The Use of Medical Directives: Why, When & How?

Randy Zettle
Borden Ladner Gervais LLP

December 4, 2003

THE DELEGATION OF CONTROLLED ACTS AND THE USE OF MEDICAL DIRECTIVES

RANDY MICHAEL ZETTLE
BORDEN LADNER GERVAIS LLP
TORONTO

DECEMBER 4, 2003

The Legislative Framework

1. The Controlled Acts Model

In Ontario, the *Regulated Health Professions Act* (the "RHPA") governs and regulates the practice of twenty-two health professions. The RHPA establishes legal principles that are applicable to all of the regulated health professions. In addition, there are twenty-two profession specific acts that regulate the individual professions.

The RHPA establishes a general prohibition against the performance of thirteen controlled acts unless specific criteria are satisfied. Each profession, pursuant to the terms in its profession specific act, is authorized to perform the controlled acts that are appropriate for that profession's scope of practice. The RHPA contains a number of exceptions that permit individuals who are not members of a regulated health profession to perform controlled acts under certain specific circumstances. As well, the RHPA contains a number of exemptions allowing anyone to perform procedures that would otherwise be prohibited pursuant to the controlled acts model.

2. The *Regulated Health Professions Act*, 1991, S.O. 1991, c.18

The RHPA contains a general prohibition against the performance of controlled acts. Section 27(1) states:

> No person shall perform a controlled act set out in subsection (2) in the course of providing health care services to an individual unless:
>
> 1. the person is a member authorized by a health profession Act to perform the controlled act; or
>
> 2. the performance of the controlled act has been delegated to the person by a member described in clause (a)

Section 27(2) of the RHPA defines the thirteen controlled acts. Section 27(2) states:

A "controlled act" is any one of the following done with respect to an individual:

1. Communicating to the individual or his or her personal representative a diagnosis identifying a disease or disorder as the cause of the symptoms of the individual in circumstances in which it is reasonably foreseeable that the individual or his or her personal representative will rely on the diagnosis.

BORDEN
LADNER
GERVAIS

2. Performing a procedure on tissue below the dermis, below the surface of a mucous membrane, in or below the surface of the cornea, or in or below the surfaces of the teeth, including the scaling of teeth.

3. Setting or casting a fracture of a bone or a dislocation of a joint.

4. Moving the joints of the spine beyond the individual's usual physiological range of motion using a fast, low amplitude thrust.

5. Administering a substance by injection or inhalation.

6. Putting an instrument, hand or finger,
   (i) beyond the external ear canal,
   (ii) beyond the point in the nasal passages where they normally narrow,
   (iii) beyond the larynx,
   (iv) beyond the opening of the urethra,
   (v) beyond the labia majora,
   (vi) beyond the anal verge,
   (vii) or into an artificial opening in the body.

7. Applying or ordering the application of a form of energy prescribed by the regulations under this Act.

8. Prescribing, dispensing, selling or compounding a drug as defined in clause 117(1) of the *Drug and Pharmacies Regulation Act*, or supervising the part of a pharmacy where such drugs are kept.

9. Prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eyeglasses other than simple magnifiers.

10. Prescribing a hearing aid for a hearing impaired person.

11. Fitting or dispensing a dental prosthesis, orthodontic or periodontal appliance or device used inside the mouth to prevent the teeth from abnormal functioning.

12. Managing labour or conducting the delivery of a baby.

13. Allergy challenge testing of a kind in which a positive result of the test is a significant allergic response.

BORDEN
LADNER
GERVAIS

Regulation 107/96 prescribes the forms of energy referred to in controlled act number 7. Section 1 of Regulation 107/96 states:

> The following forms of energy are prescribed for the purpose of paragraph 7 of subsection 27(2) of the Act:
>
> 1. electricity for,
> i. aversive conditioning,
> ii. cardiac pacemaker therapy,
> iii. cardioversion,
> iv. defibrillation,
> v. electrocoagulation,
> vi. electroconvulsive shock therapy,
> vii. electromyography,
> viii. fulguration,
> ix. nerve conduction studies, or
> x. transcutaneous cardiac pacing.
>
> 2. Electromagnetism for magnetic resonance imaging.
>
> 3. Soundwaves for,
> i. diagnostic ultrasound, or
> ii. lithotripsy.

The RHPA allows for the delegation of controlled acts in section 28, which states:

> (1) The delegation of a controlled act by a member must be in accordance with any applicable regulations under the health profession Act governing the members' profession.
>
> (2) The delegation of a controlled act to a member must be in accordance with any applicable regulations under the health profession Act governing the members' profession.

BORDEN LADNER GERVAIS

The RHPA contains a number of exceptions that permit individuals who are not members of a regulated health profession to perform controlled acts under specific circumstances. These exceptions are set out in section 29(1), which states:

> An act by a person is not a contravention of subsection 27(1) if it is done in the course of:
>
> (a) rendering first aid or temporary assistance in an emergency;
>
> (b) fulfilling the requirements to become a member of a health profession and the act is within the scope of practice of the profession and is done under the supervision or direction of a member of the profession;
>
> (c) treating a person by prayer or spiritual means in agreement with the tenets of the religion of the person giving the treatment;
>
> (d) treating a member of a person's household and the act is a controlled act set out in paragraph 1, 5 or 6 of subsection 27(2); or
>
> (e) assisting a person with his or her routine activities of living and the act is a controlled act set out in paragraph 5 or 6 of subsection 27(2).

