

Legal Expense Assistance Plan (LEAP)

A Guide for ONA Members

OCTOBER 2019



Ontario Nurses' Association



The Ontario Nurses' Association (ONA) is the union representing 65,000 registered nurses and health-care professionals, as well as more than 18,000 nursing student affiliates, providing care in hospitals, long-term care facilities, public health, the community, clinics and industry.

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TABLE OF CONTENTS

1. Purpose –The guide explains what supports are available to ONA members under our Legal Expense Assistance Plan (LEAP) . . .	1
2. Introduction – Why LEAP was established and what your coverage entails	2
3. When to Contact LEAP – Your right to legal representation	4
4. Contact Information – How to access LEAP and other important resources	6
5. College Investigation/Hearing – What to do if your regulatory college contacts you. How the College process works	7
a) Background	7
b) Investigation – Complaints and Reports	7
c) Discipline Hearing	17
d) Health Inquiries	19
e) Quality Assurance	23
f) Witness	24
6. Coroner’s Investigation/Inquest – What to do if you are involved in a coroner’s investigation/inquest related to your work	33
a) Background	33
b) Investigation	34
c) Inquest	36
d) Witness	37
7. Criminal Investigation/Trial – What to do if you are involved in a criminal investigation or trial related to your work	39
a) Background	39
b) Investigation	39
c) Trial	39
d) Witness	39
8. Personal Health Information Protection Act (PHIPA) Proceedings – What to do if the Information and Privacy Commission contacts you or you are being prosecuted under <i>PHIPA</i>	41
a) <i>PHIPA</i> Complaints to the Information and Privacy Commission. . .	41
b) <i>PHIPA</i> Prosecution by the Attorney General.	42
9. Ministry of Long-Term Care Investigation – What to do if asked to participate in a government-mandated inspection in your workplace.	43
10. Summoned as a Witness – What to do if you are witness to a matter that becomes subject of a legal proceeding	45
11. Conclusion	50

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.

You may be involved in a work-related incident that results in a coroner's investigation or inquest, criminal charges, *Personal Health Information Protection Act (PHIPA)* proceeding, Ministry of Long-Term Care inspection, or summons to appear as a witness.

We all hope 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, coroner, criminal, Ministry inspection or *PHIPA* proceeding. If you are contacted by the College, coroner, police, Ministry or Information and Privacy Commissioner, 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 Ministry inspections.
- About appearing as a witness.

Important Notes

This guide is produced for informational purposes only and should not be considered 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 LEAP Plan itself for detailed information regarding coverage.

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

This is the sixth revision of the *LEAP Guide*. Please dispose of earlier versions as the information in them may be outdated.

2. INTRODUCTION

Why ONA Established LEAP: One Incident, Five Different Legal Proceedings

Health-care professionals who make a serious medication or other error could find themselves involved in all of the following legal investigations and proceedings regarding that one error:

- An employer investigation, discipline such as termination from employment, and an arbitration hearing to determine whether the discipline was justified.
- An investigation by an insurance adjuster in connection to 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 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, who 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 Insurance Plan, which provides secondary, excess insurance coverage regarding malpractice lawsuits. If a member qualifies for coverage under their employer's insurance, ONA's Professional Liability Insurance may offer coverage beyond the dollar amount provided by the employer's insurance plan.

Initially, however, no assistance was provided to members if they were involved in any of the other legal proceedings that could arise from the one incident. The expense to an individual member to obtain legal assistance in all these additional forums – regulatory college hearing, coroner's inquest and criminal trial – 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:

- Proceedings before CNO and other regulatory colleges.
- Nurses' Health Program (NHP).
- Coroner's investigation and inquest.
- Criminal investigation and trial.
- *PHIPA* proceeding.
- Ministry of Long-Term Care inspections.
- Summoned as a witness in a *Regulated Health Professions Act (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 at leapintake@ona.org for further details.

LEAP Team and Membership Advisory Team

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

The Team works under the direction of the Plan Administrator. 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 ONA's First Vice-President and representatives from the membership at large. The Advisory Team's 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:

- **You learn of or receive a complaint or report about your professional practice to your regulatory college** (see Section 5 on regulatory college proceedings).
- **You believe you may have a substance use disorder or mental health disorder that is affecting your ability to practise and would like to seek help.**
- **The police and/or the coroner want to interview you regarding a patient or a patient death** (see Sections 6 and 7 on coroner's 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 or you are being prosecuted under PHIPA** (see Section 8 on PHIPA proceedings).
- **You are asked to attend an interview with an inspector from the Ministry** (see Section 9 on Ministry inspections).

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

Important Note Regarding Lawsuits

The Professional Liability Insurance Plan, rather than LEAP, provides assistance regarding malpractice lawsuits (see Section 4 – Contact Information).

Right to Obtain Legal Advice or Retain Legal Counsel

In all of the legal proceedings listed above, *you have the right to obtain legal advice or to retain legal counsel before being questioned.* You may be involved in a situation that has either resulted or may result in criminal charges, civil litigation, professional discipline, a Ministry of Long-Term Care inspection or a PHIPA complaint against you. If the College, coroner, police, Ministry of Long-Term Care inspector or Information and Privacy Commissioner wants 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. You should then **call LEAP Intake immediately** (see *Section 4 – Contact Information*). The 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 to question you soon after a critical incident. You may receive the impression that you must provide a statement NOW and that your failure to do so could be considered obstruction of a legal investigation. However, it is not obstruction to insist on your right to legal advice or counsel before being questioned in these circumstances. Please remember this and that *any statement you make can be later used in legal proceedings*. It is in your best interest to ensure that you are well prepared, rested, have legal advice and, if necessary, have legal counsel present 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/or in incident reports. This documentation 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 you believe should be included. 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 only." 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, you may be required to disclose these personal notes to others and they could be used against you.

4. CONTACT INFORMATION

LEAP Intake

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

Email: **leapintake@ona.org**

Hours: 8:30 AM to 4:30 PM / Monday – Friday (excluding holidays)

Ask for: LEAP Intake

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

Call: **416-964-8833** (when prompted enter 7775 for Board Intake) or **1-800-387-5580** (Enter 0 for Toronto Office, then 7775 for 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 begin 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 only."

