

Balancing Public Interests:
Publication under the
Health Professions Act

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NOTES: A copy of this paper, the cases referred to herein, and a survey of how Colleges under the *Health Professions Act* have addressed publication can be found on Ng Ariss Fong's interim website at www.ngariss.com.

Overview

1. One of the principal duties of every College under the *Health Professions Act* is to serve and protect the public. One way a College does this is by publishing, in various ways and degrees, the actions it may take against the licenses of registrants. The conventional wisdom is that the public interest demands complete disclosure and nothing else. Or, at least, this is the perspective preferred by the media, which dwells on the idea that critical matters are being hidden from the public, which has a “right to know”. Yet the publication of a registrant’s name, along with the details of what and why his registration has been restricted is not a subject even mentioned in the *Health Professions Act*. Indeed, section 19 of the Act does not even refer to “publication” as a matter on which a College can pass a by-law.
2. The lack of any publication provision is especially interesting given the importance of publication to individual registrants. Publication is often the most contentious issue in a discipline matter because publication can, in some ways, have more impact on a registrant’s affairs than whatever disciplinary measure a College may take. By definition, publication involves spreading word that a professional has acted wrongly, or is for whatever reason (medical or otherwise) not competent to fulfil his professional role. In the age of the Internet, publication is effectively permanent, and will almost certainly outlast any suspension a College might impose. Publication is also unforgiving: a published account of wrongdoing cannot be amended to show that a professional has reformed, or has remedied a defect.
3. Moreover, publication can take a life of its own. This is amply illustrated in the context of teachers, where in the case of *Newman v. Halstead*, 2006 BCSC 65, a

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parent in Comox deeply involved in educational matters maintained a website where she published a list of “Least Wanted Educators”. She would post the name and photo of teachers who had been disciplined, or found guilty of crimes, or whom she thought *ought* to be disciplined based on her own (often falsified or grossly exaggerated) accounts of her personal encounters with them. A number of teachers found themselves listed alongside notorious sex offenders and pedophiles. Where photos were not available, she would publish a cartoon of an apple with a worm through it (showing them to be “bad apples”). She also maintained a list of “Bully Educators”. Furthermore, she would post personal commentary. The Defendant parent was successfully sued for defamation by eleven plaintiffs. (Incidentally, in the course of her being sued, the parent filed formal complaints with the College of Teachers against all of the professionals who were suing her, making outrageous allegations which were later found by the court to be complete fabrications.) For purposes of publication, this case stands as a significant example of how publication, as a result of the reactions of “the public” (including more unforgiving and vocal citizens), can lead to far-reaching practical results.

4. Given the relative permanence and intrusiveness of publication, the possibility of avoiding or controlling publication as part of a settlement is often a primary factor in driving registrants to resolve complaints, by means of informal resolutions, agreements and undertakings, in order to avoid the risks involved in uncontrolled publication following a hearing. Of course, savings alone in terms of legal fees and other costs is only one factor bearing on a regulatory body deciding to refrain from publishing, or even allowing for such discretion. Practically speaking, however, how a College chooses to design its publication scheme will have an impact, known or not, on the expense of running its disciplinary process.

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5. Since the *Health Professions Act* does not refer to publication, every College under the Act has a degree of discretion to design a system of publication which serves the profession and the public interest. The public interest is not, however, always easy to define. In fact, the public interest involves a balancing between many interests which may conflict. If due regard is not given to all the various aspects of the public interest, a College risks the expense of a court intervening, at the behest of a registrant for example, to assure that all interests have been considered.
6. For example, a profession may support the publication of disciplinary matters in order to educate registrants about standards of conduct. Such an interest only justifies, however, the publications of events *without* names. The public also has a very strong interest in a *transparent* discipline process which renders the regulatory process accountable to the public. A College may find, however, that publication in some cases is particularly undesirable, because it would result in *unacceptable harm* to a patient, or to the registrant himself, or to other persons, such as their family members, or the registrant's other patients.
7. A bylaw scheme which requires name publication in some cases, but prohibits it in others, and reserves discretion otherwise, is illustrated by Law Society Rule 4-38.1(3), which prohibits name publication if a citation is dismissed, requires it generally, but provides for discretion in cases which do not involve suspension or disbarment and where disproportionate harm would otherwise result:

4-38.1 (1) Except as allowed under this Rule, a publication under Rule 4-38 must identify the respondent.

(2) If all counts of the citation are dismissed by a panel, the publication must not identify the respondent unless the respondent consents in writing.

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(3) The panel may order that publication not identify the respondent if

(a) the panel has imposed a penalty that does not include a suspension or disbarment, and

(b) publication will cause grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication.

