

DRAFT

Physicians and the Ontario *Human Rights Code*

Related Policies, Documents and Legislation

CPSO Policies

Ending a Physician-Patient Relationship

Practice Guide

Legislation

Human Rights Code, R.S.O. 1990, c.H.19.

Additional Documents

Ontario Human Rights Commission, *Policy and Guidelines on Disability and the Duty to Accommodate* <http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2>

Ontario Human Rights Commission, *Accommodating Persons with Disabilities*, <http://www.ohrc.on.ca/en/resources/factsheets/disability2>

Ontario Human Rights Commission, *How Far Does the Duty to Accommodate Go?* <http://www.ohrc.on.ca/en/resources/factsheets/disability4>

Ontario Human Rights Commission, *Guide to the Human Rights Code*, <http://www.ohrc.on.ca/en/resources/Guides/GuideHRcode2>

Canadian Medical Association, *Code of Ethics*

Contact

Public and Physician Advisory Services

Introduction

Ontario's *Human Rights Code*¹ (the *Code*) articulates the right of every Ontario resident to receive equal treatment with respect to goods, services and facilities without discrimination based on a number of grounds, including race, age, colour, sex, sexual orientation and disability.² This imposes a duty on all those who

¹ R.S.O. 1990, c.H.19, http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm

² Section 1 of the *Human Rights Code*, R.S.O. 1990, c. H.19 states, Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

provide services in Ontario – which includes physicians providing medical services – to provide these services free from discrimination.

Purpose

The goal of this policy is to help physicians understand the scope of their obligations under the *Code* and to set out the College's expectation that physicians will respect the fundamental rights of those who seek their medical services.

Scope

This policy is applicable to all situations in which physicians are providing medical services.

Policy

Physicians must comply with the *Code* when making any decision relating to the provision of medical services. This includes decisions to accept or refuse individuals as patients, decisions about providing treatment or granting referrals to existing patients, and decisions to end a physician-patient relationship.

While the College does not have the expertise or the authority to make complex, new determinations of human rights law, physicians should be aware that the College is obliged to consider the *Code* when determining whether physician conduct is consistent with the expectations of the profession. Compliance with the *Code* is one factor the College will consider when evaluating physician conduct.

This policy is divided into two sections, each of which addresses physicians' obligations under the *Code*. The first addresses physicians' obligations to provide medical services without discrimination. The second address physicians' obligations to take reasonable steps to accommodate the disabilities of patients or potentials patients.

1. Providing Medical Services without Discrimination

The *Code* requires that physicians provide medical services without discrimination.

This means that physicians cannot make decisions about whether to accept individuals as patients, whether to provide existing patients with medical care or services, or whether to end a physician-patient relationship on the basis of the individual's or patient's race, ancestry, place of origin, colour, ethnic origin,

citizenship, creed, sex, sexual orientation, age, marital status, family status and/or disability.³

This does not prevent physicians from making decisions or exercising professional judgement in relation to their own clinical competence. Physicians are always expected to practice medicine in keeping with their level of clinical competence to ensure they provide patients with quality health care in a safe manner. If physicians feel they cannot appropriately meet the health care needs of a patient or potential patient, they are not required to accept that person as a patient or to continue to act as that patient's physician, provided they comply with other College policies in so doing⁴.

Guidelines

Although the Human Rights Commission and Tribunal have primary responsibility for interpreting and adjudicating human rights matters, the following guidance is intended to assist physicians in determining how to comply with the requirements of the *Code*. Physicians may also wish to seek guidance from a lawyer.

i) Clinical Competence

As stated above, the duty to refrain from discrimination does not prevent physicians from making decisions in the course of practicing medicine that are related to their own clinical competence.

Where a physician is not able to accept an individual as a patient, provide a patient with treatment, or must end a physician-patient relationship for reasons related to his or her own clinical competence, the College offers the following as guidance.

Consider the Possibility of Referral

As a first step, physicians are encouraged to consider whether individuals or patients could be referred to specialists for the elements of care that the physician is unable to manage directly.

³ *Human Rights Code*, R.S.O. 1990, c.H.19, section 1. This legal obligation is reflected in guidance contained in the Canadian Medical Association's *Code of Ethics*, paragraph 17.

⁴ See *Ending a Physician-Patient Relationship*, and the Practice Guide.

Consult College Policies

If physicians decide that referral is not an option, and that they must end a physician-patient relationship for reasons related to clinical competence, they are expected to act in accordance with College expectations as set out in the *Ending the Physician-Patient Relationship Policy*.

Clear Communication

The College expects physicians to communicate decisions they make to end a physician-patient relationship, refrain from providing a specific procedure, or to decline to accept an individual as a patient, and the reasons for the decision in a clear, straightforward manner. Doing so will allow physicians to explain the reason for their decision accurately, and thereby avoid misunderstandings.

Where a physician's clinical competence may restrict the type of patients the physician is able to accept, physicians should communicate these restrictions as soon as is reasonable. This will enable individuals to have a clear understanding as to whether the physician will be able to accept them as a patient, or whether it will be in their best interests to try to find another physician.

Where a physician's clinical competence may restrict the type of services or treatment he or she can provide, the physician should inform patients of any limitations related to clinical competence as soon as it is relevant. That is, the physician should advise the patient as soon as the physician knows the patient has a condition that he or she is not able to manage.

ii) Moral or Religious Beliefs

If physicians have moral or religious beliefs which affect or may affect the provision of medical services, the College advises physicians to proceed cautiously.

