

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Eleazar Humberto Noriega, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity of the witnesses or any information that could disclose the identity of the witnesses under subsection 47(1) of the *Health Professions Procedural Code* (the Code), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

Subsection 93(1) of the Code, which is concerned with failure to comply with these orders, reads:

Every person who contravenes an order made under ... section 45 or 47... is guilty of an offence and on conviction is liable,

(a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or

(b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

Indexed as: Noriega, E.H. (Re)

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF PHYSICIANS AND SURGEONS OF ONTARIO**

IN THE MATTER OF a Hearing directed
by the Inquiries, Complaints and Reports Committee of
the College of Physicians and Surgeons of Ontario
pursuant to Section 26(1) of the **Health Professions Procedural Code**
being Schedule 2 of the *Regulated Health Professions Act, 1991*,
S.O. 1991, c. 18, as amended.

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. ELEAZAR HUMBERTO NORIEGA

PANEL MEMBERS:

DR. C. CLAPPERTON (CHAIR)

D. DOHERTY

DR. W. MCCREADY

DR. R. SHEPPARD

Hearing Dates:	March 24 to 26, 2014, and April 7 to 10, 2014
Decision Date:	November 3, 2014
Release of Written Reasons:	November 3, 2014

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons heard this matter at Toronto on March 24 to 26, 2014, and April 7 to 10, 2014. At the conclusion of the hearing, the Committee reserved its finding.

ALLEGATIONS

The Notice of Hearing alleges that Dr. Noriega committed an act of professional misconduct:

1. under paragraph 26.31 of Ontario Regulation 577/75 made under the *Health Disciplines Act, 1974* (“O. Reg. 577/75”) by conduct or an act relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and
2. under paragraph 26.28 of O. Reg. 577/75 in that he engaged in sexual impropriety with a patient.

RESPONSE TO ALLEGATIONS

Dr. Noriega denied the allegations of professional misconduct in the Notice of Hearing.

FACTS AND EVIDENCE

A. Overview of the Issues

Dr. Noriega is a 70-year-old pediatrician who practises in City 1. The allegations of professional misconduct are in relation to Ms X, and stem from events said to have occurred in or about January 1979. At that time, Ms X, a teenager, was a patient of Dr. Noriega’s at the teen health clinic at Hospital A. The College alleges that Dr. Noriega’s conduct with Ms X: (i) constituted sexual impropriety, as this was defined in the statute at that time, and; (ii) that it was conduct relevant to the practice of medicine which, having regard to all the circumstances, would reasonably be regarded by members as disgraceful,

dishonourable or unprofessional conduct. Dr. Noriega is alleged to have sexually stimulated Ms X during the course of a medical examination, by rubbing her clitoris to the point of orgasm.

The issues to be decided by the Committee, accordingly, are: (i) whether the conduct of Dr. Noriega in relation to Ms X constitutes sexual impropriety; and, (ii) whether this conduct is conduct relevant to the practice of medicine that would reasonably be regarded by members as disgraceful, dishonourable, or unprofessional.

In support of these allegations, the College presented evidence consisting of the testimony of Ms X, and several exhibits including Ms X's medical record at the teen health clinic, and a photocopy of a package of birth control pills prescribed for Ms X by Dr. Noriega.

The College also sought to introduce evidence pertaining to the alleged conduct of Dr. Noriega in relation to another patient, Ms Q. This alleged conduct involving Ms Q is unrelated to the allegations contained in the Notice of Hearing. This evidence, rather, is sought to be introduced as "similar fact evidence" in order to assist in establishing professional misconduct in relation to Ms X. In a *voir dire* on the admissibility of the evidence relating to Ms Q, the Committee heard the testimony of Ms Q and of her friend Ms R; several exhibits were also introduced, including Ms Q's medical record at Dr. Noriega's office.

For the reasons that follow, the Committee ruled that the evidence of Ms Q is admissible in these proceedings. This evidence then formed part of the College's case in relation to the allegations pertaining to Ms X.

Dr. Noriega testified in his defence. Counsel for Dr. Noriega also called Ms S, who was a nurse at the teen health clinic during the time Ms X attended there as a patient, and Dr. T, an expert in pediatrics, who gave evidence regarding Dr. Noriega's treatment of Ms Q.

The Committee carefully considered the totality of the evidence and the submissions of counsel. For the reasons that follow, the Committee finds that the College established on a balance of probabilities that Dr. Noriega engaged in the alleged acts of sexual impropriety with Ms X, and that his conduct in doing so would reasonably be regarded by members as disgraceful, dishonourable, or unprofessional.

B. Summary of the Evidence

Ms X

Ms X, a middle aged, married woman, testified to the events that occurred in and around 1978 and January 1979, when she was a patient of Dr. Noriega. She said that, at the time, she was living in City 1 with her mother and a younger sibling. She indicated that conditions in her neighbourhood were “pretty rough”. There was some instability in her family; her father had been absent since she was a child, her mother had a psychiatric illness, and she often had responsibility for looking after her younger sibling. She said that she had been sexually abused by her stepfather for almost five years. She said that her stepfather had initially been removed from the family home, but that he was later allowed to return, whereupon he started abusing her again. She had trouble concentrating at school, and her attendance was sporadic. She had used marijuana and LSD on occasion.

