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# INSURANCE LAW BULLETIN

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## Conflict of Interest and the *Statutory Accident Benefits Schedule*



### Summary

In the past, conflict of interest law under the *Insurance Act* was clearly defined, with remedies being available to both sides if a dispute arose under the *Statutory Accident Benefits Schedule* ("*Schedule*"). These provisions were repealed with respect to claimants, as the Ontario legislature has presumably shown deference to the professional codes guiding the ethics of representatives.

### The 1996 *Schedule*

The 1996 *Schedule*, Ontario Regulation 403/96, had specific provisions relating to conflicts of interest embedded in section 38.3.[1] That section set out what constituted a conflict for the purposes of submitting treatment plans for medical or rehabilitation benefits. Essentially, if a person could receive a financial benefit from the provision of goods or services, a conflict of interest was established. If a conflict existed, the insurer could refuse the application.[2] These provisions applied in the reverse as well, as insurers could be in conflict if they were in a position to receive a financial benefit or if the goods and services were provided pursuant to a subsisting agreement.[3] Thus a "person" under the regulation referred to both the legal (corporate) and natural (human) definition. Later in the regulation, spouses and those with blood relations were specifically included in the definition of "person".[4]

The Ontario Insurance Commission released the *Guideline Respecting Conflict of Interest in the Provision of Medical and Rehabilitation Services* subsequent to the 1996 *Schedule,* which provided a broad overview of the applicability of these provisions.[5] The obligation to disclose a conflict of interest was imposed on health professionals, lawyers, other persons representing

[1] *Statutory Accident Benefits Schedule,* O Reg 403/96, s. 38.3.
[2] *Ibid* ss. 37.1(3), 38.2(4).
[3] *Ibid* s. 38.3(1)(b).
[4] *Ibid* s. 38.3(2).
[5] *Commissioner's Guideline No. 1/97,* Ontario Insurance Commission, published August 26, 1997.

claimants, and insurers.[6] At that time, the OCF-18/59 was the form used in preparing a treatment plan, and it included a disclosure statement to be signed by the health professional which satisfied the requirements under the *Schedule*. Lawyers were required to disclose any conflict of interest to the insurer at the time the application was submitted, and the insurer had 14 days after receiving the application to disclose a conflict to the claimant.[7]

The purpose behind disclosing a conflict of interest was to identify situations where referrals for profit were likely to exist and where a party was in a position to unduly influence the course of treatment to their own pecuniary advantage.[8] A pecuniary advantage or financial benefit could consist of anything of value including rebates, gifts, sharing of profits, or the expectation of cross referral.[9]

These conflict of interest provisions were not intended to prohibit treatment when a conflict existed. Instead, they simply required disclosure of such situations, and allowed an insurer or a claimant to deny treatment based on a conflict.[10].

**The Current SABS**

Under the current *Schedule*, the only conflict of interest provisions are found under section 46. These provisions solely reference insurers. Indeed, under section 46(2), insurers are barred from referring insured persons to a conflicted party unless sufficient notice is sent to the insured, and written consent is obtained.[11] A conflict of interest is defined similarly to the old *Schedule* basically concerning financial benefit and subsisting business arrangements. The question remains, why were provisions in the *Schedule* referring specifically to related persons like husbands and wives removed while reference to insurers remained?

There was no clear directive from the legislature regarding the removal of the conflict of interest provisions, but simplifying the *Schedule* has been a stated, long-term goal. A review of the *Insurance Act* and its related provisions lead us to the conclusion that the *Unfair or Deceptive Acts or Practices* as well as the *Code of Conduct for Statutory Accident Benefit Representatives* and the *Rules of Professional Conduct* caused the conflict provisions of the *Schedule* to be redundant, though insurers remain without recourse if the conflict is disclosed.

***Unfair or Deceptive Acts or Practices***

Under section 439 of the *Insurance Act,* no person shall engage in any unfair or deceptive act or practice.[12] These practices are defined in Ontario Regulation 7/00. In 2002, Ontario passed Bill 198, *Keeping the Promise for a Strong Economy Act*, which introduced changes to the automobile insurance system designed to realize cost savings in the industry.[13] The changes amended the definition of "unfair or deceptive acts or practices" to include a failure to disclose any conflict of interest to the claimant or the insurer.[14] At that time, the provisions did not apply to lawyers in the usual course of the practice of law. However, the current *Unfair or Deceptive Acts or Practices* regulation specifically requires both lawyers and paralegals in all

[6] *Ibid* at p. B10-1.
[7] *Ibid* at pg. B10-2.
[8] *Ibid* at p. B10-3.
[9] *Ibid* at p. B10-4.
[10] *Ibid* at p. B10-5.
[11] *Statutory Accident Benefits Schedule,* O Reg 34/10, s. 46(2).
[12] R.S.O. 1990, c I.8 s. 439.
[13] S.O. 2002, c. 22.
[14] O. Reg 7/00 amended by O Reg 278/03.

circumstances to disclose a conflict of interest to a person who claims statutory accident benefits or to an insurer. The failure to do so may result in the lawyer being removed as solicitor of record[15] and a representative being excluded from the hearing.[16] While this regulation requires disclosure on behalf of a lawyer or representative, it does not go so far as allowing an insurer to deny benefits on the basis of a conflict alone.

