

Professional Liability

“Professionals should not assume that ‘personal’ expression will not attract regulatory scrutiny.”

What was the most interesting development of 2023, and why?

An important theme in 2023 was the contested intersection of professional regulation and personal expression, and specifically the regulatory risk that professionals may face as a result of their social media activity. Many regulators have long taken the position that their members’ social media activity falls within the proper scope of professional regulation. Several cases in 2023 served as clear reminders of the risks faced by regulated professionals who make public statements that are deemed to fall afoul of professional standards.

In [Peterson v College of Psychologists of Ontario](#), the Divisional Court confirmed that a person who identifies him or herself as a professional in making “off duty” remarks cannot “have it both ways” – trading on one’s professional status in social media

statements may properly expose those statements to enhanced regulatory scrutiny.

In the ongoing [Hamm case](#) and others, professional regulators have taken members to task for public statements on healthcare and social issues (such as trans rights or pandemic measures) that do not accord with the regulator’s view of professional practice or ethics.

The extent of this risk is underscored by the very recent decision in [College of Physicians and Surgeons of Ontario v Trozzi](#). In this case, the Ontario Physicians and Surgeons Discipline Tribunal directed revocation of the member’s certificate of registration based on governability concerns arising from his social media commentary, which was perceived to undermine important public health measures in response to the COVID-19 pandemic.

What’s the primary takeaway for businesses from the past year?

The upshot of these cases is that professionals should not assume that “personal” expression will not attract regulatory scrutiny. “Off duty” social media statements can be a source of risk, particularly where they touch on matters related to one’s profession (as in the *Trozzi* matter). Professionals have every right to engage in vigorous debate on contentious issues. However, regulators may take the view that public statements, even when made outside one’s professional practice, are required to comply with expected standards of professionalism and competence. Statements in which a professional refers to his or her professional qualifications will attract added scrutiny.

What’s one trend you are expecting in 2024?

Generative artificial intelligence will become increasingly pervasive and is likely to have a significant impact on all professions. Regulatory responses to the use of generative AI are in their infancy. At the Federal level, the proposed [Artificial Intelligence and Data Act](#) has not yet been passed. Some regulators are beginning to issue guidance – for example, the Office of the Privacy Commissioner of Canada and several other bodies have recently co-published a document entitled, [Principles for responsible, trustworthy and privacy-protective generative AI technologies](#). Many professional regulators have yet to take any position. Given that generative AI will see increasing use in law, finance, healthcare, and other fields, we can expect an evolving regulatory response as governments and professions seek consensus in the face of shifting practice.



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