

The Anatomy of a Complaint Made Under the *Regulated Health Professions Act, 1991*

**Presentation to
CDPA 2012 Legal Symposium**

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1. Introduction
2. The Legislative Regime: Complaints and Discipline Processes and Possible Outcomes
3. Strategic Considerations in Responding to Complaints
4. Tips and Traps
5. Conclusion and Questions

Introduction:
The Anatomy of a Complaint
to the
Royal College of Dental Surgeons of Ontario (RCDSO)



Alternate Titles to Today's Presentation:

- How to Avoid a Minor Complaint Becoming a Major Headache
- Prevention is the Best Medicine
- Extrication is Vindication

The Legislative Regime: Complaints and Discipline Processes and Possible Outcomes



The Regulatory Framework

Under the *Procedural Code to the Regulated Health Professions Act, 1991* (RHPA), the College's objectives include:

1. Regulation of the practice of the profession;
2. Governance of its members in Ontario;
3. Oversight of standards of qualification for members;
4. Oversight of quality assurance programs; and
5. Promotion of competence and improvement among its members.

Note: The College has a duty to serve and protect **the public interest**; Representation of Members of the Profession is not an objective of the College!

The Inquiries, Complaints and Reports Committee

- Investigation committee
- Comprised of dentists and members of the public
- Complaint will be considered by a panel of at least 3 people (including 2 dentists)
- Pre-2009, “Complaints Committee” investigated formal complaints, while other matters were investigated by Executive Committee (non-formal complaints) or Boards of Inquiry (incapacity concerns).
- Now, ICRC performs all investigative functions.

The Complaints Process: Overview

1. Written Complaint received by the College
2. College may seek clarification from Complainant
3. College advises Member of fact of the Complaint and provides copy of all prior decisions
4. Complaint may be disposed of by alternative means:
 - (a) Registrar may refer complaint for Alternative Dispute Resolution (ADR)
 - (b) Panel may consider complaint to be frivolous or vexatious and take no action

The Complaints Process: Alternative Approaches

4.(a) Summary Dismissal: pre-conditions

- If the panel considers a complaint to be frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process, it shall give the complainant and the member notice that it intends to take no action with respect to the complaint
 - Complainant and Dentist have a right to make written submissions within 30 days after receiving the notice
 - Panel may decide to take no action after receiving written submissions

The Complaints Process: Alternative Approaches

4.(b) ADR: Pre-conditions

- Where appropriate, and where Member and Complainant agree, and no allegation of sexual abuse, Registrar may refer complaint for Alternative Dispute Resolution (ADR)
 - Confidential process
 - Facilitated by person appointed by Registrar
 - If resolved, ICRC Panel may cease investigating and adopt resolution **or continue investigation**

The Complaints Process: Overview

5. Where no ADR, Member has 30 days to submit a Written Response
6. College provides Response to Complainant
7. Complainant may submit reply
8. Member (generally) has opportunity to respond to reply complaint

The Complaints Process: Overview

9. Further Investigation

- May be formal or informal
- Complainant and Member kept apprised of all developments but not findings on investigation.

10. Consideration by ICRC Panel

- Paper review only
- Separate consideration of Prior Decisions and submissions of Member regarding same

11. Disposition by ICRC Panel

The Complaints Process: Initiation of a Complaint

- Complaint must be in writing or in other recorded (permanent) form
- RCDSO encourages discussion of concerns with dentist and with College
- Few limitations: if document identifies a dentist and expresses concern about care provided or other aspects of professional relationship, it will be treated as a complaint
- Implied Undertaking Rule of *Rules of Civil Procedure* – information obtained in discovery process in civil action cannot be used for other purposes without permission of the court.

The Complaints Process: Sources of Complaints

- Patients
- Disgruntled employees or partners
- Other dentists
- Other professionals
- (Ex) Spouse
- Insurance companies
- Anyone!



