

Social Work and the Law

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LEARNING OUTCOMES

After reading this chapter, you should be able to:

- Explain why social service workers need to know about the law.
- Explain what it means to give legal advice, and why social service workers should never do so.
- List some of the situations in which a social service worker might work with a lawyer.
- Describe the role of the Ontario College of Social Workers and Social Service Workers.
- Identify the consequences that social service workers can experience in the event of serious errors.
- Understand the importance of note-taking in social service practice.
- Describe ways of improving the clarity and understandability of notes.
- Demonstrate an awareness of confidentiality in making notes and writing reports about clients.
- Understand the complaint and discipline process under the Ontario College of Social Workers and Social Service Workers.
- Understand the concepts of criminal and civil liability.

Introduction

Many people give little thought to the law until some event—a divorce, a criminal charge for an offence, or a dispute with an employer—happens to bring them into contact with the legal system. However, the reality is that almost every aspect of our daily lives is regulated, at least to some degree, by laws. For example, if you live in Ontario and drive to work, you are expected to comply with the *Highway Traffic Act*.¹ Your relationship with your employer is regulated by a number of statutes, including the *Employment Standards Act, 2000*² and the *Occupational Health and Safety Act*.³ Your professional status as a social service worker is regulated by the *Social Work and Social Service Work Act, 1998*.⁴

This book is designed to raise your awareness of the legal context of social service work. This is important for a number of reasons:

- It enhances your understanding of the limits of your practice—which activities fall within the scope of your duties and which do not.
- It helps you avoid actions or omissions that might expose you to professional **sanctions**, criminal charges, or civil **liability** (lawsuits).
- It helps you understand your legal rights and the legal rights of your clients.
- It helps you understand which benefits and services are available to your clients, as well as the circumstances in which benefits or services may be denied.

Social service work encompasses a broad and diverse range of services, and social service workers may be employed in a variety of public- and private-sector settings. These can include the following:

- youth programs,
- women’s shelters and programs,
- children’s aid societies,
- anger management programs,
- addictions counselling,
- programs for people with disabilities,
- immigrant services,
- housing and community development, and
- rehabilitation programs.

Each of the service delivery areas in which social service workers are active is subject to legal regulation. In some cases, such as health and long-term care, multiple statutes and regulations are applicable to a social service worker’s daily activities. This text provides an overview of the more important legal issues in particular service areas.

It is important to keep up to date with changes in the law. Statutes are frequently amended, repealed, proposed, or enacted by consent of the legislature. If you need to be certain of the exact state of the law on a particular issue, you should check the current official version of the applicable statute and regulations.

sanctions

officially imposed consequences that follow misconduct or the failure to meet compulsory standards of performance; can include fines, suspension of licence, or loss of privileges

liability

the legal responsibility to fulfil an obligation

1 RSO 1990, c H.8.

2 SO 2000, c 41.

3 RSO 1990, c O.1.

4 SO 1998, c 31 [SWSSWA].

Working with the Law and Lawyers

Legal Advice

Social service workers need to have a basic understanding of the law as it applies to their work. With experience, they may become very familiar with particular laws and how they apply to clients' situations. They may find that they can quite accurately identify the legal implications of a client's situation or predict how the law will apply to something that a client is proposing to do.

However, social service workers are not lawyers. They are not qualified to provide legal advice, and they must not give clients the impression that they can act as a substitute for a lawyer.

Generally, it takes years of legal training and experience to acquire the knowledge needed to provide reliable legal advice. In addition, even if, over time, you acquire detailed knowledge of the law relating to a particular issue, there are other reasons why you must not advise a client on matters of law:

- You may be sued for misrepresentation and **malpractice**. If your advice has resulted in financial loss or other harm, you may be held liable for damages and required to pay compensation to the client. Moreover, you will likely face disciplinary action by the governing body that regulates your profession, with potentially serious consequences for your professional standing.
- Communications between a lawyer and a client are protected by a rule of confidentiality known as solicitor–client privilege. There is no similar rule to protect the confidentiality of communications between a social service worker and a client in the event of litigation. As a result, if your advice to a client leads to or is implicated in a criminal charge or a lawsuit, any written or oral communication between you and your client may be subject to disclosure to the prosecutor or litigants.

It is very important that social service workers restrict their professional practice to the field in which they are trained. This is required by the standards of the profession and by the expectations of employers and clients. When legal services are required, your professional duty compels you to refer your client to a lawyer.

Legal Information

While social service workers should never give legal advice, they are often asked to provide **legal information**. The difference between advice and information generally relates to the level of specificity.

For example, if a client asks you how to obtain legal immigrant status in Canada, you may list the various categories under which an immigrant may apply and provide a government brochure explaining the different categories and the application process. However, you should not express an opinion on whether the client's application would be successful, since that would constitute legal advice.

Social service workers must ensure that the legal information they provide is accurate. If brochures or information sheets are not available from government sources, one strategy is for service agencies to produce their own lawyer-approved handouts for clients. For example, the agency's service personnel, including social

malpractice

failure of a professional to perform in compliance with their professional duty

legal information

general information about the law without specific reference to an individual's particular circumstance

service workers, could identify the legal matters that arise frequently for their clients and work with a lawyer to develop a handout that summarizes the relevant law. The summary would be either prepared or approved by the lawyer and presented in a reader-friendly format. The handout would include a recommendation that the reader obtain legal advice on how the law would apply in their particular situation.



A lawyer meeting with a client to discuss legal services.

