



College of Occupational Therapists of Ontario
Ordre des ergothérapeutes de l'Ontario

PREP

Prescribed Regulatory Education Program: Jurisprudence

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THIS MODULE FOCUSES ON APPLYING THE REGULATED HEALTH PROFESSIONS ACT (RHPA) TO OCCUPATIONAL THERAPY PRACTICE

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Introduction

Occupational therapists (OTs) are subject to numerous legal requirements. Some of their obligations are from the *Regulated Health Professions Act (RHPA)*, while others are specific to OTs, such as the Professional Misconduct Regulation. There are also general obligations – including the duty to report a child in need of protection – that apply to many individuals, including OTs.

Jurisprudence is the study of law that includes an understanding not only of legal and professional obligations, but of how those obligations are enforced.

This module:

- Provides a brief overview of the concept of law;
- Describes the role and mandate of the College of Occupational Therapists of Ontario (the College);
- Outlines many of the OT's legal obligations that the College administers;
- Gives examples of other legal requirements for OTs; and
- Suggests an approach for managing legal issues that arise in practice.

Part 1 focuses on the origin and nature of laws. Understanding the relevant laws helps OTs provide safe, effective services within their legal duty.

Part 2 articulates the role, mandate, accountability and activities of the College. Learn when and how the College administers an OTs' legal requirements.

Part 3 helps OTs identify their various legal obligations and when they occur in practice. It divides the obligations into categories and describes their major themes. The examples provided assist in identifying the types of legal requirements OTs encounter in professional practice and how those requirements can be met.

The information and references in this module are current at the time of publication, however, laws are continually evolving and changing. OTs are responsible to ensure they are up-to-date on the legislation and standards relevant to their practice.

a) Learning Objectives

When you have completed this module, you will be able to:

1. Identify and describe an OT's obligations as a regulated health professional and how those obligations affect day-to-day practice.
2. Demonstrate an understanding of the RHPA and the College's role and mandate, including the structure and function of its Council and Committees.
3. Demonstrate an understanding of self-regulation and reflect on how relevant legislation influences your practice.
4. Recognize and understand that ethical and professional issues related to the RHPA occur in practice.

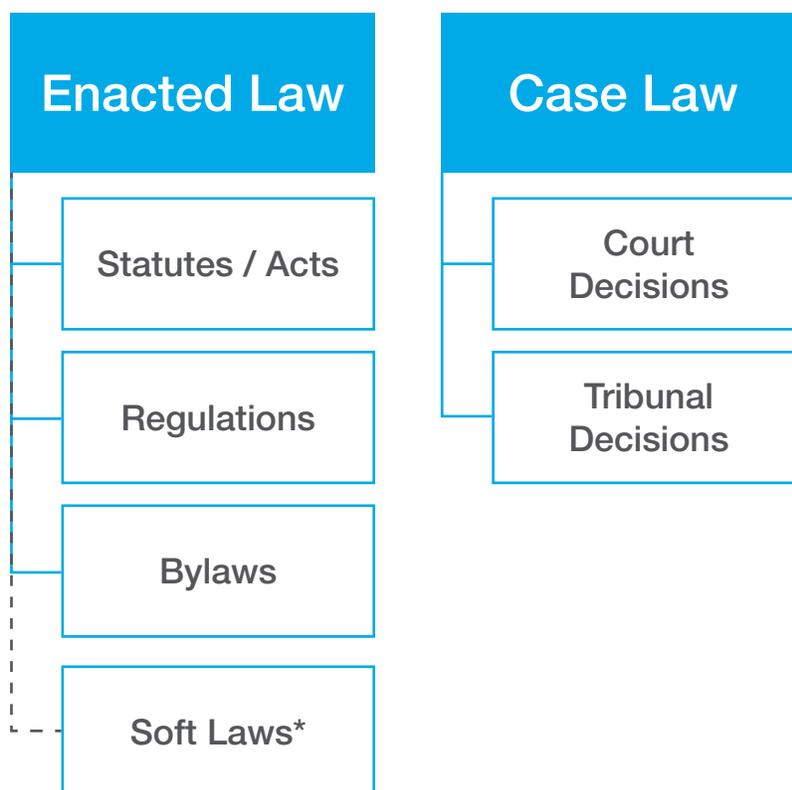
- Use your knowledge and understanding to apply the standards and legislation to a series of practice scenarios.

Part 1: The Concept of Law

a) What are Laws?

Laws are society's formal rules that government, public agencies and the courts can enforce. They originate from two main sources:

- Enacted law, such as a statute enacted by a Legislative Assembly or Parliament; and
- Case law, which interprets the application of the statute in specific situations or provides judicial oversight over government bodies. Case law is sometimes called common law.



*dotted line to soft laws indicates that these are interpretations and/or guidance established by the regulatory College to support application of the enacted laws.

An example of how statutes and case law work together, the RHPA establishes a process for investigating complaints by members of the public. However, the RHPA does not tell the College what it should do when investigating a complaint.

Let us say the complaint is about an OT being rude to a client. During the investigation, the College may receive evidence of other serious misconduct by the OT; for example, false billing. In this context, case law explains how to apply a statute. Case law gives guidance on the appropriate way to address the new concern. Case law may suggest initiating a new, separate investigation so the OT is clear about the scope of the first investigation.

Sometimes, laws evolve the other way around, with court-decided case law leading to statute law. For example, in the 1993 *McInerney v. MacDonald* case, the Supreme Court of Canada decided that clients generally have a right of access to their health records. Afterward, the *Personal Health Information Protection Act* (PHIPA) statute was enacted, providing a detailed set of rules about how clients can gain access to their personal health information.

A single event may be subject to numerous laws. For example, an OT who has sex with a client could face criminal charges for sexual assault, discipline proceedings for sexual abuse, civil proceedings for civil assault, employment termination proceedings for breach of contract and a complaint to the Human Rights Tribunal for discrimination on the basis of sex.

b) Overview of the RHPA and Occupational Therapy Act

The federal and provincial governments can enact their own statutes in their assigned areas. Provincial governments regulate the health professions. In Ontario, OTs are regulated under the RHPA and *Occupational Therapy Act*. The two Acts must be read together; they are essentially one piece of legislation.

The RHPA has two main parts. The first part deals with topics external to health regulatory colleges. It sets out the controlled acts, such as communicating a diagnosis, that only authorized persons and/or professionals can perform. As well, the first part describes the role and powers of the:

- Minister of Health and Long-Term Care;
- Health Professions Regulatory Advisory Council (HPRAC), which provides independent advice to the Minister on health regulation issues; and
- Health Professions Appeal and Review Board (HPARB), which can review the registration and complaints decisions of Ontario's 26 health regulatory colleges.

The second part of the RHPA is called the *Health Professions Procedural Code* (Code). The Code outlines the powers and duties of the colleges, which are the same for all 26 health regulatory colleges in the province. The Code also articulates the public interest mandate of the colleges' governing councils; the registration of new applicants; the complaints, investigations and discipline of members of the profession; and the colleges' quality assurance and patient relations programs.

The Occupational Therapy Act deals with topics specific to the College. For example, it sets out the official name of the College, the profession's scope of practice, the composition of the College's governing Council and the protected titles that only OTs can use.

c) Delegated Legislation

Delegated legislation refers to regulations, bylaws and other rules that a statute permits others to make. The following table illustrates this hierarchy.

Type of enactment	Definition	Examples
Statute	Law enacted by a legislative assembly or parliament	RHPA <i>Occupational Therapy Act</i>
Regulation	Law enacted by a government's cabinet	Professional Misconduct Regulation for OTs
Bylaw	Law enacted by a public and/or government body	Fees and professional liability insurance requirements for OTs
Soft Law	Interpretation and guidance published by a regulatory body	<i>Standards for Occupational Therapy Assessments</i>

As one goes down the hierarchy, each descending level provides more detail about the intent and application of the higher level(s) of enactment. The lower the level of enactment, the more specific and practical it tends to be.

Scenario #1: A Client's Options

Dero is an OT practising in the community with clients diagnosed with chronic pain. When assessing Janice, Dero obtains consent for the overall assessment. He confirms consent before physically examining Janice's legs to assess her pain level but does not confirm consent before touching her abdomen. Janice becomes upset and walks out of the clinic.

What are Janice's legal options?

Janice could raise the issue with Dero's employer or manager, who could address it as an employment issue. Janice could make a complaint to the College. In evaluating the complaint, the Inquiries, Complaints and Reports Committee would review the College's *Standards for Consent* and/or the Professional Misconduct Regulation.

A charge of assault under the Criminal Code of Canada (a federal statute) is theoretically possible but unlikely since there was overall consent for the assessment, and the touching seemed clinical in nature. A complaint to the Human Rights Tribunal is theoretically possible but also unlikely unless there is some suggestion that Dero's conduct contained a sexual component.

Part 2: The College

a) Role and Mandate

The RHPA and *Occupational Therapy Act* specify the College's role and mandate. Just as OTs are subject to the laws that apply to them, the College is subject to the laws that apply to it. These laws are determined by the chosen regulatory model.

Governments have several regulatory models to choose from when deciding how a profession should be regulated. These models include:

1. *No regulation at all.* The market determines which practitioners can provide services and what services they can offer. For example, hair stylists are not regulated in Ontario although they are regulated in some U.S. jurisdictions.
2. *Consumer protection legislation.* For example, the sale of time shares and the operation of fitness centres are governed by Ontario's *Consumer Protection Act*.
3. *Direct government regulation.* The government could have the Ministry of Health and Long-Term Care regulate OTs just as the Ministry regulates medical laboratories.
4. *Self-regulation.* Under an Act, the government can delegate the authority for a profession to regulate itself.

