

Dealing with Sexual Assault Complaints: Difficult Issues

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### Agenda

- Difficult issues that arise when a regulator receives sexual assault complaints:
  - Investigation issues
  - Concurrent criminal proceeding
  - Interim license limits or conditions
- Case Study



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### Audience Question

What is your role in your organization?

- A - Investigator
- B - Member of a complaint-screening committee
- C - Member of a disciplinary committee
- D - Staff member providing support
- E - Other



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## Investigations

- Why a properly conducted investigation is important:
  - Gathering accurate and complete information
  - Appropriate complaint dispositions by a complaint-screening committee
  - May affect the outcome of a discipline hearing



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## Investigations: 5 Common Pitfalls

- Pitfall: complainant's description of the alleged sexual assault is unclear or imprecise
  - Diagrams can be used during interviews
  - Use of terminology should be accurate and consistent
  - Interview questions should be precise and thorough, e.g. the duration of the alleged touching



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## Investigations: 5 Common Pitfalls

- Pitfall: issues with the complainant as a witness
  - Dealing with a complainant whose evidence does not appear to be reliable
  - Dealing with an uncooperative complainant
  - Protecting a complainant's sensitive information, e.g. redacting personal information from an investigation report



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**Investigations: 5 Common Pitfalls**

- Pitfall: interviewing too few or too many witnesses
  - Who to interview
  - When is it important to interview witnesses who did not witness the alleged events, such as a complainant’s friends, family members, or professionals (e.g. counselors)?

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**Investigations: 5 Common Pitfalls**

- Pitfall: photographs may not have value as evidence
  - Consider the reliability of photographs provided by a complainant or witness
  - Who took the photograph? When? Is this documented? Does the photograph show what it purports to show?

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**Investigations: 5 Common Pitfalls**

- Pitfall: records are in the possession of other agencies, e.g. the police or R.C.M.P.
  - When should you seek disclosure of records?
  - What difficulties can arise?
  - Why is it important to seek disclosure through a legal process?

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**Selecting the Right Investigator**

- Internal investigator
  - Cost effective
  - Knowledgeable about the regulator’s legislation, bylaws and policies
  - May not be equipped to handle investigations involving safety concerns or specialized expertise

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**Selecting the Right Investigator**

- External investigator
  - May be better equipped for concerns relating to safety
  - May have specialized training
  - May be able to complete the investigation more quickly
  - May appear more objective

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**Investigator Bias**

- If an investigator does not act with neutrality and objectivity:
  - Flawed information may be put before the regulator or a committee
  - Parties may have a basis to raise objections to the regulator’s process

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### Investigator Bias

- “Closed mind” test in Canada
  - An investigator has a “closed mind” where, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change
  - *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)*, 1992, SCC



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### Investigator Bias

- “Closed mind” test in Canada
  - Limited duty of open-mindedness at the investigation stage which will be breached if the investigator’s mind is so closed that any submissions would be futile
  - *College of Physicians and Surgeons of Alberta v. J.H.*, 2008, ABQB



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### Investigator Bias

- When can investigator bias arise when dealing with a sexual assault complaint?
  - Acting overly sympathetic to the complainant or registrant
  - Aggressive or hostile interaction or questioning
  - Sharing personal observations or opinions



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**Concurrent Criminal Proceedings**

- Registrant may face concurrent criminal and regulatory penalties for the same actions

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**Concurrent Criminal Proceedings**

- When *may* a regulator await a criminal investigation or proceeding?
  - As permitted by statutory timelines, if any
  - Discretion to defer regulatory proceedings at common law (not absolute or untrammelled)

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**Concurrent Criminal Proceedings**

- When *must* a regulator await a criminal hearing?
  - Court has stayed regulatory proceedings to ensure that an accused person is not prejudiced in the criminal trial, where real prejudice has been proven: *Voutsis v. College of Physicians and Surgeons of Saskatchewan*, 1987, SKQB

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### Concurrent Criminal Proceedings

- Factors a regulator should consider when deciding whether to defer its investigation:
  - Public risk and whether it can be adequately managed by interim action during the investigation
  - Access to evidence gathered and used in the criminal process



