



If you needed to file a routine set of legal documents and someone told you he or she could do it for a third of the price you've been quoted by your lawyer, would you give that person the work? If you had no dental plan and didn't speak English very well, would you go to a "practitioner" who spoke your language and offered dental treatment at half the cost? If the contractor you're using for a renovation has the words "Construction Engineer" on the contractor's business card, would you think that person capable of practising professional engineering? Some in the general public may answer yes to these questions, not knowing the risk they take might have dire consequences. The challenge for regulators is to decide how to deal effectively with impostors. Here is what some Ontario regulators are doing.

Self-regulated professions tend to fall into two groups in their attitudes towards illegal practitioners. One group sees little benefit from pursuing them and would want the government to take over the process if it became too onerous. The other group sees the enforcement process as an important way of demonstrating that the profession protects the public, and that the professional qualifications in question have great value. After all, if unqualified practitioners go to the lengths of pretending to have these qualifications, they must be worth having.

Holding Out:

How self-regulated professions deal with impostors

by Margaret McCaffery

The first group tends to investigate and prosecute only those very clear-cut cases of impostors, and may reserve prosecution for only where harm can be proven. For example, the Law Society of Upper Canada and the College of Physicians and Surgeons of Ontario would think twice before fully prosecuting cases of unqualified practitioners of law or medicine, because they might be perceived as protecting their own turf from people who charge lower fees than qualified professionals. Only when they can prove that these unqualified practitioners have harmed members of the public do they take the cases to court.

The second group takes a proactive approach to finding cases, and prosecutes all cases of unqualified practice, investing considerable resources in the process. For

example, the Law Society of Upper Canada isn't required under its legislation to prove that harm has been done by someone posing as a lawyer, but they don't pursue action unless they can prove harm. Ajit John, staff lawyer at the LSUC and formerly in charge of prosecuting "unauthorized practice," said: "We won't go forward with a prosecution just on grounds of 'holding out' [implying that the person is a lawyer]. We need an obvious element of public harm, because the press would hammer us without it."

Defining illegal practice

It's a lot easier to define illegal practice in some professions than in others. For

example, the profession takes action in relation to illegal practitioners. For example, the Law Society of Upper Canada isn't required under its legislation to prove that harm has been done by someone posing as a lawyer, but they don't pursue action unless they can prove harm. Ajit John, staff lawyer at the LSUC and formerly in charge of prosecuting "unauthorized practice," said: "We won't go forward with a prosecution just on grounds of 'holding out' [implying that the person is a lawyer]. We need an obvious element of public harm, because the press would hammer us without it."

ment should take on this responsibility—or that the fines for illegal practice should go to the profession in question, to help defray the cost of prosecution. Gail Siskind, RN, director of investigations and hearings at the College of Nurses of Ontario, says that if the college were to get 15-20 cases for prosecution annually, "we would think that maybe we shouldn't be doing this. We would ask the government to take it over."

The Royal College of Dental Surgeons of Ontario, however, has a very vigorous process of seeking injunctions against unqualified practitioners: All cases are pursued in civil court to prevent illegal practitioners from continuing to practise. A follow-up process ensures that they do not start practising again. The program costs the college \$200,000 a year, but Registrar

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example, the Royal College of Dental Surgeons obtains injunctions against every unqualified practitioner who comes to its attention. The college's enforcement program alone costs \$40 per member.

Taking on the trappings of a profession without the legal right to do so is a complex range of actions, from simply giving oneself a title because it may be good for business, through to outright criminal action. The range of consequences for these actions is determined by the legislation governing the profession in question, and the potential for harm if the practitioner is unqualified.

The self-governing professions are permitted to discipline their own members, based on the belief that the members of a profession are best equipped to judge whether a practitioner is practising improperly. Part of self-governance involves taking action against people who are not members of the profession in question, but who are practising that profession illegally.

