Regulatory Overreach – Intervention or Interference

SADJ February 2024, Vol. 79 No.1 p49-52

MI Makoea[1],ML Machete[2], T Bapela[3], PD Motloba[4]

ABSTRACT

There is a prevalent notion among healthcare professionals that their private lives have no bearing on their work. Yet, the public has expectations about the conduct of health professionals while at work or in public. Citizens are quick to broadcast information, and express opinions, and beliefs about the conduct of health partitioners via social media. Consequently, incidents and behaviours traditionally confined to the work environment, have been brought into the public domain, attracting interest and scrutiny. The exposure of personal information can have serious ramifications to the individual and professional reputation. We have witnessed in recent times, the regulator having to acknowledge, process and adjudicate professional conduct emanating outside the work environment.

In this article we interrogate the jurisdiction of the HPCSA regarding "unprofessional conduct" outside work. Several contextual questions are discussed: (i) what does it mean for the HPCSA to protect the public? (ii) How far does the HPCSA's mandate to protect the public go extend? (iii) How should the regulator interact with social media as a source of information about practitioner's behaviour and conduct. We contend that, in some cases, the HPCSA as a regulatory authority, can exercise its jurisdiction and prescribe how their members should conduct themselves outside of work. Eventually, Health Professions Council of South Africa, must protect the public and regulate the profession – "by all means necessary" or only when the "means are necessary"

Background

Reputation is a significant feature in a social construct since it is used to determine a person's social standing in society. Professional reputation means being regarded as loyal, trustworthy and possessing skill and expertise. How health professionals conduct themselves could be a matter of public interest or concern. It is through this lens that the public can construct a picture of the person in whom they place their trust. There is therefore an implied expectation by the patient, public and profession for the dentist to be a person of high moral standards, honest and trustworthy at all times. The dentist is obliged to act professionally, anticipate and avoid situations that could harm the profession and the public. Similarly, the regulatory bodies, such as the Health Professions Council, are dutybound to safeguard the interests of the public by regulating the professional conduct. Several pathways exist for the HPCSA to regulate the professions:

(i) The aggrieved party can lodge a complaint against their practitioner.
(ii) Third party's life the medical schemes can approach the HPCSA to seek retribution against the practitioner.
(iii) The court of law can refer a matter to the HPCSA seeking further sanctions against the practitioner.
(iv) Unprecedented and not codified by the HPCSA, issues emanating from social media could potentially attract sanctions from the HPCSA. "Matters of "public interest" or "that interest to the public".
(iv) In all the scenarios above the HPCSA must make a determination to initiate a disciplinary process. There is sufficient procedural certainly in dealing with the first three scenarios. Regarding the fourth scenario, the HPCSA lacks clear guidelines and process.

CASE STUDY

Over the weekend, a well-known dental professional registered with the HPCSA went on a drinking spree. He was involved in a car accident, incurred minor injuries, and caused the death of another person. Images of the incident then went viral on various social media platforms. The state charged the practitioner with recklessly operating a motor vehicle, endangering other individuals and property, and negligently killing another person while under the influence of alcohol. The court found him criminally liable on all allegations and gave him a suspended sentence. Meanwhile, he concluded an out-of-court settlement with the deceased's family to avert civil litigation. The HPCSA also charged the practitioner with unprofessional conduct and launched an investigation.

QUESTIONS

Should public opinion on professional behaviour influence how the Health Professionals Council of South Africa (HPCSA) governs the profession? In other words,

(i) Should the HPCSA investigate matters of "public interest" or matters that "interest the public".
(ii) Does the HPCSA have jurisdiction or mandate on

Author affiliations:
1. M I Makoea: LLB (Unisa); BDT(Medunsa); Lecturer Dental Therapy Section, Sefako Makgatho Health Sciences University, Department of Community Dentistry, ORCID Number: 0000-0003-6902-4364
2. M L Machete: BDS (UL), MDS (SMU), ITLAR Cert (UNISA); Registrar (MDent), Department of Community Dentistry, School of Oral Health Sciences, Sefako Makgatho Health Sciences University (SMU), Ga-Rankuwa, South Africa. ORCID Number: 0000-0002-0218-8428
3. T M Bapela: BDS (Medunsa) Department of Community Dentistry, School of Oral Health Sciences, Sefako Makgatho Health Sciences University. ORCID Number: 0009-0000-9397-2527
4. P D Motloba: BDS (Medunsa), MPH (Epidemiology) (Tulane), M Dent (Comm Dent), Head, Department of Community Dentistry, School of Oral Health Sciences, Sefako Makgatho Health Sciences University. ORCID Number: 0000-0003-1379-7576

Corresponding author: M I Makoea
Dental Therapy Section: Department of Community Dentistry
Email: moalusi.makoea@smu.ac.za

Author contributions:
1. M I Makoea: 25% Conceptualization, writing edition and final review
2. M L Machete: 25% 25% Conceptualization, writing edition and final review
3. T Bapela: 25% Conceptualization, writing edition and final review
4. P D Motloba: 25% Conceptualization, writing edition and final review

matters of public interest? If so, how far does this jurisdiction extend.

