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# Referrals to Discipline

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Regulators know that they have to accommodate a disability or other protected human rights ground. However, the extent determining whether allegations should be referred to discipline for a formal hearing and possible sanction is never easy. While the referral itself does not, in itself, amount to a finding of misconduct nor does it impose any penalty, it initiates a formal hearing process that is difficult for all concerned.

The person or committee that determines whether the allegations should go to a discipline hearing comes with a variety of names, depending on the enabling statute. The names include: complaints committee, investigation committee, professional conduct committee and Registrar (e.g., where discipline takes the form of a notice of proposal to suspend or revoke). However, what the people or committees all share is the duty to screen those cases that should go to a formal hearing from those that can be dealt with in other ways (e.g., caution, remedial action, dismissal or no further action).

The test for referral has two parts to it. The first part is to determine whether the allegations are serious enough to warrant a referral to discipline. The screening committee looks at the inherent nature of the alleged conduct (e.g., dishonesty, breach of trust, incompetence) and the other circumstances (e.g., pattern of conduct, insight, whether another alternative would effectively protect the public interest).

The second part of the test is whether the evidence is sufficiently strong to prove the conduct. There is no point in referring even the most serious allegations if they cannot be proved. Over the years courts have used different language to describe the degree of scrutiny of the evidence for this purpose. However, in recent years courts and regulators have borrowed from the criminal law model to ask themselves whether there is a reasonable prospect of proving the allegations.

This model has most recently been affirmed in the case of *Reyhanian v. Health Professions Appeal and Review Board*, 2013 ONSC 297. Dr. Reyhanian was a dentist facing regulatory action by the Royal College of Dental Surgeons of Ontario. In the course of those interactions, Dr. Reyhanian was assessed by a Dr. Hoffman. Dr. Hoffman concluded that Dr. Reyhanian suffered from a condition that made Dr. Reyhanian unfit to practise dentistry at that time.

Dr. Reyhanian complained to Dr. Hoffman's regulatory body "alleging that Dr. Hoffman's diagnosis was rendered maliciously and that Dr. Hoffman inaccurately reported what Dr. Reyhanian had said to him during the three assessment sessions." Dr. Hoffman's regulatory body declined to refer the allegations to discipline. Dr. Reyhanian challenged that decision before both the Appeal Board and to the Ontario Divisional Court.

The allegations, if true, (i.e., writing a malicious report that could seriously damage a person's career) could be seen as serious enough to warrant a discipline hearing. So the main issue was whether the screening committee (here the ICRC) simply had to refer the matter to discipline to determine the facts or whether the screening committee could scrutinize the strength of the evidence first.

Part of the problem, of course, is that screening committees are repeatedly told not to make credibility findings. There are numerous court cases that have strongly indicated that a screening committee should not be deciding whether disputed allegations are true. Even when a screening committee determines that significant educational or remedial action is warranted, it does so to avoid future problems and to enhance the member's practice and not because it has found any misconduct in the member's current practice.

However, deciding whether a serious allegation has a reasonable prospect of being proved is an acceptable function of a screening committee. That process does not include making credibility findings. Rather, it involves assessing the strength of a prosecution case.

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In *Reyhanian* the Divisional Court said:

> We do not accept the argument advanced by the applicant's counsel that absent a finding that a complaint is frivolous or vexatious, the ICRC has no power to weigh the evidence before it in determining whether a referral to the Discipline Committee is warranted. We do accept that the ICRC is not an adjudicative body and does not make findings of credibility, per se. However, it does not flow from that proposition that the ICRC must refer to discipline any case in which there are disputed issues of fact, on the theory that if the complainant were believed, professional misconduct would be established. Rather, the ICRC is entitled to take a critical look at the facts underlying the complaint and the evidence that does and does not support it, along with a myriad of other issues (such as, the record of the respondent, special circumstances surrounding the incident, policy concerns, the capacity of the discipline committee, among others). The factual record revealed from the investigation must necessarily be part of that analysis. If the applicant's argument was correct on this issue, the ICRC would be obliged to refer to discipline a case in which a wild and unsupported accusation was made about conduct that occurred in front of 10 independent witnesses, all of whom asserted that the incident did not happen at all. That is simply not the test.

Since the determination of the strength of the case involves the application of legal judgment, screening committees are increasingly obtaining a "prosecutorial viability opinion" in difficult cases to provide assistance on the issue. While the screening committee is not bound by the prosecutor's analysis, such an opinion could help ensure that the screening committee is looking at the right factors, namely whether there is a reasonable prospect of the allegations being established (rather than whether the screening committee believes the allegations).

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