PERSPECTIVES FOR THE PROFESSIONS

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THE SOCIAL MEDIA CHALLENGE – DISCIPLINE, GOOD CHARACTER, AND THE RIGHT TO FREEDOM OF EXPRESSION

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Professional regulators are beginning to grapple with the impact that social media such as Facebook and blog postings will have on their regulatory functions. Just as cases on the impact of social media in the workplace are starting to work their way through the legal system, so too are cases involving professional regulatory bodies. Social networking sites and internet postings can provide evidence relevant to the assessment of good character. They may also demonstrate behaviour that is unprofessional. As professional regulatory bodies in Canada begin to consider issues involving social media, they will also have to remain mindful of the impact that their actions have on their members' right to freedom of expression.

Discipline

It is well established that professional regulatory bodies are able to deal with the misconduct of members even if the misconduct does not arise from the member's activities as a registered member. While private conduct will not always be unprofessional conduct, it can become unprofessional conduct when it affects the member's integrity, professional character or impacts on the reputation of the profession as a whole. When members inappropriately use social media such as internet blogs, it sometimes raises the issue of whether such "off duty conduct" is unprofessional.

Last year, regulators in both Ontario and British Columbia considered internet blog postings of their members.

The College of Optometrists of Ontario received a complaint from one of its members that another member had posted personal and derogatory comments about him online hiding behind a pseudonym.[1]

The complainant complained that the content of the posting and use of a pseudonym was "disgraceful, dishonorable, unprofessional or unethical". The investigated member admitted to sending the email under the pseudonym and apologized for his conduct but defended himself against the allegation on the basis that while his comments were "intemperate or ill-considered" they did not amount to unprofessional conduct. Nor, he argued, was the use of a pseudonym unprofessional, disgraceful or discreditable. The investigated member also argued that the matter was outside the jurisdiction of the College as the complaint did not involve patient safety or engage his fitness to practice.

The Inquiries, Complaints and Reports Committee of the College found that the investigated member did not act unprofessionally in expressing his opinion on a publicly accessible website or by using a pseudonym to bring the website to the attention of others.

The complainant appealed the matter to the Appeal Board. The Board found that the Committee's decision was unreasonable on the basis that the Committee should have paid more attention to the personal and derogatory content of the postings. The Board did not

1 *T.F. v. S.T.,* 2011 CanLII 14376 (ON HPARB).

specifically address the use of the pseudonym. Given that the investigated member had already recognized that his actions were wrong, the Board did not refer that matter back for reconsideration.

The Law Society of British Columbia also considered comments posted by one of its members on the internet.[2] A BC lawyer posted comments that included discourteous and personal remarks about an Ontario lawyer. These included, "This is the kind of guy that gives lawyers a bad name. He is relying on intimidation and blackmail to get the lousy $500. Don't pay him. I hate these sleazy operators". The BC lawyer argued that his comments were justified due to the blameworthy conduct of the Ontario lawyer.

The Hearing Panel found that the blog posting was a mixture of conduct in the lawyer's practice and his private life. In this regard they noted that he identified himself as a lawyer and received potential file referrals as a result of his blog posting. Regardless of whether the blog posting was private or professional, the Hearing Panel found that the blog posting constituted professional misconduct as it was a marked departure from the conduct expected of members of the Law Society. The lawyer was ordered to pay a $1,500 fine and $3,000 in costs.

Registration Requirement – Good Character

Just as internet postings and social networking sites may offer evidence of unprofessional conduct, they may also provide evidence relevant to the assessment of good character when considering applications for registration.

Last year a hearing panel of the Law Society of Upper Canada (LSUC) considered the content of an applicant's blog in assessing the applicant's character. [3]

The applicant applied to the LSUC to be admitted as a paralegal. The Law Society opposed the application on the basis that she was not of good character. One of twelve factors cited by the Law Society were blogs maintained by the applicant that contained unsubstantiated and defamatory allegations against a number of organizations and individuals. The blogs also contained statements that were discriminatory or threatened violence to individuals. The applicant admitted to being the author of the blogs and in her evidence attempted to provide justification for the content.

The LSUC hearing panel held that the blogs adversely impacted upon the applicant's reputation and integrity as well as the reputation and integrity of the legal profession and the administration of justice. The panel further held that the information on the blogs demonstrated that the applicant did not have concern for or possess the qualities required of a member of the LSUC being, fairness, accuracy, integrity and respect for the rule of law. The application was denied with the blogs being one of eleven factors cited by the panel in support of its decision.

