

**IN THE MATTER OF
THE COLLEGE OF OPTOMETRISTS OF BRITISH COLUMBIA
AND A CITATION ISSUED UNDER THE *HEALTH PROFESSIONS ACT***

BETWEEN:

The College of Optometrists of British Columbia

(the "College")

AND:

Dr. Jerry Mackenzie

(the "Respondent")

Date and Place of Penalty Hearing:

By written submissions

Counsel for the College:

Angela R. Westmacott

Counsel for the Respondent:

Dr. Mackenzie represented himself (with assistance from Roger McAfee)

The Discipline Committee (the "Panel"):

David MacPherson (Chair)

Dr. Mark Bourdeau

Dr. Anisa Nurani

**DECISION ON PENALTY
AND ORDER OF THE
DISCIPLINE COMMITTEE**

[1] On October 7, 2013, a Panel of the Discipline Committee found that the respondent contravened Standards of Conduct, a Consent Order dated March 9, 2010, and Bylaws of the College, which conduct also constituted professional misconduct under section 39(1) of the *Health Professions Act* (the "HPA"). The Panel now makes an order on penalty, public notice and costs.

1. The jurisdiction of the Discipline Committee

[2] Under section 39 of the HPA, if a determination is made under subsection 39(1), the Discipline Committee may make orders respecting penalty:

39 (2) If a determination is made under subsection (1), the discipline committee may, by order, do one or more of the following:

- (a) reprimand the Respondent;
- (b) impose limits or conditions on the Respondent's practice of the designated health profession;
- (c) suspend the Respondent's registration;
- (d) subject to the bylaws, impose limits or conditions on the management of the Respondent's practice during the suspension;
- (e) cancel the Respondent's registration;
- (f) fine the Respondent in an amount not exceeding the maximum fine established under section 19 (1) (w).

2. Background

[3] On August 19 and 20, 2013, this Panel conducted a hearing to inquire into allegations that the Respondent contravened sections 130 and 131 and Schedule "A" of the College Bylaws and Parts 2, 4, 5 and 6 of the Standards of Practice for Optometry ("Standards of Practice"), and engaged in professional misconduct as defined in section 26 of the *Health Professions Act* (the "Act").

[4] On October 7, 2013, the Panel issued its Decision on Verdict. The Panel found that the Respondent contravened Standards of Conduct, a Consent Order dated March 9, 2010, and the Bylaws of the College. The Panel found that these contraventions were also professional misconduct. Specifically, the Panel found that:

- (a) On September 16, 2010, the Respondent failed to diagnose the presence of a cataract in the Complainant's left eye at the time of an eye examination, but the Panel did not find on the evidence that the Respondent failed to perform a complete or adequate eye examination.
- (b) The Respondent failed to refer the Complainant to an appropriate Health Specialist, following the eye examination on September 16, 2010, as required under Part 6 of the Standards of Practice.
- (c) The Respondent falsely altered Clinical Records relating to the September 16, 2010, eye examination, by adding and changing notations in the Complainant's Clinical Records, in

an attempt to show that he had discussed with the Complainant the presence of a cataract in her left eye and hide his failure to make a referral to an appropriate Health Specialist. This was a breach of the Consent Order, Part 2 and 6 of the Standards of Practice and Bylaw sections 130 and 131.

[5] See paragraphs 93 - 135 of the Decision on Verdict. The Panel also found the Respondent failed to maintain proper Clinical Records specifically by his failing to maintain legible clinical records, making mistakes and omissions in the Complainant's case history, failing to date and initial changes to the Clinical Records, and failing to document reasons for not performing dilation as part of the September 16, 2010, eye examination. However, as the Citation did not allege contraventions of Parts 2, 4 and 5 of the Standards of Practice apart from fraud, the Panel has not addressed these failures as part of its order relating to citation matters, and they have not affected penalty. See paragraphs 117 – 118 of the Decision on Verdict.

3. Written Hearing

[6] All parties consented to a written hearing on the issue of penalty.

