

**DISCIPLINE COMMITTEE OF THE
COLLEGE OF TRADITIONAL CHINESE MEDICINE PRACTITIONERS AND
ACUPUNCTURISTS OF ONTARIO**

IN THE MATTER OF

*the Regulated Health Professions Act, 1991, S.O. 1991, c.
18, and the Traditional Chinese Medicine Act, S.O. 2006,
c.27*

Decision Date: **September 10, 2018**

Indexed as: **Ontario (College of Traditional Chinese Medicine
Practitioners & Acupuncturists of Ontario) v George Li,
2018 ONCTCMPO 25**

Panel:	Henry Maeots	Chairperson, Public Member
	Yuqi Yang	Member
	Martial Moreau	Public Member

BETWEEN:

**THE COLLEGE OF TRADITIONAL
CHINESE MEDICINE PRACTITIONERS
AND ACUPUNCTURISTS OF ONTARIO**

-and-

GEORGE LI

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(Jaan Lilles and Kelly Hayden for the
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(Christopher Assié for George Li
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(Andrea Gonsalves
(Independent Legal Counsel
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(Date of Hearing: July 26, 2018

DECISION AND REASONS FOR DECISION ON PENALTY AND COSTS

[1] Following a 22-day contested hearing, in a decision dated March 7, 2018, this panel of the Discipline Committee (the “**Panel**”) of the College of Traditional Chinese Medicine Practitioners and Acupuncturists (the “**College**”) found that the member, George Li (the “**Member**”) had

committed acts of professional misconduct in relation to seven out of eight allegations in the Amended Notice of Hearing. As a result of those findings, the Panel reconvened the hearing on July 26, 2018, to deal with the matter of penalty and costs.

[2] The Member was previously represented by a paralegal, Ms. Michelle Chen. He was represented by counsel, Mr. Christopher Assié, for the penalty hearing.

[3] Prior to this hearing, the Panel received written submissions on penalty and costs from both parties.

[4] After hearing oral argument from the parties, the Panel adjourned the hearing and deliberated. These are the Panel's decision and reasons for its decision on penalty and costs.

The Findings

[5] The detailed findings and reasons for them are set out in the Panel's written reasons of March 7, 2018. In sum, the Panel found that the Member falsified records, submitted a false account for services, breached an agreement with his client, failed to meet the standards of the profession with respect to record keeping, and engaged in conduct that would reasonably be regarded by members as disgraceful, dishonourable and unprofessional

The Parties' Penalty Submissions

Submissions of the College

[6] The College sought the following penalty in this case:

- (a) revocation of the Member's certificate of registration; and
- (b) an order that the Member appear before the Panel for a public and recorded reprimand.

[7] College counsel submitted that the Member's conduct demonstrated more than a mere error in judgement. Rather, it demonstrated a persistent disregard for his professional obligations with respect to record keeping, which are necessary to ensure patient safety and to permit the College to regulate its members effectively.

[8] The principles to be applied by a Discipline Panel in imposing a penalty are: protection of the public, specific and general deterrence, and rehabilitation and remediation of the Member. As well, the Panel should have regard to the nature and seriousness of the conduct in question, the Member's circumstances, and the impact of the misconduct on the patient.

[9] College counsel argued that the penalty of revocation is appropriate in this case, not in light of any one particular finding of misconduct, but because of the Panel's broad findings of improper record keeping, record falsification, deliberately fraudulent and dishonest billing, and wider disgraceful, dishonourable and unprofessional conduct. As among the various goals of penalty, in this case primacy should be afforded to considerations of public protection and public confidence in the integrity of the profession. Cases like this one, where the member acts with fraudulent intent,

are much more serious than those where the member failed to exercise due diligence, as fraudulent intent goes to the heart of whether a member can be effectively governed through self-regulation. College counsel submitted that there was an element of premeditation in the Member's misconduct, and that renders revocation appropriate. He cited several cases wherein professional disciplinary tribunals found that intentional dishonesty merited a presumptive penalty of revocation. He submitted that the penalty of revocation ensures the greatest public protection, general deterrence, and maintenance of public trust.

[10] College counsel identified as an aggravating factor in this case the fact that the Member took deliberate steps to conceal his behaviour, demonstrating a pattern of dishonesty and disdain for the professional regulator. The Panel found that the Member had written all entries in N.S.'s treatment record in order to support his false claim that he provided the 20 treatments to the patient as recorded in the invoice. Though the Member does not have a prior disciplinary record, College counsel submitted that the traits of dishonesty, fraud and broad record-keeping deficiencies are deeply rooted problems which are not capable, in this case, of remediation. College counsel submitted that the Member has not demonstrated insight into his conduct, for example, by persistently maintaining that his record-keeping met the College's standards. This indicates that there is no possibility of rehabilitation.