In addition, the RHPA provides for a number of exemptions which allow individuals to perform procedures that would otherwise qualify as controlled acts. Section 27(3) states: "An act by a person is not a contravention of subsection (1) if the person is exempted by the regulations under this Act or if the act is done in the course of an activity exempted by the regulations under this Act." The exemptions are set out in Regulation 107/96. They include:

1. Anyone may perform:

(a) Acupuncture;

(b) Ear or body piercing for the purpose of accommodating a piece of jewellery;

(c) Electrolysis;

(d) Tattooing for cosmetic purposes; and

(e) Male circumcision as part of a religious tradition or ceremony;

2. Taking a blood sample from a vein or by skin pricking if the person is employed by a laboratory or specimen collection centre licensed under the *Laboratory and Specimen Collection Centre Licensing Act*;

3. A naturopath may carry on activities that are within the scope of practice of naturopathy and in accordance with the *Drugless Practitioners Act* and the regulations under that Act;

4. A medical geneticist who holds a doctorate may communicate a diagnosis of a genetic disease or disorder if:

(a) the disease or disorder identified is within the geneticist's area of expertise; and

(b) The geneticist is employed by a university or heath care facility and the communication of the diagnosis is performed in accordance with the university's or facility's established guidelines or protocols;

5. A Registered Nurse may prescribe a solution of normal saline (0.9%) for venipuncture performed to establish peripheral intravenous access and maintain patency.

3. *The Position of the College and Physicians & Surgeons of Ontario*

The College of Physicians and Surgeons of Ontario (the "CPSO") addressed the issue of delegating controlled acts in its policy entitled "The Delegation of Controlled Acts". Under "Introduction", the CPSO's policy states:

> The purpose of such delegation is to provide higher quality care to patients and to assist physicians in their clinical practice. ...
>
> Any such delegation should be in accordance with the following guidelines. These guidelines will serve as a reference point for assessing practice if there is concern about a specific circumstance in which delegation occurred.

Under the subheading "Establish the Physician–Patient Relationship", under the heading "Guidelines for the Delegation of Controlled Acts", the CPSO's policy states:

> The overriding principle of any delegation is to ensure that the delegation occurs within an established physician-patient relationship. The physician interviews the patient, performs an assessment, makes recommendations, obtains an informed consent to proceed, and institutes a course of therapy. It is within this context that the physician is granted the authority to perform controlled acts on a patient and therefore the opportunity to delegate some portion(s) of the interaction.
>
> If there is not a physician-patient relationship that establishes a right on the part of the doctor to provide care to that patient, the physician should not delegate the performance of controlled acts to other individuals.
>
> There are circumstances within publicly-operated health programs where physicians do delegate controlled acts to others without establishing a physician-patient relationship. Examples include the provision of emergency care in the community by paramedics, under the direct control of base hospital physicians, or the provision of primary healthcare within public health programs. These arrangements have established protocols and built-in checks and balances to provide proper quality control and accountability. This structure of control and public accountability provides a proper basis upon which delegation may occur with good public protection even though there is no traditional physician/patient relationship.
>
> Any physician contemplating delegation outside the context of an established physician-patient relationship should contact the College for guidance.

When contemplating delegation to an individual who is a member of another regulated health profession, the CPSO's policy states:

> Where the individual to whom the act is being delegated is a member of a regulated health profession, make sure the delegation conforms to the regulations, policies and/or guidelines of that health profession. If it does not, the delegatee will not be able to carry out the delegation as directed.

When considering whether to delegate a controlled act, it is very important to identify the risk involved in delegating the act. With respect to this issue, the CPSO's policy states:

> Some procedures in some circumstances carry sufficient risk that they should only be performed by a physician. This is a key concept of the controlled acts model. The physician should analyze the potential harm associated with the performance of a controlled act and be satisfied that delegating the act does not increase the risk to the patient. Vital in the process is consideration of the setting in which the procedure will be performed. Also, the physician should be aware of any general restrictions, conditions and/or contraindication to performing the delegated act.

With respect to obtaining the informed consent of the patient on whom a delegated controlled act will be performed, the CPSO's policy states:

> Physicians should be aware of the increased duty to obtain an informed consent and to make full disclosure to patients in circumstances where the procedure will be done by a non-physician. Physicians should make all reasonable efforts to satisfy themselves that the patient is made aware of the true qualifications of the person performing the act and that the consent to this procedure is informed and based on fair disclosure.
>
> The patient's consent should be documented on the medical record.