[7] Counsel for the College submitted a written Submission on Penalty dated February 13, 2014, and a Book of Authorities.

[8] Mr. Roger McAfee responded in writing to the College's submission in an undated document. We understand he is not a lawyer, but is assisting the Respondent.

[9] Counsel for the College submitted a written Reply Submission, dated February 25, 2014, in response to Mr. McAfee's submission.

4. Submissions of the College

[10] Counsel for the College submitted that in this case, the factors of particular concern are specific deterrence of the Respondent from engaging in future misconduct, punishment of the Respondent for his morally culpable behaviour, denunciation of his conduct, the need to maintain the public's confidence in the integrity of the profession, and the College's ability to regulate its members.

[11] The College further submitted that the Discipline Committee should take into account past action by the College and the previous Board of Examiners with respect to the Respondent, in considering the appropriate penalty. Specifically, the College submitted the following:

1. on May 23, 1989, the Discipline Committee of the Board of Examiners issued a Letter of Censure and imposed a fine of \$400 on the Respondent following a finding that he performed services in relation to a patient in an incompetent manner;
2. on July 25, 1995, the Discipline Committee of the Board of Examiners issued a Letter of Censure and imposed conditions on the Respondent's practice and costs

following a finding that he had contravened Rule 39 of the Rules of the Board of Examiners in Optometry;

3. on February 23, 1996, the Discipline Committee of the Board of Examiners imposed a conditional one year suspension of the Registrant's registration following a finding that he had contravened Rule 25 of the Rules of the Board of Examiners in Optometry;
4. on February 1, 2002, the Board of Examiners initiated a practice review with the Respondent's consent following the investigation of complaints filed against him, and subsequently issued recommendations in relation to his practice;
5. on February 16, 2005, the Discipline Committee of the Board of Examiners appointed an inspector to monitor the Respondent's practice one day per month for a three month period by way of random chart reviews following receipt of further complaints;
6. on August 2, 2005, the Discipline Committee of the Board of Examiners issued a letter to the Respondent indicating that concerns persisted with respect to: (a) the inappropriate use of the 02898 fee code; (b) the lack of routine dilation and intraocular pressure assessment; and (c) assessment of the entire fundus monocularly with an ophthalmoscope; and
7. on July 17, 2006, the Discipline Committee of the Board of Examiners recommended that the Respondent attend an upgrading course for clinical skills at Vision Institute of Canada following receipt of an inspector's report.

[12] The College also submitted that as a result of a complaint from a former employee regarding improper billing of the Medical Services Plan and inappropriate notations in Clinical Records regarding specific female patients, the Inquiry Committee of the College conducted a thorough audit of the Respondent's Clinical Records over a six month period. The audit confirmed the improper billings and inappropriate notations in some of the Respondent's female patients' Clinical Records, and also identified concerns with the adequacy and accuracy of his Clinical Records. The Inquiry Committee sought a Consent Order which the Respondent signed on March 9, 2010, specifying the following requirements:

1. The Registrant undertakes not to repeat the conduct of rating the appearance or any other aspect of his female patients in his clinical records.
2. The Registrant undertakes not to repeat the conduct of performing incomplete or inadequate eye examinations.
3. The Registrant undertakes not to repeat the conduct of submitting inaccurate billings to Medical Services Plan in relation to his practice.
4. The Registrant undertakes not to repeat the conduct of completing inaccurate clinical records.

