

BRIEFING NOTE

TO: Board of Directors

FROM: Patient Relations Committee

DATE: October 5 and 6, 2020

SUBJECT: Jurisprudence RHPA Module: Mandatory Onboarding for directors and committee members

For Decision For Information Monitoring Report

Purpose:

To consider adding the new Jurisprudence Regulated Health Professions Act (RHPA) Module to the set of required board training modules.

Background:

On May 27, 2020, a new chapter of the Jurisprudence Handbook, the Regulated Health Professions Act (RHPA) was reviewed and finalized by the Patient Relations Committee. This module is now part of the Quality Assurance self-directed CE program and is offered to all optician registrants to help guide them on how opticianry is regulated in Ontario, the professional misconduct regulation, the patient relations program, and the public register.

At its meeting on July 27, 2020, the Board approved a by-law change that as an additional requirement for eligibility to run for board director elections, all candidates complete certain pre-election training modules to ensure that they possess the knowledge to carry out their fiduciary role as a director if elected. For the 2020 director elections, candidates completed the RHPA chapter.

For Consideration:

The Patient Relations Committee is recommending that the RHPA module become a mandatory part of the onboarding package for new board and appointed members to be completed before their first meeting at the College.

Using the sexual abuse module requirement as a benchmark, the Board may wish to consider the RHPA module to be completed every 3 years.

Chapter 4 of the RHPA Jurisprudence Module is attached (**APPENDIX A**).

Public Interest Considerations:

The Jurisprudence RHPA module provides an overview of the primary act that governs health

regulatory colleges in Ontario. By completing this module, registrants will gain a better understanding of the COO's purpose and the role of the board and committees and better ensure that they possess the basic knowledge necessary to carry out their fiduciary role as a director of the Board or as a committee member.

Recommendation:

That the Board approve chapter 4 of the RHPA Jurisprudence Module as a mandatory part of the onboarding training requirements for new board directors and appointed members to be completed before their first meeting at the College as recommended by the Patient Relations Committee. Should the Board approve the recommendation the Director and Committee Member Policy 4-27 will be updated.

Chapter 4

Introduction to the *RHPA*

The *Regulated Health Professions Act (RHPA)* is the Act (or statute) that provides for the regulation of opticians. The *RHPA*, along with the *Opticianry Act*, establishes the duty and authority of the College of Opticians of Ontario to regulate the profession. The *RHPA* and the *Opticianry Act* also create the obligations upon opticians to practise competently and ethically.

This document describes the context in which the *RHPA* operates, outlines the duties and authority of the College and articulates some of the more significant duties imposed upon opticians.

Foundational Concepts

Some of the foundational concepts for understanding the *RHPA* include:

1. That “self-regulation” of a profession occurs when society enters into an understanding with the profession that the profession will regulate itself in the public interest;
2. That the *RHPA* is part of the legal system that includes other statutes, regulations, by-laws and case law;
3. That the College is accountable to many entities to ensure that its focus is on protecting the public; and
4. That the core regulatory activities of College include restrictive, reactive, proactive and transparent regulation.

Regulatory Framework – The Concept of Self-Regulation

Governments have options when deciding how an activity will be regulated. One choice is to not regulate the activity (say a health profession) at all. The market would determine which practitioners would succeed and which would fail. The civil courts could order the payment of monetary damages resulting from deliberate or negligent faults. And criminal courts would be available for any offences committed, such as assault or fraud. In Ontario, for example, estheticians and nail technologists are not regulated (like they are in some U.S. jurisdictions).

Another option is using consumer protection laws to require full disclosure, written contracts and cooling off periods and to prohibit unconscionable agreements. Where the practitioner does not follow consumer protection rules, the consumer has a number of remedies including rescinding the contract or taking the optician to provincial offences court. For example, fitness centres are subject to consumer protection laws.

Government regulation is a third approach. Governments regulate a number of activities directly through civil servants working for departments in a Ministry. For example, laboratories are regulated by employees of the Minister of Health and Long-Term Care (“Minister”).

A fourth option is self-regulation where the registrants of a profession, working through a regulatory body, regulate the profession under a statute. That is the option, adopted in a modified manner, for the health professions governed by the *RHPA*.

Social Contract

The notion of self-regulation is that society and professions reach a shared understanding, which we sometimes call a “Social Contract”. Society, through the government that represents it, enacts a statute for the regulation of the profession. The statute gives the profession a protected title, a recognized status and often some sort of monopoly over the performance of risky activities. In return the profession is expected to actively participate in its own regulation to ensure that the public is protected from harm or exploitation. While the social contract is a figurative concept, it is a picture that illustrates what everyone expects from the enactment of the statute.

