British Columbia Association of Kinesiologists

Guidebook

Jurisprudence In Kinesiology Professional Practice

Important Legal Principles for Kinesiologists in BC

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Introduction

The purpose of this guidebook is to provide information on the legal and ethical framework which British Columbia Association of Kinesiologists (BCAK) Practicing and Non-Practicing member kinesiologists (MEMBERS) will practice in British Columbia.

The laws (Acts) which MEMBERS and other kinesiologists must conform to, underpin the BCAK's Professional Practice Standards, Scope of Practice, Code of Ethics (Conduct), and other guiding documents.

This guidebook introduces some but not all of the important laws in a general non-specific format, to help convey the basic principles MEMBERS must understand to practice effectively. It does not cover all the circumstances or exceptions that may be encountered in real life and is not to be confused with professional legal advice. If a kinesiologist has a specific legal question about their own circumstance, they need to obtain advice from a lawyer.

This guidebook:

- Recognizes the Government of BC's designation of Kinesiologists as unregulated allied health care practitioners who provide therapy services.
- Aligns with the Health Professions (and Occupations) Act of BC restricted activities, which are to protect the public from significant harm or loss of life.
- Contains supplementary content which further supports the framework for the standards, policies, practices and procedures adopted by the BCAK and which are common to regulated health professionals who are overseen by their respective regulatory Colleges. (see Appendix)
- Utilizes personal gender pronouns (such as his, her, he, she) only in scenarios or sample questions, elsewhere in the guidebook they/them/their, are used as a singular pronoun in gender neutral or non-binary ways.

Abbreviations for Acts

In this guidebook there are a number of Acts applicable to kinesiology practice and may be referred to by their abbreviations when mentioned, including the following:

- ABCA – *Accessible British Columbia Act,* SBC 2021, c 19 <https://canlii.ca/t/b9v9>
- AGA – *Adult Guardianship Act*, RSBC 1996, c 6 <https://canlii.ca/t/544c1>
- ATIA – *Access to Information Act*, RSC 1985, c A-1 <https://canlii.ca/t/7vck>
- BCA – *Business Corporations Act*, SBC 2002, c 57 <https://canlii.ca/t/84ld>
- CCALA – *Community Care and Assisted Living Act,* SBC 2002, c 75 <https://canlii.ca/t/84lk>
- CFCSA – *Child, Family and Community Service Act,* RSBC 1996, c 46 <*https://canlii.ca/t/84dv*>
- CHA – *Canada Health Act*, RSC 1985, c C-6 <https://canlii.ca/t/7vfb>
- CA – *Competition Act*, RSC 1985, c C-34 <https://canlii.ca/t/7vdv>
- EHA – *E-Health (Personal Health Information Access and Protection of Privacy) Act, [SBC 2008] CHAPTER 38* <*https://canlii.ca/t/55jsz*>
- EHSA – *Emergency Health Services Act,* RSBC 1996, c 182 <https://canlii.ca/t/842n>
- ETA – *Excise Tax Act*, RSC 1985, c E-15 <https://canlii.ca/t/7vfn>
- FIPPA – *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c 165 <https://canlii.ca/t/8421>
- GSA – *Good Samaritan Act*, RSBC 1996, c 172 <https://canlii.ca/t/8429>
- HAA – *Health Authorities Act*, RSBC 1996, c 180 <https://canlii.ca/t/842l>
- HCCCFAA – *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181 <https://canlii.ca/t/842m>

- HPA – *Health Professions Act*, RSBC 1996, c 183 <https://canlii.ca/t/842p>
- HPOA – *Health Professions and Occupations Act*, SBC 2022, c 43 <https://canlii.ca/t/bmzj>
- IA – *Infants Act,* RSBC 1996, c 223 <https://canlii.ca/t/8446>
- LA – *Limitation Act*, 2002, SBC 2012, c 13 <https://canlii.ca/t/8qx3>
- MPA – *Medicare Protection Act*, RSBC 1996, c 286 <https://canlii.ca/t/846g>
- PGTA – *Public Guardian and Trustee Act*, RSBC 1996, c 383 <https://canlii.ca/t/84b2>
- PA – Privacy Act, Privacy Act, RSC 1985, c P-21, https://canlii.ca/t/56d3h
- PHA – *Public Health Act*, SBC 2008, c 28 <https://canlii.ca/t/84pf>
- PIPA – *Personal Information Protection Act*, SBC 2003, c 63 <https://canlii.ca/t/84mg>
- PIPEDA – *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 <https://canlii.ca/t/7vwj>
- RAA – *Representation Agreement Act,* RSBC 1996, c 405 <https://canlii.ca/t/84bw>
- SAA – *Seniors Advocate Act*, SBC 2013, c 15 <https://canlii.ca/t/8rnm>
- WCA – *Workers Compensation Act*, RSBC 2019, c 1 <https://canlii.ca/t/984d>

Other Abbreviations

- BCAK – British Columbia Association of Kinesiologists
- CASL – Canadian Anti-Spam Legislation <https://canlii.ca/t/8p22>
- BCCDC – BC Center for Disease Control <*http://www.bccdc.ca/*>
- CFTA – *Canadian Free Trade Agreement Implementation Act,* SC 2017, c 33, s 219 <https://canlii.ca/t/9154>
- CSIS – Canadian Security Intelligence Service <https://www.canada.ca/en/security-intelligence-service.html>
- HRT – Human Rights Tribunal <*https://www.bchrt.bc.ca/*>
- IPC – Infection Prevent and Control
- MCFD – Ministry of Children and Family Development <*https://www2.gov.bc.ca/gov/Ministry-of-Children-and-Family-Development*>
- MEMBER(S) – Professional (Practicing or Non-practicing) Member(s) of the BCAK
- MoH – Ministry of Health <https://www2.gov.bc.ca/gov/ministries/health>
- PPS – BCAK Professional Practice Standards
- RA – Restricted Activity (as defined under the HPA Regulation) <https://www2.gov.bc.ca/assets/gov/ministries/health/consultation.pdf>
- TSDM – Temporary Substitute Decision Maker
- WSBC – WorkSafeBC <https://www.worksafebc.com/en>

Professionalism and Professional Regulation

Professionalism

Health care professionals advise on, or apply, preventive and curative measures and promote health with the ultimate goal of meeting the health needs and expectations of individuals and populations and improving population health outcomes.

A profession differs from a business, and being a professional is more than providing a service to one or more members of the public. Those who hold themselves out as professional kinesiologists believe they help clients, not just make money from them. Kinesiology is an autonomous unregulated health profession in BC and the BCAK, through voluntary membership, works to enhance and empower MEMBERS with the necessary knowledge and skills to deliver services in a professional capacity and not simply as a means to earn an income.

The BCAK does this through the establishment of professional standards and a code of ethics, which

are designed to emulate the characteristics and policies a regulated health professions College may implement. The goal being to improve the trust and recognition of kinesiologists by the public and stakeholders, and to reduce the potential risk of harm to members of the public (clients). The BCAK establishes a number of duties that MEMBERS owe to the clients they serve. For example, MEMBERS have:

- A duty to be honest with clients,
- A duty to provide quality service to clients,
- A duty to inform clients what they are going to do for the client, including the expected outcome and inform them of the risks and benefits of any recommended services, and
- A duty to obtain a client's consent before providing services.

Similar to the requirements of regulated health care professionals, being a MEMBER also means you have a duty to other health care providers (and kinesiologists), including;

- A duty to be respectful and not denigrate or disparage them.
- A duty to work with them to serve the welfare of clients.

For example, when a client is receiving care from a kinesiologist and also another health care practitioner (who may be another kinesiologist), the MEMBER is expected to coordinate care with the other health care practitioner to enhance the delivery, outcomes and client's experience, and to optimize outcome measures, provided the client consents.

MEMBERS must obey the laws that apply to them, such as the HPA, IA, PIPA and HCCCFAA. There are many different laws that apply to a professional kinesiologist. MEMBERS also have a duty to abide by the BCAK's Professional Practice Standards, to protect the public from dishonest or incompetent service delivery, and general harm.

For example, kinesiologists are required to seek consent from a parent or guardian of a child (infant) under the age of 19 if the child is not able to comprehend the potential benefits and risks of the services being proposed or provided by the kinesiologist, including any changes in those services.

Health Professions Regulation

In Canada, the *Canada Health Act (CHA)* establishes the framework under which provinces and territories have the authority to regulate health care professions; this means that health professions are regulated provincially, rather than federally. In BC, regulated health care professions are provided the authority to self-regulate to protect the public, by setting competency and ethical standards for their profession. In many other parts of the world, professions are regulated directly by the government or through general consumer protection laws.

In BC, as in other many other jurisdictions, the "regulation" of a health care profession means that the jurisdictions in which the professional typically lives and works impose restrictions on practice to help ensure members of the public are not harmed, and that they benefit from the health care provided. There are many ways in which a profession can be regulated.

For example, the government can create offences for improper professional conduct, restrict those practicing from performing specific higher risk activities, or protect the use of professional title(s). Alternatively, the government could have one of its Ministries oversee the activities of those practicing the profession.

Self-regulation requires the BC government to implement laws (often called an Act) which designate the duty to regulate one or more professions to a separate body called a College. For distinction purposes, it is important to clarify that a College as discussed here, is a regulatory body, not a post-secondary educational institution. A College is managed by a College "Board", consisting of elected licensees/registrants who are members of their respective professions, along with members of the

public who are appointed by the government and are necessary to ensure adequate public input.

The Board establishes the policies of the College (e.g., it makes the professional misconduct regulation) and oversees the administration of the regulatory activities of the College (e.g., it establishes the budget for the quality assurance program of the College). The College will often carry out many of its operations through committees (e.g., Registration, Discipline, Inquiry, Quality Assurance, etc.), the majority of which members are from professions defined in the regulations, with other members coming from the public. Self-regulation essentially means that the members of a profession or group of professions are authorized to collectively implement standards which are acceptable to the government, oversee the licensure of practitioners for professional practice, and fund the operation of the College through levies and registration fees paid by licensed practitioners.

British Columbia's Changing Health Professions Environment

In 2022, BC passed legislation to move from a single profession model of health professions regulation to a multi-profession regulatory model to improve public trust and uniformity of standards. This change was implemented with the understanding that greater consistency in standards, along with improved public understanding and trust regarding what is, and is not, acceptable practice, are in the public's best interest, and justified modernizing the health professions framework.

In preparation for the transition to the new *Health Professions and Occupations Act (HPOA)* from the current *Health Professions Act (HPA)*, the BC government assigned the BC Health Regulators (BCHR) to coordinate many of the transition processes. The BCHR is tasked with delivering key resources aimed at supporting consistency across all Colleges under the new HPOA, including developing model bylaws; integrating new governance requirements; setting professional standards; standardizing key regulatory processes; developing complainant support programs; and running quality assurance programs.

Law In Professional Kinesiology Practice

The laws related to health care practice encompass multiple areas, such as malpractice, informed consent, privacy, and others. The laws covered here apply to professional kinesiology practice and do not encompass all the laws which a kinesiologist may be subject to, such as federal law related to medical assistance in dying (MAID), the *Canada Free Trade Agreement,* and laws which may apply in other jurisdictions the kinesiologist chooses to practice in (other than BC).

Types and Sources of Law

There are two types of law in BC and Canada, Common and Civil law, and there are a number of sources of law for each. They include the following:

- ***Acts/Statutes.*** Most often when one thinks of law, one thinks of statutes. There are overriding statutes that take priority over other statutes, such as the *Canadian Charter of Rights and Freedoms.* The statutes that kinesiologists will need to be most aware of are the HPA/HPOA, PIPA and the HCCCFAA. Statutes are made by the Legislative Assembly of BC, often referred to as the BC Legislature.
- ***Regulations.*** Regulations are made by the government when a statute provides for them to exist. Under the HPA/HPOA, regulations can be established to define the workings of a regulatory College (e.g., registration, professional misconduct, quality assurance), or by the Minister of Health in terms of restricted/reserved activities (e.g., controlled acts that only health care professionals with a certain level of training and expertise can provide).
- ***By-laws.*** By-laws are made by regulatory Colleges and by associations, such as the BCAK. They deal primarily with the internal operations of a College or association (BCAK). Some by-laws affect MEMBERS, for example, fees, professional liability insurance, information that must be provided by kinesiologists to register, additional information that could be shared with the

public, and election of registrants/MEMBERS to the Board of directors. Bylaws also establish the disciplinary actions a College or association can impose on registrants/ MEMBERS who are found to have substantially breached professional practice standards (referred to in general as "standards").

- ***Case Law.*** Court decisions are used as a guide by lawyers and judges when similar issues arise in the future. Courts try to be consistent, so long as the result is not unfair. Court decisions are particularly important on guiding the procedure of College committees (e.g., investigations by the Inquiries, Complaints and Reports Committee) and are also used to guide BCAK in its procedures, policies, and practices, where relevant.
- ***Guiding Documents.*** Regulatory Colleges and associations, such as the BCAK, publish official documents called Standards of Practice, Guidelines, Policy Statements and Position Statements. These documents are not "law" in the true sense however, they help registrants of the College or MEMBERS, other kinesiologists and health professionals and the BCAK, understand, interpret, and inform the public, registrants/ MEMBERS and other kinesiologists about the law. As such, these documents are important for unregulated and regulated health care professionals to read and understand. These documents are sometimes called "soft law".

Health Professions Act (HPA)/Health Professions and Occupations Act (HPOA)

The BC *Health Professions Act* and the future *Health Professions and Occupations Act* (not yet in force) applies to the 25 currently regulated health professions. Once the new act is brought into force, the HPOA will also include additional technical professionals approved for regulation in 2013, including Medical Radiation, Cardiac, Laboratory and Ultrasound Diagnostic Technologists. The current HPA sets out the duties and responsibilities of the Minister of Health, the Colleges and their committees, and those of the registrants of each regulated health profession, as will the new HPOA when it is brought into force to replace the HPA.

Note: Those sections of the HPA which do not apply to unregulated health professions (including kinesiologists) are covered in the Appendix.

Restricted Acts and Delegation

There are certain health care procedures that pose a significant risk of injury or death if not performed with a high level of competency and must only be done by a properly qualified person. These potentially dangerous procedures have been listed in the *Health Professions Act.* They are called "restricted activities (or acts)". No one can perform restricted acts without the legal authority to do so.

The seven restricted (also commonly referred to as controlled) acts are as follows:

1. Making a diagnosis identifying a disease, disorder, or condition as the cause of signs or symptoms of the individual.
2. Performing the following physically invasive or physically manipulative acts:
    - procedures on tissue below the dermis, below the surface of a mucous membrane, in or below the surface of the cornea, in or below the surfaces of the teeth, including the scaling of teeth,
    - setting or casting a fracture of a bone or reducing a dislocation of a joint,
    - movement of the joints of the spine beyond the limits the body can voluntarily achieve but within the anatomical range of motion using a high velocity, low amplitude thrust,
    - administering a substance, including substances other than a drug,
        i. by injection,
        ii. by inhalation,

iii. by mechanical ventilation,
iv. by irrigation, or
v. by instillation through enteral or parenteral means, and

- putting an instrument, hand, or finger(s),
  i. into the external ear canal, including applying pressurized air or water,
  ii. beyond the point in the nasal passages where they normally narrow,
  iii. beyond the pharynx,
  iv. beyond the opening of the urethra,
  v. beyond the labia majora,
  vi. beyond the anal verge, or
  vii. into an artificial opening into the body.

3. Managing labour or delivery of a baby.

4. Applying or ordering the application of a hazardous form of energy, including diagnostic ultrasound, electricity, magnetic resonance imaging, lithotripsy, laser, and X-ray, or as prescribed in regulation.

5. Prescribing, compounding, dispensing, or administering by any means a drug listed in Schedule I or II of the Pharmacists, Pharmacy Operations and Drug Scheduling Act.

   a. For the purposes of this reserved act, the following definitions shall apply:
   - "prescribing": the ordering of a drug,
   - "compounding": mixing ingredients, at least one of which is a drug,
   - "dispensing": preparing or filling a prescription for drugs.

   b. Designing, compounding, or dispensing therapeutic diets where nutrition is administered through enteral or parenteral means.

   c. For the purposes of this reserved act, the following definitions shall apply:
   - "designing": the selection of appropriate ingredients for enteral or parenteral nutrition,
   - "compounding": mixing ingredients for enteral or parenteral nutrition,
   - "dispensing": filling a prescription for enteral or parenteral nutrition.

6. Prescribing appliances or devices for vision, hearing, or dental conditions; dispensing such prescribed appliances or devices for dental conditions; fitting such appliances for devices for dental conditions or fitting contact lenses.

   a. For the purposes of this reserved act, the following definitions shall apply:
   - "prescribing" means: ordering the fabrication or alteration of appliances or devices for vision, hearing, or dental conditions,
   - "dispensing" means: filling a prescription by fabrication or altering a dental appliance or device,
   - "fitting" means:
     i. In respect of a dental appliance, to perform any intra-oral procedure related to dispensing, including the making of impressions, and
     ii. In respect of a wearable hearing instrument, to adapt, or verify, using sound field testing, real ear measurements or other methods.

7. Testing or treatment for specified conditions as identified below:

- Allergy challenge testing or allergy desensitizing treatment involving injection, scratch tests or inhalation, and allergy challenge testing by any means with respect to a client who has had a previous anaphylactic reaction,
- Cardiac stress testing conducted for medical diagnosis and treatment planning.

The 'hazardous energy' restricted activities set out section 4 above represent a preliminary list only. The Ministry of Health Services continually assesses whether additional restricted activities in this area are appropriate.

Kinesiologists may also need to conduct additional investigation or obtain external advice when dealing with nutritional substances that may be considered drugs in some circumstances. A general rule is that if a substance has a DIN (drug identification number) it is usually considered a drug, other substances are registered as natural health products.

It is important for kinesiologists to familiarize themselves with the list of restricted acts and be aware that new acts can be added without direct notice to the kinesiologist.

There are four ways in which a health care provider can receive legal authority to perform a restricted act:

- ***Authorization.*** *A regulated health professional can be* authorized to perform a controlled act by their regulatory College. This does not apply to kinesiologists in BC, as kinesiology is an unregulated health profession. All the acts which are within kinesiologists' scope of practice are within the 'public' domain.

- ***Exceptions.*** The *HPA, HCCCFAA and GSA Acts* provide several exceptions permitting people to perform controlled acts in certain circumstances. These exceptions include the following:
  - Aiding someone in an emergency (assumes no gross negligence)
  - While in formal training to become a member of a College authorized to perform the controlled act.
  - Performing the controlled act under supervision.
  - Treatment by prayer or spiritual means pursuant to one's religion.
  - When done for a member of one's household. This exception is limited to communicating a diagnosis (e.g., telling one's child that they have a cold), administering a substance by injection or inhalation or entering a body opening (e.g., removing a small toy lodged deep in a child's nose).
  - Helping a person with their routine activities of living where it includes administering a substance by injection or inhalation (e.g., on a home visit helping a client with their insulin injection) or entering a body opening (e.g., airway suctioning of a person with tracheostomy at home).
  - Counselling a person (so long as the counselling does not amount to communicating a diagnosis or providing psychotherapy or clinical counselling). In many ways the counselling exception provision is simply intended to convey the point that counselling for general and non-restrictive acts, such as for behaviour change for kinesiologists, does not normally fall within any of the restricted acts. It is not really a true exception.
  - Providing traditional indigenous healing techniques within the indigenous community.

- ***Exemptions.*** In addition to the exceptions listed in the *Health Professions Act*, a number of exemptions exist that are related to services which do not fall under the definition of health care and are regulated and monitored under different statues, such as the Public Health Act, by the Public Health Department. A few of the exemptions have broader application, including the following:
  - Cosmetic body piercings and tattooing,

- Electrolysis,
- Kinesiologists providing testing related to athletic or sport performance that are not related to health care service work, such as blood lactate testing, requiring blood droplet acquisition by means of a finger prick.

If a kinesiologist performs exempt services as part of their practice, they are classified as 'Personal Service Establishments' under the Public Health Act

Cosmetic surgery and related procedures, despite not being related to the provision of typical health care, are regulated under the HPA and any licensed medical doctor can perform them, however it is recommended that doctors performing cosmetic surgery be certified with the Royal College of Physicians and Surgeons of Canada.

The main types of cosmetic surgery and procedures are termed 'reconstructive surgery' and are done to improve the function and appearance of a part of the body that was damaged by trauma. Other procedures are also done to alter a condition that a person was born with or developed while growing up. The most common reconstructive surgeries include:

- Breast reconstruction.
- Burn reconstructive surgery.
- Cleft lip and cleft palate repair.
- Facial trauma repair.
- Gender-affirming surgery.
- Skin cancer removal.

- ***Delegation.*** A health care provider who is permitted to perform a controlled act can delegate the controlled act to others if they are authorized to do so in the Bylaws under their health profession regulation. They need to be confident that the person being delegated the act has the knowledge and skill to competently perform the act. Delegation can be made to another health care provider or to an unregistered professional. Delegation is subject to a number of rules, including the following:
  - The person giving the delegation is limited by any regulations or professional standards of their College. Since kinesiologists are not regulated health professionals in BC, and are not authorized to perform any restricted act, kinesiologists cannot delegate any restricted activities.
  - The person receiving a delegation may also be limited by any regulations or professional standards of their College or by the standards of their professional association, such as the BCAK's delegation policies and any professional insurance restrictions/limitations).
  - The person delegating the procedure is responsible for the actions of the person receiving the delegation.

Kinesiologists must understand the differences between being delegated to perform a restricted act by a regulated health professional and a kinesiologist delegating an act to another person as an assistant. Kinesiologists are not permitted to perform any restricted acts, therefore they cannot delegate a restricted act. A kinesiologist may however delegate some acts (tasks) which are in the public domain to rehabilitation assistants or practicum students who are working under their supervision. Delegation may also be limited in some circumstances if a client's treatment is being funded by an insurance company, benefits provider, or government agency. Delegation can also be restricted based on exclusions existing under the kinesiologist's professional insurance policy.

Restricted Acts Scenario 1

Diana, a chiropractor, performs spinal manipulation on her client, Petra. Spinal manipulation is a restricted act authorized to chiropractors under the Chiropractic Act. Diana wants the client to be adjusted once more this week but is away. In her absence she books the client for a kinesiology session. During the kinesiology session, the client asks the kinesiologist to perform the spinal manipulation. The kinesiologist has observed the chiropractor perform spinal adjustments on many occasions and educated the kinesiologist on how the act is performed. If the kinesiologist agrees to and performs the act, they will be in breach of the Act and subject to legal action under the HPA.

If Diana, the chiropractor, had advised the kinesiologist to perform the act, Diana would have been in breach of the Act and the Bylaws of the College of Chiropractors of BC as she is not permitted to delegate this act.

Restricted Acts Scenario 2

Jamal, a Kinesiologist, is traveling with a BC Junior Hockey Team attending a provincial tournament in Northern BC. Jamal has years of training and experience treating injured athletes and is also accompanied by a physician who is a sports medicine specialist. Two players are warming up before the second period and one of them is skating behind the net when the other player shoots a puck toward the net and hits the player on the chin, resulting in a gash laceration wound to the chin that results in profuse bleeding. The team physician has already left the rink to travel to the hospital with another unconscious player who received a concussion during the first period, instructs Jamal by telephone to apply pressure to stop the bleeding and stitch up the player's laceration. Jamal, following the physician's instructions and using the medical kit left behind, stitches up the laceration and dresses the injury. On the flight back, the physician looks at Jamal's stitching work for the first time, that was done the previous day. He comments that the wound seems a little red and tells the player to follow up with his family physician once they land in their hometown and removes Jamal's stitches.

Jamal performed a controlled act (performing a procedure on a tissue below the dermis) that is not authorized to kinesiologists. However, as previously indicated, he did so in an emergency situation (which is a recognized exception to the prohibition) and did it under the delegation of a physician. Thus, he is not at risk for an illegal conduct charge under the HPA. He could, however, still face civil liability if he completed the stitching negligently (e.g., if an infection develops because he failed to use proper sterile technique and/or a failure to advise the player to follow up with his own physician as soon as reasonably possible, or if an alternate person who was more qualified was available to perform the controlled act and Jamal did not request this person to assist and stitch up the laceration).

Restricted Acts Scenario 3

Marius a kinesiologist, has a plate of cookies in his waiting room. Paul, a client, eats one and goes into anaphylactic shock. Marius is called into the room. Marius recalls that Paul has a peanut allergy and realizes that the cookies may have peanuts in them. Marius looks in Paul's briefcase and finds an EpiPen containing a measured dose of epinephrine. Marius places the pen in Paul's hand and assists Paul in injecting himself with the epinephrine into Paul's thigh muscle. Marius then calls 911. Paul recovers. While Marius did assist in the performance of a restricted act not authorized to him (administering a drug by injection), he did so under an emergency which is a recognized exception to the restricted acts rule.

Restricted Acts Scenario 4

Donna, a kinesiologist, only works part time. Her other job is to perform artistic body piercings. Even though such piercings go beyond the level of the dermis, this procedure is not covered under the HPA but is under the Public Health Act, where Donna's premises and procedures

must meet the requirements for infection prevention and control and are subject to regular inspection by the Public Health Department.

Restricted Acts Scenario 5

Frank, a kinesiologist, works with a physician. Because of Frank's knowledge of anatomy, the physician trusts Frank to perform injections on clients at precise anatomical locations. The physician delegates intra-muscular injections of local anaesthesia to clients as part of their pain management treatments. Frank is permitted by the delegation to perform these injections however, both Frank and the physician will be responsible if something goes wrong.

Restricted Acts Scenario 6

In the situation above, if the physician has forgotten to obtain informed consent from the client to perform the injections, can Frank explain the procedure and obtain the informed consent for him to provide the shots?

The answer is 'no', the physician must be the one to obtain informed consent, the act of obtaining informed consent for a restricted act cannot be delegated.

Sample Exam Question

Which of the following is a restricted act?

i. Removing broken glass that has been deeply embedded in a child's leg.
ii. Cleaning a scrape on a child's elbow with soap and water.
iii. Applying alcohol to that scrape on a child's elbow.
iv. Wrapping the child's wounds.

The best answer is i. Deeply embedded glass almost certainly has gone beyond the dermis and is sitting in deeper tissue. There may be an issue as to whether this is an emergency (likely not as in most cases it would be possible to take the child to a hospital or physician's clinic for treatment), but that does not change the fact that removing the glass is a controlled act. Similarly, the household exemption does not apply to these procedures. Answer ii is not the best answer because a scrape on the skin implies that it has not gone beneath the dermis. Answer iii is not the best answer because applying a substance to the skin is not administering a substance by inhalation or injection. Answer iv is not the best answer because the procedure is above the skin and does not fall within any of the other controlled acts.

Scope of Practice

Because the *Health Professions Act* uses restricted activities (acts) to protect the public from potentially dangerous health procedures, the scope of practice of each regulated profession is not the primary means of protecting the public. No profession has an exclusive scope of practice. Typically, members of other professions, whether regulated or unregulated, can do some of the same things. There are two exceptions:

- People cannot perform a restricted act unless they have legal authority to do so.
- There is a "risk of harm" provision that prevents people from performing potentially dangerous procedures even if they are not restricted acts.

Scope of Practice Statement

A profession's "scope of practice" is a description of what that profession does. The BCAK scope of practice statement reads as follows:

The application of the sciences of anatomy, physiology, biomechanics, psychology, and neuroscience to enhance, restore or optimize human movement and function in an evidence-

based practice environment.

While broadly stated, this scope of practice statement does not allow a kinesiologist to provide treatments that are outside of the usual practices of kinesiologists. Kinesiologists are permitted to perform procedures which are not inherently dangerous. For example, any form of surgery is not included in this scope of practice.

Scope of Practice Scenario

Anya, a kinesiologist, is seeing Paula, a client diagnosed with Stage IV cancer. Paula is scheduled for surgery next week, to be followed by chemotherapy. Paula's physician says that the treatment has a 50% chance of success (i.e., meaning she has a 50% chance of being alive and cancer free in five years' time). Paula's physician also said that without treatment, Paula had a less than 5% chance of surviving for five years. After a careful assessment, Anya advises the client to cancel both the surgery and the chemotherapy. Anya recommends a combination of relaxation tapes and a fasting cleansing program followed by an all-fruit diet instead. Laura dies within two months and the family go to the police asking that Anya be prosecuted under the risk of harm clause.

In this case, Anya appears to have provided treatment that is outside of the scope of practice for kinesiologists. The treatment also appears to have no readily available evidence to support it. There was an inherent risk of harm in advising the client to reject the proposed medical treatment that had evidence of a reasonable chance of recovery for a treatment that had not been fully researched.

Use of Professional or Occupational Titles

The *HPA* restricts the use of professional titles and designations by any person who is not a registrant of a health professions College. Each College is assigned the authority to oversee the use of professional titles and can take action against any person who uses or misuses a restricted title or designation.

The first general rule is that only approved persons can use any form of the title "Doctor" when providing, or offering to provide, health care services in BC. If a person is not from one of the approved health professions, they cannot use the title in a clinical setting even if the person has an earned doctoral degree (i.e., the person holds a Ph.D.). Allowing a staff person to call the health care provider "Doctor" would constitute an offence. Under this provision, people can use the title "Doctor" in other settings, such as socially or in a purely teaching setting, where there are no clients. Kinesiologists are not permitted to use the title "Doctor" in a clinical practice setting.

The second rule is that each regulated profession is assigned specific titles relating to their profession and only persons registered with the respective College can use as a professional title. For example, only physical therapists can use the title "physiotherapist" or any variation of that title, such as "physical therapist". In addition, even if the unregistered person does not use the protected title, they cannot hold themself out to be a physical therapist. This prevents people from pretending that they are physical therapists when they are not. As an additional example, unless a person is a registrant of the College of Massage Therapists of BC, they cannot refer to themselves as a "Massage Therapist", "Massage Practitioner" or "Registered Massage Therapist" or infer that they are an 'RMT' even if they do not specifically use one of the reserved titles or abbreviations. Again, BCAK MEMBERS must be careful not to use a professional title or abbreviation that is restricted to registrants of a regulatory College.

