

COLLEGE OF TEACHERS/COLLEGE OF NURSES **PROFESSIONAL DISCIPLINE DIGEST**

MEMBERS OF PROFESSIONAL COLLEGES: IS A CAUTION “DISCIPLINE”?: **AN IMPORTANT DIVISIONAL COURT DECISION**

HIGHLIGHT

The Executive Committee of the College of Nurses investigated a nurse for alleged verbal abuse of a patient. The Committee decided that the abuse had been “substantiated” despite the nurse’s denial. The Divisional Court concluded that the Committee’s action in finding that the abuse was substantiated and in issuing the caution was, in fact, disciplinary. The Court expunged the letter of caution.

A recent decision of Ontario’s Divisional Court is important for members of regulatory colleges because it further clarifies what discipline is and how and when it can be imposed on members. Regulatory colleges share a similar structure in that complaints against a member are initially investigated and considered by a committee that has limited powers. At this stage, the member is entitled to

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make submissions to the committee but this is not a full and formal hearing and the member’s response is forwarded to the committee in document form.

The College of Nurses of Ontario has two such first-stage committees: the Executive Committee (for complaints referred by an

institution or taken up by the College on its own) and the Complaints Committee (for complaints from the public or other members); and the Ontario College of Teachers has one (for all complaints):

the Investigation Committee. These screening or first-stage committees are empowered to consider the matter and may dismiss the complaint, refer the complaint to the Discipline Committee (where there is a full and formal hearing) or take a lesser action such as issuing a “caution to the professional.

In *Miao v. College of Nurses of Ontario* the court considered the case of a nurse who was accused of verbally abusing a patient. The first-stage committee, the Executive Committee, did not hear evidence and therefore had no way of determining credibility. The Committee did have an investigation report and witness statements as well as our submissions on behalf of the nurse, who denied the allegation.

Unknown to us or the nurse a witness claimed that the nurse did engage in verbal abuse. Although the Executive Committee decided the matter should not be referred to the Discipline Committee it did conclude that the abuse had been “substantiated” and it issued a letter of caution to the nurse. The Committee did this on the basis of the witness statement that had not been provided to our office or the nurse and on the basis of the notes of a nurse-manager concerning a meeting after the fact which had also not been provided.

In our view this case raised two very important issues for members of professional colleges. The first was the Committee’s conclusion which

appeared to us to constitute discipline since it indicated the abuse occurred and responded with a letter of caution. The second issue, and one of long-standing concern to us as Defense Counsel to professionals, was the limited disclosure that is frequently provided prior to the first-stage committee considering the matter. In this case important information was not provided to the nurse prior to the Committee’s consideration of the matter.

We decided to take the College of Nurses to court over these issues. In response the College claimed that the Committee had the jurisdiction to issue the letter of caution and that such an action was not disciplinary in nature. The College of Nurses, however, had to admit that it would be their intention to disclose their finding in respect of this nurse to another College making inquiries about her (if, for example, the nurse attempted to move out of province) and the College further confirmed that it would use the caution against the nurse in the event another complaint was filed against her.

We argued that this amounted to discipline and that the scheme of the legislation that established the College did not contemplate that the first-stage committee would impose discipline. That role, we said, was reserved for the Discipline Committee which had the jurisdiction to impose discipline on a member following the formal process of a discipline hearing conducted according to the rules of evidence, full disclosure, and based on the College meeting its burden of proving the case against the member. Short of proving its case against the member at such a hearing the College could not, through its investigation or screening committees, make a finding of professional misconduct nor could it

reprimand members even in the guise of “educating” or “cautioning” them.

In its decision, the Court found in the nurse’s favour. The panel of judges (Mr. Justice Southey, Mr. Justice Matlow and Mr. Justice Forestell) found that the Executive Committee had exceeded its jurisdiction because it had made a finding of professional misconduct which only the Discipline Committee could do. The Executive Committee of the College of Nurses, the Court found, was limited to determining whether a complaint should be dismissed or referred on to the Discipline Committee. Other first-stage committees may have the power to caution a member in cases where they have professional concerns which do not warrant a referral to the Discipline Committee, but they do not have the power to reprimand, suspend or

revoke a licence or otherwise impose discipline and neither did the Executive Committee in this case. The Court expunged the caution from the nurse’s file.

Because the Court determined the matter on the basis of the discipline question, finding that the actions of the Executive Committee were improper in the first instance, the Court found it unnecessary to deal with the disclosure issue. That issue remains unresolved and members of colleges who are facing complaints may still find themselves having to provide a response without seeing the full or true nature of the complaint against them.

**THE ONTARIO COLLEGE
OF TEACHERS:
TWO YEARS OF DISCIPLINE
- A SUMMARY REVIEW**

The Ontario College of Teachers came into existence officially on May 20, 1997, created by the *Ontario College of Teachers Act, 1996*. One of the most important aspects of this self-regulating body is its mandate to consider

complaints against teachers, hold formal hearings and, where appropriate, impose disciplinary sanctions up to and including the revocation of a teacher’s licence to practice.