(iii) Is public interest necessary and or sufficient for the HPCSA to act?

In relation to the practitioner, the following issues for debate arise.

(i) Is the mis(conduct) of practitioner a matter of "public interest", in other words, should the public have interest in the conduct of practitioners outside the workplace.

(ii) If so, how does conduct outside the workplace (essentially life outside the workplace) translate into a matter of public interest.

DISCUSSION

We ground our discussion of the case on the following premises:

Premise 1: The mandate of the HPCSA provides the basis for extended jurisdiction.

(a) The role of the Health Professional Council of South Africa

In regulating the profession, the HPCSA has jurisdiction over improper professional conduct of the registered members.

Question: What constitutes improper conduct of the practitioner (legal and ethical constructs)? How far should the HPCSA go in regulating the conduct of members?

(i) In protecting the public, should matters of "public interest" inspire the HPCSA to regulate practitioner's conduct.

Question: What is public interest? And how far can the HPCSA go to ensure the protection of "public interest".

(i) In discharging the roles (i) and (ii), the HPCSA should always protect the individual liberties.

Question: What professional protection and liberties are beyond the jurisdiction of the HPCSA, therefore should be protected at all costs. How does the HPCSA balance the public and practitioner's interest.

Premise 2: Professionalism engenders self-regulation beyond self-interest.

(b) Understanding the nature and essential elements of the profession]

The concept of "profession" is disputed in literature, and the discourse, on its nature remains divergent. Some authors suggests that the notion of 'profession' is not amenable to definition, yet a degree of description is desirable to provide the basis for professional conduct and regulation. The paper by Ali Abadi cites perspectives such as the trait, taxonomic, functional, process, power, and contemporary frameworks as helpful in delineating the nature of the profession.[1] Despite these many permutations, the general definition of profession encapsulates *"a specialised, knowledge-based and legally self-regulating occupation that renders its services to the public and society through a complex, reciprocal relationship based on competence, recognition and trust".*[1,2] In practice, the profession should be incarnate with a great sense of *"internalised moral responsibility that transcends professional self-interest and shows itself in a sentiment of care for the client and society at large".*[3] From this viewpoint, by becoming a member of the profession, the candidate vows and publicly declares to abide by the codes of conduct and ethos of the profession. In summary, the profession should have the following core characteristics and attributes.

(i) A specialised, knowledge-based occupation with a profession-specific body of knowledge.

(ii) Professional authority enabling regulated training, credentialing, autonomy self-regulation and governance.

(iii) Transactional and reciprocal relationship with the public and society; public interest is paramount.

(iv) Regulative codes of ethical and professional conduct, with membership conditional on acceptance and adherence to these codes.

Premise 3: Public trust shapes attitude and behaviour towards health

(c) Without trust, there can be no healing.

Patient trust in their doctor is the cornerstone of the doctor-patient relationship. Health professionals are still the most trusted professionals, however, there is increasing evidence that this level of trust is eroding very fast.[4] The lack of trust in doctors is reaching a crisis level globally *"Our line is that peoples' beliefs/concepts about trust may have changed from a blind or assumed trust to a more conditional trust, although there are still high levels of trust in the medical profession, particularly in individuals as opposed to the institution".*[5] The creep of commercialism and commodification of health, incursion of social media into the private lives of clinicians are among the commonly cited reasons for declining trust of the profession.[6] The Internet is among the leading sources of health information for the general public. This resource is available for patients, to communicate, and make decisions, which may change their attitude toward clinicians.[7] Though few studies have been conducted on the impact of Internet of public trust, Meng and colleagues found that internet use is negatively associated with residents' trust in doctors. Similar studies found that physicians social media behaviour, such as appearing intoxicated on photographs can affect patient trust.[8,9]

Premise 4: Misconduct is a necessary condition for the regulatory intervention.

