Midwives Protection Program

SPECIAL DELIVERY

Volume 1, Issue 2 **Fall/Winter 2009**

A Risk Management Newsletter for Midwives' Protection Program Members

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Welcome to Special Delivery

Welcome to the second edition of Special Delivery!

In our first edition (Spring/Summer 2009) we focussed on introducing the Midwives Protection Program (MPP) to you. We also covered a few claims related topics, including case summaries and practice tips for reducing liability exposure in our "Shared Learnings" section. Then we provided you with copies of the MPP Incident Reporting Guidelines and a newly revised MPP Incident Reporting Form. The first edition is available online in the Members Only section of the Midwives Association of BC website.

In this second edition of Special Delivery we have chosen to focus on complaints and the disciplinary process.

Robin Harper, Senior Partner with the law firm of Dives Grauer Harper has contributed an article entitled: "The Midwifery Discipline Process" based on her considerable experience in defending midwives for MPP.

Grant Warrington, Senior Claims Examiner/ Legal Counsel has built upon Robin's contribution with a discussion of four frequently asked questions about MPP disciplinary coverage limits and complaints reporting issues. Look for this discussion in the section entitled "Risk Answers". Grant has also contributed an article concerning risk considerations in "Case Communications and Case Reviews."

Finally, we are also including biographies of MPP staff and Newsletter contributors so you get a chance to know us a bit better.

As always we welcome feedback on our Newsletter or your suggestions for future editions. Please contact us at MPP@gov.bc.ca . In addition to providing claims legal advice we are always pleased to help support the practice of midwifery and offer risk management advice.

We recently learned that our Newsletter was circulated to midwives in Australia and that has led to some interesting questions about how our Program works and how it might be applied Down Under.

Midwifery Discipline Process

As registrants with the College of Midwives of BC (CMBC), midwives are subject to its discipline and inquiry processes. To date, there have been over 50 complaints made to the College involving midwives. Almost all of these have resolved without proceeding to a formal discipline hearing process.

Usually, a complaint is made to the College either by the client, a family member, or in a number of cases, by other health professionals, including fellow midwives.

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Complaints are almost always devastating to the midwife involved and can take a significant personal toll. No one likes to be the subject of a complaint about breach of professional standards or to have her practice placed under a microscope when a complaint is investigated.

Complaints to the CMBC must be made in writing. Once the CMBC receives the complaint, it is reviewed by the CMBC Inquiry committee (consisting of one lay member and two midwives) and the CMBC then provides the midwife with an opportunity to respond with her explanation of what happened and will usually ask her to provide all her records relating to the matter in issue, and any other relevant documents, which can include client handouts and information as to how the practice is organized.

At this stage, the matter may be resolved by a consent agreement with the CMBC. Consent agreements are written agreements in which the midwife undertakes to do certain things, usually agreeing to follow the CMBC standards and guidelines and sometimes to undertake some further education or supervised practice. Often, the CMBC will appoint an investigator to interview those involved and review the various records and provide a report to the Inquiry Committee. Again, following this process, a consent agreement may be suggested as a way of resolving the complaint.

It is important to remember that the mandate of the CMBC is to act in the interest of the public. The CMBC does not limit its investigation to the precise complaint made, but once it receives the records and other documents from the midwife, may raise other issues which become apparent as possible breaches of CMBC standards. The CMBC does not consider whether the alleged breaches actually caused harm to anyone, but whether such breaches have the potential to cause harm to someone.

If a consent agreement cannot be entered into, or the Inquiry Committee thinks that the matter is so serious as to warrant a disciplinary hearing, the matter will be referred to the Discipline Committee (again, one lay person and two midwives, but not the same people who comprised the Inquiry Committee) for the issuance of a citation and the conduct of a formal hearing. A formal hearing is a process where the Discipline Committee hears evidence about the complaint, presented by a lawyer representing the CMBC, and evidence from the midwife, who is usually represented by a lawyer appointed by the MPP. Witnesses may be called to testify and be cross-examined and there may be expert evidence from both sides.

To date, there has only been one complaint which has proceeded to a hearing, and that matter was resolved by a consent agreement prior to the conclusion of the hearing.
A complaint to the CMBC is a serious matter with potentially very serious consequences. Any midwife who thinks a complaint may be made against her should notify MPP as soon as possible for advice and, where appropriate, assignment of legal counsel.