Self-Regulation

In its pure form, self-regulation has three components. The first is that the registrants of a profession (in this case, opticians) select some of their colleagues to sit on the governing Board of their regulatory body. In turn, that governing Board selects opticians to sit on the various Committees of the regulatory body. Elected Board directors do not represent the opticians who elected them. They are not like politicians elected to city Council. Rather they are selected as respected registrants of the profession who are trusted to fairly and effectively regulate the profession in the public interest.

A second component of self-regulation is that the governing Board, made up of opticians, makes the rules that apply to opticians. As discussed below, those rules can take various forms such as regulations, by-laws, or written standards of practice. These rules are made to ensure that the public is protected.

A third component of self-regulation is that the governing body consults with the profession on a regular basis. The consultation ensures that the rules are appropriate and effective. The consultation also provides feedback to the regulator on how it is prioritizing and implementing its regulatory activities. For example, the profession could provide feedback on how a quality assurance program can most effectively enhance life-long competency.

One consequence of self-regulation is that the profession is generally expected to pay for the costs of self-regulation through fees charged to opticians. Increasingly, however, where government directly regulates a profession, it charges the costs of that regulation to the profession.

The actual provisions of the *RHPA* have modified the regulatory model so that it is not “pure” self-regulation. The College is accountable to the government, the courts and a number of agencies to ensure that it acts in the public interest. However, these three essential elements of self-regulation are still largely present.

Why Self-Regulation?

There are three main rationales for using the self-regulation model. The most commonly identified reason is that members of the profession have the specialized knowledge and expertise to understand how the profession really works, recognize the greatest areas of risk and know how to minimize the occurrence of those risks. For example, if a patient thought an optician had touched their eyes and face unnecessarily and the optician says the touch was part of the ordinary clinical care of opticians, who

better than a panel of peers to listen to what happened and assess whether the touch was clinical or unwarranted?

Another rationale is that a profession is much more likely to accept and cooperate with a regulator if the profession selects the regulator's leaders than if the regulatory leaders are strangers to the profession. For example, in order for the peer assessment component of the quality assurance program to succeed, opticians need to be open, candid and even trusting of the regulatory body. In fact, opticians are more likely to cooperate with the regulatory processes and even volunteer to participate in regulatory activities, such as being peer assessors, if they view themselves as part of the process.

A third rationale is that it is easier to make self-regulation accountable, transparent and responsive than it is for most of the other regulatory models. For example, if the profession were regulated directly by a department in the government, there would almost certainly be less openness, feedback and scrutiny of how decisions were made than we see today with *RHPA* Colleges. Similarly, there is no centralized source of information to evaluate the success of the consumer protection regulatory model.

Implications of Self-Regulation

Self-regulation can be ended by the government at any time. In fact, in most other countries where self-regulation of professions used to exist, such as England, the government has lost confidence in the regulator and has implemented a form of direct government regulation.

Another implication of self-regulation is that those involved in regulating the profession must "honour the bargain". It must always act, and be seen to act, in the public interest. Those involved in regulation must resist any urge to use the College processes to advance the interests of the profession.

As a result the perspective of those involved in regulating the profession must be relentlessly focused on how the College can best serve and protect the public.

The Public Interest

As mentioned above, the public interest is the central theme of professional self-regulation. The mandate, or purpose, of Colleges is to serve and protect the public interest. The difficulty, of course, is that the public interest varies depending on the circumstances. For example, a proposal to re-allocate a quarter of the complaints and discipline budget to the quality assurance program may or may not be in the public interest depending on the facts. Is the complaints and discipline process achieving its goals? Is there a backlog? Can its budget be cut without exposing the public to incompetent or dishonest opticians? Is the quality assurance program effective? Will an enhanced quality assurance program reduce the demand for complaints and discipline cases? How would the money most effectively be spent? Why not find additional money, perhaps by increasing fees, so that both are done at the same time?

The College is a regulatory body, created by statute to protect the public. A professional association is a voluntary body that is formed by opticians to advance the interests of the profession in some way. The mandates of the College and a professional association are completely different. Colleges find it valuable to consult with professional associations as a stakeholder. However, the College must make its decisions based on the interests of the public as a whole.