The third set of rules created by a regulatory College for its members is the registration and professional misconduct regulations. For example, each class of registration is given a specific designation for them to use (e.g., PT, or PT (Inactive)). Regulated health professionals can only use the

title associated with their class of registration. In addition, regulated health professionals are only able to use a title indicating specialization where:

a) it is conferred by a recognized credentialing body,
b) it is earned,
c) it meets established standards, and
d) prominence is given to the professional's legislated title.

Finally, there are general professional misconduct regulations preventing the use of misleading titles or designations or engaging in false or misleading advertising. For example, it would be professional misconduct for a physical therapist to refer to an educational degree that had not been received. The BCAK similarly requires that MEMBERS not use or list titles or degrees which have not been earned and received. This is considered false advertising and constitutes a breach of the BCAK's Code of Ethics and PPS. This type of action also demonstrates a lack of good moral character on the part of the MEMBER.

Use of Titles Scenario

Ernie, a MEMBER, teaches part time at a post-secondary institution that trains kinesiologists. The institution has a clinic where clients are seen. Ernie supervises the students at the clinic. The students often refer to him as "Doctor Ernie" at the clinic. The Dean of the institution pulls Ernie aside and tells him to ask his students to stop calling him "Doctor" in the clinic where there are clients. It is okay in the classroom, but not the clinic. Ernie reviews the Health Professions Act *and realizes that the Dean is correct. Ernie is assisting in the treatment of clients and thus is not permitted to call himself (or allow others to call him) "Doctor" there. Ernie also recognizes that he was being a poor model for the students.*

A kinesiologist's use of a restricted title or designation is a breach of the HPA and the regulatory College Bylaws for which exclusive use of the title has been assigned to registrants.

Sample Regulation Exam Question

Which statement best describes the role of a health professions regulatory college and that of a professional association for the same profession?

i. The College serves the public interest, and the professional associations serve the interests of the profession.
ii. The College and the professional associations both serve the public interest.
iii. The College and the professional associations both serve the interests of the profession.
iv. The professional association directs the operations of the regulatory College.

The best answer is i. A College's mandate is to regulate the profession to serve and protect the public interest and the professional association's mandate is to serve the interests of the profession. Answer ii, is not the best answer because professional associations are designed to serve the interests of their members. While professional associations care about the public interest and often take actions that assist the public interest, they are under no statutory duty to do so and are accountable only to their members. Answer iii, is not the best answer because the College is not permitted to serve the interests of its members under its statute. While it tries to ensure that it regulates its members sensitively and fairly, and consults with its members, the College's mandate is the public interest. Answer iv, is not correct. While the College consults with the professional associations and will consider their views and respects their expertise, the College is not under the control of any professional association.

Representation Agreement Act

The purpose of the *Representation Agreement Act* is to provide a mechanism to allow adults to arrange in advance how, when and by whom decisions are made about their health care, personal care, routine management of financial affairs or other matter if they become incapable of making decisions independently, and to avoid the need for the court to appoint someone to assist an adult in making decisions or make decisions for adults when they are incapable of making decisions independently.

Type of Agreement

Representation agreements can be of two forms, standard or non-standard format. A standard agreement will allow an adult's representative to do anything that the representative considers necessary in relation to the personal care or health care of the adult. A non-standard agreement allows a representative to do one or more things in relation to the personal care or health care of the adult as defined in the Act.

Validity – A representation agreement, completed at a time when an adult was competent to make decisions, is not invalidated when the adult becomes incapable of understanding the nature and consequence of the agreement they previously entered into, but is subject to any restrictions specified in the agreement. An agreement may not prevent a representative from refusing consent to care, services, or admission to a facility under the *Mental Health Act.*

Kinesiologists must be clear on these terms and apply due diligence to ensure that, if a situation arises where a client has a representation agreement in place, the terms of the agreement permit the representative to decide on the health care the kinesiologist is proposing for the adult.

Health Care (Consent) and Care Facility (Admission) Act

The *Health Care (Consent) and Care Facility (Admission) Act* ("*HCCCFAA*") sets out rules under which a capable adult can give or refuse consent for health care. Informed consent for any assessment or treatment must be obtained from the client. If the client is incapable, informed consent is obtained from the client's representative or substitute decision maker.
(For information on obtaining informed consent for children (infants) refer to the section on the "Infants Act")

An adult client can:

- give consent or refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death,
- select a particular form of available health care on any grounds, including moral or religious grounds,
- revoke consent,
- expect that a decision to give, refuse or revoke consent will be respected, and
- expect to be involved to the greatest degree possible in all case planning and decision making.

A kinesiologist must not provide any health care to an adult without the adult's consent except in cases where, in the kinesiologist's professional opinion, the adult is incapable of giving or refusing consent. The adult's legally appointed representative through a representation agreement, personal guardian, or temporary decision maker has authority to consent to the health care, is capable of giving consent, and gives substitute consent. (Note: the laws regarding obtaining informed consent for the health care of

children and youth (infants) is established in the Infant's Act, which is covered in a later section.)

Elements of Consent

When a kinesiologist obtains consent from an adult, the consent

a. must relate to the proposed health care,
b. must be given voluntarily,
c. must not be obtained through fraud or misrepresentation,
d. must be given by an adult who is capable of making a decision about whether to give or refuse consent to the proposed health care,
e. must demonstrate that the health care provider gave the adult the information a reasonable person would require to understand the proposed health care and to make a decision, including information about:
    i. the condition for which the health care is proposed,
    ii. the nature of the proposed health care,
    iii. the risks and benefits of the proposed health care that a reasonable person would expect to be told about, and
    iv. alternative courses of health care.
f. must demonstrate that the adult was provided an opportunity to ask questions and receive answers about the proposed health care prior to making a decision.

Determining Competency to Provide Consent

When deciding whether an adult is capable or incapable of giving, refusing, or revoking consent to health care, the decision must be based on whether or not the adult demonstrates that they understand

a. the information provided by the kinesiologist that a reasonable person would require to understand the proposed health care and make an informed decision, and
b. that the information applies to the situation of the adult for whom the health care is proposed.

Duty to Communicate Effectively

When seeking consent from an adult, a kinesiologist must communicate in a manner that the adult comprehends. In other words, the kinesiologist must use words, phrases and terminology that are understood and not use technical or other terminology that the adult would not be expected to understand. The kinesiologist may also allow the adult's spouse, close relatives or friends who accompany the adult to offer their assistance to help the adult understand or enable the adult to demonstrate an understanding of the information the kinesiologist is required to provide.

Advance Directive

An Advance Directive is the adult's instructions of their health care to be given to their health care provider(s), which they must follow directly when it provides clear direction on the care needed if the adult becomes incapable. An adult may make an advance directive unless they are incapable of understanding the nature of the consequences. The adult must be able to understand what they are agreeing to in the directive for it to be valid and there must not have been significant advancements in medical knowledge, technology or practice since the directive was prepared.

The advance directive must be in writing and signed and dated by the adult in the presence of two witnesses and the two witnesses must sign the document in the presence of the adult and each witness.

Temporary Substitute Decision Makers

If the adult does not have a valid representation agreement or advance directive in place, it is up to the kinesiologist to identify and obtain consent from a substitute decision maker (SDM) to provide major or minor health care to an adult. The kinesiologist must choose the first person identified in the following list, who is available and qualifies.

a. The adult's legally appointed representative through a representation agreement
b. the adult's spouse
c. the adult's child
d. the adult's parent
e. the adult's sibling
f. the adult's grandparent
g. the adult's grandchild
h. anyone else related by birth or adoption to the adult
i. a close friend of the adult
j. a person immediately related to the adult by marriage

If no one listed is available or qualifies, or if there is a dispute about who is to be the substitute decision maker, the kinesiologist must contact the Office of the Public Guardian and Trustee, who will become involved in choosing a substitute decision maker.

Qualification

To qualify to give, refuse or revoke substitute consent to health care for an adult, a person must

- be at least 19 years of age,
- have been in contact with the adult during the preceding 12 months,
- have no dispute with the adult,
- be capable of giving, refusing or revoking substitute consent, and
- be willing to comply with the duties required of a temporary substitute decision maker.

Exceptions for Provision of Health Care

Preliminary Examination/Assessment

A kinesiologist may undertake triage or another kind of preliminary examination or treatment (excluding diagnosis) of an adult without obtaining consent if the adult wants to be provided health care or, in the absence of any indication by the adult, their spouse, near relative or close friend indicates that they want the adult to be provided with health care.

Minor Health Care Procedure

A health care provider may provide minor health care to an adult without obtaining consent if:

a. the health care provider is of the opinion that the adult is incapable of giving or refusing consent for minor health care,
b. the adult does not have a personal guardian or representative or the adult's personal guardian or representative is incapable of giving or refusing consent, and
c. the highest ranked temporary substitute decision maker who qualifies gives substitute consent to the minor health care.

Minor health care includes services such as regular checkups, routine tests, basic dental and eye care, immunizations, medications of any kind, and other health care that is not major health care.

Major Health Care Procedure

A health care provider may provide major health care to an adult without the adult's consent if

a. after consulting, or making a reasonable effort to consult, with any spouse, near relative or close friend of the adult who is reasonably available or with any other person who has relevant information, the kinesiologist determines that the adult
    i. needs the major health care, and
    ii. is incapable of giving or refusing consent to the major health care.
b. the adult does not have a personal guardian or representative who is authorized to consent to the major health care, is capable of doing so, and is available,
c. the highest ranked temporary substitute decision maker, who qualifies under the Act and has authority to consent to the major health care, provides substitute consent.

If a temporary substitute decision maker chosen under the guidance of the Act gives or refuses substitute consent, the health care provider must inform the adult, and any spouse, near relative or close friend of the adult who accompanies the adult of the decision or assessment that the adult is incapable, the name of the person chosen under the legislation, and the decision to give or refuse substitute consent.

- *Major health care includes services such as major surgery, major diagnostic or investigative procedures, any treatment involving general anesthetic, radiation therapy, chemotherapy, kidney dialysis, electro-convulsive therapy, laser surgery and other care yet to be described in future legislation.*
- *Kinesiologists typically do not perform these acts, but may do so if they are working as part of an interdisciplinary team overseen by a physician, or are conducting high risk tests, such as a cardiac stress test.*

Health Care (Consent) and Care Facility (Admission) Act Act Scenario

David, a kinesiologist, is treating an adult client who does not appear to understand what he is proposing for treatment of an ankle sprain, which is why the client's doctor has referred the client to David for treatment. No matter how he explains it, the client doesn't seem to understand what he is proposing. The client attended the session with his spouse who is in the waiting room. Is it appropriate for David to approach the wife to act as a temporary substitute decision maker in this instance?

Based on the hierarchy of substitute decision makers in the HCCCFAA, the answer is yes. (Assuming there is no representation agreement in place authorizing another person to make decisions on behalf of the client and who is readily available.)

Care Facilities

The HCCCFAA also establishes requirements for the protection of those living in care facilities. If a kinesiologist works in a long-term care or assisted living facility, the facility is required to have a zero-tolerance policy with respect to abuse and neglect of residents. Abuse includes physical, sexual, emotional, verbal, or financial abuse.

Reporting Abuse

Kinesiologists have a duty to report abuse and neglect of residents and certain other conduct to the

Ministry of Health. A report is required if a kinesiologist (or any other person) suspects on reasonable grounds that any of the following have occurred:

- improper or incompetent treatment or care of a resident that resulted in harm or a risk of harm to the resident,
- abuse of a resident by anyone,
- neglect of a resident by staff, including management, that resulted in harm or a risk of harm to the resident,
- unlawful conduct that resulted in harm or a risk of harm to a resident,
- misuse or misappropriation of a resident's money, or if
- misuse or misappropriation of funding provided to a long-term care home.

Seniors Advocate Act

The Seniors Advocate Act – requires the appointment of a BC Seniors Advocate and establishment of the Council of Advisors, who provide advice and feedback to the Office of the Seniors Advocate (OSA) on the issues facing seniors in British Columbia. The purpose of the volunteer council is to provide the perspectives of seniors from diverse backgrounds, ages, geographical areas and cultures. The council is comprised of 15 seniors who provide representation across:

- All five of BC's health authority regions,
- Diverse urban, suburban, rural and remote communities,
- Diverse cultural and socioeconomic backgrounds, and
- A balance of gender identities and sexual orientation.

Office of the BC Seniors' Advocate (OSA)

The purpose of the OSA is to advocate for high quality health care, other services and resources for seniors and makes recommendations to government and service providers to address systemic issues. The office acts in the interest of seniors and their caregivers. It offers independent support to those who feel they are not being heard and to ensure they are taken seriously and that their rights are respected.

Community Care and Assisted Living Act

The *Community Care and Assisted Living Act* establishes the licensing requirements for care facilities, including the responsibility for inspections and regulatory compliance. More importantly for kinesiologists, the Act establishes the consent requirements for admission of a person to a care facility, such as a long-term care home, in addition to the rights of a person to choose whether they leave the care facility and the limitations regarding the use of restraints.

A kinesiologist working or providing services in a care facility must ensure they do not use restraints for the purpose of punishment or discipline or the convenience of the care facility or staff and that restraints are only utilized in compliance with the regulation, such as protection of the person from self harm.

Infants Act

Section 17 of the Infants Act establishes the legal position infants (children) under the age of 19 have to consent to receiving health care. The Act states that children may provide informed consent to health care, provided the consent is effective and meets the standard required in the act. In addition, it is not necessary to obtain consent from an infant's parent or guardian to proceed with the health care.

For the child's consent to be valid without involving a parent, guardian or the Office of the Public Trustee, the kinesiologist (health care practitioner) must:

- explain to the child and be confidently satisfied that the child understands the nature and consequences and the reasonably foreseeable benefits and risks of receiving, or not receiving, the health care, and
- has made reasonable efforts to determine, and has concluded, that the health care is in the child's best interests.

The term for a child, who can provide valid informed consent for the health care being proposed for them, is a 'Mature Minor'. Inclusion of the parent or guardian in the decision-making process may be appropriate if the child consents to the parent's involvement, particularly if the parent or guardian will play a necessary role in ensuring the child is able to receive care.

Child, Family and Community Service Act

A kinesiologist who suspects that any child needs protection must report this to the Ministry of Children and Family Development (MCFD). This duty overrides all privacy and confidentiality duties and laws, including *PIPA*. No legal action can be taken against a kinesiologist for making a report, unless the report is made maliciously or without reasonable grounds.

As a result of a report, a MCFC worker may investigate the report further, and where action is needed, in many cases MCFD will offer a family services such as counselling and parental education.

A kinesiologist has a duty to report for any child under the age of 19. This includes all children, such as a child of a client, a child who is a client, or any other child. A kinesiologist has a special responsibility to report information about a child who is a client. Failure to report suspected child abuse carries a maximum penalty of a $10,000 fine, six months in jail, or both.

The duty to report is ongoing (for new information) even if a previous report has been made respecting a child. A kinesiologist must make a report personally if they have reasonable grounds to suspect any of the following:

1. **Risk or Previous Risk of Physical Harm, Sexual Abuse, or Sexual Exploitation**
   A report is required if a child has been, or is, at risk of likely being physically harmed by a person having charge of the child (e.g., a parent, guardian, or other person), either directly or as a result of neglect or a pattern of neglect.

   A report is also required if a child has been, or is, at risk of being sexually molested or sexually exploited, either by a person having charge of the child, or by another person, if the person having charge of the child knows or should know of the risk of this happening and fails to protect the child.

2. **Risk of Being Deprived of Necessary Health Care or Guardian Fails to Provide Consent for Necessary Health Care**
   There are numerous circumstances where a report is required because the person having charge

of a child does not or cannot provide services or treatment to a child or does not or cannot consent to services or treatment for a child.

A report is required where a child is not receiving services or treatment, and:

- the child is deprived of necessary health care, such as requires medical treatment to cure, prevent or alleviate physical harm or suffering,
- the child has suffered, or is likely at risk of suffering, emotional harm, demonstrated by serious anxiety, depression, withdrawal, self-destructive or aggressive behaviour, or delayed development believed to be caused by action or inaction of the person having charge of the child,
- inadequate provisions have been made for a child's care, or
- the child has a mental, emotional, or developmental condition that, if not remedied, could seriously impair the child's development.

A kinesiologist who makes a report in good faith cannot be disciplined for making a report in good faith and with reasonable grounds.

Abandonment

A report is required if a child

- has been, or is, absent from home in circumstances that endanger the child's safety or well-being,
- is in the care of a director or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force,
- has been abandoned by a parent or guardian or is otherwise left without a caregiver. This includes the death of a child's parents.

Failure to Supervise a Child

A report is required if a child has injured another person or damaged another person's property more than once because a person having charge of a child encouraged the child to do so.

A report is also required if a child has injured another person or damaged another person's property more than once because a person having charge of a child has not or cannot supervise a child adequately.

Mandatory Reporting Scenario 1

Stephanie, a kinesiologist, has a client who discloses that she has physically harmed her son. Stephanie has a duty to make a report, even if the client reported this in confidence or during the assessment or treatment. If two months later the client says something that makes Stephanie suspect that the client has physically harmed her son again, Stephanie has a duty to make another report.

Mandatory Reporting Scenario 2

Tom, a kinesiologist, has an 11-year-old client who has been displaying signs of erratic and violent behaviour, and reports that he violently attacked his friend last week. Tom believes that specialized health care services are necessary to prevent the client from causing serious injury to other people again and recommends a referral to another health care provider. The client's parents do not believe that their 11-year-old son would hurt anybody and refuse to consent to

any further treatment. In this case, Tom has a duty to make a report. This duty to report exists even if the child does not want anyone to know about the incident and the parents refuse to believe it and are angry at the kinesiologist.

Privacy Legislation

There are four primary legislative acts related to privacy that apply in Canada and British Columbia. They include,

BC-specific legislation:

- PIPA – Personal Information Act,
- FIPPA – Freedom of Information and Protection of Privacy Act (also referred to as 'FOIPPA') and

Canadian legislation:

- Personal Information Protection and Electronic Documents Act, (PIPEDA) and the
- Privacy Act (PA)

There are also other laws related to accessing non-personal information retained by either the provincial or federal government.
They include,

- E-Health Act (EHA) and the
- Access To Information Act (ATIA).

Each Act will be addressed separately, with more details provided on those which relate to professional practice, and less for those that do not. For clarity, most kinesiologists who work in private healthcare environments require knowledge of PIPA and PIPEDA, while those who work in BC public healthcare environments require knowledge of FIPPA and the EHA. Kinesiologists who work for the federal government require additional knowledge of the PA and ATIA. The information provided in this guide will focus on PIPA, PIPEDA and FIPPA as they are relevant to most of the kinesiologists working in BC.

Personal Information Protection Act (PIPA)

Kinesiologists in BC have a legal and professional duty to protect the privacy of clients' personal information. The *Personal Information Protection Act* ("PIPA") governs the use of personal information by private organizations, including its collection, use, disclosure, access and destruction. *PIPA* helps guide the general duty of confidentiality.

Personal information is any recorded information about an identifiable individual other than their business contact information. It includes personal information that can be used to identify an individual through association or inference. Personal information includes, but is not limited to:

1. Name, age, sex, weight, height
2. Home address and phone number
3. Race, ethnic origin, sexual orientation
4. Medical information
5. Health care history, including physical or mental disability
6. Number or symbol assigned to the individual
7. Income, purchases, and spending habits
8. Blood type, DNA code, fingerprints
9. Marital or family status
10. Religion
11. Education
12. Financial information
13. Criminal information
14. Employment information

15. Personal views or opinions, except if they are about someone else

PIPA applies to all organizations unless the Act states that it does not apply. An organization includes:

- a corporation, including a strata corporation,
- a partnership,
- an individual (sole proprietor) involved in a commercial activity (for example, an individual running a kinesiology business that is not incorporated),
- a doctor's office,
- an association that is not incorporated,
- a co-operative association, including a housing co-op,
- a society,
- a church or other religious organization,
- a charity,
- a sports club,
- a trade union,
- a partnership,
- a political party, and
- a trust.

An organization does not include a person who is acting in a personal or domestic way (for purposes related solely to family or home activities).

PIPA does not apply to public bodies. Public bodies, including provincial government ministries, local governments, universities, colleges, public school boards, regional health authorities, hospital, self-regulating professional bodies and Crown corporations (other than BC Rail, to which PIPA applies), are subject to the *Freedom of Information and Privacy Act (FIPPA) which may also be referred to as FOIPPA*. FIPPA will be discussed in a later section.

Privacy Officer

Each organization must assign one or more individuals to act as Privacy Officer. One person must be delegated as the 'Chief Privacy Officer'. The privacy officer(s) are responsible for:

- Conducting a privacy audit and self-assessment
- Developing a privacy policy
- Implementing and maintaining a privacy policy
- Managing privacy training
- Responding to requests for access to, and correction of, personal information
- Working with the Office of the Information and Privacy Commissioner in the event of an investigation

A privacy officer must also be familiar with the *Personal Information Protection (PIPA)* and the ten principles of privacy protection.

The privacy officer(s) is/are responsible for ensuring all personal information in an organization's care, custody, or control are correct, securely maintained and only kept for as long as required for the purpose for which it was obtained. The head or lead privacy officer for an organization often has the title of 'Chief Privacy Officer'.

A sole kinesiologist is the Privacy Officer responsible for any client information and records that the kinesiologist creates, collects, or has in their possession by default. If a kinesiologist works for an organization as an employee, the organization is responsible for ensuring that personal information is handled in accordance with *PIPA*.

If a kinesiologist is an employee of a health organization, such as a private clinic, hospital or long-term care home, the organization is usually the custodian of health records and is responsible.

Kinesiologists who work as independent contractors or sub-contractors for another health care organization must have their own privacy policy and privacy officer for the personal information that has been entrusted to them by clients.

PIPA Scenario 1

> *Three kinesiologists work together in an office. Each kinesiologist operates as a separate entity, and they share office costs. Each kinesiologist is responsible for maintaining their own records; however, they can have common security measures in their individual corporate privacy policies and can share security costs. They typically cannot blend their records with the other practitioners in a common records repository. Each kinesiologist is their own Chief Privacy Officer unless they choose to appoint another person/employee to act in this role. The Chief Privacy Officer develops the policies and procedures to protect personal information, a privacy complaint handling process that is compliant with the legislation and must ensure that the privacy policy is complied with.*

Privacy Policy and Protecting Personal Information

A privacy policy should contain a number of sections that clearly outline the way in which personal information, will be dealt with. These include:

1. Accountability
2. Identifying Purposes and Limiting Collection
3. Consent
4. Limiting Use and Disclosure
5. Retention
6. Accuracy
7. Safeguards
8. Individual Access
9. Challenging Compliance
10. Openness

The overall goal is to put in place practices to protect personal information in the organization's care, custody, or control. Practitioners or organizations must take appropriate measures to protect personal information from unauthorized access, disclosure, use or tampering. Those safeguards must include the following components:

- physical measures (e.g., restricted access areas, locked filing cabinets, security systems),
- organizational measures (e.g., need-to-know and other employee policies, security clearances), and
- technological measures (e.g., passwords, encryption, virus protection, firewalls).

Practitioners or organizations need to systematically review all of the places where they may temporarily or permanently hold personal information and assess the adequacy of the safeguards. Almost every organization will find that it needs to make changes.

Practitioners or organizations also need to securely retain, transfer, and dispose of records in accordance with PIPA requirements and should comply with the recommended retention period unless the circumstances indicate otherwise. For example, the BCAK states in its Professional Practice Standards that client records be kept for 16 years from the last contact with the client (or if the client was not an adult at the last contact), and when dealing with infants, 16 years from when the client turned 19).

Collection, Use and Disclosure of Personal Information

A kinesiologist or organization must only collect, use, or disclose a person's personal information if the person consents or if the collection, use, or disclosure is otherwise permitted or required by law. A

kinesiologist should collect, use, or disclose no more information than is reasonably required in the circumstances.

Under PIPA, collection, use and disclosure of personal information is permitted without consent in limited circumstances.

Circle of Care

Other health care practitioners who are part of an interdisciplinary team within a public or private health care facility are considered to be within a client's immediate "circle of care". Personal information can be shared within the "circle" for the purposes of providing health care, with those individuals who are involved in the direct care of the client, as long as informed consent for team care has been provided by the client.

A circle of care may include other health professionals who provide care to a given client who are not part of an interdisciplinary care team, but typically does not include administrative staff unless the kinesiologist formally requests consent, such as when administration staff are involved in the completion and sending of reports and may otherwise have access to a client's personal information for purposes of assisting the client in obtaining health care. This can include situations such as approval of third-party benefits payments. A kinesiologist should not assume that they have a client's implied consent to disclose personal health information to other health providers working in the client's circle of care, such as support workers. If consent is provided and information shared with those workers, they must recognize their duty to protect that information under the Act.

A kinesiologist who refers a client to another health professional may consider that health professional to be within the client's circle of care if the client consents to the referral.

The circle of care of an independent kinesiologist's client may also include other health care providers in other institutions, particularly if required for providing necessary health care to the person and it is not reasonably possible for informed consent to be obtained in a timely manner, such as during emergency situations. However, many practitioners do not share information with others in the health care team without the client's explicit consent unless it is an emergency to avoid misunderstandings. This caution is particularly important where the information is sensitive.

The exception to this principle is that if a client or client's substitute decision maker says that they do not want the information to be shared. The information must then be secured in a "lock box" and cannot be shared unless another provision in *PIPA, the HCCCFAA or the RA Acts* permit it.

Circle of Care Scenario

> *Maya, a kinesiologist, receives a telephone call from a registered nurse at a local hospital. The nurse advises Maya that her client, who has dementia and is incapable of making her own decisions, has just been admitted to the hospital. The nurse reports that she has been unable to contact the person named in the client's representation agreement or a substitute decision-maker (SDM). The nurse wants to know about what treatment Maya has been providing to the client. Maya tells the nurse of the treatment she has been providing and discloses the additional information she has for the person assigned in the representation agreement. In this case, the urgency of care in an emergency situation based on the "circle of care" principle allows Maya to disclose her client's personal information without express consent and it would be inappropriate to insist on a signed consent form before making any disclosure.*

Family and Friends

Generally speaking, consent must be obtained before sharing personal information with members of a client's family or close friends, even if they live in the same household.

However, personal health information may be disclosed for the purposes of contacting family members, friends, or other persons who may be potential substitute decision-makers, if the individual is injured, incapacitated, or ill, and cannot provide consent. This may be particularly relevant for kinesiologists working in acute care settings.

Disclosure Related to Risk

A kinesiologist may disclose a person's personal information if the kinesiologist believes on reasonable grounds that the disclosure is necessary to eliminate or reduce a significant risk of serious bodily harm to the person or another person or persons.

For example, if a client has a serious and highly contagious illness, and has been admitted to a hospital, a kinesiologist does not require a client's consent to disclose this to the hospital or report it to public health officials. This is because the disclosure is necessary to reduce the risk of the illness spreading to other clients, staff, or members of the public. For example, a client openly admits that they have active tuberculosis in the lungs and does not take appropriate infection prevention and control measures when in public to prevent the potential spread to others. A kinesiologist must report this to the appropriate public health department under the Public Health Act.

Other Laws

PIPA permits disclosure of personal information that is allowed or required by many other acts, including the following:

- The *Health Care (Consent) and Care Facility (Admission) Act* or *Representation Act* for the purposes of determining, assessing, or confirming capacity,
- Disclosure to a College in accordance with the *Health Professions Act*, and
- Disclosure to an investigator or inspector who is authorized by a warrant or by any provincial or federal law, for the purposes of complying with the warrant or facilitating the investigation or inspection, such as local police or CSIS.

Additionally, as discussed above in the section of this handbook on Mandatory Reports (Duty to Report), there are some circumstances in which disclosure of personal health information is mandatory.

Access to Personal Information

Every client has a right to access their own personal information that is in the care, custody, or control of an organization. One important exception is if granting access would likely result in a risk of serious harm to the client's treatment or recovery, or a risk of serious bodily harm to the client or another person. Many students of privacy law believe that "bodily harm" includes mental or emotional harm.

If a person makes a request to access personal information, the Privacy Officer must either:

- permit the person to see their record and provide a copy at the person's request within the required time limit,
- determine after a reasonable search that the record is unavailable, and notify the person of this in writing as well as their right to complain to the Information and Office of the Information and Privacy Commissioner, and
- determine that the person does not have a right of access and notify the person of this as well as their right to complain to the Office of the Information and Privacy Commissioner.

The Information and Privacy Commissioner may review the organization's refusal to provide a record and may overrule the decision.

If law does not permit disclosure for any reason, a kinesiologist should black out or redact (on a copy, not the original) those parts that should not be disclosed if it is reasonable to do so, so that the client

may access the rest of the record. Note the original document should remain untouched.

PIPA Scenario 1

Adel, a kinesiologist, has been treating Parminder for 2 months to help her recover from an ankle sprain. Parminder advises Adel that she is moving next month and won't be able to continue to work with Adel after the move, as the commute to Adel's clinic will be more than 2 hours each way and is not reasonable. Parminder verbally requests a copy of her client record so that she can share the information with a new kinesiologist closer to her new residence. Adel asks Parminder to complete a written records request form, advising her that it will become part of Parminder's permanent record and confirms that she is required to securely retain the original record in accordance with PIPA requirements. Adel further advises Parminder that she will charge a minimal fee to cover the cost of reviewing, organizing and reproducing all the information (documents) in the record, and that she will provide the copy of the record to Parminder within 30 days of receipt of the records request in accordance with PIPA requirements.