The result of a complaint may be an interim or permanent suspension of the right to practice, a reprimand which goes on the midwife's record, a requirement for further training or a period of supervised practice, which can be heavy burdens on the midwife. Again, the early involvement of MPP and legal counsel can assist in dealing with these issues. A discipline hearing may also result in the CMBC assessing the costs of hearing against the midwife or imposing a fine on her.

Even if a complaint is resolved by way of a consent agreement, and does not proceed to a hearing, recent amendments to the relevant legislation mean that the consent agreement is made public, as is the result of any discipline hearing. Therefore, in instances where there may also be litigation or potential litigation against a midwife, it is important to bear that in mind in preparing a response to the CMBC and in considering the terms of any consent agreement, as evidence of the consent agreement may be admissible and potentially damaging in subsequent litigation.

Circumstances giving rise to a complaint to the College may also on occasion result in hospitals restricting or removing a midwife's privileges. While privileging issues may arise at the same time as a complaint to the CMBC and be closely connected to the complaint, MPP does not cover the cost of legal advice relating to privileging issues per se. Because restrictions on hospital privileges can have a major impact on the ability to practice (and there is a right of appeal from such decisions), it is a good idea to obtain legal advice about privileging issues and midwives in this unfortunate situation should consider how they might fund such advice.

Obviously, it is important for midwives to avoid complaints to the CMBC wherever possible. First and foremost, all midwives should maintain their familiarity with the CMBC standards and guidelines and follow those guidelines in their practices. Midwives are well advised to periodically and regularly review the CMBC guidelines and to review whether their practices, particularly with regard to record keeping, are appropriate. The experience of MPP in assisting with the defence of these matters is that in almost all cases, there has been a failure to adhere to the standards and guidelines in some way, including record keeping. The reasons for these failures vary, but often include ignorance of a change in standards or simply forgetting applicable standards in the "heat of the moment" or in a busy practice.

A second way of minimizing the risk of a complaint is to maintain good communication with clients and their families, particularly in the event of an unexpected outcome. As experience suggests that many significant complaints are brought by other health care professionals, it is also important to maintain good working relationships with such professionals

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in both the hospital and community settings. There are a number of examples of instances where complaints have been made by hospitals about a midwife relating to a number of cases over a period of years, and one common thread in those cases has been an ongoing poor relationship between the midwife and other care providers. Midwives should be proactive in attempting to resolve such relationship problems if they arise. Participation on hospital committees, in rounds and in quality assurance reviews under s. 51 of the Evidence Act may be useful in developing and maintaining good relations with health authorities and other care providers.

Third, if a midwife is not sure how a standard or guideline may apply to her practice, it is useful, prior to acting, to get some advice from the College.

One final note: while the coverage for legal fees in professional discipline matters of $50,000 may seem like a significant amount, this amount will not always suffice to complete a lengthy or complex hearing, especially one involving review of several cases. Midwives need to be aware that they are personally responsible for paying any legal fees above that amount.

Robin J. Harper
Robin is a partner in the law firm Dives, Grauer & Harper. She was born Victoria, BC and studied at the University of British Columbia. She was a Law Clerk with the Chief Justice British Columbia from 1980-1981 and admitted to the bar in 1982. Robin practices in the areas of Medical Malpractice Defense, Products Liability, Insurance Litigation and Human Rights. She handles many midwifery claims for MPP and has co-presented with MPP at education sessions for midwives and midwifery students.

Risk Answers

The College of Midwives has notified me that it has received a complaint about the care I provided to my client while in hospital. My client tells me she is satisfied with her care and has not complained to the College. Please tell me more about the complaint process.

While most complaints about client care will come from the client or her family they can also arise from other sources. Complaints can follow a departmental review, a quality assurance review recommendation or a direct report of concern from a midwifery colleague or other health care professional such as a nurse manager or obstetrician. Pursuant to the Health Professions Act the College has an obligation to protect the public and must treat all complaints seriously regardless of how the notice comes to its attention.

The Midwives Protection Program (MPP) is there to assist you in the event of a complaint so your best course of action is to notify MPP as soon as you are notified by the College of a complaint against you and to follow the advice given.

I have heard there is a limit to the amount of coverage available to me for a College complaint or disciplinary matter. (a) How does that work? (b) How do I keep track of the expenditure and how will I know if there will be enough coverage for me?

(a) MPP provides coverage for all Registered Midwives in BC in good standing with both their College and the Midwives Association of BC and whose annual fees are paid up. It is also a condition of coverage that you cooperate fully with MPP and appointed legal counsel.

