

Risk Management In Psychological Practice

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1 CE Credit, Instructional Level: Intermediate
1 Contact Hour (New York Board of Psychology)

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Today's Presenters

Lisa E. Hamilton obtained a *juris doctor* degree from the University of British Columbia in 1989. She is called to the bar in Ontario and California, and is a partner at Bell Temple LLP, a law firm in Toronto Ontario, with a solid reputation as one of Canada's top defence litigation boutiques.

Lisa's litigation practice is focused on the defence of health professionals and healthcare facilities in malpractice and negligence proceedings. She also defends health professionals in Ontario, including psychologists, in Complaint and Discipline proceedings. She frequently presents at professional educational symposia on a range of topics including the legal and ethical issues pertaining to health law, and strategies to recognize and mitigate the risk of malpractice suits and College Complaints.

Paul Hancock is a Registered Insurance Broker of Ontario and achieved his Canadian Accredited Insurance Broker certificate with honours. He has worked as a Commercial Account Executive for the past 17 years, and is a partner at McFarlan Rowlands Insurance Brokers, One of Ontario's largest independently owned Brokerages.

Paul has a diverse book of business ranging from Commercial Automobile fleets and Contractor's Liability to Cyber and Media Liability, but focuses primarily on Non-Profit Director's & Officer's Liability, Professional Liability and Disciplinary Hearing coverage in the Mental Health Field. He has helped develop Malpractice Insurance group programs across Canada for associations of Psychologists, Psychotherapists, Social Workers and Counsellors, tailoring each to their specific needs.



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Lisa E. Hamilton (Bell Temple LLP) provides legal support to the CRHSP sponsored professional liability plan.

Paul Hancock (McFarlan Rowlands) acts as the broker for the CRHSP sponsored professional liability plan. CRHSP receives no financial compensation of any sort from its sponsorship of the plan.



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Learning Objectives

1. Identify the risks of psychological practice that are covered by liability insurance.
2. Identify the situations that commonly result in regulatory complaints and/or lawsuits.
3. Discuss best practices to reduce the risk of discipline and of legal liability.



Liability insurance and the risks of psychological practice

Types of liability risks covered by insurance

- Professional Liability
 - Term often used interchangeably with Medical Malpractice or Errors & Omissions
 - Covers third party lawsuits alleging professional negligence on behalf of the Psychologist
 - **Example: a self inflicted injury renders a client severely disabled, the family sues the Psychologist, Psychiatrist, Physician and Social Worker for damages (future earnings, increased living expenses, etc.) alleging incompetence by all involved parties**
 - This is the only insurance coverage mandated by the regulator
 - While professional liability claims have the potential to be more severe, they tend to be infrequent.
- Commercial General Liability
 - Often referred to as Public Liability or “slip & fall” coverage.
 - Lawsuits alleging bodily injury due to “house keeping” or third party property damage associated with a Psychologist’s practice
 - while related to a Psychologist’s practice these claims are not professional in nature.
 - **Example: a client slips on a patch of ice and is physically injured entering a Psychologist’s office. They sue the Psychologist, building owner and snow removal contractor for missed wages and caregiver expenses alleging property maintenance negligence**
 - Carrying this coverage is *not* a college requirement, but is often part of a landlord’s lease agreement (rented office) or a Psychologist’s home insurance (home practice)



- Disciplinary Hearing Legal Expense Coverage
 - Covers legal expense associated with regulatory investigations
 - While less severe (average \$17K rather than \$700K) these incidents are far more frequent and have increased significantly over the past decade. In fact they make up %100 of the CRHSP claims over the past 5 years
 - **Example: Any complaint made to the college by a member of the public**
 - This coverage is also optional but it is the type of claim a Psychologist is most likely to experience

- Cyber Expense/Liability
 - Typically covers third party lawsuits associated with on-line activity such as cyber and privacy liability as well as first party cyber crime coverage
 - Not be confused with on-line counselling, which would fall under the professional liability coverage (professional negligence)
 - **Example: A Psychologist's system is hacked and their client's sensitive health information is released to the public which impacts the client financially**
 - **A psychologist's hacked computer damages their clients computer while interacting**
 - I have yet to see a cyber claim involving a Psychologist, but these types of claims are on the rise in the insurance market in general





Situations that commonly result in regulatory complaints and/or law suits

History of complaints about other professionals: incompetence, bias etc.