Ms X testified that she had learned of the teen health clinic through information distributed in her neighbourhood, for the purpose of reducing unwanted pregnancies in teenage girls. She had gone to the teen health clinic at Hospital A in order to receive oral contraceptives. She had a boyfriend at the time and expected to become sexually active. Ms X’s memory with respect to much of her involvement with the clinic was poor. She remembered that she had gone there to see Dr. Noriega. She had trusted him, because he was a doctor, and had informed him about past abuse she had experienced from her stepfather. She had received a prescription for birth control from Dr. Noriega. She also

remembered, quite clearly, that on her last visit with Dr. Noriega he had subjected her to extended and intrusive sexual touching, as will be described below.

Ms X stated that, on the occasion of her last visit to the clinic, Dr. Noriega told her that he needed to see if she was sexually active. In the examining room, he told her to remove her clothes from the waist down and to lie on the examining table. No one else was present in the room. He proceeded to rub her clitoris with his fingers for approximately two to three minutes, according to Ms X, causing her to have an orgasm. She recalled that he had put lubricant or something on his hands, and that they were really wet. She described the touching as rubbing only, with a back and forth motion, "like scrubbing a spot off a pot". There was no vaginal penetration. She testified that Dr. Noriega said nothing while this was happening. She could see beads of sweat on his forehead and his breathing seemed a little more laboured than normal.

Ms X stated that it was not possible that what had occurred was a legitimate examination. She has subsequently had examinations by gynecologists on a number of occasions, and she stated that these were not similar to the actions of Dr. Noriega. She stated that she was certain that Dr. Noriega's touching of her was deliberate and not accidental.

Ms X described her reaction to this incident. While she was being touched by Dr. Noriega, she stated that she froze; she knew that what was happening was wrong, but did not say anything because he was the doctor. As she left the clinic, she recalled saying to herself that she would never go back and, indeed, she never did.

Ms X testified that she did not tell anyone what had happened. She felt embarrassed and ashamed, and did not think that she would be believed. She did, however, keep the package of birth control pills with Dr. Noriega's name on it. She did this because she thought that, if she ever came forward with her allegations about Dr. Noriega, she would have his name. She testified that she had saved a few packages at her house in her bedroom drawer and that she did not believe there was any significance to this particular package.

Ms X indicated that she had wanted to inform the authorities many times over the years about what had occurred with Dr. Noriega, but did not do so. In 2008, however, she happened to see Dr. Noriega's name on television in relation to another matter. She experienced an immediate emotional reaction upon seeing his name; she felt anxious and upset. She reconsidered whether to come forward with her allegations against Dr. Noriega. After checking the pill package which she had retained in order to ensure that the name was the same, and speaking to her husband, she decided to contact the authorities. She called the hotline and spoke to the police.

In her evidence, Ms X admitted that she has virtually no recollection of any of her other visits to the teen health clinic of which, as documented in the clinical record (Exhibit 2), there were seven in total between February 1978 and January 1979. She could not remember the location of the clinic within the hospital, the layout of the rooms, or the number or identities of other staff present. She did not remember that she had completed a detailed health questionnaire, or that she had blood work, a chest x-ray, and a pap test at different times. She was also clear that, initially when she had come forward with her allegations in 2008, she thought that she had seen Dr. Noriega only once or twice. She acknowledged that, having eventually seen her medical record, her memory in this regard was obviously inaccurate. She did recall that it was winter when the sexual assault had occurred, and she was clear that this was the last time that she saw Dr. Noriega. Having seen her medical record, she now assumes that this must have happened in January 1979, her last documented visit to the clinic.

Ms X also acknowledged that an earlier statement, which she gave to the police with respect to this incident, was inconsistent with her present testimony, in that she had told the police that on the day of the assault, Dr. Noriega had questioned her about whether she was sexually active, and she had replied "no". She stated that while she was being truthful to the best of her abilities at all times, she was obviously not accurately recalling details pertaining to the chronology of her involvement at the clinic. She now believes that she had conflated some elements of her first and last visits to the clinic. She was

clear and consistent in her recollection that the sexual touching had occurred on her last visit.

Ms X stated that she did not know and had never spoken to Ms Q.

Evidence on the Voir Dire

The panel heard evidence of two witnesses for the College on a *voir dire* in connection with the College's application to introduce the evidence of Ms Q, a second former female patient of Dr. Noriega's, as "similar fact evidence" in respect of Ms X's allegations.

Ms Q

Ms Q is now in her late twenties. She was a patient of Dr. Noriega's from her infancy until the age of seventeen. She saw him regularly at his private office located in a medical building in City 1. Dr. Noriega was also acquainted with her family; her two siblings had also been patients of his, and he had seen her mother for family counselling.