8. The Colleges under the *Health Professions Act* have created their own unique publication schemes. These schemes address and balance competing elements of the public interest in different ways. The consequences of what they achieve, or do not achieve, can be assessed first in terms of the many different considerations one can take into account when designing (or redesigning) a publication system, and secondly, in the light of court decisions which have addressed publication in the context of teachers.

The jurisdiction to publish

9. The *Health Professions Act* does not refer to any power to publish, and section 19 does not refer to publication as a matter over which a College can pass a bylaw. Therefore, a power to publish must be implied as a necessary part of each College being empowered to carry out its regulatory function, including its holding hearings. This less-than-clear basis for publication should be kept in mind because every College faces, as a result, a limitation as to what it can pass in terms of publication or other bylaws. The courts will *not* presume that the *Health Professions Act* empowers any College to act *unreasonably*, or to use a bylaw power in an unreasonable fashion. This still affords Colleges wide latitude in what it can accomplish. Every College should, however, keep in mind that even bylaws can be challenged on jurisdictional grounds for being unreasonable, or as being contrary to

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the *Human Rights Code* or the *Charter of Rights and Freedoms* (e.g., if they are discriminatory).

Factors bearing on publication

10. The many factors which weigh for and against publication have been addressed in recent court cases in BC, primarily in relation to the teaching profession. To understand these cases, one can note that the publication scheme of the College of Teachers has varied over the years. The bylaws of the College did, for some time, provide a broad discretion to the College to refrain from publishing the name of a member:

6.R.03 In a summary circulated or published, the Hearing Sub-Committee may order that the respondent in the case not be identified, and, in the event that the Hearing Sub-Committee orders that a respondent not be identified, reasons for that decision shall be given.

Respecting this discretion, the courts decided that no legal presumption existed in favour of publication. (*Treleaven v. B.C. College of Teachers*, 2000 BCSC 1160, [2000] B.C.J. No. 1562 (Q.L.) at paragraph 100)

11. The bylaws have since been altered to refer to “grievous harm” to a respondent or to another person as a basis for allowing anonymity:

6.R.03 If the respondent requests that their name be withheld from publication, the Discipline Hearing Sub-Committee may order that the respondent in the case not be identified in a summary published in accordance with 6.S.01 where:

- (a) the penalty imposed does not include the cancellation of a certificate; and

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(b) publication will cause grievous harm to the respondent or another identifiable individual that outweighs the interests of the public and the College in full publication.

6.S.04 Notwithstanding 6.S.03, where the respondent's name would identify a victim or victims, or would cause grievous harm to another identifiable individual that outweighs the interests of the public and the College in full publication, the Discipline Hearing Sub-Committee may withhold publication of the respondent's name.

12. The foremost reason favouring publication is transparency of process. Justice must not only be done, but be seen to be done. Transparency of process assures the public that justice is being done because it is done publicly, rather than behind closed doors. This was discussed by the court in *G v. British Columbia College of Teachers*, 2004 BCSC 626, where the court examined the transparency of the court process itself where an appeal was being brought from a decision of the College. The court examined both the presumption of openness, and addressed various exceptions which exist to assure that justice is actually done.
13. Notably, the court allowed the member to proceed with his appeal anonymously in Mr. G, despite the public interest in a transparent court process, because the appeal concerned the member's right to anonymity, and that right would be destroyed if the member were to proceed in court using his full name, and this would prevent a fair hearing. The court applied the principle that, "As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield."
14. Transparency is the key public interest in favour of publishing a professional's name. Of course, publication *per se* serves other useful purposes, including educating other professionals about professional standards, and deterring them from wrongdoing by showing them that misconduct will result in disciplinary action.

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- Strictly speaking, however, these goals can be accomplished by publishing the results of a hearing while withholding the professional's name. (*Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 1999 BCCA 53 (C.A.) per Donald J.A. (Newbury J.A. concurring) at paragraph 15 onward.)
15. Publication may also serve the public interest in terms of providing something of a warning to the public about a registrant. Publishing for such a purpose does, however, raise interesting issues about the purpose of discipline, in that publishing for the purpose of warning the public is not simply a part of transparency, but a communication intended to comment on a professional's character, and a possible propensity to act wrongly in the future.
 16. On the other side of the tally is the public interest in protecting individuals who may face harm from publication of the facts of a case or the name of a registrant. This may include the registrant himself, who may, for whatever reason specific to the case, face a degree of harm from publication which far outweighs the gravity of what has actually occurred. As stated by the Court of Appeal, "There is a public interest in not damaging professional reputations unnecessarily." (*Dr. Q.*, at paragraph 24)
 17. The possibility of disproportionate harm from wide publication may obviously also include harm to complainants or to other persons, such as persons related to complainants or respondents. For example, one consideration in the teaching context is what impact publication may have on a teacher's relationship with existing or future students. In a health professions context, this may translate into a question of what impact publication in a particular case may have on a professional's relationship with existing patients.

