

## Zero Tolerance

By: Richard Steinecke  
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Regulators sometimes like to say that they have “zero tolerance” for certain kinds of conduct. Part of the difficulty with this expression is that its meaning is unclear. Generally it suggests that every allegation is taken seriously. However, revocation only occurs for serious cases that are proved.

Part of the zero tolerance provisions for sexual abuse by health practitioners in Ontario is the mandatory revocation for frank sexual acts with patients. This provision has been challenged in the Ontario Court of Appeal three times of the past decade. Earlier this month the Court confirmed that, in the area of sexual abuse, such a mandatory order is valid.

### Background Facts

The complainant, met Dr. Leering, a chiropractor, in 2004. They commenced a sexual relationship, and moved in together, shortly thereafter. Approximately four months later Dr. Leering commenced regular chiropractic treatments of the complainant. These treatments occurred at Dr. Leering’s office. Dr. Leering opened a patient file for her and referred to her as his “patient” in correspondence. Six months after the commencement of treatment Dr. Leering and the complainant separated. Dr. Leering sought payment for the treatment rendered and eventually remitted the account for about \$600.00 to a collection agency.

### Discipline Committee Decision

Dr. Leering was found by the Discipline Committee to have sexually abused the complainant. The Discipline Committee turned its mind as to whether there existed a spousal exemption to the revocation provision

The Discipline Committee reviewed past decisions of the Ontario Court of Appeal.<sup>1</sup> *Mussani* and *Rosenberg* discussed the importance of the zero tolerance and mandatory revocation policy in light of the findings of the CPSO, *Task Force on Sexual Abuse of Patients* (1991). Some of the findings made during the CPSO Task Force included the following:

1. The general vulnerability of patients in such relationships;
2. The power imbalance that almost invariably exists in favour of the practitioner, thus facilitating easy invasion of the patient’s sexual boundaries;
3. The privileged position of doctors in society, based on their education, status and access to resources;
4. The breach of trust in such conduct by physicians;
5. The serious, long term injury to the patient, both physical and emotional that results from sexual abuse, including harmful effects on future care of the patient; and
6. The fact that sexual abuse tarnishes public trust in the entire profession;
7. The results of an historical review by the Task Force of sanctioning decisions.

The Discipline Committee referred to *Rosenberg* wherein it quoted that “the zero tolerance policy precludes inquiry into any explanation or excuse for the sexual activity. A patient’s consent is irrelevant.”

In light of these authorities, the Discipline Committee refused to dilute the zero tolerance and mandatory revocation policy by creating a spousal exemption. The Discipline Committee acknowledged that:

it may appear that the zero tolerance/mandatory penalty regimes are rigid and “... can lead to results in individual cases that are harsh, extreme and even arguably unjust” when applied to situations where there may be genuine consent to a relationship between mature adults and no power imbalance or

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<sup>1</sup> *Mussani v. College of Physicians and Surgeons of Ontario* (2003), 64 O.R. (3d) 641 and *Rosenberg v. College of Physicians of Ontario* (2006), 275 D.L.R. (4<sup>th</sup>) 275

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Facsimile: 416-593-7867, E-Mail: [rsteinecke@sml-law.com](mailto:rsteinecke@sml-law.com)

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exploitation on the part of the health professional. Despite this, the Panel finds that the importance of upholding the zero tolerance policy outweighs its pitfall; recognizing that the legislation was attempting to address a growing problem of sexual abuse in the health professions.

## **Court of Appeal**

The Court of Appeal confirmed the Discipline Committee's decision. Sexual abuse occurs when a health professional and his or her patient engage in sexual relations. The Court confirmed that the legislation did not contain a spousal exemption.

The Court of Appeal clarified and reinforced the zero tolerance approach. The Court of Appeal acknowledged that the finding against Dr. Leering could be construed as harsh in light of his consensual relationship with the complainant. However, Dr. Leering could have avoided the situation by refraining from treating her as his patient.

## **Implications**

While the Court upheld the concept of zero tolerance, including a significant mandatory sanction, for sexual abuse, it is clear that it viewed sexual abuse as an exceptional matter. There was evidence before the Court about the circumstances in which the zero tolerance provisions had been enacted, the harm that results from sexual abuse and the difficulty in any approach that depended on a case-by-case analysis of the degree of exploitation by the practitioner. However, it is clear that the Court is concerned generally about the unfairness that can result from mandatory orders.

One can conceive that the Court will be reluctant to support mandatory orders in many other circumstances.

The *Leering* case can be found at: [www.canlii.org](http://www.canlii.org).

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