Working with a Client's Lawyer

When a client has retained a lawyer to handle a legal matter, sometimes it is useful for the lawyer and the social service worker to communicate directly. However, the respective obligations of the social service worker and the lawyer to protect the confidentiality of client information pose a challenge regarding communications between them. To address this problem, the client can be asked to sign waivers that release both professionals from their obligations to maintain confidentiality in their communications with each other with respect to certain client information.

Sharing information allows for a multidisciplinary approach to the client's needs. Consider the example of a prison inmate who has applied to the parole board for early release. The inmate is working with a social service worker to develop a plan for addictions counselling after release, while a lawyer is representing the inmate in the application to the board. If the two professionals share information directly, the lawyer will get complete and accurate information about the counselling and will be better able to present a persuasive case to the parole board. However, the inmate must first give express consent to the sharing of information—preferably in writing. Consent is always required before a social service worker discloses personal information about a client to the client's lawyer or to anyone else.

Social service workers may also work with lawyers when acting as a client's support person during a legal proceeding. For example, a social service worker may accompany

a victim of spousal abuse to court to offer moral support. In this situation, the social service worker will best serve their client by taking care to establish a good working relationship with the client's lawyer. Here too, boundaries must be respected. When you, as a social service worker, accompany a client to court, hearings, or other formal meetings, you should take care not to answer questions on behalf of the client, express an opinion about the legal advice given, or attempt to influence the client's instructions to the lawyer. You must act only in your professional capacity and limit your role to providing support to the client.

Working with Your Employer's Lawyer

There are many situations in which a social service agency may need to consult a lawyer, including the following:

- The agency wants to incorporate or to seek charitable status.
- The agency needs advice about service issues.
- The agency needs to defend itself in a lawsuit or wants to sue another party.
- The agency needs advice on the legal implications of a proposed activity.

As an employee of the agency, you may be asked to work with the agency's lawyer on these and other legal matters.

One of the more common situations in which social service workers deal with agency lawyers is in the context of preparing documents that create or limit legal rights—for example, consent forms, releases, or other contracts. These and any other legal documents should be reviewed by a lawyer.

Ideally, a lawyer should also be consulted any time a social service agency proposes to undertake a new activity that may have legal implications, such as offering access to a sports or fitness program or arranging for transportation for participants.

Sometimes, in the course of your work, you may find yourself in need of a lawyer's advice about a service issue. When this happens, speak with your supervisor and request that the question be put to the agency's lawyer. It is important, however, to distinguish your own legal interests from the agency's interests. If your question relates to the employer and not to you personally—for example, you notice that young clients and their friends are using the agency's parking lot for skateboarding, and you're worried about the agency's liability for any injuries—it is appropriate to raise your concern with the employer's lawyer. However, if the question relates to you personally—for example, you have a violent client with whom you don't want to be alone, and the employer is not listening to your concerns—you may need to talk to your own lawyer.

Working with Your Own Lawyer

As suggested above, situations may arise in which you need to consult a lawyer on your own behalf in a matter related to your professional practice. For example, you may question the legal basis for a decision made by your employer that affects you directly, or a client may make a formal complaint accusing you of professional misconduct. Whatever the circumstances, you must remember that your duty to the client comes first. That duty requires you to act in the best interests of the client, even when it is against your own interests to do so, and to maintain the confidentiality of

the client's information. These duties can be onerous, and you should consult with your own lawyer as to a course of action.

The Regulation of Social Service Professionals: The Ontario College of Social Workers and Social Service Workers

The social service professions in Ontario—social workers and social service workers—became self-regulating in 1998, when the Ontario government enacted the SWSSWA. Other professions, including medicine, nursing, law, psychiatry, psychology, and engineering, have been self-regulated for many years.

The regulating body is the Ontario College of Social Workers and Social Service Workers (OCSWSSW). It is governed by a 21-member council equally representing social workers, social service workers, and the public. The OCSWSSW carries out a number of responsibilities or functions on behalf of the membership and the public. These include setting the criteria for membership, establishing a code of ethics, defining standards of practice, and maintaining professional standards through sanctions for non-compliance.

Code of Ethics

code of ethics
a system of moral principles designed to guide the conduct of a person or profession

A **code of ethics** reflects the core values of a profession, defines the profession's commitment to the clients whom it serves, and provides a principled framework to guide individual practice (see Figure 1.1). Table 1.1 outlines the OCSWSSW's Code of Ethics.

Table 1.1 Code of Ethics for the OCSWSSW

Maintain the best interests of the client.
Respect the intrinsic worth of the persons they serve.
Carry out their professional duties and obligations with integrity and objectivity.
Have and maintain competence in the social service work to a client.
Do not exploit the relationship with a client for personal benefit, gain, or gratification.
Protect the confidentiality of all professionally acquired information, and disclose such information only when required by law.
Do not allow outside interests to affect the social work relationship with the client.
Do not provide social work services in a manner that discredits the profession or diminishes the public's trust.
Advocate for workplace conditions and policies according to the profession's standards.
Promote excellence in the profession.
Advocate for change in the best interests of the client, society, environment, and global community.

Source: Adapted from Ontario College of Social Workers and Social Service Workers, "Code of Ethics" in *Code of Ethics and Standards of Practice Handbook*, 2nd ed—2008, Toronto: OCSWSSW, 2008, ii, online (pdf): <<https://www.ocswssw.org/wp-content/uploads/2017/03/Code-of-Ethics-and-Standards-of-Practice-March-2017.pdf>>.