The Complaints Process: Common Complaints

- Billing
- Failure to maintain standards
- Sexual Impropriety
- Inappropriate advertising
- Failure to collect insurance co-payment



The Complaints Process: Investigation of a Complaint

- Code provides that a Panel of the ICRC will be selected by the ICRC Chair to investigate a complaint filed with the Registrar regarding the conduct or actions of a member or to consider a report that is made by the Registrar
- Panel drives the investigation, directing College staff to obtain additional information, expert opinions, etc.
- Practically, College staff investigate complaint for presentation to ICRC Panel

The Complaints Process: Investigation of a Complaint

- Even if complainant withdraws complaint, ICRC Panel is entitled to continue the investigation and make a decision.
 - See *AL c HG*, 2012 CanLII 14655 (ON HPARB)

The Complaints Process: Investigation of a Complaint

Where a complaint has been made, the investigation consists of:

- Obtaining statements from all likely witnesses;
- Obtaining copies of all apparently relevant documents;
and
- Obtaining the full position of the complainant and the member.



The Complaints Process: Investigation of a Complaint

- The investigation must always relate to the complaint; it cannot expand to a general review of the entire practice of the member.
- If the investigation reveals other types of misconduct, a fresh complaint may be initiated, or the information can be brought to the Registrar for a possible investigation.

The Complaints Process: Investigation of a Complaint

- Section 75 of the Code provides for expansion of Investigation:
- Registrar may appoint one or more investigators to determine whether a member has committed an act of professional misconduct or is incompetent if:
 - (a) the Registrar believes on reasonable and probable grounds that the member has committed an act of professional misconduct or is incompetent and the ICRC approves of the appointment; ...or
 - (c) the ICRC has received a written complaint about the member and has requested the Registrar to conduct an investigation

The Complaints Process: Investigation of a Complaint

Section 75 Investigation

- Much more expansive investigation than typical complaint investigation
- Scope can expand to reviewing dentist's professional conduct and competence in particular area (i.e. where a general concern is raised by a specific complaint) or expanded to include a review of other patients' records
- Seen most often when there is more than one complaint of the same kind or complainant is reluctant to proceed



The Complaints Process: Investigation of a Complaint

Other investigative steps may include:

- Obtaining a patient's chart or other records on an unannounced basis*;
- Surveillance of or undercover attendance at the member's practice;
- Obtaining billing information from insurers;
- Approaching other patients or clients of the member, or the member's colleagues or staff.

* Under the *Personal Health Information Protection Act, 2004*, health information custodians may provide personal health information to the College without the consent of the patient.

The Complaints Process: Investigation of a Complaint

Powers of Investigators:

- Investigators generally have the power to "inquire into and examine the practice of the member to be investigated".
- They also have specific powers to enter into members' places of practice, examine things found there, summon evidence, make copies of documents, remove original items from the member's place of practice and apply for and obtain a warrant to search a place that is not a member's place of practice.

The Complaints Process: Investigation of a Complaint

Investigators have the power to require observation of a member in practice.

- The CPSO's power to do so was recently challenged and determined to be valid:
 - An inquiry into and examination of a member's medical practice includes observation of the member's treatment of patients where there is a concern about the member's competence.
 - Refusal to permit an observation of clinical practice in those circumstances constitutes obstruction of the investigator, contrary to s. 76(3) of the Code.

The Complaints Process: Investigation of a Complaint

- Investigators also have the power to compel a professional to submit to an interview:

“Even in the context of a public inquiry, an individual may be compelled to testify, although the result may be the revelation of inculpatory information. In such circumstances, s. 9 of the PIA provides protection against subsequent use of the testimony.”

- Gore v. College of Physicians and Surgeons of Ontario, [2009] O.J. No. 2833.

The Complaints Process: Investigation of a Complaint

Power of Investigators: Summoning Witnesses and Documents

- If necessary, and after taking necessary steps, the investigator may hold a private inquiry or investigative examination.
- For the inquiry, the investigator is permitted to serve a summons on the appropriate witnesses, receive documents summoned to the inquiry and take evidence of witnesses under oath.