The intent is to protect the public from being harmed by unqualified practitioners, but the public sometimes perceives it as turf protection by the pro-

example, the practice of medicine is defined under the legislation as a series of "controlled acts." Anyone undertaking any of these acts without being licensed to do so, or without being supervised by a licensed practitioner, is practising illegally. Compare that with the practice of law or professional engineering, where the respective licensing bodies first have to retain expert witnesses to verify whether the acts in question do constitute the practice of law or professional engineering, before they can prosecute offenders.

There's a philosophical difference among the professions, however, about the vigour with which they will pursue illegal practitioners. Dr. John Carlisle, deputy registrar for the College of Physicians and Surgeons of Ontario, comments that in the protracted negotiations about the *Regulated Health Professions Act*, "the concept of unauthorized practice got lost." The colleges thought that the Ministry of Health would take on the responsibility for prosecuting illegal practice. The ministry, it turned out, had no such intention. Several of the colleges think the govern-

Irwin Fefergrad thinks "it's a small price to pay. Self-regulation is a privilege. We've been delegated the responsibility; we can be trusted to carry it out."

When you are perceived to be protecting the public, it's easy to see the benefits of this attitude and approach. But what if a family has a terminally ill child who is offered "treatment" by an illegal practitioner of medicine, when the medical profession has said that no treatment is possible? According to Dr. Carlisle, in prosecuting such a case the college would "appear to be wanting to kill this child." He notes that many such cases are backed by large organizations with sophisticated public relations agencies.

Where does professional engineering sit on the spectrum? PEO has always taken an active approach to enforcing its legislation, even though it has several obstacles in its path. One is the need to prove that the work in question is professional engineering. If the work in question is an act that requires a professional engineer's seal, there's little difficulty in pursuing the case. But in many cases it's not that simple.

Another is the need to prove that use of the title may mislead the public into thinking that the person using the title is capable of providing professional engineering services. Someone who steals or forges a professional engineer's seal has not

only committed theft or fraud, but also may have endangered the public. Such cases are usually straightforward to prove. But a person selling real estate may think prospective clients will be impressed by an engineering designation, and might be

tempted to put "Engineer" on his/her business card. The legislation states that the use of the title is illegal; the onus at present (see "Enforcing the Act," p. 32) is on the profession to prove that the use of the title will mislead the public.

College of Nurses of Ontario

140,000 members (110,000 practising); 14 illegal practitioners investigated in 2001 and 22 in 2002. Of these 36 investigations, 11 were deemed worthy of pursuing a prosecution under the Regulated Health Professions Act and the Nursing Act.

The scope of nursing practice is defined in the *Regulated Health Professions Act*. Nurses are registered professionals, not licensed. The use of the titles "nurse," "registered nurse," "registered practical nurse," or any abbreviation of these titles is protected by the *Nursing Act*. Unauthorized practice tends to fall into three areas: people who are qualified in other jurisdictions who have not sought registration in Ontario, people who were once registered in Ontario and have had their registration revoked due to a disciplinary process, and those who have never been registered as nurses. The college still holds jurisdiction over members whose registration has been suspended for non-payment of dues. Fines for illegal practice vary depending on the offence; for example, people using the title illegally may be liable for fines up to \$5,000 for a first offence and \$10,000 for subsequent offences. Where a person has been found to have performed a controlled act, restricted to the profession, the penalty can be up to \$25,000 and/or six months' imprisonment. Fines are paid to the province. Proof is usually obtained from the health record. Informants are usually managers within health care facilities who call the College of Nurses to confirm a nursing registration number. There is no duty to report unauthorized practice, but it is mandatory to report termination. An investigator (nurse/former police officer) informs the facility and asks to go through records to collect evidence. Where necessary, a search warrant is obtained to gain access to records. The college acknowledges that there may be many more instances of illegal practice than it hears about and has initiated an extensive education initiative to inform potential employers of the risks and steps to prevent these individuals from obtaining employment in the first place. The college holds approximately 25-30 presentations/year for employers and managers at various venues, and holds three major information sessions per year at the college and around the province about legal obligations. The college publishes cases in its official publication, *Communiqué*, as well as the employer newsletter, *Quality Practice*. The college also publishes a newsletter for the public that describes how the complaint process works. Ideally, the college would like to recover costs of prosecution and is exploring ways to partner with other organizations to share the burden of investigating and prosecuting illegal practitioners.