If Parminder feels that the fee quoted is excessive, she can request that the fee be reduced, and Adel must review and consider the request for a fee reduction to ensure the fee is not a barrier to Parminder obtaining the record so that she can continue to receive appropriate health care from her new kinesiologist. If they are unable to reach an agreement on the fee, Parminder has the option of filing a complaint with the Office of the Information and Privacy Office, which will determine whether the fee being charged is appropriate or is excessive and will provide direction on an acceptable fee. Adel must also retain Parminder's original record for as long as required by PIPA based on the purpose for which the information was collected and/or created, after which it may be securely destroyed.

Sample Exam Question

Which of the following best describes a client's right to look at their personal information contained in a kinesiologist's records?

i. A client has an unrestricted right to access their personal health information.
ii. A client generally has a right to access their health information and has a right to complain to the Information and Privacy Commissioner if access is refused for any reason.
iii. A client has a right to access their health information unless the kinesiologist believes it is not in the client's best interests to see the information.
iv. A client can request a copy of a record containing their personal health information, but a kinesiologist does not have to provide it.

The best answer is answer ii. A client's right to access their health information is broad but has some legal limits. However, even if access is refused for an appropriate reason, the client is entitled to bring a complaint to the Information and Privacy Commission. Answer i is not the best answer because the right to access personal health information may be restricted in some circumstances (e.g., where there is a serious risk of significant bodily harm). Answer iii is not the best answer because a kinesiologist's opinion about whether it is good for the client to see the record is irrelevant. Only if the kinesiologist believes on reasonable grounds that viewing the information would seriously harm the client's treatment, may access be refused. Answer iv is not the best answer because a kinesiologist does not have a general right to refuse a person access to personal health information.

Correction of Personal Information

Individuals generally have a right to request corrections to their own personal information records held by an organization. A kinesiologist or custodian who receives a written request must respond to it by

either granting or refusing the request within 30 days. It is wise to respond to verbal requests as soon as possible. If the request cannot be fulfilled within 30 days the person should be advised of this in writing, with the 30-day period.

Corrections to records must always be made in a way that allows the original record to be traced. The original record should never be destroyed, deleted, or blacked out. If the record cannot be corrected on its face, it should be possible for another person accessing the record to be informed of the correction and where to find the correct information. The person should also be notified of how the correction was made.

At the person's request, the kinesiologist should notify anyone to whom the kinesiologist has disclosed the information of the correction. The exception to this is if the correction will not impact the person's health care or otherwise benefit the person.

The organization (or Kinesiologist) may refuse the request if the kinesiologist believes the request is frivolous or vexatious; if the kinesiologist did not create the record and does not have the knowledge, expertise, and authority to correct it; or if the information consists of a professional opinion made in good faith. In other words, corrections are limited to factual information, not professional opinions.

A kinesiologist who refuses to make a correction must notify the person in writing, with reasons, and advise the person that they may:

- prepare a concise statement of disagreement that sets out the correction that the kinesiologist refused to make,
- require the kinesiologist to attach the statement of disagreement to their clinical records, and disclose the statement of disagreement whenever the kinesiologist discloses related information,
- require the kinesiologist to make all reasonable efforts to disclose the statement of disagreement to anyone to whom the kinesiologist has previously disclosed the record, or
- make a complaint about the refusal to the Information and Privacy Commissioner.

Complaints

Every organization must have a system in place to deal with complaints regarding personal information. Clients should also be aware of their right to complain to the Privacy Officer and subsequently to the Office of the Privacy Commissioner if the Privacy Officer is not able resolve their complaint to their satisfaction.

FIPPA (FOIPPA)

Many purposes of FIPPA are similar to those of PIPA but serve the additional purpose of making public bodies more accountable to the public as the government maintains personal information for a greater number of purposes than private organizations typically do. FIPPA protects personal privacy by:

a. giving the public a right of access to records,
b. giving individuals a right of access to, and a right to request correction of, personal information about themselves,
c. specifying limited exceptions to the right of access,
d. preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
e. providing for an independent review of decisions made under this Act.

FIPPA does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public. There are some public

records that FIPPA does not apply to, these include: court records; records of a judge of the BC Court of Appeal, Supreme Court, Provincial Court or a justice of the peace, in addition to many other records of the court, judiciary, court staff, post secondary faculty, teaching assistants relating to teaching or research, public archives, museum archives or records relating to ongoing prosecution, with some exceptions.

Similar to PIPA, a request can be made to obtain access to the personal information about the person, and the public body has a duty to assist applicants to complete their request. A public body must respond to a person's request within 30 days - unless an extension request has been granted for another 30 days, or the request is transferred to another public body, the public body has been authorized to disregard the request, or if the request has been refused.

Similar to PIPA, a request may be denied if the request may result in harm to the person requesting the information, to other persons, negatively impact public safety and law enforcement, compromise a legal investigation, encourage or permit the committing of unlawful acts, or otherwise result in damage or public unrest.

E-Health (Personal Health Information Access and Protection of Privacy) Act

This Act permits public bodies to create electronic health information banks (databases) under order from the Minister. These information banks must be maintained under the control of the healthcare body or the ministry and identify the purposes for the information being collected, where it may be collected from, and any limitations for collection and use.

Health information banks serve a variety of purposes, ranging from identifying individuals who may benefit from a treatment, providing or facilitating treatment or care, identifying who is providing healthcare, managing chronic conditions, health research, managing billing and payment services, government audits, compiling statistics on treatment access and outcomes, public health surveillance and addressing threats to public health.

Requests to access information in these health information banks may be permitted if the purpose for access is authorized under the designation order, such as conducting clinical research on treatment outcomes and evidence-based practice.

PIPEDA

Another privacy law that kinesiologists should be aware of is the Personal Information Protection and Electronic Documents Act (*PIPEDA*). *PIPEDA* is a federal law that governs the collection, use, and disclosure of personal information in relation to commercial activities.

PIPEDA applies only to commercial activities of kinesiologists, such as the sale of products or services at kinesiologists' offices, and the offering of educational sessions.

The following ten privacy principles apply to kinesiologists' commercial activities:

1. **Accountability:** Someone in an organization (the "privacy officer", sometimes called an "information officer") must be accountable for the collection, use, and disclosure of personal information. The privacy officer must develop privacy policies and procedures and ensure that staff receives privacy training.
2. **Identifying Purposes:** An organization must identify the purposes for which personal information will be used at the time that the information is collected.
3. **Consent:** Informed consent is required to collect, use, and disclose personal information except in limited circumstances, e.g., in emergencies or where the law otherwise permits this.

4. **Limiting Collection:** An organization must only collect the information that is necessary to collect for the identified purposes.
5. **Limiting Use, Disclosure, and Retention:** An organization must only use, disclose, and retain personal information that is necessary for the identified purposes and that is obtained with consent. It should be retained no longer than necessary.
6. **Accuracy:** An organization must make reasonable efforts to ensure that any personal information collected is accurate, complete, and up to date.
7. **Safeguards:** An organization must protect personal information with appropriate safeguards in order to protect against loss, theft, unauthorized access, disclosure, copying, use, or modification.
8. **Openness:** An organization must make its privacy policies readily available.
9. **Individual Access:** Upon request, an individual must be informed of the existence, use, and disclosure of their personal information, and be given access to it. An individual can request corrections to the information. Access may be prohibited in limited circumstances such as the privacy of other persons, prohibitive cost to provide it, or other legal reasons.
10. **Challenging Compliance:** An organization must have a complaints procedure relating to personal information and must investigate all complaints.

PIPA and *PIPEDA* are based on the same principles. *PIPA* provides more details about how to achieve those principles.

PIPA does not apply outside BC and doesn't apply to organizations that are covered by PIPEDA, while PIPEDA does not apply in BC except to certain organizations.

Privacy Act (PA)

The purpose of the Canada Privacy Act is to protect the privacy of Canadian Citizens and permanent residents with respect to their personal information that is maintained by the Government of Canada. The Act governs the federal government's collection, retention, use and disclosure of that information. It also provides individuals with a right of access to their personal information. The complement to this Act is the ATIA, briefly explained below.

Access To Information Act (ATIA)

The Access to Information Act ("ATIA") gives Canadian citizens and permanent residents a right of access to general information held by federal government institutions. The Act was implemented in 1983, and it permits Canadians to retrieve information from government archives and files. This Act does not permit Canadians to access the personal information of other Canadians.

Human Rights Code

Every person is entitled to access and receive safe, inclusive and accessible health services in a manner that respects their human rights. The BC *Human Rights Code* requires every kinesiologist to treat clients, potential clients, employees, and others equally, regardless of the person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

If a person feels that a kinesiologist or organization has violated the *Human Rights Code*, the person can complain to the Human Rights Tribunal of BC. If the Human Rights Tribunal finds that a kinesiologist has violated the Human Rights Code, it may order the kinesiologist or organization to pay damages and require a kinesiologist or organization to take action, such as undergo training or

implement a human rights policy.

The Human Rights Tribunal does not have the authority to suspend or revoke a kinesiologist's ability to practice, however a person who believes their human rights have been violated may also file a complaint against a kinesiologist with other parties, such as an employer or professional association (such as the BCAK).

Duty to Not Discriminate

A kinesiologist must not discriminate against any person on any prohibited ground. Examples of discrimination may include the following:

- Refusing to accept a new client for a prohibited reason,
- Refusing to continue treating a client for a prohibited reason,
- Making a treatment decision for a prohibited reason,
- Insulting a client in relation to a prohibited reason,
- Refusing to permit a client with a disability to meet with the kinesiologist with a support person, and
- Making assumptions, not based on clinical observation or professional knowledge and experience, about a person's health or abilities because of their age or another prohibited reason.

It is not discrimination to make clinical decisions or to accept, or refuse to continue, seeing a client for reasons other than prohibited grounds. For example, if a kinesiologist does not have the competency to treat, or continue to treat, a person or if the treatment required is not within the kinesiologist's scope of practice, a kinesiologist should not accept or continue to treat a client.

Other examples of discrimination include:

- expressing personal moral judgments in a manner that is demeaning towards clients' beliefs, lifestyle, identity, or characteristics or the health services that clients are considering,
- relying on stereotypes associated with one or more aspects of the client's identity to determine their needs,
- refusing or delaying the provision of health services because the physician believes the client's own actions have contributed to their condition, or
- promoting or imposing their own spiritual, secular, or religious beliefs when interacting with patients.

To meet the obligations of the Act, the BCAK's Code of Ethics, and to avoid a misunderstanding that could lead to a human rights complaint, kinesiologists should always clearly communicate their reasons for making clinical, treatment, referral, and other types of decisions to their clients. Kinesiologists should always make decisions to refuse or end treatment in good faith and should not use their own lack of competency as an excuse to refuse to provide services to a person if there is no real competency issue.

Kinesiologists are similarly entitled to rely on professional knowledge, judgment, and experience to make comments upon clinically relevant matters that relate to a person's age or gender.

However, it is discrimination to treat someone unequally even if the kinesiologist did not intend to do so. For example, a policy that does not permit any animals in a building discriminates against persons who rely on service animals, even if the policy was not intended to discriminate against anyone. The policy would have to make exceptions for "service animals".

Duty to Accommodate

The *Human Rights Code* requires that persons with disabilities be accommodated unless the accommodation would result in undue hardship, e.g., because of a real risk to health or safety or because of undue cost.

Accommodation must be individualized. Not all persons with the same disability will require or request the same accommodation. Individual accommodations should be discussed with the person where possible and must be provided in a manner that respects the person's dignity and autonomy. However, a kinesiologist is not required to provide the exact accommodation that a person requests if another form of accommodation is reasonable and acceptable.

Examples of accommodation may include the following:

- Permitting a client who uses a wheelchair to reschedule an appointment with less than 24 hours notice if the elevator in the kinesiologist's office is temporarily out of service,
- Offering an extended appointment time to a client with an intellectual, learning, or mental health disability who may need a longer time to explain their symptoms,
- Permitting a person with a disability to enter your premises with a support person, service animal, or assistive device, and
- Communicating in writing if a person with a hearing impairment or other disability requests this.

The duty to accommodate also applies to other prohibited grounds of discrimination.

Human Rights claims in health care often arise when clients believe they have received inadequate care as a result of discrimination

Human Rights Code Scenario 1

Mandeep, a kinesiologist, determines she is not competent to continue to treat her client because the client's health condition has become increasingly more complex. The client is unhappy about Mandeep's decision and believes that Mandeep has always had a problem with him because of his race and religion. Mandeep should carefully communicate her reasons for terminating the kinesiologist-client relationship, so that the client is not left with a misunderstanding that the decision was for a prohibited reason, such as the client's race or religion. Mandeep should also provide an appropriate referral if possible, and in a timely manner.

Human Rights Code Scenario 2

Joseph, a kinesiologist, has a potential new client who has an intellectual disability. Joseph finds it difficult to communicate with the potential client. Joseph should ask how he can help communicate better with the client. If the client has a support person who sometimes provides assistance, the client may ask to bring his or her support person to Joseph's office. Joseph is required by law to permit a support person to accompany a client. However, Joseph should not assume that the client needs a support person and should discuss the issue with the client if possible.

Additionally, if the client does not have the capacity to make treatment decisions, the client may need a substitute decision maker. In any of these circumstances, Joseph cannot refuse to accept the client because of her disability even if it will take Joseph more time for those visits.

Human Rights Code Scenario 3

Valeria, a kinesiologist, has a client who has been diagnosed with a mental illness. Valeria has

been having increasing difficulties interacting with her client. The client has also been rude towards Valeria and staff. While no client has a right to be abusive towards kinesiologists and staff, Valeria may consider whether the behaviour is caused or exacerbated by the person's mental illness. Valeria cannot stop providing treatment or health services because of the client's mental illness, unless Valeria concludes she is not competent to continue treating the client or unless there are health and safety concerns for Valeria or her staff. If Valeria believes a referral to another health care provider with the appropriate competencies to manage the client's health care needs is necessary, Valeria should clearly explain the reasons for the decision.

Valeria also should consider whether any accommodations are possible. For example, a client who is uncomfortable in a crowded waiting room because of his or her mental health disability might be offered an alternative space to wait. There may be other practical measures that the client may be able to suggest that will help the client manage his or her disability-related symptoms.

Accessible British Columbia Act

The Accessible British Columbia Act ("*ABCA*") supports people with disabilities in BC to meaningfully participate in their communities. The Act is designed to change the culture around disabilities and reduce the barriers people with disabilities experience in their day to day lives, for movement, communication, infrastructure, public service employment, along with the delivery of goods and services, and participation in training or employment. The Act applies to the government and other public organizations, such as schools currently, and the government may expand the organizations, subject to legislation in the future.

Currently only kinesiologists who work in public health care facilities are subject to this Act, however the government has plans to amend this requirement and include additional types of organizations in the future.

Kinesiologists working in private practice are not subject to the ABCA requirements, however they do remain obligated to eliminate barriers when appropriate based on the requirements of the BC Human Rights Code.

Eliminating Barriers

A barrier is anything that hinders the full and equal participation in society of a person with an impairment. Barriers can be caused by environments, attitudes, practices, policies, information, communications, or technologies, and affected by intersecting forms of discrimination.

Interaction between ABCA and other laws

The *ABCA* will not necessarily prevail over other legal requirements, such as the occupational health and safety laws of WorkSafeBC under the *Workers Compensation Act.*

A breach of an *ABCA* standard is not necessarily a breach of the *Human Rights Code*. However, it is possible that the *ABCA* standards will be used as a reference point in Human Rights Tribunal hearings.

Customer Service Standard

Implement policies, practices, and procedures regarding the provision of goods and services to persons with disabilities that,

- are consistent with the principles of dignity, independence, integration, and equal opportunity,
- deal with the use of assistive devices and the availability of any measures that make services accessible (e.g., TTY, elevator),
- permit service animals and support persons in public areas of the work premises,
- provide reasonable notice of any temporary disruptions to any accessibility features or services, including the reason for the disruption, the anticipated duration, and a description of any alternate services,
- provide training to employees and anyone else who deals with members of the public or third parties on:
    - the purposes of ABCA and requirements of Customer Service standard,
    - how to interact with persons with disabilities who use assistive devices, use a service animal, or are assisted by a support person,
    - how to use available accessibility equipment and devices on premises or that are otherwise provided to the public, and
    - what to do if someone with a particular type of disability is having difficulty accessing the providers' goods or services.
- establish a process for receiving and responding to feedback about accessibility and make information about the process readily available to the public:
    - people must be permitted to provide feedback in person, by telephone, in writing, or electronically, and the
    - process must specify actions that will be taken if complaint is received.

Information and Communication Standard

The Information and Communication Standard requires organizations to ensure that information available to the public, and the organization's communications with the public, are accessible or can be made accessible.

Employment Standard

The employment standard requires employers to provide an accessible workplace. This includes the providing the following:

- public notice regarding accessibility practices in hiring employees,
- accessible workplace information, and
- on request, any individualized emergency response information to employees who require this individualized information because of a disability.

Built Environment Standard

The built environment standard relates to exterior paths of travel (e.g., accessible entrances) and applies to the construction of new buildings and to major renovations.

ABCA Scenario

> *Xavier, a kinesiologist, works in a long-term care facility. Xavier's employer needs to ensure that Xavier is aware of the regulation and is appropriately trained to report any issues related to the work environment that may contravene the ABCA customer service standard. Xavier's organizations must have an accessibility plan for providing accessible information, communications and customer service. The employer is responsible for ensuring that training is provided to Xavier regarding the accessibility standards (e.g., that support persons, animals or devices are allowed on the premises). Xavier should also be aware of how the information, communications and employment standards will apply to their job position.*

Public Health Act

The Public Health Act (PHA) supports key public health objectives to promote public health, disease and injury prevention. The Act deals primarily with prevention and control of communicable disease, health promotion, protection, injury prevention, poisonings and threats related to bioterrorism, such as the deliberate contamination of food or water supply resources. The PHA is not the only provincial Act which supports health initiatives. The PHA, along with the *Drinking Water Act, Food Safety Act, School Act, Tobacco Control Act, Tobacco Damages and Health Care Costs Recovery Act,* and the CCALA which was discussed previously, support public health in BC.

The PHA establishes the role of BC's Chief Health (Medical) Officer, who is appointed by the government and the public health services provided by the various provincial health regions through the public health offices. The roles of the Office of the Public Health Officer include:

- Development and implementation of standards for communicable disease prevention and control,
- Responding to environmental health hazards and public health emergencies,
- Conduct health inspections on businesses and issue orders for quarantine and isolation when appropriate (such as inspecting private gym facilities to ensure proper sanitation and cleaning amenities and policies are in place),
- Monitor for hazardous environmental exposures, such as high mercury or lead levels in water or food and beverage products,
- Enabling health officers to order groups of people to take prevention measures to control or contain a health hazard,
- Requiring public health planning hearings,
- Regulating operations, activities or conditions that could pose a health hazard or health impediments i.e. a threat to long-term population health, and
- Administrative tasks related to intergovernmental relationships with and clarification of responsibilities of local governments regarding public health and modernization of enforcement, sentencing, and penalty provisions.

Kinesiologists working in personal services establishments are subject to the Public Health Act and the guidelines for personal establishments, including the requirements for appropriate infection prevention and control procedures.

Personal Service Establishments

A personal service establishment (PSE) in British Columbia is a business in which a person provides a personal service to or on the body of another person. This includes personal wellness, hair, skin and nails, as well as body modification services, such as:

- Health/medical spa services, including personal training, kinesiology, massage (unregulated) types of massage), yoga, Pilates, etc.,
- Body and ear piercing, tattooing (incl. removal),
- Aromatherapy, reiki, beauty parlour services, face painting, electrolysis, esthetics, hair/barber services, waxing, etc.,

Guidelines for personal service establishments exist to address the use and diversity of personal services and to promote a healthy means for conducting these services. The goal of the guidelines is to give guidance on the prevention of health hazards. The guidelines establish facility design criteria, the

requirement for hand-washing stations, instrument/equipment cleaning stations, operations, including equipment types and standards for cleaning and/or, laundry and infection prevention and control practices, training of staff, hazardous materials exposure-response procedures, record keeping, cleaning, disinfection and sterilization, and monitoring. Site inspections may be conducted by a public health officer or nurse.

Personal services covered under the Public Health Act exclude services reserved for members of a regulatory college under the Health Professions Act. These include acupuncture, chiropractic, registered massage therapy, physiotherapy, cosmetic surgery, laser eye surgery, physician services and dental care.

British Columbia Centre for Disease Control (BCCDC)

The BCCDC is a program of the Provincial Health Services Authority, providing provincial and national leadership in disease surveillance, detection, treatment, prevention and consultation. It monitors the health of the population, designs and supports public health programs to prevent illness, protects against health risks, and promotes the well-being of people living in B.C.

The programs and services of the BCCDC include:

- BCCDC Public Health Laboratory services
- Clinical services for tuberculosis and sexually transmitted infections
- Communicable disease control
- Disease surveillance, epidemiology, data and analytics
- Drug and Poison Information Centre
- Environmental health
- Harm reduction and response to substance use
- Immunization programs
- Indigenous health
- Population health, health promotion and the prevention of chronic diseases and injuries
- Preparing for, and responding to, health threats

Public Health Act Scenario

Patrick, a kinesiologist, plans to open an athletic training and rehabilitation centre in his local community. He has obtained a municipal business license and insurance coverage for the business contents. Patrick is unaware that his business is also regulated under the Provincial Health Act as a personal service establishment. One of the services Patrick plans to offer is blood lactate threshold testing, which requires obtaining blood droplet samples from the client by puncturing the small blood vessels in the dermis, which is then applied to a test strip and is inserted into a test meter that provides a reading on the level of lactate circulating in the blood stream at a given time. This procedure is considered invasive, as the lance punctures the dermis and, if done improperly, can result in infection if proper sterile procedures are not followed. It can result in contamination of the immediate environment if the person from which the blood sample is drawn carries a contagious blood borne disease, such as Hepatitis B, which if inappropriately handled or disposed of, can result in infection of the kinesiologist or others.

In this case, the procedure is not being conducted for health care purposes and does not fall under Health Professions Act Restricted Activities but does fall under the authority of the PHA and the Public Health Department. Prior to Patrick offering this service to clients, he must contact the local Public Health Office and advise them of his intent to perform this activity and

the Public Health Officer or Public Health Nurse will inspect the premises to ensure that proper infection prevention and control procedures are in place and are being followed.

Workers Compensation Act

The Workers Compensation Act (WCA) establishes the occupational health and safety legislation and the legal framework under which WorkSafeBC (WSBC) provides services.

WorkSafeBC

WSBC is an independent provincial agency (crown corporation) with three main mandates:

- compensation (lost wages),
- prevention, and
- insuring employers.

It establishes and oversees the delivery of the benefits, medical care and rehabilitation services provided to individuals who suffer workplace injuries or contract occupational diseases.

The primary role of WSBC is to promote the prevention of workplace injury or illnesses. It consults with, and educates, employers and workers about safe work practices and enforces the Workers Compensation Act and the occupational health and safety legislation. In the event of work-related injuries or diseases, WSBC is mandated to provide return-to-work rehabilitation, compensation, health care benefits and a range of other services to injured workers.

WSBC legislation requires;

- Employers who hire workers (employees) to register for WorkSafeBC coverage and pay the required premiums,
- Employers and workers to cooperate with each other and with WorkSafeBC to deliver a timely and safe return to work following a worker's injury,
- An employer to hold a position for an injured employee for two years following the date of injury,
- An employer not to discriminate regarding employment, including a duty to take all reasonable steps to avoid a negative effect based on the protected grounds for discrimination,
- Employers to implement health and safety standards to protect workers from hazardous materials and workplace environments, including mitigating risks in work environments that predispose a worker to contraction or development of disease or injury.

WorkSafeBC Scenario

Manuel has been employed as a kinesiologist for the past 4 years and recently opened his own rehabilitation clinic. He has received a lot of referrals recently and has decided to hire another kinesiologist as an employee to help him out, as there are too many clients for him to treat on his own. He purchased mandatory WorkSafeBC coverage for his employee, which will ensure that the new employee is covered in the event they are injured or contract a serious contagious illness while at work. Following the purchase of WorkSafeBC coverage, a WorkSafe employee contacted him to inform him that he must implement policies and procedures to protect his employee from workplace safety hazards, including airborne, droplet and contact transmission of infectious agents, along with other preventative measures to prevent workplace injury.

Manuel was not prepared for this additional requirement and was not sure how he will continue to work with his clients and also perform the additional tasks required to meet WorkSafeBC standards. Manuel also realized that he must supply sterilizing cleaning solutions, N95 disposable respirators, nitrile gloves, gowns and face shields required for use with clients who are known to have a contagious disease or infection, such as Methicillin-Resistant

Staphylococcus Aureus (MRSA) which can be life-threatening to some people should MRSA contamination occur and be picked up by another client, his employee or himself.

Business Law

There are several ways in which kinesiologists can practice in BC. Basic knowledge of federal and provincial laws related to labour standards, business law, and taxation are essential to maintain compliance with the laws and for their own protection. Kinesiologists need to know and understand worker classifications (e.g., employee, contractor, subcontractor) and the business and tax responsibilities, liabilities and benefits for each classification. If operating as a contractor, subcontractor, or business owner, Kinesiologists also need to know and understand the different business structures available (e.g. sole proprietorship, corporation, and partnership) and the business and tax responsibilities, liabilities and benefits of each structure. Understanding the laws, regulations and requirements of working in, and on, a business is important to success. Obtaining professional advice from a competent lawyer and chartered professional accountant (CPA) will ensure kinesiologists have the knowledge to be compliant with applicable laws, taxes, employment agreements, and/or service contracts.

Worker Classification (Employment Type)

Employee

A kinesiologist hired as an employee must personally do the work which has been assigned to them and cannot hire helpers or assistants without the express consent of the employer. Kinesiologists hired as an employee have rights which are defined under the *Employment Standards Act* when working for an organization that does business only in BC and under *Part III of the Canada Labour Code* if working for an organization that has operations across Canada and is federally incorporated. The employment standards in each province or territory specify the employment conditions for hours of work, payment of wages, leaves, vacation, holidays, notice of termination, severance pay and many other requirements. These standards apply to full-time, part-time, and casual workers.

As an employee, a kinesiologist will enter into an employment contract with an employer and the employer is required to pay the employee at regular intervals. Employees are provided training and tools to perform their jobs. Employers can dictate employees' work schedules, location and job directives. Employers must withhold statutory deductions for Federal income tax, employee contributions to Employment Insurance premiums (EI) and Canada Pension Plan (CPP) contributions from the wages paid to the employee at each payment interval. Other amounts may be deducted by the employer for health benefits, disability insurance, pension plan contributions on either a mandatory or optional basis. In BC, most employees are subject to minimum wage legislation regardless of how they are paid – hourly, salary, commission or on an incentive basis. If a kinesiologist has entered into an employment agreement and the employer is not withholding the required deductions, they should discuss this with their employer, as it is most likely there has been miscommunication, and they are being hired as an independent contractor. Vacations and statutory holiday pay are required by the BC Employments Standards Act – employers must meet the minimum requirements of the BC ESA.

Overtime pay – An employee who works extended hours during a given day, or a week will receive overtime pay. They must be paid time-and-a-half for any time worked over 8 hours in a day, up to 12 hours – even if the employee does not work more than 40 hours in a week. An employee is paid double time for any time worked over 12 hours during a day. Employees who work more than 40 hours a week are also required to be paid overtime. An employer must pay for overtime, even if an employee agrees not to claim overtime pay. Overtime must be provided to an employee regardless of how they're paid – hourly, monthly salary, annual salary, or commission earnings. An employee under an averaging agreement or variance has different rules for calculating overtime. There are

also special rules for scheduling and overtime for managers, commission salespeople and certain industries, such as agriculture and high technology.

Employee Liability & Insurance Coverage – Employers in BC are vicariously liable for their employees. The law holds employers responsible for the actions of their employees or agents and that means if an employee causes harm to another person while carrying out their job duties, the employer can be held liable for the damages, i.e., for the work and actions of their employees. Two conditions must exist for a court to consider vicarious liability on the part of an employer. First, there must be an employee-employer relationship between the wrongdoer and the employer. Secondly, the wrongdoing must have been committed by the employee in the course of their employment.

Some employees are hired as a 'contract employee' with specific roles and for a defined time period, they are still covered by applicable labour laws and statutory payroll deductions and are distinct from those hired as independent contractors.

Independent Contractor (including sub-contractor)

A kinesiologist hired as an independent contractor or sub-contractor ("contractor") is not covered by the Employment Standards Act. A contractor is a person (or organization) that is hired to provide specific services to an organization. An independent contractor by definition has the opportunity to earn profit or experience a loss. Contractors typically provide their own tools to complete their work, do not receive training from their employer, and are not subject to withholding taxes and contributions to CPP or EI. This does not mean that a contractor does not have to pay income tax or CPP contributions to the government, just that as the contractor, they are responsible for paying the amounts due themselves, either when prescribed by the government or annually when filing their income tax for the previous year. An independent contractor is not required to participate in the Employment Insurance (EI) system as independent contractors are deemed to be self-employed, in that they are in business for themselves.

The difference between a contractor and a sub-contractor is typically related to the services they provide. A *contractor* will provide a range of services required by an employer, while a *sub-contractor* will provide specific services. Kinesiologists may be hired in either capacity, however most are commonly hired to perform specific tasks. A typical scenario is where a kinesiologist is hired as an independent contractor by a rehabilitation clinic to provide specific services funded by third parties, such as ICBC, private insurers or benefits providers. The contract entered into will address things such as remuneration (fee for service - hourly or percentage of third-party fee), invoice submission frequency, scope of contract services (e.g. therapy skills required, preparation of treatment plans, reports and record keeping, including who will be the custodian for the client records), along with any requirements for professional liability insurance. It is important to remember that contractors do not receive vacation pay or statutory benefits.