With respect to supervising the delegation of a controlled act, the CPSO's policy states:

> A physician delegating a controlled act to another party should provide the appropriate level of supervision to ensure that the act is performed properly and safely. The amount and nature of the supervision will vary with the assessment of risk by the delegating physician. The assessment should take into account the circumstances under which the procedure will be performed, the qualifications of the person performing it, and any specific risks which are associated with the performance of that act.
>
> It is important to remember that at all times, the accountability and responsibility for the delegation of the controlled act remain with the delegating physician. The responsibility for the performance of

the controlled act also remains with the delegating physician unless the individual performing the controlled act is a registered health professional and is authorized to perform the act.

4. The *Nursing Act, 1991,* S.O. 1991, c.32

The scope of practice is set out in section 3 of the Act as:

> The practice of nursing is the promotion of health and the assessment of, the provision of care for and the treatment of health conditions by supportive, preventive, therapeutic, palliative and rehabilitative means in order to attain or maintain optimum function.

The controlled acts authorized to nursing are set out in section 4 of the Act, which states:

In the course of engaging in the practice of nursing, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to perform the following:

1. Performing a prescribed procedure below the dermis or a mucous membrane.

2. Administering a substance by injection or inhalation;

3. Putting an instrument, hand or finger,
   - i. beyond the external ear canal;
   - ii. beyond the point in the nasal passages where they normally narrow;
   - iii. beyond the larynx,
   - iv. beyond the opening of the urethra,
   - v. beyond the labia majora,
   - vi. beyond the anal verge, or
   - vii. into an artificial opening into the body.

Section 5(1) sets out the <u>further requirements</u> required for the performance of these controlled acts. Section 5(1) states:

A member <u>shall not</u> perform a procedure under the authority of section 4 unless:

(a) the performance of the procedure by the member is permitted by the regulations and the member performs the procedure in accordance with the regulations; or

(b) the procedure is ordered by a person who is authorized to do the procedure by section 5.1 of this Act or by the *Chiropody Act, 1991, the Dentistry Act, 1991, the Medicine Act, 1991* or the *Midwifery Act, 1991*.

(a) *Registered Nurses in the Extended Class of Registration ("RNEC")*

Registered Nurses who hold an extended certificate of registration ("RNEC") are authorized to perform more controlled acts than nurses who are registered in only the general class. Section 5.1 sets out the additional controlled acts that may be performed by RNECs. Section 5.1 states:

(1) In the course of engaging in the practice of nursing, a member who is a registered nurse and who holds an extended certificate of registration in accordance with the regulations is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to perform the following acts in addition to those the member is authorized to perform under section 4:

1. Communicating to a patient or to his or her representative a diagnosis made by the member identifying, as the cause of the patient's symptoms, a disease or disorder that can be identified from,

   (i) the patient's health history,
   (ii) the findings of a comprehensive health examination; or
   (iii) the results of any laboratory tests or other tests and investigations that the member is authorized to order or perform.

2. Ordering the application of a form or energy prescribed by the regulations under this Act.

3. Prescribing a drug designated in the regulations.

4. Administering, by injection or inhalation, a drug that the member may prescribe under paragraph 3.

BORDEN LADNER GERVAIS

Regulation 275/94 under the *Nursing Act* further delineates the limitations on the performance of controlled acts by nurses in both the general and extended classes. The pertinent sections are:

14. All procedures on tissue below the dermis or below the surface of a mucous membrane are prescribed for the purpose of paragraph 1 of section 4 of the Act.

15. (1) for the purpose of clause 5(1)(a) of the Act, a registered nurse in the general class may perform a procedure set out in subsection (4) if he or she meets all of the conditions set out in subsection (5).

(2) for the purpose of clause 5(1)(a) of the Act, any member may perform a procedure set out in subsection (4) if the procedure is ordered by a registered nurse in the general class or a registered nurse in the extended class.

(3) No registered nurse in the general class and no registered nurse in the extended class shall order a procedure set out in subsection (4) unless he or she meets all of the conditions set out in subsection (5).

(4) The following are the procedures referred to in subsections (1), (2) and (3):

1. with respect to the care of a wound below the dermis or below a mucous membrane, any of the following procedures:
   (i) cleansing,
   (ii) soaking,
   (iii) irrigating,
   (iv) probing,
   (v) debriding,
   (vi) packing,
   (vii) dressing.

2. Venipuncture to establish peripheral intravenous access and maintain patency, using a solution of normal saline (0.9 per cent), in circumstances in which,
   (i) the individual requires medical attention, and
   (ii) delaying venipuncture is likely to be harmful to the individual,

3. A procedure that, for the purpose of assisting an individual with health management activities, requires putting an instrument,

(i) beyond the point in the individual's nasal passages where they normally narrow,
(ii) beyond the individual's larynx, or
(iii) beyond the opening of the individual's urethra.

4. A procedure that, for the purpose of assessing an individual or assisting an individual with health management activities, requires putting an instrument or finger,
(i) beyond the individual's anal verge, or
(ii) into an artificial into the individual's body.

5. A procedure that, for the purpose of assessing an individual or assisting an individual with health management activities, requires putting an instrument, hand or finger beyond the individual's labia majora.