In Ontario, the government chose the self-regulation model for the occupational therapy profession. If it concludes that the self-regulation model is ineffective, it can change it at any time.

Self-regulation means that OTs elect the majority of the members of the College's governing Council. In addition, the majority of the members of most College Committees are OTs that Council members have elected or selected.

This regulatory model ensures that the OTs' expertise and specialized knowledge are brought to its regulatory activities. It also helps ensure that the Registrants accept and support the College's decisions because the profession has had a large say in them.

b) Accountability

With the self-regulation model, there is always a concern that the profession will protect its own interests rather than the public interest. To prevent this, the RHPA has set up numerous safeguards. For the College, the safeguards include the:

1. *Mandate.* The College has an explicit duty under the RHPA to serve and protect the public interest.

2. *Minister.* The College has a duty to report to the Minister of Health and Long-Term Care, and to consider the Minister's suggestions and implement his or her directions. The Minister has the right to audit the College's operations. If the College is not acting in the public interest, the Minister can appoint a supervisor to take over the College.
3. *Approval of regulations.* Before any regulations that the College proposes can take effect, the government must enact them. Proposed regulations and many proposed bylaws must undergo circulation to, and comment by, the public and the profession before being enacted.
4. *Public members.* The government appoints individuals who are not OTs to College Council. Public members also serve on College Committees.
5. *Tribunals.* College decisions in registration matters and disposing of complaints can be appealed to HPARB, an independent body that does not include health care practitioners.
6. *Fairness Commissioner.* The Office of the Fairness Commissioner (OFC) reviews registration policies and procedures to ensure they are transparent, objective, impartial and fair. The OFC requires reports from the College about its registration process. It then evaluates the procedures, makes recommendations to the College and publishes them on-line. It also requires the College to periodically review its registration requirements to ensure they remain necessary and relevant.
7. *Courts.* Courts are available to hear appeals regarding discipline and fitness-to-practise decisions.
8. *Public proceedings.* College Council meetings and discipline hearings are open to the public.
9. *Public Register (also known as the OT Directory).* The College is required to publish its discipline decisions. Discipline and other information about individual OTs is recorded in the Public Register, which is on the College website.
10. *Website.* The College must have a website setting out its roles, responsibilities and regulatory activities.

Scenario #2: The College's Sole Focus

A few newly elected Council members used to hold senior positions with a professional association. In their previous positions, they advocated for OTs being given a controlled act related to the management of client medications. They propose that Council initiate a campaign to obtain this controlled act, arguing that this act would not only be convenient for many clients, it would save OT jobs because in some settings nurses are being hired to replace OTs because OTs cannot manage client medication. The new Council members ask the College to retain a lobbying firm and communication consultant to ensure that OTs secure this controlled act.

The Registrar reminds Council that the College's mandate is to regulate the profession in the public interest. Advocating for expanding the scope of practice for the primary purpose of benefiting OTs is the role of a professional association, not a regulatory college.

In addition, the Registrar tells Council that a Ministry representative recently spoke at a meeting of health regulators and indicated that the Ministry views this type of activity as evidence that a college has misconstrued its mandate. The representative said that this type of activity would warrant close scrutiny of the college.

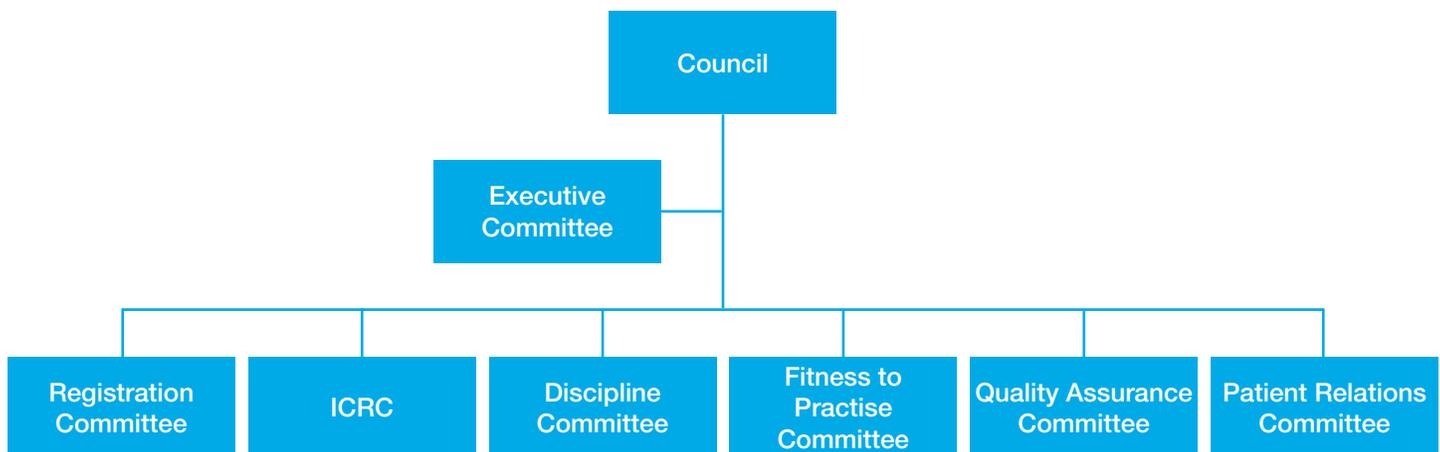
Council decides that the professional association is the appropriate body to undertake this initiative. The College's role in the issue would be to comment on the public interest aspects; for example, how it could benefit clients. If the Ministry agreed to the proposal, the College could confirm that OTs have the necessary knowledge, skill and judgement to manage medications competently and safely.

c) Types of Regulatory Activities

The College is a corporation created by statute with the sole purpose of regulating OTs in the public interest. It helps OTs meet their professional responsibilities under the RHPA and *Occupational Therapy Act*. Ensuring that the public receives high-quality, ethical services is the College's priority. Its focus on the public interest sets it apart from professional associations, such as the Ontario Society of Occupational Therapists (OSOT) and Canadian Association of Occupational Therapists (CAOT). The mandates of professional associations include promoting the interests of the profession.

The College is led by its Council, which serves as its board of directors. Under the *Occupational Therapy Act*, Council must be composed of six to nine elected OTs, and one or two faculty members from Ontario occupational therapy programs. Council also includes five to seven public members appointed by government. Council appoints Committees and a Registrar to carry out Council directions and policies. The Registrar and College Committees also have specific duties to fulfil.

The College has seven statutory Committees, as required by the RHPA, which are organized as follows:



1. The *Executive Committee* co-ordinates the work of Council. For example, it helps prepare the agenda for Council meetings.
2. The *Registration Committee* determines whether applicants meet the registration requirements, which are set out in the Registration Regulation. Sometimes, the Committee can grant exceptions when an applicant does not quite meet all of the requirements (with or without terms, conditions and limitations on his or her certificate of registration).

3. The *Inquiries, Complaints and Reports Committee* (ICRC) investigates complaints and other concerns about individual OTs. When the concerns are substantiated, the Committee has a number of options, including taking educational action (e.g., issuing a caution). When the concerns are serious, it refers the matter for a formal hearing.
4. The *Discipline Committee* holds hearings to determine whether an OT has engaged in professional misconduct or is incompetent. It can impose sanctions such as revocation, suspension, fines, reprimands, and terms, conditions and limitations.
5. The *Fitness to Practise Committee* holds hearings to determine whether an OT is incapable of performing their regular duties as a result of impairment, disability or other factors, and which may result in requiring the OT to receive appropriate treatment.
6. The *Quality Assurance Committee* encourages OTs to engage in continuous professional development. Part of its task is to assess the knowledge, skill and judgement of OTs, and facilitate remediation when gaps are identified.
7. The *Patient Relations Committee* develops programs to encourage healthy interactions between clients and OTs. For example, it develops and implements a sexual abuse prevention plan within the profession.

To perform specific tasks, the College also has other standing and special-purpose Committees created under its bylaws. For example, the College has a Nominations Committee.

The regulatory activities of the College fall into four broad categories.

1. *Restrictive regulation*: limits what people can do. For example, there are restrictions on the titles people can use, the requirements to become registered with the College and who can perform controlled acts.
2. *Reactive regulation*: responds to complaints and concerns about the conduct, competence and capacity of individual OTs.
3. *Proactive regulation*: enhances the knowledge, skill and judgement of OTs.
4. *Transparent regulation*: provides information to the public about OTs so they can make informed choices about their service providers. Transparent regulation also includes making many of the College's regulatory activities open to the public to ensure that there is confidence that the College is acting in the public's interest.

Restrictive Regulation

A primary example of restrictive regulation is the registration process. The College sets out the requirements for registration in its regulations. These requirements ensure that applicants have sufficient education and experience to practise safely and effectively. In addition, the College has requirements to prevent dishonest or untrustworthy individuals from registering.

When it is unclear whether an applicant meets these requirements, the Registrar refers the application to the Registration Committee, which looks at all of the information to determine if the applicant meets the requirements. In some cases, the Registration Committee can exempt an applicant from a requirement when

the public can otherwise be protected. For example, an applicant who has been convicted of an offence can be permitted to register if the Registration Committee concludes that the applicant has reformed.

An applicant who is unsatisfied with the Registration Committee's decision can appeal it to HPARB, which is independent of the College. Further appeals can be made to the courts.

If an unregistered person uses a protected occupational therapy title or represents him- or herself as an OT, the College can prosecute him or her in court. Also, it is professional misconduct for an OT to help unregistered individuals use the protected title or represents themselves as an OT.

Another restriction that the RHPA imposes is that no one can perform any of the 13 controlled acts without legal authorization. Controlled acts are generally considered tasks with a high potential to cause harm if not done correctly by a competent person. While no profession is authorized to perform all of the controlled acts, the same controlled act can be performed by more than one profession. Currently, OTs are not directly authorized to perform any controlled acts, although there is a proposal to authorize OTs to provide psychotherapy if and when it becomes a controlled act.

