



## E-counselling: Possible Pitfalls when Offering E-Counselling Services

### Issue 1 – What Law Will Apply?

One way to describe some of the issues you may face is by providing examples.

Perhaps you work and live in Ontario, but you decide that you want to enlarge your practice by providing e-counselling. Perhaps you do not specify in your new practice a geographic boundary that you will serve, which results in some clients residing outside of Canada. What happens if you get sued due to possible negligence or breach of contract on your part?

The person you were counselling would have options – (i) they could sue you for breach of contract, or negligence, or both depending on what happened and (ii) they could choose to sue you where they live or choose to sue you where you live. Should this happen three questions arise:

1. Which laws will apply: those of where you live or those where the client is located?
2. What difference will it make whether the client chooses sue you where you live or in their place of residence?
3. What happens if you are sued and you decide not to defend?

#### 1. Which laws will apply?



Whether a client chooses to sue you in Ontario, for example, or Florida, the court will make a determination as to which law applies. In addition to being subject

to a lawsuit based in contract, you may also find yourself being sued in negligence. This type of claim is based on the duty you owe to the client due to your receiving compensation for the services you provide. The terms of the contract may not necessarily govern what duty or standard of care you must exercise in dealing with the client. If Florida law applies it would be a good idea to know what Florida law is with respect to negligence and breach of contract before venturing into that market. While, for commercial purposes, contract law has evolved to be very similar around the world, what constitutes negligence may still vary from

jurisdiction to jurisdiction. There may also be significant differences regarding the type and extent of damage awards (e.g., the U.S. is known for its large damage awards). The rules determining which laws apply are different for contract law versus negligence law. If the client feels that they prefer Florida law and believe Florida law would apply, they may claim for negligence. This fact of law makes it difficult to develop a contract between you and the client that would prohibit Florida law from applying.

#### 2. Where They Sue: Does it make a Difference?

If the client sues you in Florida, you cannot be forced to defend the action. In fact, your lawyer may even recommend you not go to Florida to defend it for the following reason. The client may obtain a judgement (i.e., award of damages) in the Florida court and the client may then want to enforce the Florida judgment in Ontario by having your assets seized and sold to satisfy the amount you are ordered to pay by the



court in Florida. If you had appeared at the hearing in Florida, it could result in your losing the ability to dispute that the Florida court was not the appropriate court to hear the matter in any proceedings brought in Canada at a later time. That being said, conflict of laws is a complex area of the law and you can never be sure which way a judge will decide. There is also legislation in place that makes it easier for claimants in the U.S. and U.K. who have judgments against you in their country to enforce them here in Canada without having to sue you more than once.

### **3. What if you are sued and you decide not to defend?**

If you get sued and you decide not to defend,

your client can get a default judgment against you in Florida. The client can then come to Canada, register the judgment, and can now enforce that judgment against you as if it were a judgment obtained in your province or territory. The client can file writs against you, garnish your wages, and even get orders allowing them to sell your property to pay off the judgment they have against you. While no one can force you to attend in Florida to defend, a judgment abroad can still catch up to you here in Canada and you should keep this in mind before venturing into e-counselling. Clearly, if the client sues you here and is successful, there is no extra step to have the judgment registered, allowing the client to enforce it more quickly.

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## **Issue 2 – Certification**

Another issue that you need to consider is the regulations or laws in each jurisdiction relating to the profession of counselling. In each state in the United States, counselling is regulated. In Canada, counselling is regulated by statute in Quebec and Nova Scotia and soon will be regulated by statute in Ontario.

For example, if you live in Saskatchewan, where there are no set certifications or licenses required by law to counsel people, you would not be offside any laws if you opened up a practice and started providing counselling services. Now, if you decide to broaden your horizon and tap into the “online” market – allowing you to counsel people all around the globe via email, phone, etc. what happens when your client is located in a jurisdiction in which someone must be licensed by law in order to provide counselling? Could you be 'prosecuted' for not being licensed?

The answer to this dilemma would require an analysis of the laws of where the person you are counselling is located. It would be incumbent on you as the service provider to look into these laws prior to counselling someone abroad, or to obtain legal advice as to whether (1) you could be offside the local laws, and (2) what the possible consequences could be.

While it is unlikely that you could be forced to go to the country where the person is located if charges were brought against you, if it is somewhere you travel to often it could affect your ability to freely enter and leave that country should the legal consequences be serious enough.



### Issue 3 – Insurance

It is possible that any liability insurance you currently have in place might not cover e-counselling. You should check directly with your insurance provider. The contract for liability insurance coverage should be looked into to ensure that either (1) your current policy provides coverage or (2) that you may purchase an endorsement providing coverage. It would not be a good idea to leave yourself without coverage. If you were sued by someone abroad and you had no liability insurance coverage, you would have to pay a lawyer to defend you and be responsible for any judgment awarded against you.



#### How Can You Protect Yourself?

It is possible to 'contract out' of the laws of the client's place of residence, as well as the place that will have jurisdiction to hear the matter. These legal clauses are known as “choice of law” or “governing law” and “exclusive jurisdiction” clauses. While they are helpful in arguing that the law that should apply is that agreed to in the contract, it will not always be the case. The courts are quite willing to assert their 'discretion' and refuse to uphold these types of clauses. Also, “choice of law” clauses are really only one of many considerations that go into determining what law should apply to the contract. Ask directly for legal counsel regarding these clauses and their potential for your unique situation.

As in any 'commercial' relationship, the best way to protect yourself is to put everything in writing. This allows you to have proof of exactly what the client agreed to and what you agreed to provide. Should you limit what you are providing in the contract to services you know do not require certification you can protect yourself from 'prosecution'. Should you include 'choice of law' and “exclusive jurisdiction” clauses you can possibly pre-empt an action such as the Florida example, along with any chance of that jurisdiction's law applying.

As well, as mentioned earlier, it would be important to get legal advice, or to at least look into the licensure requirements and applicable laws that are in place in the residence of the potential client you will be e-counselling. You should also look into liability insurance to protect yourself should you get sued, for whatever reason.