(5) The following are the conditions referred to in subsections (1) and (3):

1. The registered nurse has the knowledge, skill and judgment to perform the procedure safely, effectively and ethically.

2. The registered nurse has the knowledge, skill and judgment to determine whether the individual's condition warrants performance of the procedure.

3. The registered nurse determines that the individual's condition warrants performance of the procedure, having considered,
(i) the known risks and benefits to the individual of performing the procedure,
(ii) the predictability of the outcome of performing the procedure,
(iii) the safeguards and resources available in the circumstances to safely manage the outcome of performing the procedure, and
(iv) other relevant factors specific to the situation.

4. The registered nurse accepts sole accountability for determining that the individual's condition warrants performance of the procedure.

16. Sections 14 and 15 do not authorize a member to prescribe a drug as defined in subsection 117(1) of the *Drug and Pharmacies Regulation Act.*

BORDEN
LADNER
GERVAIS

17. For the purpose of clause 5(1)(a) of the Act, a registered nurse in the extended class may perform any of the following procedures if he or she meets all of the conditions set out in subsection 15(5):

1. With respect to the care of a wound below the dermis or below the surface of a mucous membrane, any of the following procedures:
   (i) cleansing,
   (ii) soaking,
   (iii) irrigating,
   (iv) probing,
   (v) debriding,
   (vi) packing,
   (vii) dressing,
   (viii) suturing, except below the fascia and except in cases in which there may be underlying damage.

2. Venipuncture to establish peripheral intravenous access.

3. Venipuncture to obtain a blood sample for a test set out in Appendix C of Regulation 682 of the Revised Regulations of Ontario, 1990 (Laboratories) made under the *Laboratory and Specimen Collection Centre Licensing Act*.

4. A procedure that, for the purpose of assessing or treating an individual or assisting an individual with health management activities, requires putting an instrument,
   (i) beyond the point in the individual's nasal passages where they normally narrow,
   (ii) beyond the individual's larynx, or
   (iii) beyond the opening of the individual's urethra.

5. A procedure that, for the purpose of assessing or treating an individual, assisting an individual with health management activities or making a diagnosis with respect to an individual, requires putting an instrument or finger,
   (i) beyond the individual's anal verge, or
   (ii) into an artificial opening into the individual's body.

6. A procedure that, for the purpose of assessing or treating or assisting an individual with health management activities or making a diagnosis with respect to an individual, requires putting an instrument, hand or finger beyond the individual's labia majora.

18. For the purposes of paragraph 2 of subsection 5.1(1) of the Act, the application of sound-waves for diagnostic ultrasound of the abdomen, pelvis and breast may be ordered by a registered nurse in the extended class.

19. (1) For the purposes of paragraph 3 of subsection 5.1(1) of the Act, the following drugs are designated:
    1. an immunizing agent set out in Schedule 2.
    2. a drug set out in Schedule 3.
    3. any drug that may lawfully be purchased or acquired without a prescription.

    (2) If circumstances are set out opposite a drug set out in Schedule 3, a registered nurse in the extended class shall only prescribe the drug under paragraph 2 of subsection 1(1) in those circumstances.

20. For the purposes of subsection 5.1(2) of the Act, the prescribed standards of practice respecting consultation with members of other health professions shall be those set out in the publication of the College entitled "Standards of Practice for Registered Nurses who hold an Extended Certificate of Registration", as that publication exists and is amended from time to time by the College.

In light of the requirements of the *Nursing Act* and the regulations thereunder, RNs and RNECs who meet certain conditions have the authority to initiate specific controlled acts. In contrast, a medical order is a mandatory prerequisite to nurses performing:

1. A procedure which is a controlled act that is not authorized to nursing, but which may be delegated to a nurse. The College of Nurses of Ontario presently sanctions the delegation of: electrical defibrillation; transcutaneous cardiac pacing and all other forms of cardiac pacemaker adjustment (by a RN only); casting a fracture of a bone or dislocation of a joint; application of electrocautery and dispensing; and

2. A procedure/treatment/intervention that is not included within the RHPA, but is included in other legislation, such as the ability to order x-rays pursuant to the *Healing Arts Radiation Protection Act*.

BORDEN
LADNER
GERVAIS

5. (a) The *Medical Radiation Technology Act, 1991*, S.O. 1991, c.29

The scope of practice is set out in section 3 of the Act as:

> The practice of medical radiation technology is the use of ionizing radiation and other forms of energy prescribed under subsection 12(2) to produce diagnostic images and tests, the evaluation of the technical sufficiency of the images and tests, and the therapeutic application of ionizing radiation.

The controlled acts authorized to medical radiation technology are set out in section 4 of the Act, which states:

> In the course of engaging in the practice of medical radiation technology, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to perform the following:
>
> 1. Taking blood samples from veins.
>
> 2. Administering substances by injection or inhalation.
>
> 3. Administering contrast media through or into the rectum or an artificial opening into the body.
>
> 4. Tattooing.