While it is impossible to give a comprehensive list of components of the public interest, the following are frequently identified examples:

1. Ensuring that opticians are and remain competent,
2. Ensuring that opticians act honestly and with integrity,
3. Ensuring that opticians are always sensitive to and aware of appropriate boundaries when dealing with patients,
4. Ensuring that the College performs its functions quickly; an excellent decision made slowly can be as unhelpful as a poor decision made quickly,
5. Ensuring that the College makes as much information as possible about its processes and its decisions available to the public so long as it does not unduly intrude on the reasonable privacy interests of individuals,
6. Ensuring that internationally trained opticians have their qualifications fully recognized so that they can contribute to health care in our diverse society, and
7. Fostering ready access by the public to the services of opticians.

Legal Context and Structure of the *RHPA*

Generally, laws are enacted by the government or made through court decisions.

Enacted laws are passed by different bodies. The highest level of enacted law are statutes (sometimes called Acts) made by either the Legislative Assembly in Ontario or the Canadian Parliament. Since the provincial governments are given authority over the regulation of professions, most statutes relating to the regulation of professions are enacted by the provincial Legislative Assembly.

Many statutes authorize the making of regulations or by-laws. Regulations are typically made by the government (i.e., the Cabinet), rather than the full Legislative Assembly. Regulations provide more specific details on how their enabling statute is to be implemented.

By-laws, a third form of enacted law, are typically made by delegated bodies, like the College and usually deal with administrative matters.

Enacted laws are hierarchical. Statutes take priority over regulations and both of them take priority over by-laws.

Independently of enacted law, courts make decisions. Those court decisions are legally binding and become precedents that guide future courts when dealing with similar matters.

Some people also consider standards of practice published by the College as a sort of law. For opticians, standards of practice guide their practice and can be the basis upon which they are held accountable for their professional actions by the courts or the College. However, since they are not formally enacted and are not court decisions, they are sometimes called “soft law” (as opposed to the other, “hard laws”).

The RHPA

The *RHPA* itself is a long and complicated statute. The first part of the *RHPA* deals primarily with matters external to the Colleges such as the powers and duties of the Minister. The second part deals with the operation of Colleges. It is called the *Health Professions Procedural Code*, or *Code* for short. This contains the provisions that set out the objects, or mandate, of the College. The *Code* establishes seven College Committees and allocates their tasks and powers.

Each profession has an additional specific Act that deals with matters unique to that profession. For example, a profession-specific Act has a “scope of practice” provision that describes the activities typically performed by opticians of that profession. It also sets out the titles that can only be used by opticians registered with that College (e.g., “optician”) and the controlled acts assigned to that profession (e.g., dispensing subnormal vision devices). The *RHPA*, the *Code* and the profession-specific Act for each profession should be read as if it were one unified document.

RHPA Regulations

While all regulations made under the *RHPA* have to be approved by the Cabinet of the Ontario government, some are developed by the Minister and others are developed by the College. The regulations give more details about how regulatory activities of the College are to be conducted.

Minister-developed regulations deal with topics common to all Colleges such as the rules for health professional corporations. College-developed regulations deal with specific regulatory activities of each College. Proposed regulations must be circulated to the profession for comment 60 days before they are finalized by the Board. All Colleges have developed at least three core regulations: a regulation prescribing the requirements for registration with the College, a regulation defining what kinds of behaviour constitutes professional misconduct, and a regulation outlining the College’s quality assurance program. The College of Opticians has also made regulations dealing with advertising rules, inspections and registration examinations.

RHPA By-laws

By-laws deal primarily with internal, administrative matters. For that reason they can be made by the College Board without the prior approval of the government. The more significant provisions, that affect opticians, have to be circulated for comment to the profession 60 days before they are enacted.

Some of the matters dealt with in College by-laws include the following:

1. The procedure for conducting elections of opticians to the Board;
2. The procedure for choosing College officers like the Chair and the Vice-chair;
3. The composition and procedure for selecting members of College Committees (subject to an over-riding regulation made by the Minister);
4. Identifying the additional information about opticians (beyond the minimum specified in the *Code*) that should be placed on the public register; and
5. Specifying the amount of all fees payable by opticians, applicants for registration and the general public.

Case Law

Case law performs two main functions. The first is to interpret the meaning and application of enacted law. For example, there have been a number of court decisions (e.g., *Sazant v. College of Physicians and Surgeons of Ontario*) that have explained the powers of an investigator appointed under the *Code* to enter into the business premises of opticians to inspect it and remove records and to summon documents from third parties. These cases also emphasize the duty of opticians to cooperate with an investigation.

