

# Legal Expense Assistance Plan (LEAP)

*A Guide for ONA Members*



**The Ontario Nurses' Association**  
**[www.ona.org](http://www.ona.org)**

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# 1. PURPOSE

As a regulated health care professional, you may at some point in your career be the subject of a patient, family or employer complaint or report to your regulatory college. Or you may be involved in a work-related incident which results in a coroner's investigation or inquest, criminal charges, *Personal Health Information Protection Act (PHIPA)* proceeding or summons to appear as a witness. Hopefully, this will not happen, but if it does, you need to be prepared. You need to know about ONA's Legal Expense Assistance Plan (LEAP).

This guide has been written for ONA members to read now – before becoming involved in a College of Nurses of Ontario (CNO), coroner's, criminal or *PHIPA* proceeding. If the CNO, coroner, police or Information and Privacy Commissioner contact you, you will know:

- your professional obligations and legal rights;
- what assistance is available through LEAP;
- when and how to contact LEAP;
- about regulatory college investigations and hearings;
- about coroner's investigations and inquests;
- about criminal investigations and trials;
- about *PHIPA* proceedings;
- about appearing as a witness.

## Important Notes:

This guide is produced for informational purposes only and should not be considered to be legal advice from a lawyer, the LEAP Team or ONA's LEAP Administrator.

LEAP assistance is only available for matters connected to your employment at an ONA facility. Please refer to the Plan itself for detailed information regarding coverage.

Although reference throughout the guide is made specifically to the College of Nurses of Ontario, (CNO) LEAP provides assistance to all ONA members before their applicable regulatory college. For those ONA members who do not belong to a regulatory college, LEAP assistance is available for work-related matters which result in a coroner's investigation or inquest, criminal charges and *PHIPA* or a summons to appear as a witness.

This is the fourth revision of the LEAP Guide. Please destroy earlier versions as the information in them may be outdated.

## 2. INTRODUCTION

### **Why ONA established LEAP – One incident, five different legal proceedings**

A health care professional who makes a serious medication or other error could find themselves involved in all the following legal investigations and proceedings regarding the one error:

- An employer investigation, discipline such as termination from employment and an arbitration hearing to determine if the discipline was justified;
- An investigation by an insurance adjuster in connection with a lawsuit alleging negligence;
- A complaint or report to the regulatory college, college investigation and discipline hearing;
- A coroner's investigation and inquest;
- A criminal investigation, charges of criminal negligence and criminal trial.

As a trade union, ONA has always provided labour relations assistance pursuant to the collective agreement to members who are disciplined by their employers. This assistance continues to be provided by Local union representatives and ONA Labour Relations Officers. Employers, since they are considered to be vicariously liable for the actions of their employees, have likewise provided assistance to members involved in a lawsuit. In addition, ONA has its Professional Liability Plan, which provides assistance to members regarding malpractice lawsuits and excess insurance coverage beyond that provided by an employer's insurance plan, if needed by a member.

Initially, however, there was no assistance provided to members if they were involved in all the other legal proceedings that may arise from the one incident. The expense for an individual member to obtain legal assistance in all these additional forums – regulatory college hearing, coroner's inquest and criminal trial – was and is often unaffordable. Consequently and in response to the needs of its members, ONA established LEAP in January 1980 to reimburse members for some of these costs.

## **LEAP coverage**

The extent of coverage has expanded since the inception of LEAP and now includes assistance for a member involved in the following:

- **CNO and other regulatory college proceeding;**
- **coroner’s investigation and inquest;**
- **criminal investigation and trial;**
- **PHIPA proceeding;**
- **summoned as a witness in a RHPA matter, coroner’s inquest, court custody or criminal code case.**

LEAP may provide representation, counselling or advice in these cases. The plan may also cover some additional expenses if members are required to travel for a meeting, hearing, etc. Please contact LEAP Intake for further details.

## **LEAP Team and Membership Advisory Team**

LEAP is administered out of ONA’s Toronto office by a multi-skilled team with backgrounds in law, nursing and social work. The LEAP Team provides information and advice through its intake service and if necessary, provides representation or a referral to external counsel. French-language representation is available upon request.

The LEAP Team works under the direction of the Plan Administrator, who is appointed by ONA’s CEO. The administrator is accountable for the administration of the plan and for settling any disputes regarding coverage.

The LEAP Advisory Team is the direct link to membership and includes the First Vice-President and representatives from the membership at large. Their mandate is to review and report on the operations of the plan.

### 3. WHEN TO CONTACT LEAP AND YOUR RIGHTS

You should contact LEAP Intake *before speaking with anyone else* if:

- **There is a complaint or report about your professional practice to your regulatory college;**  
*See Section 5 on regulatory college proceedings.*
- **The police or the coroner want to interview you regarding a patient death;**  
*See Sections 6 & 7 on coroner and criminal proceedings.*
- **The police want to charge you with a criminal offence regarding a work-related incident;**  
*See Section 7 on criminal proceedings.*
- **There is a complaint about your professional practice to the Information and Privacy Commissioner;**  
*See Section 8 on PHIPA proceedings.*

*You should also contact your ONA Local representative regarding any associated employment-related issues.*

#### **Important Note Regarding Lawsuits:**

The Professional Liability Plan, not LEAP, provides assistance regarding malpractice lawsuits. See Section 4 – *Contact information*.

#### **Right to obtain legal advice or retain legal counsel**

In the foregoing circumstances, *you have the right to obtain legal advice or to retain legal counsel before being questioned*. This is because you have been involved in a situation that has either resulted or may result in criminal charges, civil litigation, professional discipline or a *PHIPA* complaint against you. If the college, coroner, police or Information and Privacy Commissioner want to question you, state that you are happy to cooperate, but want to obtain legal advice first. You can provide assurance that you or your counsel will respond as soon as possible; then **call LEAP Intake immediately** (see Section 4 – *Contact information*). The LEAP Team will immediately assess your situation and provide you with the necessary assistance.

The coroner and/or the police may appear in person at the health care facility or your home soon after a critical incident in order to question you. You may be left with the impression that you must provide a statement NOW, and that your failure to do so would amount to obstruction of a legal investigation. However, it will not amount to obstruction to insist on your right to legal advice or counsel before being questioned in the circumstances. Please remember this and remember that *any statement you make can be later used in legal proceedings*. It is thus in your best interest to ensure that you are well prepared, rested, have legal advice and have legal counsel present, if necessary, when answering questions.

## **Written notes regarding an incident**

Incidents involving patients should be fully charted in the normal course in the patient's medical record and incident reports. This should include assessments, actions, reports to physicians and other health care professionals and communications with family. You should make a late entry in the patient's medical record if you have previously omitted information. Late entries are permissible but should be timed, dated and identified as a late entry.

If you make personal written notes after an incident, you should label them "made for my lawyer." If you are the subject of a legal proceeding, such as those noted above, you should not provide those notes to anyone without first speaking to the LEAP Team. Otherwise, these personal notes are available to anyone and can be used against you.

## 4. CONTACT INFORMATION

### LEAP Intake

**Call:** 416-964-8833 or 1-800-387-5580  
(Enter 0: Toronto Office)

**Hours:** 8:30 am to 4:30 pm, Monday to Friday (excluding holidays)

**Ask for:** LEAP Intake

After-hours assistance is available regarding work-related criminal and coroner matters:

**Call:** 416-964-1979 or 1-877-839-6245  
(Enter 7775: Board Intake)

**Message:** Leave a message providing details of the situation and a phone number where you can be reached.

**Response:** The Board member on intake will call you as soon as possible to arrange any necessary legal assistance.

**Follow-up:** Contact LEAP Intake during office hours as soon as possible to file a claim and make arrangements for further assistance.

### Professional Liability Insurance Plan

You should contact the Professional Liability Insurance Plan if:

- you have been named in a malpractice lawsuit; or
- you have not been named, but have been asked for a statement by your employer regarding a work-related lawsuit, and you have questions or concerns.

If you make personal written notes after an incident, you should label them “made for my lawyer.”