Section 5(1) sets out the <u>further requirements</u> required for the performance of these controlled acts. Section 5(1) states:

> A member shall not perform a procedure under the authority of section 4 unless the procedure is ordered by a member of the College of Physicians and Surgeons of Ontario.

5. (b) *The Healing Arts Radiation Protection Act*, R.S.O. 1990, c.H.2

The ordering and performance of x-rays is governed by the *Healing Arts Radiation Protection Act* ("HARP"). Section 6 of HARP specifies who may order x-rays. Section 6 states:

BORDEN
LADNER
GERVAIS

(1) No person shall operate an X-ray machine for the irradiation of a human being unless the irradiation has been prescribed by,

(a) a legally qualified medical practitioner;

(b) a member of the Royal College of Dental Surgeons of Ontario;

(c) a member of the College of Chiropodists of Ontario who has been continuously registered as a Chiropodist under the *Chiropody Act* and the *Chiropody Act, 1991* since before November 1, 1980 or who is a graduate of a 4-year course of instruction in Chiropody;

(d) a member of the College of Chiropractors of Ontario; or

(f) a person registered as an osteopath under the *Drugless Practitioners Act*, R.S.O. 1990, cH.2.

(2) Despite subsection (1), a person may operate an X-ray machine for the irradiation of the chest, the ribs, the arm, the wrist, the hand, the leg, the ankle or the foot of a human being if the irradiation is prescribed by a member of the College of Nurses of Ontario who holds an extended certificate of registration under the *Nursing Act, 1991*.

(3) Despite subsection (1), a person may operate an X-ray machine for the purpose of performing a mammography that has been prescribed by a member of the College of Nurses of Ontario who holds an extended certificate of Registration under the *Nursing Act, 1991*.

Accordingly, pursuant to section 6 of HARP, a Medical Radiation Technologist may only operate an x-ray machine when the x-rays have been ordered by a physician, dentist, chiropodist, chiropractor or osteopath. Pursuant to section 6(1), registered nurses in the general class are not permitted to order x-rays. However, pursuant to sections 6(2) and 6(3) of HARP, RNECs are permitted to order x-rays of the chest, ribs, arm, wrist, hand, leg, ankle or foot, and to order mammograms.

BORDEN
LADNER
GERVAIS

5. The *Respiratory Therapy Act, 1991*, S.O. 1991, c.39

The scope of practice is set out in section 3 of the Act as:

> The practice of respiratory therapy is the providing of oxygen therapy, cardio-respiratory equipment monitoring and the assessment and treatment of cardio-respiratory and associated disorders to maintain or restore ventilation.

The controlled acts authorized to respiratory therapy are set out in section 4 of the Act, which states:

> In the course of engaging in the practice of respiratory therapy, a member is authorized, subject to the terms, conditions and limitations imposed on his or her certificate of registration, to perform the following:
>
> 1. Performing a prescribed procedure below the dermis.
>
> 2. Intubation beyond the point in the nasal passages where they normally narrow or beyond the larynx.
>
> 3. Suctioning beyond the point in the nasal passages where they normally narrow or beyond the larynx.
>
> 4. Administering a substance by injection or inhalation.

Section 5(1) sets out the <u>further requirements</u> required for the performance of these controlled acts. Section 5(1) states:

> A member shall not perform a procedure under the authority of paragraph 1, 2 or 4 of section 4 unless the procedure is ordered by,
>
> (a) a member of the College of Physicians and Surgeons of Ontario, the College of Midwives of Ontario or the Royal College of Dental Surgeons of Ontario;
>
> (b) a member of the College of Nurses of Ontario who holds an extended certificate of registration under the *Nursing Act, 1991*; or
>
> (c) a member of a health profession that is prescribed by regulation.

BORDEN
LADNER
GERVAIS

Regulation 596/94 under the *Respiratory Therapy Act* contains further information about "prescribed procedures" in Part VII. The following sections are worthy of note:

48. The following procedures are prescribed as procedures below the dermis for the purposes of paragraph 1 of section 4 of the Act:

1. Basic Procedures:

   (i) Arterial puncture

   (ii) Capillary puncture

   (iii) Tracheostomy tube change for an established stoma.

   (iv) Transtracheal catheter change for an established stoma.

2. Added Procedures:

   (i) Removal of a cannula.

   (ii) Manipulation or repositioning of a cannula.

   (iii) Aspiration from a cannula.

   (iv) Venapuncture.

   (v) Suturing to secure indwelling cannulae.

   (vi) Transtracheal catheter change for a fresh stoma that is less than 7 weeks.

   (vii) Tracheostomy tube change for a fresh stoma that is less than 7 days but not less than 24 hours.

   (viii) Manipulation or reposition of a cannula balloon.

3. Advanced Procedures:

   (i) Insertion of a cannula.

   (ii) Chest needle insertion, aspiration, reposition and removal.

   (iii) Chest tube insertion, aspiration, reposition and removal.

49(1) It is a condition of a general certificate of registration that a member not perform an advanced procedure unless the member has, within 2 years before the procedure is performed, successfully completed a certification process or program approved by the Registration Committee of the College.

