

Consent and Capacity Board

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Commission du consentement et de la capacité

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Memorandum

To: To All Chiefs of Psychiatry
From: Marg Creal, Chair
Subject: CCB Hearings, Hearing Document Obligations and Evidence

In past meetings with members of the Board and Bar Committee and Psychiatrists Stakeholders Committee, to discuss various matters of common interest, a common issue discussed is the access to patient records and the electronic transmission of documents for CCB hearings. I write again to reiterate and update comments previously made, and I copy Committee members on this memorandum.

To ensure hearings are held fairly, effectively, and efficiently it is critical that counsel have access to medical records, and that the parties to the hearing effectively serve the documentary evidence upon which they intend to rely to the Board and the parties to the hearing in advance.

Under s.76 of the *Health Care Consent Act, 1996*, <https://www.ontario.ca/laws/statute/96h02>, counsel representing a patient in a CCB hearing have a legal right to full access to their client's medical or health records. Moreover, given the very tight timelines involved in a CCB hearing (and due the nature of electronic hearings, which has been the Board's practice since COVID-19), the lawyer representing a patient in a specific hearing will not generally have a signed consent from the patient, be able to obtain a signed consent to transmit material electronically, and may not have other documentation or information (such as a date of birth from Legal Aid Ontario) to confirm the appointment. It is nonetheless imperative that the lawyer be provided immediate access to the patient's complete file so that he/she may properly represent the client.

I note that there are strict Law Society professional rules and obligations imposed on lawyers who indicate that they represent a specific client. As such, there should be no need for the lawyer to provide anything in writing from the client/patient or Legal Aid. Please note that the CCB is not in a position to confirm whether a specific lawyer is representing a patient as this information may change over the course of an application.

If counsel requests records for a CCB matter, and your facility is concerned about whether counsel is representing the applicant, the Board suggests that your staff ask the lawyer to provide their name and to orally or electronically confirm that they are representing the patient in a CCB hearing. This information can be documented in the patient's chart or in

the facility's records and, should you chose, their status with the Law Society of Ontario confirmed by reviewing the LSO's website at <https://lso.ca/home>.

Finally, I note that this obligation applies whether a CCB hearing in the matter has been already scheduled or not. The Board notes that there is no requirement within s.76 of the *Health Care Consent Act* that a Notice of Hearing be issued prior to compliance with the clear legal obligation to provide the medical and health records to counsel. The matters before the Consent and Capacity Board are often of an urgent nature and, in all cases, disclosure of these records must be provided promptly to counsel.

Given the strict timelines for CCB hearings and the significant issues that must be adjudicated in an efficient manner, parties are encouraged to exchange their documents and disclosure electronically. However, the arrangements for how (and the manner in which) the parties share/exchange their documents and provide disclosure is a matter which is entirely between the parties. Parties must ensure that disclosure obligations are met in accordance with the Board's Rules of Practice, in order that hearings may proceed without delay. The Board will not provide documents to parties or act as an intermediary between parties for disclosure or sharing of documents.

In addition, it is important that parties carefully review the Notice of Hearing they receive, as well as the Board's Rules of Practice posted on the CCB website. In particular Rules 21 (which address Electronic Hearings) and Rule 30 (Disclosure and Filing Documents) should be reviewed and adhered to. Policy Guideline 4 provides direction on exchanging and filing material that will be relied upon at hearing. Most commonly the physician, who bears the onus in CCB hearings, has documentary evidence to file for the hearing. All parties, however, are obliged to share their documents directly with the other parties as early as possible in advance of the hearing (again please note that the Board is not responsible for facilitating that exchange). CCB hearings are held by videoconference and teleconference, and the transfer or delivery of documents to the Board must be electronic.

We are certain that you are continuing to keep patient's rights and the role of the Consent and Capacity Board in mind in conducting your operations, and the necessary changes required, including access to medical records and timely electronic transmission of documents to the Board, as well as timely disclosure between the parties.

The Board is mindful of the extraordinary pressures you have and continue to face, and thank you for your dedication, commitment and efforts.

"Original Signed By"

Marg Creal, K.C.
Chair
Consent & Capacity Board

cc: Board and Bar Committee
cc: Psychiatrists Stakeholders Committee

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