Ms Q's testimony pertained primarily to events in April and May 2002. At that time, she was a teenager, and living with her mother and younger sister. Ms Q was a high school student in the spring of 2002, and was doing well in school. She was also working part-time, including some volunteer work.

Ms Q testified that she had developed a trusting therapeutic relationship with Dr. Noriega. As an adolescent, she had generally attended appointments with him on her own. She had discussed sensitive personal issues with Dr. Noriega, including pertaining to her drug use and her sexual activity. She saw him regularly and reasonably frequently; her clinical record at Dr. Noriega's office was entered as an exhibit to these proceedings, and indicates that she saw him ten times between January 2001 and May 2002.

Ms Q described her last three appointments with Dr. Noriega in some detail. The dates of these were in April and May of 2002. She indicated that, on each of these occasions, Dr. Noriega had subjected her to sexual touching of an increasingly intrusive nature, during the course of medical examinations. At an appointment in April 2002, when she had been wearing her school kilt, he had touched her genital area under her kilt and over her tights, while she was lying on his examining table. She was wearing a menstrual pad at the time, and felt embarrassed. At another appointment in April 2002, she stated that Dr. Noriega had touched her breasts and nipples on multiple occasions while examining her chest, and had again rubbed her genital area, with a circular rubbing motion, over the pants which she was wearing on that date.

With respect to the incident in May 2002, Ms Q testified that she had called to make an appointment to see Dr. Noriega on that date. She was feeling quite ill, with respiratory symptoms, fever, and complaints of feeling weak and shaky. She stated that she didn't really want to go back to him after her earlier appointments in April 2002 but she made the appointment out of despair because she was sick. She had felt that his touching of her had been inappropriate on those previous occasions, and she was reluctant to return to see him. Nevertheless she wanted to believe that she could still trust him, she felt that she needed urgent medical attention, and although she was aware that she could have gone to a walk-in clinic or an emergency department, she chose to see Dr. Noriega.

Ms Q stated that in May 2002, Dr. Noriega examined her chest, and again she felt that he was caressing her breasts in an inappropriate fashion, with a very light touch, brushing her nipples repeatedly with a "pitter patter" motion. He advised her that he needed to examine her legs on account of her complaint of "shaky legs"; he had her remove her pants and lie on his examining table. No one else was present in the examination room. Ms Q indicated that, in the course of this purported examination, Dr. Noriega proceeded to rub her genital area, firstly over her underwear, then inserting his hand beneath her underwear, and rubbing her clitoris with his bare fingers for a duration of approximately three minutes. This produced a physiological response in Ms Q. Dr. Noriega's finger did

not penetrate her vaginally, only the top half inch did. He was silent throughout, and she stated that his breathing was laboured.

Ms Q described her emotional reactions to these events. She stated that she was “stunned”. She was struggling to comprehend what was happening. Her heart was racing, and she felt “frozen”. Prior to leaving Dr. Noriega’s office, she was told to return for follow-up in ten days, as Dr. Noriega had diagnosed her as suffering from a respiratory infection and had prescribed antibiotics. Ms Q did not return to Dr. Noriega’s office.

After leaving Dr. Noriega’s office, Ms Q stated that she was confused and upset. She felt the need to talk about what Dr. Noriega had done to her, and phoned her best friend, Ms R. Shortly thereafter, she met with Ms R and told her what had happened. When Ms Q’s mother arrived home from work around 10:00 p.m. that night, she told her mother also, and told her mother to never again take her younger sister to see Dr. Noriega. Ms Q saw her mother’s physician the following day and disclosed the actions of Dr. Noriega. Later, she went to the police and she commenced a civil suit against Dr. Noriega at a later date, which she eventually decided not to pursue.

Ms Q testified that, in April 2002, she was taking the oral contraceptive Diane-35 not for birth control, but for her acne. She stated that she took this medication irregularly at times.

Ms Q stated that she did not know and had never spoken to Ms X.

Ms R

Ms Q’s friend, Ms R, also testified before the Committee during the *voir dire*. Ms R’s evidence was that she had known Ms Q since the two were in grade nine and that, in 2002, they were best friends. She recalled having been contacted by Ms Q on the date of her appointment in May 2002, and that Ms Q had sounded upset at the time. Later that

day, Ms Q came to her house, they talked about what Ms Q said had transpired with Dr. Noriega, and that Ms Q had been distressed, crying, and upset.

Finding and Analysis re: Similar Fact Evidence

After hearing the evidence of Ms Q and Ms R during the *voir dire*, the Committee received detailed written submissions and heard oral arguments from counsel for the parties on the College's application to admit the evidence regarding Ms Q's allegations as similar fact evidence. On consent of the parties, the Committee was asked to rule on the admissibility of the proposed similar fact evidence before the defence was called upon to answer the College's case.