5. The Registrant will attend a course on clinical competence and a course on professional record-keeping, both to be approved in advance by the Inquiry Committee, at his own cost within six (6) months of the date of this order and to provide the College with evidence that he has successfully completed those two courses no later than September 30, 2010.
6. The Registrant will attend a course on professional responsibility and ethics, to be approved in advance by the Inquiry Committee, at his own cost, within six (6) months of the date of this order and to provide the College with evidence that he has successfully completed that course no later than September 30, 2010.
7. The Registrant consents to a reprimand under s. 36(1)(c) in relation to his unprofessional conduct in relation to the rating of female patients, his failure to maintain proper clinical records, his failure to complete and competent eye examinations, and his inaccurate billing in relation to the Medical Services Plan.
8. The Registrant consents to random and scheduled audits by an inspector or team of inspectors appointed by the Inquiry Committee for the next two (2) year period from the date of this order for the purposes of ensuring that he is conducting competent eye examinations, completing proper clinical records and submitting accurate billing records to the Medical Services Plan. The Registrant acknowledges that the nature and frequency of audits is at the sole discretion of the Inquiry Committee. The Registrant undertakes to provide inspectors appointed by the Inquiry Committee with immediate and unrestricted access to all clinical and billing records relating to his practice of optometry for audit purposes. The Registrant acknowledges that he will be responsible for all audit costs (including inspector fees and disbursements) and that the requirement to pay such costs forthwith upon receipt of invoices from the College constitutes a term of Consent Order.
9. The Registrant acknowledges that a contravention of any term of this Consent Order constitutes professional misconduct and will lead to the issuance of a citation.
10. The Registrant will pay the sum of \$6,182.45 towards the College's costs of investigation as calculated in accordance with the tariff.

[13] Finally, the College submitted that in the matter of the current complaint, the Complainant suffered significant emotional distress, and the Respondent showed no remorse or insight into his actions.

[14] In summary, the College submitted that the Registrant's dishonesty, his history of misconduct, his failure to comply with a Consent Order that he had undertaken, and his lack of concern for his patient and lack of contrition, all must be considered in determining the appropriate penalty.

[15] Taking into account these relevant factors, and in consideration of penalties imposed in similar cases, the College asks this Panel to impose the following sanctions under s.39 of the Act:

1. a reprimand for the conduct of breaching the terms of the Consent Order, falsifying clinical records, and deliberately providing false records to the College during an Inquiry Committee investigation for the purposes of covering up his misconduct;
2. a fine in the amount of \$10,000 payable within 30 days of the date of the penalty decision;
3. cancellation of the Respondent's registration with a condition that he is not eligible to re-apply for registration for a period of five years from the date of the penalty decision;
4. hearing costs in accordance with the College tariff to be paid within 30 days of the date of the penalty decision;
5. a requirement to provide a letter of apology to the Complainant for falsifying her clinical records and providing false information to the Inquiry Committee about the services that he provided to her, and a requirement to reimburse her for the eye health examination fee – both requirements to be fulfilled within 30 days of the date of the penalty decision;
6. a requirement to successfully complete courses on professional ethics and clinical record-keeping, at the Respondent's cost, prior to seeking reinstatement with the College, such courses to be approved in writing in advance by the Registrar, and a requirement to provide documentary proof that he has successfully completed those courses to the College prior to seeking reinstatement of registration;
7. a requirement to permanently convert to an electronic record-keeping system within 30 days of reinstatement with the College and to provide satisfactory documentary evidence that the Respondent has done so to the College within 30 days of reinstatement of registration; and,
8. a requirement to cooperate with random chart audits at the Respondent's cost for a two year [period] following reinstatement of registration, the scheduling and frequency of the chart audits to be at the sole discretion of the College, to ensure compliance with record-keeping requirements and standards of practice.

5. Submissions of the Respondent

[16] The Respondent asserts unfairness arising from the initial investigation being done by "members of the College Board" and by this hearing being adjudicated by two "fellow Board members".

[17] The Respondent requests that the following factors be considered in determining penalty:

1. The Respondent is 69 years of age and has been practising optometry for over 40 years.
2. The Respondent has had only seven disciplinary matters, according to the College's submission, during his time in practice.
3. None of the past disciplinary matters were the result of any physical harm to a patient.
4. The patient in the current disciplinary matter did not suffer any physical harm.
5. The Respondent acknowledges that "he has no really effective system of record keeping" and was not able to comply with past agreements as "he could not find the documents he had agreed to".