The Complaints Process: Consideration of Prior History

- Since RHPA amended in 2009, ICRC Panels required to consider member's prior history with the College, including all available decisions of any College Committee (Executive, Complaints, ICRC, Discipline)
- Member is provided with a copy of all prior decisions and has opportunity to make separate submission as to their relevance to the complaint
- RCDSO permits Member to address prior history separately, so response is not provided to complainant

The Complaints Process: Consideration of Prior History

- Member should highlight lack of relevance of prior complaint where:
 - No action taken
 - Different subject matter
 - Lengthy period of time has passed
- But member should acknowledge relevance where past complaint relates to similar conduct or concerns, even if no action taken

The Complaints Process: Disposition of the Complaint

The ICRC Panel May:

- Take No Further Action (Dismiss the complaint)
- Require the Dentist to appear before it to be cautioned or issue a written caution
- Provide Advice to the Dentist
- Refer dentist to another ICRC Panel for incapacity proceedings



The Complaints Process: Disposition of the Complaint

The ICRC Panel May:

- Refer specified allegation to the Discipline Committee
- Offer the Member an opportunity to meet with the Panel
- Take action that is appropriate, and not inconsistent with legislation



The Complaints Process: Disposition of the Complaint

- The ICRC Panel May Not refer a Dentist to the College's Quality Assurance Committee, but it can require the Dentist to complete a specified continuing education or remediation program.



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DENTISTRY LIBRARY (HARRY R ABBOTT)

The Complaints Process: Right Of Review

- Member or Complainant can seek review of ICRC Panel Decision by Health Professions Appeal and Review Board (HPARB)
- Except if matter is referred to Discipline Committee: no review available
- Review may be in writing or through oral hearing
- Review is limited to the record (the material presented to the ICRC Panel) - must ensure that the record is complete

The Complaints Process: Right Of Review

- HPARB may, after conducting a review of the ICRC Panel decision, do one or more of the following:
 - a) confirm all or part of the ICRC's decision;
 - b) make recommendations to the ICRC; or
 - c) require the ICRC to exercise any of its powers other than to request a Registrar's investigation.



Health Professions Appeal and Review Board

The Complaints Process: Right Of Review

- HPARB is only permitted to interfere with ICRC Panel's Decision if it determines that
 - (a) the investigation of the complaint was inadequate; or
 - (b) The Panel's Decision was unreasonable

The Complaints Process: Right Of Review

Adequacy of the Investigation:

- An adequate investigation does not need to be exhaustive
- To be adequate, ICRC Panel must seek to obtain the essential information relevant to making an informed decision regarding the issues raised in the complaint

The Complaints Process: Right Of Review

Reasonableness of the Decision:

- The question for the Board is not whether it would arrive at the same decision as the ICRC Panel, but:
 - Can the ICRC's decision be reasonably supported by the information before it?
 - Can the ICRC's decision withstand a somewhat probing examination?
 - Does the ICRC's decision fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law?

The Complaints Process: Right Of Review

- Member and Complainant can appeal HPARB decision to Divisional Court
- Divisional Court may substitute its decision for that of the Panel or Committee



The Discipline Process: ICRC Referral to Discipline

- Specific allegations of professional misconduct or incompetence are referred to the Discipline Committee
- Trial-like process including disclosure and formal hearing
- Penalties range from reprimand to revocation of licence
- Allegations of Professional Misconduct or Incompetence can be referred



