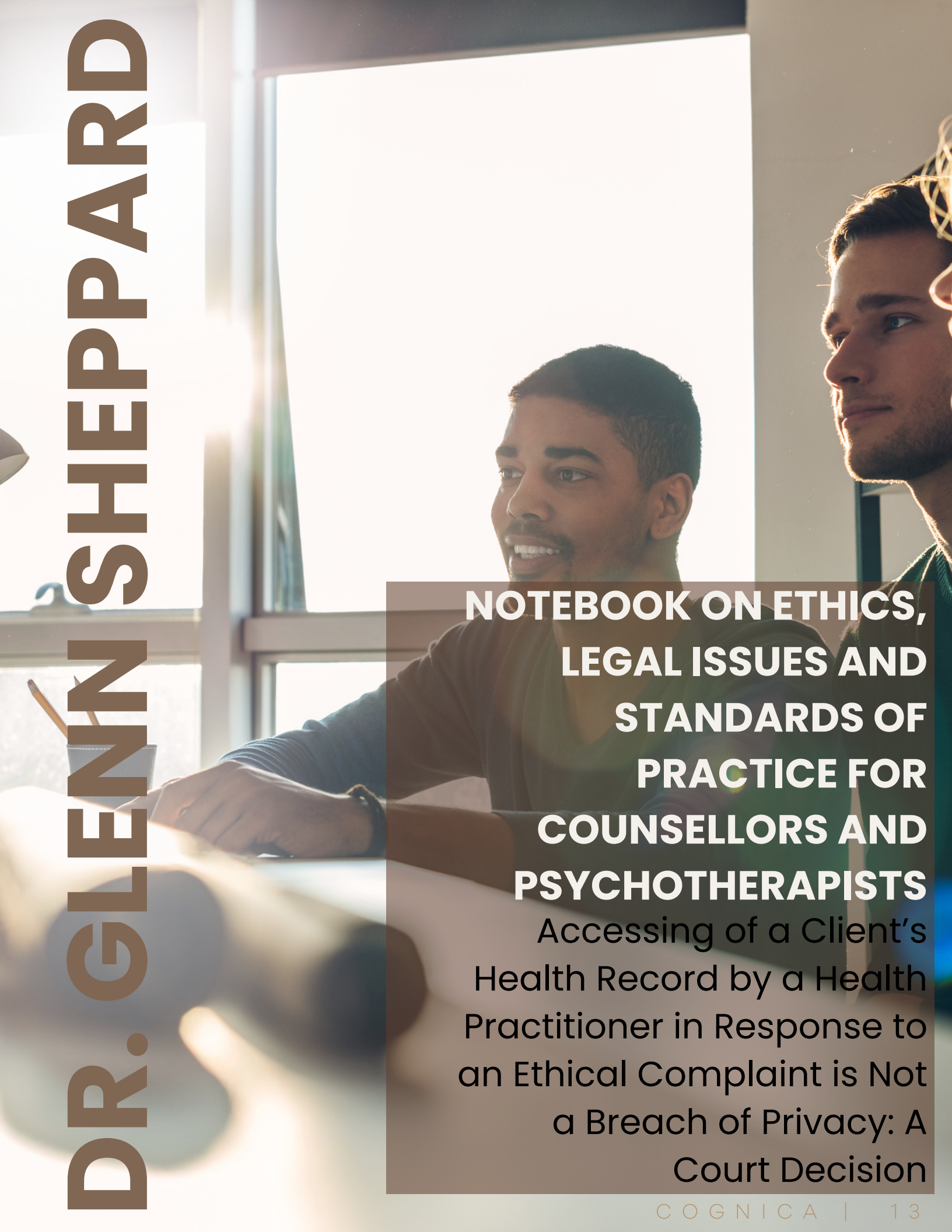

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NOTEBOOK ON ETHICS, LEGAL ISSUES AND STANDARDS OF PRACTICE FOR COUNSELLORS AND PSYCHOTHERAPISTS

Accessing of a Client's Health Record by a Health Practitioner in Response to an Ethical Complaint is Not a Breach of Privacy: A Court Decision