Revised Practice Guidelines, Decision-Making Tool, and PHIPA Toolkit

In September 2009, revised practice guidelines came into effect that were developed by the OCSWSSW.⁵ The practice guidelines outline the roles that social workers take when conducting various assessments, encountering various dilemmas, or working in various workplace settings. The guidelines are meant to assist social workers and social service workers in Ontario to apply the OCSWSSW's standards in certain circumstances or contexts of practice. These include the following:

- *Parenting time assessments*: For social workers conducting parenting time assessments.⁶
- *Medication practices*: Developed for social workers and social service workers who work settings in client services and may provide medication, such as in hospitals, residential treatment centres, group homes, and community-based programs. Social workers and social service workers may be asked to assist clients with medications, and they may not be sure if they can perform these tasks. Since administration of medication is not a primary responsibility for social workers or social service workers, it is better to understand and consider the relevant issues before deciding whether to administer medications.
- *Consent and confidentiality with children and youth*: Developed for social workers and social service workers who face situations related to the consent and confidentiality with clients who are children and youth. Social workers and social service workers may encounter this while working in schools, hospitals, community health settings, child welfare settings, residential settings, or private practice. The guidelines outlined by the OCSWSSW contain decision trees related to consent and confidentiality issues to help social workers and social service workers make better practice decisions.
- *Practice guidelines for performing the controlled act of psychotherapy*: These guidelines took effect on December 30, 2017 and are developed for social workers and social service workers who want to practise psychotherapy. Psychotherapy is a form of therapy conducted by qualified practitioners. The principles in the standards of practice identify for social workers and social service workers what factors they should consider in order to determine if they are competent to perform the controlled act of psychotherapy.

Social workers and social service workers can face ethical dilemmas and the standards of practice can aid in outlining what to do in certain situations. The OCSWSSW developed an ethical decision-making tool named ETHICS→A that assists social workers in making informed decisions and maintaining professional judgment in certain situations.⁷ The ETHICS→A tool is useful in clinical and non-clinical, direct and indirect practice. The tool is designed to navigate ethical

Figure 1.1 Code of Ethics for the CASW



5 "Practice Guidelines" (last visited 11 June 2021), online: OCSWSSW <<https://www.ocswssw.org/professional-practice/practice-guidelines>>.

6 In 2009, the term used was "custody and access," but it has been revised for this publication to coincide with the new terminology in the revised *Divorce Act*, RSC 1985, c 3 (2nd Supp).

7 The ETHICS→A Tool is based on the decision-making model published by Connie M Fossen, Jennifer I Anderson-Meger & Debra A Daehn Zellmer, "Infusing a New Ethical Decision-Making Model Throughout a BSW Curriculum" (2014) 11:1 J Soc Work Values & Ethics 66.

decisions and promote ethical and professional practice. ETHICS→A outlines the steps to use in the decision-making process:

- **E**xamine the situation and values.
- **T**hink about the code of ethics.
- **H**ypothesize all possible decisions.
- **I**dentify consequences.
- **C**onsult with others.
- **S**elect action.
- **A**dvocate for change, if required.

Another useful tool for social workers and social service workers is the PHIPA Toolkit. The *Personal Health Information Protection Act, 2004*⁸ came into effect on November 1, 2004. Its purpose is to regulate governing rules surrounding the collection, use, retention, disclosure, and disposal of clients' personal health information to health information custodians in hospitals and long-term care facilities that often employ social workers and social service workers. The PHIPA Toolkit “provides important background information on the Act, and explains who is covered by the Act using a decision tree that will help members to determine their responsibilities under the Act.”⁹ Each guideline, standard of practice, and tool helps social workers and social service workers navigate decisions and follow regulations.

Standards of Practice

professional standards
benchmarks against which
a professional is expected
to measure performance

Professional standards are benchmarks against which a professional is expected to measure their performance; these standards serve as a guide to the development of good practices. For clients and the public, professional standards facilitate the assessment of the quality of the services received. Table 1.2 outlines the subjects in the OCSWSSW's current *Standards of Practice Handbook*.

Table 1.2 Standards of Practice Handbook Subject Areas

Relationship with clients
Competence and integrity
Responsibility to clients
Social work and social service work record
Confidentiality
Fees
Advertising
Sexual misconduct

Source: Adapted from Ontario College of Social Workers and Social Service Workers, “Code of Ethics” in *Code of Ethics and Standards of Practice Handbook*, 2nd ed—2008, Toronto: OCSWSSW, 2008, iii, online (pdf): <<http://www.ocswssw.org/wp-content/uploads/2017/03/Code-of-Ethics-and-Standards-of-Practice-March-2017.pdf>>.

It is clearly important for a social service worker to be thoroughly familiar with the code of ethics and the standards of practice applied by the profession. Doing

8 SO 2004, c 3, Schedule A [PHIPA].

9 “PHIPA Toolkit” (last visited 11 June 2021), online: OCSWSSW <<https://www.ocswssw.org/professional-practice/phipa-toolkit>>.

your job competently and with integrity is the best protection against both professional and legal penalties. For social service workers in today's world, doing your job competently includes understanding how the law applies to you and your work.

Notes, Reports, and Records

Accurate and timely note-taking is a crucial skill for social service workers. It is important for workplace efficiency, and it is critical to protect against liability.