The second main function of case law is to require that certain procedural safeguards be followed by Colleges when dealing with opticians. For example, the case of *Katzman v. Ontario College of Pharmacists* requires that the investigation of a complaint is confined to issues raised in the written complaint.

Accountability of the College, its Board and its Committees

In this context, the word “accountability” describes the systems and mechanisms in place to ensure that the College regulates effectively in the public interest. Accountability generally refers to forms of external scrutiny of the College.

Under the *RHPA* there is an extensive system of checks and balances to ensure that the College is focusing on its regulatory mandate and is doing so effectively. This accountability takes various forms and includes the following:

1. Structural accountability designing the organization of the College to combine professional expertise with the public interest (e.g., a balance of professional and public members on the Board and the College committees).
2. Political accountability to the Minister including making reports, providing information about the College’s activities when requested and where there are significant concerns, appointing an auditor to review the College or a supervisor to take over its leadership.
3. Individual decision reviews by the Health Profession Appeals and Review Board (for registration and complaints decisions) and the courts (for discipline, fitness to practise and other decisions).
4. Program scrutiny that reviews the overall effectiveness of a College’s activity such as the review of the College’s registration practices by the Office of the Fairness Commissioner.
5. Direct accountability to the profession by the duty to consult with the profession on proposed regulations and by-laws, holding open Board meetings (with the meeting materials placed on the College’s website) and through the election of the professional members of the Board.
6. Direct accountability to the public through operating a website that includes a public register on each optician and holding open Board meetings and discipline hearings and engaging in public consultations.

Together these accountability structures help ensure that the College fairly and effectively regulates the profession in the public interest.

Core Regulatory Activities of the *Code*

Colleges have seven statutory committees as required by the *RHPA*.

1. The Executive Committee coordinates the work of the Board. For example, it helps prepare the agenda for Board meetings. It also acts on Board's behalf on urgent matters between Board meetings.
2. The Registration Committee determines whether an applicant for registration meets the requirements for registration. Those requirements are set out in the registration regulation. Sometimes the Committee can grant exceptions where an applicant does not quite meet all of the requirements (with or without terms, conditions and limitations on the applicant's certificate of registration).
3. The Inquires, Complaints and Reports Committee ("ICRC") investigates complaints and other concerns about opticians. Where the concerns are substantiated, the ICRC has a number of options including taking no action, taking educational action (e.g., requiring completion of remediation), or referring the matter to a formal hearing when the concerns are serious.
4. The Discipline Committee holds hearings to determine whether an optician has engaged in professional misconduct or is incompetent. It can impose sanctions such as revocation, suspension, fines, reprimands and terms, conditions and limitations.
5. The Fitness to Practise Committee holds hearings to determine whether an optician is incapable (or impaired). It can impose orders to protect the public, such as requiring the optician to receive appropriate treatment.
6. The Quality Assurance Committee encourages opticians to engage in continuous professional development. Part of its task is to assess the knowledge, skill and judgment of opticians and to facilitate remediation where gaps are identified.
7. The Patient Relations Committee develops programs to encourage healthy interactions between patients and opticians. For example, it develops and implements a sexual abuse prevention plan within the profession.

The College can also have other standing and special-purpose committees created under the College's by-laws to perform specific tasks. For example, the College has a standing Governance Committee.

The regulatory activities of the College can be described as falling into four broad categories:

1. Restrictive regulation: limiting what people can do. For example, there are restrictions on the titles people can use, on who can perform controlled acts, and on who can become registered with the College.
2. Reactive regulation: responding to complaints and concerns about the conduct, competence and capacity of opticians.
3. Proactive regulation: designed to enhance the knowledge, skill and judgment of opticians.
4. Transparent regulation: providing information to the public about opticians so that the public can make informed choices about them. Transparent regulation also includes making many of the College's regulatory activities open to the public so that the public can have confidence that the College is acting in the public interest.

Each of these regulatory activities is discussed below.

Restrictive Regulation

Restrictive regulation means people are legally prevented from doing certain things unless they are registered because it would be harmful to the public if just anyone did them. A significant value in our society is freedom of choice. Governments will only limit free choice where it can be demonstrated that consumers are not in a position to protect themselves. Some examples of restrictive regulation include:

1. Protected titles such as “optician”,
2. Controlled acts such as dispensing subnormal vision devices, and
3. Registration requirements such as requiring applicants to complete appropriate professional training, pass an examination and demonstrate their good character, before being permitted to be registered with the College.