Dr. Glenn Sheppard

The maintenance of a client's confidentiality is a fundamental ethical obligation of members of the health professions. However, this obligation does not provide an absolute guarantee because there are certain circumstances under which confidentiality may be breached. One such condition is stated in the CCPA Standards of Practice "...when a client files a complaint or claims professional liability by the counsellors/therapists in a lawsuit" pg. 14. Prior to the enactment of the various provincial and national privacy legislation it was generally understood that an ethical complaint against a health practitioner gave permission to access the complainant's health files in order to prepare an informed response. This understanding was challenged in a 2016 decision by an adjudicator appointed by the Alberta Office of the Information and Privacy Commissioner. The issue before the Adjudicator resulted from a complaint by a mother against two physicians alleging that their medical care provided to her daughter displayed a "...a lack of knowledge, skill and/or judgment and contravened the College's Standards of Practice and/or Code of Conduct." In addition to this complaint to the regulatory college, another was against the health facility where these physicians worked. The mother granted permission for the college to access her daughter's medical files but when the physician did so in order to prepare their response to the complaint, she lodged a complaint to the Information and Privacy Commissioner alleging that their access was a breach of privacy legislation. The Adjudicator appointed by the Commissioner rendered a decision in favour of the complainant. This decision was made even

though the Alberta Health Information Act (HIA) in Section 27(1)(C) provides for the use of health information for the purpose of "Conducting investigations, discipline proceedings, practice reviews or inspections relating to the members of a health profession or health discipline."

Subsequently this decision was considered by the Alberta Court of Queen's Bench (2018 ACQB 70). The judge rejected the Adjudicator's decision and stated that it was unreasonable for the adjudicator to conclude that the doctors' use of their patient's personal health information to defend themselves did not fall within this provision 27(1)(C). The judge made the following observation:

What reasonable person reading and signing this form would think that the doctors in question might not access the information from Netcare to respond to the complaint?Remember that the doctors' treatment of the patient was then some six or seven years earlier. They cannot have been expected to respond from memory.

The conclusion the Court stated the following:

A reasonable interpretation of the privacy statue requires a balancing of the competing values identified in s2 of the Act. The adjudicator's interpretation gives prominence to the privacy of the individual over appropriate sharing and access of health information to manage the health system. A complaint to a professional governing body, like the College, engages potentially serious consequences to a physician including the loss of his or her license to practice. While the jeopardy faced by the physician is not that of a criminal proceeding, the physician must be able to respond to the complaint An interpretation that fails to balance competing values is unreasonable..

The Court also held the view that the patient's signed consent for the regulatory College to use her personal health information was also an authorization for the physician to use it as well.

This Court decision was appealed by the complainant to the Alberta Court of Appeal (JK v Gowrishankar, 2019 ABCA 316 (Canlii) and it dismissed the appeal and said the following:

Any investigation requires the gathering of relevant information. An investigation is also contextual in that the information gathered will depend on the nature of the matter being

investigated. At a minimum, it requires information surrounding the matter under investigation. It also assists the investigation if the person being investigated provides their response to the matter at issue. The response of the person being investigated is not for their personal benefit but for the benefit of the investigation as a whole.

It is interesting that the involvement of an adjudicator and judgments from two courts was not a challenge of the decision of the College to dismiss the complaint but dealt solely with the privacy issue. In conclusion, circumstances health practitioners in Alberta have the right to access their client's personal health records in order to respond to an ethical complaint from a patient. This access does not violate the privacy legislation in Alberta with respect to privacy protection. It is reasonable to assume that this case will be referenced to inform similar issues in other provinces in Canada. This case also serves as a reminder that ethical dilemmas always confront us with the challenge of making a decision when confronted with competing values.

Dr. Glenn Sheppard is President Emeritus of CCPA and is the CCPA Ethics Amicus. He was co-chair of the committees that created the first comprehensive Code of Ethics for CCPA and its various revisions and the committee that developed the first CCPA Standards of Practice. Dr Sheppard maintains the regular feature in Cognica entitled Notebook on Ethics, Standards of Practice , and Legal Issues for Counsellors and Psychotherapists. He works in private practice.