

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

Records and Regulation

This week a group of pharmacists sought an injunction to prevent Zellers from selling their client records to two major grocery store chains for millions of dollars. The pharmacists claimed that they owned the records and that it was not in the best interests of their clients for the corporate owner to sell the records. Clients, they say, would likely prefer that the pharmacists keep the records, particularly if they open up a pharmacy close by their previous location.

Regulators, of course, have no interest in the commercial value of records. However, regulators do have an interest in their ability to access the records for regulatory purposes. They also have an interest in continuity of service for clients. It appears that the good will associated with client records has taken priority over professional regulation.

Gone are the days when it can be assumed that a practitioner makes and keeps their client records. Records would only be transferred if the practitioner retired and sold his or her practice. Disputes would typically only arise where a practitioner's employee or associate wanted a copy of the record to open his or her own office.

With creative corporate structures developing, multi-disciplinary practices becoming normal and the size of professional firms growing exponentially, the traditional approach to client records is no longer feasible. While not widely recognized at the time, the privacy legislation of the last decade put a spike in the heart of the old model. Privacy statutes introduced the concept of custodians for record keeping and put the duty for maintaining records in the hands of the custodian. In settings other than a small office of single-profession practitioners, the custodian would not necessarily be a regulated professional. The unregulated custodian now had the legal muscle to pry control of the records from the regulated professional.

Of course, there was a trade-off. The custodian had a duty to safely maintain the records, make them accessible to the client and retain them for a responsible period of time. However, if the custodian was unregulated, the regulator would have difficulty monitoring the location of the records (particularly if the practitioner was no longer there) and enforcing retention rules became more difficult.

FOR MORE INFORMATION

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Some tools do remain for regulators to ensure regulatory access to the records and to promote continuity of client services. For example, regulators can always go through the practitioner to ensure that the practitioner has access to the records. In addition, regulators can go through the client to use the client's right of access to the records (especially if the client is a complainant). Also, many regulators have the right to summons records. Besides, even corporate operators would usually prefer to remain on the good side of regulators who obviously are not competitors.

Unregulated ownership of client records is part of a larger issue for regulators. The unregulated owner will often control other administrative aspects of the services provided. Such administrative control can interfere with a practitioner's ability to act professionally. For example, unregulated owners often places the advertising, books the appointments, provides the necessary supplies and equipment, influences the degree of support services available, bills for the services and terminates "difficult" practitioners. It is easy for that administrative role to have a significant impact on the quality and ethics of the services provided by the professionals on site.

In order to combat undue influence by unregulated owners, some regulators have encouraged (or even required) their members to enter into written contracts defining the role of the owners. In particular, the practitioner should have a clause in the contract giving him or her control over the professional aspects of the practice, including record keeping retention and access. Such a provision ensures that the unregulated owner respects the

professionalism and regulatory oversight inherent in a regulated profession.

Regulators may wish to review their enabling legislation to ensure that it has sufficient tools for accessing records held by unregulated custodians. Indeed, regulators might even wish to ensure that the enabling legislation permits the regulator to require its members to have a written contractual provision with unregulated owners giving the practitioner control over all professional matters.