[18] The Respondent challenged the relevance of the cases cited in the College's submission, suggesting that these precedents were primarily medical matters where the likelihood of physical danger, and even death, were far greater than in the practice of optometry.

[19] The Respondent also challenged the role of the Counsel for the College and the authority of the Disciplinary Committee to adjudicate this matter in a fair and unbiased manner.

[20] The Respondent proposed that the Panel consider progressive discipline.

[21] The Respondent seeks the following with regard to penalty:

1. The Respondent agrees to convert to an electronic system of record-keeping at his own cost;
2. The Respondent agrees to a reprimand from the College for failure to keep proper clinical records in relation to this matter;
3. The Respondent agrees to write a letter of apology to the Complainant "apologizing for the fact that his conduct has caused her upset";
4. The Respondent agrees to re-pay to the Complainant any and all funds that she paid for her eye examination;
5. The Respondent agrees "that he would benefit from a course on professional ethics and office record keeping";
6. The Respondent agrees "to take courses on those topics, such as courses to be approved by the College";
7. The Respondent agrees to random chart audits;

8. The Respondent is not able to pay any of the costs as suggested in the College's submission due to limited income; and,
9. The Respondent agrees to a one month suspension, arguing that this is consistent with a 'progressive discipline' approach and is appropriate given the nature of the transgressions and previous disciplinary history.

6. Reply Submissions of the College

[22] In a written response, dated February 25, 2014, Counsel for the College submitted the following:

1. The process leading to the discipline hearing is consistent with the statutory requirements of the HPA and the common law requirements of procedural fairness. The College refers to the statutory existence and composition of the Inquiry Committee and the Discipline Committee, to section 17(3) of the Bylaws which provides that each committee must include two public representatives, at least one of whom must be an appointed board member, and section 21(5) of the Bylaws, which provides that a person may not simultaneously be a member of the Inquiry Committee and a member of the Discipline Committee.
2. The age of the Respondent is totally irrelevant to the discipline matter under consideration, particularly given the serious nature of the misconduct, and given the lack of evidence that it was a mitigating factor.
3. One serious discipline matter, particularly one involving falsification of records to cover-up misconduct, is one too many for any professional, and the Respondent's discipline history is egregious by any standard.
4. The notion of "physical harm" as a key determinant of the severity of penalty is not supported by case precedents, including those in the medical profession.
5. There was impact on the patient as a result of "mental anguish" due to the uncertainty regarding the cause of the blurred vision in her left eye.
6. The impact on the patient is but one of a number of factors that should be considered by discipline panels in assessing penalty, as cited in case precedents submitted by the College.
7. The Respondent's "problem" is more complex than an inability to manage records, given his disciplinary history, and given the Respondent's failure to address the three core issues in the case, namely his failure to comply with undertakings in his 2010 Consent Order, his failure to refer the Complainant to a specialist, and his deliberate falsification of his clinical records to deflect responsibility for his action and mislead the investigation.

8. The concept of 'progressive discipline' has been extensively applied in the case of this Respondent as demonstrated by a discipline history starting in 1989 with the Board of Examiners in Optometry and later with the College of Optometrists of BC.
9. The College reiterates its fundamental position that the penalties in this case must "adequately protect the public from [the Respondent's] grossly unethical and unsafe professional conduct".

[23] The College also submitted that the authority of the Discipline Committee is clearly governed and specified under the *Health Professions Act*, RSBC 1996, and the College Bylaws. Furthermore, the role of counsel for the College in a discipline hearing is clear, namely, to "prosecute the citation by calling evidence to establish each of the allegations contained in it".

7. Reasons for decision

[24] Respecting the Respondent's assertion of unfairness arising from Board members being part of both the Inquiry Committee and this Panel of the Discipline Committee, the HPA and the College's bylaws do not preclude, and indeed require, that each committee include Board members. Section 21(5) of the Bylaws prevents any one person from being simultaneously a member of the Inquiry Committee and a member of the Discipline Committee. The composition of this Panel complies with the HPA and the Bylaws.