Call: **416-964-8833, ext. 7723** or **1-800-387-5580** (Enter 0 for Toronto Office, then 7723)

Email: **MalpracticeIntake@ona.org**

Hours: 8:30 AM to 4:30 PM / Monday – 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 (for example, nursing, medicine and physiotherapy) the authority to regulate itself in the public interest. Under the *RHPA*, each of the regulatory colleges, among other obligations, 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.

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. The legislative duty of each regulatory college is solely “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 Resolve and Notify you of Any Complaint

Each regulatory college must resolve 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 and other members of the public. There is no time limit for filing a complaint.

If you are the subject of a complaint, CNO will notify you by mail. The letter will state that CNO has received a complaint regarding your nursing practice and is required to resolve the complaint. The complaint letter from the patient, family member or other member of the public will normally be attached. The complaint may be dealt with through the more informal Alternative Dispute Resolution Process (ADR) or by way of a full investigation. ADR is discussed on page 8. If the complaint is being investigated, a CNO investigator will be assigned to your case and you will be asked to telephone the investigator by a particular date to discuss the matter further.

Do not call CNO.

Call LEAP Intake immediately. Do not call CNO. CNO keeps a record of

all telephone calls and anything 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 when they learn of a complaint: distress, anger, hurt, disbelief, fear. It is not advisable to speak with CNO in this frame of mind. We urge you to call LEAP Intake and not to call CNO. The LEAP Team will arrange for representation, and your representative will communicate with CNO on your behalf.

Some members worry that CNO will consider that a member who has a representative has something to hide or has done something wrong. None of the regulatory colleges draws this conclusion. We have many years of experience of working with College investigators and this relationship is often helpful to our members.

Unproven Accusation or Allegation

Keep in mind that every complaint received at CNO is an accusation or allegation against you. Some members have told us that because 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, was unaware of hospital practices and protocol, and so on. This is why it is best to say nothing to CNO and not to provide any verbal or 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 practice. The reasons for complaints at CNO generally fall into two broad categories: nursing practice and nursing conduct. Examples of nursing practice issues are medication errors, documentation errors and assessment errors. Nursing conduct complaints include issues regarding communication, failure to follow up, abuse and so on.

Alternative Dispute Resolution (ADR)

If the complaint is less serious, CNO may try to settle the matter informally between the complainant and you via its alternative dispute resolution process, or ADR. Both the complainant and you must agree to settle the complaint via ADR. Otherwise, the complaint proceeds through the normal investigative and adjudicative process. By participating in ADR, you are not acknowledging that you have breached any nursing standard.

After consulting with LEAP, you may agree, for example, to complete an online module or modules on a specific nursing standard or standards or review a particular standard of practice to resolve the complaint.

The advantages of resolving a complaint via ADR are that it is generally quicker and you know the outcome with finality. The Inquiries, Complaints and Reports Committee (ICRC) is required to look at prior decisions in reviewing a complaint. However, information from a complaint resolved via ADR is not used in future CNO proceedings and is used only to assess whether ADR is a viable option in the event of a subsequent complaint.

Investigative Process

If the complainant and/or the member do not agree to ADR, or if it is not appropriate given the nature of the allegations, CNO will conduct a formal investigation of the complaint. The investigator, among other steps, will interview witnesses such as the patient, family members and other staff members. The investigator will also obtain other relevant information such as nursing notes, doctors' orders, MARs, nursing care plans, rotation schedules, patient assignment sheets, incident reports, job descriptions, employer policies, etc. Once the investigation is complete, your representative will receive copies of documentation CNO considers necessary for you to refresh your memory regarding the allegations. CNO releases only documentation such as the patient's chart, incident reports and employer policies.

Your representative will send you a copy of this documentation and then review it with you to obtain your side of the story. Your representative will prepare your written defence, which is submitted to the ICRC for its review.

Decision

A panel of the ICRC reviews the complaint. Each panel is composed of RNs and RPNs elected by members of 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. It then disposes of the case in one of the following ways:

- Takes no action (the result in a large percentage of cases).
- Provides non-disciplinary advice.
- Issues you a non-disciplinary caution.

- Orders you to undertake remediation such as completing a nursing course, reviewing standards and other College resources, meeting with a nursing expert, etc. This type of decision, called a Specified Continuing Education or Remediation Program (SCERP), is also non-disciplinary.
- Refers the matter to the Discipline Committee for a hearing (this happens in only a small percentage of cases).
- Refers the matter for incapacity proceedings and a possible Fitness to Practise Committee hearing.

After you receive the letter from the College notifying you of the complaint against you, it can take up to a year (and sometimes longer) before the ICRC issues one of the decisions above.

The vast majority of complaints are resolved without the member being referred to the Discipline Committee.

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

Public Record

CNO sends the ICRC's decision only to you, your representative and the complainant. Your employer will not receive a copy of the decision from CNO.

If the ICRC has taken no action or has provided only non-disciplinary advice, the decision is not placed on the public register/CNO website ("Find a Nurse").

As a result, CNO will not release information about the complaint or its disposition to anyone calling CNO with general inquiries about your practice. Nor will someone searching your name on Find a Nurse on CNO's website find any reference about the complaint or its disposition. However, if you apply for registration in another jurisdiction, you may be required to sign a release authorizing CNO to release all information about you. This release may include information about ICRC dispositions that are not otherwise available.

However, if the ICRC imposes a SCERP or caution, this information will be placed on the public register/Find a Nurse. The information will remain there indefinitely.

If you have 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 Committee hearings schedule posted on CNO's website listing the member's name, the member's designation, the geographic region, the hearing date and the nature of the allegations. As Fitness to Practise hearings are closed to the public, there is no hearings schedule for these matters posted on CNO's website.

CNO keeps copies of all complaints and decisions for at least 25 years. If another complaint or report is made about you in the future, the prior decision is brought to the attention of the panel considering how to dispose 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 HPARB within 30 days of receiving the formal ICRC decision, unless the decision is to refer the matter to the Discipline Committee or to commence incapacity proceedings 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 is composed of three government-appointed members of the public who are not health-care professionals. This panel conducts a review hearing to determine only if the CNO investigation was adequate and if the ICRC decision was reasonable.