The Right to Freedom of Expression

While social media may be changing how we communicate, the tension between the duty of professional regulatory bodies to protect the public interest and the rights of regulated members to freedom of expression is not new. Before internet blogs and social networking sites professional regulatory bodies wrestled with their members' letters to the editor, pamphlets and picketing. In addition to raising issues about when a member's conduct in their private life can be the subject of disciplinary action, these cases also raise issues about the extent to which professional regulators can restrict their members' freedom of expression – a right protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. As social media provides an ever expanding platform for expression, these issues will likely increasingly land on the doorstep of regulators.

Recommendations for Regulators

In the College of Optometrists of Ontario case discussed above, the Appeal Board of the College of Optometrists of Ontario concluded its decision by commenting that the case

2 *Laarakker (Re)*, 2011 LSBC 29; 2012 LSBC 2.

3 *Ormilla Bhoopaul v. Law Society of Upper Canada,* 2011 ONLSHP 35.

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RECENT CASES OF INTEREST TO REGULATORS

***College des medecins du Quebec v. Genest*, 2011 QCCA 1683.**

A disciplined member who was in compliance with disciplinary sanctions and penalties sought to be re-registered as a member in good standing with her College. The Quebec Court of Appeal held that upon the member satisfying the sanctions and conditions imposed by the Disciplinary Committee, the College had no discretion to deny her reinstatement and held that reinstatement was automatic.

The member was the subject of several disciplinary complaints over the space of a year and was provisionally struck from the register pending a decision on the merits. A decision on the merits was made on August 1, 2006, in which the Discipline Committee convicted the member of eight counts. In May 2007, it imposed a penalty of a permanent restriction on the member's ability to practice medicine, with the exception of providing operating assistance in an urban public hospital. However, the member's striking from the register was not extended or made permanent.

The member appealed the decision. She also sought to have her status as a member in good standing at the College confirmed, so that she could practice medicine in accordance with the restrictions imposed by the Discipline Committee. The College's Administrative Committee informed her that, in light of the permanent restrictions on her practice, she would have to re-apply for reinstatement. She did so and was denied, and an application for reconsideration was also denied. She then applied for judicial review of the decisions to deny her reinstatement, arguing that she either should be automatically reinstated following the decision on the merits that ended her provisional striking from the register, or she was entitled to re-enrolment as a member in good standing upon her compliance with the disciplinary conditions imposed on her and her fulfillment of the requirements for application to be admitted.

The College argued that in denying the member's reinstatement, it was acting in fulfillment of its mandate to protect the public interest. The Quebec Superior Court, in a decision upheld by the Court of Appeal, rejected this argument. It held that the College's Administrative Committee had overstepped its authority and usurped the role of the Discipline Committee when it attempted to impose further conditions beyond those made by the Discipline Committee on the member's reinstatement as a member in good standing.

The Court of Appeal held that the Administrative Committee had no discretion or authority to deny reinstatement to the member once the sanctions had been complied with. In so doing, the Court rejected the College's argument that its general mandate to protect the public interest allowed it to step outside the specific role it had been prescribed in the legislative scheme.

Commentary: Where a disciplined member satisfies or complies with penalties or sanctions imposed as a result of misconduct, any further disciplinary action will be deemed improper and unlawful. Once a member has complied with sanctions ordered by a discipline tribunal, the registration committee cannot deny registration or reinstatement as that would have the effect of increasing the penalty ordered by the discipline tribunal. ▲

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demonstrated the need for the College to develop policy regarding what is appropriate use by its members of the internet, social networking sites and other forms of electronic communication:

"Clearly, as this case demonstrates, there is still some debate over where the line is drawn between acceptable and non-acceptable online postings. …the College is in the best position to determine where that, and other lines regarding electronic communication, should be drawn. Given the burgeoning nature of the internet and similar forms of electronic communications and the broadly and almost instantly available information, the Board believes the College could greatly assist its members by developing a clear set of expectations in the use of these media."

Regulatory bodies may wish to implement Standards of Practice or written policy that confirm expectations regarding the use of social media, including potential implications if a member breaches the guidelines. ▲

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