Clients have access to all mental health and medical records regarding their care unless the treatment professional has reason to believe that access to the information contained in the clinical record may be harmful to the client or a third party.¹⁰

Documenting work in progress is a necessary component of keeping organized and prioritizing when dealing with heavy client caseloads. Information that is undocumented may be quickly forgotten or inaccurately recalled. By taking a few extra minutes to jot down notes summarizing all phone calls and meetings with clients, as well as internal discussions about clients, you will be able to pick up a file several weeks later and, at a glance, update your knowledge of the case. If co-workers are involved with the same client, notes to file are a valuable communication tool, keeping everyone informed. To-do lists and action points are also helpful to keep you focused on what needs to be done.

In the event that you are asked to justify your decisions or actions with respect to a client, reliable and detailed notes will back you up. Your notes are evidence that you considered the issue carefully and fully and responded in a competent and responsible manner. Without this document trail, you put yourself at risk of allegations of negligence.

Besides generating notes for personal or internal agency use, social service workers may also need to produce reports designed to be read by others, such as social workers, judges and lawyers, or government administrators. While internal **notes** are primarily designed as memory aids for the social service worker or to provide information to colleagues, **reports** have different and often quite specific purposes. A social service worker's duty both to respect client privacy rights and to communicate honestly with agencies entitled to receive reports means that considerable judgment is required in preparing external reports.

Standards of Practice for Record-Keeping

The OCSWSSW sets out the following requirements for record-keeping:

The creation and maintenance of **records** by social workers and the social service workers is an essential component of professional practice. The process of preparation and organization of material for the record provides a means to understanding the client and planning the social work and social service work intervention. The purpose of the social work and social service work record is to document services in a recognizable form in order to ensure the continuity and quality of service, to establish accountability for and evidence of the services rendered, to enable the evaluation of service quality, and to provide information to be used for research and education. College members ensure that records are current, accurate, contain

notes

documentation primarily designed as memory aids for the social service worker or to provide information to colleagues

reports

documents written by persons who have direct knowledge of or experience with a client, an event, or a set of circumstances and that are designed to be read by a third party

records

material prepared and organized to provide a means to understanding the client and planning the social work and social service work intervention

¹⁰ *McInerney v MacDonald*, [1992] 2 SCR 138, 1992 CanLII 57.

relevant information about clients, and are managed in a manner that protects client privacy and in accordance with any applicable privacy and other legislation.¹¹

Note-Taking

General Considerations

In taking notes, you are creating a written record of certain events. Before you begin, you should ask yourself the following questions:

- Who will read these notes?
- What will the reader be hoping to learn from them?
- Is the reader familiar with the context, or must I provide background information?
- What are the privacy implications of making these notes?
- What is my own purpose for making these notes?

In the simplest scenario, you will be keeping notes for your own future use. In that case, you should make notes in the format that you find most useful, without worrying about providing background information. However, it is important to keep in mind that in some circumstances, notes recorded for personal use may need to be made available to others, such as colleagues or perhaps the client. Your notes may even be used in a legal proceeding; for example, you may be required, in your professional capacity, to give testimony based on your notes in a court of law. For this reason, any notes relating to the practice of your profession should be accurate, and free from offensive or inappropriate content that would reflect badly on you or on the agency where you work.

If you are keeping notes that are intended to be read by others—for example, in a setting where clients are served by multiple professionals—there will be additional considerations. For example, you will need to consider whether what you write is understandable to the intended reader and whether the notes provide sufficient information.

In the course of your practice, you may encounter situations in which legal issues arise. These can include harassment by another resident in a group home, disciplinary action against staff members, use of restraints to manage a client, and the witnessing of abuse involving a client.

In these situations, it is prudent to take notes so that you can substantiate your actions and your reasons for taking them in case the incident forms part of a subsequent investigation or legal claim. This type of note-taking is especially challenging, and the keys to getting it right are to be thorough, honest, accurate, and neutral. Sometimes notes taken in these contexts need to be used at a later time to generate a report.

Usefulness and Understandability

Your notes will be useful only to the extent that they can be understood by the reader and that they provide all the information that is required. In reviewing your notes for understandability, you may find the following checklist helpful:

¹¹ *Code of Ethics and Standards of Practice Handbook*, 2nd ed—2008, Toronto: OCSWSSW, 2008, 19, online (pdf): <<http://www.ocswssw.org/wp-content/uploads/2017/03/Code-of-Ethics-and-Standards-of-Practice-March-2017.pdf>>.

1. Did you make the notes as soon as possible after receiving the information? Timeliness in making notes promotes accuracy.
2. Do your notes follow a well-organized structure—for example, chronological order?
3. Are your notes dated? If you make notes in a shared notebook or file, are they marked as yours?
4. Did you write out, in full, any pertinent details and check the accuracy of the information recorded (including the spelling of names, addresses, and phone numbers)?
5. If you used abbreviations, did you work from a list of accepted or recognized abbreviations or provide explanations of what they refer to?
6. Did you make it clear which portions of your notes are direct quotations of another person's words by using quotation marks?

Generally, it is not appropriate to attempt to answer the question “Why?” Often, you will be reporting on the actions of others, and you cannot be sure that you understand the motivations for someone's actions, or the underlying causes of an event. Attempting to do so can make you appear less than impartial, if the matter is ever reviewed, or can inappropriately narrow the scope of an investigation.

Making useful, understandable notes requires careful consideration of what information should and should not be reported, and how it should be reported. Some guidelines are suggested in the following section.

Choices About Information

Notes should be focused and concise. Including unnecessary or excessively detailed information will only reduce the readability and impact of important content. For the purpose of building a rapport with your clients, you may sometimes listen to their ideas about quite irrelevant matters, but those conversations need not be recorded. Personal comments should also be avoided; if you must note something negative about a client, you should do so in language that is professional and as neutral as possible.