At the end of the hearing, HPARB 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 HPARB.

It is our experience that HPARB generally confirms the ICRC's decisions.

Reports

In addition to complaints, you may also find yourself the subject of a report, usually from your employer. Legislated mandatory reporting obligations are as follows:

- Employers must report the termination of a regulated health-care professional if the termination is because of professional misconduct, incompetence or incapacity.
- Employers must report an intention to terminate a regulated health-care professional for reasons of professional misconduct, incompetence or incapacity *even if the member resigns and the termination never takes place.*
- Employers must report if they have disciplined a regulated health-care professional due to privacy violations. They must also report if that member resigns during an investigation into a privacy violation.
- Facility operators (in our case, employers) must report a regulated health-care professional if they have reasonable grounds to believe that they have sexually abused a patient, are incompetent or incapacitated.
 - A regulated health-care professional is considered to be incompetent if they: i) lack significant knowledge, skill or judgment, **and** ii) need to be removed from practice or practise in a restricted manner to ensure public safety.
 - A regulated health-care professional is considered to be incapacitated if they: i) suffer from a health condition **and** ii) need to be removed from practice or practise in a restricted manner 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 must self-report to CNO in the following circumstances:
 - They have been found guilty of any offence in any jurisdiction.
 - They have been charged with any of the following offences in any jurisdiction:
 - An offence under the Criminal Code of Canada.
 - An offence under the *Controlled Drugs and Substances Act*.
 - Other offences that could be relevant to practice. For example, if a nurse is charged with a provincial offence under *PHIPA* for inappropriately accessing personal health information.
 - CNO says members do not need to report speeding or parking tickets.
 - They are the subject of a current investigation, inquiry or

proceeding for professional misconduct, incompetence or incapacity or any similar investigation or proceeding in relation to the practice of nursing or any other profession in any jurisdiction. Nurses do not have to report if they are the subject of an investigation, inquiry or proceeding by CNO.

- They have received a finding of professional misconduct, incompetence or incapacity or any similar finding in relation to the practice of nursing or any other profession in any jurisdiction.
- They are the subject of 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 has not been reported to the employer.

If you have questions about whether you have to self-report, please contact LEAP Intake.

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

Report May Result in Investigation

Although each regulatory college must resolve all written complaints, the Executive Director has discretion as to whether they will order an investigation of an employer report or other information that comes to the attention of a college. In some cases, CNO may deal with a report or other information informally without an investigation. If you are notified by 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.

The Executive Director of CNO may choose to deal with a report by simply keeping the report on file. They might require the member to engage in remediation or education, such as reviewing online learning modules or other College resources before attending a meeting with them or one of their delegates. In these cases, there is no formal investigation of the allegations provided in the report.

Normally, CNO will notify you about a report by mail. The letter will state that CNO has received a report regarding your nursing practice and is either

dealing with the matter informally or launching an investigation. If the report is to be investigated, a CNO investigator will be assigned to your case and you will also be asked to telephone them by a particular date to discuss the matter further.

Do not call the CNO.

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

Some members worry that CNO will consider that a member who has a representative has something to hide or has done something wrong. None of the regulatory colleges draws this conclusion. We have many years of experience working with College investigators and this relationship is often helpful to our members.

Unproven Accusation or Allegation

Keep in mind that every report received at CNO is an accusation or allegation against you. Some members have told us that because they are so upset 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, was unaware of hospital practices and protocol, and so on. This is why it is best to say nothing to CNO and not provide any verbal or 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 practice. The reasons for reports at CNO generally fall into two broad categories: nursing practice and nursing conduct. Examples of nursing practice issues are medication errors, documentation errors and assessment errors. Nursing conduct reports include issues regarding communication, failure to follow up, abuse and so on.

Investigative Process

In cases in which the Executive Director has chosen to proceed with an investigation, they will appoint an investigator to investigate the report. The investigator, among other steps, will interview witnesses, such as the patient, family members and other staff members.

The investigator will also obtain other relevant information, such as nursing notes, doctors' orders, MARs, nursing care plans, rotation schedules, patient assignment sheets, incident reports, job descriptions and employer policies.

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

Your representative will send you a copy of this documentation and will then review it with you to obtain your side of the story. Your representative will prepare your written defence, which is submitted to the ICRC for its review.

Decision

A panel of the ICRC reviews reports. Each panel is composed of RNs and RPNs elected by members of 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 is present when the ICRC reviews the report. The Committee reviews the investigator's report, all relevant documentation and your written defence. It then disposes of the case in one of the following ways:

- Takes no action.
- Issues you a non-disciplinary caution.
- Orders you to undertake remediation such as completing a nursing course, reviewing standards and other College resources, meeting with a nursing expert, etc. This type of decision, called a SCERP, is also non-disciplinary.
- Refers the matter to the Discipline Committee for a hearing (this happens in a small percentage of cases).
- Refers the matter for incapacity proceedings and a possible Fitness to Practise Committee hearing.

It can take a significant amount of time from the date you receive the letter from CNO before the ICRC issues a decision in your case.

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

Public Record

CNO sends the ICRC's decision only to you and your representative. Unlike with a complaint, the individual who reports you to CNO is not a "party" to the process. The reporter is not notified if an investigation has been ordered and is not advised of the outcome of the process, regardless of the outcome. Therefore, unlike a complainant, the reporter is not given a copy of the decision. This is the case even when the reporter is your employer.

If the ICRC takes no action or provides only non-disciplinary advice, the decision is not placed on the public register/Find a Nurse on CNO's website. As a result, CNO will not release information about the report or its disposition to anyone calling CNO with general inquiries about your practice. Nor will someone searching your name on "Find a Nurse" on CNO's website find any reference to the report or its disposition.

However, if you apply for registration in another jurisdiction, you may be required to sign a release authorizing CNO to release all information about you. This release may include information about ICRC dispositions that are not otherwise available.

However, if the ICRC imposes a SCERP or caution, this information will be placed on the public register/Find a Nurse on CNO's website. The information will remain there indefinitely.

If you have 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/Find a Nurse regarding the referral and a brief summary of each specified allegation.