Contractors and sub-contractors will submit invoices for payment to the employer, itemizing the services provided, dates of service, fee for service, and bill for applicable excise (sales) tax. It is the requirement of the (sub) contractor to maintain correct and accurate business and financial records in accordance with the Income Tax Act. Again, (sub) contractors do not have income tax or government contributions (CPP, EI) deducted by the employer and they do not receive a T4 slip from the employer. If there is a long-standing contract or agreement in place, a company may provide a T4A slip to a (sub) contractor, which shows self-employed earnings only, however employers are not obligated to do this.

As a (sub) contractor, a kinesiologist is required to collect excise taxes on the services they provide to residents or organizations in each province or territory (GST in BC, GST or HST as is applied in other provinces) unless the services are exempt or zero rated. Health care services provided by a regulated health care profession are typically exempt from excise tax. Kinesiology is not a regulated

health profession in BC and, as such, kinesiologists are not exempt and must obtain a business number, collect and remit GST, unless they are otherwise exempt under the small supplier regulations.

Business Structure

There are three common types of business structures in Canada under which a business may operate -- Sole proprietorship, Partnership and Corporation. A fourth type, Co-operative, also exists but is not frequently encountered in professional practice and will not be discussed here. In BC, the *Business Corporations Act* establishes the type of structure and the requirements of each.

i. *Sole Proprietor*
   A sole proprietorship is a non-registered, unincorporated business run solely by one individual kinesiologist, with no distinction between the business and the owner (no separate legal entity). They provide services directly and do not have others working for or with them in a formal way and the kinesiologist is the sole decision maker. Sole proprietors report their income and pay their taxes with their other personal income. Sole proprietors have unlimited liability for the services they provide, necessitating Commercial General Liability Insurance in addition to Professional Liability Insurance and other insurance to protect the person and business from liability suits brought in relation to the services provided.

ii. *Partnership*
   A partnership is a legal arrangement that allows two or more people to share responsibility for a business which provides services and/or goods. Each partner contributes money, property, labour and skills and shares in the profits and losses of the business entity reports and pays their taxes with their personal income. Business liability is shared between the partners and each party (kinesiologist) must maintain separate professional and other liability insurance to protect the business and themselves from loss and/or hardship.

iii. *Corporation*
   A Corporation is a legally established entity that can enter into contracts, own assets and incur debt, as well as sue and be sued—all separately from its owner(s). It is operated by individuals, stockholders, or shareholders, with the purpose of generating profit. A corporation is taxed separately from that of its owner's (or owners') personal income. Corporation owners are not held personally liable – only the corporation and its assets are liable. The corporation must obtain liability insurance.

The structure that best aligns with your business plans will depend on a variety of factors, including where you plan to provide services: only in British Columbia; primarily in British Columbia but may expand nationally or internationally; or across Canada and/or internationally, along with other factors. It is important for kinesiologists to consult with professionals, such as a chartered professional accountant (CPA) and a business lawyer during the decision-making process, and for guidance setting up their businesses correctly.

Health Professions Corporations

In BC, many regulatory Colleges establish requirements for registrants who want to incorporate their business as a Health Professions Corporation (HPC), primarily for tax purposes. In addition to other legal requirements, Colleges may oversee the naming and ownership of Health Professions Corporations and require that registrants submit additional filings annually with the College. Once the HPC is established, it will be overseen and subject to oversight and the regulations imposed by the College for ethics and professional conduct.

As Kinesiologists are not regulated in BC, there is no regulatory College and they are not required to follow the Health Professions Act requirements related to Health Professions Corporations. Kinesiologists cannot establish a Health Professions Corporation but they can, of course, incorporate their business (or set up in one of the other business structures). Additional information on practice

expectations and regulations for regulated health care providers can be found in the Appendix – it is important for Kinesiologists to be aware of those regulations as they work in a health care environment that includes both regulated and unregulated health professionals.

Municipal Licensing

A municipal business licence is granted and regulated by a city or municipality under the *Local Government Act when* there is a licensing bylaw in place. A business licence may be required if a kinesiologist operates their own business at a commercial business premises within a city or municipality or if they operate a mobile business from their personal residence, even if they do not provide client services at their residence or in the same city or municipality where they reside. The fact that a kinesiologist performs business related office work out of their home is enough to require a business license. These laws apply to those who are independent contractors or sub-contractors providing services to another business. Kinesiologists may also require multiple municipal business licences if they provide services in more than one city or municipality as a mobile kinesiologist.

The purpose of municipal licensing is to set conditions for the premises in which a kinesiologist operates, as well as oversee public health matters, such as sanitation. For example, a bylaws officer or local fire prevention services officer may inspect a kinesiologist's office to ensure that maximum occupancy levels are being complied with, or to ensure that fire prevention measures and equipment are in place to respond to a fire.

A municipal licensing body does not oversee professional qualifications or professional conduct.

Of note, if a health professional is regulated, the regulatory College may require a higher standard or different standard than the municipality does. If a profession is regulated, the College's standard must always be followed by the health practitioner. The *Health Professions Act* is a provincial statute; it takes priority over a municipal by-law.

Municipal Licensing Scenario

> *Daniella, a kinesiologist, runs a small kinesiology business and has three employees working for her. She has WorkSafeBC coverage and health and safety policies in place to help protect her employees from potential workplace injury or disease transmission. A bylaws officer from her municipality recently contacted Daniella to advise her that she was required to have a municipal business license and have her premises inspected. Daniella purchased the business license, and on inspection of the premises, it was found that she did not have the required fire protection equipment and did not have the required emergency signage posted at key locations throughout her business to assist employees and clients to safely exit the building in the event of a fire or other emergency situation. Daniella installed the required signage, fire extinguishers and had her fire protection and smoke detection system inspected to ensure it was operating properly.*
>
> *Daniella's previous failure to recognize and comply with the business licensing and inspection requirements could have presented a significant risk to Daniella, her staff and clients if she did not have the required safety equipment and the fire protection system was not properly operating. Should there have been a fire or emergency situation in which clients' or a staff member could not safely exit the premises without injury, Daniella would have been at risk of a legal suit for personal injury or death of a third-party.*

Conclusion

If a legal issue arises, kinesiologists should review any legislation that may apply, discuss the issues with colleagues and their professional association and, if applicable, check with regulatory bodies

overseeing the enforcement of the legislation to determine the regulator's expectations. It is also in a kinesiologist's best interest to obtain professional legal advice in complex situations where multiple laws intersect and impair the ability of the kinesiologist to be adequately informed. Colleges and the BCAK are not permitted to provide legal advice, which highlights the importance of seeking professional legal advice from a lawyer.

BCAK Standards

In the absence of professional regulation of kinesiologists in BC, the BCAK has implemented bylaws, policies and practices designed to emulate those a regulatory college would be likely to impose. The standards, which are found in the BCAK Bylaws, Code of Ethics, and detailed in the Professional Practice Standards and related documents, are intended to assist MEMBERS in maintaining compliance with the applicable laws and understanding their societal obligations when practicing as a kinesiologist to an acceptable standard. The primary purpose of the standards is to ensure public trust in the competency and practices of BCAK Practicing and Non-Practicing MEMBERS to act in the best interest of their clients.

The BCAK, through its Bylaws, is permitted to take action against a MEMBER for misconduct, incompetence, and incapacity if a public complaint is filed with the BCAK and the MEMBER is found to have significantly breached a standard or have been convicted of a criminal offense, whether knowingly or unknowingly. The BCAK cannot stop a person from practicing kinesiology, however it can discipline, suspend, or expel a MEMBER from the association. The concepts of ethics and standards are each different in their role and purpose. The following sections of this guidebook review each of them.

Code of Ethics (Conduct)

Professions, whether regulated or unregulated, have ethical principles to guide their registrants or members, as they may referred to, and the BCAK is no exception. Some of the more common ethical principles are to always be honest, to respect the confidentiality of a client, to treat clients with sensitivity, to maintain one's professional competence, and to allow clients to make informed choices as to the health care they receive. Similar to the BCAK, many other unregulated health professional associations have developed a Code of Ethics (Conduct) for their members.

Compliance with the BCAK Code of Ethics and the Practice Standards is a requirement of membership. The Code of Ethics establishes broad guiding principles for good moral character, including honesty, integrity, and professionalism. The principles are often set out as positive statements (e.g., a kinesiologist will be honest). This is different from Professional Practice Standards and conduct requirements which set the minimum requirements kinesiologists must meet to avoid discipline (e.g., a kinesiologist will not issue a false or misleading document). Many principles of the Code of Ethics also encourage kinesiologists to continually improve (e.g., one can always try to be more sensitive and inclusive, by avoiding making assumptions or stereotyping).

Again, the purpose of the Code of Ethics is to guide and encourage the kinesiologist to assess and reflect on their actions, thoughts, and expressions in the context of existing and expected changes in societal standards. If a kinesiologist follows the principles of the Code of Ethics (e.g., being honest), they will avoid engaging in professional misconduct (e.g., they will not issue a false or misleading document) and they will not breach the minimal standards specified in the Professional Practice Standards.

Ethics Scenario 1

Shawn, a MEMBER, is always respectful to his clients, in a formal way. However, he often says "My God" to express surprise. The phrase has no consequential meaning to him, and no one has expressed concerns about his use of the term in the past. One of his clients, Mansour, has shared that he is very religious. Whenever Shawn says, "My God", Mansour flinches a bit. Shawn notices and asks Mansour if his use of the term "My God" bothers Mansour. Mansour states, 'actually it does'. Shawn makes a point of not saying "My God" anymore in front of Mansour. After discussing the incident with a colleague, Shawn decides that the ethical thing for him to do is to stop using "My God" as an expression of surprise whenever he is with a client because Shawn cannot tell in advance who will be offended.

Ethics Scenario 2

Amardeep, a MEMBER, typically wears disposable gloves when treating clients for the first time but does not continue with the procedure for subsequent client sessions if she feels confident the client does not present a risk of spreading germs. One of her new clients (Jasmeet) sees her finishing up treating the previous client while not wearing gloves, then puts on gloves prior to working with Jasmeet. Jasmeet see this and feels uncomfortable and wonders why Amardeep put gloves on for her and did not for the previous client. Jasmeet doesn't think she exhibits any signs or symptoms of infection and asks Amardeep why she is being treated differently than her previous client. Amardeep realizes at that point that she is not being transparent or consistent in her use of IPC measures with clients, and explains her situation, apologizes, and removes the gloves. She further reassesses her actions after the session and realizes that she needs to be more consistent with all her clients, have set policies and not be, or appear to be, discriminatory regarding the use of gloves and other IPC equipment. She decides to add additional information to her client information handout that each client receives prior to their first in- person session, and to then confirm with each client during the intake session, the purpose of why she may use IPC measures with a given client.

Professional Practice Standards

Professional practice standards describe the way in which health care professionals practice their chosen profession. For example, it is a professional standard for kinesiologists to always assess a client before treating them.

Often the details of the practice standard are not written down by the BCAK. For example, the BCAK may not have a document describing exactly how a kinesiologist is to assess a client. This omission of details recognizes that the standard applied by the kinesiologist will change with the circumstances (e.g., the answers the client provides to the kinesiologist's intake interview questions will change how the assessment is conducted and what tests the client will be asked to perform). Professional standards are learned through a kinesiologist's academic education, professional reading, work integrated learning and practice experience, and through one's discussions with other kinesiologists. Professional standards are dynamic and evolve with changes in societal standards (including laws) and perceptions.

The BCAK maintains various written publications that discuss professional standards. The BCAK refers to these documents collectively as the 'Guiding Documents'. They are similar to the documents published by a health professions regulatory College. These publications can have different names (e.g., Professional Practice Standards, Standards of Practice, Guidelines, Policies, Position Statements, Codes, Competencies) depending on their context and purpose. The purpose of these publications is to remind kinesiologists about the fundamental principles underlying the professionalism that is essential to practice in an effective, safe and ethical manner. These publications cover a wide range of topics and are found on the BCAK's website. They are accessible to both the public and MEMBERS to review, inspect and inquire on. These publications are updated and amended as the related laws, and the

needs of MEMBERS and the public, change over time, including when there is a need for greater clarity or direction. While professional standards are not "law" in the same way that a statute or regulation is, failing to comply with a published standard often leads to a violation of law or will result in professional misconduct.

Professional Practice Scenario 1

Xian is a MEMBER and has been working as a kinesiologist for two years. She has established herself in her community as a kinesiologist who cares about her clients and helping them improve their health. When Xian first sees a new client, she obtains an initial signed consent from the client to provide assessment and treatment services and follows up by obtaining additional consent either verbally or in writing when necessary. Xian has been referred a new client, Sarah, who during her first session completed a treatment consent form and asked Xian if she could invoice her extended-health benefits provider for her sessions as she had $500 in benefits coverage for kinesiology. Xian indicated that she would follow up with the benefits provider to confirm her coverage and that she would bill the insurer directly for her sessions. Xian gets busy and neglects to contact the benefits provider to confirm that she can bill for Sarah's treatment. At the end of the month, Xian submits an invoice to the benefits provider for Sarah's treatment sessions. When Xian receives payment, she notices that the payment is less than what she billed and calls the benefits provider to inquire. She is advised that the benefits provider pays a maximum of $75 per session and Xian billed $100, and that the payment was adjusted to reflect their maximum amount allowed. Xian is upset that she did not receive full payment and decides to bill the client for the outstanding amount. Sarah is very unhappy to receive this invoice and does not believe that she should have to pay it and complains to the BCAK.

Did Xian breach any of the BCAK's Professional Practice Standards?

Answer: Yes, she breached several standards. (1) Xian failed to confirm that the insurance provider would cover Sarah's treatment as she had indicated she would do. (2) Xian also failed to obtain informed consent from Sarah regarding her billing policies and explain that if a benefits provider was covering the cost of treatment, any amounts over and above what the benefits provider paid would be her responsibility. (3) Xian did not confirm her standard session fee with her client.

Professional Practice Scenario 2

Mark, a MEMBER, has been hired to work in a Chiropractic office to assist the chiropractor with treatment of their clients and to see insurance clients independently. The chiropractor has been treating a client injured in a motor vehicle accident and wants the client to also do exercise therapy treatment and recommends to the client that they contact the insurer for approval. The client obtains approval for treatment and books an appointment with Mark. Prior to the first session, Mark refers to the chiropractor's chart notes and the assessment results which included range of motion, a posture assessment and specialized other tests specific to chiropractic care but does not include any tests for current functional abilities. During the first session, Mark immediately begins prescribing exercises for the client, which are explained to the client and the client agrees to. During the third exercise of the session, the client is carrying a 40lb box 20 feet across the room and during the second repetition, the client drops the box on their foot, reporting intense back pain and injury to their leg from dropping the box.

Did Mark breach any of his legal requirements, including the BCAK's Professional Practice Standards?

Yes, he likely did. (1) Mark was not working under the supervision of the chiropractor when providing treatment – he was working as an autonomous health care professional. Failing to perform an appropriate assessment is a sign of incompetence and as a BCAK MEMBER, a kinesiologist is required to conduct an appropriate assessment of the client and obtain informed consent prior to treatment. The assessment allows the kinesiologist to assess and determine whether kinesiology treatment is appropriate for the client and what those treatment parameters should be based on the assessment results, including initial loads for strengthening and functional exercises. By not completing an assessment, the kinesiologist is also prevented from providing alternative treatment recommendations or from determining whether they are competent to treat the client, based on their current health and necessary treatment. (2) The absence of assessment results also means that the kinesiologist had no basis for obtaining informed consent, as they were not able to appropriately explain the potential benefits and risks of the proposed treatment.

Most professional practice standards are based on the laws kinesiologists must comply with.

Enforcement of Standards and Handling of Complaints

BCAK, in the absence of regulation, works with MEMBERS to establish standards that help ensure they act appropriately when providing professional services and interacting with the public. The BCAK can discipline, suspend or revoke BCAK membership if a MEMBER substantially breaches the minimum standards. Again, it is very serious for a kinesiologist to engage in professional misconduct and brings disrepute to the profession, other MEMBERS, and kinesiologists in general when it occurs.

The BCAK does not have the authority to prevent a kinesiologist from practicing kinesiology, as it is not recognized or delegated by the BC Ministry of Health to regulate the profession in BC. The principal goals of enforcing professional standards are to:

- educate MEMBERS and other kinesiologists on appropriate professional conduct,
- inform MEMBERS when they have, or are likely to have, breached laws or normal ethical standards,
- try and ensure MEMBERS and other kinesiologists do not bring disrespect to the profession, to other MEMBERS and kinesiologists,
- discipline, suspend or expel members who:
    - significantly breach standards without regard for client safety,
    - repeatedly breach the same standard on multiple occasions after they have been informed of the breach and its cause, or
    - refuse to change their behaviour, improve their knowledge/skills or implement appropriate policies and procedures when client wellbeing is put at risk.
- improve stakeholder respect for the profession, the BCAK and its MEMBERS.

Assessment and Investigation

When assessing complaints, the BCAK employs procedural fairness standards. Fairness standards include:

- fair processing standards that require participation and being heard, impartiality, and integrity,
- fair decision-making standards that are based on lawful and fair rules, reasoned decision making and equity, and

- fair service standards – that include accessibility, responsiveness and accountability[1],

An investigation of a public complaint regarding a breach of standards typically includes assigning a "review panel" to review the complaint allegations, which will also review the response to the allegations from the MEMBER, other available evidence, the kinesiologist's client records when available (requires client consent and provision), other relevant documentation, and laws and standards. As the BCAK is not entitled to requisition records (which a regulatory College can do), a client filing a complaint would be required to supply or provide access to their applicable health care records and provide consent for BCAK use those records in the complaint review process. MEMBERS must understand that it is appropriate and often necessary for the MEMBER to provide a factual and comprehensive written statement that provides the clear reasoning behind their decision-making process that explains the circumstances that led to the complaint allegations. This process also amplifies the importance of maintaining comprehensive and clear client records, detailing objective, subjective, assessment, as well as planning processes and ongoing consent for assessment and treatment.

Professional Misconduct

Unprofessional conduct is termed 'professional misconduct' and is conduct that falls below the minimum requirement of safe and ethical practice. The term includes sexual misconduct, unethical conduct, infamous conduct, and conduct unbecoming a health care professional. Unethical conduct includes situations where a conflict of interest exists or, in some cases, where it is perceived to exist. The requirements for the conduct of BCAK MEMBERS are embedded in the BCAK's Bylaws and further detailed in its standards.

Conflict of Interest

A conflict of interest arises where a kinesiologist does not take reasonable steps to separate their own personal interests from the interest of clients. Where the personal interest would reasonably affect the kinesiologist's professional judgment, a conflict of interest exists. For example, if a kinesiologist refers a client to a health store owned by their health care practitioner's long time good friend to purchase products, a reasonable person will question whether the kinesiologist recommended that product because the client needed it, or to increase the sales of the friend's business.

There is no need for proof of an actual conflict of interest because this would require reading the kinesiologist's mind (to know if they were influenced by the conflicting interest). Instead, one looks to what a reasonable person might conclude from the circumstances regardless of what is actually going on in the mind of the kinesiologist. A conflict of interest can be actual, potential, or perceived. In that way, conflict-of-interest rules are intended to prevent concerns from arising.

A conflict of interest can be direct or indirect. For instance, an improper benefit conferred on a close relative (i.e. parent, grandparent, child, spouse, or sibling) of a kinesiologist can put the kinesiologist in a conflict of interest.

Some common examples of conflicts of interest are as follows:

- Splitting fees with a person who has referred a client,
- Receiving benefits from suppliers or persons receiving referrals from the kinesiologist,
- Giving gifts or other inducements to clients who use the kinesiologist's services where the service is paid for by a third party (e.g., insurance),
- Allowing an employer to interfere with professional decisions (e.g., agreeing to allow an employer to schedule client appointments of a shorter duration than is required by the third-

[1] Fairness By Design – Administrative Fairness Self-Assessment Guide; BC Ombudsperson Special Report No.52 December 2022

party payer),
- Using or referring a client to a business in which one has an undisclosed financial interest, and
- Selling a product to a client for a profit without disclosing the mark-up.

Many of the examples depend on the reasonableness of the circumstance in determining if a conflict of interest exists. Health care practitioners should always ask themselves – would another objective and reasonable person think that there is a conflict of interest, given this circumstance? For example, it probably would be appropriate to give a client a small calendar to record their future appointments even if an insurance company pays for the treatment. However, giving the client a new pair of expensive running shoes is unreasonable.

Most conflicts of interest are prohibited outright, however there are certain circumstances where taking certain safeguards could remove the concern. In the example above about referring a client to a health store owned by the health care practitioner's spouse to buy a product, such a referral would not raise concerns if the practitioner did the following:

- Disclose the nature of the relationship with the health store (e.g. "my spouse owns the store"),
- Provide alternative options (e.g. "here are three other places you could get the product I am recommending for you"), and
- Reassure the client that choosing another store will not affect the client's care (e.g. "You are free to choose any of the places to get the product; you will still be welcome here as my client").

Many BCAK publications will assist MEMBERS in recognizing how to avoid engaging in professional misconduct. These publications are available on the BCAK website in the MEMBERS Resources section.

Professional Misconduct Scenario 1

Wendy, a MEMBER, works in the same clinic as her co-worker Mary, who is also a MEMBER. Wendy feels that Mary speaks too loudly and pushes her clients more than she should. Wendy mentions that in speaking loudly she is disrupting other practitioners in the clinic. Mary tells Wendy that she is sorry for disrupting her, and any of her clients, and that she will try to keep her voice down or lower it out of respect for the rest of the practice. But Wendy feels this is a serious problem, and that Mary should be reported to the BCAK for professional misconduct because she cannot stand loud noise during her sessions with her clients. She wants the very best atmosphere created for her clients and thinks loud talking is completely unprofessional. Is Wendy correct in saying this would be professional misconduct according to the regulations?

Probably not. Wendy holds a particular view about Mary's level of voice that may not be consistent with the rest of the profession. Unless the conduct persists, and unless it is so loud that most neutral observers would agree that Mary is disrupting the rest of the office, it is not professional misconduct. While it is courteous for Wendy to raise the issue with Mary so that they can come to a reasonable resolution, professional misconduct is not meant to apply to uniquely personal views of unacceptable behaviour. Instead, it is intended to be based on conduct that is, by a general consensus in the profession, considered unacceptable.

Professional Misconduct Scenario 2

Kaylee, a MEMBER, wants to stop treating a client because the client has stopped paying, despite Kaylee reminding the client that their account has been arrears for more than a month. Kaylee reads an article in the BCAK's Professional Practice bulletin suggesting that clients should be given a reasonable amount of time, usually one to two weeks, to find a new kinesiologist before treatment is withdrawn for the client in this type of situation. Kaylee cannot see why she needs to see a client who is not paying for her services and does not follow the recommendation. She advises the client over the phone that she is cancelling the current day's

session and all remaining sessions that have been pre-booked for her and will not see the client again until the account balance is paid. Upon Kaylee discontinuing the client's treatment, the client experiences increased pain and subsequently misses ten days of work before the client can arrange for another kinesiologist to take over the necessary treatment to help her to continue working.

The client complains to the BCAK. Upon investigating the complaint, the BCAK learns that Kaylee failed to inform the client of her policies regarding payment for treatment or her cancellation/missed appointment policies and did not obtain a signed informed consent regarding the policies. Kaylee effectively abandoned the client who was in pain without giving the client adequate time to find another kinesiologist. The BCAK cautioned Kaylee, informing her that her conduct was unprofessional. Just because Kaylee was not paid, did not remove her duty to the client, who was experiencing pain, to continue the necessary treatment.

Professional Misconduct Scenario 3

Daniel is a MEMBER and has a busy and successful practice. Recently, he began using a new "daily back protection" video. Clients have responded quite well to it. Daniel calls the company to provide them his feedback from his clients, to say that he likes using the product, and to order copies. The company asks him if he would like to be in a new advertising campaign they are going to put into some health and wellness magazines to promote the product where he would provide statements similar to what he just gave unsolicited to the company. They plan to put a picture of him within the advertisement and identify him by name and qualifications. They say they cannot pay him because they are still a small company, and don't have the budget for it. He thinks, why not? He likes the product, and since he is not getting paid, he is not inappropriately benefiting from the relationship.

Unfortunately, this would still likely be a conflict of interest and would be professional misconduct. A kinesiologist cannot use their professional status to promote a product commercially. This is in spite of the fact that he has not been paid for the endorsement. It can be assumed that he will benefit from the advertisement in some indirect manner (for example, he may have increased client influx from those people who see the advertisement). Additionally, without conducting a proper assessment and consideration of a client's health history, a kinesiologist should not be making any sort of clinical recommendations. Daniel can give advice on products and remedies, including in choosing what type of videos to recommend to clients, provided it is within a health practitioner-client circle of care relationship, which is based on professional judgment regarding a client's individual needs through proper assessment.

Sample Exam Question 1

Which of the following situations is possible professional misconduct according to the BCAK professional practice standards?

i. Failing to maintain client confidentiality.
ii. Using verbal threats and insults to a client in an email to them when they did not show up for an appointment.
iii. Giving a client a reduced rate for services if they do not have insurance.
iv. All of the above.

The best answer is iv. Answers i and ii are both related to requirements of various laws (PIPA, Criminal Code, HRA) and iii is an ethical standard relating to transparency and consistency of professional practice. All of the situations described involve conduct that falls within the definition of 'professional misconduct'

Sample Example Question 2

A kinesiologist overhears another kinesiologist tell two male clients a sexually explicit joke that

causes the clients to laugh loudly. Does this conduct constitute sexual abuse?

i. No. Dirty jokes are not sexual abuse.
ii. Yes. This is sexual harassment. The report should be made to the Human Rights Tribunal.
iii. No. The clients liked the joke and would not have been harmed by it.
iv. Yes. This constitutes sexual abuse.

The best answer is iv. Sexual abuse includes comments of a sexual nature to a client. While it is unlikely that punitive action will be taken, it is still important for health care practitioners to learn that such conduct can be harmful to some clients. One never knows what experiences clients have had in their past that might make even a sexual joke harmful. Answer i is incorrect because dirty jokes are sexual misconduct as that term is defined in the Health Professions Act. Answer ii is not the best answer because there are no mandatory reporting requirements under the Human Rights Code. Answer iii is not the best answer because whether the client was a willing participant or not is irrelevant. The comment still should not have been made. Sexualizing the practice of the profession is inherently confusing to clients who assume that there is no sexual aspect to their relationship with the health care provider.

Professional Boundaries

Kinesiologists must at all times act as professional health care practitioners, and not as a friend to clients. Failing to maintain professional boundaries or becoming too personal or too familiar with a client, may be confusing to clients and make them feel uncomfortable. Clients will be uncertain as to whether the professional advice or services are motivated by something other than the best interests of the client. It is also easier for a kinesiologist to provide professional services when there is a "professional distance", sometimes referred to as 'arms length' relationship, or neutrality between the kinesiologist and the client (e.g., telling the client the truth about the client's condition).

Maintaining professional boundaries is about being reasonable in the circumstances. For example, one should be careful about accepting gifts from clients, but there are some circumstances in which it is appropriate to do so (e.g., a small thank you gift from a client). In other areas, however, crossing professional boundaries is never appropriate. For example, it is always professional misconduct to engage in any form of sexual behaviour with a client.

The following are some of the areas where kinesiologists need to be very cautious to maintain professional boundaries.

Self-Disclosure

When a kinesiologist shares personal details about their private life, it can confuse clients. They might assume that the kinesiologist wants to have more than a professional relationship. Self-disclosure suggests that the professional relationship is serving a personal need for the kinesiologist, rather than serving the client's best interests. Self-disclosure can result in the kinesiologist becoming dependent on the client to serve the kinesiologist's own emotional needs, which is damaging to the client-kinesiologist relationship.

Self-Disclosure Scenario

Fatima, a MEMBER, is treating Maya for workplace stress-related conditions. Maya is having difficulty deciding whether to marry her boyfriend and talks to Fatima about this issue a lot during treatment sessions. To help Maya make up her mind, Fatima decides to tell Maya details of her doubts in accepting the proposal from her boyfriend. Fatima tells Maya of how

those doubts gradually ruined her first marriage, resulting in both her and her husband having affairs. Maya is offended by Fatima's behaviour and stops coming for treatment.

In this scenario, Fatima failed to separate her professional life from her personal life by sharing personal details on her own experience with relationships, on a subject which is outside of her scope of practice. A more appropriate response would be to ask Maya if she had considered seeking the assistance of another health care provider, such as a clinical counsellor or other professional with specialized knowledge to provide impartial advice.

Giving or Receiving of Gifts

Giving and receiving gifts is potentially a conflict to the professional relationship. A small token of appreciation by the client purchased while on a holiday, around New Year's, or given at the end of treatment may be acceptable provided they are of a low value (e.g., gifts with a value less than $50), such as a box of holiday chocolates or cookies. In addition, one must be sensitive to a client's culture where refusing a gift may be a serious insult. However, anything beyond small gifts can indicate that the client is developing a personal relationship with the kinesiologist. The client may even expect something in return. Gift giving by a kinesiologist will often confuse a client. Even small gifts of emotional value, such as a "friendship" card, can confuse the client, even though the financial value is small. While many clients would find a religious holiday season card from a kinesiologist to be a kind gesture and good business sense, some clients might feel obliged to send one in return. So even here thought should be given to the type of clients in one's practice (e.g., some new Canadians might be unfamiliar with the tradition).

Gift Giving Scenario

Marcella, a MEMBER, has a client from a Mediterranean culture who brings food for every visit. Marcella thanks her but tries not to treat it as an expectation. On one visit Marcella happens to mention his home-made pizza recipe. The client insists that Marcella bring it over to her house for Thanksgiving. Marcella politely declines, giving the client a written recipe instead. The client stops bringing in food, is less friendly during visits and starts missing appointments. Marcella did not do anything wrong, in this scenario, but it shows the confusion that can occur with a client when the professional boundary starts to be crossed.