6. The *Public Hospitals Act*, R.S.O. 1990, c.P.40

"Treatment" is defined in the *Public Hospitals Act* as:

> the maintenance, observation, medical care and supervision and skilled nursing care of a patient and, if dental service is made available in a hospital by its board, includes the dental care and supervision of the patient.

For the purposes of Regulation 965, the "Hospital Management" regulation under the *Public Hospitals Act*, "extended class nursing staff" is defined to mean those Registered Nurses in the Extended Class in a hospital:

(a) who are employed by the hospital and are authorized to diagnose, prescribe for or treat out-patients in the hospital, and

(b) who are not employed by the hospital and to whom the board has granted privileges to diagnosis, prescribe for or treat out-patients in the hospital.

Section 11 of Regulation 965 addresses who may order a patient's admission to hospital. This section states:

(1) No person shall be admitted to a hospital as a patient except,

(a) on the order or under the authority of a physician who is a member of the medical staff;

(b) on the order or under the authority of an oral and maxillofacial surgeon who is a member of the dental staff;

(b.1) if the person is being admitted for treatment by a dentist who is a member of the dental staff other than an oral and maxillofacial surgeon, on the joint

order of the dentist and a physician who is a member of the medical staff; or

(c) on the order or under the authority of a midwife who is a member of the midwifery staff.

(2) No physician, dentist or midwife shall order the admission of a person to a hospital unless, in the opinion of the physician, dentist or midwife, it is clinically necessary that the person be admitted.

(3) No person shall be registered in a hospital as an out-patient except,

(a) on the order or under the authority of a member of the medical staff, midwifery staff or extended class nursing staff;

(b) on the order or under the authority of a member of the dental staff who is an oral or maxillofacial surgeon;

(b.1) in the case of a person who is an out-patient solely for the purpose of attending a dental clinic in a hospital, on the order or under the authority of a member of the dental staff;

The authority to discharge patients from hospital is addressed in section 16 of Regulation 965, which states:

(1) If a patient is no longer in need of treatment in the hospital, one of the following persons shall make an order that the patient be discharged and communicate the order to the patient:

1. The attending physician or midwife or, if the attending dentist is an oral and maxillofacial surgeon, the attending dentist.

2. A member of the medical, dental or midwifery staff designated by a person referred to in paragraph 1.

The authority to provide orders for treatment is addressed in section 24 of Regulation 965, which states:

> (1) Every order for treatment or for a diagnostic procedure of a patient shall, except as provided in subsection (2), be in writing and shall be dated and authenticated by the physician, dentist, midwife or registered nurse in the extended class giving the order.
>
> (2) A physician, dentist, midwife or registered nurse in the extended class may dictate an order for treatment or for a diagnostic procedure by telephone to a person designated by the administrator to take such orders.
>
> (3) Where an order for treatment or for a diagnostic procedure has been dictated by telephone,
>
> (a) the person to whom the order was dictated shall transcribe the order, the name of the physician, dentist, midwife or registered nurse in the extended class who dictated the order, the date and the time of receiving the order and shall authenticate the transcription; and
>
> (b) the physician, dentist, midwife or registered nurse in the extended class who dictated the order shall authenticate the order on the first visit to the hospital after dictating the order.

Registered Nurses in the Extended Class (RNEC)

The combined effect of the legislative amendments in 1998 was to create a class of nurses (RNEC) capable of performing a number of controlled acts and procedures that their colleagues in the general class cannot. In addition to the three controlled acts authorized to nursing, RNECs have the authority to perform the following controlled acts:

1. Communicating to a patient or his/her representative a diagnosis made by the RNEC, identifying as the cause of a patient's symptoms, a disease or disorder that can be identified from:

   (a) the patient's health history;
   (b) the findings of a comprehensive examination; or

(c) the results of any laboratory tests or other tests and investigations that the RNEC is authorized to order or perform;

2. Ordering the application of a form of energy including: x-rays of the chest, ribs, arm, wrist, hand, leg, ankle or foot; mammograms; and diagnostic ultrasounds of the abdomen, pelvis or breast;

3. Prescribing designated drugs (including prescribed immunizing agents); and

4. Administering a drug by inhalation or injection that the RNEC has prescribed.

The regulations under the *Nursing Act* allow RNECs to perform and order a number of additional acts/procedures on their own patients. The additional procedures that a RNEC may perform and order are:

1. suturing, except when it is below the fascia or when there may be underlying damage;

2. venipuncture to establish peripheral intravenous access and to decide on the type of IV solution, the rate and duration of the infusion;

3. venipuncture to obtain blood samples for designated laboratory tests;

4. procedures that involve putting an instrument: beyond the point in the nasal passages where they normally narrow; beyond the individual's larynx; and beyond the opening of the urethra, for the purpose of assessing or treating, or assisting an individual with health management activities;

5. a procedure that requires putting an instrument, hand or finger: beyond the anal verge; or, into an artificial opening into the individual's body, for the purpose of assessing or treating an individual, assisting an individual with health management activities or making a diagnosis with respect to that individual; and

6. a procedure that requires putting an instrument, hand or finger beyond the individual's labia majora for the purpose of assessing or treating an individual, or assisting an individual with health management activities, or for making a diagnosis with respect to that individual.