There is also a Discipline Committee hearings schedule posted on CNO's website listing the member's name, the member's designation, the geographic region, the hearing date and the nature of the allegations. As Fitness to Practise hearings are closed to the public, there is no hearings schedule for these cases posted on CNO's website.

CNO keeps copies of all reports and decisions for at least 25 years. If another complaint or report is made about you in the future, the prior decision is brought to the attention of the panel considering how to dispose of the subsequent complaint/report.

Judicial Review

There is no right to request a review by the HPARB of ICRC decisions concerning reports. The only recourse for a member who disagrees with a decision is to file an application to the Divisional Court of Ontario for a judicial review of the decision. In some cases, and with the approval of the Plan Administrator, LEAP will provide representation for you to launch a judicial review.

C. Discipline Hearing

Serious Matters of Professional Misconduct and Incompetence

Before referring allegations to the Discipline Committee, the ICRC normally requests a legal opinion as to the likelihood of success if CNO prosecutes allegations against you at a Discipline hearing. Only serious matters of professional misconduct and/or incompetence, where there is some evidence to support the allegations, are referred to the Discipline Committee. The Discipline Committee's decisions are the cases reported in CNO's magazine, *The Standard*, and deal with issues such as abuse, theft, fraud, falsification of records or qualifications, and serious practice errors. If your case is referred to the Discipline Committee, LEAP will provide legal representation.

Pre-hearing and Hearing

Once a matter is at the Discipline Committee stage, the complainant, if there is one, is no longer a "party" to the proceedings. The parties are you and CNO. The complainant becomes a witness in the Discipline hearing. LEAP provides legal counsel to defend you and CNO retains outside counsel to prosecute you.

A pre-hearing is convened after the referral to the Discipline Committee. It is conducted by a member of the Discipline Committee. You, your defence counsel, a representative of the College, and its prosecuting counsel also attend. Your counsel and the College's counsel will make oral submissions 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 made by the College's counsel.

If the parties agree on the correct outcome – that is, if the member acknowledges serious misconduct or incompetence and the member and the College agree on the proper penalty – the College’s counsel prepares an agreed statement of facts and a joint submission on penalty. This proposed resolution is presented at a Discipline hearing and in most cases approved by the Discipline Committee.

If there is no agreement between the parties or if the Discipline Committee does not approve of the proposed resolution, a contested Discipline hearing is held in which you and CNO take opposite positions. CNO must prove by calling witnesses and introducing other evidence that you are guilty of professional misconduct or are incompetent.

Discipline hearings are open to the public and are very similar to court proceedings. There are normally five people on a Discipline panel: two public members and three nurses. Two of the nurses will be the same designation – RN, RPN or NP – as the member facing the allegations. Your counsel will be in attendance with you throughout the entire hearing and will present your defence, including cross-examining the College’s witnesses and calling and questioning witnesses on your behalf.

Decision

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

- A finding of guilt.
- An oral reprimand.
- A fine.
- A 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 and providing a copy of the Discipline Committee’s decision to all employers for a specified period.
- Suspension of your Certificate of Registration for a specified period.
- Revocation of your Certificate of Registration.

Discipline Committee decisions are published in *The Standard* and are available on the public register/Find a Nurse on CNO’s website. Regardless of whether the matter is resolved by way of agreement or a hearing, if there is a finding of professional misconduct or incompetence, it is

recorded on the public register. Any penalty that is imposed, be it revocation, suspension or the imposition of terms, conditions and limitations on a member's Certificate of Registration, is also posted on the public register.

If the Discipline Committee finds that CNO has not proven the allegations, the decision is published in *The Standard* without the member's name. The decision, including the member's name, will be published on the public register/Find a Nurse for 90 days, at which time it will be automatically removed.

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. Health Inquiries

Health Inquiries are Treated Differently

CNO deals with health issues differently than it deals with professional misconduct and incompetence. Health concerns that might affect a member's ability to practise safely come to CNO's attention 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 and an unkempt appearance, bizarre behaviour, conviction for impaired driving or sloppy work habits.

Health Inquiries/Nurses' Health Program

In most cases, when CNO learns a member may have a health issue that could affect their ability to practise, they will write to the member offering a choice of how to proceed:

1. A CNO Health Inquiry; or
2. Participation in the Nurses' Health Program (NHP).

Both options will be explained below.

Call LEAP Immediately

When you receive a letter from CNO regarding a health issue, **call or email LEAP Intake immediately**. Do not call CNO or the Nurses' Health

Program and do not sign any medical authorization forms or consents.

A LEAP representative will speak with you about the details of your situation and help you determine which option is right for you: a CNO Health Inquiry or participation in NHP.

1. CNO Health Inquiry/ Fitness to Practise

When CNO embarks on a Health Inquiry, it investigates whether you have a health condition (usually a substance use disorder or mental health disorder) that affects your ability to practise safely.

As part of the health inquiry, you may be required to undergo a medical assessment by a health-care practitioner chosen by CNO. Your LEAP representative will advise you as to whether such an order is reasonable in your case.

Treatment for Substance Use Disorders

If you suffer from a substance use disorder, your LEAP representative can advise you as to the type of treatment CNO's assessors have considered necessary in previous matters, to allow a member to return to work safely as a RN. We have information about treatment facilities, addiction specialists and other addiction resources and would be happy to share this information with you.

If your health condition affects your ability to practise safely, it is important that you take a medical leave of absence from your workplace, if necessary. Do not resign from your job because of your health condition, even if you have been accused of wrongdoing.

Negotiated Resolution

If you indeed have a health problem that affects your ability to practise nursing safely and you acknowledge that problem, your case will most likely be dealt with at CNO without the need for a formal hearing. Your LEAP representative will gather information from your health-care practitioners and then negotiate with CNO regarding the best resolution for you.

You might agree to surrender your Certificate of Registration until your treatment is complete and there is medical clearance to return to work. Your LEAP representative will ensure that the terms of a surrender agreement are as minimally intrusive as possible. If you are able to practise safely with medically recommended terms, conditions or limitations on your certificate of registration, your LEAP representative will ensure that those conditions are the least restrictive necessary to protect the public.