Dual Relationships

A dual relationship is where the client has an additional connection to the kinesiologist, other than that of only client (e.g., where the client is a relative of the kinesiologist). Any dual relationship has the potential for the other relationship to interfere with the professional one (e.g., being both the individual's kinesiologist and employer). It is best to avoid dual relationships whenever possible. Where the other relationship predates the professional one (e.g., a relative, a pre-existing friend), referring the client to another kinesiologist is the preferred option. Where a referral is not possible (e.g., in a small town, where there is only one kinesiologist), special safeguards are essential (e.g., discussing the dual relationship with the client and agreeing with the client to be formal during visits and never talk about issues outside of the office).

Dual Relationships Scenario

Isabella, a MEMBER, has Pakeezah as a client. Pakeezah recently relocated to Canada as a refugee with very little money. Pakeezah works part-time as a house cleaner. Isabella decides to hire Pakeezah to clean Isabella's house. Isabella also recommends Pakeezah to some of Isabella's friends, who also hire Pakeezah. Pakeezah is extremely grateful. Later, Isabella recommends a change in treatment that will not be covered by Pakeezah's insurance. Pakeezah wonders to herself if Isabella is recommending this treatment to get back the money for cleaning Isabella's house. Pakeezah also feels that she cannot say no, or else she will lose her job cleaning the houses of Isabella's friends. The concern in this type of situation

is "Does the creation of a dual relationship contribute to Pakeezah's confusion and will it in some way negatively affect her access to, or the quality of, the health care she receives?" The answer is, yes.

Ignoring Established Customs

Established customs usually exist for a reason. Ignoring a custom confuses the nature of the professional relationship. For example, treatment sessions are usually held during regular business hours at the clinic, rather than at a restaurant. Ignoring this custom, the client might begin thinking that the meeting is a social visit or may feel that they have to pay for the meal. Treating clients as special, or different from other clients, can be easily misinterpreted.

Personal Opinions

Everyone has personal opinions. Kinesiologists are no exception. However, kinesiologists should not use their position to promote their personal opinions (e.g., religion, politics or even a vegan lifestyle) on clients. Similarly, strongly held personal reactions (e.g., that a client is unpleasant and obnoxious) should not be shared. Disclosing personal reactions does not help the professional relationship.

Personal Opinions Scenario

Paul, a client discussing world events, pushes Caleb, a MEMBER, for his views on immigration. At first Caleb resists, but eventually says he has some concerns about the abuses of the immigration system. Caleb says he has heard, often directly from clients, about how they have lied to the immigration authorities. Paul loudly criticizes the immigration authorities for allowing too many immigrants into the country. Paul is overheard by other clients in the clinic at the time, including some who are new Canadians. The other clients tell other staff at the clinic that they feel uncomfortable with either Caleb or Paul around.

Becoming Friends

Being a personal friend with a client is a form of dual relationship. Clients should not be placed in the position where they feel they must become a friend of the kinesiologist to receive ongoing care. Kinesiologists bear the main responsibility to not allow a personal friendship to develop. Being friendly with clients, rather than thinking you need to become their friend, is an important concept in health care. In certain situations, inherent trust issues can arise based on societal issues. Gaining friendship can be seen as a means for the kinesiologist to build the client's trust in them. In some cases, such as when a kinesiologist is located in a small community where all the residents are tightly connected and know each other, it can be difficult to provide impartial care.

Despite these potential pitfalls, it remains important for the kinesiologist to not end up in a situation where either the client or the kinesiologist are uncomfortable with the professional relationship and/or resulting in the client not being able to receive competent and necessary care. If a kinesiologist truly feels that they are becoming too close with a client, they should be up front with the client and address the need to maintain an impartial professional relationship. In some cases, it may be appropriate to discontinue treatment if a friendly relationship turns into a friendship. If this occurs, as soon as possible, the kinesiologist should facilitate the arrangement of alternate treatment and transfer care to another kinesiologist and stop personal contact or discussion until this process has been completed.

Becoming Friends Scenario

Jason, a MEMBER, who recently moved to a new city for work, started treating a new client two weeks ago who requires exercise therapy for soft-tissue injuries suffered in an automobile accident and is being funded by insurance. Since beginning treatment, Jason has learned that the client has a similar interest in hiking and long-distance cycling that he does. They initiate a discussion on hiking and cycling and Jason asks the client if he could join them for their Sunday hike as he is new to the community and does not know the hiking routes. The client agrees and during the hike, shares personal information about themselves that is related to the motor vehicle accident that was not shared during their client sessions, which has a bearing on the client insurance benefits. Jason is not sure what to do with this information as it was not provided by the client and could compromise the client's treatment.

By making friends with the client, Jason has put himself in a conflict-of-interest situation that jeopardizes his professional relationship with the client and the client's right to privacy.

Being friendly is different than being a friend. When you are friendly with someone, you are approachable and polite, but you don't actually have to like the person. You may be willing to spend some time with them if it suits you to do so. A friend is someone with whom you choose to build a relationship. They are somebody whom you like and enjoy spending time with.

Touching and Disrobing

Touching can be easily misinterpreted, particularly where disrobing is involved. A client can view an act of encouragement by a kinesiologist (e.g. a hug) as an invasion of space or even a sexual gesture. Extreme care must be taken when any touching between the kinesiologist and their clients occurs. The nature and purpose of any clinical touching must always be explained first, and the client should always be asked for, and provide consent, before the touching begins. Clients should be provided a private space that respects their dignity, cultural and social norms when asked to disrobe themselves. The presence of a third party acceptable to the client should be permitted and even recommended where appropriate. The touching must always have a clinical relevance that is obvious to the client. Managing boundaries is important for both kinesiologists and clients.

Kinesiologists may only touch or hug a client with a therapeutic or supportive intent and with the implicit or explicit consent of the client.

Infamous Conduct

Infamous conduct describes several types of bad behaviour by a health professional. It includes acts that would be considered illegal or grossly negligent, for example, sexual intercourse with a client during treatment, falsification of client records, or breaching the restricted activities of the Health Profession's Act of BC, such as prescribing or providing medications without appropriate authority or medical indication.

Permitting Illegal Conduct Scenarios

Danyia, a MEMBER, works at a gym alongside another kinesiologist and five personal trainers. Danyia has too many clients to see one day at work and decides to have one of the senior

personal trainers work with her client. The client has complex medical conditions and is being treated for multiple soft tissue injuries and a concussion sustained in a motor vehicle accident and whose treatment is funded by her automobile insurance company. The client has been recovering quickly from their injuries and Danyia feels that there will not be a significant risk to the client if she passes the client over to the personal trainer to conduct the session and complete the charting/record keeping for the client during today's session and bill the service as a kinesiology session provided by her to the insurer. A few days later, the client meets with the insurance adjuster and the insurance adjuster learns from the client that the kinesiologist did not see her for her last session and had a personal trainer substitute for her. The insurance adjuster files a complaint with the BCAK about the kinesiologist having delegated the treatment to the personal trainer, and having submitted fraudulent billing information indicating the work was completed by the kinesiologist. Is Danyia at risk for her conduct?

The answer is yes, it is professional misconduct to commit fraud, including submitting fraudulent billing records and record entries. Fraud is a criminal offence. Additionally, MEMBERS are only authorized to delegate tasks to student kinesiologists or properly qualified rehabilitation assistants, under their direct supervision. Students must be registered in a recognized kinesiology degree program and completing a work integrated learning placement (practicum). Delegation to a rehabilitation assistant requires the kinesiologist ensure they have appropriate insurance coverage in place to cover supervision and that the rehabilitation assistant has completed a recognized rehabilitation assistant program. The kinesiologist must complete client record keeping (charting) for each session and not delegate this to an assistant or student, although a student/assistant may be permitted to add supplemental chart notes. As Danyia willingly authorized the personal trainer to substitute for her and created a fraudulent record, rather than obtain assistance from another kinesiologist recognized by the treatment funder, she is at risk of disciplinary action. In addition, Danyia failed to obtain the client's prior consent for the personal trainer to substitute for her and did not consider that she should have requested authorization from the insurance adjuster for any changes in practitioner and that she could be subject to additional action imposed by the Insurer (treatment funder).

Incompetence

Incompetence is where a kinesiologist shows a serious lack of knowledge, skill or judgment when assessing or treating a client.

Incompetence Scenario

Erin, a MEMBER, does not really assess her clients. She just asks the client what is wrong and then gives each of them exactly the same treatment. A client, Paulette, came in with a serious condition. Erin did not recognize it and did not conduct any assessment that might have identified it or ruled it out. Paulette's condition worsened and she asked Erin to investigate further. Erin still did not recognize the condition and failed to recommend Paulette seek the services of another more qualified health care provider (or another kinesiologist). After three months, Paulette went to the emergency department at the local hospital and was immediately diagnosed and treated correctly. Paulette complained to the BCAK about Erin's incompetence.

The BCAK assessed the treatment records created by Erin and provided by Paulette following a request under PIPA to obtain the client records from Erin. The BCAK also and requested and received a written statement from Erin explaining what she had done. The complaint appearing to have merit, was referred to a committee established by the BCAK to complete an impartial review. The committee delivered a thorough review to the BCAK board of directors agreeing that Erin showed a lack of knowledge, skill and judgment. The BCAK then advised Erin she would need to participate in specific upgrading courses aimed at improving her assessment skills and provide proof of completion by a specified date to avoid being suspended for a specified time. Note: the action taken by the BCAK does not prevent the client from launching a civil suit to

recover damages for an error or omission committed by Erin.

Incapacity

A health professional is incapable when they have a health condition that prevents them from practicing safely. Usually, the health condition is one that prevents the kinesiologist from thinking clearly. Even a kinesiologist with severe physical disabilities can practice safely so long as the kinesiologist understands their limits and gets the necessary assistance. Most issues of incapacity are related to kinesiologists (practitioners) who suffer from addictions or certain mental illnesses that impair their professional judgment. For example, a kinesiologist who is addicted to pain killers or other mind-altering substances may attempt to continue to see clients when they are impaired, knowingly or unknowingly.

Complaints related to the incapability of a kinesiologist are not treated as strictly as if they had engaged in professional misconduct or are incompetent. Provided information can be ascertained about the health condition, an investigation will consider the kinesiologist's health condition and the treatment they are receiving. If the BCAK had the same authority to investigate as a regulatory College in this situation, the kinesiologist could be required to undergo examination by a specialist related to their condition from which a report would be provided to the BCAK. The BCAK is limited to assessing the actions of the kinesiologist and providing recommendations if the concern is justified. In extreme cases (e.g., where a kinesiologist continues to treat clients while impaired), the BCAK could suspend a MEMBER temporarily until their condition improves. In the case where there are repeated offences, which have also been identified as putting clients at risk, and a determined to be serious breach of standard of care, the BCAK could expel a member. Again, the BCAK is limited in that it can only enforce its standards under its bylaws and cannot stop a kinesiologist from practicing. The ability or willingness of the BCAK to act, or not to act, on an allegation does not prevent a client from filing a civil suit against a kinesiologist if they feel they have been harmed.

Incapacity Scenario

John, a MEMBER, has been working long hours to make up for a one-month period where he was unable to work due to a back injury sustained while playing sports. To allow him to work the long hours, he has been taking large doses of pain medication and ephedrine to stay awake. This has allowed him to work the additional hours, however his level of cognition has been negatively affected by the medications he is taking. Paul, the client, notices one day that that John is nodding off or falling asleep and responding with slurred speech during his session. Paul senses that this situation could be dangerous for some clients and informs the BCAK. At first John denies he has a problem. However, during the investigation, information is presented suggesting that colleagues have noticed a significant change in John's behaviour in recent weeks. It also becomes known that John fell asleep at the wheel of his car one evening while driving home and drove into the ditch.

Investigation - The BCAK cannot require John to complete a medical examination to determine if the substances he is taking are significantly impairing his abilities and are a risk to the public and reputation of other kinesiologists. However, the BCAK can encourage John to seek additional treatment for his condition which is in his area and not cost prohibitive. In most cases such as this, John would agree to obtain additional assistance with the treatment of his condition and work reduced hours, due to the risks it presents to clients and others.

Section Summary

Each of the above concepts looks at different aspects of professional practice. Each also serves a different purpose. The Code of Ethics focuses on the ideals which health professionals try to achieve. Professional standards identify ways in which to practice safely, effectively, and professionally. Professional misconduct communicates the conduct necessary to avoid discipline. Incompetence deals

with having an adequate level of knowledge, skill and judgment in the assessment and treatment of a client. Incapacity focuses on health conditions that prevent a health professional from practising safely.

Sample Exam Question

The sentence "Kinesiologists are sensitive to the wishes of their clients" is most likely to be found in which of the following concepts?

i. The definition of incapacity.
ii. The definition of incompetence.
iii. The definition of professional misconduct.
iv. Professional practice standards.
v. The Code of Ethics.

The best answer is v. Striving to be sensitive is an ideal that kinesiologists should endeavour to deliver in terms of ensuring that practices are impartial, fair and provide equal possible outcomes for every client. Answer i is not the best answer because incapacity focuses on the kinesiologist's health condition. Seriously insensitive behaviour may accompany some illnesses (e.g., addictions), but it is the illness that must be treated first. Answer ii is not the best answer because incompetence deals with kinesiologists having an adequate level of knowledge, skill, and judgment. Answer iii is not the best answer because professional misconduct communicates the minimum conduct that is necessary to avoid discipline. The corresponding professional misconduct provision would likely be that kinesiologists shall not abuse their clients. Answer iv is not the best answer because professional standards focus on ways in which to practice safely, effectively, and professionally. A professional standard would likely provide practical suggestions about how to practice sensitively (e.g., advice on how to listen to the client first before doing anything else).

Communication

Introduction

Many complaints against kinesiologists could be avoided through the use of good communication with clients, staff, and colleagues. Good communication first involves listening to the client, and potentially others involved in their care. Understanding the person's wishes, expectations, and values before doing anything is an important principle. Asking questions to clarify and expand on what the person is saying also helps. Repeating back to a client, in the kinesiologist's own words, can help ensure understanding and reassures the client that the kinesiologist is attentive and has been listening. Good communication also involves making sure that the client knows what the kinesiologist is going to do, why they are going to do it, and what is likely going to happen. When the client is confused by what the kinesiologist is saying, doing or does not understand why, there is miscommunication. People also do not like to be surprised (e.g., by pain which is unexpected side effect) unless they have been appropriately informed of the possibility that they will experience it. Telling the person what will, or may, happen will remove the surprise. The following section of this guidebook deals with some of the areas in which good communication is particularly important for legal reasons.

Informed Consent

Clients have the right to control their bodies and health care. Kinesiologists do not have the right to assess or treat a client unless the client agrees to it (i.e., consents). A kinesiologist who assesses or treats a client without the client's consent can face criminal (e.g., a charge of assault), civil (e.g., a lawsuit for damages) or professional (e.g., a discipline hearing) consequences, if applicable. This section deals with consent for the assessment and treatment of clients. Other parts of this guidebook deal with the requirements for consent relating to the creation, retention, sharing and destruction of a client's personal information or when billing them.

General Principles

To be valid, a client's consent must:

- ***Relate to the Treatment.*** The kinesiologist cannot receive consent for one procedure (e.g., taking a history of the client's health) and then use it to do a different procedure (e.g., physically examine the client). The client's consent must be for what is actually going to be done. Note: This means multiple consents are required.
- ***Be Specific.*** The kinesiologist cannot ask for a vague consent. For example, one cannot ask for the client to consent to any treatment the kinesiologist believes is appropriate. The actual assessment or treatment procedure that is being proposed must be clearly explained. This means that the kinesiologist often must obtain the client's consent many times as changes in treatment become advisable. A kinesiologist cannot obtain a "blanket consent" when the client first comes in to cover every procedure.
- ***Be Informed.*** It is necessary that the client understands what they are agreeing to. The kinesiologist must explain to the client everything the client needs to know before asking the client to give consent. For example, if someone asks for your consent to drive your car without telling you that they intend to use it to race over rocky fields, your consent was not informed. To be informed consent, it must include the following:
  - ***Nature of the Assessment or Treatment.*** The client must understand exactly what the kinesiologist is proposing to do. For example, does the kinesiologist intend to just ask questions or will the kinesiologist also be touching the client? If the kinesiologist is going to be touching the client, they need to tell the client first.
  - ***Who Will be Doing the Procedure?*** Will the kinesiologist be doing the procedure personally or will an assistant or colleague be doing it? If it is an assistant or colleague, are they recognized by the treatment funder, accepted by the client, and are they a regulated health professional of a different profession or an unregulated health professional?
  - ***Reasons for the Procedure.*** The kinesiologist must explain why they are proposing that procedure. What are the expected benefits? How does the procedure fit in with the overall treatment plan of the kinesiologist? How likely is it that the desired benefits or results will happen?
  - ***Material Risks and Side-Effects.*** The kinesiologist must explain any "material" risks and side-effects. A risk or side-effect is material if a reasonable person would want to know about it. For example, if there is a high risk of a modest side-effect (e.g., discomfort), the client needs to be told. Further, if there is low risk of a serious side effect (e.g., death or serious harm/injury), the client must be told.
  - ***Alternatives to the Procedure (Treatment).*** If there are reasonable alternatives to the procedure, the client must be told. Even if the kinesiologist does not recommend the option (e.g., it is too aggressive and has a higher risk), the kinesiologist should describe the option and inform the client why the kinesiologist is not recommending it. Also, even if the kinesiologist does not offer the alternative procedure (e.g., it is provided by a member of a different profession, such as a physician), the kinesiologist must tell the client if it is a reasonable option, and they know it is an option.
  - ***Consequences of Not Having the Procedure (Treatment).*** One option for a client is to do nothing. The kinesiologist needs to explain to the client what is likely to happen if the client does nothing. If it is not clear what will happen, the kinesiologist needs to say so and provide some likely scenarios.
  - ***Particular Client Concerns.*** If the client has a special interest in some aspect of the procedure (e.g., its nature or a side-effect), the client needs to be told (e.g., the procedure will violate the client's religious beliefs).
- ***Be Voluntary.*** The kinesiologist cannot force a client into consenting to a procedure. This is particularly important when dealing with younger or older clients who may be overly influenced by family members or friends. This is also important where the assessment or treatment will have financial consequences for the client (e.g., the client will lose their job or will lose financial benefits if the client refuses to consent). The kinesiologist needs to discuss with the client that consent is their choice, and that the client need not let anyone pressure them into

doing something the client does not want to do.

- ***Not be a Misrepresentation or Fraud.*** The kinesiologist must not make claims about the assessment or treatment that are not true. For example, telling the client that a treatment will cure them when, in fact, the results are uncertain. This situation would not result in a true consent. Clients must be given accurate, factual, information and honest opinions.

Therefore, consent to an assessment or treatment must involve effective communication between the kinesiologist and the client. The kinesiologist must make sure that the client understands what they are agreeing to. While it may sound like a lot of work, most of the time informed consent can be obtained quickly and easily. It is only when dealing with complex or particularly risky matters that a lot of time is required.

Consent Scenario 1

Desiree, a MEMBER, meets a new client, Estrella. Estrella complains about feeling stressed and tired. Desiree says: "I would like to fully understand your personal and family background and your medical history. There could be a lot of things making you feel tired and stressed and this information will help me try to figure out why. If you are uncomfortable with any of my questions, please let me know. OK?" Estrella responds, 'I understand and please proceed'. Desiree has just obtained informed consent for taking a full history.

Estrella could have also used body language such as nodding her head up and down, which in North America and many other regions is a positive affirmation, however in some regions it means the opposite. The kinesiologist should reconfirm the client's response in cases where body language is used to communicate decisions.

Sample Exam Question

Obtaining a broad consent (often called a "blanket consent") in writing from the client on his or her arrival at the office is probably a bad idea because:

i. The client does not know if they will need someone to drive them home afterwards.
ii. The client does not have confidence in the kinesiologist yet.
iii. The client does not know what they are agreeing to.
iv. The client does not know how long the visit will be.

The best answer is iii. Informed consent requires the client to understand the nature, risks and side-effects of the specific procedure proposed by the kinesiologist, as well as who will be performing the assessment or treatment. It is impossible for the client to know these things upon their arrival at the office. Answer i is not the best answer because it focuses on a side-issue and does not address the main issue. Answer ii is not the best answer because having confidence in the kinesiologist is not enough for there to be informed consent. A client may trust the kinesiologist and that may motivate the giving of consent, but the client still needs to know what they are agreeing to.
Answer iv is not the best answer because it focuses on a side-issue and does not address the main issue.

Ways of Receiving Consent

There are three different ways in which a kinesiologist can receive consent. Each has its advantages and disadvantages.

- ***Written Consent.*** A client can give consent by signing a written document agreeing to the procedure. A written consent provides some evidence that the client did give consent. One disadvantage of written consent is that people confuse a signature with consent. A client who signs a form without understanding the nature, risks and side-effects of the procedure has not given proper consent. Also, the use of written consent documents can discourage the asking

of questions. In addition, the kinesiologist might not check with the client to make sure the client understands the information and is truly consenting.

- ***Verbal Consent.*** A client can give consent by a verbal statement. A verbal consent is the best way for the kinesiologist and the client to discuss the information and ensure that the client really understands it. Making a brief note in the client record of the discussion and consent can provide useful evidence later on if there is a complaint.
- ***Implied Consent.*** A client can give consent by their actions. For example, in Consent Scenario No. 1, above, the client Estrella could just nod her head. That would be implied consent for Donna to begin asking her questions. The main disadvantage of implied consent is that the kinesiologist has no opportunity to check with the client to make sure that the client truly understands what is going to happen. A secondary disadvantage is that there is no record of the consent (unless the kinesiologist makes a note of the consent activity/action in the client record). This form of consent should be relied upon the least in practice.

Consent Scenario 2

Hendrik, a MEMBER, proposes that his client, Paul, take a vitamin and mineral supplement. Hendrik says: "Try these: they will make you think more clearly". Paul takes one immediately and buys a bottle from the receptionist. When arriving at home Paul reads about the supplement on the internet and learns that it contains a megadose of Vitamin A, which, if taken for a long period of time, could lead to liver and other damage. Paul complains to the BCAK. Hendrik tells the BCAK that he was relying on Paul's implied consent by swallowing the first pill and buying a bottle from the receptionist. The BCAK Board of Directors informs Hendrik that he has potentially breached several Professional Practice Standards, and in doing so puts at risk, not only the client's wellbeing, but also himself and the reputation of other kinesiologists for not first explaining the potential benefits, risks and pertinent information relating to the supplement he was recommending and obtaining informed consent. Specifically:

- *Hendrik did not explain the nature of the "pill", including that it contained a megadose of Vitamin A,*
- *Hendrik did not explain how the supplement would make Paul think more clearly,*
- *Hendrik misrepresented the 'hoped for' benefit of the supplement as there was little evidence to support his very strong statement that it would make Paul think more clearly,*
- *Hendrik did not explain the way in which the supplement was to be used (how often to take the supplement and for what period of time),*
- *Hendrik did not explain the alternatives to taking the supplement, including not taking anything; and, perhaps more importantly,*
- *Hendrik did not explain the risks of taking the supplement to Paul,*
- *Hendrik did not inform the client whether the supplement was approved as a Natural Health Product (NHP) by Health Canada and may not have considered whether the high dosage of vitamin A[2] could reclassify the supplement as a drug and therefore prescribing it may be a restricted act under the HPA.*

Consent Where the Client is Incapable

A client is not capable of providing informed consent if the client:

- Does not understand the information, or
- Does not appreciate the reasonably foreseeable consequences of the decision.

[2] 1 A megadose of Vitamin A could reasonably result in the supplement being classed as a drug. Thus, this scenario also raises issues about whether the practitioner is engaging in a restricted act. See the restricted acts further on this guidebook.

For example, if a kinesiologist recommends that a client increase their daily intake of calcium by consuming a 500mg calcium supplement once a day for a month to prevent bone loss, and the client insists that taking 30 of the 500mg calcium supplements at once will prevent the client from forgetting to take them, it is clear that the client does not appreciate the consequences of the decision.

A kinesiologist can assume a client is capable unless there is evidence to the contrary and does not need to assess the capacity of every client to provide consent. In situations where a client does not demonstrate to a kinesiologist that they are capable (e.g., the client simply cannot understand the explanation of the test protocols that must be followed or treatments the kinesiologist is recommending) the kinesiologist needs to assess the client's capacity. The kinesiologist can assess the capacity of the client by discussing the proposed procedures with the client in detail to determine if the client understands the information and appreciates its consequences. If necessary, to ascertain comprehension, the kinesiologist can ask the client to repeat the potential consequences in their own words.

The issue is whether the client is capable to provide informed consent for a proposed procedure. A client can be capable to provide informed consent for one procedure but not capable for another. A child under the age of 19 is referred to as a minor. "Mature minor consent" is the term used when a health care provider has assessed and determined that a child (described in legal terms as an 'Infant') has the necessary comprehension and understanding to provide informed consent to receive or refuse health care. They are then referred to as a "mature minor". The laws regarding obtaining consent from a minor were covered earlier in the guidebook. For example, a fifteen-year-old client might be capable to consent to an exercise program but not be capable of consenting to treatment for a major eating disorder. (There is no minimum age of consent for health care treatment.)

If a kinesiologist concludes that the client is not capable to give consent for a procedure, the kinesiologist should tell the client. The kinesiologist should also inquire as to whether there is a representation agreement in place if the client has not volunteered this information previously. Alternatively, if there is no representation agreement in place and/or the representative is not readily available, the kinesiologist needs to determine who the substitute decision maker will be in accordance with the legal requirements. If there is a representation agreement in place, the kinesiologist will need to confirm its existence and terms to ascertain whether it is valid for the required decision. The laws around representation agreements and substitute decision makers were covered previously in the guidebook. Once the kinesiologist confirms who the decision maker will be, they need to continue to include the client in the discussions as much as possible, even if there is a confirmed representative or substitute decision maker who will need to be aware of the pertinent information. Of course, there are circumstances where involving the incapable client in the discussions will not be possible (e.g., in situations where it will be quite upsetting to the client; or where the client is unconscious).

Unless it is an emergency, the kinesiologist must then obtain consent for the assessment or treatment from either the client's appointed representative holding a valid representation agreement (first option) or a substitute decision maker. A substitute decision maker must meet the following requirements:

For Adults

- The substitute for an adult must be at least 19 years of age and have been in contact with the person during the preceding 12 months and have no dispute with the person.
- The substitute must, themselves, be capable. In other words, the substitute must understand the information and appreciate the consequences of the decision.
- The substitute must be able and willing to act.
- There must be no higher ranked substitute who wants to make the decision. The ranking of the substitute decision maker is as follows (from highest ranked to lowest ranked):
    - the spouse/partner (a partner can include a same-sex partner, or a non-sexual partner. For example, two elderly sisters who live together),
    - a child,
    - a parent,

- a sibling,
- a grandparent,
- a grandchild,
- anyone else related by birth or adoption,
- a close friend of the adult,
- person immediately related to the adult by marriage.

For Children (Minors)

- The substitute for a minor must be at least 19 years of age. There is an exception where the substitute is a parent of the child. (For example, a 15-year-old mother, a minor themselves, can be the substitute decision maker for the care of her child, provided they meet the remaining requirements).
- The substitute must, themselves, be capable. In other words, the substitute must understand the information and appreciate the consequences of the decision.
- The substitute must be able and willing to act.
- Substitute decision maker ranking (in descending order)
  - Parent or legal guardian with custody,
  - Parent without custody (if applicable),
  - Brother or Sister,
  - Grandparent,
  - Anyone else related by birth or adoption,
  - Spouse of a parent if related by marriage,
  - Office of the Public Guardian Trustee (PGT) or PGT appointed.

Consent Scenario 3

Lisa, a MEMBER, proposes a procedure for her client, Paula. Paula does not understand the proposed procedure at all. She is clearly incapable. Lisa knows that Paula appointed her friend Pat to be her power of attorney for personal care. However, Pat is travelling outside of the country and cannot be reached. Therefore, Pat is not able to make the decision. Lisa contacts Paula's elderly mother, but Paula's mother is frail herself and does not feel confident in making the decision. Thus, Paula's mother is not willing to act as a substitute decision maker. Paula's sister is willing and able to make the decision on Paula's behalf and appears to understand the information and its consequences for Paula. Paula's sister can give the consent even though she is not the highest ranked substitute.

If there are two equally ranked substitute decision makers (e.g., two sisters of the client), and they cannot agree, the Public Guardian and Trustee can then make the decision.

A substitute decision maker must consent to treatment decisions on the following basis:

- The substitute must act in accordance with the last known capable wishes of the client, if known. For example, if a terminally ill client, while still thinking clearly, said: "Don't send me to the hospital, I want to die at home" the substitute needs to obey those wishes.
- The substitute must act in the best interests of the client if the substitute does not know of the last known capable wishes of the client. For example, if a proposed treatment is simple and painless, and would make the client more comfortable through a difficult illness with little risk of harm, the substitute decision maker should consent to it.

If a situation arises where a substitute decision maker is not following the above rules, the kinesiologist needs to speak with the substitute decision maker about it. If the substitute decision maker is still not following the above rules in a way that will harm a client, the kinesiologist must call the office of the Public Guardian and Trustee. The contact information of the Public Guardian and Trustee of BC is available on the internet.

Consent Scenario 4

Nathan, a MEMBER, proposes a procedure for his client, Paul. Paul does not understand the proposed procedure at all. He is clearly incapable. Nathan knows that Paul appointed his friend Sam to be his legal health care representative when needed and that there is a representation agreement in place. Sam is going to inherit Paul's money when Paul dies. Paul has a lot of money. Paul is going to die within a few months. The proposed procedure is simple and painless, would make the client more comfortable through a difficult illness, and has little risk of harm. Nathan is convinced that Sam is refusing to consent to the treatment to inherit more money (even though treatment is not very expensive). The rest of Paul's family is very upset because they want Paul to receive the treatment. Nathan suggests that the family contact the office of the Public Guardian and Trustee.