Coverage for complaint or disciplinary matters (investigations and proceedings) is subject to a $50,000 limit per policy period. A policy period runs for one year from February 1st to January 31st. All reported incidents falling within the policy period are subject to the $50,000 limit. This means that if there is more than one complaint to the College or if the College opts to investigate more than one case and if all of those complaints or cases reviewed are fully investigated and proceed to hearing(s) it is likely the $50,000 will not be sufficient to cover all of your legal expenses. In addition any fines levied by the College against you and the College's legal costs of any hearing are not covered or paid for by MPP. Discussions or advice about privileging issues are also not included.

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In most instances of a single complaint to the College during any policy period the $50,000 limit will be more than adequate, even if hearings do take place. MPP has provided a $50,000 coverage limit since the Program began in 2000 and so far no midwife in BC has required financial assistance beyond what MPP provides. Bear in mind as well that the majority of complaints are resolved by way of a Consent Agreement between the Midwife and the College negotiated with the assistance of MPP-appointed counsel and are well within the limit. (By the way, make sure your counsel has a chance to go over the Consent Agreement with you before you sign it, even if the terms look perfectly acceptable to you.)

(b) MPP keeps track of the legal expenditure and will notify you in writing approximately half way through the limit with its best estimate of whether or not there will be sufficient funds in place. Where there is a strong possibility of multiple case reviews or hearing(s) of several weeks' duration you may be informed earlier on that the coverage limit could be problematic. If MPP and your appointed counsel are of the opinion the College may levy a fine or seek its legal costs for a hearing we will do our best to provide you with early warning of that possibility. If at any time you have any concerns about the amount of coverage available you may wish to consider other funding options and discuss any funding or coverage concerns with the Midwives Association of BC or with your own legal counsel or business advisor.

Are the limits for disciplinary coverage and coverage for a claim of malpractice or negligence against me different?

Yes! MPP also provides liability coverage for claims of malpractice or negligence (generally brought against you by the parents of an infant but in some instances by others' on behalf of the infant or by an infant who has reached the age of majority). So far in Canada no obstetrical claim brought against any single practitioner or hospital has exceeded the $10,000,000.00 MPP liability limit, nor is one likely to in the foreseeable future.

My client has indicated she is unhappy with the birth of her infant and is thinking about making a complaint to the College or has complained to my practice partner or to the obstetrician to whom I transferred care. (a) Should I report myself to the College? (b) Do I let my practice partner or other health care providers know? (c) What if my client has "fired" me or refuses follow-up visits?

(a) There is no clear obligation to self report a potential complaint to the College. There are many instances where dissatisfaction with outcome has not been in the midwife's control (e.g. hospital interventions were required where an otherwise planned home birth has not been able to proceed and the client is simply hospital, or medical model adverse) or where the dissatisfaction is transient or a misunderstanding clarified in follow-up visits or that fades in importance as the infant thrives. The Health Professions Act does require that you document errors, incidents and complaints and that you notify appropriate authorities and that you initiate restorative action (where possible). So far the Health Professions Act has not been interpreted to mean every hint or suggestion of a complaint requires notice to the College.

(b) It is most certainly appropriate to let your practice partner know of any arising tensions with your client. In some circumstances it may also be appropriate to discuss a concern with the department head for quality assurance purposes (e.g. in a case where RN support was not forthcoming and the client was unhappy with overall tension or care in the delivery room). Consider the article "Case Communications and S. 51 reviews" and consult with MPP if in any doubt about quality review conversations or participation in a s. 51 review. Unless your client has refused follow up or has "fired" you, in general, there should be no reason to notify other health care providers of a potential complaint as you may be subject to a suggestion you have tried to "poison" the client's relationship with that other health care provider by giving your interpretation first.

(c) Different obligations arise when a client fires you or refuses follow-up visits. In these circumstances you are absolutely required to follow the College's standards of practice for ensuring

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appropriate referral and follow-up arrangements and these may include notifying the client's GP, the obstetrician, the paediatrician and the public health nurse that the client is no longer in your care, providing detail of any anticipated follow-up problems e.g. elevated bilirubin, history of non-compliance with recommendations that could impact care, and cooperating with provision of copies of records to appropriate persons and in appropriate circumstances. You should avoid discussion of your interpretation of the reasons for firing or for service or follow-up refusal. For most practitioners the facts will speak for themselves. You should notify MPP of a potential complaint and most certainly notify MPP if the client fires you or refuses care or if you receive an actual notice from the College of a complaint.