**Call:** 416-964-8833 or 1-800-387-5580  
(Enter 0: Toronto Office) – Ext. 7723

**Hours:** 8:30 am to 4:30 pm, Monday to Friday (excluding holidays)

**Ask for:** Malpractice Intake

### Disciplined at Work

If you have been disciplined at work and require information on how to file a grievance or professional responsibility complaint, you should contact your ONA Local representative.

## 5. COLLEGE INVESTIGATION/HEARING

### A. Background

The *Regulated Health Professions Act (RHPA)* delegates to each of the health professions such as nursing, medicine and physiotherapy, the authority to regulate itself in the public interest. Under the *RHPA*, each of the regulatory colleges, amongst other things, must establish standards of practice, administer quality assurance programs and set up investigative and adjudicative processes for the public to file complaints/reports and have those complaints/reports dealt with.

The CNO, pursuant to the *RHPA* and the *Nursing Act 1991*, is the regulatory college for nursing in Ontario; while the material in this section is specific to CNO proceedings, other regulatory college proceedings are similar. LEAP provides assistance to all ONA members before their applicable regulatory college. While the legislative duty of each regulatory college is “to serve and protect the public interest,” LEAP was established to protect the interests of ONA members.

### B. Investigation – complaints and reports

#### Complaints

##### *College must investigate and notify you of complaint*

Each regulatory college must investigate all written complaints about a member unless they are deemed to be frivolous, vexatious or without merit. Complaints are normally made by patients, family members, co-workers and employers, and there is no time limit for filing a complaint.

If you are the subject of a complaint, the CNO will notify you by registered letter. The letter will state that the CNO has received a complaint regarding your nursing practice and is launching an investigation. The complaint letter from the patient, family member, co-worker or employer will normally be attached. A CNO investigator will be assigned to your case and you will also be asked to telephone the investigator by a particular date to discuss the matter further.

##### *Do not call the CNO*

**Call LEAP Intake immediately.** Do not call the CNO. The CNO keeps a record of all telephone calls and what you say can be used against you. You have the right to retain a representative and you should exercise that right. We have found that members experience a myriad of emotions upon receipt of a complaint: distress, anger, hurt, disbelief, fear. It is not advisable to speak with the CNO in this frame

of mind and we urge you to call LEAP Intake and not to call the CNO. The LEAP Team will arrange for representation, and your representative will communicate with the CNO on your behalf.

### **Unproven accusation or allegation**

Keep in mind that every complaint received at the CNO is an accusation or allegation against you. Some members have told us that they are so upset that someone has filed a complaint about their practice, they don't stop to consider that someone may have identified the wrong care provider, misunderstood the situation, read the chart improperly, been unaware of hospital practices and protocol, etc. This is why it is best to say nothing to the CNO and not to provide any written response until you and your LEAP representative have had a chance to review the information in your case.

### **Reason for complaints**

A complaint may include allegations regarding a breach of any of the standards of nursing practice. The reasons for complaints at the CNO generally fall into two broad categories: nursing practice and nursing conduct issues. Examples of nursing practice issues are medication errors, documentation errors and assessment errors. Nursing conduct complaints include issues regarding communication and failure to follow-up.

### **Resolution Program (RP)**

If the complaint is less serious, the CNO may try to settle the matter informally between the complainant and yourself via its mediation process, RP. After LEAP consultation, you may agree, for example, to attend an educational workshop or review a particular standard of practice in order to resolve the complaint. The advantage to resolving the matter via RP is that information from the complaint is not used in future CNO proceedings and is only used to assess whether RP is a viable option in the event of a subsequent complaint. Both the complainant and you must agree to settle the complaint via RP; otherwise, the complaint proceeds through the normal investigative and adjudicative process.

### **Investigative process**

In most cases, the CNO will conduct a formal investigation of the complaint. The investigator, among other things, will interview witnesses such as the patient, family members and staff members. In addition, all other relevant information such as nursing notes, doctors' orders, MARS, nursing care plans, rotation schedules, client assignment sheets, incident reports, job descriptions, employer poli-

cies, etc. will be obtained. Once the investigation is complete, your representative will receive copies of documentation the CNO considers necessary for you to refresh your memory regarding the allegations. The CNO does not release witness statements at this point in its investigation, only documentation such as the patient's chart, incident reports and employer policies.

Your representative will review copies of the documentation with you and obtain your side of the story. Your representative will prepare your written defence, which will be submitted to the Inquiries, Complaints and Reports Committee (ICRC) for its review.

## **Decision**

The ICRC reviews the complaint and is composed of RNs and RPNs elected by members of the CNO and members of the public appointed by the government. Each panel is normally made up of two RNS, one RPN and two public members. Neither you nor the complainant is present when the ICRC reviews the complaint. The committee reviews the investigator's report, all relevant documentation and your written defence and will dispose of the case in one of the following ways:

- Take no action (this occurs in a large percentage of cases);
- Issue you a non-disciplinary concern;
- Issue you a non-disciplinary written/oral caution;
- Request that you voluntarily undertake remediation such as completing a nursing course, meeting with a nursing expert, etc;
- Refer the matter to outside counsel for an opinion as to the viability of the CNO prosecuting allegations against you at a Discipline Committee hearing;
- Refer the matter to the Discipline Committee for a hearing (happens in a small percentage of cases);
- Refer the matter for incapacity proceedings and then a possible Fitness to Practise Committee hearing.

It can take about eight months or longer from the time you receive the letter from the CNO before the ICRC issues a decision in your case. The committee issues a written decision with reasons about three to four months after the matter is reviewed.

Please see the sections below for discussion about a referral to either the Discipline or Fitness to Practise Committee.

## **Public record**

The decision of the ICRC is only sent by the CNO to you, your representative and the complainant. Your employer will not receive a copy of the decision from the CNO unless your employer filed the complaint.

If the ICRC has taken no action or non-disciplinary action, this information is not placed on the public register/CNO website. As a result, the CNO will not release information about the complaint or this type of disposition to anyone calling them with general inquiries about your practice. Anyone searching your name on “Find a Nurse” on the CNO website, will not find any reference about the complaint or its disposition. However, if you move to another jurisdiction where you apply for registration, you may be required to sign a release authorizing the CNO to release all information about you. This may include information about ICRC dispositions.

If the matter has been referred to either the Discipline or Fitness to Practise Committee for a hearing and the matter has yet to be decided, there is a notation on the public register/CNO website regarding the referral and a brief summary of each specified allegation. There is also a Discipline hearings schedule posted on the CNO’s website listing the member’s name, the member’s designation, the geographic region, the hearing date and the nature of the allegations. Fitness to Practise hearings are closed so there is no hearings schedule for these cases posted on the CNO’s website.

The CNO keeps copies of the complaints and decisions for at least 25 years, and if another complaint or report is made against you in the future, the prior decision is considered when disposing of the subsequent complaint/report.

## **Health Professions Appeal and Review Board (HPARB)**

You and the complainant both have the right to request a review of a decision of the ICRC by the HPARB within 30 days of receiving the formal ICRC decision (unless the decision is to refer the matter to either the Discipline Committee or to commence incapacity proceeding, with a possible referral to the Fitness to Practise Committee). LEAP will provide representation for you to defend against a review requested by a complainant, and in some cases will provide representation to launch a review.

The HPARB Panel, which is composed of three government-appointed members of the public who are not health care professionals, conducts a review hearing to determine if the CNO investigation was adequate and the ICRC decision reasonable.

The HPARB at the conclusion of the hearing has the authority to:

- Confirm all or part of the decision;
- Make recommendations to the ICRC;
- Require the ICRC to investigate further and/or issue a new decision as directed by the Board.

