



**Regulation Matters:
a CLEAR conversation**

Episode 18: Use of a Professional's Social Media History in Registration, Investigations and Professional Misconduct Prosecutions **July 9, 2019**

Line Dempsey: Welcome to our podcast, Regulation Matters: a CLEAR conversation. I'm your host, Line Dempsey. For those of you who do not know me, I am currently the chief compliance officer with Riccobene and Associates here in North Carolina. I was with the North Carolina Dental Board for 16 years prior to that. I am on the CLEAR board of directors, as well as the current chair of the National Certified Investigator Training committee and vice chair of the annual conference program committee with CLEAR. As you are well aware, the Council on Licensure, Enforcement and Regulation, or CLEAR, is an association of individuals, agencies and organizations that comprise the international community of professional and occupational regulation. Our podcast is always a chance for you to hear about the latest and greatest in our community.

And today I'm joined by some presenters for a session in the entry to practice track at CLEAR's Annual Educational Conference that's happening this September in Minneapolis. We'd like to give you a sneak peek of what's in store during the session. The session is titled "Too Much Information: The Use of a Professional's Social Media History in Registration, Investigations and Professional Misconduct Prosecutions." I welcome Marc Spector with College of Early Childhood Educators of Ontario; Dean Benard with Benard & Associates; Brad Williams with Australian Health Practitioner Regulation Agency; and Jill Dougherty with Weirfoulds LLP. We're glad to have you with us today.

Speakers: Glad to be here. Thank you, Line.

Line: Excellent. Well, thanks for joining me. First, let me turn this to Marc. Marc, you and I go back a long time, but I do have a starting question for you. To what extent has the approach that watch dogs have taken to social media evolved over the years? I know that's something you and I've talked about before, but kinda bring us up to date.

Marc Spector: Thanks, Line. That's a really good question. Well, it starts by recognizing that some applicants for licensure, either regulatory or a watch dog, were actually born in the 2000s. They would never have grown up in a world without having a social media presence. They've been contributing to that universe since they were children. And regulators and watch dogs from around the world are

alive to this. For examples, closer to home, the watchdog for retirement homes and actually the regulator for psychotherapists, they both conduct media searches as part of their licensing processes. And in fact, Immigration Canada when people apply for visitor visas to Canada and oftentimes they are having their social media websites looked at as well. And this has all kinds of implications, for both applicants and for watch dogs. So for example, for the watch dogs, do applicants know that that they're conducting these searches? Should they know? Do the regulators really want to know the answers, and are they ready for those answers when they're gleaned?

And if we do take a look at that, well, how does it look different for different regulators? Do you have the resources to do that in a thoughtful and meaningful way? For example, with the retirement homes watch dog, they have about 700 members or licensees. The psychotherapists have about 6000. But what does that mean on the ground for a larger regulator? For example, there are about 200,000 teachers in Ontario, 150,000 nurses and 50,000 attorneys and lawyers, 75,000 engineers. What do social media searches look like for those regulators? And this changes the entire way that both applicants and regulators are looking at the issue of social media history.

Line: That's really interesting. I know it's something that we see here in North Carolina as well. Let me direct this maybe towards Dean. What are you observing with respect to the number of investigations that are centered on or have a significant social media component with the work that you're doing?

Dean Benard: Well, Line, anecdotally I can say that social media is definitely having an impact on the number and the nature of investigations we encountered. We see this happening in different ways. For example, the first way is really, the most common impact we see, is how it serves as the impetus for many concerns being reported. For example, a potential registrant is awaiting their licensing process to be completed, and the regulator receives information about their social media posts, and sometimes those posts lead to questions about the person's suitability for registration. And of course that ends up leading to a registration investigation.