There are some exceptions in which individuals not expressly authorized to perform a controlled act can do so. One exception set out in a regulation made by the Minister of Health and Long-Term Care permits OTs to perform acupuncture. However, since this is an exception and not directly authorized to OTs, they cannot delegate others to perform acupuncture.

Another exception is that a person can perform controlled acts to provide first aid in an emergency. Also, anyone can assist a person with his or her routine activities of living, such as giving injections (e.g., insulin) or internal procedures (e.g., cleaning a stoma). In addition, an authorized practitioner can delegate controlled acts in accordance with profession-specific regulations. For example, a physician could delegate to an OT the administration of oxygen to a client.

Scenario #3: Knowing Your Boundaries

Deepika, an OT working on a family health team, performs a wound care assessment and treatment for a client, Rita. On a follow-up visit, Rita voices concerns about increased erythema in her month-old wound. After an assessment, Deepika tells Rita she does not have cellulitis and suggests that she take an over-the-counter pain reliever and rest for the day to see if there is any improvement. The pain increases, and Rita goes to the emergency department where she is treated for cellulitis.

What restrictive regulation principles apply here?

Telling Rita that she does not have cellulitis amounts to communicating a diagnosis because Rita relied on the OT's advice for her care. Therefore, Deepika performed the first controlled act – communicating a diagnosis – without legal authority. Deepika faces possible prosecution in Provincial Offences Court for committing an

offence and possible disciplinary action by the College. In addition, Deepika acted outside of the scope of practice of occupational therapy by diagnosing whether Rita has cellulitis.

Reactive Regulation

Perhaps the College's most well-known regulatory activity is handling complaints and investigations. When a complaint is made to the College about the conduct of an OT, the ICRC investigates it. The College makes a full and fair investigation into the concern, being certain to hear the OT's explanation.

The ICRC then considers all of the information to determine what action to take. In some cases, the concern is explained and no action is required. In other cases, the ICRC concludes that the concern should be addressed by educational measures, such as cautioning the OT or having the OT complete a specified continuing education or remediation program. Examples of remediation programs include a record keeping course, and reflection papers or programs in communicating with clients and colleagues. In serious cases, allegations of professional misconduct or incompetence are referred to the Discipline Committee for a hearing.

Often, OTs can prevent complaints or concerns. OTs should regularly review the expectations of the profession, such as the essential competencies and standards. Active participation in the College's Quality Assurance Program (QA Program) also helps OTs remain competent. OTs should follow the protocols they have established to prevent mistakes and errors. Courteous and sensitive communication with clients and colleagues can prevent many complaints or concerns.

If a professional misconduct or incompetence concern is referred to the Discipline Committee, a hearing is held. The College gives full disclosure of all relevant information to the OT. Both sides can hire a lawyer, call witnesses and make arguments to the Discipline Committee.

When some or all of the allegations are proven, the Discipline Committee order can range from a reprimand, a fine and practice restrictions, to registration revocation. The decision of the Discipline Committee is summarized in the Public Register on the College website. Either party can appeal the decision to the Divisional Court of Ontario.

When there is serious concern that an OT may be incapacitated or impaired, the ICRC can obtain information about his or her health. "Incapacity" is defined in the Code as an OT who is "suffering from a physical or mental condition or disorder" that requires restrictions on his or her practice.

In incapacity cases, an OT could also be required to be examined by an independent health practitioner, typically a mental health professional or an addictions specialist. When there is a serious concern that the OT may not be able to practise safely, the incapacity concern can be referred to the Fitness to Practise Committee for a hearing, which is similar to a discipline hearing. If a finding of incapacity is made, the most common consequence is a monitored treatment program.

Proactive Regulation

Proactive regulation is about the continuous improvement of OTs. The best example is the QA Program, which helps OTs enhance their knowledge, skill and judgement. It aims to promote reflective practice, and provide tools and resources for OTs to continue to improve their practice. It is also designed to ensure that OTs demonstrate their continued competence. All Registrants must participate in the program. The QA Program is separated from the complaints and discipline process so OTs can feel confident in candidly participating.

The RHPA outlines the following components that need to be present in a regulatory quality assurance program:

- a. continuing education or professional development designed to:
 - i. promote continuing competence and continuing quality improvement among the registrants,
 - ii. address changes in practice environments, and
 - iii. incorporate standards of practice, advances in technology, changes made to entry to practice competencies and other relevant issues.
- b. self, peer and practice assessments; and
- c. a mechanism for the College to monitor the registrants' participation in, and compliance, with the quality assurance program.

Another proactive regulatory activity of the College is its Patient Relations Program, which has a detailed plan to prevent the sexual abuse of clients. The plan includes education in occupational therapy schools, providing resources to OTs and their employers, and public education.

The practice tools on the College website promote proactive regulation. These tools provide organized, comprehensive information about specific practice topics. For example, there are e-learning modules, including one on support personnel. Other practice tools include the College's *Record Keeping Checklist* and *Consent Checklist*. These tools are supplemented by regular articles in the College's newsletter, *On the Record*.

Transparent Regulation

Providing information to the public is a role of almost every regulatory system. The public expects to know about the qualifications, registration status and any significant concerns about regulated practitioners. Regulating in secret raises suspicions; the public wants to see regulation take place.

Council meetings are open to the public to help OTs and the public observe key aspects of the regulatory process. Discipline hearings are also public; however, on rare occasions (such as when sensitive personal health information will be revealed) a hearing is closed to the public in part or in whole.

The College also provides detailed information to OTs and the public about its regulatory initiatives. For example, the College consults with the profession and the public about any proposed changes to College

regulations and most of its bylaws. Not only is this process transparent, it fosters feedback and quality decision-making.

Under the RHPA, the College must maintain a Public Register of every OT in Ontario on its website. The Register contains the name, location, registration status and regulation history of OTs. Suspensions or revocations are recorded on the Register, as are any current terms, conditions and limitations on an OT's practice. Pending referrals to discipline are noted. When a finding is made, a summary of the finding is set out on the Register, as are any findings of professional negligence by the courts. The scope of information in the Public Register is constantly evolving, and additional information will likely be included in the future.

Scenario #4: Using Discretion

Lily, an OT, provides services to her boyfriend and bills the insurance company without disclosing the relationship. The relationship ends, and the boyfriend reports the conflict of interest to the insurance company and complains to the College that Lily engaged in sexual abuse. Lily acknowledges the conduct and faces discipline. She asks the Discipline Committee not to publish its reasons because her former boyfriend is stalking her, and she does not want him to know where she lives and works.

Can the College withhold its Discipline decision reasons?

The College's transparency obligations require the reasons for the decision to be published; the public and the profession need to know how this issue was resolved. However, the reasons for the decision are edited so as not to contain where Lily lives and works. In addition, the Registrar exercises her discretion to withhold Lily's most recent business address from the Public Register on the grounds of risk to her personal safety.

Part 3: Examples of Jurisprudence

a) Duties to the College

i. Practising in Accordance with Professional Expectations

OTs have a number of professional expectations regarding their clinical and non-clinical practice. Perhaps the broadest category of expectations is set out in the profession's standards of practice.

The College's Standards of Practice

The College has developed and published standards of practice on many of its key expectations. For example, *Standards for Occupational Therapy Assessments* describes the importance of an occupational therapy assessment for any clinical intervention and the principles that apply in all stages of the process. The performance indicators demonstrate how to apply the principles in typical assessments; for example, an OT should distinguish the client from other stakeholders and determine if there are any actual, potential or perceived conflicts of interest.

An overarching College expectation is that OTs demonstrate essential competencies for practice (*Essential Competencies of Practice for Occupational Therapists in Canada-third edition, 2011*). This document analyzes the fundamental characteristics of a competent OT. It describes the competencies for both clinical and non-clinical work. The seven competencies are:

1. Assumes professional responsibility
2. Thinks critically
3. Demonstrates practice knowledge
4. Utilizes an occupational therapy process to enable occupation
5. Communicates and collaborates effectively
6. Engages in professional development
7. Manages own practice and advocates within systems

Other College standards are specific. For example, *Standards for Acupuncture* focuses on a modality that only some OTs perform. This document reminds OTs that they need training beyond their core occupational therapy education to perform acupuncture safely and effectively. It also emphasizes the need for OTs to study and apply the risk factors associated with the procedure (e.g., infection, puncturing an organ) and alerts OTs to the fact that they cannot delegate this controlled act to others.

Other College standards address conflicts of interest, the supervision of students and support personnel, psychotherapy, infection control, consent and record keeping.

The College's Guides and Practice Guidelines

To help OTs interpret and apply broadly stated expectations in practice, the College publishes guides and practice guidelines. The *Guide to Discontinuation of Services*, for example, addresses the often difficult situation of an OT needing to discontinue services perhaps because the client and OT disagree on the proposed treatment plan, or because funding does not cover the services. This document contains scenarios to assist OTs in appropriately balancing competing factors, and clearly communicating the considerations to the client and others.

Another example is the *Guide to Use of Title*, which helps OTs apply the various provisions for communicating an OT's professional status and qualifications. A particularly challenging issue is how OTs communicate their additional training and recognition without suggesting they have a specialist certification. It also explains how an OT with a PhD can refer to that achievement without violating the RHPA's restrictions on the title of "doctor."