[25] Respecting the Respondent's assertion that he has only had seven discipline matters over his 44 years of practice, the Panel views seven discipline matters as a significant number, despite his years of practice. The Consent Order arose in March 2010.

[26] Respecting the Respondent's assertion of no physical harm to the Complainant or any patient within the Respondent's years of practice, harm to a patient need not be physical. Further, confidence in the profession would be lost if the profession required physical harm as a basis for discipline. A lack of physical harm fails to address the harm to the profession and to the public caused by a registrant falsifying records to mislead the Panel.

[27] The submission that the Respondent is a poor record keeper, and that he likely did not comply with the Consent Order because he could not find the documents he agreed to, demonstrates a cavalier attitude to his professional duties.

[28] The Panel agrees with both parties that it may consider principles of progressive discipline. Section 39.2 of the HPA authorizes this Panel to consider any action previously taken by the Inquiry Committee or the Discipline Committee under Part 3 respecting the Respondent. The Panel recognizes that actions taken respecting the Respondent progressed from a letter of censure and a small fine to practice conditions, a conditional one-year suspension, monitoring and random chart audits, to a consent order. His violations of the Consent Order are serious, especially given his discipline history.

[29] Respecting the Respondent's assertion that College counsel's submissions "reads like that of a prosecutor," the characterization does not disclose any confusion about the role of College counsel. Although this is not a criminal prosecution, and although the standard of proof is a civil standard, the role of College counsel is to prosecute the citation in the public interest, in accordance with the College's statutory duties and objects under section 16 of the HPA.

[30] The Discipline Committee may decide on an appropriate measure under HPA s. 39(2) with a view to a number of objectives, including the following:

1. the need for specific deterrence of the respondent;
2. education and general deterrence of other registrants who might otherwise offend;
3. punishment as an expression of public denunciation; and,
4. the need to maintain the public's confidence in the capacity of the College to effectively regulate the conduct of its registrants.

[31] In deciding on an appropriate measure, the Discipline Committee may consider many factors bearing on penalty, including the following:

- (a) the nature and gravity of the conduct proven;
- (b) the age and experience of the respondent;
- (c) the previous character of the respondent, including details of prior disciplinary proceedings;
- (d) the impact upon the victim;
- (e) the advantage gained, or to be gained, by the respondent;
- (f) the number of times the offending conduct occurred;
- (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
- (h) the possibility of remediating or rehabilitating the respondent;
- (i) the impact on the respondent of criminal or other sanctions or penalties;
- (j) the impact of the proposed penalty on the respondent;
- (k) the need for specific and general deterrence;
- (l) the need to ensure the public's confidence in the integrity of the profession; and,

(m) the range of penalties in similar cases.

[32] An additional factor the Discipline Committee may consider is if the matter is an appropriate case for a refund of monies by a respondent to a complainant: see HPA s. 39(10).

[33] Ultimately, a penalty must fall within a reasonable range of appropriate penalties, having regard to the circumstances of the misconduct (or incompetence) and the evidence in mitigation.

[34] In determining penalty in this case, the Discipline Committee considered a number of factors, including the history of previous transgressions, the seeming lack of ability or willingness to adhere to standards despite previous sanctions and remedial measures, the impact on the Complainant, the attempts to deceive the Inquiry Committee, and the lack of acknowledgement or contrition on the part of the Respondent.

[35] As the conduct in this case is extremely grave and the circumstances demonstrate a need for specific deterrence, the Discipline Committee considered cancellation of registration. Cancellation would have been a reasonable outcome, given the Respondent's actions. The one-month suspension that the Respondent proposed is far too light, given the Respondent's disciplinary record, and the gravity of his actions, including his falsifying records. However, in reviewing case precedents and considering the severity of the transgressions, the Discipline Committee is satisfied that the appropriate penalty is a suspension, combined with other measures, including mandatory remedial work and supervision, as specified below. The Panel took special note of *Artinian v. College of Physicians and Surgeons of Ontario*, [1990] O.J. No. 1116 (Div.Ct.), where the Ontario Divisional Court upheld a discipline decision imposing a reprimand, a \$5,000 fine, and a 27-month suspension where a registrant failed to maintain proper patient records, and attempted to frustrate a patient chart review by the College (although parts of the suspension period could themselves be suspended if the registrant cooperated with investigations of his practice). However, the Panel considered the Respondent's actions in this case to be of more serious concern.

