

# A Caution about Cautions, SCERPs and Remedial Programs – The Impact of Publication

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By Jill Dougherty

“...Health regulatory colleges should consider the effect of public disclosure of ICRC<sup>1</sup> screening outcomes on their own decision-making. Traditionally, screening outcomes have been viewed as educational. In upholding ICRC decisions related to cautions, reviewing courts have pointed to the fact that cautions are “remedial in nature” and therefore distinct from sanctions and that they are not recorded in the public register or publicised. If cautions and other screening outcomes are made publicly available, will they be subject to increased judicial scrutiny? Health regulatory colleges may need to consider increasing procedural protections afforded to members at the screening stages to avoid judicial criticism.” <sup>2</sup>

Prior to the introduction of recent transparency initiatives, including the publication of cautions and “SCERPs”<sup>3</sup>, the law regarding the ability of screening bodies to impose cautions, SCERPs and other non-mandatory remedial measures had been well settled for a number of years. The courts have repeatedly held that cautions (and analogous types of non-mandatory advice or recommendations) are not sanctions, are advisory in nature and are intended to be remedial. In support of that approach, courts frequently emphasized the fact that cautions (and other remedial dispositions by screening bodies) were not recorded on the public register or otherwise published by the College. As a result, they were not viewed as carrying the same implications as a finding of misconduct or a penalty imposed by the Discipline Committee. In short, they did not expose the member to the same “jeopardy” that he or she would face in a discipline proceeding and did not have the same potential impact on the member’s professional practice.

What flowed from the remedial and non-punitive character of cautions, advice and other governing body dispositions was the equally well settled proposition that the requirements of procedural fairness owed by a screening committee are more limited in scope than those that apply in a relation to a proceeding before the Discipline Committee. This is because the duty of procedural fairness is variable and its content depends on a number of factors, including, among other things, the nature of the decision being made and the importance of the decision to the individual or individuals affected. For example in *Silverthorne v. College of Social Workers and Social Service Workers (Ontario)*,<sup>4</sup> the Divisional Court held that:

...[I] am satisfied that the Committee owed the applicant a duty of procedural fairness, because the decision whether to refer a complaint and whether to caution a member affects the individual’s interests as a professional social worker. However the content of the duty is limited, given the nature of the decision being made and the statutory context.

Turning to the nature of the decision being made, this is a case where the Committee investigates complaints and disposes of them by referring them to another process or by determining that they should not be referred. The Committee does not make findings of fact nor determine whether discipline is warranted; rather, it weighs the evidence to determine whether there is sufficient evidence to refer the matter to the Discipline Committee or the Fitness to Practise Committee. It is those bodies

which will make findings of fact.

While the Complaints Committee can itself caution a member, a caution is not a sanction. It is advisory in nature and intended to be remedial. A caution is not recorded in the public registry of the College nor publicized by it. While the applicant has expressed concern about certain information disclosed on a website, that is not information that was disclosed by the College. Moreover, while the applicant has raised concerns about the impact of a caution on her ability to act as a social worker, there is no evidence, other than her perceptions, that an advisory caution is likely to have any negative affect on her career. (emphasis added)

At a practical level, there are a number of ways in which the procedural protections available at the investigation and screening stage have historically been more limited than those available at the discipline stage. At the investigation and screening stage, the requirement is typically that the affected member be provided with reasonable information about any allegations, whereas at the discipline stage, much broader disclosure obligations apply. Similarly, at the investigation and screening stage, there is no entitlement to an oral hearing, nor to attend before the Committee to make oral submissions. The requirements relating to the reasons to be provided by screening committees have similarly been less rigorous than at the discipline stage.

As noted earlier, one of the considerations that has shaped procedural obligations at the screening stage is the fact that until recently, screening dispositions (like cautions, etc.) were not public, which was viewed (by members and the courts) as reducing the potential impact of the process on the member. This then raises the question: what impact might the increasingly public nature of cautions and SCERPs have on the procedural requirements relating to screening bodies?

Since the publishing of cautions and SCERPs is a recent phenomenon, there is limited judicial or other guidance about how it may impact the manner in which cautions and SCERPs are viewed and the attendant procedural protections for those involved in the screening process. However, recent HPARB5 decisions have continued to view SCERPs and cautions as remedial rather than as sanctions that may negatively impact a professional's practice, despite publication. For example, in P.H. v. H.L.6, HPARB upheld the decision of the ICRC of the College of Physicians and Surgeons of Ontario to issue a caution in person to a doctor and require him to undertake a SCERP. The doctor sought review of the ICRC's decision, arguing that the committee had failed to obtain relevant evidence, made unsupported findings of credibility, failed to conduct a sufficient investigation and failed to provide the doctor with an opportunity to "elaborate or explain his position". In concluding that the ICRC's disposition was reasonable, HPARB commented as follows:

Among the array of educative or remedial dispositions available to the Committee, the decision to caution a physician and to require him to complete a SCERP are two of the available dispositions. A caution is advisory and intended to be remedial; it is not a sanction. As noted by the Committee, a caution occurs in circumstances where the Committee is concerned about an aspect of a physician's practice and believes the physician would benefit from direction as to how to conduct himself in the future.