For example, in *Harris v. Wawanesa Mutual Insurance Co.,*[17] a representative referred his client (the claimant) to a doctor with whom he had a close business relationship. Though the representative did not receive any financial benefit from his relationship with the doctor, it was found that he "could receive" a financial benefit, which constituted a conflict of interest.[18] There was no commentary with respect to whether the insurer had any right to deny benefits and/or treatment on the basis of the conflict alone. Recourse resulting from the conflict was restricted to the representative's exclusion from the hearing in accordance with the *Code of Conduct for Statutory Accident Benefit Representatives.*

The current statutory and regulatory provisions confirm that the rules of ethical conduct for lawyers and representatives are the main safeguards available to insurers to ensure that lawyers and representatives avoid conflicts of interest.

**Code of Conduct for Statutory Accident Benefit Representatives**

Paralegals, referred to as "representatives" by the legislation, are governed by the *CCSABR.* A conflict of interest is defined in this Code as arising when "the representative could receive, directly or indirectly, a financial benefit that arises out of the claim, other than compensation for providing a service…"[19] This Code also specifically mentions that related persons, such as a spouse, receiving any kind of financial benefit is a conflict of interest.

Under section 3.9, a representative must disclose a conflict of interest relating to a claim for accident benefits to anyone who claims the benefits and to the appropriate insurer. If representatives fail to act in a manner consistent with this Code, they will be subject to administrative action taken by the Superintendent and to prosecution under the *Insurance Act*.

**Rules of Professional Conduct**

All attorneys practicing in Canada are subject to the Law Society of Upper Canada's *Rules of Professional Conduct*. One of the over-arching rules holds that "[a] lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity."[20] This guiding principle leads into the rules regarding conflict of interest.

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[15] *Moffat v. Wetstein,* [1996] 29 O.R. (3d) 371.
[16] *Harris v. Wawanesa Mutual Insurance Co,* [2005] OFSCD No 101, at para 28.
[17] *Supra* note 15.
[18] *Ibid* at paras 20, 24 & 28. Notably, the arbitrator pointed out that "disclosure and waiver of a conflict of interest [did] not necessarily negate the conflict". The arbitrator relied on *Moffat v. Wetstein*, a 1996 Ontario Court of Justice decision, which held that although a conflict had been waived, there was no evidence the parties were provided with independent legal advice with respect to the waiver. Therefore, the fact that the conflict only related to one of the issues did not mean that the representative could continue to deal with the other issues in dispute moving forward.
[19] *Code of Conduct for Statutory Accident Benefit Representatives*, Issued by the Superintendent of Financial Services, Effective November 1, 2003 at s. 1.2.
[20] *Ibid* at 2.1-1.

A conflict of interest is defined in Rule 1.1-1 as follows:

> "Conflict of Interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a **genuine, serious risk** to the duty of loyalty or to client representation arising from the retainer."[21]

This definition is put into action by Rule 3.4-1 which holds that "[a] lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section."[22] In the commentary of this rule, it states that a lawyer's own interests can impair client representation and loyalty when, for example, a lawyer is asked to advise the client in respect of a matter in which the lawyer, or a family member has a material direct or indirect financial interest.[23]

Unless a lawyer has received fully informed and voluntary consent to continue after disclosure of the conflict, that lawyer is not permitted to represent the client in that matter.[24] A breach of these rules may result in discipline from the Law Society, but there remains no rule under the *Rules of Professional Conduct* compelling a lawyer to disclose a conflict to an opposing party.

**Conclusion**

It seems that in the interest of efficiency, and to reduce redundant regulations, the Ontario legislature is allowing the profession to govern itself when it comes to representatives and lawyers referring claimants to related medical professionals. As long as representatives make full and frank disclosure of these conflicts to both the claimant (who they require consent from under the Law Society Act) and the insurer (through the Insurance Act), these types of referrals typically do not give rise to any discipline proceedings or civil claims.

What is clear from these changes is that insurers no longer have the option to deny a claimant accident benefits for treatment on the basis of concerns over a conflict between claimants and their respective representatives. Any recourse resulting from a potential conflict can be sought through the Unfair or Deceptive Acts or Practices regulation (by way of removal as lawyer/paralegal of record or exclusion from a hearing) and/or discipline from the applicable governing body.

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[21] *Ibid* at 1.1-1.
[22] *Ibid* at 3.4-1.
[23] *Ibid* at 3.4-1 commentary [4].
[24] *Ibid* at 3.4-2.