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18. The public interest against causing disproportionate harm is illustrated in the case of the *British Columbia College of Teachers v. Mitchell*, 2005 BCCA 76, where, about twenty years previous, a young female teacher was pursued by and ultimately entered into a romantic relationship with a male student after he had left the school where she taught. As found by a jury and a court in civil proceedings, the case was unusual in that it involved seduction by a student, rather than vice versa. The teacher later broke off the relationship and went on to lead an otherwise exemplary professional and personal life – that is, until the former student commenced civil proceedings. Following criminal and civil proceedings (in which she was exonerated), she had her teaching certificate cancelled by the College, which also decided to publish her name along with the circumstances leading to her discipline. Both decisions were, however, varied by the Supreme Court (which imposed a 2 year suspension and no name publication), due to a failure of the discipline panel to consider mitigating circumstances, including the passage of time, her exemplary record in the intervening ten years, and a proven lack of risk of reoccurrence. That decision was affirmed by the Court of Appeal, which noted that the member’s discipline record would be provided to all school boards, could be provided to potential employers, and would be recorded in the College’s register.
19. The *Mitchell* case illustrates ultimately that transparency is *one* of many public interests, and shows an expectation that all factors, including the *extent* of publication, be carefully weighed.
20. The *Mitchell* case also illustrates that the public interest in transparency may be satisfied by means of mandatory publication to particular persons or public bodies (such as school boards), as distinct from the general public. In the health professions context, this might translate into publication to specific bodies, such as pub-

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lic employers (e.g., Worksafe), to parallel bodies elsewhere in Canada, or to the governing bodies of related professions in BC.

21. One additional consideration arising specifically in the health professions context is the fact that any impact on a professional's registration should show up on a College's register, which in turn is open to inspection by the public. In this way, the Act establishes a limited degree of transparency by providing for publication in a form which discourages idle curiosity, but which does provide disclosure to anyone wishing to exercise due diligence by investigating a particular professional. Publication by means of the register is very limited, however, since the statute appears to require only that a College permit physical access to the register during reasonable business hours.

Other factors to consider

22. In the course of designing or revising a publication scheme, a College must consider what, and to what extent, public interests are being served by the scheme in terms of what information may or must be published at various stages of the discipline process. Here are some useful questions, along with a brief random sampling of how a few different Colleges have taken different courses.
23. *What information to publish:* For example, given that the investigation and inquiry process produces different information at each stage one question is what information a College should publish as it becomes available. This decision may be affected by whether a given matter is resolved at a given stage. For example, an investigation may lead to a decision
 - a. to take no action (s.33(6)(a)),
 - b. to reach an informal resolution (s.33(6)(b)),

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- c. to an undertaking or consent agreement (s.33(6)(c)), or
 - d. to a citation (s.33(6)(d)).
24. If no action is taken after an investigation, the result is an *investigation report* to the board (s. 34(1)(a)), which must be provided in some form to the complainant (s. 34(1)(b)). Given that the report triggered by “no action” must be published at least to the person with the most direct interest in the complaint, the question is whether any public interest might warrant any wider publication. Different Colleges take different approaches. For example, at least according to their bylaws, the College of Dental Hygienists and the College of Dieticians publish summaries of all Inquiry Committee dispositions, but without names.
25. In contrast, some Colleges implicitly take the position that the public interest does not warrant publication of any matter which has led to either “no action” or an informal resolution by a College. For example, the College of Denturists will only publish Inquiry Committee consent orders and agreements (as well as hearings) to registrants. Moreover, other Colleges do not publish Inquiry Committee actions at all.
26. Where an Inquiry Committee decides that regulatory action is necessary, but manages to arrange for an undertaking or consent, the result is an *undertaking and consent agreement*, and one important question is whether to publish agreements at all. Notably, the statute requires first that the Inquiry Committee must deliver a written summary of the consent or undertaking to the complainant (under section 36(1.1)); secondly, the statute authorizes bylaws which can obligate suspended members to give proper notice of the suspension to patients or potential patients (section 19(1)(k.5); and thirdly, the statute requires that any terms, conditions and limitations imposed on a professional’s registration be set out in the register (sec-