To illustrate the choice of appropriate information, consider a situation where you are making notes of a client interview to determine employability. Information obviously worth recording would be details about education and work experience, and about the kind of work sought. It would also be useful to note factors that could restrict the client's availability for certain kinds of employment; for example, “She has school-age children and might have difficulty working afternoon and night shifts,” or “He was fired from a job that involved sales, which he says he hates.” Anecdotes about friendships in previous workplaces are probably not important. You should avoid value judgments, such as “They claimed to have excellent customer service skills, but I think they were just being arrogant.” Instead, keep it factual.

Finally, it can sometimes be useful to note gaps in information or to note that you have not observed something that you expected to observe. This can serve as a reminder, to yourself or to colleagues, of matters that should perhaps be investigated further. In the context of the employability interview described above, you might discover that there is a gap of a few years in the client's employment history and that the client is reluctant to provide information about what they were doing during that time. Since the reason could affect your client's eligibility for a particular job (e.g., if your client was serving time in prison), further attempts should be made to obtain an explanation from the client.

Revising Notes

Sometimes it is necessary to make changes in your notes—for example, if you discover an error or if you want to include additional information. When and how you make such revisions will depend on the kind of work you do and the format you use for recording information. However, in all circumstances, you should follow certain procedures in altering your notes.

The first rule is that unlike personal notes, notes made for professional purposes should never be destroyed.

The second rule is that since your notes may be used by others, you should make your changes clear. For example, in handwritten notes or a typewritten copy, use a single line to strike out, and write the correction above or after this line. It is good practice to date and initial any changes of substance (as opposed to trivial changes such as corrections in spelling), particularly if your notes are part of a file to which several people contribute.

Some professionals use notebooks with numbered pages, both for easy reference and for security of the record since it is immediately evident if an entry has been torn out. If you use this type of note-taking system, never tear out a page; it may appear that you are trying to hide something. Instead, strike through the page with a diagonal line. You should not be reluctant to correct inaccuracies, but you should do so by crossing out in a way that doesn't obliterate the entry, or by adding new, more accurate information on another page.

If you make notes in an electronic format (on a computer), the safest way to make a change is to save the previous entry as a draft, and work from a new version of the document, saving any previous versions for your records. Alternatively, you can use a word processing program that tracks changes. These programs often note changes using strikethroughs or different colours and can save the date and time of the change. Many of these programs are designed to manage documents that are accessed by more than one user, tracking the deletions and additions of each.

Privacy Considerations

The introduction of the federal *Personal Information Protection and Electronic Documents Act*¹² and the Ontario PHIPA added a new layer to the issue of protecting clients' privacy. It is difficult to give specific recommendations about privacy protection here, because social service workers work in a wide range of settings. However, some general guidelines can be suggested:

- Be aware of concerns about privacy and the confidentiality of client information.
- Be familiar with your employer's policy with respect to client privacy.
- If you need to request, share, or use personal information about a client, ensure that the appropriate releases have been obtained.
- Never share your notes unless you have been given permission to disclose them from every person mentioned in them. (Your office may have obtained releases to permit certain kinds of disclosure; inquire whether this is the case.)
- If you are authorized to disclose your notes, make sure you understand the scope of that authorization: to which client(s) and to what information it applies, and to whom the information can be disclosed.

12 SC 2000, c 5.

- If in doubt about your right to disclose certain information, withhold the information until you have checked with a supervisor or obtained a new release from the client.

Typically, in a setting where you are expected to take notes to facilitate the provision of client services, there is a certain expectation of privacy associated with the content of those notes. In many cases, people who have interests that are opposed to your client's interests (e.g., the other party in a lawsuit) will not be able to gain access to your notes. There are, however, exceptions. Unlike the communications between a lawyer and a client, what is said between you as a social service worker and your client is not considered privileged (protected from disclosure in court). Also, some statutes or court orders can force you to disclose the content of communications with a client. You might also, under certain circumstances, feel a moral obligation to disclose information to a third party, such as if you believe your client is suicidal.

As a result, you should never promise a client confidentiality unless you are certain that you can guarantee it. You should also not allow the client to be lulled into a false sense of security about talking with you. In some cases, it is necessary to warn a client ahead of time that there are certain kinds of information that you cannot keep to yourself. This gives a client the opportunity to decide whether to censor what they choose to tell you.

If you know that a party who is opposed to your client could gain access to your notes, you should use extra care when deciding what information to include in them. This means that you can use discretion in recording unfavourable or unflattering details, but it doesn't allow you to omit information that you ought to record.

It is possible that in a criminal matter involving sexual assault, the lawyer for the accused will request that the victim disclose certain information about past history that will assist in the accused's defence. This is a right for the accused to make a full and fair defence under section 7 of the *Canadian Charter of Rights and Freedoms*.¹³ Victims have protections against disclosure of information related to past history. It is possible that social service workers will be asked to appear at court along with any relevant notes relating to their client's past history. In such cases, the social service worker has the right to object to the disclosure of confidential client records. The court will balance the legal rights of the defendant and the rights of the victim. The judge will conduct an ***in camera* hearing** to determine whether the production of records is necessary based on the interests of justice.

The court will look at society's interest in encouraging the reporting of sexual offences, in encouraging treatment for complainants of sexual offences, and in the integrity of the trial process. The judge determines which records are relevant and how the record will be produced, viewed, and edited.¹⁴

***in camera* hearing**
a court hearing
conducted privately
with no public access

Report Writing

Report writing differs from note-taking in two key ways:

1. Reports are prepared specifically for use by persons other than the writer.
2. Reports are usually written for a specific purpose other than just the creation of a written record.