(d) Misconduct and unprofessional conduct

Misconduct is a heterogeneous phenomenon, produced by multiple causes. Viewed as a continuum, misconduct ranges from actions that are illegal (prohibited by criminal and civil laws) to actions that are unethical (contrary to societal norms and expectations) or unprofessional (against professional codes of conduct and protocols). Theoretically therefore, misconduct by professionals can include a range of examples of actions deviant to the laws, norms, and protocols.

Unprofessional conduct is defined in the HPCSA (Section

2 of the Health Professions Act 56 of 1974), as a *"set of attitudes, behaviours, and characteristics deemed desirable in members of a profession. It defines the profession and its relationship to its members and to society"*.[10] The Act also defines, unprofessional conduct as *"improper or disgraceful or dishonourable or unworthy conduct or conduct which, when regard is had to the profession of a person who is registered in terms of this Act is improper or dishonourable or unworthy"*. The expanded legal definition of unprofessional conduct according to Law Insider includes *"conduct unbecoming a licensee or detrimental to the best interests of the public, including conduct contrary to recognized standards of ethics of the licensee's profession or conduct that endangers the health, safety or welfare of a patient or client."*[11] This means commission or omission of acts or behavior that fail to meet the minimally acceptable standard expected of similarly situated professionals constitute unprofessional conduct. The conduct maybe harmful to the public, but also reflect negatively on one's fitness to practice. There is no contestation about unprofessional conduct occurring in the context of professional practice or work. That is during interaction with patients or third parties in the execution of professional activities. However, implied, even though not widely accepted is the notion that harm can occur at the level of the public, which goes beyond the confines of the clinical practice. Based on the definitions above the unprofessional conduct implies the following:

1. The offender is a bonafide member of the profession, a licensed professional in good standing.
2. There should be commission or omission of an act or behaviour.
3. The act or behaviour is detrimental to the patient.
4. The act or behaviour is harmful to the public.
5. The act or behaviour is damaging to the profession.

Each of the criteria above are necessary and not mutually exclusive. They would apply individually and in concert.

Premise 5: Public Interest a necessary condition for regulatory intervention.

(e) The Public Interest Theory

Public interest represents the notion that an action or process or outcome will benefit the public at large, promoting general welfare of the public or better serving the public. Public interest is purposefully undefined so that it can apply under different context and circumstances. This lack of definition allows flexibility and applications across jurisdictions and on a case-by-case basis. [12] Ultimately public interest is about what matters and why it matters.[13] On the contrary, what interests the public is sensational or heightens curiosity, without any meaningful benefits or harm. A matter that interests the public could translate into a matter of public interest; the reverse is also true. Public interest is often dismissed as a vague, lacking robust criterion, hence difficult to apply rationally and based on empirical evidence.[14] According to Public Interest Theory, regulation should, (i) protect and benefit the public at large or (ii) be imposed in order to maximise the welfare of the public. Therefore, public officials and organizations should ensure that the objectives, process and procedures and outcomes are aligned to the two concepts.

The following criteria represents an extensive list to be considered when evaluating matters of public interest:

(i) The action or regulation will advance the interest of the public.
(ii) The actions or regulation will advance the interest of the profession.
(iii) The action or regulation will advance the interest of the of the practitioner.
(iv) The procedure and process are compliant with the applicable law (letter and spirit)
(v) The actions or procedures are reasonable.
(vi) The action causes embarrassment to the council of profession
(vii) The actions or procedures causes loss of confidence in the council or profession.
(viii) The actions or procedures should be done or permitted to be done.

Premise 6: Legal precedence provide jurisdiction for the HPCSA.

(f) Council the primary custos morum of the health professions

On 25 November 2014 the respondent, Dr G was charged with unprofessional conduct. In his appeal, he cited that the HPCSA lacked jurisdiction over matters under review. His internal appeal was dismissed resulting in him going to the courts. In the High court Dr G contented that the Council had no authority to institute the disciplinary proceedings as the conduct complained of did not relate to the health profession. The High Court recognised the HPCSA authority over the conduct of its members. The Council is therefore not merely a medical malpractice watchdog; it is also the primary guardian of morals of the health profession. Preddy and Another v Health Professions Council of South Africa. At the end the Court, reiterated that the Council has jurisdiction over improper, or disgraceful or dishonourable or unworthy conduct. However, such a relationship is not a prerequisite for the council's jurisdiction. This court ruling interpreted the extent of the jurisdiction of the HPCSA, noting the centrality of proven misconduct on the part of the practitioner.