8. Order of the Committee on Penalty

[36] Effective immediately, and pursuant to HPA s. 39(2), the Discipline Committee orders the following:

1. The Respondent is reprimanded.
2. The Respondent's registration is suspended for three years, effective from the date of this decision.
3. The Respondent's practice is limited by a requirement that, prior to his registration being reinstated or his otherwise resuming practice as a registrant, he successfully complete courses on professional ethics and clinical record-keeping, at the Respondent's cost, with such courses to be approved in advance by the College. The Respondent must also provide documentary proof to the College

demonstrating successful completion of these courses. The Respondent may not practice until this requirement is met.

4. The Respondent's practice is limited by a requirement that, prior to his registration being reinstated or his otherwise resuming practice as a registrant, he must permanently convert to an electronic record-keeping system. The Respondent must also provide documentary proof to the College demonstrating his conversion to an electronic record-keeping system. The Respondent may not practice until this requirement is met.
5. The Respondent's practice is limited by a requirement that, prior to his registration being reinstated or his otherwise resuming practice as a registrant, the Respondent must arrange to be supervised (the "Supervision") by a registered optometrist (the "Supervisor"). The Supervisor must be approved by the College in advance and approval must not be unreasonably refused. The Respondent will be responsible for any and all costs associated with this supervision.
6. The Supervision will be carried out on-site for every patient seen by the Registrant for a period of three months following the Respondent's reinstatement or other return to practice, with further on-site supervision periods of three months each until the Supervisor recommends the Respondent for independent practice.
7. During the Supervision, the Supervisor must review each patient's chart and the problem/plan list before the patient leaves the clinic and take any steps necessary to ensure that the patient has received the appropriate optometric care. The Respondent may not practice without supervision requirements being met.
8. The Supervisor will report to the College monthly on the Registrant's compliance with the Supervision, and will advise the College immediately of any compliance, competence or other serious concerns. The Supervisor will submit a report at the end of each 3 month period of supervision, set out any continuing concerns the Supervisor may have concerning the Respondent's practice, and advise as to whether he or she recommends the Respondent for independent practice.
9. Following reinstatement or other return to practice, the Respondent must cooperate with random chart audits at the Respondent's cost for two years. The scheduling and frequency of the random audits will be at the sole discretion of the College in order to ensure compliance with record keeping requirements and standards of practice.
10. The Respondent must reimburse the Complainant for her eye examination fee within 30 days of the date of this penalty decision, and provide written proof to the College, as a condition of practice.

- 11. The Panel recommends that the Respondent provide a letter of apology to the Complainant, but does not require that he provide such a letter.
- 12. The Respondent is fined in the amount of \$10,000.

9. Costs

[37] With respect to costs, the Panel orders that the Respondent pay hearing costs in the amount of \$13,005.75 in accordance with the College tariff.

10. Publication

[38] The Panel orders the registrar to give public notification pursuant to section 39.3 of the HPA.

11. Notice

[39] Under HPA s. 40(1), a Respondent aggrieved or adversely affected by an order of the Discipline Committee under HPA s. 39 may appeal the order to the Supreme Court. Under HPA s. 40(2), an appeal must be commenced within 30 days after the date on which this order is delivered to the Respondent.

Dated for reference this 28 day of April, 2014.

DISCIPLINE COMMITTEE,
COLLEGE OF OPTOMETRISTS OF BRITISH COLUMBIA

Per:

D. M. Pruden Victoria, BC April 21, 2014
Name Place Date

Name Place Date

Name Place Date