The Discipline Process: ICRC Referral to Discipline

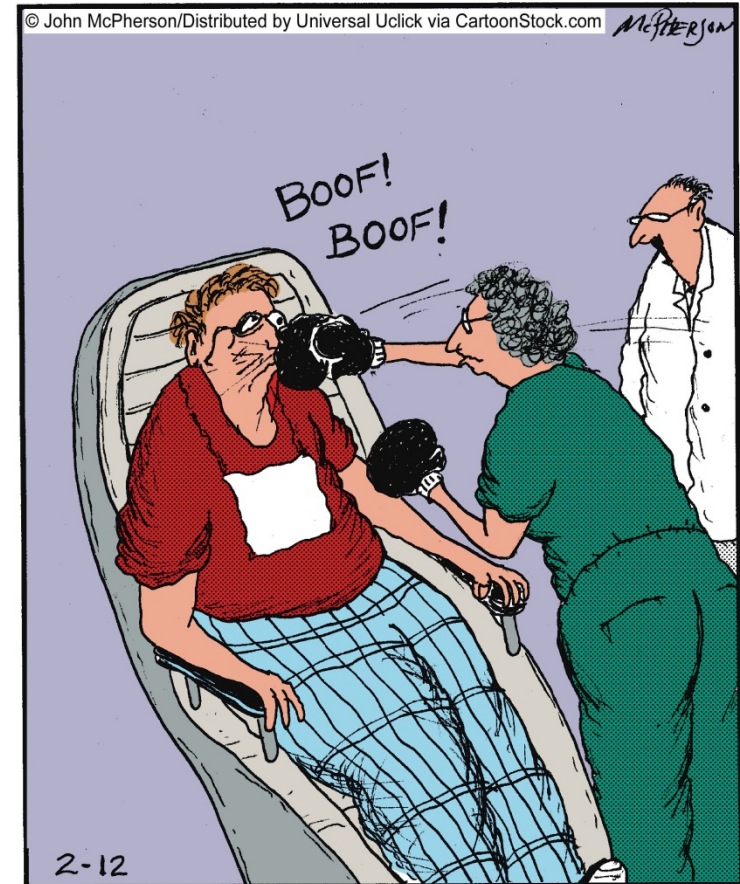
Professional Misconduct

- Conviction for offence relevant to suitability to practice
- Professional misconduct in another jurisdiction
- Sexual abuse of a patient
- As defined in the regulations

The Discipline Process: ICRC Referral to Discipline

Incompetence - If alleged that the care of a patient:

- Displayed a lack of knowledge, skill or judgment, or
- Displayed disregard for the welfare of the patient that demonstrates that:
 - The Dentist is unfit to continue to practice or
 - The Dentist's Practice should be restricted



"OK, Bernice. He no longer seems to feel your punches. The Novocain seems to have kicked in."

The Discipline Process: Outcome of the Hearing

A Discipline Committee Panel may:

- suspend or revoke the dentist's licence
- impose terms, conditions, or limitations on the dentist's licence
- reprimand the dentist
- require the dentist to pay a fine

If the misconduct is found to occur, a summary of the matter will be published in *Dispatch*.

Strategic Considerations in Responding to Complaints



Responding to Complaints: Overview

- A calm, complete and respectful response, prepared by a lawyer is your best defence
- A lawyer will assist you in formulating your written response to the complaint and plan the strategy in going forward
- Do not exacerbate the situation by:
 - Inflaming the complainant
 - Disrespecting the College or the ICRC Panel
 - Submitting a response that contains too much, too little, or concerning information

Responding to Complaints: Strategic Considerations

- If College staff call, limit the information you provide – records are being created of every conversation
- Do not discuss the complaint with staff, other patients, anyone but your lawyer
- Get legal advice early
- Goal of the response: Show the Panel the way out
 - Explanation of what transpired
 - Measures to address outstanding concerns

Responding to Complaints: Strategic Considerations

A lawyer will also help you decide whether to:

- Present an explanation at all
- Offer up witness names?
- Obtain an expert opinion?
- Propose a resolution to the Committee?
 - i.e. if records are illegible, consider taking a record keeping course and indicate this in your response
 - If case was difficult, consider further training in the area

Responding to Complaints: Strategic Considerations

In preparing your response you should

- Be clinical not emotional
- Answer only the allegations
- Know your dentistry
- Include relevant clinical notes and records
(DO NOT MAKE ANY CHANGES, ADDITIONS
OR DELETIONS)
- Aim is to diffuse, not inflame complaint