## Reports

### Mandatory reports

In addition to complaints, you may also find yourself the subject of a report. There are legislated mandatory reporting obligations as follows:

- Employers must report the termination of a regulated health care professional if it is due to professional misconduct, incompetence or incapacity;
- Employers must report an intention to terminate a regulated health care professional if it is due to professional misconduct, incompetence or incapacity *even if the member resigns and the termination never takes place*;
- Facility operators (in our case, employers) must report a regulated health care professional if they have reasonable grounds to believe that s/he has sexually abused a patient, is incompetent or is incapacitated (a regulated health care professional is considered to be incompetent if s/he: i) lacks significant knowledge, skill or judgment; **and** ii) needs to be removed from practice or practise in a restrictive manner in order to ensure public safety. A regulated health care professional is considered to be incapacitated if s/he: i) suffers from a health condition; **and** ii) needs to be removed from practice or practise in a restrictive manner in order to ensure public safety).
- Regulated health care professionals who have “reasonable grounds, obtained in the course of practising the profession, to believe that another member of the same or a different college has sexually abused a patient” must file a report with the appropriate college in the manner set out in the *RHPA*.
- Nurses are required to self-report to the CNO findings of guilt for offences under the *Criminal Code of Canada*, offences under other federal statutes, such as the *Food and Drugs Act* or the *Controlled Drugs and Substances Act*, which involve criminal court trials and offences under *Province of Ontario Statutes* where the sentence can include jail time (nurses do not have to report offences that can only result in a fine such as speeding, parking or other offences under the *Highway Traffic Act* and bylaw offences);

- Nurses are required to self-report information regarding disciplinary or incapacity proceedings from other governing bodies;
- Nurses are required to self-report a finding of professional negligence or malpractice as a result of a lawsuit;
- Nurses who witness or know of an incident of unsafe practice or unethical conduct by a health care provider must report to that health care provider's regulatory college *if* the matter is not reported to the employer.

A regulatory college may also follow up on information it receives about members whether it is from colleagues, employers, the public, the police or reports in the media.

### **Report may result in investigation**

Although each regulatory college must investigate all written complaints, it is optional as to whether the Executive Director will order an investigation of a report or other information that comes to the attention of a college. In some cases, the CNO may deal with a report or other information in an informal manner without an investigation. If you are notified by the CNO about such an informal resolution without an investigation, **you should contact LEAP Intake immediately**, before speaking or meeting with college staff. The LEAP Team will assess your situation and provide you with the necessary assistance.

However, it has been our experience that most reports of termination are investigated by the CNO and reviewed by the ICRC. Normally, the CNO will notify you about the report by registered letter. The letter will state that the CNO has received a report regarding your nursing practice and is either dealing with the matter informally or launching an investigation. A CNO investigator will be assigned to your case and you will also be asked to telephone her by a particular date to discuss the matter further.

### ***Do not call the CNO***

**Call LEAP Intake immediately.** Do not call the CNO. The CNO keeps a record of all telephone calls, and what you say can be used against you. You have the right to retain a representative and you should exercise that right. We have found that members experience a myriad of emotions upon receipt of a complaint: distress, anger, hurt, disbelief, fear. It is not advisable to speak with the CNO in this frame of mind and we urge you to call LEAP Intake. The LEAP Team will arrange for representation, and your representative will communicate with the CNO on your behalf.

## **Unproven accusation or allegation**

Keep in mind that every report received at the CNO is an accusation or allegation against you. Some members have told us that they are so upset that someone has filed a report about their practice, they don't stop to consider that someone may have identified the wrong care provider, misunderstood the situation, read the chart improperly, been unaware of hospital practices and protocol, etc. This is why it is best to say nothing to the CNO and not to provide any written response until you and your representative have had a chance to review the information in your case.

## **Reason for reports**

A report may include allegations regarding a breach of any of the standards of nursing practice. The reasons for reports at the CNO fall into two broad categories: nursing practice and nursing conduct issues. Examples of nursing practice issues are medication errors, documentation errors and assessment errors. Nursing conduct reports include issues regarding communication and failure to follow-up.

## **Investigative process**

In most cases, the CNO will conduct a formal investigation of the report. The investigator, among other things, will interview witnesses such as the patient, family members and staff members. In addition, all other relevant information such as nursing notes, doctors' orders, MARs, nursing care plans, rotation schedules, client assignment sheets, incident reports, job descriptions, employer policies, etc. will be obtained. Once the investigation is complete, your representative will receive copies of documentation the CNO considers necessary for you to refresh your memory regarding the allegations. The CNO does not release witness statements at this point in its investigation, only documentation such as the patient's chart, incident reports and employer policies.

Your representative will review copies of the documentation with you and obtain your side of the story. Your representative will prepare your written defence, which will be submitted to the ICRC for its review.

## **Decision**

The ICRC reviews reports and is composed of RNs and RPNs elected by members of the CNO and members of the public appointed by the government. Each panel is normally made up of two RNS, one RPN and two public members. Neither you nor the individual who reported you are present when the ICRC reviews the

report. The committee reviews the investigator's report, all relevant documentation and your written defence and will dispose of the case in one of the following ways:

- Take no action (this occurs in a large percentage of cases);
- Issue you a non-disciplinary concern;
- Issue you a non-disciplinary written/oral caution;
- Request that you voluntarily undertake remediation, such as completing a nursing course, meeting with a nursing expert, etc;
- Refer the matter to outside counsel for an opinion as to the viability of the CNO prosecuting allegations against you at a Discipline Committee hearing;
- Refer the matter to the Discipline Committee for a hearing (happens in a small percentage of cases);
- Refer the matter for incapacity proceedings and then a possible Fitness to Practise Committee hearing.

It can take eight months or longer from the time you receive the letter from the CNO before the ICRC issues a decision in your case. The committee issues a written decision with reasons about three to four months after the matter is reviewed.

Please see the sections below for discussion about a referral to either the Discipline or Fitness to Practise Committee.

## **Public record**

The decision of the ICRC is only sent by the CNO to you and your representative. Unlike a complaint, the individual who reports you to the CNO is not a "party" to the process, so the reporter is not notified if an investigation has been ordered and is not advised of the outcome of the process. Therefore, unlike a complainant, the reporter is not provided a copy of the decision. Because of this, an employer will sometimes change their report to a complaint so they are considered a party and provided a copy of the decision from the CNO.

If the ICRC has taken no action or non-disciplinary action, this information is not placed on the public register/CNO website. As a result, the CNO will not release information about the report or this type of disposition to anyone calling the CNO with general inquiries about your practice. Anyone searching your name on "Find a Nurse" on the CNO website will not find any reference about the

report or its disposition. However, if you move to another jurisdiction where you apply for registration, you may be required to sign a release authorizing the CNO to release all information about you. This may include information about ICRC dispositions.

If the matter has been referred to either the Discipline or Fitness to Practise Committee for a hearing and the matter has yet to be decided, there is a notation on the public register/CNO website regarding the referral and a brief summary of each specified allegation. There is also a Discipline hearings schedule posted on the CNO's website listing the member's name, the member's designation, the geographic region, the hearing date and the nature of the allegations. Fitness to Practise hearings are closed so there is no hearings schedule for these cases posted on the CNO's website.

The CNO keeps copies of the reports and decisions for at least 25 years and if another complaint or report is made against you in the future, the prior decision is considered when disposing of the subsequent complaint/report.

## **Judicial Review**

There is no right to request a review of decisions of the ICRC about a report by the Health Professions Appeal and Review Board. The only recourse is to file an application to the Divisional Court of Ontario for a judicial review of the decision. LEAP will provide representation for you to defend against a judicial review, and in some cases will provide representation to launch a judicial review.

## **C. Discipline hearing**

### **Serious matters of professional misconduct and incompetence**

Prior to referring allegations to the Discipline Committee, the ICRC normally requests an opinion from outside counsel as to the viability of the CNO prosecuting allegations against you at a Discipline hearing. Thus, only serious matters of professional misconduct and incompetence, where there is some evidence to support the allegations, are referred to the Discipline Committee. These are the cases reported in *The Standard* and deal with issues of abuse, theft, fraud, falsification of records and serious practice errors. If your case is referred to the Discipline Committee, LEAP will provide legal representation.

### **Pre-hearing and hearing**

Once the matter is at the Discipline Committee stage, the complainant is no longer a "party" to the proceedings. The parties are you and the CNO, and the complain-

ant becomes a witness in the Discipline hearing. LEAP provides legal counsel to defend you and the CNO engages outside counsel to prosecute you.

A pre-hearing is convened after the referral to the Discipline Committee and is conducted by a member of the Discipline Committee. You, your defence counsel, a representative of the College and their prosecuting counsel are also in attendance. Your counsel and the College's counsel will make oral submissions in order to explore the possibility of settling the matter and/or narrowing the issues. Your counsel will advocate on your behalf and advise you as to the reasonableness and suitability of any proposals. If there is agreement between the parties, an agreed statement of facts and a joint submission on penalty is prepared. This is presented at a Discipline hearing and in most cases is approved by the Discipline Committee.