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### Concurrent Criminal Proceedings

- Factors a regulator should consider when deciding whether to defer its investigation:
  - Special resources and expertise of the police and Crown
  - Stage of the criminal investigation and/or proceeding



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### Concurrent Criminal Proceedings

- Factors a regulator should consider when deciding whether to defer its investigation:
  - Whether the criminal proceeding is likely to be determinative for the regulator, e.g. statutory provisions allowing a regulator to engage in summary discipline based on the mere fact of a criminal conviction



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### Concurrent Criminal Proceedings

- Risks of deferring an investigation:
  - Evidence may be lost
  - Witnesses may disappear or become uncooperative
  - Lengthy delay may cause procedural unfairness



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### Interim Action

- A regulator’s statute often provides for an extraordinary power to suspend, limit, or place conditions on a registrant’s practice during an investigation or pending a discipline hearing



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### Interim Action

E.g. section 35 of the British Columbia *Health Professions Act*:

- If “necessary to protect the public during the investigation of a registrant or pending a hearing of the discipline committee”, the Inquiry Committee and Discipline Committee may suspend a registrant or impose limits or conditions on his or her practice



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### Interim Action

- Purpose: to allow expeditious action before a hearing on the merits to protect the public in exceptional circumstances



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### Interim Action

- Test:
  - Depends on statutory requirements
  - Under the B.C. *Health Professions Act*, requires sufficient evidence that action is necessary to protect the public during an investigation or pending a hearing



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### Interim Action

- *Farbeh v. College of Pharmacists of British Columbia, 2009, BCSC*
  - Applicable standard of proof falls “somewhere between the assertion of one or more unsubstantiated allegations and the high standard which is required with respect to the evidence considered at the full hearing of the merits of the case”



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**Interim Action**

- *Hannos v. Registered Nurses Association of British Columbia, 1996, BCSC*
  - Risk of harm “must be real and not speculative”

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**Interim Action**

- **Test:**
  - Under the B.C. *Health Professions Act*, requires a balancing between the registrant’s right to pursue his or her profession and earn a livelihood and the public’s interest in being protected from the misconduct

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**Interim Action**

- *Larre v. College of Psychologists of British Columbia, 2007, BCSC*
  - “Must consider all reasonable alternatives to an interim suspension that may be available and that restrictions or conditions imposed must be the least severe possible, while safeguarding the public”

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### Interim Action

- Committee may consider the nature of sexual assault complaints



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### Interim Action

- *Porter v. College of Physicians and Surgeons of Ontario, 2001, ONSC*
  - Interim suspension was not patently unreasonable, considering, *inter alia*, the psychiatrist’s practice “behind closed doors” and the fragile nature of the complainants



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### Interim Action

- What kind of difficulties arise when dealing with a sexual assault complaint?
  - Vague or imprecise descriptions from complainant
  - Credibility conflicts
  - Single complaint



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## Interim Action

- Publication
  - Under the B.C. *Health Professions Act*, publication of interim suspension, conditions or limits is mandatory, with certain specified exceptions, including:
    - Necessary to protect the interest of the complainant or another person, other than the registrant, affected by the matter



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## Case Study

The College of Massage Therapists has received a complaint from Ann Anders about a registrant, Rob Reed.



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## Case Study

Video



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**Audience Question**

Should the College defer its investigation until the criminal investigation and/or proceeding is completed?

A - Yes  
 B - No, the risk to public safety is too great  
 C - No, a one-year delay is too long  
 D - Not sure

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**Case Study**

Video

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**Audience Question**

Should the committee take interim action?

A - Yes, Mr. Reed should be suspended  
 B - Yes, Mr. Reed should only be able to treat female patients in the presence of a chaperone  
 C - No, the risk to the public is not sufficient  
 D - No, there is a risk to the public but the balance of convenience doesn't favor it  
 E - Not sure

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**Case Study**

Video



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**Audience Question**

Should the committee publish the interim action?

A - Yes  
B - No  
C - Not sure



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