The requirements for obtaining informed consent when a client is incapable of making their own decisions are based on the HCCCFAA and covered earlier in the guidebook. Kinesiologists should be aware of which legislation a standard is based on, in the event they need to refer to it for clarity or to ensure they are following the most recent updates to the legislation. Kinesiologists can also refer to the additional information provided by the Office of the Public Guardian and Trustee of BC regarding substitute decision makers.

If there is a dispute between the available parties as to which of them should be the temporary decision maker for the client based on ranking and qualification, the kinesiologist should contact the Office of the Public Guardian and Trustee for assistance.

Sample Exam Question

Which of the following is the highest ranked decision maker for a client that cannot make their own informed decision (assuming that these are willing and able to provide consent):

i. The person named in a Representation Agreement issued in accordance with BC law,
ii. The client's live-in boyfriend,
iii. The client's mother,
iv. The client's son when the client has assigned them as a temporary substituted decision maker (TSDM).

The best answer is i. An adult named in a representation (legal) agreement for the client, is higher in rank than the others. Answer ii and iii are not the best answers because the client's spouse or partner is a lower ranked substitute decision maker, as is an adult child unless they have been designated as a TSDM. In addition, it is not clear that the live-in boyfriend is a spouse (under the HCCCFAA, they must meet the criteria for a spouse). Answer iv is not the best answer because they are lower ranked than the person named in the Representation Agreement. The client's child and mother would be ranked in that order if neither party were assigned as the client's preferred TSDM.

Emergency Situations

One exception to the need for informed consent is in cases of emergencies - during these types of situations, the Good Samaritan Act often applies. There are two kinds of emergencies:

1. Where the client is incapable and a delay in treatment would cause suffering or serious bodily harm to the client.
2. Where there is a communication barrier (e.g., language, disability), despite efforts to accommodate, the barrier and a delay in treatment would cause suffering or serious bodily

harm to the client.

In either case the kinesiologist must attempt to obtain consent as soon as possible (either by finding a substitute decision maker in the first example or by finding a means of communication with the client in the second example).

The chance of encountering an emergency situation is typically rare for kinesiologists unless they are providing first aid or field side care to athletes but can occur and needs to be planned for.

Consent Scenario 5

Leanna, a MEMBER, is seeing her client Manuel at the office. Manuel suddenly collapses in an apparent heart attack. Leanna has a defibrillator in the office. Without trying to get consent from a substitute decision maker, Leanna uses the defibrillator. Leanna was able to act without consent in these circumstances.

Consent Scenario 6

Across the city, Leonardo, a MEMBER, is seeing his client Paul at the office. Paul has terminal cancer and has filled out a wallet card saying that he does not want any measures taken to resuscitate him should he have a cardiovascular accident. Paul has mentioned this to Leonardo. Paul suddenly collapses in an apparent heart attack. Leonardo has a defibrillator in the office. Leonardo is not able to act without consent in these circumstances. Leonardo already has a refusal from Paul that applies to these circumstances. Leonardo calls 911.

Sexual Misconduct

Kinesiologists must refrain from any form of sexual contact between themselves and clients. These acts result in an imbalance of power and expectation in the relationship between the health professional and client. Sexual contact between a health practitioner and a client can cause significant harm to the client, even if the client consents to the sexual contact or initiates it. Kinesiologists must not engage in this manner with the client.

The term “sexual misconduct” is included under the general term of ‘professional misconduct’ in the HPA and includes unethical conduct, infamous conduct, and conduct unbecoming a member of the health profession. It includes the following:

- sexual intercourse or other forms of physical sexual relations between the health care professional (e.g., kinesiologist) and the client,
- touching, of a sexual nature, of the client by the kinesiologist, or
- behaviour or remarks of a sexual nature by the kinesiologist towards the client.

The more serious forms of sexual misconduct, including sexual assault, abuse or harassment are subject to criminal prosecution under section 271 of the Criminal Code of Canada. Less obvious examples of sexual misconduct include:

- telling a client a sexual joke,
- hanging a calendar on the wall with sexually suggestive pictures or images (e.g., women in bikinis, a “fire fighters” calendar),
- non-clinical or non-therapeutic comments about a client’s physical appearance (e.g., “you look sexy today”),
- asking a client out for a romantic date.

In health care the definition of sexual misconduct also includes treating one’s spouse or common-law partner. There have been a number of court decisions that have established that a health care provider

cannot treat their spouse or partner (with very limited exceptions, such as in an emergency). Kinesiologists need to transfer the care of their spouse or common-law partner to other kinesiologists. It does not matter that the spousal or common-law relationship came first.

Touching, behaviour, or remarks which are based solely on clinical or therapeutic care do not constitute sexual misconduct. For example, if it is necessary for the treatment of a client to ask about the client's sexual history, it can be done. However, asking about a client's romantic life where this is unnecessary for treatment is sexual misconduct. Similarly, touching of the chest or pelvic area of a client must be clinically necessary (and, as discussed previously, only be done after receiving informed consent).

It is always the responsibility of the kinesiologist to prevent misconduct from happening. If a client begins to tell a sexual joke, the kinesiologist must stop it. If the client makes comments about the appearance or romantic life of the kinesiologist, the kinesiologist must stop it. If the client asks for a date, the kinesiologist must say no (and explain why it would be inappropriate). If the client initiates sexual touching (e.g., a kiss), the kinesiologist must stop it.

Sexual Misconduct Scenario 1

> *Zaileen, a MEMBER, tells a colleague about her romantic weekend with her husband at Niagara-on-the-Lake for their anniversary. Zaileen makes a joke about how wine has the opposite effect on the libido of men and women. Paula, a client, is sitting in the reception area and overhears. When being treated by Zaileen, Paula mentions that she overheard the remark and is curious as to what Zaileen meant by this, as in her experience, wine helps the libido of both partners. Has Zaileen engaged in sexual abuse? Zaileen clearly has crossed boundaries by making the comment in a place where a client could overhear it. However, the initial comment was not directed towards Paula and was not meant to be heard by her. It would certainly be sexual misconduct for Zaileen to answer Paula's question. Zaileen should apologize for making the comment in a place where Paula could hear it and state that she needs to focus on Paula's treatment.*

Sexual assault is an indictable offense under section 271 of the Criminal Code of Canada and there is no statute of limitations

Because sexual misconduct is an important and sensitive issue in Canadian society, the government has regulations in place to prevent it. Health professions regulatory Colleges take sexual misconduct very seriously, as each College is required by law to take steps to prevent sexual misconduct from occurring and develop a prevention plan to ensure health professionals, professional educators, and employers understand how to avoid sexual misconduct.

There are typically special provisions dealing with the handling of allegations and reports of sexual misconduct. Importantly, the identity of the client is protected in cases of alleged sexual misconduct, however the client may even be given a role at the discipline hearing (e.g., to deliver an impact statement on the impact of the sexual abuse on the client).

MEMBERS who commit sexual misconduct are subject to potential discipline, suspension, or termination of their BCAK membership, and must always consider ways of preventing sexual misconduct (including the perception of sexual misconduct) that may arise. Analysis of sexual misconduct report cases in health care suggests that most incidences of sexual misconduct are not perpetrated by predators. Rather, in most cases the health professional (e.g., kinesiologist) and the client develop romantic feelings for each other, and the health professional fails to act to prevent it.

In situations where any romantic feelings develop, the kinesiologist has only one option: to stop, set boundaries and act in ways to prevent and eliminate those feelings. In almost all circumstances, it is

advisable to transfer the care of the client to another kinesiologist immediately.

Other suggestions for preventing even the perception of sexual abuse include the following:

- Do not engage in any form of sexual behaviour, including comments or remarks of a sexual nature, towards a client.
- If a client initiates sexual behaviour, the kinesiologist must find a means to terminate it. This can be achieved in a number of ways, examples include:
    - redirecting conversation,
    - using clear but sensitive communication, inform the client that you are bound by professional standards which prohibit fraternization with clients,
    - reporting the issue to a manager for assistance in dealing with the situation.
- Do not date current or former clients.
- Avoid self-disclosure.
- Avoid comments that might be misinterpreted ("You are looking pretty or handsome today").
- Do not take a sexual history unless there is a good clinical reason for doing so. If the kinesiologist must take a sexual history, explain why first and be very clinical in the approach and language used.
- Do not touch a client except when necessary for assessing or treating them. If the kinesiologist must touch a client, explain the nature of the touching first, the reason for the touching, and be very clinical in the approach (e.g., wear gloves). Consider having a third person in the room if examining or otherwise touching a disrobed client.
- Do not comment on a client's body or romantic life.
- Thoroughly document any clinical actions of a sexual nature or any incidents of a sexual nature.

Dating former clients is a sensitive issue. Kinesiologists should follow similar, if not the same, standards as regulated health professionals, who are legally prohibited from dating former clients for a specified period of time. The restriction period should be at least one year following the date on which the client left the care of health professional. Dating a former client before the expiry of the one-year period can be considered sexual misconduct.

It is important to note, and understand, who will be considered a client, for the purpose of determining whether sexual misconduct has occurred. It is typically very broad from a legal perspective. A person will be considered a client of a kinesiologist if any of the following criteria are met:

- The kinesiologist has provided a health care service to a specific person.
- The kinesiologist has charged or received payment from a specific person or a third-party (e.g., insurance company) for a health care service provided to the person.
- The kinesiologist has contributed to a health record or file for a person. (This typically occurs when the kinesiologist is acting in a different role, such as under delegation as a rehab assistant/support worker, or as part of an interdisciplinary team in a program setting.)
- The person has consented to a health care service recommended by the kinesiologist.

It is therefore not necessary for a kinesiologist to have provided a health care service directly to a person for that person to be considered a client; for example, if a kinesiologist contributes to a health care record for a person, that person will typically be considered a client of the kinesiologist for a minimum period of one year.

Sexual Misconduct Scenario 2

> *Oliver, a MEMBER, is attracted to his client, Paulette. Oliver notices that he is looking forward to working on the days when Paulette will be there. Oliver extends the sessions a few minutes to chat informally with Paulette. Oliver thinks Paulette might be interested as well by the way that she makes eye contact. Oliver notices that he is touching Paulette on the back and the*

arm more often. Oliver decides to ask Paulette to join him for a coffee after his next visit to discuss whether Paulette is interested in him. If Paulette is interested, Oliver will transfer Paulette's care to a colleague. If Paulette is not interested, then Oliver will make the relationship purely professional. Oliver decides to ask a colleague, Ming, for advice.

Ming, correctly, informs Oliver that he has already engaged in sexual misconduct by letting the attraction develop while continuing to treat Paulette. Ming also says that it is important for Oliver to transfer the care of Paulette right away and to cease pursuing a personal/romantic relationship with her. Ming reminds Oliver that dating a client is prohibited for a period of at least one year after the client leaves the kinesiologist's care, and that dating a client within this period would be considered sexual misconduct that could lead to the revocation of Oliver's registration if he was a member of a regulated College. In BC, as a MEMBER, Oliver would be subject to potential disciplinary action.

Sample Exam Question

Which of the following is sexual misconduct:

i. Taking a sexual history when it is clinically necessary to do.
ii. Using glamour shots of scantily dressed Hollywood stars as your interior design theme to attract younger clients.
iii. Telling an employee a sexual joke when there are no clients around.
iv. Dating a former client after not having had any contact with the client or their health care for a period of five years.

The best answer is ii. These pictures sexualize the atmosphere at the clinic which is inappropriate in a health care setting. Answer i is not the best answer because taking a sexual history is appropriate when it is needed to assess the client, and it is done professionally. Answer iii is not the best answer because the sexual misconduct rules only apply to clients. Sexual behaviour with employees may, however, constitute sexual harassment under the BC Human Rights Code and could otherwise be unprofessional. Answer iv is not the best answer because the person has not been a client more than one year at the time of dating. However, it might still be unprofessional to date a former client after they stop being a client regardless of the time period, particularly if the kinesiologist had an intense or intimate role in the treatment of the client.

Interprofessional Collaboration

It is in the best interest of clients if all their health care providers work with each other in collaboration. Collaboration helps to ensure that treatments are coordinated and as effective as possible. Collaboration would also reduce the chance of there being conflicting or inconsistent treatment (e.g., the doctor reducing the client's drug prescriptions as other forms of treatment produce greater benefits for the client). Collaboration can also reduce the chance that clients could receive inconsistent information and advice.

The *HPA* requires regulatory Colleges to promote interprofessional collaboration. The Colleges work together to develop a model of collaboration that reinforces working together with other health professionals to ensure the best care is provided to clients. They achieve this through sharing information on investigations and developing standards to promote consistency). BCAK works collaboratively with the other BC Health Professions associations to help improve the working relationships between kinesiologists and other health professionals working in multi-disciplinary and interdisciplinary environments.

It is important to remember that the client determines the extent of interprofessional collaboration which they want to occur. If a client is uncomfortable with it, the client can direct kinesiologists (and other health professionals) not to share the client's personal information amongst other health care

professionals who are providing the client with care. The kinesiologist must comply with such a direction unless one of the exceptions in the *Personal Information Protection Act* applies.

Kinesiologists should discuss any planned interprofessional collaboration with the client and obtain informed consent. There are circumstances however, where prior client consent is not possible (e.g., when the client goes to the hospital in an emergency and the hospital calls asking about what treatment the client has received). Kinesiologists can disclose information needed for the treatment of the client without consent so long as the client has not prohibited the kinesiologist from doing so.

Interprofessional collaboration only succeeds if kinesiologists respect their colleagues. Even if the kinesiologist does not agree with the approaches taken by other colleagues, communications need to be respectful. Kinesiologists should share information and cooperate with their colleagues whenever possible. Reasonable attempts to coordinate treatment should be made. Compromises may sometimes need to be made (e.g., as to which treatment to try first). Interprofessional rivalries should be set aside; it is the client's best interests that need to come first. Attempts should be made to avoid forcing the client to choose which health care provider to use.

Where interprofessional collaboration involves working in a multi-disciplinary setting (i.e., a place where members of different professions work together and where clients are often seen by multiple health care providers), other issues arise, including the following:

- Will the setting have shared records, or will the kinesiologist have separate records?
- If the records are shared, will the kinesiologist keep any private notes outside of the shared record? If so, how will the kinesiologist make sure that the other health care providers have access to the information they need?
- How does the setting deal with the wording used in the records? Will everyone use the same abbreviations?
- What happens to the records if the kinesiologist leaves to practice elsewhere? Will the client be told where the kinesiologist has gone? Will another kinesiologist from the setting take over the client's care? Will the client be given a choice? The client really should be given a choice, although some settings will only do so if the client asks.
- Who is the health information custodian that owns the records?
- Will there be one person who has overall responsibility for the care of the client? If so, who? If not, how will the client's care be coordinated?
- How will disagreements be dealt with in the approach to the care of the client? If it is the kinesiologist who disagrees, when and how does the kinesiologist tell the client?
- Is the client aware of all of the above?

The topic of collaboration is one of the many areas covered in this document for which a kinesiologist should consider consulting with their own lawyer to ensure they are aware of their responsibilities and client rights. While interprofessional collaboration will be complicated and challenging for the kinesiologist, it is the direction health care in BC is moving. It is also in the best interest of most clients.

Interprofessional Collaboration Scenario

> *Amrita, a MEMBER, has started up her own rehabilitation clinic. Amrita receives a referral from a GP for one of his more challenging clients, Becky, who was involved in a Motor Vehicle Accident three years earlier and has not responded well to the treatment she has received. Becky was seen by a physiatrist who completed an independent medical examination (IME) and had a cervical recumbent MRI completed. The physiatrist has continually recommended cervical muscular strengthening with ROM stretching that has been carried out by a physiotherapist. Becky reports feeling much worse after rehabilitation treatments and insists that her pain and dysfunction have had little to no improvement over the years of treatment. Her physiatrist wants her to continue with the exercise regimen.*
>
> *Amrita completes her own physical assessment and declines to complete the physiatrist's*

suggested exercise regimen. Amrita speaks with Becky's GP, who suggests a set of lateral stress X-rays may provide more information on the source of the issues. Amrita understands what has been explained by the GP and that a static recumbent MRI would be unable to detect these dynamic lateral stress X-ray findings and questions whether an Upright Weight Bearing MRI may be of value. She sends Becky back to the physiatrist with the findings of the lateral stress X-rays and the suggestion to obtain the UWB MRI. The physiatrist was agitated by Amrita's referral back to him. He told Becky that the radiologist's report and findings of the lateral stress X-rays were nothing and that his own physical examinations could detect pathology just fine. The physiatrist also told Becky that there are no Upright Weight Bearing MRIs in Canada and that it would be a waste of money to go down to the US to obtain one. He said that if Amrita didn't want to do the exercises, the physiatrist suggested that Amrita refer the client to another kinesiologist to assist her with them.

Becky advised Amrita of the physiatrist's recommendation and Becky decided that she wanted to have the additional test due to the lack of improvement and travelled to the US, obtained the Upright Weight Bearing MRI that confirmed multiple ligamentous failures and other traumatic non-degenerative structural pathology. As suspected by Amrita, there were other biomechanical issues going on with Becky that were never properly identified or addressed. With the new information, Becky, Amrita and the physiatrist agree that a new course of treatment is indicated.

Record Keeping

Kinesiologists must have a strong understanding of the concept of record-keeping. Keeping records is essential for providing high quality client care; even kinesiologists with excellent memories cannot recall all the details of their clients' health status and treatment. Records permit the monitoring of changes in clients. Records assist other kinesiologists or health professionals who may see the client afterwards.

Records also enable a kinesiologist to explain what they did for clients if any questions arise. Records help a kinesiologist defend themselves if a client recalls things differently than the kinesiologist. Failure to make, and keep, adequate records can be a failure to maintain minimum professional standards and is professional misconduct.

The BCAK establishes similar standards to those typical of a regulatory College and which are based on existing laws. Provisions on record keeping typically deal with matters such as:

- The information that must be recorded,
- The form in which records can be kept (e.g. written, computerized),
- How long the information must be kept,
- Maintaining or transferring records upon leaving a practice or retiring,
- Confidentiality and privacy issues, and
- Client access to records.

BCAK sets similar standards for its professional (practicing and non-practicing) MEMBERS.

Information That Must Be Recorded

The client record is intended to record what was done and what was considered by the kinesiologist. It acts as a communication aid to ensure that there is continuity of care for the client. Proper records also enhance client safety. The following is a list of general requirements of the client health record:

- The record must always contain identifying information, such as the name and date of birth of the client. It should be on each document in the record so that a particular document may be

returned to the record if separated.

- The record must include all relevant subjective and objective information gathered regarding the client. This includes all relevant information provided by the client (or their authorized representative, or other health care providers involved in the client's care) to the kinesiologist regardless of the medium or format (e.g. communicated in person, on paper, email, fax, telephone, etc.). It also includes any records regarding findings from assessments or during observations (e.g. how the client walked into the office).

- Any results of testing done (including physical testing, etc.) by the kinesiologist must be recorded. If a client discloses test results from another health professional, it should be noted in the record. However, kinesiologists do not have to ask for copies of reports if they are not needed.

- The treatment plan or advice/recommendations must be recorded. Then the actual treatment provided should be described. The record must also include any progress notes of how the client progressed during treatment, any changes in the client's condition, or any reassessments or modifications of the treatment plan. It should be clear to any kinesiologist reading the record what happened during treatment.

- If the client was a referral, the person who made the referral and the reason for the referral should be in the record.

- Any consent that is obtained must be included in the record. Refer to the guidebook sections on the HCCCFAA and consent specific guidelines surrounding consent.

The records kept will vary depending on the nature of the practice of the kinesiologist. For example, a kinesiologist in ergonomic practice may not have a "treatment plan" per se, but rather will make ergonomic recommendations for the workplace itself. However, these recommendations should be documented appropriately, just like a treatment plan would be. The concepts described above need to be applied to the context.

Form In Which Records Can Be Kept

Records must be legible. Failure to maintain a legible record would defeat the purpose of maintaining a complete and accurate record.

Records can be written on paper or stored electronically in digital form on a computer hard drive, cloud storage or external drive. Computerized records should be printable and viewable and must have an audit trail of changes made. These requirements are discussed further in the section on the *Personal Information Protection Act (PIPA)* below.

It should be clear who made each entry into the record, and when that entry was made. Any change or amendment to the record should be indicated, the date on which the change was made should be noted, and who made the change should be recorded. Importantly, any changes to the record should still permit the reader to read the original entry.

Kinesiologists cannot falsify records; this means that if an error is made in a previous entry, it cannot be removed (e.g. 'whited-out' or deleted). The record must be maintained with correction to the error (usually a simple line through the erroneous entry with the date and initial of the person correcting the error).

The record must be in English or French. The information can be recorded in other languages so long as all the information is also recorded in English or French. The generally accepted languages in the

health care system in BC are English, but French is also a permitted official language. This permits other health care providers on the client's health care team (e.g., doctors, chiropractors, physical therapists, and other health care providers) to understand the record.

How Long Must Personal Information Be Maintained

The requirements for how long to retain client records are detailed in law, primarily in the *Personal Information Protection Act (PIPA)* and the *Limitations Act (LA),* however other Acts can contain requirements for retaining information. BCAK recommends kinesiologists (or the health information custodian with whom the kinesiologist is employed) keeps kinesiology client records for 16 years from the last interaction with the client to comply with the limitation established in the LA for civil litigation. Recognize that this limit may not be sufficient in special situations, such as if the client is a minor under the age of 19, or is a person with a disability, at the time the care is provided. The retention period may need to be extended, to comply with the legislation, unless the record is no longer required due to other circumstances.

PIPA specifies the minimum amount of a time a record should be kept is one year, while both PIPA and the LA establish the requirements for the maximum time a record should be kept. The terms under the two acts differ as each has its own purpose: PIPA's is for protection of privacy and access to personal information and the *Limitation Act* is for dictating the maximum limit on how long a client has to file a civil suit against a kinesiologist or other health practitioner for wrongful care, should there be alleged professional misconduct or malpractice. For example, if a client is 8 years of age the last time the kinesiologist sees the client (i.e., last client visit), then the kinesiologist should keep the record until the client reaches the age of 19 plus the ultimate limitation period of 15 years, for a total of 26 years since the last date of interaction. This would ensure records are kept for the possibility of a liability claim being brought. Again, the maximum period equates to the number of years remaining before the minor reaches the age of 19 and becomes an adult in BC, plus ultimate limitation period of 15 years.

The maximum 15-year limit detailed in S.21 of the *Limitations Act* is based on when a person should have been aware of an injury or loss and is in addition to a standard one-year discovery period, for the total of 16 years, not considering the additional time required under special situations. The date on which the grounds for misconduct or malpractice liability are determined is referred to as the 'discovery date' and it is not necessarily the same as the date (or dates) on which the act (or acts) of the kinesiologist resulted in an injury to the client.

An example of this is when a person suffers an injury or illness, but the injury or illness does not become apparent for many months or years after the exposure to the source or cause of the injury, such as being exposed to cancer causing agents. An example more related to kinesiology practice, is when a client suffers a disc herniation or bulge resulting from, or contributed by, a kinesiologist inappropriately prescribing exercise to a client. In such cases, the injury can remain hidden (asymptomatic) for months or years after the incident causing the injury. This necessitates the kinesiologist retaining client records for a very long period of time depending on the situation and it is important that kinesiologists understand their obligations when it comes to retaining client records. It is also important to recognize that the most recent date of a client interaction can involve any contact with the client, including a phone call or an email to inquire how a client is doing, even if you have not seen them for a client session for a number of years.

- *The Limitations Act necessitates that a kinesiologist's client records are kept for up to 15 years, plus one year for discovery of the claim (plus additional time for minors or vulnerable adults) in the event a legal suit is by a client against a kinesiologist.*
- *Records that need to be kept are client-specific.*
- *Other business records, such as accounting and taxation records, will have retention standards set by other Acts or government agencies (e.g., Revenue Canada).*

Again, the rule regarding keeping records for 16 years is based on the 15 years maximum limit under the *Limitations Act,* plus 1 year for discovery of the claim. The following client information needs to be kept: client treatment record, appointment/attendance record, billing record, and when appropriate, equipment record. It does not include business records kept for income tax filing purposes. Tax record retention standards are set by Revenue Canada and should not be confused with limits for personal client records.

Maintaining or Transferring Records Upon Leaving a Practice or Retiring

The entire original record should be kept by the kinesiologist (or the health information custodian for whom the kinesiologist works) and only copies are supplied to others. If the kinesiologist is an independent contractor, and providing services under another business that provides kinesiology services, the agreement between the kinesiologist and the business should detail who will be the custodian for the client records for the work completed and client records made by the kinesiologist. It is important to recognize that this may change over time, as a business may sell to a new owner and the kinesiologist should ensure that the agreement specifies that the original business owner is responsible for ensuring that the records are maintained, as detailed in the original agreement.

Even when a kinesiologist retires, or leaves practice, the original record should be kept for the 16-year retention period unless the record has been transferred to another kinesiologist or other health care provider who will maintain the record. The client must be notified of the transfer. In those circumstances, the original record can be transferred to the new kinesiologist.

However, if the client has just been referred to another health care provider and the client record has not been transferred, then the retention period of the entire original record (i.e., sixteen years from last contact or the client's eighteenth birthday) is still mandatory.

The only exception to this is if there is some legal compulsion to provide the original record (i.e. in a Police, Coroner's or College investigation, or with a summons). If this circumstance occurs, the kinesiologist should retain a legible copy of the record for themselves.

If transferring from paper records to electronic records, and the original paper record has been scanned into an electronic form, then the original may be destroyed. The electronic version of the document becomes the original.

Confidentiality and Privacy Issues

Kinesiologists should take reasonable steps to keep records safe and secure. In general, no one outside of the authorized circle of care of health professionals should be able to access the records. Privacy protections must be in place to ensure the records cannot be seen, altered, or removed by others. Paper records should be kept locked in a secure location. Computer records need to be password protected on computers that have firewall and virus protections, and the data must be backed up regularly. Particular privacy issues are discussed in the section on the *Personal Information Protection Act (PIPA).*

Client Access to Records

Generally, a client has the right to review and receive a copy of all clinical records kept by a kinesiologist, unless access would significantly jeopardize the health or safety of a person. Although the kinesiologist may own the health care record and be responsible for it, clients are authorized by *PIPA* to access the record. Also, the client has the right to require correction of any errors in the client health record. If a client requests any relevant parts of the record, the kinesiologist should provide them with a copy, and not the original.

Secure Destruction of Personal Records

When the time for keeping a client record has expired, the records should be securely destroyed. Destruction of the records should be done in a secure manner that prevents anyone accessing, discovering, or otherwise obtaining the information (i.e. shredding, complete electronic destruction, incineration). If a kinesiologist destroys any records, a good practice is to keep a list or record of the names of the files which were destroyed, the date they were destroyed, and how they were destroyed (i.e., method).

Kinesiologists, or the organizations they work for, are expected to securely dispose of documents that contain personal information that are no longer required for legal or business/professional purposes to prevent unauthorized access, inappropriate use or identity theft.

The goal is to permanently destroy personal information or irreversibly erase it so that it cannot be reconstructed, whether in paper or electronic format. This includes the original records and any duplicate copies of records that may have been created for use in the practice.

A service provider may be contracted to provide the record destruction services. Industry best practices for the secure destruction of data are constantly evolving and it is generally the responsibility of all parties who handle personal information to adequately protect that personal information.

Best Practices

Kinesiologists, or the organization they work for, are responsible for developing and implementing a retention and secure destruction policy. Secure destruction practices are continuously evolving, and kinesiologists should ensure they keep up with current best practices in this area. The following are currently accepted standards for secure disposal of records:

- disposing of paper records securely by cross-cut shredding (do not use single-strip, continuous shredding because it is possible to reconstruct the strips),
- incineration of paper records, if practical,
- disposing of personal information stored on electronic devices (such as disks, CDS, DVDs, USB storage devices, and hard drives) securely by physically damaging the item such that the records are not retrievable by any means and discarding it, or by using a wipe utility to remove the original information (note that deleting electronic information does not constitute destruction, and a wipe utility may not completely erase the information),
- ensuring machines, such as photocopiers, fax machines, scanners or printers with storage capabilities are overwritten, erased, removed, or destroyed when the machines are replaced,
- keeping a destruction log that includes the client's name, time period covered by the destroyed record(s), the method of destruction and person responsible for supervising the destruction (if applicable).

Record Keeping Scenario

> *Franco, a MEMBER, has been practising for 35 years in the same practice, and has built up a busy and successful practice. He decides he is ready for retirement but wonders what he is supposed to do with his client records. Does he have to keep them himself? Ordinarily, he would have to retain client records for 16 years from the last interaction with the client, or the client's 19th birthday plus an additional 15 years, whichever is greater. If in this case Franco sells his practice to another kinesiologist to take over the business and clients, he can simply make part of the agreement that the new owner becomes the custodian for the records for the specified retention period and then he does not have to retain them himself. Franco and the new business owner should notify all current and past clients of the change in ownership and that the records will be kept by the new owner. If Franco simply shuts down his business, he can arrange with a speciality service to become the custodian of the records to comply with the*

legal requirements. Clients can be notified by letter or electronic mail and by posting a public notice in the local newspaper.

Sample Exam Question

Which one of the following does not need to be recorded in the client's record?

i. The client's birth date.
ii. The person who recommended the client to you.
iii. The client's health concerns.
iv. The treatment plan for the client.

The best answer is ii. Only if the client was referred by another health care provider must there be a record of who recommended the client. If another client referred the person or the person found out about your service through advertising, that does not have to be recorded (although in some cases it would be helpful to record this information). Answer i is not the best answer because kinesiologists need to record the client's birth date. It is relevant to many treatment decisions. Answer iii is not the best answer because kinesiologists need to record the client's health concerns (sometimes called chief complaints). It is relevant to many treatment decisions. Answer iv is not the best answer because kinesiologists need to record the treatment plan for the client. It is relevant to following through with the treatment on future visits and for justifying one's actions should it be necessary.