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- tion 22.1). Thus, with the person most directly interested in the outcome being informed pursuant to statute, and with public access to terms, conditions and limitations on the register, the question is whether any public interest may warrant wider publication, and whether any wider publication should allow for anonymity.
27. On this point, one can usefully note that the availability of anonymity as a bargaining point can represent a substantial incentive for registrants to settle matters by way of undertaking or consent, rather than to proceed to hearing.
 28. Finally, a decision of the Inquiry Committee to direct the registrar to issue a citation under section 37 results, obviously, in a citation which sets out allegations. The issuance of a citation does not, however, represent a final outcome. To the contrary, the need for a citation indicates that facts are in dispute. Accordingly, the question of whether a citation ought to be published is a question of whether the public interest supports the publication of facts which are alleged, but neither proven nor admitted.
 29. There is no right answer. The public interests both for and against publication are heightened. On the one hand, a citation indicates the commencement of a statutory hearing process. On the other hand, a citation has great potential to cause unwarranted and significant harm to a professional, since a citation may cast a shadow of serious wrongdoing, without proof and without any opportunity of the professional to publish an answer. The public interest may, however, weigh significantly more in favour of publication where the weight of the evidence, or the seriousness of the allegations, warrants, for example, extraordinary action to protect the public (under section 35).
 30. An instance of a governing body having discretion to publish a citation is illustrated by Law Society Rule 4-16, which authorizes the Executive Director to dis-

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- close to the public a citation and its status, including by means of the Law Society's website.
31. Citations lead, of course, to hearings, which in turn result in *hearing decisions* which consist of findings of fact and some decision of a discipline committee to take action under section 39. The question then becomes whether the hearing decision should be published in full, or in summary form. A hearing decision represents a final resolution for which the public interest strongly favours some form of publication (subject to the matter going to appeal), but this engages, the important question of what details a College should publish.
 32. *What details to publish:* The key question in terms of what ought to be published is invariably whether a College should publish the identity of the registrant in any given case (assuming some discretion of a College on this point). This is because anonymity is the means of allowing publication of facts while insulating a registrant from disproportionate collateral harm ("collateral" here meaning harm separate from whatever discipline, limit or condition may be formally imposed by a College). One special issue here is whether anonymity should be afforded as a matter of course where a registrant has been found innocent of any wrongdoing or incompetence, and the discipline committee has decided to dismiss a matter (s. 39(1)(a)).
 33. For example, the College of Dental Technicians publishes summaries of disciplinary proceedings to registrants in every case of *a restriction or suspension*, with discretion otherwise. It has discretion to publish to the general public, but only in cases involving a restriction or suspension.

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34. By comparison, the College of Dental Hygienists publishes *all* disciplinary hearing decisions to registrants and, in the event of a limitation or suspension, provides notice to other governing bodies in Canada.
35. On the other end of the spectrum, the College of Midwives retains complete discretion over publication, even respecting its own registrants.
36. *To whom to publish:* A publication scheme may make publication mandatory or discretionary with respect to certain people. For example, a College may publish in different ways
 - a. to its own registrants,
 - b. to parallel regulatory bodies in other jurisdictions (in Canada or elsewhere),
 - c. to regulatory bodies of related professions in BC (or elsewhere),
 - d. to a standard list of specific persons (such as public employers),
 - e. to persons with a special relationship with the registrant (e.g., patients),
and
 - f. to the general public.
37. *When:* Publication may, but need not necessarily, occur immediately after a decision. Although immediate publication is ideal, publication may be delayed for two reasons: first, because the right to publish may be in question (where, for example, a discipline decision is under appeal), and secondly, because of practical reasons.

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38. If a decision is under appeal or review, the question of whether publication should occur under a normal timeline (whatever that may be) will generally be a matter for the court. If, for example, the appeal challenges verdict, a court may grant a stay of penalty or publication, in which case publication may be delayed until the appeal is resolved.
39. If publication is not delayed by court order, the question is the extent to which the public interest allows for delay. The pragmatic answer is that unless a statutory provision or a bylaw sets a certain deadline or timeline, a College may carry on as it wishes (provided it does not act unreasonably) to determine the relative importance of publication to particular segments of the public. For example, apart from notice to current patients, publication to others might occur in stages: an immediate update to the register could provide for people contemplating a special relationship with the professional who could be expected to exercise due diligence (such as potential patients), combined with later direct notice to particular groups (such as selected public bodies), and less timely but wider publication to others (such as registrants or to the general public), by means of a newsletter or a media release.
40. *Where or how*: Finally, unless a statutory provision or a bylaw mandates publication in a particular form, a College may choose a method of publication which reasonably meets the College's publication objective. On this point, the issue is scope of publication, and in particular whether any given method results in overly narrow or overly broad publication. For example, publication to registrants by means of posting on an unrestricted website is, for all intents and purposes, publication to the general public. By contrast, a decision to publish to the general public may imply a minimum degree of distribution, such in traditional print media in particular locales, as well as by means of website.

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Conclusion

41. Because the *Health Professions Act* provides no guidance with respect to wide publication, Colleges must design their systems with a view to the complexities of the public interest. To accomplish this, Colleges should review their bylaws periodically with a view to issues being addressed in the courts as to when the public interest demands publication, and when it also demands that publication be limited or curtailed to achieve a more just outcome in every case.

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