Argument

The Health Professions Council of South Africa has a mandate to regulate professional's conduct beyond the confines of work. In other words, the jurisdiction of the HPCSA can extend beyond the doctor-patient interaction. Being a professional places further responsibility on the practitioner to develop and maintain public trust at all times. We argue that in protecting the public the HPCSA should be vigilant and cognizant of issues that could undermine public trust. Such issues can get on the agenda of the HPCSA through several pathways. We note that improper conduct by practitioners is not restricted to the work environment but could originate from non-work, "private" situations. Particular to this case, the improper conduct by the practitioner occurred in their" private". The HPCSA could evoke the "public interest" stance to consider private conduct by a practitioner. It is recommended that an extensive test of public interest be undertaken to determine the impact of the practitioner's conduct. There are legal precedent cases that the HPCSA can refer to in dealing with this case or similar. The rapid adoption of the internet and social media has brought substantial changes in the way the HPCSA, the public and practitioners interact. In future more and more cases of improper misconduct by practitioners will go viral and attract curiosity and sensationalism from the public. The regulator cannot miss this opportunity to

develop guidelines aimed at addressing these impending trends.

CONCLUSION

We conclude that it is undesirable and irresponsible for the professionals to ignore their presence and relationship with social media. Similarly, the regulator must develop guidelines to manage conduct of practitioners as they interact with social media.

REFERENCES

1 Abadi HA, Ayentimi DT, Coetzer A. The meaning and essential nature of a profession: a multi-perspective approach. Labour & Industry.2020; 30, 85-96.
2 Saks M. Defining a profession: The role of knowledge and expertise. Professions and Professionalism.2012; 2: 1-10
3 Münte P, Scheid C. Coping with crises: a neo-classical view on professions. Professions and Professionalism.2017; 7: e1618-e1618
4 Huang ECH, Pu C, Chou YJ et al. Public trust in physicians—health care commodification as a possible deteriorating factor: cross-sectional analysis of 23 countries. INQUIRY.2018; 55:46958018759174. https://doi: 10.1177/0046958018759174
5 Collier R. Professionalism: the importance of trust. CMAJ. 2012 Sep 18;184(13):1455-6. doi: 10.1503/cmaj.109-4264
6 Nie, J.-B. et al. Rebuilding patient-physician trust in China, developing a trust-oriented bioethics. Developing World Bioethics.2017:1-8.https://doi:10.1111/dewb.12172 (2017).
7. Meng L, Yu X, Han C et al. Does Internet Use Aggravate Public Distrust of Doctors? Evidence from China. Sustainability. 2022;14. 3959. https://doi.org/10.3390/su14073959
8. Fatollahi JJ, Colbert JA, Agarwal P et al. The Impact of Physician Social Media Behavior on Patient Trust. AJOB Empir Bioeth. 2020;11(2):77-82. https://doi: 10.1080/23294515.2019.1678533
9. Forgie E, Lai H, Cao B et al. Social Media and the Transformation of the Physician-Patient Relationship: Viewpoint J Med Internet Res. 2021;23(12):e25230. https://doi:10.2196/25230
10. Health Professions Council of South Africa (HPCSA). Guidelines for good practice in the health care professions. Accessed December 2023. URL: http://www.hpcsa.co.za/Uploads/editor/UserFiles/downloads/conduct_ethics/rules/ generic_ethical_rule
11. Currie G, Richmond J, Faulconbridge J. et al. Professional misconduct in healthcare : setting out a research agenda for work sociology. Work, Employment and Society.2019; 33 (1):149-161.https://doi.org/10.1177/095001701879335
12. Thaldar D. Research and the meaning of 'public interest' in POPIA. S Afr J Sci. 2022;118(3/4). https://doi.org/10.17159/ sajs.2022/13206
13. Sorauf FJ. (1957). The public interest reconsidered. The Journal of Politics.1957; 19(4): 616-639.
14. Klosterman RE. (1980). A public interest criterion. Journal of the American Planning Association. 1980;46(3):323-333.
15. Lewis CW. (2006). In pursuit of the public interest. Public administration review.2006; 66(5):694-701.

Online CPD in 6 Easy Steps

The Continuing Professional Development (CPD) section provides for twenty general questions and five ethics questions. The section provides members with a valuable source of CPD points whilst also achieving the objective of CPD, to assure continuing education. The importance of continuing professional development should not be underestimated, it is a career-long obligation for practicing professionals.