The second impact we see sometimes is where social media - it isn't really a new issue; it isn't something that, in other words, it's not a different type of investigation - but social media is what's leading to an investigation occurring. So, for example, we get reports of behaviors or issues that are, as I say, not new or different but just made known through social media. So some examples of this might be things like a healthcare practitioner advertising services that are outside the scope of practice or a licensee promoting the sale of test answers for a registration exam. In fact, we've done two of those investigations. Or maybe a member is posting things that suggest or leads to questions about their fitness to practice. So these are all examples of things that aren't really new in terms of the nature of the matters being investigated, but this is where social media comes into play as a source of information that leads to the investigation starting or provides evidence to aid in the investigation. And in this respect, we've seen an upward trend.

Now with respect to social media being the actual issue, we're also seeing an increase there as well. And it's not really surprising given that social media options and the proliferation of its use is always

increasing, so it stands to reason that professionals will also be using these services. And we had a case last year where a person working in a small community was posting on Facebook about their experiences on the job, and those descriptions were such that other people in the community could actually identify some people involved. And in turn, there was a breach of confidentiality through social media.

So the short answer, or maybe now the long answer, to your question is yes, we are seeing a rise in social media component to our investigations and as a result we're always looking for evidence and information through that medium.

Line: Right. And you know, I immediately think to especially people getting licenses and what we experienced at the Dental Board when I was working there. We would constantly look at their Facebook pages and social media areas. And you'd question in your head their fitness to practice when you see some of their posts with their friends that they just don't think about when they place them. Well, let me ask you this, Dean. Are there any restrictions or obstacles to actually collecting and using that social media to aid in an investigation?

Dean: Well, I think there definitely are. And I'm gonna have to start my answer with that not-so-helpful phrase, it depends. And I know people hate that caveat.

Line: Of course.

Dean: But the reason I say this is because there's a variety of ways that we can obtain social media information. I think that's an important consideration. So, for example, in some cases, the information is truly in the public domain. For example, a person posts something openly on social media, no private account settings are implemented, and whatever they post is out there for all to see. And I think in these cases, I don't see a lot of restrictions for its use in an investigation.

However, in other cases, there's situations where people are posting through private accounts or within private groups. And the challenge for is, how do we get into these accounts and see what's there, and should we? And we may be given the access through a third party who wants us to see it, or we may even infiltrate group by creating a fictitious account and getting ourselves invited into the group so we can see what's there and becoming "friends" with the subjects of interest. Still other times, we're provided with information from another member to a private group just through a printed form or a screenshot. So, essentially, we can get what we want by one means or another, but this doesn't address the question of whether information we gather through these tactics will ultimately be usable later in some proceeding. So I think there are arguments that have yet to be fought on some of these issues. And it's important that investigators exercise some caution and seek advice from legal counsel before proceeding. An argument can be made that having this information, whether admissible later or not, can still be extremely helpful to an investigation, but for now, I think we need to consult appropriately on a case-by-case basis.

Line: Right, that makes good sense. Well, let me turn to Brad. How does the increased prevalence of social media commentary influence public confidence that regulators are appropriately discharging their responsibility? I feel like it always comes back in the States to this kind of - are you better off restricting a licensee's ability to use social media and infringe on their second amendment, first amendment rights, or is the public better off by being able to see and search these things out on their own? But I guess, what are your thoughts?

Brad Williams: Thanks, Line. I think over the last 10 years, social media has become a powerful source of communication and is readily accessible to allow anyone with an internet connection to publish their own content and to connect with other people. And for many, it's become a key source of information. It's overtaking traditional media sources such as print and television. Social media campaigns that we saw with #MeToo movement, for example, have a really strong influence on society, and by allowing individuals to be part of a louder collective voice, that brings an idea into the public consciousness. So as regulators, we have increasingly seen social media being used not only by the registrants but also by others to make public comment about disciplinary processes. So it might be, for example, a registrant who's been subject to some form of disciplinary investigation garnering support from their social networks. They might be asking them to lobby politicians that might use their social networks to advertise protests against the regulator. We've also seen members of the public who have learnt of an outcome of a disciplinary process expressing their dissatisfaction about the disciplinary sanctions, which they might consider to be, for example, too lenient. Each of these has the potential to detrimentally impact on the confidence the public has in the regulator.