BORDEN LADNER GERVAIS

Limitations on RNECs in the Hospital Setting

Section 24 of the Hospital Management Regulation appears to limit the scope of practice of RNECs in public hospitals.

Only physicians, midwives, oral and maxillofacial surgeons, and in certain circumstances dentists, can order the admission of a patient to hospital and his/her subsequent discharge.

With respect to hospital outpatients, RNECs may diagnose, prescribe for or treat them, providing that the RNECs are employees of the hospital and authorized by it to do so, or they are not employed by the hospital and the hospital's board has granted them privileges to do so. The scope of the RNECs treatment of hospital outpatients is limited by their scope of practice. Hospital management must remain cognizant of the fact that RNECs are not physicians, interns, residents or post-graduate medical trainees. They are Registered Nurses with additional training and skills. Therefore, in many situations, their ability to provide care to hospital outpatients will not be equivalent to that of physicians or post-graduate medical trainees.

With respect to hospital inpatients, the legislation appears to preclude RNECs from providing orders for treatment. Accordingly, RNECs appear to be restricted, with respect to hospital inpatients, to providing the same level of care as their nursing counterparts in the general class. Accordingly, for hospital inpatients, RNECs may only perform the additional acts available to them under their extended certificate of registration providing that those acts are delegated to them by means of appropriately drafted medical directives. In developing appropriate medical directives, hospital management must remain cognizant of the fact that RNECs are not physicians, interns, residents or post-graduate medical trainees. They are Registered Nurses with additional training and skills. In developing medical directives for RNECs, it is imperative that they not be equated with post-graduate medical trainees.

Medical Directives

A medical order is a prescription for a drug, treatment, procedure or intervention. Medical orders exist in two forms.

A direct order is a prescription for a procedure, treatment, drug or intervention for a particular patient, given by a specific physician, to be implemented or administered in accordance with its specific terms. *A direct order is patient specific*. It may be either written or verbal.

A medical directive is a prescription for a treatment, drug, procedure or intervention that may be performed for a range of patients when specific conditions and circumstances exist. A medical directive contains specific conditions that must be met and specific circumstances that must exist *before* the medical directive can be implemented. *A medical directive is not patient specific*. It is always written.

Medical directives create a form of blanket delegation from physicians to carry out the treatments, interventions or procedures that are specified in the directives, providing that certain conditions and circumstances exist. The physicians delegate treatments, procedures or interventions that may be performed on any given patient, providing that the patient strictly satisfies the criteria set out in the directive.

A medical directive is not only used to delegate controlled acts. While in most cases medical directives are used to delegate controlled acts, they may also be used to order a procedure, treatment or intervention that does not involve a controlled act. For example, a medical directive may be used to provide instructions for dressings on superficial wounds (not a controlled act).

Because medical directives are prescriptions or orders for treatment, they must be authorized by the specific physician(s) whose patients will receive treatment pursuant to them. It would be inappropriate for a medical directive that applied to all of the patients of a department or division of a hospital to be authorized by only a single physician or the Chief of the department or division. As noted previously, the College of Physicians and Surgeons of Ontario has stated: "the overriding principle of any delegation is to ensure that the delegation occurs within an established physician-patient relationship". Given that the Chief of a department or division will not personally be treating all of the patients who will be receiving treatment pursuant to the medical directive, it would be inappropriate to institute a medical directive pursuant to which he/she provides orders for the investigation and/or treatment of all of the patients seen within his/her department or division. When drafting medical directives, this is a pitfall to be avoided.

1. *The Issue of Informed Consent*

A medical directive cannot be instituted until the patient has provided his/her informed consent to the treatment, intervention or procedure that is to be performed pursuant to the directive. In a medical directive, a physician proposes that a specific treatment (i.e. an x-ray) be performed for a range of patients who meet certain conditions. Instituting a medical directive raises the possibility that a physician may not be available to obtain the patient's informed consent to the proposed treatment. Under these circumstances, the physician is also delegating the responsibility for obtaining the patient's informed consent for the proposed treatment, intervention or procedure. Obtaining informed consent includes the

provision of information and the ability to answer questions about the material risks and benefits of the procedure, treatment or intervention proposed. If the individual who will be enacting the medical directive is unable to provide the information that a reasonable person would want to know in the circumstances, the delegation of the treatment, intervention or procedure by means of a medical directive is inappropriate.