Responding to Complaints: Strategic Considerations

Do not approach the complainant

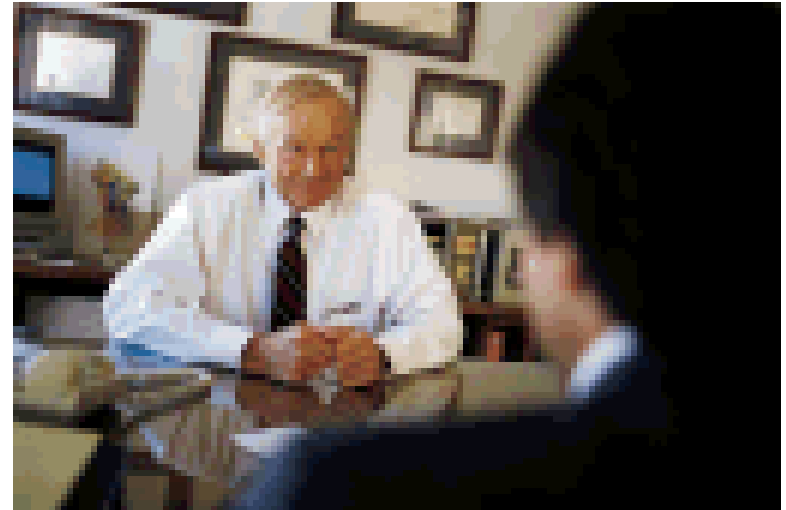
- Anything said can be used against you
- You could be viewed by the College and complainant as threatening, or inappropriately attempting to interfere
- By this point the College already has the statutory obligation to investigate
- Ensure the complainant's treatment needs are not forgotten in the process – refer them elsewhere

Responding to Complaints: Strategic Considerations

- Consider making colour copies of patient records in the event that the originals are seized by the College
- Disclose all relevant records, documents and other data – do not pick and choose portions of the record to submit
- Get advice if an investigator attends at your office. You have rights.

Responding to Complaints: Strategic Considerations

- Create a written record of all interactions with the College, such as:
 - Meetings
 - Phone conversations
 - Correspondence



Responding to Complaints: Strategic Considerations

Be careful of...

Investigators showing up unannounced

- Investigators have been known to show up at a dentist's office unexpectedly to:
 - Demand patient files, day books, and appointment books
 - Interview dentists, staff and patients

Responding to Complaints: Strategic Considerations

Be careful of the
“Stoolie”

- The College can place undercover patients in your practice to assess standards and treatment



Tips and Traps



Tips and Traps: Managing Complaint and Litigation

Managing Complaint and Related Legal Action:

- Separate processes; RHPA precludes use of documents created for College process in litigation
- Deemed undertaking rule prevents using legal action documents for other purpose
- Case law is clear: A Release that requires withdrawal of complaint is unenforceable and may amount to misconduct!

Tips and Traps: Action against Complainant

Thinking of Suing the Complainant? See 2005 Superior Court case *Tucakov v. Engelbert*

- Ms. Engelbert received treatment from Dr. Tucakov
- She complained that he:
 - utilized dental tools which appeared unsanitary
 - neglected to wear a mask
 - sprayed his saliva onto her face and into her mouth while speaking to her
- RCDSO investigated and warned dentist not to speak to patient during investigation.

Tips and Traps: Action against Complainant

- Dr. Tukacov approached the patient repeatedly, advising that he would sue if she did not withdraw her complaint and pay her outstanding account (\$99.00)
- Ms. Engelbert forwarded this correspondence to the RCDSO
- Dr. Tukacov sued her for defamation
- Ms. Engelbert succeeded in having the action dismissed on summary judgment.

Tips and Traps: Action against Complainant

- The Court found that there was no genuine issue for trial
- Because she had a legal, social or moral duty to communicate information to the RCDSO as a statutory body exercising disciplinary powers over its members, statements made in the course of RHPA proceedings were privileged communications
- Dentist was likely ordered to pay costs and saw his minor complaint become a major headache!
- Dr. Tukacov attempted to appeal dismissal of his case. Costs of unsuccessful appeal were \$10,000.

