

February 11, 2021

College of Dental Surgeons of Saskatchewan
201 1st Ave S
Saskatoon, SK S7K 1J5

VIA EMAIL: mitch@saskdentists.com

Attention: Dr. Mitch Taillon, Registrar

Dear Sir:

RE: Anonymous Submission of Complaints

This correspondence follows upon our recent discussions on January 18, 2021 regarding the ability of the College of Dental Surgeons of Saskatchewan (“CDSS”) to accept complaints or concerns which are submitted anonymously. Although we understand these concerns to relate largely to advertising matters, consideration is necessarily given to whether any allegation of misconduct or incompetence could be the subject of an anonymous complaint.

Role of Professional Regulators

The role of a professional regulator is to set and enforce standards for the profession. The intent is to protect the public.

As part of the enforcement of standards, regulators have a duty to abide by the concept of a “duty of fairness”. There are many elements of a duty of fairness, which vary depending on the stage of a proceeding. For instance, the duty of fairness is different at an investigative stage than at a discipline hearing.

The most significant component of the duty of fairness is that a member understand the nature of complaint made against him or her and have a fair opportunity to respond. Underlying these discussions, those two concepts must be considered:

1. Protection of the public; and
2. The duty of fairness.

Legislation

As you may know, section 29 of *The Dental Disciplines Act* (“Act”) describes the jurisdiction of the professional conduct committee (“PCC”). That section provides:

Where the professional conduct committee is requested by its council to consider a complaint or is in receipt of a written complaint alleging that a member is guilty of professional misconduct or professional incompetence, the committee shall:

- (a) review the complaint; and
- (b) investigate the complaint by taking any steps it considers necessary, including summoning before it the member whose conduct is the subject of the complaint or assessing the member's competence.

This wording in the *Act* is relatively permissive; there is no required form for the complaint and no requirement that the complainant be identified. In any case where a matter has been referred by council to the PCC, or where the PCC receives a written complaint, the PCC is tasked with reviewing and investigating the complaint. The CDSS bylaws do not provide for any additional requirements in terms of a complaint, though it would potentially be open to CDSS to impose additional procedural requirements pursuant to its ability to make bylaws prescribing procedures for the review, investigation and disposition of complaints as described in section 15(2)(f)(i) of the Act.

Case Law

In our previous memorandum regarding anonymous complaints, we made reference to a decision of the Court of Queen's Bench in *Rotelick v. The Institute of Chartered Accountants of Saskatchewan*, (1998), 169 Sask. R. 180. We confirm that that decision, in which the Court found that a complaint need not include the identity of the complainant, continues to be good law. More recently, although dissenting on other grounds, a Justice O'Ferrall of the Alberta Court of Appeal stated:

The disciplinary proceedings were the result of an anonymous complaint received ten days after the marriage had taken place. There was no evidence that the anonymous complainant had been harmed by the appellant's conduct. The anonymous complainant refused to be interviewed when approached by the College's Complaints Director. There is nothing wrong with anonymous complaints and anonymous complainants. The point being made is simply that there was no evidence emanating from the complainant in this case which supported a finding of unprofessional conduct.

[Emphasis added]

Hunter v. College of Physicians and Surgeons of Alberta, 2014 ABCA 262 at 77.

Protection of the Public and Duty of Fairness Considerations

Looking first at the protection of the public, CDSS has an interest in ensuring that regulatory standards (including advertising regulations) are respected. To that end, accepting anonymous complaints likely leads to members and the public reporting concerns about a member's adherence to CDSS regulations. It seems likely that transgressions about advertising would not be reported by fellow members of the profession if they could not be submitted anonymously. There would be fear of retaliation and ostracization.

In terms of the duty of fairness, depending on the nature of the complaint, the identity of the complainant may not be required in order for the member to respond to the allegation. For instance, if the complaint is that a member had an advertisement on the radio which contravened the

advertising rules, the member can respond fully and completely without knowing the identity of the complainant. Thus, the duty of fairness is not compromised.

Obviously, where a complaint is delivered anonymously, the PCC in the course of its investigation will not have any evidence that the complainant has been harmed by the alleged misconduct, but this does not prevent the PCC from consider the information that is available and making a determination on that basis. Indeed, as a self-regulating profession, CDSS is tasked with governing the conduct of its members in the public interest. It is not difficult to imagine circumstances where given the nature or severity of an allegation, investigation of an anonymous complaint is necessary to ensure the required level of professional regulation.

Conclusion

We understand that CDSS considered whether a “concern” with respect to advertising could be made on an anonymous basis but that a formal “complaint” would require the complainant to identify him or herself. As indicated above, we see nothing in the Act or the bylaws which requires a complainant to identify him or herself to submit a complaint. Of course, in accordance with the bylaws, the Registrar has a broad discretion to attempt to resolve any complaint informally and we anticipate that this process would be undertaken in most cases with respect to advertising concerns, whether the matter is raised formally or informally. Speaking more generally, if CDSS were to amend its bylaws to provide that, at least for advertising matters, a complaint will not be accepted on an anonymous basis, this will operate to the benefit of those members who are breaching the regulatory requirements. No matter how flagrant the breach, CDSS may inadvertently limit its own ability to deal with the concern if there is no person willing to go on record as a complainant.

We trust the foregoing is satisfactory. If you have any questions or comments, please feel free to contact our office.

Yours truly,

Robertson Stromberg LLP
Barristers and Solicitors

Per: *Sean Sinclair*

Sean M. Sinclair
SMS Legal Prof. Corp.

SMS:cdg