario’s Information and Privacy Commissioner that the *Policy* should better reflect the requirements under *PHIPA* regarding disclosure of personal health information in circumstances where a patient has died. We would be interested in learning whether the Privacy Commissioner agrees with the language proposed in the draft Policy as currently written.

**Reference to CMPA**

The draft Policy and the companion *Advice to the Profession* document encourage physicians to consult the CMPA’s publication, *Disclosing harm from healthcare delivery: Open and honest communication with patients*. However, similar to the existing Policy, the *Advice to the Profession* document simply suggests that physicians contact their “medical malpractice provider” for advice before proceeding with disclosure.

Given that the vast majority of practising physicians in Ontario are CMPA members, it would be preferable for the *Advice to the Profession* document to expressly recommend that physicians contact the CMPA in relation to their disclosure obligations.

I trust these comments will be of assistance to the College in finalizing the draft Policy.

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