The College's position on the application was that the proposed evidence is admissible on the basis that it meets the legal test for admissibility of such evidence and that its probative value outweighs its prejudicial effect. Dr. Noriega's position, in contrast, was that the proposed evidence is extremely prejudicial and that this far outweighs any probative value that the evidence may have.

There was no allegation of any collusion between Ms X and Ms Q made in this case, nor was there any evidence before the Committee to suggest any such collusion.

In the event that the Committee's decision was to allow the College to introduce the proposed similar fact evidence, the parties agreed that the evidence adduced in the *voir dire* could be considered by the Committee as evidence in the hearing.

For the reasons set out below, the Committee granted the College's application for leave to introduce the evidence of Ms Q as "similar fact evidence" in respect of the allegations related to Ms X. The Committee therefore considered the evidence given in the *voir dire* of these witnesses in its deliberations on the allegations of professional misconduct pertaining to Ms X.

Similar fact evidence (or evidence of other discreditable acts) is presumptively inadmissible because it is considered highly prejudicial. However, in certain limited circumstances, courts will admit similar fact evidence where the probative value of the evidence exceeds the prejudicial effect normally associated with such evidence.

In *R. v. Handy*, 2002 SCC 5, the Supreme Court of Canada set out the legal framework to be followed in the consideration of the admissibility of proposed similar fact evidence.

As stated by the Court,

“The general exclusionary rule that similar fact evidence is presumptively inadmissible has been affirmed repeatedly and recognizes that the potential for prejudice, distraction and time consumption associated with the evidence generally outweighs its probative value. Issues may arise, however, for which its probative value outweighs the potential for misuse. Similar circumstances may defy coincidence or other innocent explanation. As the evidence becomes more focused and specific to the charge, its probative value becomes more cogent. The onus is on the prosecution to show on a balance of probabilities that the probative value of the similar fact evidence outweighs its potential for prejudice.”

The onus is on the College to show that, on a balance of probabilities, in the context of the particular case, the probative value of the proposed similar fact evidence in relation to a particular issue outweighs its prejudicial effect.

The Committee heard the proposed evidence of Ms Q and Ms R in the context of a *voir dire*. The Committee had to: (i) evaluate the probative value of the proposed evidence; (ii) assess its potential for prejudice; and, (iii) weigh the probative value and potential prejudice in order to decide on the admissibility of the evidence. In approaching this determination, the Committee carefully considered the proposed similar fact evidence, the written and oral submissions of counsel and all the relevant case law referred to by counsel for both the College and Dr. Noriega. The Committee also received advice at the

hearing from independent legal counsel regarding the law relating to similar fact evidence.

(i) Probative Value of the Similar Fact Evidence

In order to determine the probative value of the proposed similar fact evidence, the Committee first identified the issue in the hearing to which the proffered evidence is allegedly probative.

Counsel for Dr. Noriega emphasized that care must be taken not to identify the issue too broadly. Evidence of discreditable conduct, separate from the allegations of professional misconduct which are before the Committee, is inherently prejudicial. A broad definition of the issue, which the similar fact evidence is intended to support, increases the potential for prejudice. Unless properly focused on an identifiable issue, similar fact evidence can become nothing more than evidence of “bad character”, or a “general predisposition” to bad behaviour. These concepts are too vague to have significant probative value, and are highly prejudicial.

The Committee found that the proposed similar fact evidence is probative of the central issue before the Committee of whether Dr. Noriega engaged in sexual impropriety with Ms X.

The Committee then considered the probative value of the proffered similar fact evidence in relation to the purpose for which it is tendered. As a starting point, the evidence must be found to be sufficiently credible and reliable so that it is reasonably capable of belief. If this is the case, then its probative value rests on its degree of connectedness to the evidence pertaining to the allegations in the Notice of Hearing. In the circumstances of this case, the determination of the degree of connectedness required the Committee to thoroughly consider the similarities and dissimilarities between the evidence of Ms X and the proposed evidence of Ms Q, in the context of the allegations in the Notice of Hearing.

The Committee found Ms Q to be a highly credible witness. Her evidence was, in fact, very strong. Her memories of the events in question were precise, detailed, and consistently stated. Her demeanour in giving her evidence was consistent with the content of her testimony; it was evident that she was struggling, successfully, to maintain emotional control when relating the effects of the trauma to which she had been subjected. The Committee found that Ms Q's evidence was reliable and reasonably capable of belief.

The testimony of Ms R was evidence regarding the sequence of events following Ms Q's appointment with Dr. Noriega and regarding Ms Q's emotional state at that time. In that sense it was consistent with the evidence given by Ms Q. The Committee understands that it is not evidence going to the truth of what Ms Q told her.

The Committee disagrees with the suggestion of the defence that Ms Q's story was fundamentally implausible. She was challenged with respect to why she would have returned to see Dr. Noriega in May 2002 if she had been touched inappropriately by him on two occasions in April 2002. Her explanation for this, however, was reasonable. She was sick, as confirmed by Dr. Noriega's diagnosis of pneumonia in May 2002, and her subsequent absences from work. She had known Dr. Noriega her entire life and, despite her misgivings, she still wanted to believe that she could trust him. The Committee understood and accepted her explanation for why she called Dr. Noriega's office that day for an urgent appointment, rather than going to a walk-in clinic or an emergency room. In the view of the Committee, these circumstances do not diminish Ms Q's credibility.

