

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

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| PANEL: | Henry Maeots | Chairperson, Public Member |
| | Xianmin Yu | Professional Member |
| | Barrie Haywood | Public Member |

BETWEEN:

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

(Jaan Lilles and Laura Robinson for the
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(Lisa Freeman for the Member

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DAN MICU

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(Edward Marrocco (October 3, 4, 10
(and November 9)

(Aaron Dantowitz (October 12)

(Independent Legal Counsel

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(Dates of Hearing: October 3, 4, 10, 12
and November 9, 2017, and March 28,
2018

DECISION AND REASONS FOR DECISION ON PENALTY

This matter came on for hearing before a panel of the Discipline Committee (the “Panel”) over the course of five days on October 3, 4, 10, 12 and November 9, 2017 at the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario (the “College”).

Dan Micu (the “Member”) was present and represented by counsel at all times.

On January 15, 2018, the Panel released its Decision and Reasons for Decision finding that the Member had committed professional misconduct as set out in Allegations 1-4 of the Notice of Hearing which was dated June 10, 2016 (the “Notice of Hearing”).

On January 24, 2018, with the benefit of submissions from all parties, the Panel issued an order suspending the Member's certificate on an interim basis pending disposition of the penalty phase in this proceeding. The Member did not oppose interim suspension but the Panel understands that this was done without prejudice to the Member's ability to argue that a revocation order in this matter is not mandatory.

On March 28, 2018, the parties appeared before the Panel and made oral submissions with respect to penalty and costs.

Position of the College

The College seeks an order revoking the certificate of the Member as well as a reprimand.

In support of this position, College counsel relies on the Panel's findings and conclusions that, on two different appointments, the Member committed sexual abuse of a patient as defined in the *Health Professions Procedural Code* (the "Code"), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, C. 18 (the "RHPA"). The established misconduct included both inappropriate touching and inappropriate comments of a sexual nature. College counsel argues that revocation is the only appropriate penalty given the seriousness of the findings that have been made.

The College asserts that the Panel has no discretion, given its findings, not to order revocation. The College relies on the amendments to the Code arising out of the *Protecting Patients Act, 2017*, S. O. 2017, c.11 – Bill 87 which amended the Code in May of 2017 to make the type of sexual abuse that has been found in this case subject to mandatory revocation of the Member's certificate (the "mandatory revocation amendment").

In addition and in the alternative to an order triggered by the mandatory revocation amendment, College counsel argues that this matter is an appropriate case for revocation even under the discretionary powers afforded to the Panel by way of the Code prior to its amendment. The College argues that there cannot be seen to be any tolerance of the kind of misconduct that the Member engaged in and points to other regulated health professions in which findings of sexual abuse have triggered revocation. Mr. Lilles, on behalf of the College, also contends that the Member has provided no evidence of any meaningful rehabilitation. The Member testified in the course of the March 28 hearing on penalty and stated that he regrets what occurred. College counsel rejects that statement as not sufficient.

The College seeks a costs order in the amount of \$70,000.00 representing approximately 65% of the total costs incurred to investigate and successfully prosecute this matter. In support of this request, College counsel contends that the Member had the choice to put forward a defence and, though he should not be penalized for doing so without success, the cost should not be shared by the profession.

Lastly, the College requests that, pursuant to section 51(2)(5.2) of the Code, the Member should be ordered to post \$16,060.00 as security for funding for therapy and counseling for the victim in

this matter in the event that she elects to seek professional help for the abuse she endured in her dealings with the Member. College counsel did not provide a victim impact statement from the complainant but contends that this does not impact the propriety or impropriety of an order seeking security for funding for therapy or counseling.