At times there can be a discrepancy between actions taken by regulators and community expectation. Disciplinary proceedings are prone to being misunderstood and mischaracterized. And this may occur when the public's not fully informed by the knowledge of the facts. [***] flow from misunderstanding of the purpose of disciplinary proceedings, which, unlike criminal processes, are not focused on punishing a registrant. Disciplinary proceedings are focused on protecting the public against the individual repeating their conduct, deterring others from behaving in a similar way, while upholding the reputation or standards of the profession. This latter concept has at its core the confidence the public has in a profession molded by how the regulator responds to aberrant behavior. It's tricky.

Line: No doubt. Well, I guess, is it possible, or how do we incorporate public expectations when you're running a disciplinary hearing or disciplinary proceeding?

Brad: Yeah, we gotta be really alive to [how we address that]. In the past, we have very much focused on professional standards and our part in professional standards without recognizing community expectations. In the legislation in Australia that we work under, the Health Practitioner Regulation National Law, this legislation expressly recognizes the role of community expectations in assessing behavior of registrants. So, for example, in our professional conduct, the statutory test specifically talks of to conduct that falls below the expected standard of the public or the professional peers.

Also, there's a definition of professional misconduct, which talks of behavior which inconsistently

being a fit and proper person to hold registration. And again, that seems to incorporate an expectation from society that a person is able to be trusted to carry out a profession. So we commonly lead evidence from experts about standards set to by peers. What proves more difficult for us is arguing that the community regards the conduct in question as not befitting a health professional or is this bringing discredit upon or reducing confidence in the profession. At present this is principally done through submissions addressing the seriousness of behavior and how it is incompatible with the values of the profession.

We need to start looking at ways of incorporating this reasonable public expectation about conduct of health practitioners. In doing so, we must be very careful though to advance what I call reasonable expectation. It's not a populist clamor or an outrage that may not be well-informed. Such submissions must be sounded based on, and particularly by reference to the Board and professional association values and prior tribunal decisions. All of the codes of conduct which our boards operate under in Australia are subject to broad community consultations, not just with the professions. And so that's one way in which these values can be instilled within the codes of conduct and then utilized to assess behavior of practitioners who are registered with the boards. And one other way in which we moved in Australia to incorporate the public expectation is by having a community representative on all tribunal hearings that involve disciplinary matters, which helps also to also further gauge what might constitute a reasonable expectation of the public.

Line: Very good, great thank you, Brad. Well, Jill, how do regulators contend with social media commentary by witnesses or members during investigations and prosecutions?

Jill Dougherty: Well, the issue starts, really, even as early as receiving complaints because sometimes the challenge that a regulator has to contend with is complainants who have already been participating in, for example, a Facebook group where they've exchanged comments relating to a particular member. And the issue gets raised as to whether the complaints from the outset are badly motivated or vexatious and has been influenced by the various comments posted within the group. Sometimes it becomes a challenge as to whether the complaint should be investigated and processed.

Once you get past that, you continue to have issues relating to dealing with witnesses who have been commenting on a matter that is under investigation in social media. And there's a number of difficulties with that. One of which is that during the investigation - unlike at the point when you're in a discipline hearing - during an investigation, the information gleaned during the investigation is supposed to be confidential and maintained confidential by the regulator. So, the challenge then that arises for the regulator is trying to deal with individuals who are perhaps commenting on or publishing information relating to an ongoing investigation on social media in circumstances where the person who is doing that may not be a member of that particular regulatory body, and therefore the college doesn't directly have any immediate tools with which to deal with that sort of publication. Unlike if the person who is posting the information is themselves a professional and the college is in a position to, for example, point out to the member that it may not be appropriate to do so.