The defence suggests that it is implausible that Dr. Noriega would have acted as alleged by Ms Q, when his wife/receptionist was also in the office, in close proximity to the examination room. The evidence is that Dr. Noriega always saw Ms Q alone. They had never been interrupted when alone in the examining room. The evidence does not support the defence's suggestion of implausibility.

Ms Q's credibility was further challenged in relation to her testimony that she was menstruating in April 2002, the date on which she stated Dr. Noriega first touched her sexually. A notation in her chart on a subsequent appointment in April 2002 indicates that her last normal menstrual period was "March 10-12. Regular menses of 28 days", seems to suggest that she was probably not menstruating on the first appointment in April 2002. The evidence discloses, however, that Ms Q was taking the oral contraceptive Diane-35 for acne, and that she took this irregularly. This could have resulted in irregular menstrual periods. The Committee finds that Ms Q's credibility is not seriously undermined by this issue.

The Committee finds that the evidence of Dr. T, with respect to Ms Q's care by Dr. Noriega, was credible. He is obviously an experienced pediatrician, well qualified to give an expert opinion. His opinion in essence was, however, that if the entries in Ms Q's chart were a complete and accurate reflection of everything that had occurred between Dr. Noriega and Ms Q, then his care of her would have been appropriate. Dr. T testified that, in light of Ms Q's complaint of shaky legs, it would have been proper and appropriate for Dr. Noriega to examine her legs, including palpating her femoral arteries and inguinal lymph nodes.

The significance of Ms Q's evidence, however, is that it pertains to an entirely different issue. She complains that she was sexually assaulted by Dr. Noriega during the course of the purported medical examination. A review of her chart can shed no light on this issue. Her description of Dr. Noriega's actions at the material time, if accurate, cannot be understood as part of a legitimate medical examination. Accordingly, Dr. T's evidence, while credible, does not impugn Ms Q's credibility in any way.

For these reasons, the Committee finds that Ms Q's evidence is reasonably capable of belief.

The Committee then followed the non-exhaustive list of factors provided by the Supreme Court of Canada in *Handy* to be used in assessing the degree of connectedness between

the proposed similar fact evidence to the evidence of the complainant. The factors the Committee considered in this regard included:

- 1) the proximity in time of the similar acts;
- 2) the extent to which the other acts are similar in detail to the charged conduct;
- 3) the number of occurrences of the similar acts;
- 4) the circumstances surrounding or relating to the similar acts;
- 5) any distinctive feature(s) unifying the incidents; and
- 6) any intervening events.

With respect to temporal proximity, in this case the alleged similar acts did not occur in close temporal proximity to the events involving Ms X. There is a significant gap, some 23 years, between the two sets of occurrences. The Committee carefully considered to what extent this diminishes the probative value of Ms Q's evidence. The Committee reviewed the relevant case law on this issue; including cases in which the proposed similar fact evidence was rejected in part because the lack of temporal proximity was felt to significantly diminish its probative value.

The Committee found, however, that the lack of temporal proximity in this case is not determinative with respect to the probative value of the evidence. In this case, unlike other cases reviewed by the Committee, the proposed similar fact evidence pertains to events which are alleged to have taken place 23 years *after* the allegations of the complainant, Ms X. For this reason, the concern expressed in other cases regarding the potential for character reform in the intervening years between the proposed similar fact evidence and *before* the allegations of the complainant do not apply.

Furthermore, the Committee finds that the context in which these allegations arise is of crucial importance, and mitigates the reduction in probative value which the lack of temporal proximity might suggest. Specifically, the Committee has a mandate to protect the public and maintain public confidence in the integrity of the profession. The College alleges that Dr. Noriega, a pediatrician, engaged in sexual impropriety with a minor

female patient by various actions, including but not limited to rubbing the patient's clitoris. It is of crucial importance that the Committee hear all the relevant evidence in order to fairly adjudicate the matter. The Committee is concerned with determining the truth. The regulatory context, in the view of the Committee, imparts a dimension not found in criminal or non-regulatory civil cases. The Committee is required to determine allegations of professional misconduct which place the public at risk. The passage of time between the separate allegations of striking similarity becomes less significant in this context.