Position of the Member

Counsel for the Member does not dispute that findings of sexual abuse require a strong response which condemns the behavior and protects the public. However, the Member argues that these purposes can be accomplished in this case without a revocation order. The Member argues that the appropriate penalty in all of the circumstances of this matter is a suspension of 12- months as of January 24, 2018 along with the requirement that the Member shall complete an ethics and boundaries course and also be subject to conditions requiring him to notify every patient he subsequently treats of the misconduct findings of the Panel. In support of this position, counsel for the Member contends that none of the cases put forward by the College are sufficiently factually similar to militate in favour of revocation. The Member was not, according to his counsel, preying on particularly vulnerable people (i.e. children or young people). The Member is also not a repeat offender or, again as counsel argues, ungovernable in any other demonstrable way.

Counsel for the Member argues that revocation is not mandatory in this case despite the mandatory revocation amendment. There is no dispute that the misconduct occurred prior to the Code being amended in May of 2017 despite that the hearing on the merits and finding of misconduct both occurred after the mandatory revocation amendment. In support of the Member's position, Ms. Freeman argues that the mandatory revocation amendment does not properly avail itself of the public interest exemption which is required to relieve the presumption against retrospective application. College counsel obviously disagrees and asserts that the public interest exemption certainly does apply in this case.

The Member concedes that the propriety of revocation – whether mandatory or discretionary – is an issue that the Panel must consider regardless of its ultimate decision on the application of the mandatory revocation amendment to the within proceeding.

With respect to the issue of costs, the Member concedes that a costs order is appropriate but does not agree with the quantum proposed by the College. The Member seeks a costs order in the amount of \$10,000.00. In support of the propriety of this position, the Member relies on evidence from his wife, and himself, detailing both personal and financial hardships that would result from an order directing payment in the amount sought by the College.

In response to the College's request for an order requiring security for counseling or funding costs of the victim, the Member argues that there is an insufficient evidentiary basis to support such an order given that the complainant did not provide a victim impact statement. In particular, counsel for the Member argues that there is no evidence before this Panel suggesting that the complainant is contemplating or has in fact sought any counseling or therapy as a result of the Member's misconduct or the hearing into the Member's misconduct.

Decision

Having considered the findings of professional misconduct, including sexual abuse of a patient, the relevant evidence and submissions of the parties, the Panel orders as follows:

- (a) that the Registrar be directed to revoke the Member's Certificate of Registration;
- (b) that the Member appear before the Panel to receive a public and recorded reprimand; and
- (c) that the Member post \$16,060.00 for security for funding for therapy and counselling for the victim, in a form acceptable to the College, to be administered in accordance with the relevant provisions of the RHPA, the Code and related Regulations.
- (d) that the Member pay \$53,500 to the College in respect of hearing costs.

Reasons for Decision

I. Revocation and Reprimand

Revocation with a reprimand is the appropriate penalty in this case and would be appropriate even under the law as it stood prior to the mandatory revocation amendment.

The mandatory revocation amendment came into effect in May of 2017. As above, this is after the misconduct took place but prior to the hearing and decision in this matter. The misconduct found in this case would attract the mandatory revocation amendment provisions if it occurred today.

There is a presumption against retrospective application of legislative amendments absent a clear signaling from Parliament that it has weighed the benefits of retrospectivity against potential unfairness to parties who will be impacted as a result. The presumption can be rebutted if it is established that the intent of the amended statute is to protect the public and not punish the impacted responding party. The presumption will not apply to procedural amendments. It only applies to substantive amendments.

The mandatory revocation amendment is substantive. Any College member confronted today with allegations similar to the within case would have no basis to request a suspension in exchange for an admission of sexual abuse. The presumption against retrospective application applies in this case. This is not however the end of the analysis.

The next question is whether the presumption against retrospective application is rebutted on the basis that the mandatory revocation amendment falls within the public protection exemption. College counsel argues that the mandatory revocation amendment is plainly targeted at protection of the public. The Member's counsel argues that the issue is more complicated and that, when punishment is involved, the presumption against retrospective application must not be rebutted.

The Panel finds that the public protection exemption applies and rebuts the presumption against retrospective application. Revocation is therefore mandatory given the Panel's findings.