[11] At the penalty hearing, the Panel asked College counsel what the College's alternative position on penalty would be if the Panel found that revocation was not warranted. College counsel responded that a very lengthy suspension, in the range of eighteen (18) to twenty-four (24) months, would be appropriate, along with additional terms, conditions and limitations on the Member's certificate of registration, including some form of coursework.

Submissions of the Member

[12] Counsel for the Member submitted that the appropriate penalty would be as follows:

- (a) an order that the Member appear before the Panel to be reprimanded;
- (b) suspension of the Member's certificate of registration for a period of between three and six months;
- (c) a requirement the Member complete a record-keeping course; and
- (d) a requirement the Member take a course in ethics chosen by the College for the purpose of addressing the professional and ethical issues that arose in this case.

[13] The Member's counsel cited the case of *Re Milstein and Ontario College of Pharmacy et al*, [1978] 20 OR (2d) 283 (CA), in which the Court of Appeal stated, at para. 17, "The cancellation or revocation of a professional licence to practise, is an extreme penalty and ought, in my view, to be reserved for the most serious cases." He submitted that the penalty being sought by the College in this case is significantly harsher than the penalties imposed in other cases that involved more serious misconduct. He cited, for example, cases in which patients or governments had been defrauded by amounts over \$100,000, or where a patient's care had been actually impacted by the professional's misconduct.

[14] The Member's counsel acknowledged that this was not a case of mistake and that, by definition, the fraudulent conduct was premeditated. However, the Panel made only one finding that the Member had submitted a false account (in respect of N.S.). He agreed also that it was unacceptable for the Member to have billed his patient for the full 20 treatments without having completed them. That conduct warrants denunciation, as well as both specific and general deterrence. However, the Member had never put patients' care in jeopardy. The penalty should be commensurate with the misconduct and the effect it has had on patients. He submitted that the Member had not attempted to defraud anyone nor was there a finding of ulterior purpose, such as financial gain, in the transcribing of multiple records in one sitting. He stated that there was also no evidence of having put the patient's health at risk.

[15] The Member's counsel noted that the Member has no prior disciplinary history with the College, and that with appropriate remedial programs he can be rehabilitated. He argued that the Member, who is 63 years old, has dedicated his entire life to the practice of traditional Chinese medicine, and revocation would be a harsh and unreasonable penalty.

[16] Member's counsel submitted that the public's confidence in the ability of the College to govern its members and protect the public can be maintained by a penalty order that consists of a reprimand, suspension, and remedial courses.

The Parties' Costs Submissions

Costs Submissions of the College

[17] College counsel submitted that this is a case in which a cost order is warranted as the misconduct was serious, involving patient safety and trust, and ignores the fundamental tenets of the profession. In determining an appropriate cost award, College counsel advised the Panel to consider the nature of the misconduct, the relative success of the parties in the proceeding, and the conduct of the Member during the hearing. The College sought a costs order in the amount of \$275,000, which represents approximately 65% of the College's total costs of \$427,058 incurred in this matter, including its legal costs and expenses, costs of investigating the matter, and costs of the 22 day hearing.

[18] College counsel contended that the Member and his representative at hearing (not his counsel for the penalty hearing), conducted themselves in a manner that resulted in unnecessary delays and that unduly prolonged the hearing, increasing the College's costs. In particular, College counsel cited the following conduct.

- (a) The Member's representative brought more than ten motions at various points throughout the hearing, including during the questioning of witnesses. The vast majority of these motions were made with no notice to College counsel and were unsuccessful, and on several occasions the same motion was brought more than once.
- (b) the Member's conduct as a witness prolonged the hearing. He testified for eleven days, often making submissions during his testimony, rather than answering questions. The Panel found in its decision that during cross-examination the

Member was evasive and argumentative, and ignored the directions of the Panel to answer the questions he was asked.

- (c) A half day was spent waiting for a witness called by the Member who did not appear.
- (d) An entire day was spent dealing with another witness called by the Member who refused to comply with an order made by the Panel to produce certain records. After that time was spent, the Member ultimately decided not to call the witness, even though an additional hearing day was scheduled so that he could attend the hearing and give evidence.
- (e) The Member contested each of the eight allegations in the Notice of Hearing, all but one of which the Panel ultimately concluded had been established by the College on the basis of cogent and compelling evidence.

