

Focus HEALTH LAW

Health professionals on the hook for dishonest staff



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Health professionals are not unique in employing staff to support the administrative or other aspects of their practices. But unlike other employers, health professionals can face regulatory action for the actions of their employees, even where the employee acted wrongfully and without direction from the professional.

Health professionals must therefore do what they can to prevent those (unfortunately) not uncommon scenarios where such individuals not only don't fulfil their professional duties, but take advantage of their trusted positions. From stealing from a pharmacy to billing for dental services not performed to even answering telephone queries in a discourteous fashion, employees' wrongful conduct has caused many health professionals to face professional exposure.

Take, for instance, the case of a pharmacist who hired a woman (who had previously served as a caregiver for his children) to help out in his pharmacy: *Ontario (College of Pharmacists) v. Reich* 2013 ONCPDC 18 CanLII. A police investigation revealed that the employee was stealing large quantities of narcotics from the pharmacy and selling them on the street. Unfortunately, as the pharmacy staff had not been as thorough as they should have been with their required reconciliation practices, the theft went undetected for over a year. While the employee was ultimately found guilty of drug possession and sentenced to imprisonment, the pharmacist was found to have engaged in professional misconduct for, among other things, failing to manage the inventory of narcotics to prevent loss or theft. Although the pharmacist acknowledged that his lack of oversight had permitted the employee to get away with the theft for so long, he had reason to trust her, not only with his stock but also with the care of his children.

The challenges with putting trust in employees can also be seen in a recent decision of the Health Professions Appeal and Review Board: *BMG v. MM* 2014 CanLII 59308 (ON HPARB). In this decision, the



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board upheld a decision of the Inquiries, Complaints and Reports Committee (the ICRC) of the Royal College of Dental Surgeons of Ontario to caution a dentist regarding improper billings that were submitted under her name. The dentist admitted that staff of the clinic in which she worked had billed dental hygiene services to patients' insurance companies under the dentist's name and without her knowledge and that the billings were improper. The dentist argued, however, that she was not an owner of the clinic, but was required as a term of her employment to permit staff to use her stamp and to submit bills under her name. She denied any wrongdoing and argued that the owners of the clinic were ultimately responsible for the billing practices of the clinic.

The ICRC acknowledged that the dentist was in a difficult position, but still found that as a dentist, she had the ultimate responsibility of ensuring that all billings submitted under her name were accurate. The ICRC cautioned her that “she should not allow her professional responsibilities to be compromised by anyone, including her employer.” The review board rejected the argument that the complaint should have been made against those truly responsible for the billing sub-

missions, and upheld the ICRC's decision as reasonable. Again, the requirement to

supervise staff, in this case with respect to billing, was found to be part of the health professional's obligations.

Other cases have seen health professionals having to respond to regulatory complaints or investigations because their staff have not followed proper infection control practices, failed to relay client information to the health professional or have been allegedly been rude to a patient. Consequently, while it may be very tempting (and, in some cases, required for the necessary functioning of the practice) to delegate administrative or other tasks to staff, health profession-

als would be wise to remember that the buck ultimately stops with them — they are responsible for everything that occurs in their office. Health professionals would be well served to have clear office policies and protocols in place setting out all expectations — on which they can rely in the event that a staff member acts in a manner outside their duties. Training of staff regarding their expectations and regular internal audits of compliance with office practices and protocols could also minimize the risk that professionals will be held to account for the acts of their employees. At the end of the day, while no one will ever expect a health professional to have to go it alone, professionals need to remember that, no matter how busy they may be, they are on the hook for the actions of their staff and must make it their business to know what their staff members are doing on their behalf.

Elyse Sunshine and Lonny Rosen are partners at the firm Rosen Sunshine, a boutique health law firm that includes all areas of health law advice and advocacy on behalf of health professionals and health professional organizations.

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Court rejects vanity plate fertilizer defence

Proving that persistence doesn't necessarily beat the law, a Maryland man has exhausted his latest legal option in a fight to keep his vanity licence plate. John T. Mitchell obtained an agriculture commemorative plate with the Spanish word for feces in 2009. Reacting to a complaint in 2011, the Motor Vehicle Administration ruled the word belonged on its list of over 4,000 letter-and-number combinations deemed unacceptable and rescinded his plate. Mitchell filed and lost an administrative appeal, took it to the state court and was denied and appealed all the way to the state's Supreme Court, where he lost for the last time. He argued that the word has a variety of non-profane and non-obscene meanings, some of which, such as “compost,” make sense in the context of the agriculture plate. Court of Appeal judge Glenn Harrell, Jr. disagreed, writing: “Even though a witness to a vanity plate message will discern easily the vehicle owner as the speaker, because the speech takes place on government property and only with state permission, the message will be associated with the state.” — STAFF