Billing

Kinesiologists are required to have transparent billing practices that do not take advantage of clients. Billing must be open and honest. Clients must be told the amount of the health care providers' fees before the service is provided. The kinesiologist must ensure that clients are:

- properly informed in advance of the total fee for the service being offered and not advertise only part of the fee and reveal additional charges later as the client goes through the payment process. This is often referred to as drip pricing. (For example, this would include charging additional fees for use of the clinic facility, equipment or treatment supplies such as tape or other supplies).
- not subjected to tied selling where a kinesiologist or clinic requires or induces a customer to purchase a second service or product. For example, it is inappropriate to refuse to provide a certain service unless the client also purchases another service.
- properly informed that they are free to purchase any recommended products, devices or equipment elsewhere and that the client is not obligated to buy them from the kinesiologist or their employer's business,
- informed about the service fees (the best way to do this is to provide clients with access to a written list or description of the fees the kinesiologist charges, whether the fees are eligible for reimbursement by third-party providers, and, if so, how much of the fee is reimbursable, if it is a standard amount). The client can also be told fees verbally or there can be a sign clearly displaying the fees in the practice's reception area. The problem with those other methods of notification is that the client might forget and if they are submitting for reimbursement from a third-party benefits provider, the benefits provider may not cover the full amount of a session fee, have a deductible amount, have an annual maximum payable amount and/or have a limit on the number of sessions that are covered for one or more services. The list or description of the fees must also include all charges, as well as any penalties or policies for late payment or missed appointments.

Defining as Excessive Fee

A fee is excessive when it takes advantage of a vulnerable client or is so high that the profession would conclude that the kinesiologist is exploiting a client. Many clinics in BC offer appointment bookings

through online software applications (e.g. Jane app) – fees can be clearly communicated to clients at the time of booking. Fees for kinesiology services, or kinesiologists, are not set by the government or the BCAK, however some government bodies and crown corporations establish fee rates for specific services that they provide under legislation, such as an ICBC initial assessment.

Invoicing

A kinesiologist must provide an itemized bill for professional services provided to a client. The bill must describe the services that were provided and the products that were provided. Any document relating to fees (e.g., a bill or a receipt) must be accurate. For example, it would be inaccurate for the document to do the following:

- Indicate that the kinesiologist provided the service when someone else did.
- Indicate the wrong date for the service. For example, it is unprofessional to enter a service date when the client had third-party insurance coverage, rather than the actual date of service when the client did not have insurance coverage on the date of service.
- Indicate that one service was performed when, in fact, another service was provided. For example, it is unprofessional to indicate that the fee is for a follow-up visit when in fact there was only a telephone conversation or virtual session.
- Bill for services at more than the kinesiologist's usual rate because the service is being paid for by an insurance company.
- Indicate that a service was performed when, in fact, no service was performed. For example, it is unprofessional to indicate that a client visit occurred when, in fact, the client missed the appointment, and a late cancellation fee is being billed.

No fee can be billed when no service was provided. The only exception is that a fee can be billed when a client misses an appointment or cancels the appointment on very short notice. However, most insurance companies will not pay for a missed appointment and the fee must be charged directly to the client. To bill the client a late cancellation or no-show fee, the client must have provided informed consent to this policy prior to receiving any treatment.

Kinesiologists must not offer a reduction in the amount of a bill if it is paid immediately. That would give wealthy clients an advantage over other clients. However, a kinesiologist can charge interest on overdue accounts because there is an actual cost to kinesiologists in collecting them. The offering of promotional pricing of kinesiology services is a marketing issue rather than a billing issue and is covered below under marketing.

Billing Scenario

> *Greg, a MEMBER, has a posted rate of $120 per visit in the reception area of his office. In fact, if the client is paying for the service personally and does not have extended health insurance coverage, Greg provides a credit reducing the rate to $99 per visit. If client has special financial needs, Greg will consider reducing his rate even further; in fact, he has three regular clients who pay only $5 per visit.*
>
> *The above scenario is contrary to standards for professional conduct regarding billing transparency. In effect, Greg's posted fees are not honest and accurate. Greg is billing clients with insurance more than his actual regular fee.*
>
> *It is acceptable, however, for Greg to lower his actual fee in individual cases of financial hardship. Greg must do this on a case-by-case basis and not through a general policy intended to hide his true fee.*

Marketing

Marketing includes advertising, promotional and market research activities, which are used to inform target audiences of the relative merits of a product, service, brand or issue, and/or drive, persuade, entice or otherwise convince a person or organization that the kinesiology services provided are a viable option for their needs.

Advertising

The use of appropriate advertising and promotions by MEMBERS to attract potential new clients should focus on communicating the type and availability of services within their scope of practice to potential consumers (the public, third-party treatment funders or other health professionals). The purpose of advertising should be to provide relevant information which will allow consumers to make informed choices regarding their, or the health of their clients', care needs. Advertising must be honest, truthful, and responsible.

Advertising is any message that communicates information about a kinesiologist, their practice and what services they may offer, under the kinesiologist's control. Advertising may be in any medium and may include (but is not limited to) the following:

- Radio
- Television
- Websites
- Social Media
- Print based notices – e.g., letterheads, newspapers, magazines, journals, flyers
- Contact listing services – e.g., yellow pages, specialized third-party internet-based service sites

Appropriate advertising is factual, accurate, objectively verifiable, independent of personal opinion, comprehensible, and professionally acceptable. It should not include any information that is misleading by either leaving out relevant information, or including non-relevant, false, or unverifiable information. For example, providing before and after pictures of how one's services can enhance a client's appearance is inherently misleading and unverifiable. MEMBERS should also take reasonable steps to ensure that the advertisements placed by others (e.g. employers, marketing consultants) meet these standards.

Testimonials must be verifiable, true, and correct. The kinesiologist must obtain time-dated consent for use.

In particular, references to qualifications or services in an advertisement that are false, or misleading, are not likely to be consistent with the federal *Competitions Act* and societal-based ethics standards.

Important information, such as office hours and days of operation, telephone or fax numbers, languages spoken, website address, location, and methods of payment, are acceptable inclusions in advertising. Fees or prices advertised should meet expectations for honesty and accuracy.

Promotions

Some kinesiologists may try to entice new clients by offering a "free" initial consultation or a free follow up session. The main point to consider in terms of billing, is that any promotion must be completely honest and transparent and not promote inappropriate or unnecessary services.

If a kinesiologist offers a reduced fee for an initial consultation, or alternatively a free follow up session, the service provided for the initial consultation must be complete and not just a partial service that requires the client to attend a second or follow-up session to receive what would otherwise constitute the typical service standard provided. In the case of a free initial consultation, there must be no requirement to attend a second time (e.g., to get the results). There must also be no hidden charges, and the offer must be open to all potential new clients regardless of how the service is funded.

Advertisements and promotions must not

- offer incentives, inducements or promote a demand for any unnecessary services, including incentive policies which are discriminatory towards clients, groups of clients or client's whose treatment is or may be funded by third parties in whole or in part,
- make a claim or promise a result that cannot always be delivered (i.e. be interpreted as a guarantee of success of a service provided),
- use comparative (e.g., "better"), superlatives (e.g., "best"), suggestion of uniqueness, or appeal to a person's fears about any service quality, products, or people (e.g. comparing one's services to another's, or claims their service is superior to others), unless there is credible evidence that can be readily verified,
- involve the pressuring of vulnerable or marginalized clients or others in general.

Soliciting or permitting the solicitation of an individual in person, by telephone, through electronic communications or by similar means, is unprofessional. However, it is not solicitation to remind existing clients of appointments, new developments or changes in your services, availability or business.

Inappropriate advertising can also result in a conflict-of-interest scenario, where the client's best interests become secondary to generating revenue and profit. The offering of incentives is a prime example of how good intentions can create competing purposes in the provision of quality health care by kinesiologists and other health care practitioners.

Advertising Scenario 1

Lynne, a MEMBER, has just started performing a new procedure with her clients that helps improve posture and is noticing great results. She wants to let other people know she now does this procedure so that clients can choose to come to her for it, or maybe even have another health care provider refer clients to her to have her perform it. She decides to add information to her website with a description of the service. She makes sure the description only describes the procedure and does not offer any guaranteed outcomes, compare it to other procedures or provide reasons why she might be a better choice because she performs this procedure. However, she wants people to know the great results she has been seeing with her clients. So, with the consent of a few of her clients, she takes some before and after pictures and publishes them to her website. She feels that people can decide for themselves based on the pictures if they want to try the procedure. Unfortunately, in doing so Lynne has violated the advertising standards for the profession. Before and after pictures are inherently misleading as they cannot be verified for authenticity and involve comparisons to promote a specific procedure. Also, before and after pictures may be construed as suggesting an outcome, or a guarantee, that cannot always be expected.

Advertising Scenario 2

Ali, a MEMBER, owns a practice down the street from a gym. He has been practicing there for less than a year. He is trying to build his practice and wants people to know he is new to the neighbourhood. Ali offers to give the manager of the gym free services in return for having him and his staff refer clients to Ali's practice. The manager of the gym thinks this is a great idea and offers Ali a free membership to the gym if Ali also refers clients to his gym. While this may

seem like a good business decision, Ali is in a conflict of interest for two reasons. Ali cannot give free services to the manager of the fitness center to obtain referrals as this would constitute a collateral benefit. Clients should be referred to Ali because they need his services and not because the referring person is getting free service. Further, Ali cannot accept free membership at the gym as this would conflict with his duty to refer clients to a gym only if Ali honestly believed that this would be in their best interest. In addition, unless there was something special about the local gym, Ali should recommend that the client go to the gym that they are most likely to actually use.

The referrals would be based on professional judgment and not on any 'kickbacks' he may receive.

Sample Exam Question

Advertising needs to be:

i. Accurate
ii. Verifiable
iii. Not contain personal opinions
iv. All of the above

Answer iv is the best answer. All of the qualities are those that are required of advertising. There are more qualities that advertisements should be such as factual, objective, comprehensible, and professional appropriate. Answer i is not the best answer because all of the qualities listed in the question are fine. Answer ii is not the best answer because all of the qualities listed in the question are fine. Answer iii is not the best answer because all of the qualities listed in the question are fine.

Appendix A – Professional Practice in a Regulated Environment

Note: This appendix is for information purposes only and is not subject to testing as part of the BCAK entrance examination.

The content in this section provides information specific to regulated health professions, however when BCAK MEMBERS and other kinesiologists work in health care teams with regulated health professionals they need to be aware of the similarities and the differences that affect their work.

This additional information may also provide BCAK applicants and MEMBERS, who wish to continue their education and become a regulated health professional (PT, OT, DC, MD) at a future point in their professional career, a greater understanding of the policies, practices, and processes of health professions regulation in general. The terms of reference for Boards, committees, oversight bodies and levels of government may differ from profession to profession, however the overall structure and function of regulated health professions, including legal structure, by-laws, policies and practices, remains relatively similar.

Health Profession Specific Acts, Regulations, By-laws

The mandate of a regulatory College is to serve the public interest. It does this by regulating the profession through legislation that is designed to protect the public from significant harm. Under its statute, the College "has a duty to serve and protect the public interest". A College cannot serve the self-interest of the profession (e.g., the College cannot set fees to be charged to clients, nor can it advocate to the government on behalf of the interests of the profession); that is the role of a professional Association, not a regulatory College. Professional regulation does not mean self-interest; in fact, it means exactly the opposite. Professional regulation means public-interest. That is, the College ensures that the profession acts honestly and competently for the benefit of the public.

There are a number of safeguards that ensure a College serves the public interest. They include the following:

i. The Board and the committees of a College include public members (i.e., non-health care professionals appointed by the government). While public members are typically a minority of the Council and its committees, they usually form a sizable minority.
ii. Board meetings and discipline hearings are open to the public. Observers can attend to monitor what happens.
iii. A College must typically consult with members of the profession and the public before making a regulation or by-law affecting them. A College will typically circulate the proposed wording of the regulation or certain by-laws for comment for a period of at least 60 to 90 days.
iv. The Minister of Health or the designated official may launch an investigation into any administration or operation process or decisions of a regulatory College in BC.
v. In BC, a College must report to the Office of the Superintendent of Health Profession and Occupation Oversight, who reports directly to the Associate Deputy Minister of Health, and ultimately reports to the Health Minister. The Minister has the ability to make recommendations, issue directions, or audit the operations of a College. Despite a College being separate from the government, it still is accountable to the Minister of Health.

These safeguards ensure that the College serves the public interest in a fair and open manner.

Given the public interest mandate of a regulatory College and the safeguards that are in place,

professional members elected to the Board of a regulatory College need to be respectful of their role. Board members are likely directors of a corporation who have a duty of loyalty and good faith to the mandate of their organization. Board members are not like politicians who represent and serve those who elected them.

Regulations and by-laws are both forms of law: civil and common. The major difference between a by-law and a regulation is that a by-law is made directly by a regulatory branch of a College, while a regulation must be approved by the government of BC. By-laws typically relate to the administration and internal affairs of a College. Regulations generally deal with matters of broader public concern. A regulatory College will typically establish regulations for the various aspects under its authority and control - these commonly include the following.

Registration Regulation

The Registration regulation sets out the requirements for obtaining and maintaining registration with the College. It is intended to make sure that members of a College are competent and have good character. The registration regulation will establish the classes of members, such as a general registrant, inactive registrant, or specialist registrant.

General Requirements

There are certain requirements that must be met by all applicants for registration with a given profession. Typically, all applicants must:

- Complete an application form fully and pay applicable fees,
- Inform the College of any criminal or regulatory proceedings or findings against them.
- Provide information regarding the applicant's training, experience, and past professional experiences (including previous registration with another regulatory body).
- Provide other information that may affect their ability to practice effectively and safely (e.g., professional liability insurance).
- Be able to speak, read and write in English and/or French with reasonable fluency.
- Not be incapacitated (e.g., have an illness that prevents them from practising safely, like a drug addiction that is not under control).
- Have jurisprudence knowledge on basic health regulation principles and law that applies to their practice (which is the primary purpose for this guidebook).

Specific Requirements

There are specific requirements for each class of registration.

- For example, applicants for General membership must have completed an acceptable educational program and passed the registration examination. There are special provisions for practitioners who were practising at the time the Act was proclaimed for a specified minimum period (i.e., they are grandfathered for some of the requirements, and they do not have to pass the required examination).

- Applicants for Inactive membership need to first be General members and must promise not to practice while inactive.

- Applicants for Specialist membership (assuming such a category exists) will need to demonstrate completion of advanced training that is of a specific form and recognized by the College.

There are also typically provisions that would allow for out-of-province Canadian registrants to transfer to BC with recognition of their qualifications – providing that the registrants are in a health profession that is regulated in both the outgoing and incoming provinces. These are called labour mobility provisions. A BC College would not typically require qualified applicants from another province where kinesiology was a regulated health profession and who are regulated there (such as registrants of The College of Kinesiologists of Ontario) to once again prove that they have adequate education, experience, and examination credentials. This accommodation is required within Canada under the *Canada Free Trade Agreement (CFTA)* (which all the provinces have signed on to) and contains a labour mobility clause that is designed to improve the ability of professionals to move between provinces and territories in Canada to work and live.

General Conditions

Once a person is registered with the College, they must continue to meet certain general terms, conditions, and limitations. For example, if a registrant (member of the College) is charged or found guilty of a criminal or other offence, the member must inform the College. If a registrant is disciplined by another professional regulator, the registrant must inform the College. If the registrant no longer has professional liability insurance coverage, the registrant must inform the College. Members of each class of registration are assigned a specific title that they must use so that the public can identify their registration status.

Professional Misconduct Regulation

As discussed above, some types of professional misconduct are detailed in the *HPA/HPOA* itself. For instance, the *HPA/HPOA* makes breaking the law, professional misconduct (e.g., to be found guilty of an offence relevant to a health professional's suitability to practice the profession in BC) subject to disciplinary action. Being found guilty of professional misconduct outside of BC can also lead to disciplinary action in BC as well. Sexual misconduct relating to a client is considered professional misconduct. So is failing to cooperate with any quality assurance program of the regulatory College.

A College's professional misconduct regulation describes additional examples of professional misconduct. Some provisions found in the professional misconduct regulation are common to many of the professions regulated under the H*PA/HPOA*, while others are more specific to a given profession based on their scope of practice.

The following are the main topics covered in professional misconduct regulations.

Standards of Practice

The professional misconduct regulation makes failing to meet the standard of practice of the profession an act of professional misconduct. Usually, this relates to the assessment and treatment of clients by a health practitioner. The standards of practice may be written or unwritten. They reflect a shared understanding of the profession and how it should be practiced effectively and safely. This is based on what would be reasonably expected of the ordinary competent health practitioner in their field of practice. Expert witnesses are often used to determine a standard of practice when it is unwritten or under consideration.

One specific standard of practice in the professional misconduct regulation is that a health professional must refer a client to another health care provider where the client has a condition that is beyond the knowledge, skill, and judgment of the practitioner.

Sexual Misconduct

Section 32.4 of the *Health Professions Act* requires regulated health professionals to report sexual misconduct by another health care provider. The duty arises if there are reasonable grounds to believe

the sexual misconduct occurred while practising the profession or while operating a health facility (which includes an office or clinic). The reasonable grounds could arise even if the regulated practitioner did not personally observe the sexual misconduct. For example, if a client informs the regulated practitioner of details of misconduct, that will likely constitute reasonable grounds. A regulated practitioner does not have to investigate the events first nor do they have to actually believe that the information is true. The term, reasonable grounds, means information that would cause a reasonable person who does not know the individual involved to conclude that it is more likely than not that the information is correct.

The report is made to the Registrar of the regulatory College under which the offending health provider is licensed. For example, if a client tells a physical therapist that her massage therapist fondled her, the physical therapist must submit a written report to the Registrar of the College overseeing the massage therapist.

Sexual Misconduct Duty to Report Scenario

> *Mandy, a physical therapist, is told by Paula, a client, that Paula had an affair with her family doctor. Mandy asks Paula if her family doctor was treating her while the affair was ongoing. Paula says yes. Mandy tells Paula that she is required by law to report this information to the Registrar of the College of Physicians and Surgeons of BC (CPSBC). Mandy explains that the CPSBC will want to investigate the report. It will be very difficult for the CPSBC to investigate the report if Paula's name and contact information is not included in the report. The CPSBC will likely want to interview Paula about the affair. The investigation could lead to a discipline hearing. However, the law is clear that Mandy cannot include Paula's name and contact information unless Paula is prepared to sign a written consent permitting Mandy to do so. Mandy says that they can call the CPSBC right now, on an anonymous basis, to see what the process would be like. Paula agrees to the telephone call. After the call is completed, Paula says that she will not give her consent to include her name and contact information. Mandy then provides the report in writing without identifying Paula.*

Incompetence, Incapacity and Professional Misconduct

A regulated health care professional must report in writing to the registrar of another person's regulatory college if the registrant, on reasonable and probable grounds, believes that the continued practise of a designated health profession by the other person might constitute a danger to the public.

There are distinct situations under which this applies.

If a person

a) terminates the employment of another person,
b) revokes, suspends or imposes restrictions on the privileges of another person, or
c) dissolves a partnership or association with another person.

And,

d) reporting provisions that apply to incompetence, incapacity, and professional misconduct.

Report Types for the above situations:

i. The first is a termination report when one ends a professional relationship with another practitioner.

ii. The second is a report by a facility operator. These two reporting requirements have slight differences. For example, a facility operator does not have to report professional misconduct (except for sexual misconduct, as described above), only incompetence or incapacity.

iii. The third is when a regulated health care practitioner reports when they end a business relationship with another health care provider on the basis that the other health care provider is

incompetent or incapacitated or engaged in professional misconduct. Examples of business relationships include employer-employee, partners, shareholders in a professional corporation or space sharing. The report must be made even if the person quits or resigns first; if the regulated health care practitioner was going to make a report, it must still be made.

The report must be made in writing to the Registrar of the College that regulates the other health care provider. The report must be made in thirty days of ending (or proposing to end) the business relationship. Under this mandatory reporting obligation, the name of the client can be included without the client's consent.

In addition, if a health care practitioner to be reported operates a health facility (which probably includes an office or clinic), the reporting practitioner typically must report any reasonable grounds to believe that another health care provider is incompetent or incapacitated. This report must be made even if the business relationship with the other health care provider is not ended. For example, if a health care provider at the facility is found to have a drug addiction and goes into a treatment program while the job is kept for them, the report would still have to be made.

The report of the operator of the health facility must be made in writing to the Registrar of the College to whom the alleged incompetent, incapacitated or unprofessional practitioner belongs. The report must contain the reporting practitioner's name and the grounds of the report. Under this mandatory reporting obligation, the name of the client can be included without the client's consent. The report must be made within 30 days of receiving the information. If it appears that clients are continuing to be harmed, the report must be made right away.

Incompetence, Incapacity and Professional Misconduct Duty to Report Scenario

David, a physical therapist, learns that his employer, also a physical therapist, is an alcoholic. David tries to help his employer get treatment, but the employer keeps relapsing. Yesterday the employer came back after lunch totally impaired such that David had to call in his employer's wife to pick him up and take him home. David had to cover for his employer with his clients. What scared David the most was that his employer treated three clients after lunch before David found out about his condition. David is preparing his letter of resignation. He consults a lawyer about what to do. David's lawyer advises him that David must make a written report to the Registrar of the College of David's employer, in this case, the College of Physical Therapists of BC.

Permitting Illegal Activity Scenario

Pierre, a kinesiologist, is registered with the College of Kinesiologists in Ontario. Pierre's father was previously a kinesiologist but is no longer registered with the College. Pierre's father sometimes drops into Pierre's office to treat his former long-term clients, with Pierre's consent. The office assistant refers to Pierre's father as "Doctor" when booking clients. A client complains to the College of Kinesiologists when her extended health insurance refused to pay for Pierre's father's services because he was unregistered. Is Pierre at risk for his father's conduct?

The answer is yes. It is professional misconduct to permit a person to hold themselves out as practising the profession when they are not registered. Similarly, permitting a person to illegally use the title "Doctor" in one's practice would be seen as professional misconduct if Pierre knew about it. Pierre condoned the conduct that occurred at Pierre's office. Pierre, by being registered, gave credibility and status to the illegal conduct of his father. Pierre could face a discipline hearing.

Charges and Offences – Self Reporting

Regulated health professionals must report themselves when they have been charged or found guilty of an offence, including any bail conditions or other restrictions imposed on them. All offences are supposed to be reported. Thus, criminal offences, offences under federal drug or other legislation and provincial offences (including motor vehicle act offences) need to be reported. Only courts can make offence findings. Thus, any findings by a body that is not a court (called "tribunals") are not reportable under this provision. All charges and findings are reportable regardless of whether they resulted in a conviction (e.g., a finding of guilt that leads to an absolute or conditional discharge is not a conviction, but still needs to be reported to the College).

Reports are to be made to the Registrar of the College as soon as possible after the charge or finding and should contain the following information:

- the name of the health professional filing the report,
- the nature of, and a description of, the charge or offence,
- the date the health professional was charged or found guilty of the offence,
- information regarding every bail condition or other restriction imposed or agreed to in relation to the charge,
- the name and location of the court in which the charge was laid, the bail condition or restriction was imposed, or that found the health professional guilty of the offence, and
- the status of the proceedings and any appeal initiated in respect to the finding of guilt.

If there is an appeal that alters the information reported, an updated report must be made. The report will be reviewed by the College and may result in an investigation.

Charges, bail conditions and restrictions, and findings of guilt in relation to the *Criminal Code* (Canada) and the *Controlled Drugs and Substances Act* (Canada) will appear on the public register. This information will only be removed when the charges are withdrawn or no finding of guilt is made; the bail conditions or restrictions are lifted; or whether the finding of guilt is subject to a pardon, is subject to a record suspension, or is overturned on appeal.

Offence Duty to Report Scenario

> *Hannah, a regulated health professional, is found guilty of dangerous driving under the BC Motor Vehicle Act. On the College's annual renewal form she sees a question asking if she has been found guilty of any offence. She cannot believe that this question is meant to include her dangerous driving charge. She calls the College for clarification. Hannah is told that the Health Professions Act requires <u>all</u> offences to be reported. The intent of requiring such reports is to prevent regulated health professionals from determining whether the findings were relevant or not. That decision is to be made by the College. In fact, Hannah should have reported the finding when it occurred and not waited six months for the annual renewal form. Hannah 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 that this finding is worth investigating further and reminding her that in future such findings need to be reported right away.*

Professional Negligence – Self-Report

Regulated health care professionals must report themselves when they have been found to have engaged in professional negligence or malpractice. Findings of professional negligence or malpractice are only made by the courts. Thus, any findings by a tribunal are not reportable under this provision. Settlements of claims for professional negligence may not be included in the reporting requirement if they did not result in a court "finding".

Reports are to be made to the Registrar of the College as soon as possible after the finding and should contain the following information:

- the name of the health care professional filing the report,
- the nature, and a description, of the finding,
- the date of the finding,
- the name and location of the court that made the finding, and
- the status of any appeal initiated in respect to the finding.

The report will be reviewed by the College and may result in an investigation. The report is automatically put on the public register (see the discussion of the register below).

If there is an appeal that alters the information reported, an updated report must be made.

Professional Negligence Duty to Report Scenario

> *Kalen, a registered health care practitioner in Ontario, is sued in Small Claims Court by a client, Matt. Matt claims that he told Kalen about pain in his lower abdomen, but that Kalen attributed those symptoms to stress. After two weeks of supportive treatment for the stress, despite increasing pain, Matt went to the emergency department. Matt was rushed into surgery for appendicitis and stayed in the hospital for almost a week. Matt claims Kalen should have referred him to another health care provider to rule out appendicitis before treating the symptoms as purely stress related. The Small Claims Court judge agreed and ordered Kalen to pay Matt $10,000 for his malpractice. Kalen reports the finding to the College. The College places a note about the finding on the public register.*

Duty to Warn

Under case law, a regulated health practitioner who has reasonable grounds to believe that another person is likely going to cause severe bodily harm must warn the appropriate people of the risk. This duty applies even if the person who will likely cause the harm is the client of the health care practitioner. A regulatory College includes an aspect of this duty to warn in its professional misconduct regulation. Where a health care practitioner learns of an incident of unsafe practice by another regulated health practitioner, the first regulated health care practitioner must report this to the Registrar. This duty to report does not include all forms of incompetence, incapacity, or professional misconduct. It only applies where the health care practitioner jeopardizes the safety of a person (normally, but not always, a client).

This provision only applies where the other person, causing the risk of harm, is a regulated health professional under the same College, however, when the health care practitioner causing a risk of harm belongs to another profession, there may be an ethical or even a case law duty to intervene in an appropriate way to prevent harm to a client or other person.

The report must be made promptly to the College. It would be advisable to make the report in writing with all necessary details. Under this mandatory reporting obligation, the name of the client can be included without the client's consent.

Public Register

The *HPA/HPOA Act* requires that the public be able to obtain certain information about regulated health care practitioners. This information helps the public (e.g., clients, employers) to decide whether to choose a particular health care practitioner. This information also helps the public to see how well the College is regulating its health care practitioners. The register also helps ensure that health care practitioners practice only as they are permitted to. For example, if a health care practitioner is suspended for three months, people can more easily report to the College if the health care practitioner

is still working in their professional role during the suspension period.

The register must contain detailed information about each regulated health professional, such as the following:

- Name
- Business address and telephone number
- Name and business address and telephone number of each professional corporation, and names of shareholders
- Class of registration
- Any terms, conditions, and limitations on the registration
- Notation of any licenses or registrations to practice another profession inside or outside of BC
- Notation of every caution delivered by the Complaints and Review Committee
- Notation of every specified continuing education or remediation program ordered by the ICR Committee
- A summary of every undertaking entered into in relation to the ICR or Disciplinary Committee process that is in effect
- Referrals to the Disciplinary committee for a discipline hearing
- Information related to current charges, bail conditions and restrictions, and convictions under the *Criminal Code* and *Controlled Drugs and Substances Act*
- A summary of every finding of professional misconduct, incompetence, or incapacity
- Findings by a court of professional negligence
- Every suspension of registration
- Every revocation of registration
- Any agreement to resign and never reapply for registration, and
- Any other information that the by-laws say should go on the register.

There are only a few circumstances where the College can choose not to put this information on the register or to remove information from the register. However, it can typically do so in the following circumstances:

- The information (e.g., contact information) would jeopardize the safety of a health professional (e.g., if a health practitioner is being stalked).
- The information is obsolete or no longer relevant (e.g., the finding of professional misconduct relates to conduct that is now acceptable, for example if the advertising rules happen to change).
- Unnecessary information about the personal health of a health practitioner (e.g., in incapacity matters).
- After six years, where there was only a reprimand, a fine or a finding of incapacity and a disciplinary committee or fitness to practice committee agrees that there is no public interest in keeping the information on the register. The register is available to the public in a number of ways. It will be available on the College's website or/and College's office. A paper copy can be requested. A College can also give information on the register over the telephone. Where a person asks about a health professional, a College must help the person find whatever information that person wants that is on the register.

Professional Corporations

Regulated health care practitioners, offering their services to the public, can choose to practice personally (i.e., in their own names), through a partnership or through a professional corporation (i.e., a special type of corporation for regulated professionals). They cannot offer their services to the public through regular business corporations; they can only practice through a professional corporation. (This is distinct from a corporation hiring a health care practitioner to provide services to their own

employees, rather than to the public, which is acceptable.) In a regulated environment, health care practitioners who already have a regular business corporation will have to change that corporation to a professional corporation once they become registered with the College.

Health care practitioners working at a rehab clinic or multi-disciplinary practice need to be clear that it is they, not the clinic, that are providing the services to the clients. Often such clinics leave the impression that it is the clinic (often owned by a corporation), not the practitioners who are providing the services.