The College began officially accepting and investigating complaints in May, 1997 and the firm has been involved in representing teachers with respect to complaints since that moment. At that time the College was investigating complaints

even before the Professional Misconduct Regulation - which defines professional misconduct - was in effect. That Regulation came into effect on December 4, 1997.

In its first year the College compiled the following statistics on the origin of complaints that had been referred to it:

Origin of Complaints*

Origin (Number/Percentage)

**Minister/Ontario Teachers' Federation (OTF)	11	20.3
School Boards/Employer	20	37.0
Parents	15	27.8
Students	3	5.6
Minister of Education	1	1.9
Registrar	1	1.9
Members of College	3	5.5
Total	54	100.0

*This information, and that in the chart below, is from the web site maintained by the Ontario College of Teachers at www.oct.on.ca

** These complaints were originally filed with the OTF by school boards and employers in compliance with the legislation then in force.

Further information from the College shows that the vast majority of these first-year complaints were associated with criminal activity, if not convictions:

On April 8-9, 1998, the College's Disciplinary Committee held its first public hearings into allegations against members. Four teachers had their licences revoked on those days, mostly because of prior criminal convictions for sexual offences (the College's web site summaries of these matters lists "Federal Corrections Facility" as the member's residence). Since then the College has proceeded with its investigations and hearings into many other matters before all of the three Committees (Investigation, Discipline, and Fitness to Practise).

The firm has represented teachers before all of these committees:

Investigation Committee:

This is the most active Committee owing to its first-level or screening function. Complaints that come to the College are investigated by the investigation staff who also invite submissions on the matter from the teacher complained against. While the nature of the complaint is disclosed to the teacher by the investigation staff, our experience is that the College appears to be following a practise similar to that found at the College of Nurses. That is that while basic information about the complaint, and even some documentation, is provided to the member, full disclosure consisting of notes of interviews with witnesses or interested parties are not provided. Teachers are thus experiencing the frustration frequently felt by nurses who are the subject of complaints in that they do not receive full disclosure in a matter that may have a significant impact on their career and self-esteem (this very issue was raised in the *Miao* case which is reviewed elsewhere in this *Update*).

Teachers should also be aware that the process at the investigation level is that the submissions filed on behalf of the teacher are routinely provided to the person making the complaint. The complainant is then given a further opportunity to respond but the teacher is not made aware of this response nor is the teacher invited to further comment. Although personal information (such as the teacher's *curriculum vitae*) is not passed on to the complainant some teachers have been concerned that other sensitive information provided in their submissions should not be forwarded to the complainant and the College has been cooperative with these requests.

Although the College is working on an alternative dispute resolution mechanism this is not yet functioning and, in particular, the College has not yet developed an effective strategy to deal with complaints that are quite obviously frivolous or meant as little more than an attempt to aggravate the teacher being complained of. While it is hoped that the College will become more adept at weeding out such complaints at an early stage our experience has been that on a number of occasions teachers are put to the time, trouble, and aggravation of constructing serious submissions in the face of vexatious complaints. The subsequent dismissal of such complaints by the Investigation Committee has been gratifying to the teachers involved but does little to alleviate the stress and aggravation experienced during the submissions process.

The Discipline Committee:

The Discipline Committee has become increasingly active over the almost two years that

the complaints process has been functioning. As indicated above the initial hearings, with much media attention, focussed on cases of criminal impropriety. Of some note is the fact that the Committee has summarily determined that it has jurisdiction over matters that pre-date the Professional Misconduct Regulation and, indeed, pre-date the creation of the College itself.

In addition to addressing itself to the obvious cases of criminal misconduct we can expect to see the Discipline Committee turning its attention to issues of teaching standards. The College is, at this time, engaged in the process of developing the professions “Standards of Practice”. While these standards, which for the College answers the question “what does it mean to be a teacher?”, will be put to a variety of uses such as the accreditation of University and other professional learning programmes, they will undoubtedly be used to measure a teacher’s performance in disciplinary matters.

On December 10, 1998, the College met and approved, in principle the Standards of Practice for the Teaching Profession. These standards give specific directions to teachers in their practice of the profession. The Standards are to be submitted to a further “validation” process and are expected to be finalized in the fall of this year.

T h e F i t n e s s T o P r a c t i s e Committee:

Unlike the Discipline Committee, the Fitness to Practise Committee’s process is confidential. This has been the least active of the Committees although we expect to see this change over time. Teachers are no less insulated from the stresses of their work, and the problems that can result, than other professionals. Already the Committee has had to deal with an addiction problem that affected a teacher’s ability to perform the job. While this particular case did not require a full-blown hearing and was resolved on the basis of an agreed set of conditions that were approved by the Committee if the experience of other Colleges is any indication this Committee will also see its share of litigation.

As we continue to represent teachers at the College we will provide on-going information about the College’s approach to discipline and developments in the regulation of the practise of teaching in the pages of the *Update*.

TIP

See the “Standards of Practice for the Teaching Profession” as approved in principle by the College at the College’s web site at:

www.oct.on.ca