Other College guides and practice guidelines include:

- *Guide to Independent Practice*
- *Guide to the Apology Act*
- *Guide to the Child & Family Services Act*
- *Guideline: Use of Social Media*
- *Guideline on the Controlled Acts and Delegation*
- *Use of Surveillance Material in Assessments: Practice Guidelines*
- *Responsibilities in a Climate of Managed Resources*

Best Practices and Standards of Practice

It is important to distinguish between best practices and minimum acceptable standards of practice. OTs are encouraged to strive toward best practices, as portions of the College's QA Program (proactive regulation) encourage. However, the College's complaints and discipline process (reactive regulation) will only hold an OT accountable for failing to maintain the minimum acceptable standard of practice. For example, an OT who is discharging a client because he or she is unable to provide the service the client wants might only have to provide the client with a list of alternative providers and reasonable notice before terminating the relationship. However, a best practice would be for the OT to ensure that the list contains the alternative providers most likely able to assist the client, and to offer to speak with the provider of the client's choice to explain the circumstances.

Just as there are best practices and minimum acceptable standards of practice, there are ideals and bare minimums in the realm of professional behaviour. The "best practices" equivalent would be the College's *Code of Ethics* which sets out the ideals to which OTs aspire. The bare minimum expectations are found in the Professional Misconduct Regulation.

Employment Obligations and Standards of Practice

OTs need to distinguish between standards of practice and employment obligations, which exist separately. The profession develops standards of practice, and the College is the "official spokesperson" on the content of the standards. Employment obligations arise from an OT's employment contract, and include verbal and implied employment contract provisions. Employers generally have the right to require their employees to meet additional or higher obligations than the College's. For example, an employer could require OTs to enter additional information in their records (e.g., the start- and end-time of each service).

Difficulties can arise when an employer requires an OT to do or not do something that a standard of practice requires. For example, an employer might not want an OT to inform clients that he or she is leaving so the employer has a better chance of retaining the clients. In some circumstances, such "anti-competition" clauses in an employment contract could violate professional standards (e.g., when clients have no occupational therapy services available to them to provide continuity of care). OTs must be careful to avoid agreeing to contractual terms that require them to breach the standards of practice; instead, they should advocate to their employer for the ability to comply with the standards. OTs may need legal advice when the standards of practice and employment duties cannot be reconciled.

Scenario #5: Balancing Employment and Professional Obligations

After taking a position as a behaviour consultant with an outpatient facility for children and youth, Mercy is asked by her employer to remove her OT designation from her email signature and business cards. The employer also tells Mercy not to share her OT status with clients and stakeholders, explaining that he wants to identify everyone with the same job title to support consistency and autonomy.

Mercy is concerned about the lack of transparency and tells her employer that she will seek clarification from the College. In discussions with a College practice resource liaison, Mercy identifies these issues:

- The requirement to demonstrate transparency to clients and stakeholders would not be met if she withheld her OT designation. While the College does not identify the removal of the OT designation as illegal, it is not recommended because transparency is a core practice requirement.
- If not practising as an OT, she will not be gaining practice hours. An issue could develop if she does not obtain sufficient hours to maintain her registration.
- Having an OT practising within the role would benefit clients, stakeholders and the employer through, for example, accountability for continuing competence/professional development, credibility to assessment findings and recommendations, and a formalized complaints process.

Mercy shares the analysis with her employer. The employer supports Mercy in using both her job title (behaviour consultant) and designation (OT Reg. (Ont.)).

Professional Misconduct Regulation Expectations

While professional expectations are articulated in several documents, the Professional Misconduct Regulation sets out in legal language the acts or omissions that can result in discipline findings. The regulation gives the following examples of professional misconduct:

- Contravening a minimum acceptable standard of practice;
- Abusing clients or others;
- Acting without consent;
- Breaching confidentiality;
- Abandoning a client;
- Creating or issuing false or misleading documents;
- Making misleading statements, including use of title or in advertising;
- Practising while in a conflict of interest;
- Charging a false, misleading or excessive fee;
- Contravening a law relevant to the practice of occupational therapy; and
- Failing to co-operate with the College.

There are two broad definitions of professional misconduct that capture acts or omissions that are not described in the close to 50 specific definitions. These “catch-all” provisions address the kinds of conduct

that responsible OTs recognize as a serious breach of professional values. The Professional Misconduct Regulation words them as follows:

48. Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.
49. Engaging in conduct that would reasonably be regarded by members as conduct unbecoming an occupational therapist.

An example of “conduct unbecoming,” that actually occurred in another profession and was upheld in the courts, was that a practitioner acted completely inappropriately in private, as in displaying extreme road rage and then punching an older person in the face, shouting crude profanities at a primary school play, and posting crude, discriminatory comments on social media.

Other College Regulations

Additional expectations are set out in other College regulations. For example, the Registration Regulation and College bylaws require OTs to carry five million dollars of professional liability insurance. Failure to provide proof of such coverage could result in an administrative revocation of an OT’s certificate of registration.

Similarly, the College’s Advertising Regulation prohibits misleading advertisements.

To refer to College documents, visit the Resource Room on the College website, www.coto.org.

Scenario #6: Posting on Social Media

Tianna, a recent graduate, has opened a private practice in the community and wants to use social media to promote it. One of her first clients, Mitchel, sends Tianna a message to say how pleased he was with her help and that it “went above and beyond the call of duty.” He states that her assistance in finding just the right wheelchair was particularly helpful since other practitioners could not find a workable solution. Tianna is uncertain about whether she can quote the comment on social media.

Do any College restrictions apply?

Tianna first looks at the Professional Misconduct Regulation. To Tianna, nothing seems to apply to social media, but she notices the duty of confidentiality and realizes that any posting must not identify Mitchel. She then reviews the Advertising Regulation and notes that the use of testimonials and comparative statements are prohibited. Still not convinced that posting a quote from Mitchel would constitute advertising, she reviews the College guideline on the use of social media and reads:

... while a client may be eager to add a testimonial to an OT's Facebook page ... [t]he OT should explain to the client that as per the Advertising Regulation, ... the College does not allow testimonials ...

Tianna realizes that posting Mitchel's comment would be contrary to College expectations.

ii. Co-operating and Participating with the College

To be a regulated health practitioner, it is necessary to recognize the regulatory college's authority. This is part of the "social contract" between the profession and society.

Without the active participation of OTs in regulatory activities, the College would fail in its mandate. Self-regulation depends on the support of the profession. Many forms of co-operation with the College are voluntary. For example, OTs are asked to participate in consultations on proposed changes to College regulations and bylaws. They are invited to run for, or vote in, the election of OTs to Council, and to fill assessor positions. The College also has numerous Committees, task forces and working groups. These forms of "giving back" are not enforced; they are up to the individual OT.

Some forms of co-operation are compulsory, including those that are routine and administrative; for example, paying membership fees, providing information updates at least annually and demonstrating that you have the required professional liability insurance. College bylaws require OTs to update certain information during the year. For example, a change in the OT's name, home address, business address or phone number, or a change of employer, employment status or employment profile must be reported within 30 days of the change. The College handles most administrative requirements; it sends out a reminder notice, and if the deficiency is not remedied the OT's certificate of registration is automatically suspended or revoked.

Another obligation is to participate in the QA Program, in which mandatory tools are required to be completed on a regular basis in the manner indicated by the College.

Co-operation with the complaints, discipline and incapacity processes are also essential. For example, OTs have the duty to co-operate with an investigation into an allegation of professional misconduct or incompetence. This duty includes allowing an investigator onto the OT's business premises to inspect, copy and even remove records, and to comply with a summons issued by the investigator. Failure to co-operate can result in more serious consequences than the underlying concern itself, including suspension of the OT's certificate of registration.

It is equally important for OTs to be honest with the College. Providing a false statement to a College Committee or investigator, or encouraging colleagues, clients or other witnesses to lie, falsify, conceal or destroy records will result in significant repercussions, including revocation of the OT's certificate of registration.

Scenario #7: The Obligation to Participate

David, an OT, did not pay his annual fees by the deadline. After being given notice, his registration was suspended for a month, and insurers refused to pay for his services during that time. David was incensed.

When David was randomly selected to provide portions of his portfolio to the Quality Assurance Committee, he refused. After the Committee sent him multiple reminder letters, it referred him to the ICRC for not co-operating. David did not respond to the ICRC's letters asking him to provide his side of the story. As a result, the ICRC requested that an investigator review his records.

The investigator made an appointment to meet with David, who then realized that the investigator might notice records of him practising during the month he was suspended. David deleted those entries from his electronic records. The investigator noticed discrepancies between David's clinical and billing records for that month and took a copy of his hard drive. The investigator determined that David had deleted records a week before she visited.

David was referred to the Discipline Committee for obstructing the investigation. His certificate of registration was suspended for six months (with close monitoring during that time), and for two years after reinstatement he had to practise under the supervision of another OT.

iii. Preventing Sexual Abuse

An explicit goal of the RHPA is to eliminate any form of sexual behaviour between practitioners and clients. The term "sexual abuse" is intended to convey how seriously the conduct is taken. However, sexual abuse is not limited to exploitive behaviour. In fact, sexual abuse includes conduct that might, on the surface, appear genuine and sincere.

The term "sexual abuse" is defined broadly in the RHPA to include:

- Sexual intercourse or other forms of physical sexual relations between the practitioner and client;
- Touching, of a sexual nature, of the client by the practitioner; and
- Behaviour or remarks of a sexual nature by the practitioner toward the client.

For example, telling a client a sexual joke is considered sexual abuse. Hanging a calendar with sexually suggestive pictures – for example, women in lingerie or firefighters in suggestive poses – is sexual abuse. Non-clinical comments about a client's physical appearance – for example, "Do these exercises in front of the window and guys will be lining up for dates" – are sexual abuse. Dating a client is sexual abuse. Unnecessary statements about a client's sexual orientation, gender identity or gender expression is sexual abuse. This definition of sexual abuse would encompass treating your spouse as a client.