The Committee carefully considered the similarities, and the dissimilarities, between the acts alleged by the respective complainants. The Committee found that the similarities are compelling, that the circumstances surrounding these disparate allegations are also similar, and that the two sets of allegations have many distinctive features in common. Both complainants were sexually mature adolescent females, who had established therapeutic relationships with their pediatrician, Dr. Noriega. Both had regularly attended his office alone for medical appointments. The alleged sexual activity occurred, in each case, under the guise of a medical examination. The nature of the sexual touching described by the two complainants is virtually identical, involving clitoral stimulation of approximately two to three minutes in duration, resulting in physiological responses in the complainants without vaginal penetration. In each case, the touching was said to have been prolonged and to have borne no resemblance to clitoral touching which could have occurred accidentally, or during the course of a legitimate medical examination. Each complainant described Dr. Noriega as having been silent throughout these encounters with audible breathing described as laboured. Each incident was said to have occurred in a medical setting where other personnel were present, but each occurred in a private examination room behind a closed door. Both complainants were clear in their evidence that, following these incidents, they were certain that Dr. Noriega had touched them for a sexual purpose. Both complainants were determined that, following the similarly described sexual touching, they would never return to see Dr. Noriega again. (The Committee notes that Ms Q testified that she did return after the first two incidents of sexual touching of her but not after the clitoral stimulation.)

The Committee is mindful of the distinction between generic and specific similarities. The case law reviewed cautions that generic similarities between two sets of allegations, such as would ordinarily be expected in the context of the case, are unlikely to be of any probative value and carry the potential for prejudice to the defendant. In this regard, the Committee finds that some of the similarities between the two sets of allegations are generic and therefore, lacking in probative value with respect to the issue to be determined. These include that both complainants were adolescent girls with associated vulnerabilities, both had experimented with drugs, and both attended with Dr. Noriega on their own. These things are to be expected in a pediatric practice and, on their own, impart no specific probative value to Ms Q's evidence.

There were some dissimilarities between the two sets of allegations. Ms X recalled very little with respect to the particulars of her involvement with the teen health clinic, where she had been a patient for approximately one year when the alleged sexual abuse occurred. Ms Q, by contrast, recalled a great deal about her history with Dr. Noriega; she had been his patient for her entire life. She had precise memories regarding the location of his office, the layout of the office, his routine protocol in assessing and examining her for various problems, and that his wife worked as the receptionist, the sole other staff member on site. Ms X recalled very little with respect to these contextual details.

These dissimilarities, in the view of the Committee, do not substantially detract from the probative value of Ms Q's evidence. Ms Q's evidence was stronger than that of Ms X. The fact that she remembered more of the contextual details can be attributed to the fact that her allegations pertain to more recent events; Ms X was recounting events from 36 years ago.

The specific similarities between the two sets of allegations are striking to the Committee. This provides the basis for the Committee's finding that there is a high degree of connectedness between the two sets of events, imparting strong probative value to the proffered similar fact evidence.

Potential Prejudice to Dr. Noriega

The Committee carefully considered the potential prejudice to Dr. Noriega in admitting the proposed similar fact evidence. Prejudice can arise due to the potential of the similar fact evidence leading the Committee to engage in unacceptable “propensity reasoning”; that is, to lead the Committee to conclude that Dr. Noriega is a person of bad moral character, and therefore more likely to have committed the acts alleged. There is a further risk that the Committee might become confused or distracted with respect to the allegations which the College is pursuing against Dr. Noriega at this time, and conflate aspects of Ms Q’s evidence with the evidence of Ms X, leading to a form of “reasoning prejudice”.

The Committee accepts that Ms Q’s evidence, separate and distinct from the allegations in the Notice of Hearing, is inherently prejudicial to Dr. Noriega and that the potential for prejudice to Dr. Noriega as a result of the proposed evidence is high.

Weighing of Probative Value against Prejudicial Effect

The process of weighing the probative value of the evidence against its prejudicial effect is a case-specific one, driven by the context of the case. Although the case law distributed by counsel on the issue of the admissibility of similar fact evidence is helpful, previous judicial decisions also make clear that the particular facts of the case drive the Committee’s decision. No two cases are the same. In the circumstances of an individual case, the factors identified in *R. v. Handy*, in assessing the probative value of the similar fact evidence, will be weighted differently. This is not an actuarial or mathematical exercise; the approach to this task should be more nuanced and flexible, incorporating the unique facts specific to the case. While the Committee is guided by case law in this area, the particular circumstances and specifics of each case are different.

The Committee is satisfied that the potential prejudice to Dr. Noriega can be mitigated in this case by the Committee’s careful use of the proposed similar fact evidence, based on

the submissions of counsel and the caution it received from independent legal counsel at the hearing regarding the use that can be made of similar fact evidence.

The issue to which the evidence of Ms Q is potentially probative is the central issue before the Committee, that is, did Dr. Noriega engage in sexual impropriety with Ms X? The Committee finds that the similar fact evidence of Ms Q is highly probative with respect to this issue in that her evidence has been found to be credible and reliable, and reasonably capable of belief. The Committee is satisfied that this evidence is not being introduced in order to show that Dr. Noriega is a person of bad moral character, or has a general propensity to discreditable conduct. On the evidence before it, in fact, the Committee would not be persuaded that these descriptions apply. The evidence, rather, can be used to infer a specific propensity on the part of Dr. Noriega to sexually abuse adolescent female patients in his care, with whom he has developed a trusting therapeutic relationship, under the guise of medical examinations.