Common conditions include limiting access to controlled substances for a specified amount of time, having a workplace monitor who is aware of your health history, and requiring you to continue to receive appropriate medical treatment. The terms of any agreement will depend on the nature of your health problem and the recommendations of health-care practitioners.

Hearing if Dispute about Capacity

The vast majority of health inquiries are resolved by agreement. However, if there is a dispute about your health condition or CNO is not willing to negotiate a reasonable agreement, a hearing before the Fitness to Practise Committee will be held to determine if you are “incapacitated” as defined in the *RHPA*:

“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’s certificate of registration be subject to terms, conditions or limitations, or that the member no longer be permitted to practice.

Fitness to Practise hearings are similar to court proceedings, but unlike CNO Discipline Committee hearings, are not open to the public. A LEAP lawyer will represent you at the Fitness to Practise hearing. If CNO proves you are “incapacitated,” the Fitness to Practise panel can order one of the following:

- Revoke your Certificate of Registration; or
- Suspend your Certificate of Registration; or
- Impose specified terms, conditions and limitations on your Certificate of Registration.

Regardless of whether your Fitness to Practise matter is resolved by agreement or by a hearing, a summary of the terms, conditions and limitations is recorded on the public register/CNO website.

Your personal health information such as diagnosis and specifics of required treatment is not recorded on the public register/CNO website. However, information about current terms, conditions and limitations may include a notation that your health must be monitored by treating health-care professionals and/or that you may not have access to controlled substances.

2. Nurses' Health Program

The Nurses' Health Program (NHP) is an alternative to CNO's Health Inquiry process. It is a voluntary, bilingual program designed to help Ontario nurses with substance use disorders and/or mental health disorders that might affect their ability to practise safely. NHP is a monitoring program that offers referral to treatment for these health conditions, with the goal that nurses can return to practice or continue to practise safely.

NHP was developed through a partnership between ONA, the Registered Nurses' Association of Ontario (RNAO), the Registered Practical Nurses Association of Ontario (RPNAO) and CNO. Nurses can enter NHP after they are reported to CNO or they can self-refer. NHP is run at arms' length from CNO, but CNO is aware of the participation of every nurse who enters NHP. Therefore, **NHP might not be the best option for nurses in all situations.**

If you are considering entering NHP, please contact LEAP immediately and before you communicate with CNO or with NHP. A LEAP representative will ask you about the details of your situation and will help you decide whether NHP or a CNO Health Inquiry is your best choice.

If CNO learns (most often through an employer report) that you may have a health issue that affects your ability to practise, they will write to you, offering the choice of NHP or a Health Inquiry. As stated above, you should contact LEAP immediately if you receive such a letter. If, after discussing your situation with a LEAP representative, you decide to enter NHP, you will be assigned an NHP case manager who will assist you throughout the NHP process. LEAP will also assign you a representative in case you have any questions or concerns.

NHP includes many elements that are similar to a Health Inquiry: members often need to attend for an independent medical examination, they receive treatment, if necessary, and work towards recovery so that they are able to practise safely. In many cases, there will be terms, conditions and limitations placed on their certificate of registration based on the recommendations of their treating health-care providers. These conditions can include ongoing treatment, workplace monitoring and restrictions on access to certain medications.

However, a significant advantage of NHP is the fact that none of the above information will appear on the public register/Find a Nurse on CNO's

website. If you participate in NHP and are compliant with your contract, there will be no indication on the public register that you have terms and conditions on your licence or are otherwise dealing with a health issue.

E. Quality Assurance

Self-Assessment, Practice Assessment and Peer Assessment

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

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

In addition, the College randomly selects a small number of nurses every year to participate in the practice and peer assessment component of the program.

First, a College-assigned peer assessor reviews the member's learning plan. Second, the member must complete other specified assessments such as an objective multiple-choice test on the two practice standards selected by the program. CNO-appointed peer assessor will also review the results of these specified assessments. The peer assessment component of the program is completed 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

There is no LEAP coverage for the self-assessment, practice assessment or peer assessment components of CNO's Quality Assurance Program.

Likewise, there is no LEAP coverage for matters that arise if you fail to complete the annual self-assessment or participate in practice and peer assessment, if randomly selected.

However, LEAP coverage is available if a peer assessor recommends in their report that you must participate in remedial learning activities. Please contact LEAP if this happens.

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. An investigation may concern a colleague in your health profession or a colleague in one of the other regulated health-care professions. The regulatory college that has contacted you may be 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 be contacted by an investigator and asked to voluntarily provide information. In a 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.

All of the regulatory colleges have the legislative authority to summon you to provide information, if necessary. A summons is a legal document requiring you to attend to be examined. 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.

LEAP Coverage

In most cases, the matter under investigation will be straightforward. The information that follows should help you 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 contacted by an investigator or summoned to testify in a regulatory college matter. The Plan provides legal representation only in those rare circumstances when 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 Cooperate, but First Obtain Assurance/Information

If you are a nurse, you are required to cooperate in CNO's investigation of a colleague's practice; it could even be considered professional misconduct if you fail to cooperate.

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 concerning a colleague, you should indicate that you are prepared to participate.

However, cooperation does not mean that you have to provide unlimited information or that you have to provide information immediately. 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 cooperate, but would like the following before providing any information:

- An assurance that you are being asked for information only 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 the investigator cannot provide such an assurance, call LEAP Intake immediately before saying anything to CNO.
- An assurance that the investigator has been properly appointed pursuant to the *RHPA*.
- Some general idea from the investigator as to what they want 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 a patient's personal health information, you should confirm with the investigator that there is consent from the patient.
- Absent patient consent, you should not divulge any personal

health information 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 nurses and other health-care professionals who are also patients are entitled to all of the same confidentiality protections as any other patient. If an investigator asks you to comment on the health of colleagues, stick with your observations and do not gossip or speculate about the cause of behaviour you have observed.

- A reasonable period of time for review and preparation unless the matter is very straightforward and 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 before Providing Information

It is very important to review all relevant documents before providing information. These documents could 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 investigator's responsibility to legally obtain all relevant documents from the proper custodian. If the investigator intends to interview you over the telephone, they will have to send you a copy of the relevant documents so you are able to refer to them 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 their 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, before 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 before the interview.