The one exception to the definition of sexual abuse is touching, behaviour or remarks of a clinical nature. For example, appropriately counselling a client on how to engage in sexual activities despite his or her recently acquired disabilities can be appropriate. Unnecessary inquiries about a client's sex life would, however, constitute sexual abuse.

Sexual abuse is but a single example, albeit a critical one, of the need for OTs to maintain professional boundaries. OTs need to ensure that their actions or omissions do not confuse clients or make them lose confidence in the client-therapist relationship. Categories of boundary crossings include:

- Self-disclosure (e.g., using a client as a sounding board to discuss difficulties you are having in a family relationship);
- Gift giving (e.g., giving to or accepting from a client an expensive or personal gift);
- Dual relationships (e.g., hiring a client to clean your house);
- Befriending a client (i.e., considered a form of delayed dual relationship);
- Touching and disrobing (e.g., hugging clients, not draping a female client when examining or performing a procedure on her chest area);
- Ignoring established customs (e.g., taking a client's medical history at a restaurant); and
- Personal opinions (e.g., advocating for a vegan lifestyle during a clinical encounter).

These boundaries can apply to either sexual or non-sexual contexts. In non-sexual contexts there may be greater scope for applying judgement as to appropriate exceptions. For example, an OT disclosing how he or she recovered from an automobile accident might be appropriate in some circumstances. However, there are no exceptions in sexual contexts; an OT disclosing about his or her sexual activities is always inappropriate.

Scenario #8: An Accidental Disclosure

Donna, an OT, tells a colleague about her romantic weekend with her husband at Niagara-on-the-Lake. Donna makes a joke about how wine has the opposite effect on the libido of men and women. Paula, a client sitting in the waiting area, overhears the conversation.

During treatment, Paula tells Donna that she heard the remark and is curious as to what Donna meant. Paula relates that in her experience, wine helps the libido of both men and women.

Has Donna engaged in sexual abuse?

Donna has clearly crossed a boundary by making the comment where a client could overhear it. However, the initial comment was not directed toward Paula and not meant to be heard by clients. Donna would certainly be engaging in sexual abuse if she continued the discussion with Paula. Donna should apologize for making the comment where Paula could hear it and state that she needs to focus on the treatment.

The College has a zero-tolerance policy toward sexual abuse, and thoroughly investigates every report. When the Discipline Committee proves that sexual abuse of a client has taken place, it makes a comprehensive order. When the sexual abuse involves frank sexual acts with a client, the order must include revocation of the OT's certificate of registration for a minimum of five years. All findings of sexual abuse are permanently posted on the Public Register.

The College must take steps to prevent sexual abuse. Its Patient Relations Committee has developed a sexual abuse prevention plan that educates OTs, employers of OTs and the public about the nature of sexual abuse, the harm it causes, the expectations on OTs and how sexual abuse can be avoided.

There are a number of special provisions for how sexual abuse matters are handled in the complaints and discipline process. They are not resolved through the alternate dispute resolution process. A referral to discipline will likely be made when a substantiated complaint of sexual touching of a client is made. At the discipline hearing, the client's identity is protected (e.g., at the client's request, the Discipline Committee will ban publication of the client's identity). The client may be given a role at the discipline hearing (e.g., to make a statement on the impact of the sexual abuse if a finding is made). Whenever a finding of sexual abuse is made, the OT will be reprimanded, and can be ordered to pay for the costs of counselling and therapy for the client. (The College's bylaws require that every OT's professional liability insurance policy includes coverage to reimburse the College for funding counselling and therapy for a client who has experienced sexual abuse.)

Sexual abuse complaints can often be avoided by taking simple steps: keep all conversations professional; avoid disclosing personal information about yourself; do not ask clients gratuitous personal questions; avoid non-clinical touching of clients, such as hugging. The College's Standards for the Prevention of Sexual Abuse provides examples of sexual abuse and practical tips.

iv. Mandatory Reporting

A regulated health professional cannot remain silent when another health care provider is harming a client. An OT must intervene.

Both the RHPA and case law provide immunity to OTs who make a mandatory report in good faith. The mandatory reporting requirements also create an exception to the OT's duty of confidentiality. In addition, the *Personal Health Information Protection Act* (PHIPA) states that a report to the College is an exception to the privacy duties under that statute.

Sexual Abuse

An OT must report sexual abuse by another regulated health practitioner. During the course of practising the profession, the duty arises if the OT obtains reasonable grounds to believe that sexual abuse occurred. A similar duty exists for the operators of facilities, such as hospitals.

If the OT does not personally observe the sexual abuse, he or she could still have "reasonable grounds" to believe that it occurred. For example, if a client tells the OT the details of the sexual abuse, it would likely constitute reasonable grounds. An OT does not have to investigate the events before reporting them. Nor

does the OT have to believe that the information is true; for example, the OT might know the alleged abuser and not believe that the practitioner would do such a thing. Reasonable grounds means information that would, if believed, cause a reasonable person to conclude that it is more likely than not that sexual abuse occurred.

The report must be made in writing to the Registrar of the college with whom the alleged sexual abuser is registered. (If the alleged abuser is a nurse, for example, the report would be made to the College of Nurses of Ontario.) The report must contain the reporting OT's name and the grounds of the report. The report cannot contain the client's name unless the client agrees in writing to it being included. This limitation is intended to protect the privacy of clients who may be vulnerable. The report must be made within 30 days of receiving the information. If it appears that a client is continuing to be harmed and there is an urgent need for intervention, the report must be made right away.

When an OT is providing psychotherapy to a health care provider who was convicted of sexual abuse of a client, the OT must provide an opinion to the appropriate college as to whether the provider is likely to abuse clients in the future (if the OT can form such an opinion). In addition, the OT must make another report to the health care provider's regulatory college immediately after the treatment ceases.

Scenario #9: Reporting Sexual Abuse

Paula, a client, tells Elena, an OT, that she had an affair with her family doctor while undergoing treatment. Elena tells Paula that she is required by law to report this information to the Registrar of the College of Physicians and Surgeons of Ontario (CPSO). She explains that CPSO will want to investigate the report, and that it will be difficult to investigate if Paula does not allow her name and contact information to be in the report. Elena explains that CPSO will likely want to interview Paula, and that the investigation could lead to a discipline hearing.

The law is clear that Elena cannot include Paula's name and contact information unless Paula provides written consent. Elena says they can make an anonymous call to CPSO to see what the process is like. Paula agrees to the call. After the call, Paula says she does not give her consent to include her name and contact information.

Elena then writes the report without identifying Paula.

Incompetence, Incapacity and Professional Misconduct

OTs must report the incompetence or incapacity of colleagues in certain circumstances, such as when operating a health care facility. In some circumstances (e.g., when terminating an employment relationship), professional misconduct must also be reported. The College has resources, including fact sheets, on its website that provide the details of when reports are required.

Scenario #10: Reporting Incapacity

Asia's employer, also an OT, is abusing alcohol. Asia encourages him to get treatment. Yesterday, her employer came back from lunch so impaired that Asia had to call his wife to come pick him up and take him home. What scares Asia is that her employer saw three clients before she discovered his condition. Asia is preparing her letter of resignation. She consults a lawyer who advises her to make a written report to the College Registrar.

Self-Reporting Offences

OTs must report themselves to the College when they have been found guilty of any offence. Criminal offences (e.g., fraud), offences under federal drug or other legislation (e.g., unauthorized possession of a controlled drug) and provincial offences (e.g., breach of privacy under PHIPA) must be reported. Only courts can make offence findings. Therefore, findings by a body that is not a court (often called a tribunal) do not need to be reported.

Make the report to the College Registrar as soon as possible after the finding and include the:

- Name of the OT filing the report;
- Nature and a description of the offence;
- Date the OT was found guilty of the offence;
- Name and location of the court that found the OT guilty of the offence; and
- Status of any appeal initiated respecting the finding of guilt.

The College will review the report and may initiate an investigation.

If an appeal alters the reported information, you must make an updated report.

Scenario #11: Self-Reporting Findings

Jasmine, an OT, is found guilty of trespassing under the Criminal Code of Canada related to a protest about the civil war in Syria. On the College's annual renewal form, she sees a question asking if she has been found guilty of any offence. Jasmine wonders about the relevance of this offence and calls the College for clarification. Jasmine is told that the RHPA requires all offences to be reported, and that the College must

decide whether the finding is significant. She is also told that she should have reported the finding when it occurred and not waited six months for annual renewal.

Jasmine makes the report. A few weeks later, she receives a letter from the College thanking her for her report, stating that the College does not believe this finding is worth investigating and reminds her that such findings need to be reported right away.

Self-Reporting Professional Negligence

OTs must report when they have been found to have engaged in professional negligence (sometimes called malpractice). Only the courts can make a finding of professional negligence. Settlements of claims for professional negligence are typically not included in the reporting requirement if they did not result in a court finding.

Make the report to the College Registrar as soon as possible after the finding and include the same information as in the offence self-report. The College will review the report and may decide to initiate an investigation. Under the RHPA, a professional negligence finding is automatically put on the Public Register.

If an appeal alters the reported information, the OT must send an updated report to the College Registrar.

Scenario #12: Self-Reporting a Malpractice Finding

Paul, a client, claims that Arttanhero, an OT, should have recommended a more stable scooter that would be unlikely to tip. The scooter fell over, causing Paul to break his arm. Paul sues Arttanhero in Small Claims Court, claiming that Arttanhero did not adequately assess whether he could use the scooter safely. The judge agrees with Paul and orders Arttanhero to pay Paul \$10,000 for malpractice.

Arttanhero reports the finding to the College. The College places a note about the finding on the Public Register. It also initiates an investigation but concludes that, at the time, Arttanhero adequately assessed Paul's needs and abilities.