College of Physicians and Surgeons of Ontario

26,000 members, one enquiry regarding unauthorized practice every two years, no more than one case prosecuted in three to five years.

Since the *Regulated Health Professions Act* came into force, the legal definition of the practice of medicine has been reduced to 13 acts that could do harm if performed by other than licensed professionals. Enforcement is a complaints-driven process; the college is not seek-

ing to increase the number of cases it prosecutes. The fringe practice of medicine—a very active field—usually does not involve the 13 restricted acts and usually cannot be prosecuted. Many unauthorized practitioners work in ethnic communities in other languages, and may not come to the college's attention. Most publicized recent cases involve defendants who employ public relations strategists; some are former MDs whose licences were removed. Evidence is given by affidavit and injunctions are sought in civil court if the practice is considered dangerous. In many cases, the college attracts negative media attention, as, for example, in a case where a family pursues alternative treatment for a terminally ill family member. These cases cannot be pursued unless evidence is available, which will rarely be the case.

Law Society of Upper Canada

32,000 members, 101 new files dealing with unauthorized practice opened in 2001. Of files closed in 2001, six resulted in prosecution, 13 were closed due to insufficient evidence, 17 saw remedial resolutions and 37 were closed because there was no evidence of unauthorized practice.

The Law Society defines unauthorized practice as being one of four things: holding out; acting (one instance); practising (more than one instance); and representing.

About 50 per cent of cases involve acting or practising. Although legislation does not require the Law Society to prove harm, it will not prosecute without evidence of harm having been done. The Law Society's rules allow lawyers to delegate work to non-lawyers under certain conditions. Provincial statutes also define circumstances where a non-lawyer agent can appear for a client before a tribunal. The Law Society would like to see a clearer definition of the practice of law and would also like to see paralegals regulated, so the public has similar protections when hiring paralegals as when hiring lawyers. Paralegal organizations are seeking regulation; the Law Society is working with these paralegal groups, other legal organizations and the provincial government to come up with a regulatory model (see "Whose court is it anyway?," *Engineering Dimensions*, September/October 2002, p. 33).

Institute of Chartered Accountants of Ontario/ Public Accountants Council

*(ICAO is the qualifying body; the PAC is the licensing body)
ICAO: 33,000 members, 12-20 enquiries/year, no prosecutions
PAC: 8200 licensees, 100 enquiries/year, 43 considered by Enforcement Committee, prosecutions were authorized for 11.*

Fines under the CA Act are very low: approximately \$300 for holding out as a chartered accountant. Institute legal counsel sends "cease and desist" letters, and usually gets cooperation. The majority of offenders are accountants who qualified in another country, and are willing to comply with regulations. The institute has not prosecuted an enforcement case. Under the *Public Accountants Act*, which is the legislation for licensure, fines are much higher, but the legislation stip-

At this point, some professions might not pursue the matter, because they may view the expense of prosecuting the case, the uncertainty of the outcome, and the paucity of the potential fine as not being worth the trouble. PEO has always taken

the view that the right to title exists because those who have the right have undertaken to be governed by, and be accountable to, their professional body. If PEO did not prosecute illegal practitioners, they would be professionally

accountable to no one—and that would not serve the public interest. ❖

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ulates that evidence related to practising without a licence must be dated not more than six months before the laying of charges. This sometimes makes it difficult for the Public Accountants Council to obtain evidence sufficient to support prosecution. There must be evidence of practice: The defendant must have been paid for work, which meets the act's definition of public accounting, and it must have been used by third parties. Complaints are received from the public and from licensees, who have a duty to report apparent infractions. The Enforcement Committee considered 43 complaints in the past year: 28 were closed for insufficient evidence or after the defendants agreed to comply with the act in future; five were deferred for further investigation; 10 were recommended for prosecution. One prosecution was already in progress from the previous year. In four of the 10 cases, charges were withdrawn or not laid because the defendants agreed to comply with the act. Four defendants have been found guilty and fines totalling \$5,700 were imposed. Three cases are still in progress and one defendant has successfully appealed his conviction, but that decision was overturned on further appeal. A summary of enforcement activity is published in the Council's Annual Report.