Professional corporations typically have a number of conditions and restrictions. These frequently include the following:

- only regulated health care practitioners from a specific group (such as physical therapists owning a business using the word 'physiotherapy' in the registered name) can hold shares,
- the officers and directors of the professional corporation must be shareholders,
- the name of the professional corporation must include the words "Professional Corporation",
- the professional corporation cannot be a numbered company (*e.g.*, 1234567 BC Inc.), and
- the professional corporation can only practice the profession or provide related or ancillary services. It cannot, for example, practice another profession like massage therapy.

Regulated health care practitioners cannot avoid professional liability through a professional corporation. Injured clients can sue the practitioner personally. However, a physical therapist working through a professional corporation does have protection against trade creditors. For example, if suppliers or other creditors are not paid by the professional corporation, they cannot sue the licensed physical therapist personally.

A number of provisions have been made to prevent health professionals from hiding behind the professional corporation when facing questions from the College. These include the following:

- the *HPA/HPOA* applies to regulated health practitioners despite their practicing through a professional corporation,
- a regulated health care practitioner's fiduciary (i.e., good faith) and ethical obligations to clients remain in place, and now apply equally to the professional corporation as well,
- during investigations and other proceedings involving regulated health care professionals, the College has the same powers over the professional corporation (*e.g.*, access to premises and documents) as it does over the health care practitioner,
- any monetary orders against regulated health care practitioners are also payable by the professional corporation,
- any duty to a client, the public or the College takes precedence over the duties of the health care practitioners as an officer or director of the professional corporation,
- any terms, conditions and limitations against a health care practitioner apply to the professional corporation as well, and
- any knowingly false representation made to obtain a certificate of authorization is an offence.

Professional corporations typically must obtain from the College a "certificate of authorization", similar to a certificate of registration, for individual health professionals. To obtain a certificate of authorization, a health professional goes through the following process:

- Selects a name for the professional corporation. Ministry regulations require that the name must be in a specific form (as set out in the College register). The name will typically include the person's surname and can include the person's given name and initials. The name of the corporation must also indicate the name of the member's health profession (i.e., "Physiotherapy"). The name must also typically include the words "professional corporation". The name can include nothing else.
- The professional corporation must then be incorporated with the government. This involves

preparing articles of incorporation, corporate by-laws, paying a fee and submitting an application form with the government. If the paperwork is acceptable, the government will issue a certificate of status and a certificate of incorporation.

- Within a defined period of obtaining one's certificate of status, the professional corporation must apply to the College for a certificate of authorization.

Once incorporated, the corporation must notify the College immediately if its name or articles of incorporation change. The College also needs to be notified promptly of any change in shareholder, officer, or director of the professional corporation or if the corporation changes its location or locations of practice. Each year the professional corporation must renew its certificate of authorization. The renewal process involves completing the same sort of paperwork as was involved in the initial application. The renewal process updates the information about the corporation and its shareholders.

A certificate of authorization can be revoked if the professional corporation does not follow the rules.

The College cannot give advice to health professionals as to whether a professional corporation is good for them. Health Professionals, including health care practitioners, will need to obtain advice from their own accountants or lawyers.

Inappropriate Behaviour Towards Clients or the Public

Many provisions in a College's professional misconduct regulation relate to inappropriate behaviour towards clients or the public. For example, physical or verbal abuse of clients is professional misconduct. This includes rude or unbecoming behaviour towards clients, members of the public or other health care practitioners. In addition, if a client has a concern about a health care practitioner's conduct and wishes to make a complaint, the health care practitioner has a professional obligation to advise the client about the College's regulatory role and how to get in contact with the College.

Risk of Harm Provision – Duty to Report

Part of being a member of a regulated health profession is that one cannot remain silent when another health care practitioner is at risk of causing harm to a client. Section 32 of the *Health Professions Act engrains* the need to protect clients by requiring regulated health professionals to file mandatory reports when they have reasonable grounds to suspect the practice of another regulated practitioner may constitute a danger to the public. Other requirements for mandatory reports also exist for the protection of children (infants) and vulnerable populations in other statutes (e.g., the *Child, Family and Community Service Act*), some of which are dealt with below.

The risk of harm provision requires regulated health care practitioners to report any conduct that may put a client at significant risk of harm to the regulatory college of the other health care practitioner, if in their opinion, the other health care practitioner's actions, advice or omissions present a foreseeable risk of harm, even if it is within their scope of practice. The risk of harm provision prohibits a health care practitioner from treating or advising a person with respect to their health, if it is reasonably foreseeable that serious bodily harm may result from the treatment or advice or from an omission by them.

This provision is designed to prevent health care practitioners from taking advantage of vulnerable clients, in ways other than performing a controlled act. For example, encouraging a cancer client to follow a specific diet as the only means of treatment might fall within this risk of harm provision.

Both the *Health Professions Act (S32.5)* and case law provide immunity to health professionals who make a mandatory report in good faith.

Record Keeping

Failing to make and keep appropriate and adequate records is professional misconduct. Note: this is an important concept to understand and was addressed in the BCAK standards in a manner similar to what is required for regulated health professionals, as the laws which apply to the retention of all personal information establish the framework for the requirements.

Informed Consent

Informed consent is dictated by the HCCCFAA and health professions regulation makes it professional misconduct to fail to obtain informed consent before assessing or treating a client.

Restricted Acts, Delegation and Supervision

The legislation specific to each health profession will establish the basic scope of practice and the College regulations will detail any restricted activities that registrants may perform, including any special or advanced training that is required.

Confidentiality

All regulated health care practitioner's Colleges have requirements detailing the necessary requirement to keep all client information confidential. Failing to maintain confidentiality can be considered professional misconduct. There may be exceptions depending on the circumstances to this duty of confidentiality. For example, clients can consent to disclosing information. Also, where a health care practitioner is required (e.g., by a court summons) or permitted (e.g., when selling one's practice) by law to disclose client information, it can then be disclosed. Note: the concept of confidentiality was discussed earlier in the section on the *Personal Information Protection Act (PIPA).*

Conflict of Interest

Practitioners have a duty to act in the best interest of their clients. A conflict of interest arises when a health care practitioner has an inconsistent duty to the client, to someone else, or to themselves, at the same time. For example, a health care practitioner has a duty to only refer clients to others where it is in the best interest of the client. Where a health care practitioner pays another health care practitioner to refer clients to them, the health care practitioners have a conflicting interest (i.e., getting paid for the referral) that is unprofessional. Note: Conflict of interest was previously discussed in its own section under the BCAK standards.

Improper Billing and Fees

Regulated health professionals must be honest in their billings. Because of this, the professional misconduct regulation typically prohibits improper billing, which was discussed under the BCAK standards.

Misrepresentation

It is professional misconduct to be dishonest in one's dealings with clients, colleagues, third party payers or a regulatory College. Dishonesty with third parties is also not acceptable (even if the intent is to help a client). Third parties often assume that regulated health professionals are honest because of their professional status of being a regulated health profession, which in turn implies integrity. For example, it would be professional misconduct to issue a letter or certificate saying that a client was too sick to work when the health professional does not know this to be true.

Improper Use of Names, Title, or Descriptions

There are specific rules in the professional misconduct regulation for regulated health care practitioners that restrict use of certain names, titles, or descriptions. For example, the title of the member will depend on their class of registration (classes of registration was discussed previously). These rules are intended to ensure consistent, appropriate, and clear use of titles that help the public know with whom they are dealing and to prevent confusion. Similarly, members of a College can only use a term, title or designation indicating or implying that they have a specialization in an area or areas of practice where legitimate. Also, practising the profession under a name that is not registered with the College may be considered professional misconduct (e.g., if a health care practitioner uses a nickname when practising, the College must be told of that nickname first so that it may enter this information into the register).

Improper Advertising

Regulatory Colleges make it professional misconduct to engage in false or misleading advertising. Note: the general information was discussed as part of the BCAK standards.

Conduct towards Colleagues

Health care practitioners must treat their colleagues with courtesy and civility. For example, if a client goes to another health care practitioner and that person asks for a copy of a client's record (with client consent), one cannot simply ignore the request letter. If a health care practitioner disagrees with the treatment being provided by another health care practitioner, they must not make insulting comments about the other health care practitioner to the client.

Conduct towards the College

Obligations come with the privileges of self-regulation. One obligation is that health care practitioners must accept the regulatory authority of the College. Examples of conduct towards the College which can constitute professional misconduct include:

- Publicly challenging the integrity of the College's role or actions.
- Breaching an undertaking given to the College.
- Failing to co-operate in, or obstructing, an investigation by the College.
- Failing to participate in the quality assurance program.
- Failing to respond appropriately and promptly to correspondence from the College.
- Failing to report a health care practitioner to the College who has jeopardized the safety of a client.

Disregarding Restrictions on Certificate of Registration

A regulated health care practitioner must confine their practice to what is legally permissible. If the Act or a committee of the College restricts a practitioner in certain areas, it would be professional misconduct to exceed those restrictions. For example, a health care practitioner who is required by a committee to practice under supervision, must always do so.

General 'Catch-all' Provisions

A regulatory College will also have general catch-all provisions. These cover types of conduct that are not specifically dealt with elsewhere. One provision prohibits conduct that would be reasonably regarded as dishonourable, disgraceful, or unprofessional. This provision assumes that there is a general consensus in the profession of conduct or behaviour that would be considered unacceptable.

For example, there is no specific provision that says that a health care practitioner cannot abuse a client's mother during a visit. However, no one doubts that this conduct would be unprofessional.

The second catch-all provision makes it professional misconduct to engage in conduct unbecoming a member of the profession. This provision refers to conduct in a health care practitioner's private life that brings discredit to the profession. For example, a health care practitioner who engages in a fraud on the stock exchange could be disciplined for the dishonesty.

Conflicts of Interest

A regulated health care practitioner must not engage in a conflict of interest. To avoid a conflict of interest, health care practitioners must put the interests of their clients first, and not allow personal or other interests to interfere. Health care practitioners must provide their regulatory College with any documents, explanations, or information regarding a suspected conflict of interest if requested. This is to enable the College to assess whether a conflict of interest is a concern. For example, if the College receives information that health care practitioner "a" is receiving referrals from health care practitioner "b" and health care practitioner "a" is making unusual payments to a health food store whenever they refer clients to health care practitioner "b", then the College could ask for an explanation of those payments, and any financial records related to them, to determine whether there is a conflict of interest.

Regulatory College Processes

A regulatory College does a number of things to protect the public. Under its Act, the College sets up various committees and operates various programs. The following are some of the most important processes the College carries out in the regulation of the profession.

Registration Process

As mentioned previously, registration is the way for a person to enter into the profession and become a member of the College if they meet the requirements set out in the registration regulation. The process of registration itself is fairly structured.

To become a member of the College a person files an application form with the Registrar and pays the applicable fees. The form is available on the College website. Through the application form, the applicant provides the College with information about their training and experience, their past conduct, and other information that may affect their ability to effectively (e.g. language fluency, professional liability insurance, current experience, etc.) practice. The applicant should provide enough information to demonstrate that they meet the requirements for registration. The applicant must not make any false statements on the application.

Where the applicant meets the requirements, including passing or completing any courses or exams that are required by the College, the Registrar's office will simply accept the application. In this case, a certificate of registration is issued to the new member of the College.

However, if it appears that the applicant does not meet the registration requirements (or even if the Registrar is not sure) the Registrar will refer the application to the Registration Committee. The applicant will be told of the concern and be given an opportunity to provide a written practice response to the concerns. The Registration Committee will consider the application further and determine suitability of the applicant to become a member. If the Registration Committee concludes that the applicant meets the requirements, a certificate of registration will be issued. If the Registration Committee concludes that the applicant does not meet the requirements it can make a number of decisions including:

1. Direct the applicant to complete further training or examinations.
2. Register the applicant with terms, conditions and limitations (for example, if the missing requirement is exemptible and the public can be protected in the circumstances).
3. Refuse the application.

If a certificate is not granted by the Registration Committee, the applicant has further options. The decision may be appealed, for example, to the Health Professions Appeal and Review Board (HPARB). HPARB is appointed by the provincial government and is independent of the College. HPARB will review the file and, if the applicant wishes, hear from witnesses. HPARB can determine that an applicant meets the registration requirements or require the Registration Committee to obtain additional information and make a new decision. HPARB's decision can be appealed to the courts.

To ensure that a College's registration process is fair, the registration system itself is audited and reviewed through one or more government bodies; in BC, that would be the office of the Fairness Commissioner of BC, the Director of Health Professions Regulation or the BC Ombudsperson. Further, the *HPA* has provisions to ensure that the registration process of Colleges is transparent, objective, impartial and fair.

Where an applicant is a registered health professional in another part of Canada, and there is a similar College in BC, the College must, with rare exceptions, accept the applicant's education, experience, and examination credentials without further inquiry. One exception would be if the class of registration was not the same. The College can still review the other registration requirements (e.g., good character, professional liability insurance, jurisprudence requirements). This accommodation for professionals transferring in from other parts of Canada who are regulated in a given province of territory, helps to ensure labour mobility through all parts of Canada under the *Canadian Free Trade Agreement*.

Registration Process Scenario 1 – Making False Statements

> *Trevor, an Occupational Therapist, filled out his application form for registration in the College of Health & Care Practitioners of BC, but when asked if he had any previous criminal findings, he did not want to put down the shoplifting conviction he received 20 years ago. He was worried it would affect his application. So, on his application he reported that he did not have any previous criminal findings. Based on the application form, the College registers Trevor. A few years later the College is told about Trevor's previous conviction. The College realizes that Trevor made a false statement. The College can revoke Trevor's registration because he made the false statement on the application form. Ironically, if Trevor had disclosed the conviction, the Registration Committee would probably have accepted Trevor for registration since he has had no difficulties in twenty years. However, making a false statement on the application form is so serious and reflects current dishonesty, that now he will be removed from the profession.*

An applicant who has received a pardon or who has received a conditional or absolute discharge from court must still report the offence.

Complaints and discipline process

To protect the public, investigating concerns about a health care practitioners professional conduct or competence is an essential element of self-regulation. Where a concern appears serious, disciplinary action must be taken. Where possible, the College deals with concerns related to potential professional misconduct and incompetence in an educational manner. If a matter is referred for discipline, the College provides a fair procedure to the health care practitioner.

The following outlines how a complaints and discipline process works.

Complaints, Inquiries and Reports Committee

A committee established to deal with Complaints, Inquiries and Reports is a statutory committee typical

to a regulatory College, which handles member-specific concerns (e.g. professional misconduct, incompetence, and incapacity).

The committee can only handle concerns regarding members and some former members of the College. Further, the committee is only involved in allegations regarding professional misconduct, incompetence, or incapacity. It does not handle claims about professional negligence (i.e. civil lawsuits).

For professional misconduct and incompetence issues there are two main sources for concerns:

1. Formal complaints, and
2. Formal investigative reports (called Registrar's Reports).

Incapacity concerns are also handled by this committee but will be discussed in a later section because they are handled in a different way than complaints that bring a health care practitioner's professional conduct or competence into question.

Intake of Complaints

For concerns to be considered a formal complaint, the following requirements must be met:

- The complaint must be in writing or recorded on tape, film, disk or other medium, as set out in the College submission guidelines.
- The complainant must be identified.
- The member who is the subject of the complaint must be identifiable (the committee may be able to assist in identifying the member based on the information provided by the complainant).
- The complaint must identify some conduct or actions that are of concern (e.g., not just the complaint that a member is "unprofessional", "incompetent" or "incapable", but instead including some level of detail about those complaints.)
- The complainant must intend the matter to be a complaint (and not simply be airing their disapproval of the health professional's action, without the willingness to be involved in a formal complaint review).

The Registrar must give the member notice of complaint. This must be done within a specified time period of the receipt of the formal complaint. With limited exceptions, all complaints must be investigated by the College.

Intake of Registrar's Reports Investigations

As mentioned before, the discipline process can be initiated by a Registrar's Report. In this method the following occurs:

- A concern arises that the Registrar believes warrants investigation, and it is brought to the committee with the request to approve appointment of an investigator,
- Where approved by the committee, an investigator is appointed,
- The investigation is conducted, and the investigator makes a report to the Registrar,
- The Registrar then makes a Registrar's Report to the ICRC.

Once a Registrar's Report is made to the committee, the matter proceeds in much the same way as a complaint.

Investigations

The investigations by the committee should be thorough but neutral, objective and fair. Frivolous or vexatious Complaints are those made in bad faith, are moot or are otherwise an abuse of process and are not required to be investigated. Typically, this rarely occurs, generally it will be fairly obvious that there is little merit to the complaint and the processing of the complaint is unfair in the circumstances.

For example, a complainant repeating a complaint without any new evidence would be frivolous and vexatious. When an investigation proceeds, both complainant and registrant are usually first asked to provide all documentation available to them. The information is gathered until it is determined that all reasonable and available evidence has been obtained. Information is gathered from a variety of sources, including College files, the health care practitioner's files, public databases (i.e., court files), other regulators, witnesses, and other health practitioners.

Decisions

Once the investigation is completed, the investigations committee of the College renders a decision on the issues. There are typically a number of options available, and discipline is not the only option. The committee acts as a 'screening' body directing the concern to the most reasonable solution. The investigations committee does not hold a hearing, make findings of credibility, find wrongdoing, or impose a disciplinary sanction (i.e. fine or suspension). Only a disciplinary committee can do these things. The following are some of the dispositions that can take place.

- Withdrawal of complaint: If a complainant wishes to withdraw a complaint, the investigations committee can still decide to proceed with investigation. The Registrar must decide whether to accept a withdrawal of a complaint.
- Request an Undertaking: This means that a member promises to do certain things (or refrain from doing certain things).
- Referral to Discipline: Discipline is intended for serious concerns (e.g. dishonesty, breach of trust, wilful disregard of professional values, inability to practice competently) Even then the disciplinary committee must ensure that there is reasonable evidence to support the concern.
- Referral for Incapacity Proceedings: This is done where the conduct may be due to an illness or health condition. The procedure is described separately below.
- Appearance for a Caution: The member can be required to appear before the investigations committee for a conversation about the conduct. Usually this is accompanied with the statement that if the circumstances do not change that the member will face more formal action in the future.
- Other Actions: The investigations committee can be creative in their decisions and solutions. For example, they can require the member to undergo a specified continuing education and remediation program (e.g., a record keeping course).
- Taking No Action: If there is no basis for concern the investigations committee can close (or dismiss) the complaint. Reasons must be given for taking no action.

Appeal Process

In a complaints matter, either party can seek a review of an investigations committee decision before the College Appeals Board unless the decision was referred to discipline proceedings or for incapacity proceedings. The Appeal Board may confirm a decision of the investigations committee or return the matter to the investigations committee to make a new decision. The Appeals Board can also make recommendations to the investigations committee or require the committee to take specific action (e.g., specify the outcome.)

Discipline Proceedings

All disciplinary matters are referred to the disciplinary committee and where the investigations committee views a matter as serious, it can refer specified allegations to the discipline process.

In very serious cases an investigations committee may issue an interim order (for example, the suspension of the member's certificate of registration) to protect the public while awaiting a discipline hearing. It is only used when absolutely necessary to protect clients from harm. There are a number of processes that occur prior to a disciplinary hearing to ensure the process is transparent and fair for both the complainant and the regulated health professional and that each can provide evidence to support their case.

Once the investigation is complete, the disciplinary committee must determine what a health professional has done and decide whether or not that behaviour constitutes professional misconduct, as is outlined in legislation.

Findings of Incompetence

Incompetence is different from professional misconduct. It generally does not involve unethical or dishonest conduct, but rather that the health care practitioner does not have the knowledge, skill and judgment to practice safely. A finding of incompetence is based on the care of one or more of the health care practitioner's clients. A finding of incompetence can either be that the health care practitioner is unfit to continue to practice, or that the member's practice should be restricted.

Decisions and Orders in Discipline Cases

If a health care practitioner has been found to have engaged in professional misconduct, the Disciplinary committee can make one of more of the following orders:

- Revocation – the removal of the member from the profession. This would typically be for at least a year, with the requirement that the health care practitioner must satisfy the disciplinary committee that they ought to be permitted back into the profession. In cases of sexual abuse involving certain frank sexual acts (e.g., sexual intercourse), revocation for a significantly longer period is mandatory.
- Suspension – the temporary removal of a member from the profession. Its duration can be fixed or flexible, or dependent on an event occurring (e.g., successful completion of a course).
- Terms, conditions, or limitations – can either be for a specified period (e.g., until the health care practitioner successfully completes certain remedial training) or for an indefinite period (e.g. the health care practitioner cannot consume any alcohol). The terms, conditions or limitations must relate to the finding made by the disciplinary committee. For example, if the health care practitioner was dishonest because of a substance abuse problem, the condition cannot be to take remedial education courses because there was no finding the health care practitioner lacked any basic knowledge.
- Reprimand – conversation between the disciplinary committee and the health care practitioner where the Committee tells the health care practitioner its views of their conduct and how to avoid similar problems in the future.
- Fine – the Disciplinary committee can impose a fine of many thousands of dollars.
- Reimbursement for funding in sexual abuse cases – where there is a finding of sexual abuse the Disciplinary committee can require a health care practitioner to reimburse the College for any funding for counselling or therapy provided to the client.
- Minimum order in sexual abuse cases – cases involving frank sexual acts have a mandatory minimum order of both a reprimand and revocation. No reinstatement can be made for five years after revocation on these grounds.
- Costs can be ordered by the Disciplinary committee to cover a portion of the expenses associated with the hearing.

In incompetence cases, the Disciplinary committee can order revocation, suspension, or terms conditions and limitations.

The Disciplinary committee must issue both a written decision and written reasons.

Appeals

Either party at the discipline hearing may appeal to the Divisional Court. The Divisional Court has the power to confirm, amend or reverse a decision of the Disciplinary committee if it acted unreasonably or made an error of law.

Complaints and Discipline Scenario – The Typical Complaint

A client sends a letter of complaint to the College saying that Donna, a chiropractor, was rude to her. The client says that Donna became angry when the client expressed concern that the treatment was not working. The client says that Donna "threw her out of the office". The Registrar sends a letter notifying Donna of the complaint and asking for a response. Donna responds that the client was extremely challenging and after doing all that she could for the client, the client became verbally abusive, and Donna had to terminate the professional relationship. Donna's letter is sent to the client who replies that she was never verbally abusive to Donna and that Donna is making this up to defend herself. The investigations committee obtains statements from the client's husband, Donna's receptionist, and a couple of clients who were around at the time. It is difficult to reconcile the stories but the picture that emerges is that there was a verbal confrontation in which both parties may have used intemperate language.

The investigations committee decides that this is not a case for discipline, particularly since there have been no previous complaints about Donna. However, the committee sends Donna a letter of caution reminding her of the need to be professional in her dealings with clients even in challenging circumstances.

Incapacity

Incapacity relates to a health care practitioner having a physical or mental condition which may warrant some restrictions on their registration or their removal from practice. This section focuses on what happens when incapacity becomes a concern.

The intent of the incapacity provisions is not to punish an ill health care practitioner, it is to ensure that the member receives appropriate treatment and is supervised and monitored sufficiently closely that they can continue to practice without undue risk to the public.

When incapacity becomes a problem for a health care practitioner, the concern is brought to the attention of the College. The information of possible incapacity can come from a number of sources, including a law enforcement agency, a mandatory report by an employer, or an expression of concern by a member of the profession or the public.

Inquiry

The inquiry may involve any (or all) of the following:

- an interview with the health care practitioner,
- a review of any relevant information that might be contained in other College files,
- obtaining witness statements from clients, co-workers, colleagues, family members, and others who have observed the health care practitioner's behaviour recently, particularly any unusual behaviour,
- obtaining hospital and health care provider office charts of relevant treatment of the health care practitioner,
- obtaining a report from health care providers who have treated the member, and
- ordering a specialist examination of the health care practitioner.

A report of the College's inquiries is prepared, and a copy sent to the health care practitioner for comment. The review committee then determines if the matter should be referred for a fitness to practice hearing.

The matter is only referred when the health care practitioner's problem is serious. The decision to refer to the committee for a hearing is not taken lightly and there must be sufficient evidence and a reasonable prospect of finding incapacity. This is usually when there is some concern that the

member's illness will now, or in the future, affect their professional practice negatively. Typically, it involves a lack of insight by the health care practitioner into the extent of their condition.

The committee can make an order that directs the College Registrar to suspend the certificate of registration of the member, or to impose terms, conditions, or limitations on the member's registration, temporarily until the matter is otherwise addressed by the review committee. Typically, there will be a fitness to practice hearing as follows:

- A panel is selected by the chair of the Fitness to Practice Committee – a panel consists of at least three people, including at least one public member of College Council and at least two other persons (usually members of the College).
- Disclosure of evidence – the College has the same disclosure obligations as in a discipline hearing.
- Closed hearing – ordinarily fitness to practice hearings are closed to the public because of the personal nature of such hearings (and because the hearing is not meant to be a punishment for the health care practitioner). Only the health care practitioner can request that the hearing be opened to the public.
- Order of hearing – is similar to a discipline hearing. The burden of proving that the health care practitioner is incapacitated lies upon the College. The College presents its case first.

Decisions of Fitness to Practice Hearing

The committee must determine if a health care practitioner is indeed incapacitated. As mentioned, this requires that the member have a physical or mental condition and that the condition warrants, in the public interest, some restrictions on the member's registration (e.g., supervision or treatment). This will be based upon evidence presented at the hearing, usually involving expert evidence on the member's health status. The Committee looks at the present status of the member's health (which is different from a discipline hearing).

If the Fitness to Practice Committee finds the member to be incapacitated, it must also decide what restriction to place on the member's certificate of registration. It can revoke a member's certificate entirely, suspend a member's certificate, or impose terms, conditions, or limitations on the member's certificate of registration. Usually terms, conditions, or limitations on the certificate are ordered, for example, an order for treatment followed by monitoring and supervision.

If circumstances change, the Committee can vary an order it made in the past. For instance, if a health care practitioner establishes a period of time that their illness has been in remission (e.g., sobriety), there can be a loosening of the restrictions on their certificate of registration.

Appeals

Either party at the fitness to practice hearing may appeal. Despite an appeal being filed, any order from the review committee takes effect while the appeal is pending. Again, the appeal board or College can confirm, amend or reverse a previous decision.

Fitness to Practice Scenario – The Typical Case

> *Brian is a health care practitioner working with John, another health care practitioner. John reports to the College that he is terminating his partnership with Brian because Brian's drinking is beginning to affect his work. John is tired of covering for Brian when he comes to the office two hours late after a binge. The Registrar makes some inquiries that tend to confirm John's report. Brian, however, denies he has any problems. The Registrar reports the matter to the investigations committee, which asks Brian for consent to obtain a copy of his medical records, which Brian provides.*
>
> *Those records indicate that Brian has separated from his wife who accuses him of drinking and that Brian has recently been charged for impaired driving. The College directs that Brian attend*

an assessment with a specialist in substance abuse disorders. The report from the specialist indicates that Brian clearly has a substance abuse disorder. Brian is referred to the Fitness to Practice Committee for a hearing and suspends Brian's certificate of registration until the hearing can be completed. Brian enters and successfully completes a 30-day in-patient treatment program for substance abuse and is an active participant in the recommended after-care program. At the Fitness to Practice hearing, Brian's lawyer and the College's lawyer present a joint submission asking the Committee to find that Brian is incapacitated, as defined in the Act. They also ask that Brian's certificate of registration be restored on the condition that he continue in regular treatment, that he works with another health care practitioner who will monitor Brian's work performance, and that regular reports be made to the College of Brian's progress. The Committee accepts the joint submission.

Quality Assurance Program

Purposes of the Program

Every profession expects that its members are learning continuously. Professions are constantly evolving and expanding. The quality assurance program of the College supports and, to some extent, formalizes this already existing process.

The quality assurance program is not a form of discipline. No information about a health professional obtained through the quality assurance program may be used by the College to discipline a registrant or by any person in any legal proceeding. A quality assurance committee can report the name and alleged misconduct of a registrant to the complaints committee. The only exception is where the member makes a false statement to the College or fails to cooperate with the program.

A quality assurance program usually consists of various components, such as:

- Professional development,
- Self, peer, and practice assessments, and
- Monitoring of members' participation in, and compliance with, the program.

Self-Assessment and Professional Development

College registrants must participate in the various components. For example, health care practitioners in Ontario are required to complete an annual self-assessment wherein the health care practitioner describes the nature of their practice, the skills needed to practice well, and what actions the health care practitioner plans to implement to maintain or improve to meet those skill requirements. The health care practitioner could then take a course or otherwise improve those skills. Health care practitioners are required to record these activities so that the College can monitor them. A health care practitioner must produce their record upon the request of the College.

Professional development activities allow health care practitioners to remain informed about changes and innovations in practice standards and techniques and develop skills and knowledge of inter-professional collaboration.

Peer and Practice Assessment and Remediation

Some programs require health care practitioners to participate in peer and practice assessments. This allows the College to assess health care practitioners' skill, knowledge and judgment and helps them with recommendations and implementation of updated standards when appropriate.

Quality Assurance Scenario No. 1

Heather, a health care practitioner, fails to complete and submit her annual self-assessment. Accordingly, Heather is selected to participate in the Peer and Practice Assessment Process. A

practice assessor is appointed. The practice assessor meets with Heather, conducts an interview, and reviews her professional development and self-assessment activities. The practice assessor prepares a report for the Committee that describes Heather's responses and the professional development activities that Heather participated in. The Committee may decide that there is no reason to take any action because Heather has learned from this experience about the importance of completing her annual self-assessment and keeping records of professional development activities.

Quality Assurance Scenario No. 2

Nathan, a health care practitioner, is randomly selected for a peer and practice assessment. A practice assessor is appointed. Nathan cooperates with the practice assessor's review of his records and inspection of his office. The practice assessor provides a report to the Committee, who reviews the report and finds that Nathan has not been keeping adequate clinical records. The Committee gives Nathan an opportunity to respond in writing. After reviewing Nathan's response, the Committee decides that Nathan must take a record keeping course. The Committee also directs that Nathan's practice be reassessed in one year's time to see if there has been an improvement.

End.