Duty to Warn

Under case law, an OT who has reasonable grounds to believe that another person will likely cause severe bodily harm to another must warn the person at risk of being harmed. This duty applies even if the individual likely to cause the harm is a client.

The College has included an aspect of this duty to warn in its Professional Misconduct Regulation. It states that it is professional misconduct if an OT fails to promptly report to the College an incident of unsafe practice by another OT. If you learn of an incident of unsafe practice by an OT, you must report it to the Registrar. This

duty to report does not include all forms of incompetence, incapacity or professional misconduct; it applies only when an OT jeopardizes the safety of a person (normally, but not always, a client).

The report about an OT must be made promptly. It should be made in writing and contain all of the necessary details. Under this mandatory reporting obligation, the name of the client can be included without the client's consent.

This provision only applies when an OT causes a risk of harm. However, when a health care practitioner from another profession causes a risk of harm, there may be an ethical or even a case law duty to intervene in an appropriate way to prevent harm.

Scenario #13: Reporting Duty to Warn

Raul, an OT, administers a cognitive assessment of Sunny. Raul is concerned that the results strongly suggest that Sunny is unable to handle an automobile safely. Raul discusses his concerns with Sunny's family physician. The family physician indicates that she has had growing concerns about Sunny's ability to drive and these objective results are just what she needs to report the concerns to the Ministry of Transportation. Raul documents the discussion.

v. Conflict of Interest

An OT cannot engage in a conflict of interest. To avoid a conflict of interest, OTs must put the interests of their clients first, and not allow personal or other interests to affect their professional judgement. A conflict of interest arises when an OT does not take reasonable steps to separate his or her personal interests from the interests of a client. For example, an OT should not accept a personal gift or other perks from equipment suppliers if the OT might recommend the equipment to clients.

A conflict of interest can be actual, potential or perceived. It can also be direct or indirect. For instance, a supplier of health products providing products to an OT's close relative is an improper benefit that can put the OT in a conflict of interest.

Conflicts of interest can arise in so many ways it is impossible to itemize them all. OTs who are not in clinical practice can face conflicts of interest as well. For example, OTs working in health equipment sales must not offer incentives, such as free products or gifts, to practitioners who might purchase equipment from them. In addition, OTs working in research or teaching must ensure that their writing and teaching are based on the best available evidence and not influenced by anyone directly or indirectly funding their work.

Some conflicts of interest need to be avoided entirely; for example, receiving payment for a referral. Other conflicts of interest can sometimes be adequately addressed by full disclosure (e.g., declaring funding sources for a research project) and providing the client with options. Conflicts of interest depend on the circumstances. OTs should familiarize themselves with the concepts set out in the College's *Standards for Prevention and Management of Conflict of Interest*.

b) Other Duties

In addition to the duties that OTs have to the College, they have many other legal obligations and must keep up-to-date on these constantly emerging and developing obligations. For example, federal legislation recently required consent for the use of email and other similar forms of electronic communications for commercial purposes (i.e., the “anti-spam” legislation).

While it can be challenging for OTs to keep up with these obligations, the College does alert the profession to major developments, as does the popular media and the profession’s publications. OTs are well advised to monitor these sources. OTs should also devote some of their professional development activities to jurisprudence updates.

i. Child in Need of Protection

Most OTs know that if they suspect that a child is in need of protection, they must personally report it to a Children’s Aid Society (CAS). This duty, found in the *Child and Family Services Act*, overrides other privacy and confidentiality duties. Following a report, a CAS worker may investigate and, when appropriate, take action.

An OT has a duty to report any child under the age of 16 (or who is 16 or 17 and under a child protection order). This duty applies to all children, including a child of your client’s, and a child of another OT’s client. The duty to report is ongoing; that is, if a previous report has been made about a child but new information becomes available, a new report must be made.

Categories for a child in need of protection include:

- The child has been or is at risk of harm;
- Failure to provide or consent to necessary services or treatment;
- Abandonment;
- Failure to supervise a child; and
- Involvement in child pornography (pending an amendment that clarifies an already existing duty).

The College’s *Guide to the Child & Family Services Act* provides further information on this duty. At the time of publication, a number of amendments to this mandatory reporting requirement are awaiting proclamation.

ii. Consent to Treatment

The Health Care Consent Act (HCCA) sets out principles for consent to treatment. In brief, except in an emergency you must obtain informed client consent for any assessment or treatment. If the client is incapable, informed consent must be obtained from the client’s substitute decision-maker. OTs need to be familiar with the procedural requirements to be followed when doubting a client’s capacity (*Substitute Decisions Act*, 1992) and the hierarchy (ranking) of substitute decision-makers (*Health Care Consent Act*, 1996).

When there is a dispute about the care of incapable clients, the Consent and Capacity Board (CCB) is responsible for making decisions. An OT, client or substitute decision-maker may apply to the CCB when a decision relating to a client's consent or capacity needs to be made.

The College's Standards for Consent detail the requirements of informed consent and the responsibilities of OTs when a client is incapable of making a specific decision.

iii. Confidentiality and Privacy

OTs have a legal and professional duty to protect the privacy of their clients' personal health information. PHIPA governs an OT's use of personal health information and helps guide the general duty of confidentiality.

Confidentiality and privacy are slightly different concepts. Confidentiality primarily relates to the duty to prevent disclosure of client information. Privacy is a broader concept that recognizes that client information belongs to the client and must be respected throughout the cycle of collecting, using, disclosing, retaining and destroying information.

The College's website and *Standards for Record Keeping* provide information on the confidentiality and privacy of client information, as well as on Ontario's privacy legislation.

iv. Human Rights, Occupational Health and Safety, Long-Term Care Homes Act, Public Hospitals Act and Other External Legislation

Here is a partial list of other pieces of legislation that OTs should be familiar with:

- The Ontario *Human Rights Code* protects individuals from discrimination on protected grounds. A ground that frequently applies to OTs is "disability." Recently, gender identity and sexual expression were added. The Human Rights Code takes priority over other legislation.
- The *Occupational Health and Safety Act* creates numerous duties to make workplaces safer. For example, most organizations need to have measures in place to prevent workplace violence. There are quite a few regulations dealing with specific types of occupational risks and premises, including one for health care and residential facilities.
- The *Long-Term Care Homes Act* and the newer *Retirement Homes Act* ensure that the residents of these facilities have timely, appropriate care. OTs may be part of developing and implementing required care plans. The statutes also impose restrictions on the restraint of residents. Both Acts have mandatory reporting requirements for when a resident is abused or neglected.
- The *Public Hospitals Act* deals with all aspects of its operation. Under this Act, a Hospital Management Regulation has been enacted to specify a particular governance structure for hospitals, and there are specific rules about which regulated health practitioners can make certain types of client care decisions. Sometimes, the provisions result in conflicts with OTs trying to practise autonomously and professionally, and require OTs to problem-solve.
- The *Criminal Code of Canada* has numerous provisions that could apply to OTs, including prohibitions against assault, theft, hate crimes and criminal negligence. The provisions can apply to OTs in the

course of practice and in their personal life.

- The *Mental Health Act* deals with the admission to and treatment of clients at psychiatric facilities. Admission can occur without consent when the person is at risk of harming him- or herself or others in certain circumstances. There are special rules for acting without consent for some forms of assessment and treatment. However, this Act must be read in conjunction with the HCCA.
- The *Insurance Act* deals with provisions pertaining to the administration and governance of insurance bodies and includes requirements for eligibility for coverage, premiums, addressing disputes, and statutory accident benefits (SABS) (what expenses are paid when a claim is made).

The College's primary obligation is not to administer these laws. For example, if an OT breaches the *Human Rights Code*, it would typically be enforced through a complaint to the Ontario Human Rights Tribunal. However, these issues can arise in College proceedings; for example, if a client's complaint about an OT's rudeness contains discriminatory aspects. In addition, the College could have a secondary role in enforcing such obligations; for example, an OT who assaulted a client could be disciplined on the basis of the criminal conviction alone.

Part 4: The Conscious Decision-Making Process

The approaches and tools that OTs use to make clinical and other professional decisions may be applicable to jurisprudence issues. For example, the College's *Conscious Decision-Making in Occupational Therapy Practice* document can be used.

Scenario #14: A Step-by-Step Approach

Ulika, an OT, is the executive director of a small charitable organization, The Refuge, that provides support to refugees with physical disabilities acquired through conflicts or violence in their place of origin. The service model involves an intake of needs (not a clinical assessment), a referral to suitable practitioners (many of whom volunteer their services), funding for equipment and devices, and assistance in locating housing. Money is always short.

Conglomerato, a medical devices supplier, is prepared to donate \$100,000 worth of its equipment and devices to clients of The Refuge. To seal the deal, though, Conglomerato wants Ulika to participate in a video to be broadcast on television and radio as well as online. In the video, she will be identified as an OT and is to say, "We are grateful that Conglomerato is providing its top-quality assistive devices and equipment to the clients of The Refuge." This request concerns Ulika, so she decides to apply the College's Conscious Decision-Making Framework to her situation.

Step 1: Describe the situation

Conglomerato is grateful for the usual donor recognition, such as being mentioned on The Refuge’s website, in its annual report, and being able to use the phrase “A valued supporter of The Refuge” in its promotional materials. Conglomerato even addresses the obvious conflict-of-interest issue by agreeing that only if the practitioner and/or client selects a Conglomerato product will it be used. The Refuge’s board of directors urges Ulika to agree to participate in the video. But Ulika has heard that the devices and equipment are somewhat fragile. In fact, Ulika has learned that Conglomerato is the subject of a class-action lawsuit for making defective devices and equipment that have allegedly injured scores of people.

