

## The Conflict of Interest Conundrum

by Bernie LeBlanc

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Regulators have always struggled with how to regulate conflicts of interest involving their members. Some conflicts are inherent in the practice of almost every profession. Any regulator of a profession where its practitioners recommend courses of action to clients that the practitioner will implement for a fee struggles with how to ensure that the advice is entirely candid and altruistic. Of course recommendations are at the core of the professional duty of the practitioner, but advice which departs significantly from professional standards can be reviewed. Clients must also appreciate the existence of this conflict and be encouraged to ask questions or seek a second opinion.

Other conflicts of interest are of a moral nature. Dr. Abigail Zuger, in her editorial in the Journal of the American Medical Association entitled "What Do Patients Think About Physicians' Conflict of Interest? Watching Transparency Evolve" describes them as follows:

Some are the moral dilemmas inherent in medical practice, a profession an ethicist described in 1983 as "an incessant conflict" between self-interest and altruism. This tension is clearly visible to patients in a score of mundane details: one physician is exhausted but refuses to go home, another is needed to provide care but leaves for vacation anyway. One physician shuns contagious patients whereas another contracts their illness and dies; the list goes on.

Regulators address blatant moral conflicts through the concept of professional misconduct supported by guidelines and standards. Less significant moral conflicts are left to the professional judgment of the practitioner and the impact upon their reputation.

Financial conflicts of interest are even more challenging to address. The most egregious ones, such as accepting a *direct* payment for the referral of a client, are usually (but not always) prohibited. Of course such arrangements are usually hidden and difficult to prove.

Many other financial conflicts, such as receiving an *indirect* financial benefit, are often difficult to prohibit entirely and even more difficult to demonstrate. Referring a client to a specialist in the practitioner's office or to a practitioner who refers clients back is just one example.

One strategy that is gaining popularity is to require the practitioner to disclose all benefits received, sometimes accompanied by a duty to provide the identity of other local practitioners to whom the client can go to if they so desire. Sometimes this disclosure is required at an individual level (e.g., where a client is referred to a provider owned by a relative of the practitioner). Sometimes the disclosure is required to be posted publicly (such as in Bill 160 just introduced in Ontario requiring drug companies and providers of medical services to disclose any benefits conferred, including meals and educational programs, to health care providers).

Dr. Zuger identified a number of limitations on the effectiveness of this disclosure approach in maintaining the confidence of clients. While studies

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showed that such disclosure did somewhat improve the confidence of clients in their practitioners, most clients were unable to appreciate the impact of the conflict on the services they received. This problem could be amplified by requirements for detailed disclosure statements that provide too much information to quickly digest. In addition, clients still wondered what other conflicts have not been disclosed.

So far, studies from the United States, which has had such disclosure obligations for some time, cannot tell whether it has altered behaviour (e.g., physicians declining such benefits or clients choosing practitioners without, or with fewer, such conflicts). While clients may distrust the profession as a whole, they still tend to trust their own practitioners even if those practitioners receive benefits.

Dr. Zuger suggests that when a client needs a service, all they really want is help. If the service goes well, there is no concern about the conflict. If the service goes poorly, the presence of the conflict looms large. While unable to prove this hypothesis, Dr. Zuger provided the following anecdote:

George Bernard Shaw was a notorious crank in matters of health and disease. He dismissed most of the great medical advances of his day, including bacteriology, vaccination, and antisepsis, and he bitterly disparaged the medical profession in plays, letters, and articles throughout his long life. A committed vegetarian, Shaw was diagnosed with pernicious anemia in his later years. The details of the ensuing conversations between him and his physician are, unfortunately, lost to posterity, but their outcome is well

documented: Shaw meekly accepted a prescribed extract of pig's liver for a few months and recovered. When other vegetarians criticized his decision to abandon his convictions and bow to the conventions of the morally dubious medical profession, Shaw told them to mind their own business.

While disclosure of indirect financial conflicts of interest is better than keeping them secret, it may not be enough. Regulators should consider whether some should be prohibited entirely, where feasible. For example, there has been discussion about reducing such conflicts in the real estate industry relating to representing both sides in a real estate transaction (called "double ending") even with full disclosure.

Dr. Zuger's editorial can be obtained at:  
<https://jamanetwork.com/journals/jama/article-abstract/2623628>