¹³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

¹⁴ *R v O'Connor*, [1995] 4 SCR 411, 1995 CanLII 51; *R v Mills*, [1999] 3 SCR 668, 1999 CanLII 637.

Reports may also differ in other ways, including the following:

- A report may be prepared in collaboration with other colleagues, professionals, etc.
- The organization or content of a report may be formally prescribed, instead of being left to the preference of the writer.
- The writer may be required to express opinions and/or make recommendations.

While the range of reports that social service workers may encounter in their work is almost limitless, the general function of those reports is universal: they provide a formal framework by which a person who has direct knowledge of or experience with a client, event, or set of circumstances can communicate that knowledge or experience to a third party (a supervisor, an administrator of an agency, a committee, etc.).

The following examples indicate the kinds of reports that social service workers may be required to contribute to or write:

- *Human resources reports:* A social service worker who supervises other employees may be required to report to a senior manager on the performance of those subordinates.
- *Reports in family relations contexts:* A social service worker who works in a supervised access program may be asked to prepare a report for a court on how well this approach is working for a particular family and whether there are any problems.
- *Reports for use by care workers or health care professionals:* A social service worker may be asked to observe a candidate for long-term care and report on the extent of the candidate's need for assistance with daily living.
- *Reports in the corrections context:* A social service worker who counsels offenders serving custodial sentences may be asked to prepare a report about some aspect of an inmate's progress or behaviour for use in an early release assessment.
- *Reports in the context of making social benefits decisions:* A social service worker who is an intake officer for a social benefits program, such as Ontario Works, may be required to prepare regular reports for program administrators on whether individual clients are complying with participation requirements.

When preparing a report, you will benefit from having thorough and clear notes from which to work. If there is a prescribed format, you should be careful to follow it. This may mean converting content that is organized in one way in your notes into a different format for the report. You may also have to supplement the information in your notes with additional background information, if the intended readers of the report do not have your knowledge of the context—for example, the client, the issue or event, and the circumstances. In effect, you must put yourself in the reader's shoes and ask yourself what the reader needs to know.

Often, you will be required to strike an appropriate balance between your duty to the client, or to your employer, and your obligations as the author of the report. For example, if you are an intake officer with Ontario Works, and you are preparing a report for benefits about an applicant whom you feel is not prepared to comply with participation requirements, you may have a duty to express that opinion even

though it would disappoint the applicant. Your duty to your employer and the goals of the program supersede your obligations to the applicant.

Similarly, if you are working as a parole officer, or in a program for inmates of a correctional facility, you may be required to report on a client's suitability for early release. If you have concerns about the client, you must report them, even if doing so appears to be against the client's interest. In such situations, where you are required to draw unfavourable conclusions about a client, explain your reasons truthfully and briefly; avoid unnecessary elaboration. Ideally, well in advance of making your report, you will have laid the groundwork with the client, advising them:

1. that you are required to make reports about them in the course of your work,
2. that your reports must be truthful and accurate, and
3. that there are important limits on the confidentiality of communications between you and the client.

The general guidelines for writing reports are similar to those for note-taking and can be summarized as follows:

1. In making reports, you should always be scrupulously honest.
2. You should be neutral in your comments unless an opinion is specifically required.
3. You should use appropriate and professional language:
 - a. Avoid labels or comments that could be construed as racist, sexist, elitist, or otherwise discriminatory.
 - b. No matter how strong your private opinions, refrain from making judgmental or damaging remarks about anyone, even a person whose behaviour toward your client is extremely offensive and upsetting.
 - c. Avoid comments that could reflect poorly on you as a professional or on your employer.
 - d. Avoid any comments that might suggest bias or a desire to cast blame on another party.

Finally, you should remember that your reports, or your notes, may be viewed by the client at some later time. Therefore, you should take care always to communicate with the sensitivity that is expected of you as a helping professional.

Professional Misconduct and Incompetence

As outlined earlier, the professions of social work and social service work are regulated by the OCSWSSW. One of the key goals of the college is to maintain standards of practice that promote high-quality service to clients, and thereby build public confidence in the work of social service. To this end, the OCSWSSW has authority to call its members to account for failure to meet the established standards of the profession.

Liability Issues

Social service workers seldom harm others out of malice or recklessness. However, mistakes happen. Social service workers often carry large caseloads. Overwork, inexperience, lack of support, and other factors can contribute to situations in which

a social service worker fails to take correct action on behalf of a client or makes an error in judgment.

There are three main kinds of consequences that social service workers can experience in the event of serious errors:

1. sanctions for professional misconduct,
2. criminal charges, and
3. lawsuits under the **civil law** of torts.

civil law

all non-criminal law;
differs from judge-made
common law

Reasonable everyday errors or missteps made in the course of performing assigned duties are unlikely to land a social service worker in legal trouble. Problems tend to arise, instead, where an error is unreasonable given the circumstances—for example, where a social service worker's efforts have fallen markedly below the recognized standards of the profession. Taking actions that are outside the acceptable scope of your professional duties, such as giving legal advice, can also cause problems. Finally, any action motivated by malice, personal gain, or other inappropriate objectives is presumed to be outside the scope of a social service worker's duties and can lead to legal or professional consequences.

Complaints and Discipline

An instance of professional incompetence or misconduct typically comes to the attention of the OCSWSSW when someone—often a client or a family member of a client—makes a written complaint about the social service professional to the college.