2. *The Development and Implementation of Medical Directives*

a. *General Considerations*

When a Hospital is considering whether to develop and implement medical directives, the following issues should be addressed:

(i) The risks associated with delegating the controlled act must be very seriously considered and assessed. Some procedures, treatments or interventions carry sufficient risk(s) that they should only be performed by a physician. The potential harm associated with the performance of a controlled act should be thoroughly analysed and considered. The hospital should satisfy itself that delegating the controlled act will not increase the risk(s) to its patients. This analysis should include a consideration of the setting in which the procedure, treatment or intervention will be performed, as well as the knowledge of any restrictions, prerequisite conditions and/or contraindications to performing it;

(ii) What is the nature of the procedure, treatment or intervention? Can it be appropriately ordered by means of a medical directive? Is the nature of the procedure, treatment or intervention such that it requires a hands-on assessment by a physician prior to its initiation? In other words, is it more appropriately dealt with by means of a direct patient specific order, rather than a generic order that is applicable to a range of patients providing that certain conditions and circumstances are satisfied?;

(iii) Is the nature of the procedure, treatment or intervention such that it would be inappropriate for members of the nursing staff to be obtaining patients' informed consent prior to its initiation? If so, it is better dealt with by a direct patient specific order;

(iv) Which physicians are willing to participate in the use of the medical directive(s)? All of the physicians in the department or only a select number? Unless all of the physicians in a department agree to utilize the medical directive(s), they will be administratively difficult to institute and the risk that they will be inappropriately initiated will increase;

(v) What is the appropriate level of care provider - Unregulated Care Providers ("UCPs"), Registered Nurses ("RNs"), Registered Practical Nurses ("RPNs"), or some other regulated health care professional?;

(vi) Who may implement the medical directive - UCPs, RPNs, RNs or some other regulated health care professional? Will the medical directive apply to all RNs or RPNs, or to only a select subset? Will the implementation of the medical directive be restricted to only specific nurses who have special knowledge, training, or skill?;

(vii) What documentation will be required when the medical directive is implemented? At a minimum, it should be documented that the actions of the nursing staff were taken pursuant to the medical directive. Where a medical directive is patient specific, a copy of the directive should be placed in the patient's medical record and retained for the same duration as other health records pursuant to the requirements of the Public Hospitals Act;

(viii) The RHPA requires physicians to confine their medical practice to those areas of medicine in which they are suitably trained and experienced. Accordingly, a physician may only delegate those procedures, treatments and interventions for which he/she personally has the knowledge, skill and ability to perform. It would be inappropriate for a physician to delegate the performance of a controlled act that he/she is not capable of performing personally, and which does not form part of his/her regular practice;

(ix) Where the individual to whom the controlled act is being delegated is a member of a regulated health profession, one must ensure that the delegation conforms to the regulations, policies and/or guidelines of that health profession. If it does not, the delegatee will not be able to carry out the proposed delegation;

(x) Because medical directives are prescriptions or orders for treatment, they must be authorized by the specific physician(s) whose patients will receive treatment pursuant to them. It would be inappropriate for a medical directive that applied to all of the patients of a department or division of a hospital to be authorized by only a single physician or the Chief of the department or division. As noted previously, the College of Physicians and Surgeons of Ontario has stated: "the overriding principle of any delegation is to ensure that the delegation occurs within an established physician-patient relationship". Given that the Chief of a department or division will not personally be treating all of the patients who will be receiving treatment pursuant to the medical directive, it would be inappropriate to institute a medical directive pursuant to which he/she provides orders for the investigation and/or treatment of all of the patients

seen within his/her department or division. When drafting medical directives, this is a pitfall to be avoided;

(xi) It is strongly recommended that all of the physicians who are authorizing a medical directive be required to sign a copy of the directive, which is preserved by the hospital, as confirmation of their agreement with the contents and implementation of the directive; and

(xii) Of necessity, a medical directive will have to be updated each time there is a medical staff change within the department or division to which the directive applies. The name(s) of the new staff physician(s) will need to be added to the existing medical directive and he/she/them will be required to "sign on" to the directive.

b. ***Contents of Medical Directives***

The following information should be included in a medical directive:

(i) The name, and a description, of the procedure, treatment or intervention being ordered;

(ii) An itemized and detailed list of the specific clinical conditions that must be met before the directive can be implemented;

(iii) An itemized and detailed list of any situational circumstances that must exist before the directive can be implemented;

(iv) A comprehensive list of contraindications to the implementation of the directive. While it is up to each institution to decide how comprehensive the list of contraindications will be, it is advisable that the list be very thorough and detailed. Physicians should not assume that the individual carrying out the medical directive will know all of the contraindications. As such, they should be explicitly set out on its face;

(v) The individual(s) authorized to implement the directive. This list should be specific and detailed;

(vi) The physician(s) authorizing the directive; and

(vii) A list of the administrative approvals that were provided to the directive. The date(s) and each committee should be specifically listed.

BORDEN
LADNER
GERVAIS

c. ***Who should be involved in the development of a medical directive?***

A medical directive is a prescription for a procedure, treatment or intervention that may be implemented for a range of patients when specific conditions and circumstances exist. Although a medical directive is strictly speaking a physician's order, it significantly impacts on a number of other health care professionals who will be involved in the patient's care. Accordingly, the development of medical directives should be a collaborative team approach. All of the health care professionals who may be affected, either directly or indirectly, by the medical directive should be involved and have input into its development.

::ODMA\PCDOCS\LITIGATE\538420\1