Reactive Regulation

Reactive regulation deals with concerns about professional misconduct, incompetence or incapacity that comes to the attention of the College. The College may learn of the concern through a formal complaint, issues identified by another department of the College (e.g., an optician who is not participating in the College’s quality assurance program), a mandatory report (e.g., from an employer), a voluntary report (e.g., from a concerned colleague), or information provided by the police or a media report.

Complaints

Perhaps one of the more well-known regulatory activities of the College is its handling of complaints. When a complaint is made to the College about the conduct of an optician, it is investigated by the ICRC. Both the complainant and the optician are given formal notice of the receipt of the complaint and a description of the process. The College tries to complete the process within 150 days. If the College requires more time, it must report regularly to the complainant and the optician about the delay.

The optician is given an opportunity to respond to it in writing. The optician is usually required to provide all relevant documents to the ICRC. The complainant is asked to comment on the optician’s response to the complaint. Other witnesses may be approached for any information they might have. Documents may be obtained from third parties such as the patient’s other health care providers. Where more information is needed, an investigator with additional powers can be appointed. For example, the investigator can attend at the optician’s place of practice to review and copy records, summons documents from third parties or summons a witness to be questioned before a verbatim reporter.

Registrar’s Investigation

Where there is no complaint in writing, the College can still investigate concerns through a Registrar’s investigation. The initiation of the Registrar’s investigation is approved by the ICRC. The report of the investigation (including any interview with the optician) is made in writing to the ICRC. The optician is given the results of the investigation and an opportunity to respond in writing. The ICRC then decides what to do with the Registrar’s investigation report in the same way as it deals with a formal complaint.

ICRC Dispositions

The ICRC considers all of the available and relevant information to determine what to do about the concern. In some cases the concern has been explained and no action is required. In other cases the

ICRC may conclude that the concern should be addressed by educational measures. For example, the optician could be asked to attend in person before the ICRC to be cautioned verbally. The optician could be required to complete a specified continuing education or remediation program (SCERP). Record keeping courses and programs in communicating with patients and colleagues are examples of remediation programs.

In serious cases, allegations of professional misconduct or incompetence can be referred to the Discipline Committee for a discipline hearing. Or if it appears that the optician is incapacitated, the fitness to practise process can be initiated.

Misconduct Regulation

Some types of professional misconduct are described in the *Code* itself. For instance, the *Code* makes breaking the law professional misconduct (e.g., to be found guilty of an offence relevant to an optician's suitability to practise the profession). Being found guilty of professional misconduct by another regulator can lead to disciplinary action by the College as well. Sexual abuse of a patient is also listed in the *Code* as being professional misconduct. So is failing to cooperate with the quality assurance program.

However, the College's professional misconduct regulation describes additional examples of professional misconduct. The following are the main topics covered by the professional misconduct regulation.

1. Standards of Practice

The professional misconduct regulation makes failing to meet the standard of practice of the profession professional misconduct. Usually, this relates to the assessment and treatment of patients by the optician. The standards of practice may be written, or unwritten. Standards of practice reflect a shared understanding of how opticianry should be practised effectively and safely. This is based on what would be reasonably expected of the ordinary competent optician in his or her type of practice. Expert witnesses are often used to describe a standard of practice and how it applies.

One specific standard of practice in the professional misconduct regulation is that an optician must refer a patient to a physician where the patient has a condition that requires medical attention. For example, if a patient had symptoms that suggested a disease of the eye, the optician has to refer the patient.

2. Inappropriate Behaviour towards Patients or the Public

Many provisions in professional misconduct regulation relate to inappropriate behaviour towards patients or the public. For example, in addition to sexual abuse, physical or verbal abuse of patients is professional misconduct.

In addition, if a patient has a concern about an optician's conduct and wishes to make a complaint, the optician has a professional obligation to tell the patient about the College and how to contact the College.

3. *Record Keeping*

Failing to make and retain appropriate and adequate records is professional misconduct. Part of the record keeping obligation is providing patients with the information contained (or should be contained) in their files. For example, a patient can request and obtain their pupillary distance measurements even if they intend to use that information for other purposes (e.g., making an online purchase).

This is an important area to understand for opticians, so it is discussed in depth in its own jurisprudence chapter.

4. *Informed Consent*

This regulation makes it professional misconduct to fail to obtain consent before assessing or treating a patient. As discussed in the jurisprudence chapter on boundaries, it is particularly important to obtain consent before touching a patient.