A complaint is defined as an expression of concern about the conduct or actions of a member relating to their professional misconduct, incompetence, or incapacity as follows:

- Professional misconduct is defined as conduct that violates the SWSSWA, the regulations under that Act, or the by-laws of the OCSWSSW.
- Incompetence generally means being unable to do one's job properly through lack of experience, skill, effort, or application.
- Incapacity is different from incompetence and means not being able to do one's job because of a physical or mental condition or disorder.

When a complaint is made, the OCSWSSW provides the social service worker with a copy or written summary of the complaint. The social service worker has at least 35 days to prepare a written response. The response is delivered to the complainant, who is allowed to provide additional information for clarification. If necessary, the OCSWSSW makes additional inquiries (e.g., speaks to other witnesses) to obtain any other information that may be needed.

Complaints Committee

Once the information has been gathered, the complaint is reviewed by a three-member panel of the Complaints Committee. The panel does not hear oral submissions; it only reviews documents. The panel is generally required to provide a decision and written reasons within 120 days where possible, but sometimes the process takes longer.

The panel of the Complaints Committee can take a range of actions, which include the following:

- Do nothing.
- Require the social service worker to appear before the committee to be “cautioned” (given a formal warning).
- Take any action permitted by the legislation or by-laws (such as referring the matter to a mediator for an attempt at resolution).
- Refer the matter to the Discipline Committee to make a determination regarding professional misconduct or incompetence of the member.
- Refer the matter to the Fitness to Practice Committee to make a determination regarding incapacity of the member.

The panel of the Complaints Committee does not have authority to make an order of damages. Complainants who are seeking monetary compensation must pursue a civil lawsuit (discussed in the “Tort Liability” section, later in this chapter).

Discipline Committee

When a complaint is referred to the Discipline Committee, the OCSWSSW can temporarily suspend the social service worker’s membership in the college, pending resolution of the complaint.

The Discipline Committee deals with complaints through a formal hearing process with oral submissions and witness testimony. The hearings are usually open to the public. Because an adverse discipline decision remains on the member’s record and can have a significant impact on their future career, it is a good idea for anyone facing discipline to hire a lawyer. For example, if the OCSWSSW proposes to suspend the individual’s membership pending the resolution of the complaint, the member has 14 days in which to prepare written submissions about why the membership should not be suspended. A lawyer’s advice would be very useful for the purpose of drafting these submissions.

If the Discipline Committee finds the member guilty of professional misconduct or incompetence, it may make any of the following orders (as provided in s 26 of the SWSSWA):

1. Revocation of any certificate of registration held by the member under this Act.
2. Suspension of any certificate of registration held by the member under this Act for a specified period, not exceeding 24 months.
3. Imposition of specified terms, conditions, or limitations on any certificate of registration held by the member under this Act.
4. Direction that the imposition of any of the above be postponed for a specified period and not be imposed if specified terms are met within that period.

Additional orders are available if the member is found guilty of professional misconduct (but not incompetence), as follows:

1. Reprimand, admonishment, or counselling, and if considered warranted, recording of such on the member’s record.
2. Fine to a maximum of \$5,000.

3. Publication of the case, in detail or in summary, with or without the name of the member, in the official publication of the OCSWSSW and in any other manner or medium considered appropriate in the particular case.
4. Costs of the discipline hearing to be paid by the member.

The OCSWSSW maintains a register of members, with a record of any revocation or suspension of an individual's membership. In some cases, the college can order that the fact that a member was found guilty of disgraceful or dishonourable conduct, or professional misconduct, be entered on their permanent record.

Criminal Offences

The *Criminal Code*¹⁵ covers a wide range of criminal acts, and it's conceivable that a social service worker could commit a variety of crimes in the course of their work.

The risk of assault is present whenever a client is difficult to manage physically, or hard to handle. This category includes a wide variety of clients and service contexts.

Social service workers who work with physically hard-to-handle clients should receive thorough training in the use of restraints (physical restraints and/or submission holds) and other measures involving the application of force. The use of restraints is permitted in certain settings (e.g., hospitals that treat mental illness) within very strict guidelines.

As a general rule, unless you have been made aware of a specific employment policy permitting the use of force in your work, and unless you have undergone appropriate training in support of that policy, as a social service worker, you should avoid the use of force completely. In fact, unless physical care is included in your job description (as it may be if you work in a daycare centre or a long-term care facility), you should try to avoid any physical contact with clients, particularly those who are known to be hard to handle.

To prevent unwarranted suspicion or accusations, social service workers should be diligent in avoiding any behaviour that might be deemed inappropriate, including suggestive or ambiguous comments and, particularly, physical contact with clients.

The best policy on the question of physical contact is to exercise extreme caution, particularly in high-risk situations. Unless it is part of the job, limit physical contact with clients to, at most, a brief and formal handshake, preferably initiated by the client.

While assault generally implies some degree of action, the concept of **negligence**, which also exists in tort law, implies a lack of action in circumstances where action (or caution) is warranted.

negligence

implies a lack of action in circumstances where action is warranted

Civil Lawsuits

Tort Liability

Torts fall into two basic categories: **intentional torts** and unintentional torts. An intentional tort, as the name suggests, is harm caused intentionally to one person by another. The events that form the basis for an intentional tort lawsuit are often similar to those that give rise to offences under criminal law, the key difference being that in the latter case, a criminal charge is laid and prosecuted by the Crown.

intentional torts
a category of tort that involves causing harm on purpose rather than through negligence

Unintentional torts are based on the civil concept of negligence. There are a number of elements that must be proved by the plaintiff in a negligence case—namely, duty of care, standard of care, causation, and remoteness.