Tips and Traps: Preventing Complaints

Preventing Complaints:

- Documentation - create a thorough record of all advice, procedures and patient visits
- Communication - take time to properly explain matters
- Consent - be sure patients understand procedure
- Confidentiality - err on the side of caution
- Treatment Decisions – use your judgment and justify the decision

Preventing Complaints: Documentation

- create a thorough record of all advice, procedures and patient visits
- Records can be relied upon by dentist but can be basis of negative decision by ICRC
- Maintain original records as per RCDSO policy – provide only copies upon request
- Ensure your handwriting is legible
- Ensure you review all lab reports and correspondence and that you have a way of proving that you did so (i.e. initial)

Tips and Traps: Documentation

- Document need for treatment (i.e. restorations), advice provided and observations through charting and radiographs
- Goal: another practitioner reviewing the record should have no question as to the need for the treatment
- Systematically organized records convey an organized approach to treatment
- Include financial estimates and payment policies as part of record and part of consent process

Tips and Traps: Documentation

- Document non-compliance with advice, hygiene - this can provide a defence to allegations of neglect
- Document reasons for concern about complication or complexity
- Document complications and advice provided



Tips and Traps: Confidentiality and Privacy

- Err on the side of caution
- Note that capable person can direct who can see their personal health information – don't disclose without consent
- Note recent case law in which civil action resulted in damages award simply for “snooping” where no financial harm resulted



Tips and Traps: Communication

- Take time to properly explain matters
- Avoid appearing rushed or inattentive
- Address all questions – if you cannot address all issues in one sitting, identify all and deal with them over several visits



Tips and Traps: Communication

- Clearly explain all risks (rare, but serious; common, but minor)
- Don't avoid patient and family after bad outcome
- Sensitive questions or examinations – explain reasons in advance – don't surprise patient
- Be pro-active when a problem occurs: apologize where appropriate, never cover up, take steps to address problem including by referring patient elsewhere for care

Tips and Traps: Communication with Staff Regarding Emergencies

- Have a policy and train staff on handling emergencies
- Without a clear plan, staff are more likely to panic and panic results in bigger problems
- Instruct your staff never to fear calling for help- fear having to explain why you didn't!



Tips and Traps: Informed Consent

- Consent is a process, not a form
- Make your process complete: be sure patients are informed about and understand:
 - The procedure proposed
 - The benefits
 - The material risks and side effects
 - The alternatives to the treatment
 - The consequences of not having the treatment
- Most important part of process: opportunity to ask questions

Tips and Traps: Treatment Decisions

- Ensure you direct treatment, not your patient
- Refuse to provide treatment that the ICRC may consider “heroic but certain to fail”
- Ensure complex treatment is documented in a treatment plan, supported by a diagnosis
- Where initial treatment is difficult and unsuccessful, avoid attempting retreatment

Practical Tips DO's and DONT's

- Don't panic
- Don't confront patient
- Don't contact College
- Don't add to, erase or alter records
- Don't breach patient's confidentiality

Practical Tips DO's and DONT's

- Do get advice from someone experienced in dealing with complaints
- Do prepare draft response
 - Be clinical not emotional
 - Confine response to issues in complaint
- Do consider obtaining expert report
- Do be patient –allow process to unfold

Conclusion and Questions



Conclusion

- Treat each patient as if they could be your next complainant:
 - Properly explain all matters
 - Consent: be sure patients understand
- Do not attempt to cover up mistakes or potential complaints
- Recognize your limitations and treat within your comfort level
- Refer patient to a colleague and ensure accuracy of information in referral letter

Conclusion

- Consider an apology where an error occurred; *Apology Act* precludes expression of apology from being used in civil action
- Consider a refund or not charging for a service – lost income may pale in comparison to emotional, time and other costs associated with complaint
- But document discussions, purpose of any proposed refund or waiver (goodwill, patient relations, not as admission of wrongdoing or liability) and consider seeking a release.

Conclusion

- Create a thorough record of all advice, procedures and patient visits
- Obtain advice if patient threatens complaint or lawsuit
- When responding to a complaint, get advice first
- Give the ICRC Panel “a way out”
- See *Dispatch* Vol. 25, No. 4, Nov/Dec 2011 – Tips for avoiding malpractice claims apply to complaints as well!



For More Information

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