If you are not able to review the documents before the interview, we suggest you advise the investigator that you will need time to review them before answering any questions. Make sure you take sufficient time to familiarize yourself with them. The interview will be more productive and you will be more helpful if you take the time you need before 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 be used later 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 as a fact.
- Stay 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 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. You want to ensure that blame is not being directed at you, etc.

Other College Investigations

If you are contacted to assist with investigations of colleagues from other regulatory colleges, you have only a general obligation 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 are entitled simply 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 you should follow the same steps as above with respect to a request for information from a CNO investigator. You want 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 *PHIPA*, etc. Remember, all the regulatory colleges have the legislative authority to summon 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 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 you may receive a summons to testify at the hearing. The summons might be from the college or a colleague's lawyer. You are legally obligated to obey a summons to testify, and a summons will be served to you personally, either at your workplace or at 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 might 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. This party should 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 or 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 who are 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 what your participation is expected to be. You will want to clarify that you are being asked for information only as a witness, your practice is not being investigated and 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.

The summons is for you to testify at a hearing. Absent patient consent and before 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 *PHIPA*.

You should remember that nurses and other health-care professionals who are also patients are entitled to all of the same confidentiality protections as any other patient. If an investigator asks you to comment on the health of colleagues, stick with your observations and do not gossip or speculate about the cause of behaviour you have observed.

The party who summoned you should keep you advised regarding any changes in the date and location and will ideally 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 when you 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, knowing the type of questions that you are likely to be asked by all parties and familiarizing yourself with the chart and all other relevant documents 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 that summoned you will likely contact you before the hearing 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 before the hearing. The relevant documents may include:

- A copy of the chart.
- Any previous statements you have previously provided.
- Incident reports.
- Policies and protocols.

You want to be able easily to refer to the sections of the chart and to other documents, such as incident reports, policies, etc. while testifying. You may also want to review any relevant standards of nursing practice. The party that summoned you may review with you the kinds of questions you are likely to be asked so you can think about your answers in advance by referring to the chart, incident reports, and other relevant documents.

Keep in mind that without patient consent, before you divulge any personal health information at the hearing, you should consult with the health information custodian at your health-care facility (normally the health records department) regarding your confidentiality obligations pursuant to *PHIPA*.

You can ask the party that 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 before testifying. The hearings are generally open to the public and the hearings schedule is available by contacting the regulatory college or visiting its website.

Testifying at the Hearing

Discipline hearings are formal legal proceedings, similar to trials in a court of law. The Discipline Committee, the body that decides whether a member is guilty of professional misconduct or incompetence, is normally made up of five members – three members of the health-care profession and two public members. The Committee hears evidence to determine whether the regulatory college has proven the allegations of professional misconduct or incompetence against the health-care professional and, if it has, decides on the appropriate penalty. The hearings are generally 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 as hearings rarely run right on schedule.

The party that summoned you will normally bring you into the hearing room when it is your turn to testify. Apart from the Discipline Committee members, the participants in the hearing may include the College's 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 first be asked to swear or affirm that your testimony will be truthful. Then the lawyer for the party who summoned you will begin questioning you. This is called examination-in-chief. The other party's lawyer will then have an opportunity for cross-examination, which is an opportunity to clarify information and point out inconsistencies in your testimony. The party that summoned you and/or the members of the Discipline Committee may have some follow-up questions.

You should refer to Section 5 – *CNO Investigation/Hearing, The Interview*, for some points to keep in mind while testifying. It is particularly important to listen carefully to the questions and to make sure you understand exactly what you are being asked. If you don't understand the question, simply request clarification.

Answer only the questions you are asked and speak loudly, clearly and slowly so that the court reporter can accurately record your answers as an official transcript is made of the hearing.

You want your testimony to be consistent with information in the chart, incident reports and other important documentation. If the question refers

to your care of a particular patient, ask to refer to those documents to answer the question. It is critical to remain factual, not to express an opinion as a fact and not to speculate. If you don't remember something or don't know the answer to a question, say so. If there are objections by the lawyers to the questions being asked, don't answer the question unless the Discipline Committee instructs 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, unless it is anticipated that you will be testifying further, you may be able to observe the rest of the hearing. At or after the conclusion of the hearing, the Discipline Committee will reach a decision. Decisions are public and are available by contacting the regulatory college or by visiting its 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 on the issues in question, and review the information in this guide, you will be able to maintain your professionalism throughout the process.

6. CORONER'S INVESTIGATION/INQUEST

A. Background

Mandatory Reporting and Investigations

You may be involved in a coroner's matter during your career as a health-care professional since a significant number of the deaths that are the subject of a coroner's investigation or inquest are patient deaths in a health-care facility. The coroner must be notified 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 to improve public safety and make recommendations to prevent death in similar circumstances. It is not to assign blame or legal responsibility to anyone for the death. 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 physicians who have undergone special training in death investigations. By the end of an investigation or inquest, they must answer the following questions:

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

The answer to these questions, particularly how and by what means did the death occur, may involve a finding that some action or inaction by a health-care professional contributed to the patient's death. While the coroner is not permitted to assign blame or legal responsibility, information from the investigation/inquest may be used indirectly against a health-care professional as grounds for a lawsuit, criminal proceeding or regulatory college matter. For example, while extremely 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 powers to enter and inspect the premises and to seize evidence. Typically in a coroner's matter, the coroner, or the police on behalf of the coroner, seizes the patient's chart and seals the room where the patient died until they have concluded the investigation.

You should fully chart incidents involving patients in the normal course in the patient's medical record and incident reports. Your documentation 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 all entries before the coroner seizes the chart.

If you make personal written notes after an incident, you should label them "made for my lawyer only" and not provide them to anyone without speaking with the LEAP Team. Otherwise, you may be required to disclose these personal notes to others and they could be used against you.