If there is no agreement between the parties or the Discipline Committee does not approve of a settlement, a Discipline hearing is convened where the CNO must prove by calling witnesses and introducing other evidence that you are guilty of professional misconduct or incompetent. Discipline hearings are open to the public and are very similar to court proceedings. There are normally five people on a Discipline panel with two public members and three nurses (two of the nurses will be in the same category – RN or RPN – as the member facing the allegations). Your counsel will be in attendance with you throughout the whole hearing and will present your defence, likely engage in cross-examination of the college's witnesses and likely call and question witnesses on your behalf.

## **Decision**

The outcome of a Discipline Committee hearing, if the allegations are proven, can include:

- A finding of guilt;
- An oral reprimand;
- A fine;
- Requirement to undertake specific remediation such as completing a nursing course, meeting with a nursing expert, etc;
- Imposition of conditions on your Certificate of Registration such as reporting to and monitoring by a supervisor at your place of employment;
- Suspension of your Certificate of Registration for a specified period;
- Revocation of your Certificate of Registration.

Discipline Committee decisions are published in the CNO’s magazine, *The Standard* and are available on the CNO’s website. Whether the matter is resolved with or without a hearing, a finding of professional misconduct or incompetence, if there is one, is recorded on the public register/CNO website as well as the disposition be it revocation, suspension or the imposition of terms, conditions and limitations regarding a member’s Certificate of Registration.

If either party is dissatisfied with a Discipline Committee decision, it can be appealed to the Divisional Court of Ontario. LEAP will provide representation for you to defend against an appeal, and in some cases will provide representation to launch an appeal.

## **D. Fitness to Practise hearing**

### **Health matters treated differently**

The CNO deals with health matters which affect the capacity of a member to practise nursing safely in a different manner. Health concerns come to the attention of the CNO in the form of written complaints, mandatory reports or information from the public. The allegations typically include misappropriation of medication from work, reporting for work in an intoxicated state, slurred speech, bizarre behaviour, conviction for impaired driving and sloppy work habits. The CNO investigator in these cases will not only investigate your conduct, but also will investigate whether a health problem such as a mental illness or substance dependence is related to the conduct.

### ***Do not call the CNO***

Again, when you receive the letter from the CNO regarding health concerns, **call LEAP Intake immediately**. Do not call the CNO. The CNO keeps a record of all telephone calls, and what you say can be used against you. You have the right to retain a representative and you should exercise that right. The LEAP Team will arrange for representation, and your representative will communicate with the CNO on your behalf.

### ***Do not sign CNO medical authorizations***

The CNO investigator will request that you sign authorizations allowing the CNO to obtain your health records. We urge you not to sign those authorizations until you have spoken to your LEAP representative who may obtain all necessary medical documentation to mount your defence. In some cases, the allegations may be the result of a misunderstanding and not be related to a health concern. Your LEAP representative will provide assistance in determining the most appropriate course of action in your case.

## **Informal Resolution**

However, if you indeed have a health problem which affects your ability to practise nursing safely and you acknowledge that problem, your case will most likely be dealt with in an informal manner. Your representative will gather information from your health care practitioners and then be in a position to negotiate with the CNO regarding reasonable terms of a surrender agreement (surrendering your Certificate of Registration for a specified period of time until your treatment is complete and there is medical clearance to return to work) or the imposition of the least restrictive conditions necessary to protect the public on your Certificate of Registration (limiting access to certain medication for a specified period of time, workplace monitor, etc). The terms of either of these agreements will depend on the nature of your health problem and the recommendations of health care practitioners.

## **Treatment for substance dependence**

You may also be required to undergo a medical assessment by a health care practitioner chosen by the CNO. Your LEAP representative will advise you as to whether such a requirement is reasonable in your case. Also, if you suffer from substance dependence, your LEAP representative can advise you of the type of treatment that the CNO – in previous matters – has deemed necessary in order to allow a member to return to and work safely as a RN. We have information about treatment facilities, addictions specialists and other addiction resources and would be happy to share this information with you.

## **Hearing, if dispute about capacity and decision**

If there is a dispute about your capacity or the CNO is not willing to negotiate a reasonable agreement, the matter will be referred to the Fitness to Practise Committee for a hearing to determine if you are “incapacitated” as defined in the legislation:

*Incapacitated means, in relation to a member, that the member is suffering from a physical or mental condition or disorder that makes it desirable in the interest of the public that the member no longer be permitted to practise or that the member's practice be restricted...*

Fitness to Practise hearings are very similar to court proceedings but unlike Discipline Committee hearings, are not open to the public. The outcome of a Fitness to Practise hearing, if incapacity is proven, must include one of the following:

- Revocation of your Certificate of Registration;
- Suspension of your Certificate of Registration;
- Imposition of specified terms, conditions and limitations on your Certificate of Registration for a specified or indefinite period of time.

Whether a Fitness to Practise case is resolved informally or with a hearing, a finding of incapacity, if there is one, is recorded on the public register/CNO website as well as the disposition be it voluntary surrender, revocation, suspension or the imposition of terms, conditions and limitations regarding a member's Certificate of Registration. A summary of the terms, conditions and limitations is also recorded on the public register/CNO website. This excludes personal health information of a member, such as diagnosis and specifics of required treatment. However, information about current terms, conditions and limitations may include a notation that a member's health be monitored by treating health care professionals and/or that a member not have access to controlled substances.

If your case is referred to the Fitness to Practise Committee, LEAP will provide legal representation. If either party is dissatisfied with a Fitness to Practise Committee decision, it can be appealed to the Divisional Court of Ontario. LEAP will provide representation for you to defend against an appeal and in some cases, will provide representation to launch an appeal.

## **E. Quality assurance**

### **Self- Assessment, Practice Assessment and Peer Assessment**

There are three components of the CNO's Quality Assurance Program: self-assessment, practice assessment and peer assessment.

All nurses must participate every year in the self-assessment component of the CNO's quality assurance program. This entails practice reflection and developing and maintaining a learning plan to meet learning goals.

In addition, the College randomly selects nurses every year to participate in the practice assessment component of the program. This involves a review of the member's learning plan as well as other specified assessments such as an objective multiple-choice test on the two practice standards selected by the program. All nurses selected for the practice assessment must also submit their learning plans and the results of the specified assessments for review by a CNO-appointed peer assessor. The peer assessment component of the program is complete when the peer assessor completes a report with recommendations for remedial learning, if warranted.

The Quality Assurance Committee then reviews the peer assessor's report and decides if the nurse has successfully completed the program or is required to participate in remedial learning activities.

The decisions of the Quality Assurance Committee are not recorded on the public register/CNO website. However, if the Committee directs the Executive Director to impose terms, limits or conditions on your Certificate of Registration while you complete the remediation, those terms, conditions or limitations are recorded on the public register/CNO website.

### **LEAP coverage**

LEAP coverage is provided to members before the Quality Assurance Committee, if the peer assessor has made recommendations in his/her report that the member must participate in remedial learning activities. Since the Committee has the authority to direct the Executive Director to impose terms, limits or conditions on your Certificate of Registration, we urge you to contact LEAP for assistance if, following random selection and the practice assessment, the peer assessor recommends that you undergo remedial learning activities.

### **No LEAP coverage**

There is no LEAP coverage for the self-assessment, practice and peer assessment components of the CNO's quality assurance program or for matters arising out of a member's failure to complete the annual self-assessment or participate in practice and peer assessment, if randomly selected.

## **F. Witness**

### **Colleague's practice under investigation**

You may be contacted by a regulatory college not because your practice is being investigated, but because a colleague is the subject of a complaint or report. You may have observed, overheard or otherwise have information about the alleged incident(s) in question. This may involve a colleague in your health profession or a colleague in one of the other regulated health care professions. Therefore, the regulatory college may be the CNO or another health profession college such as the College of Physicians and Surgeons, College of Pharmacists, College of Respiratory Therapists, etc.