As further stated by the Committee, a SCERP is intended to address the Committee's concerns and to protect the public interest, a summary of the decision will appear on the College's public register, and the College will monitor the Program.

While recent HPARB decisions suggest that SCERPs and cautions continue to be viewed as remedial dispositions rather than sanctions, despite the fact that they are now published, it is worth noting that in the previous Divisional Court decision regarding Gopinath v. College of Physicians and Surgeons of Ontario<sup>7</sup>, the fact that the ICRC was giving consideration to requiring Dr. Gopinath to participate in a fairly extensive remedial/educational program was cited as one factor in support of the Court's determination that more onerous procedural requirements (specifically, disclosure obligations) applied at the screening stage. In that regard, the Divisional Court made the following comments<sup>8</sup>:

The extent of the duty of procedural fairness depends on a variety of factors including the following: the nature of the decision being made; the nature of the statutory scheme; the importance of the decision to the member affected; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the tribunal.

The standard of disclosure at the screening or investigative stage has been held to require adequate notice to ensure that a member has sufficient information to answer the case against him or her. It has also been held that it is adequate at the investigative stage for the member to know the allegations or substance of the complaint against him or her, not all of the information obtained during the course of the investigation.

Applying the factors in *Baker*, the respondent gave notice to the applicant that his patient care and his conduct were at issue. Pursuant to s. 26(1), the ICRC had the jurisdiction to make one or more of the following decisions: refer to the Discipline Committee on account of an allegation of professional misconduct or incompetence; refer to a panel of the ICRC for incapacity proceedings; require the member to appear before a panel of the ICRC to be cautioned; and take other action it considers appropriate that is not inconsistent with the Act, the Code, the regulations or by-laws. Given those possible outcomes, the decision made by the ICRC was important. The applicant was aware that Dr. Patel was considering a recommendation that he attend the PHP or the PULSE program. He mentioned both in his written response dated November 29, 2010. It follows that he had a legitimate expectation that a referral to a program such as PHP or PULSE might be the outcome. Given the multiple requests he or his counsel made for disclosure and the extent of the disclosure he did receive, the applicant also had a legitimate expectation that he would receive adequate disclosure to be able to respond.

Based on that analysis, we are satisfied that the duty of disclosure by the respondent was at the high end of the continuum in the investigative phase. (emphasis added)

While the *Gopinath* case did not involve the publication of a caution or SCERP, it did involve a significant remedial disposition (namely, a SCERP which required attendance at the PHP or PULSE programs) that was viewed as giving rise to a "legitimate expectation" that the member would receive disclosure that was at the high end of the continuum for the investigation phase. In other words, the potential impact of such a SCERP on the member and his practice was viewed as justifying a higher level of procedural protection.

It remains to be seen whether the fact that cautions and SCERPs are now published with increasing frequency<sup>9</sup> will create a corresponding increase in the procedural protections required at the screening stage to satisfy the duty of fairness. Some Colleges have already initiated processes designed to address this possibility. Those measures might include, for example:

- enhanced disclosure to the member at the investigation and screening stage;
- providing members with notice of a proposed SCERP and an additional opportunity to respond to address it;
- additional training for screening committees regarding cautions, SCERPs and decision writing.

In closing, for every professional regulatory College, it is worth considering whether (and how) screening committee procedures and the communications to members regarding those procedures should be updated, if the screening committee's dispositions may be published. Enhancing procedural protections in the screening process and training of Committee members is a proactive step to minimize the prospect of criticism by HPARB or the court.

[1] Inquiries, Complaints and Reports Committee

[2] WeirFoulds LLP Client Alert, March 2015, "Regulatory Colleges Tackle Transparency", By Debbie Tarshis and Lisa Feinberg

[3] Specified Continuing Education and Remediation Programs

[4] 2006, 264 DLR 4th 175 (Div. Ct.) at paras. 14-16

[5] Health Professions Appeal and Review Board

[6] 2017 CANLII 62551

[7] 2014 ONSC 3143 (Div. Ct.)

[8] Ibid, at paras. 11-14

[9] In the case of RHPA Colleges, pursuant to a requirement in Health Professions Procedural Code, and in the case of many non-RHPA Colleges, pursuant to By-laws expanding the information to be included on the Register in order to provide increased transparency regarding screening committee dispositions.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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