The coroner, as part of the investigation, will generally 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 arranging for an autopsy, the coroner will often engage the police to investigate the circumstances leading to the death. The police, acting as the coroner's investigators in most cases, 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 during which 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 obligation), you have the legal right to retain legal counsel and/ or advice before being questioned. Your involvement in the situation might lead to criminal charges, a lawsuit, or discipline proceedings at your regulatory college, and any statement you make could later be used in these proceedings. Your request to obtain legal advice before 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. You should 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 and direct interest" in a coroner's matter – that is, if 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. LEAP may also provide legal representation if there are serious systemic problems relating to the patient's death that will not be addressed by other parties or if 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 it will provide legal assistance. Many employers will ensure that staff are 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 seizes the chart shortly after receiving 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 with the health information custodian at your health-care facility (normally the health records department) regarding your confidentiality obligations pursuant to *PHIPA*.

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 as fact.
- Stay 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 at any time while providing your statement you have the impression that the coroner or police are suggesting that 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 and confirm that it accurately reflects your interview responses.

C. Inquest

Normally at the end of their investigation, the coroner is able to establish the cause of and circumstances surrounding the death and is able to make

recommendations, if needed, thus concluding the matter. However, in a very small percentage of cases, the coroner's office convenes an inquest when the coroner deems that it is in the public interest to undertake a more detailed inquiry into the circumstances surrounding the death. Inquests are mandatory when death occurs in certain narrow circumstances.

An inquest is a hearing open to the public and the media. It is held in a courtroom or court-like facilities. A five-member jury, who is selected from the jury roll, hears evidence to determine who the deceased was and how, where, when and by what means they died. The jury also makes recommendations to avoid deaths in similar circumstances based on the evidence it hears.

During an inquest, witnesses are summoned to testify about information they have regarding the circumstances of the death. They 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 generally be admitted.

After all of the evidence is presented, the parties, including the crown attorney, are given an opportunity to make submissions on the findings and possible recommendations. The jury will then deliberate and return with their answer to the five questions and any recommendations to prevent death in similar circumstances in the future. Like the coroner, the jury cannot make any findings of legal responsibility.

The coroner distributes the findings and recommendations to the appropriate persons, agencies or ministries of government, which may be able to implement them. The coroner's office evaluates the rate of implementation about one year later. The recommendations are not mandatory and no one is legally required to carry out the recommendations. The best recommendations are those that 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 legal representation at the inquest. If you have a more peripheral

interest, LEAP can provide advice or counselling, and we suggest you review the advice set out in Section 10 – *Summoned as a Witness*.

As stated earlier, although a coroner’s jury is not permitted to assign blame or determine legal responsibility, there may be considerable risk for members involved in an inquest as information that becomes public 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 to 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 matters are extremely serious and it is strongly recommended that if you are the subject of a criminal investigation or charges in relation to your Bargaining Unit work, you **call LEAP Intake immediately** before speaking with anyone, including the police.

B. Investigation

During the criminal investigation stage, LEAP may provide legal representation and your lawyer's fees will be paid subject to the Plan's limitations, up until 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 to **call LEAP Intake immediately** before talking to anyone, especially the police.

C. Trial

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

D. Witness

You may be asked to provide a statement to the police as a witness 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 Section 10 – *Summoned as a Witness*. You may find yourself in the situation where 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. They can be quite insistent that you answer their

questions and can appear to have the authority to obtain information and records, as they are undertaking a criminal investigation.

It is critical to keep in mind that while you may want to cooperate 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 (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 the *Mandatory Gunshot Wounds Reporting Act* mandates that public hospitals report gunshot wounds. 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 required by this legislation to be provided to police. While not as common, you should check with your employer concerning the protocol at your facility on reporting gunshot wounds.

8. PERSONAL HEALTH INFORMATION PROTECTION ACT (PHIPA) PROCEEDINGS

Personal Health Information Protection Act (PHIPA)

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, viewed or disclosed personal health information, they 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 complainant learning about the breach.

A. PHIPA Complaints to the Information and Privacy Commission

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

Mediation, Investigation and Review

Most *PHIPA* complaints are resolved informally through mediation. However, if mediation is unsuccessful, the Commissioner appoints an investigator to investigate and then review the matter. Before the review, the parties are given an opportunity to provide written submissions. Your LEAP 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 their personal health information or direct the health information custodian to make a correction to the individual's personal health information.
- Order an individual to cease collecting, using or disclosing personal health information.
- Perform a duty imposed by *PHIPA*.

- Dispose of personal health information that has been collected, used or disclosed in contravention of *PHIPA*.
- 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 *PHIPA*. This is a limited right to damages, that is, a remedy of money for the harm caused by the contravention.

B. *PHIPA* Prosecution by the Attorney General

The Attorney General has the authority to prosecute the allegations of *PHIPA* breaches under the *Provincial Offences Act*. This is similar to a criminal prosecution and carries serious potential consequences. **It is essential that you contact LEAP immediately before speaking with anyone, including the police.**

As with criminal charges, LEAP will reimburse members for legal fees associated with a *PHIPA* prosecution only if they have been found not guilty of all charges or the charges have been withdrawn, stayed or dismissed. Limitations of coverage are detailed in the LEAP Plan.

9. MINISTRY OF LONG-TERM CARE INVESTIGATION

If you work in a facility that is governed by the *Long-Term Care Homes Act*, you may be asked to participate in an interview with an inspector from the Ministry of Long-Term Care. The purpose of the inspection can vary. Comprehensive annual inspections are mandated for each facility that comes under the jurisdiction of the *Long-Term Care Homes Act*. In addition and more commonly, inspections are carried out in response to complaints from residents or family members, or because of a report of a critical incident.

Under the *Long-Term Care Homes Act*, inspectors have considerable powers, including the following:

- The power to inspect the premises and the operations of the facility.
- The power to inspect all records.
- The power to conduct examinations or tests.
- The power to question a person.

What to do if you are Asked to Participate in an Inspection Interview

If the matter under investigation is straightforward and unlikely to include concerns regarding your practice, the information in this section may be sufficient to prepare you for the interview. If not, please contact LEAP Intake. We will provide advice regarding your participation in the interview.

If you have concerns about the care you provided, you should call LEAP Intake immediately before providing a statement to an inspector from the Ministry of Long-Term Care. You have the right to obtain advice before being questioned. Although an inspector is not a health profession regulator, they could make orders to the facility that reflect on your practice as a health-care professional. Moreover, reports from inspectors may be obtained by your regulator as part of an investigation in response to a complaint or a report.