The similar fact evidence is not tainted by any suggestion of collusion between the complainants, who had not known each other. The proposed similar fact evidence would serve to rebut any proffered defence that the touching of Ms X was accidental, or that she misinterpreted a legitimate medical examination, or that she is simply lying about what occurred. The acts alleged by the respective complainants are strikingly similar in nature, go well beyond the generic similarities which would be expected in the practice of a pediatrician with female adolescent patients, and for this reason the probative value of Ms Q's evidence, with respect to the issue at hand, is high.

In the view of the Committee, the probative value of the evidence of Ms Q outweighs its prejudicial effect. Accordingly, the evidence of Ms Q and Ms R was admitted and considered by the Committee in its deliberations on the allegations of professional misconduct pertaining to Ms X.

Dr. Noriega

Dr. Noriega testified that he is from Mexico. He came to Canada at age 26, having completed his medical degree in Mexico. He interned in City 1 and then did his training in pediatrics at Hospital A. He obtained his specialist certificate in 1977 and commenced a private practice in pediatrics in 1978, while also working part-time at Hospital A, and later at several other hospitals in City 1. He had worked at the teen health clinic at Hospital A as a fellow in the mid-1970's, then as a part-time pediatrician there commencing in 1977.

Dr. Noriega testified in detail regarding the operations of the teen health clinic, including its location, layout, staffing, target population, clinical services, and prominent teaching function. With respect to the latter, his evidence was that the clinic functioned mainly as a teaching clinic, and that he only saw a few patients when he was there, generally between one and three on the half days in which he worked. He stated that medical students, residents, and fellows in pediatrics were often present in the clinic. As the staff pediatrician, one of his main roles was to teach and supervise the students and residents. He testified that he also worked closely with nursing staff who were an important component of the clinic. When Dr. Noriega was working at the clinic, which was for two mornings per week, he would be the only pediatrician on site. He stated that often the clinic was not busy, as it was perceived by others as "dirty", apparently meaning that it dealt, amongst other things, with the sexual issues of adolescent patients.

With respect to his involvement with female patients at the teen health clinic, Dr. Noriega described the usual practice at the clinic which, he stated, would always include the presence of a female staff member during sensitive examinations. A sensitive examination is any examination in which the patient was required to partially or completely disrobe, and would include pelvic examinations. Dr. Noriega described the usual procedure followed at the clinic for pelvic examinations, and the importance of helping the patient feel comfortable with the process. Often medical students or a resident would also be present for these examinations, with the patient's consent.

Dr. Noriega testified that he did not recall Ms X. He had reviewed her medical record and confirmed that he had seen her on a number of occasions, but he had no independent recollection of his involvement with her. Referring to her medical record, Exhibit 2, he informed the Committee of the various examinations and investigations undertaken in relation to Ms X, and the reasons that these things had been done. He stated that, according to the record, a follow-up appointment had been made with Ms X for April 1979, which she did not attend. The record confirms that her last attendance at the clinic was in January 1979. Dr. Noriega said that it was not uncommon for patients to miss appointments.

Dr. Noriega stated that he did not rub Ms X's clitoris on the date of her last visit to the clinic as she alleges. He denied that he committed any sort of sexual impropriety with her at any time.

Dr. Noriega also testified about the operation of his private practice, including the layout of his office, the ways in which his patients tended to differ from those seen at the teen health clinic, and that his wife was employed there as his receptionist, the only other staff at the office.

Dr. Noriega did recall Ms Q and her family. He stated that he had engaged in discussions with Ms Q's mother regarding issues pertaining to her children. He confirmed that Ms Q had been his patient from her infancy until the age of seventeen.

Referring to Ms Q's medical record at his office, Dr. Noriega confirmed for the Committee the contents of those records, elaborating on the various clinical issues with which she had presented from time to time, outlining his method of examining female adolescents, including in relation to the examination of the chest, abdomen, and central nervous system. He confirmed that, with adolescents, the issue of drug use would sometimes be discussed, and that this had been an issue in Ms Q's case. He stated that his approach to this issue was to try to be understanding, and not too authoritarian.

With respect to Ms Q's attendance at his office in early April 2002, Dr. Noriega stated that this had been for a scheduled follow-up appointment. He was concerned about her drug use at that time, because her mother had earlier informed him that she was "partying", and attending raves where drugs were present. At the appointment in early April 2002, Ms Q was complaining of a headache. Neurological examination was normal; Dr. Noriega examined her chest and abdomen as well, and found no abnormalities. He denied that he had touched her breasts or genital area. He stated that he suggested to Ms Q that she should call the substance abuse team at Hospital A, which operated by self-referral, on account of his concern about her drug use.