Vicarious Liability

It is important to realize that unprofessional practice that results in harm to a client can have legal consequences not only for the social service worker but also for their employer.

Generally, under the doctrine of **agency**, an employer may be held responsible for mistakes of its employees made in the course of carrying out their duties. Agency applies to actions of an employee taken in the line of duty—that is, actions taken on the employer’s time that are within the employee’s job description. In addition, in limited circumstances, employers can be held accountable, under the doctrine of **vicarious liability**, for actions that fall outside the scope of the employee’s work. For example, vicarious liability could arise where the employer ignores complaints from clients alleging inappropriate sexual advances or touching by a social service worker, and eventually a client sues the social service worker for sexual battery under the law of torts. Knowing about (and ignoring) the social service worker’s inappropriate behaviour while promoting their access to vulnerable clients will likely make the employer liable to compensate the victims, even though the social service worker’s actions fall outside the scope of duties in the employee’s job description.

Where a social service worker’s actions result in liability for the employer, the consequences may be worse than just costing the employer money. Many social service providers operate on a non-profit basis. The cost of a lawsuit may force the service provider to go out of business. Proven harm to a client may also cause the agency to lose a licence that it requires to do business (e.g., a daycare licence under the *Day Nurseries Act*,¹⁵ or status as a non-profit housing provider for the purpose of government funding).

Social service workers must realize that failing to perform their job to expected professional standards, and within the requirements of the law, not only harms existing clients but may also result in reduced access to services for others in the community. In addition, successful lawsuits erode the public trust in social service providers.

agency

applies to actions of an employee taken in the line of duty—that is, actions taken on the employer’s time that are within the employee’s job description

vicarious liability

when employers are held accountable for actions that fall outside the scope of the employee’s work

SOCIAL SERVICE WORKERS IN PRACTICE

Dual Relationships

A dual relationship occurs when a social service worker has more than one relationship with a client. This may take one of several forms: it can be based on a pre-existing relationship, it can develop concurrently during the counselling relationship, or it could form following the provision of professional services.

It is not inconceivable that there will be instances in which our professional and personal roles may intersect; this is particularly true in smaller rural communities or even insular urban ones. Despite this being the case, dual relationships can be quite

(Continued on next page.)

¹⁵ RSO 1990, c D.2.

problematic, and although they are not entirely forbidden by the OCSWSSW or, more specifically, the profession's standards of practice, certain actions and behaviours may blur professional boundaries. Examples of the kinds of incidents that may create a conflict of interest that can lead to allegations of professional misconduct include fostering intimacy (emotional as well as sexual), promoting emotional reliance, seeking personal benefit (which can include but is not limited to monetary gain), and not appropriately responding to unanticipated circumstances.

This holds true even *following* the termination of the counselling relationship because, as per the OCSWSSW's *Code of Ethics and Standards of Practice Handbook*, section 3.8, it is entirely incumbent on the social service worker to ensure that the former client is not being exploited, coerced, deceived, or manipulated intentionally or unintentionally. The bottom line is dual relationships ought to be immediately addressed and/or avoided wherever possible.

Consider the following scenarios:

Scenario #1: You are employed by an organization that works with women and children who experience abuse. Your partner has been promoted, and their boss has invited you to dinner to commemorate the advancement. The following week, you meet a client for the first time. The client is your partner's boss's wife.

Scenario #2: You are a social service worker whose client has completed a credit recovery program at a local adult education centre; you attend the graduation ceremony to acknowledge your client's success—they are the class valedictorian. Afterward, you are introduced to the client's family, who offers you a gift and adamantly insists you accept it and join them at their home for a celebratory meal.

Scenario #3: You are a social service worker who is applying to teach at the local community college. When you arrive for the job interview and are introduced to the panel, you realize that one of the members is a former client. You counselled the client, whose child was moved into temporary care, while the client sought treatment in an addiction rehabilitation program you referred them to.

Discussion Questions

1. How might cultural or ethnic norms in the above scenarios affect the way a social service worker responds to each situation? For example, in the second scenario, how might the social service worker avoid violating the family's deep-seated cultural and ethnic norms related to food and celebration yet uphold their professional and ethical obligations?
2. What ways can a social service worker manage the risk inherent in each of these scenarios?

KEY TERMS

agency, 19	legal information, 3	professional standards, 8
civil law, 16	liability, 2	records, 9
code of ethics, 6	malpractice, 3	reports, 9
<i>in camera</i> hearing, 13	negligence, 18	sanctions, 2
intentional torts, 18	notes, 9	vicarious liability, 19

SUGGESTED SOURCE

The Ontario College of Social Workers and Social Service Workers, <<https://www.ocswssw.org>>

REVIEW QUESTIONS

1. Why should a social service worker never provide legal advice? Give three reasons.
2. Explain the difference between legal information and legal advice and give an example of each.
3. A code of ethics reflects the core values of a profession. Describe five different values that are reflected in the Code of Ethics of the Ontario College of Social Workers and Social Service Workers.
4. Professional standards are benchmarks against which a professional is expected to measure their performance. Name three areas that serve as a guide to the development of good practices.
5. Are communications between a client and a social service worker protected by privilege?
6. Name three kinds of consequences that can arise when social service workers commit serious professional errors.
7. If a complaint against a registered social service worker is referred to the Discipline Committee of the OCSWSSW, and the committee finds the member guilty of incompetence or professional misconduct, what consequences can follow?

