

OTLA Submission to the College of Physicians and Surgeons of Ontario

Draft Boundary Violation Policy and Advice to the Profession: Maintaining Appropriate Boundaries document

August 2, 2019

The Ontario Trial Lawyers Association appreciates the opportunity to make submissions to the College of Physicians and Surgeons of Ontario (the College) on its review of the draft *Boundary Violations* policy and draft *Advice to the Profession: Maintaining Appropriate Boundaries* document.

The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA's members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada. Many of our members represent those who have been the victims of sexual or historical sexual abuse.

OTLA's Position

OTLA supports the College's effort to draft a *Boundary Violations* policy and *Advice to the Profession: Maintaining Appropriate Boundaries* document which better clarifies to the profession the College's expectations with respect to physician obligations in relation to physicians establishing and maintaining appropriate boundaries with patients, including both sexual and non-sexual boundaries. Although OTLA fully supports both the draft policy and advice documents as currently drafted, OTLA has some suggestions to strength both documents.

Recommendations for the draft *Boundary Violation* Policy

Below are recommendations that OTLA suggests should be considered before approving the draft *Boundary Violation* policy:

1. In the definition portion, consideration should be given to defining and explaining "informed consent". Specifically, the policy should clarify to the profession what informed consent means and require that a patient must provide informed consent for any intimate procedure or when a physician needs to intimately touch a patient in the process of caring or treating them.
2. With respect to the *Sexual Boundary Violations* section, consideration should be given to including a list of prohibited conduct such as a patient touching a doctor or a doctor forcing or allowing a patient to sexually touch them.
3. Paragraph 3 of the draft policy outlines what a physician must do to ensure sexual boundaries are not violated. The College should consider including the following additional terms, including that a physician:

- a. Must not terminate a patient-physician relationship for the purpose of pursuing a sexual relationship.
 - b. Must stop the physical examination or procedure upon the patient's request or when the patient has withdrawn their consent.
 - c. Ensure that a parent, guardian or trustful adult is present during an intimate examination of a child, unless the child has capacity to consent otherwise.
 - d. Must not commit any behavior, gesture, impression or comment that is sexually seductive or sexually suggestive to a patient, made in person, by telephone, text message or through social media.
 - e. Must not use unorthodox examination techniques, including touching a patient's body in a manner which does not respect the dignity of the patient.
 - f. Must not substantially or repetitively touch a patient's body for any purpose other than an appropriate physical examination or treatment, or when the patient has refused or withdrawn consent or would have withdrawn consent if the patient appreciated that such touching did not constitute appropriate physical examination or treatment.
 - g. Must not engage in any form of sexual activity with the patient, even if initiated by the patient and/or consented to by the patient.
4. Paragraph 4 of the draft policy states that physician must explain the indication of a physical exam and consider the comfort of the patient at all time. It is recommended that the policy include that physicians must explain the purpose of the physical touching while they conduct their examination.
 5. At the section, *Third Party Attendance at Intimate Examinations*, the College should consider adding that the patient should be provided the option that a third party be in attendance during an intimate examination regardless of their age or gender (applies to all patients).
 6. Paragraph 6 of the draft policy talks about the necessity of a third party attendant when performing intimate examinations. Consideration should be given to advising physicians to document in the patient's record whenever a patient has been offered a third party attendant and has decided to waive having a third party present.
 7. Paragraph 9 of the draft policy sets out when a physician-patient sexual relationship with their former patients may be in appropriate even after the one or five year end of their professional relationship has passed. OTLA recommends that the following should be added to this section: Physicians must not initiate any form of sexual advances toward a previous patient when the physician used or exploited trust, knowledge, emotions or influence derived from the previous physician-patient relationship.

Recommendations for the *Advice to the Profession: Maintaining Appropriate Boundaries* Document

While generally good guidance to the profession, consideration should be given to adding a few additional practice points to the profession in the *Advice to the Profession: Maintaining Appropriate*

Boundaries document. Specifically, additional precautions to the profession should be added to the document, including that physicians should:

- a. be mindful of cultural preferences;
- b. avoid crossing non-sexual boundaries such as self-disclosure; and
- c. explain why a question relating to sexual matters is being asked. The physician should specifically be reminded that any question that he or she asks a patient must be solely asked for the purpose of treatment or necessary for care.

Recommendations for both the draft *Boundary Violation Policy and Advice to the Profession: Maintaining Appropriate Boundaries* Document

Neither the draft policy nor the advice document touch on social media interactions with patients. It would be best to caution physicians about these interactions and make it clear that they can violate a boundary via social media.

Also, neither the draft policy nor the advice document provide guidance about how physicians should deal with patient initiated contact. The policy should make clear that physicians must not engage in any sexual activity with patients, even if initiated by the patient or the patient has consented. It would help to also suggest how physicians should navigate a situation in which a patient does attempt to engage in this fashion and consideration should be given to providing advice on whether the physician should be documenting these uninitiated patient interactions and contact.

Conclusion

OTLA thanks the College for inviting us to provide input on this consultation. OTLA supports the College's initiative to ensure physicians and patients maintain appropriate boundaries. OTLA would be pleased to discuss our position and recommendations further should the need arise.