You can advise the inspector that you are happy to cooperate, but that you would like to consult with counsel first. You can also provide assurances that you or your counsel will get back to them shortly. Then call LEAP Intake.

LEAP will provide you with advice about what to expect when making a statement to the inspector and about how to answer questions and conduct yourself during an interview.

Points to Remember when Making a Statement to a Ministry Inspector

If applicable, you should familiarize yourself before the interview with the chart and all other relevant documents, such as any previous statements you have provided, incident reports, policies and protocols.

The inspector will write down everything you say, and you need to remember 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 carefully, 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.

Keep the following points in mind when making a statement to an inspector for the Ministry:

- Make sure you understand the question and, if not, request clarification.
- Answer only the questions you are asked.
- Do not ramble or feel the need to fill pauses.
- 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 as a fact.
- Stay 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 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. Advise that you are prepared to cooperate, but need to consult with LEAP Intake first.**

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

10. SUMMONED AS A WITNESS

Witness to a Matter that Becomes the Subject of a Legal Proceeding

In your practice as a health-care professional, you may observe, hear 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 trial. A community nurse may treat a child and family and be summoned to testify at a child custody hearing. A nurse may be summoned to testify at a hearing before the Discipline Committee of any of the regulated health colleges.

You are legally obligated to obey a summons to testify. The summons will be served on you personally, either at your workplace or at your home. You may be summoned to testify as a witness in a civil lawsuit, coroner's 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 – *College Investigation/Hearing, Witness*.

LEAP Coverage

LEAP offers advice or counselling for members who have been summoned to testify in an *RHPA* matter, coroner's inquest, custody matter or criminal code matter. If the matter is relatively straightforward, you may find the information below sufficient. However, if the matter is more complex, you can contact LEAP Intake for further advice. 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 Liability Insurance 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 item you may be required to bring to a hearing is any personal notes you may have written of any incident(s). Please contact LEAP to determine if you are required to disclose these personal notes.

You may receive a summons asking you to bring the chart or other medical

records. You do not own or control the chart and other medical records and you are not entitled to remove these documents from the health-care facility. 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. We have sometimes found that when the Crown summons nurses to testify in criminal trials, they also summon them to bring the patient's chart and other health records. We want to emphasize that the nurse cannot take the chart and other health records out of the health-care facility. 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 that summoned you to ask what the hearing is about and how you are involved in the matter. You want to clarify that you are being asked only to testify as a witness and that there are no allegations of blame or negligence against you. **If you do not receive this clarification, do not speak further and call LEAP Intake immediately.**

If the party that issued the summons wants to discuss matters that will involve you disclosing a patient's personal health information, you should ensure that there is consent from the patient. Before you actually testify at the hearing, without patient consent, you should not divulge any personal health information until you consult with the health information custodian at your health-care facility (normally the health records department) regarding your confidentiality obligations pursuant to *PHIPA*.

In cases where nurses (or other employees) are involved, you should limit comments about their personal health information to your observations. You should not make statements outside your scope of practice, such as offering a possible diagnosis. Of course, if a nurse or other employee was a patient in your facility, you have the same confidentiality obligations as with any other patient.

The party that summoned you should keep you advised regarding any changes in the date and location of the hearing. Ideally, they will be able to pinpoint a specific time when you will be required to testify. You should also request information about what expenses will be covered when you testify (for example, travel, accommodation and food). Normally, lost wages are not covered by the party that summoned you. 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, knowing the type of questions that you are likely to be asked by all parties and familiarizing yourself with the chart and all other relevant documents should help make the experience easier. Good preparation, so there are no surprises, is the key to delivering testimony professionally.

Ideally, the party that summoned you will contact you before the hearing 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 all the relevant documents before the hearing. The relevant documents may include the following:

- A copy of the chart.
- Any previous statements you provided regarding the incident.
- Incident reports.
- Policies and protocols.

You want to be able to refer easily to the relevant sections of the chart and any other documents such as incident reports, policies and so on while testifying. You may also want to review the relevant standards of nursing practice. The party that summoned you may review with you the kinds of questions you are likely to be asked so that you can think about your answers in advance by referring to the relevant document. Again, remember that you need to confirm that there is patient consent before divulging any personal health information. Before you testify at the hearing, you should consult with the health information custodian at your health-care facility (normally the health records department) regarding your confidentiality obligations pursuant to *PHIPA*. If possible, carefully review all the relevant documents and questions before the hearing. As you prepare, consider the points 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 probably be required to 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 as hearings rarely run right on schedule.

The party that summoned you will normally bring you into the hearing room when it is your turn to testify. You will be asked to swear or affirm that your testimony will be truthful. The party that summoned you will then begin questioning you. This is called examination-in-chief. The other side will then have an opportunity for cross-examination, which is an opportunity to clarify information and point out inconsistencies in your testimony. The party that summoned you may also have some follow-up questions.

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

- Listen to the questions carefully and make sure you understand the question being asked. If you don't understand the question, request clarification.
- Because an official transcript is made of the hearing, speak loudly, clearly and slowly so the court reporter can accurately record your answers.
- Answer only the questions you are asked.
- Do not ramble or feel the need to fill pauses.
- Answer questions regarding the care of a particular patient by referring to the patient's chart and, if necessary, clarifying the meaning of what you have documented.
- Answer questions regarding any previous statement you have made, incident reports, and policies and protocols, by referring to those documents, and, if necessary, clarifying what is written.
- Stick to the facts (*I observed this, I heard this, etc.*) and do not express an opinion as a fact.
- Stay 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 about a question you have been 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 rather 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 guide, you will be able to maintain your professionalism throughout the process.

11. 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 less and less common, 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 be taken by surprise if the College, coroner, police, Ministry of Long-Term Care, 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 are hopeful that the hour or so you have taken to read this guide was time very well spent!

We would appreciate any feedback you have regarding the guide. We are always trying to improve our communication with members and your comments will help us to ensure that we are addressing your concerns and providing you with the information you need. Send us an email at leapintake@ona.org or write the LEAP Team at ONA's Toronto office. You can also read more about LEAP on the ONA website at www.ona.org/leap.



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