Normally, you will first be contacted by an investigator and asked to voluntarily provide information. Then, in very few cases, if the matter is serious and there is sufficient evidence to warrant a Discipline hearing, you may be asked or summoned to appear at the hearing and testify.

## LEAP coverage

In most cases, the matter will be straightforward and the information below should help you to know what to expect and how to prepare as a witness in a regulatory college matter. LEAP also offers advice or counselling for members who have been summoned to testify in a regulatory college matter. The plan provides legal representation in rare circumstances only if you are summoned as a witness and require representation due to significant risk of legal repercussion. **If you are of the opinion that there is a significant risk of legal repercussion in either voluntarily providing information and/or testifying as a witness in a regulatory college matter, please contact LEAP Intake as soon as possible.**

You should also contact your employer about the matter and find out what assistance is provided when staff are asked to voluntarily provide information and/or are summoned to testify in a regulatory college matter.

## CNO investigations

### Duty to co-operate, but first obtain assurance/information

If you are a nurse, you are required to co-operate in the investigation of a colleague's practise by the CNO; it may even be considered professional misconduct if you fail to co-operate. Therefore, if you are contacted by a CNO investigator and asked to voluntarily provide information about an incident(s) raised in a complaint or report about a colleague, you should indicate that you are prepared to be of assistance. However, co-operation does not mean that you have to provide unlimited information or that you have to immediately provide information. You should first ask for certain assurances, an opportunity to review relevant documents such as the chart and adequate time to prepare.

You can advise the investigator that you are prepared to co-operate, but would like the following prior to providing any information:

- An assurance that you are only being asked for information as a witness, that your practice is not being investigated and there is no blame or allegations of professional misconduct, incompetence or incapacity against you. If such an assurance is not forthcoming, call LEAP Intake immediately before saying anything to the CNO.
- An assurance that the investigator has been properly appointed pursuant to the *RHPA*.
- Some general idea from the investigator as to what she or he wants to question you about. If the matter is complicated, you might request a written list of the questions the investigator intends to ask you.

- If the investigator intends to question you about matters that will involve you disclosing personal health information regarding a patient, you should ask the investigator for assurance that there is consent from the patient. Absent patient consent, you should not divulge any personal health information unless and until you consult with the health information custodian at your health care facility (normally the health records department) regarding your confidentiality obligations pursuant to the *Personal Health Information Protection Act (PHIPA)*. You should remember that in cases where nurses (or other employees) are being investigated, their personal health information, whether it is in the possession of the Occupational Health Department or otherwise acquired, is also confidential and subject to protection.
- A reasonable period of time for review and preparation unless the matter is very straightforward, does not require the disclosure of personal health information and/or a review of relevant documents. Arrangements can be made for the investigator to contact you at a mutually convenient time after you have considered the matter, consulted with the health information custodian and reviewed relevant documents such as the chart.

### **Preparation prior to providing information**

It is very important to review all relevant documents prior to providing information. These documents may include the chart, incident reports, previous statements you have made or policies and protocols. When reviewing the documents you should keep in mind what the investigator generally wants to question you about. You want to ensure that your responses will be consistent with information in the chart, incident reports, etc.

It is the responsibility of the investigator to legally obtain all relevant documents from the proper custodian. If the investigator intends to interview you over the telephone, she or he will have to send you a copy of the relevant documents, so you are able to refer to those documents during your interview. However, what most often happens is that the investigator arranges a time to attend at the health care facility to interview you. The investigator will bring her/his copy of the relevant documents and allow you to review those documents while answering questions.

You don't want the interview with the investigator to be the first chance you have to review the relevant documents. Therefore, we suggest that you make arrangements through your manager and/or the health information custodian to review relevant documents such as the chart prior to meeting with the investigator. You will be in a much better position to answer an investigator's questions in a professional, methodical and coherent fashion, if you have already reviewed the documents prior to the interview.

## The interview

The investigator will normally interview you in person or over the telephone. You should remember that the investigator will write down everything you say and that your statement could later be used in legal proceedings where you are held to account for what you have said. You want to proceed cautiously, stick to the facts and ensure that all relevant documents are in front of you so you can reference the applicable passages when answering questions. You may also want to review and have in front of you any specific standards of nursing practice, if relevant.

You should keep the following points in mind when answering questions:

- Make sure you understand the question and if not, request clarification.
- Answer only the questions you are asked.
- Answer questions regarding the care of a particular patient by referring to the patient's chart, and clarifying the meaning of what you have documented, if necessary.
- Stick to the facts (I observed this, I heard this, etc.) and do not express an opinion.
- Stick within your scope of practice.
- Do not guess at answers and do not speculate.
- If you do not know the answer to a particular question or do not recall a particular incident, say so.
- If you don't understand a question, ask for clarification.
- **If at any time during the interview, you are of the opinion that your practice is or could be under investigation or that the line of questioning is inappropriate, stop the interview and contact LEAP Intake immediately.**

At the conclusion of the interview, you should request a copy of your statement to ensure it accurately reflects what you have said.

## **Request from colleague for information**

You may also be contacted by your colleague or your colleague's representative to voluntarily provide information about the incident(s) in question. You are not obligated to provide the requested information. However, if you choose to do so, you should follow the same steps as above with respect to a request for information from a CNO investigator. This is to ensure that blame is not being directed at you, etc.

## **Other College investigations**

With respect to investigations of colleagues from other regulatory colleges, there is only a general obligation for you not to withhold, conceal or destroy information related to an investigation. So, if you are contacted by an investigator from another regulatory college and asked to voluntarily provide information about an incident(s) raised in a complaint or report about a colleague, you may just want to advise the investigator to review the relevant documents such as the chart, incident report, etc. for a record of your involvement in the incident(s) in question.

If you choose to be interviewed by the college investigator because the matter is very straightforward and the requested information is not contained in the chart, etc., you should follow the same steps as above with respect to a request for information from a CNO investigator. This is to ensure that blame is not being directed at you, you have consulted with the health information custodian at your health care facility about your confidentiality obligations pursuant to the *PHIPA*, etc. Remember, all the regulatory colleges have the legislative authority to summons you to provide information, if necessary. Therefore, if you don't voluntarily provide the information, you may be summoned to provide the information to the investigator or to testify at a hearing.

## **Summons to appear as witness**

### **The Summons**

Most complaints/reports to the regulatory colleges are resolved without the need for a Discipline hearing. However, in a few cases where the allegations of professional misconduct or incompetence are serious and there is sufficient evidence to warrant a Discipline hearing, you may be asked to testify or receive a summons to testify at the hearing. The summons might be from the college or your colleague's lawyer. You are legally obligated to obey a summons to testify and a summons will likely be served to you personally either at your workplace or your home.

The summons should provide information about who has summoned you and when and where you are to testify. The summons should also indicate whether

you are required to bring anything with you to the hearing. The only thing you would likely be required to bring to a hearing are your personal written notes of any incident(s). However, if you made personal written notes after the incident(s) in anticipation of litigation, you may not be required to release those personal notes.

Please also note if you receive a summons asking you to bring the chart or other medical records, you should contact the party who summoned you so that they can issue a separate summons for these documents to the health information custodian (normally the health records department) at your health care facility. You do not own/control the chart and other medical records and are not entitled to remove these documents from the health care facility.

You should consult with your employer about the summons and find out if the employer provides any assistance to staff when summoned to testify in a regulatory college matter.

### **Contact party who summoned you**

You should contact the party who summoned you to find out what the hearing is about and your involvement in the matter. You will want to clarify that you are only being asked for information as a witness, your practice is not being investigated and that there is no blame or allegations of professional misconduct, incompetence or incapacity against you. **If you are of the opinion that blame is being directed at you in any way, contact LEAP Intake immediately.**

If the party who issued the summons wants to engage in a discussion with you about matters that will involve you disclosing personal health information regarding a patient, you should ensure that there is consent from the patient. Since the summons is for you to testify at a hearing, absent patient consent, prior to actually testifying at the hearing, you should not divulge any personal health information unless and until you consult with the health information custodian at your health care facility (normally the health records department) regarding your confidentiality obligations pursuant to the *PHIPA*. You should remember that in cases where nurses (or other employees) are being investigated, their personal health information, whether it is in the possession of the Occupational Health Department or otherwise acquired, is also confidential and subject to protection.