Personal beliefs and values and cultural and religious practices are central to the lives of physicians and their patients. However, as a physician's responsibility is to place the needs of the patient first, there will be times when it may be necessary for physicians to set aside their personal beliefs in order to ensure that patients or potential patients are provided with the medical treatment and services they require.

Physicians should be aware that decisions to restrict medical services offered, to accept individuals as patients or to end physician-patient relationships that are based on moral or religious belief may contravene the *Code*, and/or constitute professional misconduct.

Contravention of the Code

Within the *Code*, there is no defence for refusing to provide a service on the basis of one of the prohibited grounds. This means that a physician who refuses to provide a service or refuses to accept a patient on the basis of a prohibited ground such as sex or sexual orientation *may* be acting contrary to the *Code*, even if the refusal is based on the physician's moral or religious belief.⁵

The law in this area is unclear, and as such, the College is unable to advise physicians how the Courts will decide cases where they must balance the rights of physicians with those of their patients.

There are some general principles however, that Courts have articulated when considering cases where equality rights clash with religious freedoms. They are as follows:

- There is no hierarchy of rights in the *Charter*; freedom of religion and conscience, and equality rights are of equal importance;⁶
- Freedom to exercise genuine religious belief does not include the right to interfere with the rights of others;⁷
- The right to freedom of religion is not unlimited; it is subject to such limitations as are necessary to protect public safety, order, health, morals or the fundamental rights or freedoms of others;⁸
- The balancing of rights must be done in context. In relation to freedom of religion specifically, courts will consider how directly the act in question interferes with a core religious belief. Courts will seek to determine whether the act interferes with the religious belief in a 'manner that is more than trivial or insubstantial'⁹. The more indirect the impact on a religious

⁵ This could occur if the physician's decision to refuse to provide a service, though motivated by religious belief, has the effect of denying an individual access to medical services on one of the protected grounds. For example, a physician who is opposed to same sex procreation for religious reasons and therefore refuses to refer a homosexual couple for fertility treatment may be in breach of the *Code*.

⁶ *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 13 B.C.L.R. (4th) 1 (B.C.C.A.), at paragraph 133.

⁷ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at p.33.

⁸ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p 336-7; *Ross v. School District no. 15*, [1996] 1 S.C.R. 825 at p.868.

⁹ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at paragraphs 59-60.

belief, the more likely courts are to find that the freedom of religion should be limited.¹⁰

These principles appear to be generally applicable to circumstances in which a physician's religious beliefs conflict with a patient's need or desire for medical procedures or treatments. They are offered here to provide physicians with an indication of what principles may inform the decisions of Courts and Tribunals.

Professional Misconduct

Irrespective of whether a physician's actions are found to have violated the *Code*, the physician's conduct could constitute an act of professional misconduct.

If physicians limit their practice, refuse to accept individuals as patients, or end a physician-patient relationship on the basis of moral or religious belief, the College expects physicians to do the following¹¹:

- Communicate clearly and promptly about any treatments or procedures the physician chooses not to provide because of his or her moral or religious beliefs.
- Provide information about all clinical options that may be available or appropriate based on the patient's clinical needs or concerns. Physicians must not withhold information about the existence of a procedure or treatment because providing that procedure or giving advice about it conflicts with their religious or moral beliefs.
- Treat the patients or potential patients seeking or requiring the treatment or procedure with respect. This means that physicians should not express personal judgements about the beliefs, lifestyle, identity or characteristics of a patient or potential patient. This also means that physicians should not promote their own religious beliefs when interacting with patients, nor should they seek to convert existing or potential patients to their own religion.
- Tell patients about their right to see another physician with whom they can discuss their situation and ensure they have sufficient information to exercise that right. If patients or potential patients cannot readily make

¹⁰ *Ross v. School District no. 15*, [1996] 1 S.C.R. 825; In *Syndicat Northcrest v. Amselem*, [2004] 3 S.C.R. 698, the Court said that the religious belief must be interfered with in a manner that is more than trivial or insubstantial. (at paragraphs 59, 60)

¹¹ These points are consistent with the guidance provided by the General Medical Council in its document, *Personal Beliefs and Medical Practice*, http://www.gmc-uk.org/guidance/ethical_guidance/personal_beliefs/personal_beliefs.asp

their own arrangements to see another doctor or health care provider, physicians must ensure arrangements are made, without delay, for another doctor to take over their care.

The College will consider the extent to which a physician has complied with this guidance, when evaluating whether the physician's behaviour constitutes professional misconduct.

2. Reasonable Accommodation of Disability

Although the *Code* recognizes that all people have the right to access medical services free from discrimination, some individuals may, by virtue of a disability, be unable to access those services in the same manner as others.

When physicians become aware that existing or potential patients have a disability which may impede or limit access to medical services, physicians must take reasonable steps to accommodate the needs of these individuals. The purpose in doing so is to eliminate or reduce any barriers or obstacles that disabled individuals may experience. Reasonable accommodation of persons with disabilities should be provided in a manner that is respectful of the dignity, autonomy and privacy of the person.

Physicians can only accommodate those needs of which they are aware. Thus, the duty to accommodate is one that is shared both by the physician and the individual seeking care: the individual has a duty to inform the physician of their needs and the physician has a duty to take reasonable steps to accommodate those needs.

Guidelines

There is no set formula for accommodating the needs of persons with disabilities.

Physicians are advised to approach situations where accommodation is required on a case-by-case basis, and to tailor the nature of the accommodation to the needs of the individual before them.

Examples of accommodation may include taking steps to ensure that a guide dog can be brought into an examination room, or that patients are permitted to have a sign language interpreter present during a physician-patient encounter.