The mandatory revocation amendment (which arises as above out of the *Protecting Patients Act*) is clearly aimed at protection of the public. Its objective is not to punish the Member. There is an inherent trust and imbalance of power in the practitioner/patient relationship. Sexual abuse of a

patient cannot be tolerated and the Panel is satisfied that this is the key legislative intention underlying the mandatory revocation amendment.

The Member argued that, separate and apart from the mandatory revocation amendment, a suspension was a more appropriate penalty. It is not. The Panel is satisfied that revocation would be appropriate in this case even absent the mandatory revocation amendment.

It is a primary responsibility of the College to establish and maintain professional standards. The public must be confident in the profession and its perceived integrity. Sexual abuse tarnishes the public trust in the entire profession. Matters involving sexual abuse of patients represent some of the most serious forms of professional misconduct.

The penalty in this case should discourage similar conduct by others in the profession but also be commensurate with the severity of the findings that have been made.

Aside from character testimonials, no evidence was presented to enable the Panel to assess the likelihood of success if rehabilitation was attempted.

While evidence of the Member's family and financial circumstances mitigated the Panel's cost order (discussed below), such factors did not outweigh the other factors noted above with respect to revocation.

In totality, the Panel assesses the severity of the penalty it is ordering as being proportionate to the severity of the misconduct.

II. Security for Counseling

While no evidence was presented by the College regarding the victim's utilization or need for therapy or counselling to date as a result of her experiences with the Member, such needs may occur in the future. If in fact the victim has already sought therapy, this information would be useful but the Panel does not agree with the Member's counsel that the absence of such evidence is fatal to a request for security for counseling.

The Panel understands that security for funding is provided in the form of an irrevocable letter of credit or similar instrument. It follows that if the victim elects not to seek therapy, the Member suffers no financial loss. The Code provides for security for funding for a reason and making funds available in appropriate cases is crucial. The victim should be able to access funding and the Panel is not satisfied that this is a cost properly shared by the profession at large. An order for security for funding acknowledges the importance of the relevant Code provisions and is appropriate in this case.

III. Costs

Both parties indicated that some costs were appropriate in this case. The College cited its total costs at \$106,007.91 and sought \$70,000 in costs or approximately 65%. The validity of the College's expenses is not in dispute. The Member, on the other hand, presented evidence of limited financial resources and earnings potential as reason to seek an amount of only \$10,000.00.

The parties and their representatives were at all times professional and efficient. Neither party took steps that were unnecessary, or that unreasonably prolonged the proceeding.

The Panel is mindful of the principle that the purpose of a costs order in favour of the College is not meant to promote public protection, be punitive, or to deter the Member or other Members from defending themselves against allegations of professional misconduct. Rather, it is meant to compensate the College for costs incurred in an appropriate case. It is recognized that, in some cases, the broader profession, which funds the discipline process through its fees to the College, should not bear the complete burden of that process, but rather that burden should be shared by the Member.

The Member was found to have committed misconduct in respect of each allegation in which a finding was sought by the College. However, the Panel also accepts that the Member's position on each of the allegations was reasonable to take and has considered this accordingly.

This is an appropriate case for costs. The Panel accepts that in these circumstances the College and its membership should not bear the full cost of the matter. The Panel does however attach weight to the evidence presented by the Member regarding his limited financial resources and ability to earn alternate income.

While recognizing that there are differences as between regulated professions and that no two cases are the same, the Panel nevertheless finds that an award of approximately 50% of the costs incurred by the College in investigating and conducting this discipline hearing is in line with other successful orders by other health colleges for similar offences by members in challenging financial circumstances.

I, Henry Maeots, sign this Decision as Chairperson of this Discipline panel and on behalf of the members of the Discipline panel as listed below:

Date: May 15, 2018



Henry Maeots, Chairperson

Panel Members:

Henry Maeots

Xianmin Yu

Barrie Haywood