Ontario Association of Architects

2615 members, maximum 30 enforcement enquiries annually, legal counsel writes cease and desist letters, average 2-3 prosecutions/year.

Most cases are brought to the association's attention by members, and all are investigated. Cooperation is diminishing from building officials ("That's not our job. We're here to enforce the Building Code"), Teledirect (Yellow Pages publisher) and the public. Recent legal opinion confirms that designs submitted to building departments must be prepared under the personal supervision and direction of an architect. Some potential clients attempt to get around this requirement by having an architect come in to finish off the design after initial work is completed by non-architects. Fines for infringements of the *Architects Act* are low; there is no interest in seeking to have them raised. The association prefers to seek injunctions, publishing the results in their communication channels. The executive director and president visit each of the association's 14 regional societies to talk about duty to report, need for evidence, etc. There is a recently launched enforcement program against all entities illegally using "architect" or a derivative in the "White Pages" website phone listings. Members want the association to do more, but don't realize that there must be reasonable and probable grounds to prove a case in court.

Professional Engineers Ontario

65,000 members, approximately 400 enquiries/year, all investigated, "cease and desist" letters written where appropriate, average 4-5 prosecutions/year.

Most cases are brought to the association's attention by members, and all are investigated. The second largest group bringing cases to PEO's attention is Ontario building inspectors. PEO takes action

against those who: illegally use the title "professional engineer," "P.Eng." or variations of it; offer engineering services to the public without a Certificate of Authorization; illegally practise professional engineering; or illegally use an engineering seal.

To check use of engineering titles, PEO staff checks job postings, correspondence and telephone directory listings. Current outreach includes writing to classified pages advertisers in various publications and Yellow Pages advertisers, web-based advertisers, members of other engineering associations residing but not licensed in Ontario, and certain companies that give engineering titles to non-engineers. The media are notified of the results of an enforcement court action. Results of enforcement actions are also published in the *Gazette*. Over the past decade, PEO's enforcement program has resulted in more than \$310,000 in fines to be paid to the provincial government.

Royal College of Dental Surgeons of Ontario

7200 members, approximately 35 enquiries/year, all investigated, injunctions sought against those who refuse to comply.

The college initiated a communications program related to illegal practice about two years ago. Most information in the 40 cases that have been investigated in the last 18 months has been supplied by members. If patients consent, they are interviewed. If not, the dentist supplying the information finds out where the illegal practitioner is practising. The college's investigator (a former police officer) does surveillance; he may interview people going into the practitioner's office, and/or may pose as a patient with a toothache. Once the investigator has evidence that the practitioner is performing acts that are controlled under the *Regulated Health Professions Act*, the investigator charges him/her with contravening the act. While the *Provincial Offences Act* and the *Regulated Health Professions Act* allow for prosecution through the criminal courts, the college thinks the fines are too low, the process takes too long and the illegal practitioner could still carry on practising. The college's preferred route is through the civil courts, where it has been most successful in securing injunctions preventing each individual from practising illegally. Injunctions may be sought to cease and desist, and to turn over equipment. Behaviour is monitored; one practitioner who re-offended went to jail. If an illegal practitioner subsequently seeks certification from the college, the case will be carefully assessed; the practitioner may be refused admission on the grounds of previous behaviour. Restricted certificates are sometimes issued, allowing the practitioner a restricted scope of practice. All cases to date have involved practice in immigrant communities. The public is not cooperative because these illegal practitioners are perceived to be providing "treatment" at a lower price. Only those who have experienced harm have complained. This aggressive program costs about \$200,000/year or \$40/member and has strong support from the college's Council.