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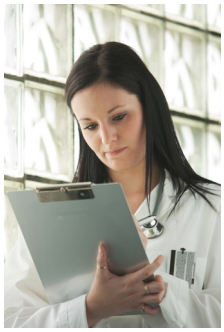
Senior Claims Examiner/Legal Counsel
Midwives Protection Program

Case Communications and Section 51 Reviews



Registered Midwives are not only concerned with practicing to the highest standards and ensuring best outcomes for their clients, they also frequently evaluate their own performance to improve care and communication. In most practices their evaluations and discussions will be "informal" case communications and will include both verbal and written (often in the form of email) to their practice partners. In other practices doulas and physicians may be included in the communications. In the normal course of events these case communications are usually limited in scope and/or unlikely to ever be disclosed to the client or be subject to legal scrutiny. In the event of a poor outcome or serious care complaint this may change and Registered Midwives need to be aware of the circumstances where such communications may be disclosed.

All oral and written communications about client care may be subject to a formal request for access by the client or designated authority (in most instances this would be the client's lawyer) or by the College of Midwives in the event of a complaint investigation. Generally the request to access information will be a request for a copy of the chart or health record pursuant to the *BC Freedom of Information and Protection of Privacy Act* or *BC Personal Information Protection Act*, as appropriate, but it may also come via court order. Either way you may have to disclose communications you might not have intended to share with anyone other than your colleagues.

Even detailed communications that ultimately have to be disclosed will not always prove troublesome. Registered Midwives are often frank with a client and her family about a particular outcome or concern and their clients respect them for their communications. Bear in mind however that where there has been harm to a client or her infant, or where there is a possibility of a complaint to the College for a possible breach of standard of care (even where there was no actual harm to the client or her infant or where it was not the client who made the complaint) all communications that are not protected by solicitor client privilege or fall within the ambit of a s. 51 review may have to be disclosed.

Disclosures are most concerning in the context of litigation where your record keeping is subject to the scrutiny of legal counsel and, in cases proceeding to trial, the courts. Sometimes those disclosures will be forced upon you many years after the birth e.g. in a case where the infant has been compromised and the developmental problems have led the parents to look for better ways to care for their child's needs by increasing their access to funds by initiating a lawsuit.

Even where families have indicated satisfaction with midwifery care they may still initiate a law suit later on and, rarely, where a child has reached age of majority, this young adult can still bring an action where the parents or guardians did not do so prior to the child reaching 19. Case communications can expose you to an examination for discovery or to cross examination under oath in a court of law about what was said and to whom. Talking about a poor outcome with a colleague may even lead to your colleague being subpoenaed and having to give evidence in court about that communication. This scrutiny by a court may even apply to what you might have hoped or considered to be only "need to know information" within a shared practice.

MPP does not suggest a midwife never discuss specific outcomes or particular cases with colleagues. Rather, we caution the midwife to think about how information is best communicated, to whom, and for what purposes. What does that look like in practical terms? Rather than comment on a colleague's care in a casual email or in a conversation in front of other health care providers, ask yourself: "Do I need to put

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this comment in writing or is it best that I talk to the individual in person?" "Is this information that I should only share with a lawyer because I may need solicitor client privilege even if not now but later on?" Of course not every conversation about a case should have to go through a lawyer first, however, where there has been a serious adverse outcome or the family is particularly unhappy the midwife should report the incident to MPP as soon as possible.

A number of Registered Midwives have posed the following question to advisors at MPP:

"I've been asked to participate in a s. 51 review where there was an unexpected outcome. Should I participate?"

One of the first questions to ask is: "Does the case fall within the provisions of the legislation so that I have its protection?" It is crucial to remember that s. 51 of the BC Evidence Act, which protects properly conducted quality reviews from disclosure (in fact prohibits unauthorized disclosure) only applies to facilities that come under the Hospital Act. In other words a planned hospital birth that takes place within a hospital can be properly reviewed under s.51 providing all the other components of a s.51 review are met (such as a properly constituted individual or committee reporting up to the Board, for the purposes of improving care within the hospital etc.).

"What about a planned home birth that ends up in the hospital?"

If the Registered Midwife is still involved in the hospital care after the client is admitted to hospital then arguably any review of care that includes the at-home or community component of care should also be included in the s. 51 review in order to learn from all of the circumstances with the ultimate goal of improving hospital care. This scenario is arguably appropriate for a s. 51 review assuming all other elements necessary to constitute a protected review are in place. Unfortunately no one yet knows if s. 51 protection applies to a planned home birth ending up in hospital as no court has had to consider this issue yet.