The party who summoned you should keep you advised regarding any changes in the date and location and will hopefully be able to pinpoint a more specific time when you will be required to testify. You should also request information about what expenses will be covered in order for you to testify. Normally, travel, accommodation, food and a nominal attendance allowance will be reimbursed, but not

lost wages. However, your employer may cover your lost wages, and you should contact your ONA Local representative regarding any coverage that may be provided pursuant to the collective agreement.

## **Preparation**

It is never easy to testify at a hearing. However, if you know the type of questions that you are likely to be asked by all parties and have familiarized yourself with the chart and all other relevant documents, this should help make the experience easier. Good preparation, so there are no surprises, is the key to delivering testimony in a professional manner.

The party who summoned you will likely contact you prior to the hearing in order to ensure you are prepared. If you have not been contacted and the hearing date is approaching, you should initiate the contact. You should be provided an opportunity to carefully review a copy of all the relevant documents prior to the hearing. The relevant documents may include:

- A copy of the chart;
- Any previous statements you have provided prior to the hearing;
- Incident reports;
- Policies and protocols.

You want to be able to easily refer to the sections of the chart and other documents such as incident reports, policies, etc. while testifying. You may also want to review any relevant standards of nursing practice. The party who summoned you may review with you the kinds of questions you will likely be asked, so you can think about your answers in advance by referring to the chart, incident reports, etc. Keep in mind that without patient consent, before divulging any personal health information prior to actually testifying at the hearing, you should consult with the health information custodian at your health care facility (this is normally the health records department) regarding your confidentiality obligations pursuant to the *PHIPA*.

You can ask the party who summoned you if they have a booklet or other written information to help you to prepare to testify. You may also find it helpful to attend a Discipline hearing prior to testifying. The hearings are for the most part open to the public, and the hearings schedule is available by contacting the regulatory college or visiting their website.

## Testifying at the hearing

Discipline hearings are formal legal proceedings, similar to trials in a court of law. The Discipline Committee, the adjudicative body, is normally made up of five members – three members of the particular health care profession and two public members. The Committee hears evidence to determine whether or not the allegations of professional misconduct or incompetence against the health care professional are proven, and if so, to decide on the appropriate penalty. The hearings are for the most part open to the public and the media.

When you arrive at the hearing, you will likely wait in a witness waiting area outside the hearing room until it is your turn to testify. Witnesses are normally not allowed in the hearing room until after they have testified. You should plan to spend the whole day since hearings rarely run right on schedule.

The party who summoned you will normally bring you into the hearing room when it's your turn to testify. Apart from the Discipline Committee members, the participants in the hearing include the college lawyer, the health care professional's lawyer, the Committee's independent lawyer and the court reporter. The health care professional will also be present.

You will be asked to swear or affirm that your testimony will be truthful and then the party who summoned you will begin questioning. This is called direct examination. The other party will then have an opportunity for cross-examination, which is an opportunity to clarify information and point out inconsistencies in your testimony. The party who summoned you and/or the Discipline Committee may also have some follow-up questions.

You should refer to the above-noted section, *CNO Investigations – The Interview* for some points to keep in mind while testifying. It is really important to listen carefully to the questions and to make sure you understand the question. If you don't understand the question, simply request clarification. You should answer only the questions you are asked and speak loudly, clearly and slowly so the court reporter can accurately record your answers. An official transcript is made of the hearing.

You want your testimony to be consistent with information in the chart, incident reports, etc., so if the question refers to your care of a particular patient, ask that you be able to refer to those documents to answer the question. It is critical to remain factual, not to express an opinion and to not speculate. If you don't remember something or don't know the answer to a question, just say so. If there are objections by the lawyers with respect to the questions being asked, don't answer the question unless the Discipline Committee allows you to respond. Remember

that you are an independent and impartial party. You are not there to help either side, but to provide the Committee with certain information.

Once you have finished testifying, you may be able to observe the rest of the hearing unless it is anticipated that you will be needed to testify further. At the conclusion of the hearing, the Discipline Committee will reach a decision, which is public and is available by contacting the regulatory college or visiting their website.

### **Maintaining your professionalism**

As a health care professional, you want to ensure that the information you provide as a witness is consistent, credible and professional. If you take the time to prepare, carefully review all the relevant documents such as the chart, keep a fact-based focus to the issues in question and review the information in this guide, you should be able to maintain your professionalism throughout the process.

## 6. CORONER INVESTIGATION/INQUEST

### A. Background

#### Mandatory reporting and investigations

You may likely be involved in a coroner's matter during your career as a health care professional – a significant number of deaths which are the subject of a coroner's investigation or inquest are patient deaths in a health care facility. The coroner must be notified in a number of circumstances, such as when a patient death is sudden and unexpected and must undertake an investigation of all patient deaths in psychiatric facilities, institutions under the *Mental Hospitals Act* and facilities defined in the *Developmental Services Act*. The coroner must also be notified when a resident dies in a home for the aged or a nursing home, but it is discretionary as to whether the coroner will conduct an investigation or call an inquest.

#### Purpose

The purpose of a coroner's investigation or inquest is not to assign blame or legal responsibility to anyone with regards to the death, but to improve public safety and make recommendations to prevent death in similar circumstances. The mission statement of the Office of the Chief Coroner is as follows:

*The Office of the Chief Coroner serves the living through high quality death investigations and inquests to ensure that no death will be overlooked, concealed or ignored. The findings are used to generate recommendations to help improve public safety and prevent deaths in similar circumstances.*

#### The five questions to be answered

Coroners are medical physicians who have undergone special training with respect to death investigation, and must determine at the end of an investigation or inquest:

1. Who the deceased was;
2. Where the death occurred;
3. When the death occurred;
4. How the death occurred;
5. By what means the death occurred (accident, natural causes, suicide, homicide or undetermined).

As one can see, the answer to these questions, particularly how and by what means the death occurred may involve a finding that some action or inaction on the part of a health care professional contributed to the patient's death. While blame or legal responsibility is not to be determined by the coroner, information from the investigation/inquest may be used indirectly against a health care professional to indicate that there are grounds for a lawsuit, criminal proceeding or regulatory college discipline matter. For example, while it is rare, two nurses were charged with criminal negligence causing death shortly after the conclusion of an inquest.

## **B. Investigation**

### **Chart Seized, Autopsy and Statements**

The coroner has broad powers to conduct the investigation including the power to enter and inspect the premises and to seize evidence. Typically in a coroner's matter, the patient's chart is seized and the room where the patient died is sealed until the coroner has investigated.

Incidents involving patients should be fully charted in the normal course in the patient's medical record and incident reports. This should include assessments, actions, reports to physicians and other health care professionals and communications with family. You should make a late entry in the patient's medical record if you have previously omitted information. Late entries are permissible but should be timed, dated and identified as a late entry. You should try to make your late entry prior to the coroner seizing the chart.

If you make personal written notes after an incident, you should label them "made for my lawyer" and not provide them to anyone without speaking with the LEAP Team. Otherwise, these personal notes are available to anyone and can be used against you.

The coroner, as part of the investigation, will likely arrange for an autopsy or post-mortem examination shortly after the death. An autopsy is performed by a pathologist who provides a report to the coroner with an opinion as to the cause of death.

In addition to the completion of an autopsy, the coroner will often engage the police to investigate the circumstances leading to the death. In most cases, the police will want a statement from all the health care staff involved in the care of a patient, particularly the health care staff who provided care on the previous shift and the shift when the patient died. Front-line staff often have the most relevant information about the circumstances surrounding a patient's death.

## **What to do if the coroner or police request a statement**

**You should call LEAP Intake immediately before providing a statement to the coroner or the police.** Although it is contrary to the *Coroner's Act* to obstruct, interfere or withhold information in a coroner's investigation (and the police may remind you of this), you have the legal right to retain legal counsel and/or advice before being questioned. This is because your involvement in the situation might lead to criminal charges, a lawsuit or discipline proceedings at your regulatory college. Any statement you make could later be used in these proceedings and your request to obtain legal advice prior to making a statement or being accompanied by a lawyer while making a statement cannot be construed as obstruction, interference or withholding information.