Difficult personality traits (your client or a person in conflict with your client): High sensitivity to criticism, vengeful focus on winning, demand for the professional to fully support their position, rage directed at anyone who stands in their way.

Involvement in legal disputes:

- Divorce, custody or other family law disputes
- Personal injury litigant
- Disputes with an insurer
- Victim or accused person in criminal law process



Most common allegations

- **Disagreement with opinions rendered for legal disputes:**

Your client and/ or your client's opponent may complain

Allegations often include bias, incompetence, lack of consent

- **Collateral attacks (e.g. to indirectly discredit an opinion):**

May include relatively trivial issues such as details of contract terms, billing discrepancies, appointment scheduling, demeanor and tone of communications



Complaint Investigation Process

Cursory screen:

Regulator determines that minimum requirements are met to investigate the complaint

Investigation (6 – 18 months):

1. Psychologist is invited to respond to the complaint, and directed to submit relevant documents
2. If appropriate, the complainant is invited to reply to the psychologist's response. Sometimes statements/documents are obtained from other sources
3. Material information is disclosed to the psychologist for response

Decision:

The complaints committee decides whether to take any further action



Likely Complaint Outcome

- While Complaints may be inevitable, and this process may be long and excruciating, referral to Discipline is rare!
- Regulators will focus on the *process* used to render opinions. They are loathe to critique the substance of an opinion in the absence of patently obvious error.
- If there are concerns that standards were not met, but which don't raise serious public risk, these are usually addressed with remedial measures, e.g. caution, coaching, course
- Only the most serious complaints are likely to result in Discipline, e.g. sexual abuse, billing fraud, practicing outside of authorized scope, or repeated conduct despite previous remediation.



Law Suit Process

Statement of Claim is filed with the court (no screen of the merits is conducted) and then it is served on the psychologist.

Statement of Defence notes whether the allegations are admitted or denied (which determines the range of issues in dispute)

Discovery: the parties exchange all documents that are relevant to the issues in dispute, and then each party is questioned by the opposing lawyer

Settlement or disposition by the court: Settlement depends on the parties reaching agreement on the range of likely outcomes of proceeding to court and weighing this against the legal fees that would be incurred and whether those fees will be recoverable.



Likely Law Suit Outcome

- Very few suits go to trial!
- Suits that are solely directed at discrediting an opinion prepared for a legal dispute are often summarily dismissed at a motion on the basis of “expert witness immunity”
- The few suits that have merit will usually resolve with a settlement agreement, subject to policy coverage terms and exclusions, in exchange for a release that has non-disclosure terms and no admission of liability.



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Best practices to reduce the risk of discipline and legal liability

- **Good screening!** If the client's history or presentation suggests an inclination to complain, consider referral elsewhere and facilitate continuity of service
- **Manage expectations!** Detail and document the terms of service clearly, including limits on the scope of work, timelines, cost, and a dispute resolution process. If you don't plan to write reports, let the client know up front!
- **Stay within your boundaries of competence!** Before writing a report that may be used in a legal dispute, obtain all relevant documents and information, ensure you are up to date on the legislation, regulations, case law and court procedures. Remember, your client's opponent can complain too!
- **Optimize objectivity!** Opinions for court should objectively address confirming and disconfirming information, acknowledge the limitations on your ability to verify any significant issues, and stipulate the intended use of the report
- **Seek support!** If red flags arise, consult with a peer or your regulator. Watch for signs of burnout and exercise self care.



Q&A



- We will now discuss questions that were submitted via the Q&A feature throughout the presentation.
- Due to time constraints, we will not be able to address every question asked.



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