5. *Confidentiality*

Opticians must keep all patient information confidential. Failing to maintain confidentiality can be considered professional misconduct. For example, collecting personal health information (e.g., their medical conditions and the medications they take) in an open area with other people around would violate the patient's privacy.

Another example would be if a patient requests glasses that look like their friend's (who is also a patient) glasses. One could easily end up in a situation where one is disclosing information about the other patient (e.g., the cost of frames purchased by the friend, the unsuitability of the frames for some prescriptions).

There may be exceptions to this duty of confidentiality. For example, patients can consent to the optician disclosing information. Also, where an optician is required (e.g., by a court order or a summons) or permitted (e.g., when selling one's practice) by law to disclose patient information, it can then be disclosed.

6. *Conflict of Interest*

Opticians have a duty to act in the best interest of their patients. A conflict of interest arises when the optician is, or even appears to be, acting in their own or someone else's interest instead. For example, an optician has a duty to only refer patients to others where it is in the best interest of the patient. Referring a patient to a provider who confers a benefit (e.g., financial payment) to the optician is often a conflict of interest.

7. *Improper Billing and Fees*

Opticians must be honest in their billings. Because of this, the professional misconduct regulation prohibits improper billing.

8. *Misrepresentation*

It is professional misconduct to be dishonest in one's dealings with patients, colleagues, third party payers or the College. Dishonesty with third parties is also not acceptable (even if the intent is to help a patient). Third parties often assume that opticians are honest because of their professional status and rely upon their integrity. For example, it would be professional

misconduct to issue a receipt for lenses in an incorrect amount, for a different family member or for a different date in order to facilitate insurance coverage for the patient.

9. *Improper Use of Names, Title or Descriptions*

There are specific rules in the professional misconduct regulation that restrict use of certain names, titles or descriptions. For example, registrants of the College cannot use a term, title or designation indicating or implying that they have a specialization in an area or areas of practice unless the optician has been issued a specialty certificate issued by the College. Also, practising the profession under a name that is not registered with the College may be considered professional misconduct (e.g., if an optician uses a nickname when practising, the College must be formally told of that nickname first).

10. *Improper Advertising*

It is professional misconduct to engage in false or misleading advertising. This would include the publication of anything that, because of its nature, cannot be verified (e.g., a testimonial of a patient, comparative or superlative statements like “best” or “most comfortable”).

11. *Conduct towards Colleagues*

Opticians must treat their colleagues with courtesy, respect and civility. For example, if an optician disagrees with the treatment being provided by another health care provider, the optician must not make insulting comments about the other health care provider to the patient.

12. *Conduct towards the College*

Obligations come with the privileges of self-regulation. One obligation is that opticians must accept the regulatory authority of the College. Examples of conduct towards the College which can constitute professional misconduct include:

- a. Breaching an undertaking given to the College;
- b. Failing to cooperate in, or obstructing, an investigation by the College;
- c. Failing to participate in the quality assurance program; and
- d. Failing to respond appropriately and promptly to correspondence from the College.

13. *General Provision*

The College has a general provision for professional misconduct. This covers types of conduct that are not specifically dealt with elsewhere and prohibits conduct that would be reasonably regarded as dishonourable, disgraceful or unprofessional. This provision assumes that there is a general consensus in the profession of the types of conduct or behaviour that would be considered unacceptable. For example, there is no specific provision that says that an optician has to provide a patient with the eyewear that they ordered and paid for, but such a refusal would be unprofessional.

Professional Misconduct Regulation Scenario

Sample Exam Question

Which of the following situations is/are possible professional misconduct according to the professional misconduct regulation?

- a. Taking a patient's medical history in an open area with other people around.
- b. Using verbal threats and insults to a patient in an email to them when they did not show up for an appointment.
- c. Eyewear sold as prescription eyewear so a patient can claim it on their insurance
- d. All of the above.

The best answer is d. The regulation describes many types of professional misconduct. All of the situations described involve conduct that is specifically prohibited in the Professional Misconduct Regulation. Answer i), ii) and iii) are not the best answers because all of the situations listed in the question are clear examples of professional misconduct.

Discipline Hearings

When a professional misconduct or incompetence concern is referred to the Discipline Committee, a full hearing is held. Formal allegations are prepared by the College and given to the optician. The College gives full disclosure of the relevant information to the optician. Both sides can hire lawyers, call witnesses and make arguments (often called submissions) to the Discipline Committee.