You can advise the coroner or police that you are happy to cooperate, but want to consult with legal counsel first. You can also provide assurance that you or your counsel will get back to them shortly. Do not say anything else – then call LEAP Intake immediately. The Team will immediately assess your situation and provide you with the necessary assistance.

## **LEAP coverage**

If you have a “substantial direct interest” in a coroner's matter – there is a suggestion or suspicion that your care, action or inaction contributed to the patient's death in some way, LEAP may provide legal representation during the investigation and later if an inquest is convened. There may also be legal representation provided if there are serious systemic problems relating to the patient's death that will not be addressed by other parties or your employer's interest is directly opposed to your interest.

If your involvement in the matter is more peripheral, you should speak with your employer to determine if legal assistance will be provided. Many employers will ensure that staff is accompanied by a lawyer when making a statement to the coroner or police. LEAP also provides advice about what to expect when making a statement to the coroner or police and about how to answer questions and conduct yourself during the interview.

## **Points to remember when making a statement to coroner or police**

The coroner or the police acting on behalf of the coroner normally seize the chart shortly after notification of the patient's death. It is acceptable for you to identify whether a particular entry in the chart is yours. However, any further discussion of a patient's personal health information should be postponed until after you have consulted the health information custodian at your health care facility (this

is normally the health records department) regarding your confidentiality obligations pursuant to the *PHIPA*.

Generally, you should keep the following points in mind when making a statement to the coroner or the police acting on behalf of the coroner:

- Make sure you understand the question and if not, request clarification.
- Answer only the questions you are asked.
- Answer questions regarding the care of a particular patient by referring to the patient's chart, and clarifying the meaning of what you have documented, if necessary.
- Stick to the facts (I observed this, I heard this, etc.) and do not express an opinion.
- Stick within your scope of practice.
- Do not guess at answers and do not speculate.
- If you do not know the answer to a particular question or do not recall a particular incident, say so.
- If you don't understand a question, ask for clarification.
- **If at any time while providing your statement you have the impression that the coroner or police are suggesting your care, actions or inaction contributed to the patient's death or that the line of questioning is inappropriate, terminate the interview. Advise the coroner or police that you will continue the interview once you have consulted with a lawyer and call LEAP Intake immediately.**

You can ask the coroner or the police acting on behalf of the coroner for a copy of your statement at the conclusion of the interview.

### C. Inquest

Normally at the end of an investigation, the coroner is able to establish the cause and circumstances surrounding the death and is able to make recommendations, thus concluding the matter. However, in about 150 cases a year, an inquest is convened where the coroner deems that it is in the public interest to undertake a more detailed inquiry into the circumstances surrounding the death.

An inquest is a hearing open to the public and the media and is held in a courtroom or court-like facilities. A five-member jury is selected from the jury roll and hears

evidence in order to determine who the deceased was and how, where, when and by what means the deceased died. The jury also makes recommendations to avoid deaths in similar circumstances based on evidence heard.

During an inquest, witnesses are summoned to testify about information they have regarding the circumstances of the death. The witness will first be questioned by the Crown Attorney who acts as legal counsel for the coroner and then by counsel for the parties with standing; normally the family's counsel, the physicians' counsel and the hospital's counsel. Witnesses can also be questioned by the coroner and jury members. Strict rules of evidence do not apply at an inquest, so hearsay and other information or documents that the coroner considers relevant will be admitted.

Following the presentation of evidence, the parties including the Crown Attorney are given an opportunity to make submissions with respect to the findings and possible recommendations. The jury will then deliberate and return with their answer to the five questions and recommendations to prevent death in similar circumstances in the future. As said before, the jury cannot make any findings of legal responsibility.

The coroner then distributes the findings and recommendations to the appropriate persons, agencies or ministries of government who may be able to implement them, and then evaluates the response about a year later. The recommendations are not mandatory and no one is legally required to carry out the recommendations. The best recommendations are those which are most practical and relevant to the issues presented at the inquest.

## **D. Witness**

You may be asked or summoned to testify at a coroner's inquest. If you have a "substantial and direct" interest as described above, LEAP may provide for legal representation at the inquest. If you have a more peripheral interest, LEAP can provide advice or counselling and we suggest that you review the advice in Section 9 – *Summoned as a Witness*.

Again, although a coroner's jury is not to assign blame or determine legal responsibility, there may be considerable risk for members involved in such a proceeding since information at the inquest could be used indirectly by other parties in other legal proceedings. **You should contact LEAP Intake so we can ensure you receive appropriate assistance.**

## 7. CRIMINAL INVESTIGATION/TRIAL

### A. Background

It is rare that health care professionals are the subject of a criminal investigation or charges arising out of their professional practice, but it can happen. LEAP has provided legal representation for health care professionals who have been the subject of a criminal investigation and in some cases charged with second-degree murder, criminal negligence causing death, sexual assault and theft. These are extremely serious matters and it is strongly recommended that you **call LEAP Intake immediately** before speaking with anyone, including the police, if you are the subject of a criminal investigation or charges in relation to your Bargaining Unit work.

### B. Investigation

During the criminal investigation stage, LEAP may provide legal representation and your lawyer's fees will be reimbursed subject to the Plan limitations up until the time charges are laid. The immediate involvement of a lawyer at the beginning of a criminal investigation before any statements are made has sometimes resulted in charges not being laid. We cannot stress enough – **call LEAP Intake immediately** before talking to anyone.

### C. Trial

If you are charged with a criminal offence in relation to your Bargaining Unit work, please **contact LEAP Intake immediately**. We will advise you regarding filing a claim, and provide a legal referral if necessary. Please note that once criminal charges have been laid, LEAP only reimburses for legal expenses, if after all appeals are exhausted, you are found not guilty of all charges or all charges are dismissed or stayed. The Plan provides full details regarding coverage.

### D. Witness

You may be asked, as a witness, to provide a statement to the police during a criminal investigation or summoned to testify at a criminal trial as a witness. If you are summoned to testify at a criminal trial, please review the next section of the Guide – “*Summoned as a witness.*” However, what happens more frequently is that the police attend at the health care facility, during or shortly after treatment of an alleged offender or victim of a crime, and want you to answer questions. Sometimes, they can be quite insistent that you answer their questions and can appear to have the authority to obtain information and records since they are undertaking a criminal investigation.

It is critical to keep in mind that while you may want to co-operate with the police, you first and foremost owe a duty of confidentiality to your patients. You cannot release confidential health information without the consent of the patient or specific lawful authority such as a court order or search warrant. If the police want to question you in a criminal investigation, you should immediately consult with your employer and the health information custodian at your health care facility (this is normally the health records department) regarding your confidentiality obligations pursuant to *PHIPA* before answering any questions. If you breach patient confidentiality, you could find yourself the subject of a lawsuit for negligence, the recipient of a complaint to the Information and Privacy Commissioner and/or subject to disciplinary proceedings for professional misconduct.

Please note that there is legislation that mandates public hospitals to report gunshot wounds. Pursuant to the *Mandatory Gunshot Wounds Reporting Act*, there is an obligation to report to police the fact that a person is being treated for a gunshot wound, the person's name (if known) and the name and location of the facility. This is the only information that is required by this legislation to be provided to police. You should check with your employer with respect to the protocol at your facility on reporting gunshot wounds.

## **8. PERSONAL HEALTH INFORMATION & PROTECTION ACT (PHIPA) PROCEEDING**

### ***Personal Health Information & Protection Act***

*PHIPA* governs the collection, use and disclosure of personal health information in Ontario. The purpose of the legislation is to ensure that personal health information is kept confidential and secure. If a health care provider has improperly collected, used or disclosed personal health information, s/he may be the subject of a complaint to the Information and Privacy Commissioner. *PHIPA* complaints must be filed in writing and should be filed within one year of the breach coming to the complainant's attention.

### **LEAP Coverage**

LEAP provides coverage in the event a member is the subject of a *PHIPA* complaint and members are urged to contact LEAP immediately before responding to the Information and Privacy Commissioner. As can be seen below, in serious cases where a breach is proven and an order issued, a complainant can file a lawsuit for damages.