[19] College counsel cited several cases in which the Divisional Court upheld costs orders representing a comparable proportion (50%-65%) of the college's costs in other health profession discipline proceedings, including in one case, a costs order of \$318,297.87 (see *Clokie v Royal College of Dental Surgeons of Ontario*, 2017 ONSC 2773 (Div Ct)). College counsel also relied on the case of *College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v Tran*, in which this Discipline Committee awarded costs of \$105,000.00 against a member of this College after a five day hearing in which the allegations were contested.

[20] The Member's counsel did not challenge the College's cost accounting or the propriety of a cost award in this case. However, he submitted that a cost award should not exceed \$30,000.00. He argued that the costs being sought by the College would amount to financial ruin and would serve as a deterrent to any other member of the College to defend him or herself against allegations of professional misconduct.

Order

[21] Having considered the findings of professional misconduct and the submissions of the parties, the Panel orders as follows.

1. The Member shall appear before the Panel of the Discipline Committee to be reprimanded.
2. The Registrar is directed to suspend the Member's certificate of registration for a period of six (6) months, to commence immediately upon the release of this decision.
3. The Registrar is directed to immediately impose the following terms, conditions and limitations on the Member's certificate of registration:
 - a. Requiring that the Member successfully complete a course in professional ethics, at his own expense, within six (6) months of this order;

- b. Requiring that the Member successfully complete the College's Record-Keeping E-Workshop, at his own expense, within six (6) months of the date of this order; and
 - c. Requiring that the Member participate in a College Assessment focussing on ethical and record-keeping issues, at his own expense, within six (6) months of resuming his practice following the suspension set out in paragraph 1 above. The cost of the assessment shall not exceed \$500.00.
4. The Member shall pay to the College costs in the amount of \$120,000.00, to be paid in four equal instalments of \$30,000.00 each. The first instalment shall be due within one month after the date of this order. Each of the next three instalments shall be due every six, twelve and eighteen months thereafter, respectively.

Reasons for Order

Order as to Penalty

[22] In considering the appropriate penalty in this case, the Panel considered the goals of penalty in professional discipline proceedings, namely: protection of the public, specific and general deterrence, and rehabilitation and remediation (where possible and appropriate). The Panel recognizes that an appropriate penalty must also maintain public confidence in the College's ability to regulate its members and safeguard the public.

[23] It is the Panel's view that the professional misconduct of the Member, while serious, was not as serious as those cases relied on by the College in which revocation orders were imposed for fraudulent record-keeping and/or billing, particularly in terms of dollar amounts involved, the number of instances, the time period over which the misconduct occurred, and the harm suffered by patients. The Panel considered the case of *College of Physicians and Surgeons v Moore* [2002] ONCPSD 16 in which the Discipline Committee of that College wrote: "in most cases of *substantial premeditated fraud*, the penalty of revocation should be the norm". The Panel does not characterize this case as involving substantial fraud, as the sum involved was a few hundred dollars. Even in the *Moore* case cited above, the penalty imposed was a 12 month suspension with the possibility of six months being suspended if the member met specified conditions. Nevertheless, the Member's misconduct in falsifying entries in patient records and dishonest billing merits a significant period of suspension that falls into the reasonable range of penalties imposed for similar misconduct in other cases. In *Ontario College of Pharmacists v Oduro*, 2013 ONCPDC 15, the pharmacist was found to have defrauded five patients and was suspended for three months. In *Ontario College of Pharmacists v Tawfil*, 2014 ONCPDC 15, a case in which the member was suspended for eight months for having committed fraud totaling over \$100,000. In *College of Physicians and Surgeons of Ontario v Sokol*, 2011 ONCPSD 42, the Discipline Committee panel imposed a suspension of 3 months for a member who had been found guilty of submitting fraudulent billings to OHIP. The Panel notes that penalty resulted from a joint submission of the parties, and therefore should be approached with appropriate caution in determining the appropriate range of penalties. Considering the body of case law presented by the parties, the Panel is satisfied that *Oduro*, *Tawfil* and *Sokol* are most similar to the present case, and the six-month penalty imposed in his case is in line with the penalties ordered in those cases.

[24] The College relied on two cases from this Discipline Committee (*Micu* and *Tran*) in which the members' certificates of registration were revoked. However, both of those cases involved findings of sexual abuse of patients and mandatory revocation under s 51(2)5.2 of the *Health Professionals Procedural Code*, and are therefore distinguishable from the present case.