Step 2: Identify the principles related to the situation

Some of the applicable principles can be derived from the Code of Ethics, including honesty, fairness, collaboration, communication, client-centred practice, accountability and transparency. From a jurisprudence perspective, Ulika identifies her obligations to the public and the College in not making misleading statements. She recognizes that she needs to use her professional power and status for the best interests of the client.

Step 3: Identify the relevant resources to assist with the decision-making

Ulika reviews the College’s *Standards for Prevention and Management of Conflict of Interest, Guide to Use of Title and Guideline: Use of Social Media*. She identifies the Professional Misconduct Regulation and Advertising Regulation as possibly being applicable. Ulika discusses the situation with her colleagues who work for suppliers of devices and equipment and calls the College’s practice resource service. She also recognizes that organizations and colleagues that support charities have likely addressed the boundaries for donor recognition, so approaches them as well.

Step 4: Consider if you need further information or clarification

Ulika realizes that the class-action lawsuit is an area she is unfamiliar with so decides to contact The Refuge’s lawyer, who tells her that at this point the defects are only allegations. Ulika asks the lawyer if she or The Refuge risks liability for endorsing the quality of Conglomerato’s devices and equipment. The lawyer says there may be some risk if the statement is not “supportable” in the Court’s opinion.

Step 5: Identify the options

Ulika identifies the following options:

- Decline to participate in the video.
- Ask The Refuge’s board chair, who is an accountant, to do the video instead of her.
- Decline to say “top quality” in the video.
- Decline to be identified as an OT in the video.
- Negotiate other wording that thanks Conglomerato for its generosity but does not discuss its devices or equipment.
- Do the interview as requested.

Step 6: Choose the best option

Ulika concludes that any use of her professional status to support Conglomerato would potentially be conduct unbecoming an OT or even a conflict of interest. While the Advertising Regulation only directly applies to the promotion of OT services, she concludes that she would be breaching the spirit of the prohibition in the regulation against making “any reference to a specific brand of drug, device or equipment.” She believes it would be unfair, dishonest and lack transparency to ask the board chair to participate in the video instead of her. Ulika tries to negotiate a video that focuses on thanking Conglomerato for its generosity, but this option proves unacceptable to the donor.

Step 7: Take action

When negotiations are unsuccessful, Conglomerato withdraws its offer. The board of directors is unhappy with Ulika but reluctantly accepts her reasoning.

Step 8: Evaluate the decision

Ulika is satisfied that she made the right decision. At times she second-guesses herself as to whether she could have made more of an effort to negotiate an acceptable compromise. Conglomerato enters into an arrangement with a charity serving children with disabilities. They make a video that is very supportive of Conglomerato. The health care practitioner involved in the video is not disciplined, to Ulika’s knowledge. However, rumour has it that his reputation (and that of his charity) suffers when a class-action lawsuit results in a multi-million-dollar judgement against Conglomerato.

Conclusion

The College operates within a legal system in which the regulation of the profession is constitutionally allocated to the province of Ontario. The regulation of OTs is authorized and detailed in legislation. The Ontario government has chosen the self-regulation model. While this allows OTs to regulate the profession, it must do so in the public interest.

OTs have numerous professional responsibilities, and the College was established to ensure OTs fulfil their professional responsibilities under the leadership of its Council and through its Committees and staff. The regulatory activities of the College can be thought of in four categories: restrictive, reactive, proactive and transparent. All of these activities are designed to ensure protection of the public interest.

The College publishes standards and guidelines to help OTs recognize and fulfil their legal obligations. However, OTs need to ensure that they keep current on the legal obligations that apply to them, including those for which the College is not the primary administering agency. When faced with a jurisprudence issue, OTs can use tools such as the College’s *Conscious Decision-Making in Occupational Therapy Practice* to help make appropriate choices.

Reflective Practice Exercises

Case Studies

For each question or statement, choose the best answer.

1. Sources of Law

Understanding the various sources of law can help OTs because then OTs:

- a. Can focus on federal statutes because they are the most important, especially the *Criminal Code of Canada*.
- b. Can focus on provincial statutes because the province has constitutional authority over the regulation of professions.
- c. Will be more likely to identify an applicable legal duty.
- d. Will understand that courts interpret and apply statutes, and have the final say.

The best answer is (c). By ignoring any one source of law, an OT may overlook an applicable legal duty.

Answer (a) is not the best answer. The federal statutes are not necessarily more important than the provincial ones. The division of roles between the federal and provincial governments is not based on importance but on what, in 1867 at least, is best handled centrally or locally. While the Criminal Code is important, most OTs do not engage in criminal behaviour.

Answer (b) is not the best answer. The provincial authority to regulate professions is not the only significant source of law applicable to OTs. Regulations and bylaws also play a crucial role in the regulation of OTs.

Answer (d) is not the best answer. Court decisions deal only with specific issues so are not comprehensive. In addition, courts do not necessarily have the last word; a statute can be enacted to reverse an earlier court decision.

There is some truth in each of the answers, so none are completely right or wrong.

2. The College’s Role, Mandate and Accountability

Extended health insurers are fed up with health care “billing fraud.” As a group, they set a maximum compensation rate of \$30/hour for all practitioners other than dentists. OTs are angry about this ceiling, and some of the OTs on Council bring a motion that the College establish a reasonable fee schedule for OT services.

What approach should the College take?

- Since the College establishes standards of practice including billing rules for OTs, it should establish a suggested fee schedule.
- The College acts to serve and protect the public. This is a professional self-interest matter better left to a professional association.
- As an entity that values collaboration, the College can model this value by joining with all stakeholders, including insurers and professional associations, to work out an acceptable solution.
- Since the College is accountable to the Minister of Health and Long-Term Care, the College should approach the Ministry on the issue.

The best answer is (b). The College’s public interest mandate prevents it from acting on behalf of the profession on self-interest issues. This is the role of professional associations. Participating in this initiative would result in confusion as to who the College serves.

Answer (a) is not the best answer. Ensuring high and/or reasonable compensation for OTs does not fall under the College’s mandate. The College’s involvement in billing issues is generally only engaged when the public is harmed by dishonest or excessive fees.

Answer (c) is not the best answer. Although the collaborative process is suitable for some issues, this goal is outside of the College’s public interest mandate.

Answer (d) is not the best answer. The College is accountable to the Minister for its performance. This relationship should not be used to advocate for professional self-interest issues.

3. The College’s Regulatory Activities

Tie, an OT, does home assessments for the Community Care Access Center (CCAC). A number of clients have made complaints that his assessments did not result in the recommendations they had hoped for. In his written response to the Inquiries, Complaints and Reports Committee (ICRC), he says, “I call it as I see it. If clients don’t like it, they can lump it.”

Is Tie’s response appropriate?

- a. No, it will anger the clients and increase the likelihood that they will appeal the ICRC decision to HPARB.
- b. No, the response may reinforce the clients' concerns that Tie is not a careful, objective assessor.
- c. No, the public appointees on the ICRC panel are sympathetic to clients and may be offended by the response's abrupt tone.
- d. Yes. Tie has the legal right to present his own defence as he sees fit. The ICRC panel cannot hold Tie's advocacy style against him.

The best answer is (b). The ICRC panel is usually made up of a majority of OTs and some public members. They consider all of the information before them, including how Tie responds to the complaint. Even if the panel concludes that Tie was technically justified in his recommendations, it could consider the manner and tone of Tie's communication. The panel might be more inclined to take action, such as directing an educational or remedial response (e.g., a caution in person, communication courses), if they sense that Tie is aggravating the clients' concerns.

Answer (a) is not the best answer. Tie's response to the complaint is a continuation of his professional relationship with his clients and not just a legal strategy.

Answer (c) is not the best answer. The ICRC panel acts as a team in the public interest. It is rare for a panel to split on issues because of their professional or public status.

Answer (d) is not the best answer. The panel is entitled to consider the manner of response when assessing the complaint, particularly if the complaint deals with a communication issue.

4. The College's Additional Regulatory Activities

Why do public Council meetings and a Public Register setting out OTs' registration and discipline history, as well as consulting the public about new regulations and bylaws, exemplify transparent regulation?

- a. They illustrate that openly regulating the profession inspires public confidence in the College.
- b. The RHPA requires these activities to be done publicly.
- c. They are different methods of providing public access (e.g., in person, website, written communications).
- d. They are all on the Public Register

Answer (a) is the best answer. The underlying theme of all of the College's transparent activities is that significant regulatory action performed in front of an audience is more likely to serve the public interest and inspire public confidence.

Answer (b) is not the best answer. It focuses on the College's legal authority and obligations rather than the purpose for the provisions. The College is committed to the principle of transparency and makes more information public than the RHPA requires.

Answer (c) is not the best answer. It focuses on process rather than the underlying goal, which is what the question asks for.

Answer (d) is not the best answer. Some transparent activities are not on the Public Register, including public consultations on regulations and bylaws. Transparency is about more than individual OTs, it is mostly about the College.

5. Practising in Accordance with Professional Expectations

Aleesha wonders if it is acceptable to provide occupational therapy treatment to pets. She searches the College website and finds no standards, guides or regulations that speak to her question.

Should Aleesha conclude that:

- a. No news is good news. If providing services to pets was an issue, there would be something about it on the College website.
- b. In the absence of a College regulation or standard, she should apply her best professional judgement.
- c. Not every issue is specifically addressed in the College's regulations and standards. She needs to look elsewhere for an answer.
- d. If nothing is written, then unwritten standards of practice apply. She should consult with her peers on the accepted standard of practice.

Answer (c) is the best answer. The College website does not cover every legal issue that an OT might face, particularly if an issue is uncommon in occupational therapy practice. In fact, there is legislation dealing with the treatment of animals; the *Veterinarians Act* may well apply and is administered by another college.

Answer (a) is not the best answer. As noted above, the College does not address all jurisprudence issues.