What if the Registered Midwife has transferred care to an obstetrician before any midwifery care is given in hospital? If the Registered Midwife in this scenario is asked to participate in a s. 51 review will she be covered by the protection?

Arguably she would not and any argument that s. 51 should apply to the midwife is unlikely to pass judicial scrutiny in this scenario but again this is not known for certain.

A Registered Midwife may be called to participate in a s. 51 review in a case where she provided home care but then transferred care to an obstetrician before labour and did not provide any care for the client in hospital but rather became responsible again after discharge. Should she participate in the s. 51 review?

It is likely she should not if she expects that s. 51 will protect her conversations with hospital staff from disclosure, even though the s. 51 protection will extend to the doctors and hospital staff who became responsible for the client on admission.

When in any doubt about whether you should or should not participate in a s. 51 review it is advisable to contact the Midwives Protection Program (MPP) first. In most instances where a s. 51 review has been organized you will have already reported the matter to MPP. Be careful not to assume that the hospital organizing the review will have fully considered your professional rights, responsibilities, obligations and options where a s. 51 review is being organized.

Bear in mind as well that a s. 51 committee can, if it deems appropriate, notify the College as to a particular concern and also disclose information that the Registered Midwife might otherwise have expected to be protected. In fact it is sometimes because of a s. 51 review that a complaint arises and the College is required to investigate even in circumstances where the client, her family, a colleague or other individual health care providers have not lodged personal complaints.

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Midwives Protection Program

Meet the Team

Linda Irvine, Director, Client Services – Health Programs
As Director, Client Services – Health Programs, Linda Irvine is responsible for delivery of the Midwives Protection Program. Linda joined the Risk Management Branch in 2003 originally working with the Health Care Protection Program (HCPP). She brought with her 18 years experience in the private property & casualty insurance industry, mainly in underwriting, including 5 years as a department manager. Linda attained her designation as an Insurance Institute of Canada Chartered Insurance Professional (CIP) in 1999, with the distinction of top graduating marks for Vancouver Island. She attained her Canadian Risk Management (CRM) designation through Simon Fraser University's distance program in 2004. In 2009 she advanced to the role of Director of Health Programs.

Grant Warrington, Senior Claims Examiner/Legal Counsel
Grant Warrington provides claims handling and advice to a wide variety of clients including health authorities, midwives, universities, colleges and school districts. His qualifications as a nurse, practicing lawyer and mediator give him a unique perspective on medical malpractice claims. Grant completed his Masters Degree in Conflict Analysis & Management at Royal Roads University in 2000, and his CRM through Simon Fraser University in 2003. Grant is the Senior Claims Examiner/Legal Counsel assigned to handle the majority of MPP claims. He has presented at MPP education sessions for midwives and midwifery students and authors many articles for *Special Delivery.*

Kim Oldham, Director Claims and Litigation Management
As Director of Claims and Litigation Management, Kim has numerous responsibilities including the review and assignment of all new claims to members of the claims team. She may be the first point of contact for midwives requiring assistance or reporting a potential claim. Kim has overall responsibility for allocation of legal and adjusting resources. She began her career in the insurance industry in 1986. She obtained her Chartered Insurance Professional designation in 1998 and completed her Canadian Risk Management designation through Simon Fraser University in 2004. Kim is currently pursuing graduate studies through Royal Roads University.

Sharon White, Senior Risk Management Consultant – Health Programs
Sharon began working in health care risk management in 2001 after over 20 years in the insurance industry. She has been an insurance underwriter and a broker, dealing with all types of commercial insurance, including general and professional liability. She achieved her Chartered Insurance Professional (CIP) designation in 1988 and a Canadian Risk Management (CRM) designation in 2003. Sharon works with clients on a broad spectrum of risk management issues both in day-to-day operations and on special project teams. She is the Senior Consultant assigned to MPP and works with the Midwives Association of BC on coverage and administrative matters. Sharon has presented MPP education sessions for midwives and midwifery students and serves as editor of *Special Delivery*.

FEEDBACK IS IMPORTANT TO US AT MPP

Midwives Protection Program

Please let us know what you think about **Special Delivery**.
Did you find the **Midwifery Discipline Process** informative?
Will **Case Communications** make any difference to your practice?
Are there any topics you would like us to cover in **Special Delivery?**
Do you have any questions **f**or the **Risk Answers** section?

Write to us at MPP@gov.bc.ca or
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