The Discipline Committee hearing panel has no prior involvement in the case. It makes an independent determination of whether the allegations have been proven by the College. The hearing is open to the public. Where some or all of the allegations have been proven, both sides tell the Discipline Committee what order they think would be fair. The order can range from a reprimand, a fine, and restrictions on practice, to a suspension or revocation of registration. Those types of orders can be combined. The decision of the Discipline Committee is summarized in the public register on the College's website. Either party can appeal the decision to the Divisional Court of Ontario.

Incapacity Inquiries

Where there is a serious concern that the optician may be incapacitated, or impaired, the ICRC can obtain information about his or her health. "Incapacity" is defined in the *Code* as an optician "suffering from a physical or mental condition or disorder that makes it desirable in the interest of the public that the registrant's certificate of registration be subject to terms, conditions or limitations, or that the registrant no longer be permitted to practise." Typically incapacity concerns relate to addictions or certain mental illnesses that impair the judgment of the optician.

Incapacity is different from incompetence, which is also defined in the *Code*. Incompetence occurs when an optician lacks knowledge, skill and judgment to the extent that the restrictions should be imposed on their ability to practise in order to protect the public.

In incapacity matters the optician is often required to be examined by an independent health practitioner; typically a mental health professional or an addiction specialist. Where there is a serious

concern that the optician may not be able to practise safely, the incapacity concern can be referred to the Fitness to Practise Committee for a hearing.

Fitness to Practise Hearings

Fitness to Practise hearings are similar to discipline hearings with a few exceptions. The allegations are about the current capacity of the optician to practise safely and effectively. Since the person's health is in issue, the hearing is closed to the public. Where a finding of incapacity is made, the most common consequence is a monitored treatment program.

Reactive regulation has a high legal component. This is the area of regulation where lawyers are most frequently used. Reactive regulation can be an expensive part of the College's regulatory activities.

Proactive Regulation

Proactive regulation involves the College engaging with opticians when there are no specific concerns. The goal is to support opticians so that they enhance their practice. It can also be seen as fostering systemic changes to the profession (e.g., a change in the approach to a particular activity, such as informed consent). Proactive regulation can also be viewed as preventative as it tries to anticipate areas where issues can develop if nothing changes. However, the underlying assumption of proactive regulation is that the vast majority of opticians are dedicated and conscientious. The College's supporting of these opticians (rather than focusing on a small number of opticians with concerns) can have a large and positive impact on the quality and professionalism of services provided to the public.

Quality Assurance Program

The best example of proactive regulation is the quality assurance program. The goal of the quality assurance program is to help opticians enhance their knowledge, skill and judgment. All opticians participate in the program.

Each year, opticians must complete a Professional Portfolio which requires opticians to reflect on their practice, enhance their competence and demonstrate continuous learning. As part of the Portfolio, opticians must complete a combined total of 16 continuing education (CE) hours annually⁸, which includes:

- 4 Accredited Contact Lens (CL) Hours
- 4 Accredited Eyeglass (EG) Hours
- 4 Accredited Professional Growth (PG) Hours
- 4 Self-Directed CE hours

Opticians must also successfully complete the Jurisprudence and Sexual Abuse Prevention Self-Evaluation Tool once every three years. The tool is designed to help opticians maintain professional boundaries in their practice.

⁸ Opticians who have a refracting designation from the College are required to submit two additional CE hours specific to refraction (RF).

The quality assurance program is separated from the complaints and discipline process so that opticians can feel confident in candidly participating in quality assurance. An optician will only be referred to the ICRC if the optician does not fully participate in the quality assurance program or if serious concerns are identified.

Patient Relations Program

Another proactive regulation activity of the College is its patient relations program. For example, the program has a detailed plan to prevent sexual abuse of patients from occurring. The prevention plan includes education on the issue in the school training programs, providing learning resources for opticians and their employers and through public education. The completion of the Sexual Abuse Prevention Self-Evaluation Tool once every three years is part of this program. The Patient Relations Program is not limited to sexual abuse and can deal with other topics that help opticians interact constructively with patients.

Support and Education of Opticians

The College provides information and support to opticians to enhance their practices. The College provides alerts and information about changes to legislation or other laws that affect the practice of the profession. The College website has numerous resources and links for opticians as well as for members of the public. In addition, the College answers practice questions that are within the purview of the College.

Proactive regulation is a major component of the College's regulatory activities.

Transparent Regulation

Expectations on regulators have changed in recent years. Part of almost any regulatory system today is providing information to the public. The public expects to know about the qualifications, registration status and any significant concerns about regulated opticians. In addition, the public is suspicious of secret regulation and expects to see regulatory activities take place in the open. A regulator can no longer simply say "trust us". The continual expansion of the accountability mechanisms for Colleges reflects the need for enhanced transparency.