[25] The Member's conduct during the hearing left the Panel with some doubt as to whether he has recognized the error of his ways and is now willing to comply with the College's standards of practice. However, the Panel nevertheless believes that giving the Member a chance to return to practice, at his age, is a professional lifeline, and the Panel believes the Member recognizes he can successfully make changes with this second chance. The Panel recognizes also that more experienced legal representation may have led the Member to govern himself differently during the hearing.

[26] The Panel found the Member's years of practice and lack of prior disciplinary record to be mitigating factors.

[27] This was not a case of significant fraud either in the amount at issue or period of time over which the fraud continued. As such, revocation of the Member's certificate of registration is not justified and would be disproportionate to the seriousness of the misconduct. The Panel accepts that the Member is capable of rehabilitation, and is prepared to adhere to the policies and standards of the College with the benefit of the enhanced education, understanding and insight that he is expected to gain through the terms, conditions and limitations imposed pursuant to the Panel's order, both during the suspension and after the Member returns to practice. The Panel is satisfied that the reprimand and six-month suspension will deter both the Member specifically and other members of the profession generally from engaging in similar misconduct. The public will be protected by the penalty order as a full package, including the suspension, the educational courses, and the requirement that the Member undergo a practice re-assessment within six months of his return to practice. The Panel is satisfied that the penalty order is in the public interest and that it will maintain the public's confidence in the College's ability to regulate its members and to ensure they are practising safely and competently.

Order as to Costs

[27] The Member does not dispute that this is an appropriate case in which to order costs. The issue between the parties is the quantum of costs to be awarded.

[28] In determining the appropriate amount of a costs award in this case, the Panel considered the nature of the misconduct, the conduct of the Member during the hearing, and the relative success of the parties at the hearing. The Panel also recognized that costs awards are not meant to penalize the Member or provide a windfall to the College; rather, they are meant to defray some of the costs of prosecuting the Member for his misconduct, which costs would otherwise be fully borne by the membership.

[29] The College was substantially successful, having proven seven of the eight allegations of misconduct against the Member. The Panel agrees that the misconduct was serious.

[30] The Panel accepts that the conduct of the Member and his legal representative (a paralegal) significantly and unnecessarily prolonged the hearing and increased the College's costs. The

Member made lengthy statements that were not responsive to any question. When the Member was asked questions under cross-examination, he gave lengthy, defensive responses without answering the question, or he asked questions himself in response. He often commented on the testimony of other witnesses, and questioned their credibility. For example, he stated to College counsel that the counsel could not ask him certain questions because the counsel lacked knowledge of Traditional Chinese Medicine. The Member's counsel brought multiple motions that were often repeated, and were improperly constituted or brought in the middle of a witness's testimony. All of these decisions are attributable solely to the Member and his lawyer, and added to the length of the hearing.

[31] While those considerations led the Panel to consider a cost award that would offset a large portion of the College's costs in this matter, the Panel also formed the impression over the course of the hearing that the Member had not been well prepared for the process and had not been informed as to the roles of the various participants or how to conduct himself appropriately. (This was evidenced, for example, by him making comments such as "It's not fair for you [College counsel] to interrogate me, that should be done by the panel.") In the Panel's view, it would not be fair to the Member to visit upon him the full cost consequences of his representative's failings in that regard.

[32] The Panel found that other factors that contributed to the length of hearing were beyond the Member's control. For instance, the Member required the assistance of an interpreter throughout the hearing. The use of an interpreter significantly slowed the pace of the hearing, but it was the Member's right. The hearing was also prolonged by the failure of one proposed witness for the Member to appear, and by the failure of another proposed witness for the Member to comply with an order by the Panel to produce certain records.

[33] The fact that the College did not meet its burden on one of the allegations is also a relevant factor.

[34] Also, while no evidence was presented of the Member's income or financial circumstances (though the Panel was told at the hearing that the Member had been terminated from his employment), the Panel recognizes that the quantum of the order sought by the College is an onerous one, particularly given the Member's age and the years of practice he likely has ahead of him.

[35] Taking all those factors into consideration, the Panel decided that a costs order of \$120,000.00 is appropriate. It is also reasonably in line with other costs orders by other health colleges for hearings involving similar misconduct and circumstances. Given the significant amount the Member is required to pay for costs, the Panel finds it appropriate to allow him to pay in four equal instalments of \$30,000.00, with the first instalment due within one month of the date of this decision, and the remaining instalments due every six months thereafter.

I, Henry Maeots, sign this decision as chairperson of the Panel and on behalf of the Panel members listed below.

Date: September 10, 2018

Signed:



Henry Maeots, Chair
Yuqi Yang
Martial Moreau