### **Mediation, Investigation and Review**

Most *PHIPA* complaints are resolved informally via mediation. However, if mediation is unsuccessful, an investigator is appointed to investigate and then review the matter. Prior to the review, the parties are given an opportunity to provide written submissions. Your representative, after reviewing relevant documentation and discussing the matter with you, will prepare your written defence to the complaint.

After the review, the investigator will issue an order with reasons. Orders may include the following dispositions:

- Grant an individual access to his/her personal health information or to make a correction;
- Cease collection, use or disclosure of personal health information;
- Perform a duty under the *PHIPA*;
- Dispose of personal health information;
- Change, cease or implement an information practice.

## **Actions for Damages**

A complainant who obtains an order from the Information and Privacy Commissioner can file a lawsuit for damages for actual harm suffered as a result of a contravention of the *PHIPA*, but this is a limited right to damages.

## 9. SUMMONED AS A WITNESS

### **Witness to matter that becomes subject of legal proceeding**

In your practice as a health care professional, you may observe, overhear or otherwise obtain information that becomes the subject of a legal proceeding. For example, an emergency triage nurse may treat the victim of an assault and be summoned to testify as a witness at a criminal hearing. A community nurse may treat a child and family and be summoned to testify at child custody hearing.

You are legally obligated to obey a summons to testify; the summons will likely be served to you personally, either at your workplace or your home. This may be a summons to testify as a witness in a civil lawsuit, coroner inquest, court custody proceeding, regulatory college hearing or criminal trial. If you have been summoned to testify in a regulatory college hearing, you should refer to Section 5 f) of the – *College investigation/hearing – Witness*.

### **LEAP coverage**

LEAP offers advice or counselling for members who have been summoned to testify in a *RHPA* matter, coroner's inquest, court custody and criminal code matter. You may find the information below sufficient, if the matter is relatively straightforward. However, if the matter is more complex, you can contact LEAP Intake. In addition, you should contact your employer to find out what assistance is provided to staff when summoned to testify in a work-related legal proceeding.

If you have been summoned to provide information in a lawsuit, please contact the Professional Malpractice Plan, see Section 4 – *Contact Information*.

### **The summons**

The summons should provide information about who has summoned you and when and where you are to testify. The summons should also indicate whether you are required to bring anything with you to the hearing. The only thing you would likely be required to bring to a hearing are your personal written notes of any incident(s). However, if you made personal written notes after the incident(s) in anticipation of litigation, you may not be required to release those personal notes.

Please also note that if you receive a summons asking you to bring the chart or other medical records, you should contact the party who summoned you so they can issue a separate summons for these documents to the health information custodian (normally the health records department) at your health care facility. You do not own/control the chart and other medical records and are not entitled to

remove these documents from the health care facility. We have sometimes found when the Crown summons nurses to testify in criminal trials, they also summon them to bring the patient's chart and other health records. The nurse cannot take the chart and other health records out of the health care facility, and valuable time and resources are wasted when the nurse shows up at the hearing without the records and is unable to testify until the chart is properly summoned.

### **Contact party who summoned you**

You should contact the party who summoned you to find out what the hearing is about and your involvement in the matter. You want to clarify that you are only being asked to testify as a witness and that there are no allegations of blame or negligence against you. **If you do not receive that clarification, do not speak further and call LEAP Intake immediately.**

If the party who issued the summons wants to engage in a discussion with you about matters that will involve you disclosing personal health information regarding a patient, you should ensure that there is consent from the patient. Since the summons is for you to testify at a hearing, absent patient consent, prior to actually testifying at the hearing, you should not divulge any personal health information unless and until you consult with the health information custodian at your health care facility (normally the health records department) regarding your confidentiality obligations pursuant to the *PHIPA*. You should remember that in cases where nurses (or other employees) are involved, their personal health information, whether it is in the possession of the Occupational Health Department or otherwise acquired, is also confidential and subject to protection.

The party who summoned you should keep you advised regarding any changes in the date and location and will hopefully be able to pinpoint a more specific time when you will be required to testify. You should also request information about the expenses to be covered in order for you to testify. Normally, travel, accommodation, food and a nominal attendance allowance will be reimbursed, but not lost wages. However, your employer may cover your lost wages, and you should contact your ONA Local representative regarding any coverage that may be provided pursuant to the collective agreement.

### **Preparation**

It is never easy to testify at a hearing. However, if you know the type of questions that you are likely to be asked by all parties and have familiarized yourself with the chart and all other relevant documents, this should help make the experience easier. Good preparation so that there are no surprises is the key to delivering testimony in a professional manner.

The party who summoned you will likely contact you prior to the hearing in order to ensure that you are prepared. If you have not been contacted and the hearing date is approaching, you should initiate the contact. You should be provided an opportunity to carefully review a copy of all the relevant documents prior to the hearing. The relevant documents may include:

- A copy of the chart;
- Any previous statements you have provided prior to the hearing;
- Incident reports;
- Policies and protocols.

You want to be able to easily refer to the sections of the chart and other documents such as incident reports, policies, etc. while testifying. You may also want to review any relevant standards of nursing practice. The party who summoned you may review with you the kinds of questions you will likely be asked, so that you can think about your answers in advance by referring to the chart, incident reports, etc. Keep in mind that without patient consent, before divulging any personal health information prior to actually testifying at the hearing, you should consult with the health information custodian at your health care facility (this is normally the health records department) regarding your confidentiality obligations pursuant to the *PHIPA*.

You should carefully review all the relevant documents and the questions prior to the hearing and as you prepare consider the points to remember set out in the next section on testifying at the hearing.

You can ask the party who summoned you if they have a booklet or other written information to help you to prepare to testify.

### **Testifying at the hearing**

When you arrive at the hearing, you will likely wait in a witness waiting area outside the hearing room until it is your turn to testify. Witnesses are normally not allowed in the hearing room until after they have testified. You should plan to spend the whole day since hearings rarely run right on schedule.

The party who summoned you will normally bring you into the hearing room when it's your turn to testify. You will be asked to swear or affirm that your testimony will be truthful and then the party who summoned you will begin questioning. This is called direct examination. The other party will then have an opportunity for cross-examination, which is an opportunity to clarify information and point

out inconsistencies in your testimony. The party who summoned you may also have some follow-up questions.

It is really important to keep the following points in mind when testifying:

- Listen to the questions carefully and make sure you understand the question. If you don't understand the question, request clarification.
- Speak loudly, clearly and slowly so the court reporter can accurately record your answers. An official transcript is made of the hearing.
- Answer only the questions you are asked.
- Answer questions regarding the care of a particular patient by referring to the patient's chart, and clarifying the meaning of what you have documented, if necessary.
- Answer questions regarding any previous statement you have made, incident reports, policies and protocols by referring to those documents, and clarifying what is written, if necessary.
- Stick to the facts (I observed this, I heard this, etc) and do not express an opinion.
- Stick within your scope of practice.
- Do not guess at answers and do not speculate.
- If you do not know the answer to a particular question or do not recall a particular incident, say so.
- If there are objections by the lawyers with respect to the questions being asked, don't answer the question unless the decision-maker allows you to respond.
- Remember that you are an independent and impartial party; you are not there to help either side, but to provide the decision-maker with certain information.

Once you have finished testifying, you may be able to observe the rest of the hearing unless it is anticipated that you will be needed to testify further.

As a health care professional, you want to ensure that the information you provide as a witness is consistent, credible and professional. If you take the time to prepare, carefully review all the relevant documents such as the chart, keep a fact-based focus to the issues in question and review the information in this, you should be able to maintain your professionalism throughout the process.

## 10. CONCLUSION

We hope you have found this guide helpful in providing information about the legal proceedings you may find yourself involved in as a health care professional. It is becoming more and more difficult, given the shrinking resources and increased expectations in health care, to have a career untouched by even peripheral involvement in a professional work-related legal matter. It is important to know your rights and not to be taken by surprise if the College, coroner, police or Information and Privacy Commissioner contact you. The proper response at the time of an incident can significantly affect the outcome of a case. We're hopeful that the hour or so you have taken to read this guide was time very well spent!

We'd appreciate any feedback you have regarding the guide. We're always trying to improve our communication with members and your comments will help us to ensure that we're addressing your concerns and providing you the information you need. Simply log onto the ONA website and send us an e-mail or write the LEAP Team at ONA's head office.

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