In circumstances where the person who is posting information on social media sites is in fact the member who is the subject of the investigation, you have another challenge, which is that the comments themselves might be taken in some situations to show a lack of cooperation on the part of the member interference with an ongoing investigation, intimidation of witnesses. And all of those things can in and of themselves constitute the basis for potentially separate allegations of professional misconduct.

When you get to the point where you're dealing with the witnesses in a hearing, then the challenge that you had during the investigation, which is largely one of trying to control the investigation and maintain appropriate levels of confidentiality, becomes an issue of dealing with challenges to witness credibility. Because if you have a group of witnesses who have been posting commentary on social media and using social media to discuss issues in the case with each other, then of course that is a very fruitful source of cross-examination to challenge the credibility of those witnesses. And even with an expert witness we have had cases where the social media history of the expert and their presence on social media has been used to suggest that they are not objective, that they have an axe to grind, that they are biased and are trying to advance a particular agenda, again with a view to challenging the expert's evidence.

So that is just a very short snapshot of some of the challenges that exist for regulators when they're dealing with social media commentary by witnesses and members during investigations and prosecutions.

Line: Yeah, they're quite significant though and can certainly sink a case pretty easily. Are there special considerations when using social media information as evidence in prosecutions? Is there anything we have to do special with that?

Jill: Well, in one sense, it's your standard hearsay evidence, so statements made outside of the hearing that you may be using to, for example, demonstrate that the member conducted themselves in a certain way or had a certain type of, let's say, inappropriate relationship with a client or patient or perhaps crossed boundaries with a client or patient. So there are certainly lots of cases involving professionals, for example, sometimes teachers who have engaged in inappropriate interaction with students on social media. And of course, it's not restricted in any way to teachers; there are examples of many different types of professions where the professional has engaged in inappropriate communications with clients and patients through social media. So, in dealing with that, in some senses it's typical hearsay evidence. But in other senses, it is something on which you may end up wanting to call expert evidence. So for example, you may need to get an expert to provide some technical evidence about, for example, what inferences can be drawn about when something was posted on social media.

You may, in fact, have to call an expert, depending upon the nature and frankly the age of the panel, to talk about particular aspects of social media that they may not be familiar with. Because, just as Marc pointed out at the beginning, whereas many of the registrants in professions may be people who were

born in the 2000s and have always had a social media presence and it may be second nature to them, people sitting on the panel who is deciding a discipline case may in fact not be particularly familiar about how social media works. And so you may end up having to call expert evidence to specifically deal with that type of issue.

Line: Well, that's a great point. Well, I think this has been a great discussion and a great lead-in to our conference session. Let me round this back out to Marc. Marc, any homework for our listeners in preparation for the AEC?

Marc: Thanks, Line. The world is different today than it was even five years ago. So what I'd ask regulators is to reflect on what are they doing now. Are they ready for the future? Have they thought about all the implications, and do they have the right policies, procedures, and thoughtfulness in place to be ready for it?

Line: Excellent. Well thank you, Marc, Dean, Brad and Jill, for your time and being a part of this CLEAR podcast. As I say each time, it's always wonderful to have the opportunity to share and learn from each other. And I think this is a great opportunity, and I really look forward to hearing your session at the Annual Educational Conference in September. And again, thank you for speaking with us today.

And thank you, our listeners. We'll be back with another episode of Regulation Matters: a CLEAR conversation very soon. Please subscribe through our podcast on Podbean, iTunes, Apple Podcast, Google Podcast and Google Play, Stitcher, Spotify or TuneIn. If you enjoyed the podcast episode, please leave a rating or comments in the app. These reviews help us improve our ranking and make it easier for new listeners to find us. Feel free to visit our website at www.clearhq.org for additional resources and a calendar of upcoming training programs and events. Hopefully we'll see you at the Annual Educational Conference in September. Again, finally, thanks to Stephanie Thompson, our CLEAR staff member who is the content coordinator and editor for our program. I'm Line Dempsey, and I hope to be speaking to you again very soon.

*The audio version of this podcast episode is available at
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