Answer (b) is not the best answer. There may be (and likely is) guidance in other laws. The concept of professional judgement applies only when an OT has ascertained there is no applicable law.

Answer (d) is not the best answer. Unwritten standards of practice apply only when there is no applicable law that addresses the issue. Aleesha must first rule out the possibility that a law applies.

6. Co-operating and Participating with the College

How should OTs reconcile the “right to remain silent” with their duty to co-operate with the College?

- a. While OTs can remain silent, the College is then free to infer the worst about the OT’s behaviour.
- b. The College cannot force an OT to respond. However, it can discipline an OT who chooses to exercise that right.
- c. The right to remain silent is a popular misconception often seen in TV dramas.
- d. Since the role of the College is to protect the public and not to punish OTs, OTs are expected to co-operate with the College.

Answer (d) is the best answer. It addresses the key reason why OTs are expected to co-operate with the College.

Answer (a) is not the best answer. It does not address the reason why the right to remain silent (which is primarily a criminal law concept) does not fully apply in the sphere of professional regulation. Also, the College looks at all of the available information and tries not to base its actions on the absence of information.

Answer (b) is not the best answer. It does not address why OTs are expected to co-operate. In addition, the distinction between not forcing an OT to respond, but disciplining him or her for not responding, is a very legalistic approach.

Answer (c) is not the best answer. It does not really address the competing values and is not accurate. There is a right to remain silent in some circumstances, such as in criminal law.

7. Preventing Sexual Abuse

What should an OT do if a client asks him or her for a date?

- a. Ask the client to repeat the request once the services are completed.
- b. Accept the request if the OT wants to date the client, but tell the client that they cannot have sex.
- c. Explore with the client other people who the client could date.
- d. Explain that it is inappropriate for an OT to date his or her client.

Answer (d) is the best answer. OTs need to approach all client relationships on a professional level and not allow themselves to dwell on other possibilities. While you could respond that OTs are “not allowed” to date clients, that would send the message that the OT would like to date the client if he or she could, which might confuse and even harm the client.

Answer (a) is not the best answer. By keeping open the possibility of a personal relationship, the dynamics of the professional relationship would change. In addition, given the power dynamics, dating a client immediately after completing professional services could harm the client.

Answer (b) is not the best answer. It involves a dual relationship with the client and may be considered sexual abuse.

Answer (c) is not the best answer. By becoming a “dating coach,” the OT enters a dual relationship with the client which could involve inappropriate personal disclosure.

8. Mandatory Reporting

An OT must report the sexual abuse of a client in which of the following circumstances:

- a. Only if the OT personally observes the sexual abuse.
- b. Only if the OT believes that the sexual abuse likely occurred.
- c. When a client consents to a sexual abuse report being made in writing.
- d. When reasonable grounds to believe that sexual abuse has occurred are obtained in the course of the OT’s practice.

Answer (d) is the best answer. During the course of an OT’s practice, if the OT has reasonable grounds to believe that a client has been sexually abused by a regulated health practitioner, the OT must report the abuse to the Registrar of the alleged abuser’s college.

Answer (a) is not the best answer. The OT does not have to personally observe the sexual abuse to have reasonable grounds that it occurred. For example, a client reporting sexual abuse often constitutes reasonable grounds.

Answer (b) is not the best answer. The OT’s personal belief as to whether the sexual abuse likely occurred is irrelevant. As long as reasonable grounds exist, the OT must make the report so that the regulatory body, with expertise in investigations, can inquire into the matter.

Answer (c) is not the best answer. A report must be made regardless of whether the client agrees to it or not. The client’s written consent is needed to include the client’s identity in the report, but the report must be made with or without client consent.

9. Other Duties

Victoria works in a hospital. Her cousin Duffy has been in an accident and admitted to the hospital. Victoria works in a different unit and has not seen Duffy. Victoria’s uncle calls her in a panic wanting to know how Duffy is doing.

What should Victoria do?

- a. Refer her uncle to the admitting department where her uncle can inquire about Duffy's status.
- b. Check the hospital's electronic records to see Duffy's status and then advise her uncle.
- c. Check the hospital's electronic records to see Duffy's status but only tell her uncle Duffy's general condition; for example, fair.
- d. Call a nurse she knows in the emergency department for an update on Duffy's condition and then report that information to her uncle.

Answer (a) is the best answer. This scenario raises a primary issue of confidentiality and a secondary issue of conflict of interest. Although Victoria is related to Duffy and communicating with a concerned close relative, Victoria cannot access Duffy's personal health information for non-clinical or personal reasons. In addition, Victoria should not use her position in the hospital to obtain information that her relative would not be able to obtain. Referring Victoria's uncle to the admitting department is transferring the concern to a proper channel of communication.

Answer (b) is not the best answer. It involves a breach of privacy because it proposes accessing records informally and not for the purpose of caring for the client. It also includes a conflict of interest because she is using her status as an OT and hospital employee for personal reasons.

Answer (c) is not the best answer. As above, it involves a breach of privacy and conflict of interest. The fact that Victoria shares little information with her uncle does not fully address these concerns.

Answer (d) is not the best answer. Obtaining information verbally, by using her status as an OT and hospital employee, does not alter the substance of the privacy breach and conflict of interest.

10. Additional Duties

Alex is transitioning from a man to a woman. Abel, an OT, is performing a home visit after Alex's surgery to assess rehabilitation needs and make appropriate recommendations. Abel has deep religious objections to what Alex is doing. During their conversation, Abel refers to Alex as a man. Alex asks Abel to refer to her as a woman. Abel has enormous difficulties bringing himself to do this.

Legally speaking, what should Abel do?

- a. Avoid using any gender terms for the rest of the visit (e.g., refer to Alex as "you").
- b. Refer to Alex as a woman as Alex requested.
- c. Abel should have declined the referral to avoid the issue.
- d. Continue to refer to Alex as a man because it is Abel's constitutional right to freedom of religion.

Answer (b) is the best answer. Under the Human Rights Code, Alex has protection for her gender identity and expression. As Alex’s service provider, Abel needs to respect those rights.

Answer (a) is not the best answer. It will be apparent to Alex that Abel is avoiding gender terms. This is insensitive to Alex’s gender identity and expression protection under the Human Rights Code.

Answer (c) is likely not the best answer. Abel is covertly avoiding honouring the gender identity and expression provisions of the Human Rights Code. This option may affect Alex’s ability to access health care services. OTs routinely provide services to individuals who behave in ways that are contrary to their personal beliefs. Disagreeing with a client’s choices is not usually a basis for declining to provide services. Declining services because of an OT’s personal beliefs, if it happens at all, should be reserved for exceptional circumstances in which the provision of the service itself involves a fundamental violation of the OT’s personal beliefs.

Answer (d) is not the best answer. It is contrary to the gender expression and identity protections of the Human Rights Code. Generally, an OT cannot use his or her own legal rights to actively infringe on the legal rights of others.

Additional Professional Development Activities (optional)

The following activities are optional and are provided to you if you wish to pursue additional professional development on the topic of jurisprudence. You may wish to add these activities to your Professional Development Plan.

Identify three legal obligations most likely to occur in the course of your practice, briefly explaining the following for each obligation.

- a. In what context will this legal duty likely arise?
- b. What “laws” apply?
- c. What resources are available to you?
- d. What is your primary legal obligation?

Research Exercise

Locate three “laws” from different websites that apply to your practice context that you were unaware of before working through this module. For each law, summarize the provision/decision in your own words and explain how it applies in your practice. Suggested websites include:

- Ontario Acts and Regulations: www.ontario.ca/laws
- Federal Acts and Regulations: <http://laws-lois.justice.gc.ca/eng>
- College of Occupational Therapists of Ontario: www.coto.org
- Canadian Court and Tribunal Decisions: www.canlii.org
- Information and Privacy Commissioner of Ontario: www.ipc.on.ca

In addition, identify the limitations of doing your own legal research.

Case Study: Researching the Applicable Laws

Amy, an OT in community practice, keeps electronic records. She has the most current version of her records on a thumb drive that she carries in her purse to update her home and office computers. During a home visit, her purse is snatched. The thumb drive is not encrypted.

Using the following websites, research the laws that might apply to this situation. Determine whether Amy has breached any laws and what she should do next. Document your research and answers.

- Ontario Acts and Regulations: www.ontario.ca/laws
- Federal Acts and Regulations: <http://laws-lois.justice.gc.ca/eng>
- College of Occupational Therapists of Ontario: www.coto.org
- Canadian Court and Tribunal Decisions: www.canlii.org
- Information and Privacy Commissioner of Ontario: www.ipc.on.ca

Definitions

Bylaw: The rules made by a public and/or government body to regulate itself.

Case Law (common law): The law as established by the outcome of former cases. It interprets the application of the law in specific situations. Case law is sometimes called common law.

Enacted Law: The law(s) that are adopted by the people or legislative bodies.

Health Professions Appeal and Review Board (HPARB): An independent body which reviews the registration and complaints decisions of Ontario's 26 health regulatory colleges.

Health Professions Procedural Code (Code): Outlines the powers and duties of the colleges within Ontario including the mandate of the colleges (public protection).

Health Professions Regulatory Advisory Council (HPRAC): An independent body which provides advice to the Minister on health regulation issues.

Occupational Therapy Act: Outlines details specific to the laws governing the College of Occupational Therapists of Ontario and the profession within the province.

Regulated Health Professions Act (RHPA): The provincial legislation which outlines the requirements of 26 health professions including their scopes of practice, requirements for self-regulation, and powers of the Ministry of Health and Long-term Care.

Regulation: A principle, rule, or law designed to control or govern the conduct of a profession.

Soft law: The rules that are neither strictly binding in nature nor completely lacking legal significance, such as the interpretation and guidance published by a regulatory body.

Statue: Detailed set of rules.