Transparently demonstrating the fair and effective regulation of the profession can instill public confidence in the College. The disclosure of unfair or ineffective regulation of the profession undermines respect for the regulator.

Information about the College

Part of the transparency expectations is that the College makes information available to the public about its processes. The College strives to ensure that its website is readily navigable by both opticians and members of the public. The College makes efforts to ensure that the information is in plain language. As part of its openness, the College posts Board meeting materials in advance of Board meetings.

The College provides detailed information to opticians and the public about its regulatory initiatives. For example, the College consults with the profession and the public about any proposed changes to the College's regulations and most by-laws. Not only is this transparent, it also fosters feedback and better quality decision-making.

The College has to make a number of reports to accountability bodies including an annual report to the Minister and regular reports and filings with the OFC. In addition, when the Minister consults with Colleges, those communications are often posted on the relevant websites, including that of the College.

Public Register

Under the *RHPA*, the College is required to maintain a public register on all opticians on its website. This information helps the public (e.g., patients, employers) to decide whether to choose a particular optician. This information also helps the public to see how well the College is regulating opticians. In addition, the register helps ensure that opticians practise only as they are permitted by the College. For example, if an optician is suspended for three months, people can more easily report to the College if the optician is still working during the suspension period.

The register must contain the following information about each optician:

1. name;
2. contact information for each optician and, where applicable, the name of their health professional corporation;
3. the fact and date an optician died if known;
4. the contact information for health professional corporations;
5. the shareholders of health professional corporations (where they are opticians);
6. details of the registration categories of each optician;
7. the terms, conditions and limitations on each certificate of registration, regardless of their source;
8. a notation of any cautions and remediation orders issued by the ICRC;
9. details about any referrals to discipline;
10. a copy of any specified allegations of referrals to discipline;
11. the result of discipline and incapacity proceedings;
12. details of any acknowledgements and undertakings in force;
13. professional negligence or malpractice findings;
14. a notation of any suspension or revocation of registration;
15. a notation of any suspension or revocation of an authorization for a health professional corporation;
16. additional information specified by the registration, discipline or fitness to practise committees;
17. a notation of any pending appeals of disciplinary findings;
18. a summary of any outstanding charge or finding of guilt under the *Criminal Code* (Canada) or the *Controlled Drugs and Substances Act* (Canada),
19. any bail conditions,
20. any findings of professional misconduct or incompetence in any jurisdiction,
21. any license or registration to practise a profession in any jurisdiction, and
22. any resignation and undertaking given by the optician not to reapply in the face of a complaint or investigation.

The College's by-laws provide that additional information must also be placed on the public register, including the following:

1. An optician's refraction designation or contact lens designation;
2. Details of an optician's practice (e.g., areas of practice, languages spoken);
3. Address(es) and telephone numbers of an optician's practice location(s);
4. An optician's business email address;
5. Any nicknames or name abbreviations used by the registrant; and
6. Fact that there is a pending investigation where the public needs to know.

These by-laws are constantly changing as society's expectations about what information should be available to the public evolve. So opticians need to carefully read notices from the College about new information being added to the public register.

There are some circumstances where information can be withheld from the public. These exceptions include where the information is no longer relevant (e.g., old advertising infractions), where the safety of an individual was at risk (e.g., contact information where an optician is being stalked), where it includes personal health information (e.g., about patients) and after six years for minor discipline findings (e.g., where only a reprimand was administered).

Public Register Scenario

Bella, an optician, has separated from her husband. Bella's husband has hit her a number of times. Since the separation, Bella's husband has been following her. The police cannot seem to stop him. Bella moves to another city. She asks the Registrar not to put her business address or telephone number on the public register so that her husband cannot find her. Bella provides documents from the police and the courts about her husband's behaviour. The Registrar removes Bella's contact information from the register.

Conclusion

The *RHPA* provides a detailed road map for the regulation of the profession in the public interest. Together with the *Opticianry Act*, regulations, by-laws and case law, the College is authorized to use various regulatory techniques to effectively and fairly protect the public including restrictive regulation, reactive regulation, proactive regulation and transparent regulation. Opticians need to be aware of the professional obligations that apply to them including the various types of professional misconduct to avoid. Maintaining public confidence is essential to preserving self-regulation of the profession as well as the reputation of the profession.