Dr. Noriega stated that Ms Q's appointment later on in April 2002, had been scheduled for follow-up, primarily in relation to the issue of Ms Q's drug use. He stated that he had wanted to know if she had followed his advice and contacted the substance abuse team at Hospital A. She was complaining of mild abdominal pain and nausea at this appointment, and he examined her abdomen. He denied having examined her legs or her chest. He denied touching her breasts or nipples, and denied touching her genital area. She was not given a follow-up appointment. Dr. Noriega stated that, because Ms Q would be turning eighteen soon, he thought that he probably would not see her again.

Dr. Noriega testified that he did see Ms Q again, in May 2002. She had phoned to make an appointment because she was feeling sick. He stated that, on that date, Ms Q presented with two issues, namely respiratory symptoms including cough, and a complaint of weakness and tremor in her lower limbs, which had not occurred with her before. He testified that he was very concerned about the latter issue, as it could be a sign of potentially serious neurological illness.

Dr. Noriega informed the Committee with respect to the specifics of his examination of Ms Q in May 2002, including his examination of her chest and her legs, which included palpation of the femoral artery in her groin area, bilaterally. He denied caressing her breasts or nipples, although he acknowledged that, on auscultating her chest, his hand

could have contacted her breasts. Dr. Noriega denied touching Ms Q's genital area over or under her underwear, and he denied rubbing her clitoris or vaginal area. He diagnosed her with right lower lobe pneumonia and prescribed an antibiotic. He stated that he wanted to see her again in ten days, and that he provided a note for her to be off work. He stated that the length of this appointment was approximately fifteen minutes in total, which was typical for his practice.

Dr. T

Dr. T is an experienced pediatrician currently practising part-time in City 2. His background was reviewed for the Committee, which includes a fellowship in pediatrics in 1971, and full-time practice in pediatrics in City 3 from 1971 to 2007. His clinical experience is wide-ranging and includes neonatology and developmental delay.

The Committee accepted that Dr. T was qualified to provide expert opinion evidence in Dr. Noriega's case. His opinion was based on his review of Ms Q's medical chart, and on the evidence of both Ms Q and Dr. Noriega at this hearing. He had not spoken to Dr. Noriega.

Dr. T testified that, in his opinion, Dr. Noriega's management of the issues with which Ms Q presented in May 2002 was sound. His opinion was based on his review of the documentation in her chart. He indicated that her complaint of shaky legs was unusual, and needed to be taken seriously. He stated that this complaint could have been related to a number of potentially serious conditions, and that careful enquiry would have been required. He stated that it would have been appropriate for Dr. Noriega to examine Ms Q's chest in the manner which he had described in his testimony. He stated that some touching of her breasts could have occurred during the course of a chest examination. Dr. T was also of the opinion that it was necessary for Dr. Noriega to examine Ms Q's lower limbs, in light of her complaint of shaky legs. He outlined for the Committee what such an examination would ordinarily entail, and concluded that Dr. Noriega's examination was appropriate under the circumstances. Dr. T also stated that, in light of documentation

in Dr. Noriega's chart that Ms Q's last normal menstrual period was "March 10-12" it is probable that she was not menstruating in early April 2002.

Dr. T acknowledged that he had no way of knowing whether the records of Dr. Noriega with respect to Ms Q, which formed in large part the basis of his opinion, represented a complete and accurate account of everything that had occurred on that day. He stated that the touching of her breast and genital area as described by Ms Q, if it had occurred in the manner in which she alleges, would have been absolutely inappropriate and not part of a legitimate medical examination. Dr. T stated that he had made no attempt to assess the relative credibility of Ms Q and Dr. Noriega, and that he was not qualified to do so. Dr. T acknowledged also that, with respect to the timing of Ms Q's menstrual periods, if she had been taking the oral contraceptive Diane-35 irregularly, her periods could have been irregular.

Ms S

Ms S is a registered nurse who worked at the teen health clinic at Hospital A between 1976 and November 1979 during the time when Ms X was a patient at the clinic. She described for the Committee the general nature of how the clinic functioned, including the role of nursing staff in assisting physicians with their assessments and examinations. She stated that members of other disciplines also worked at the clinic and that frequently, medical students, residents, and fellows in pediatrics would also be present.

Ms S testified regarding her recollection of Dr. Noriega's time at the clinic as a staff pediatrician. She stated that training students was a large part of his role there, and that frequently students would be present with him while he was examining patients, including for sensitive exams. She stated that the doctor's office where examinations occurred was in close proximity to the reception desk, roughly six to eight feet away, and that someone would always be at the desk. Ms S described the usual process which was followed for pelvic examinations, including that a female staff member, usually a nurse, would always be present in the examination room. She recalled that Dr. Noriega was

meticulous in adhering to clinic protocol and that if a female staff member was not immediately available to assist in sensitive exams, he would wait until one was. However, Ms S also testified if no sensitive examination was contemplated, the nurse would not be present and that, given her many duties in Dr. Noriega's office and given that it was a busy clinic, she was not with Dr. Noriega for all patient exams.

Ms S testified that she had no independent recollection of Ms X, although her review of Ms X's chart indicates that she had been involved in her care. She stated also that, although teaching was a large part of Dr. Noriega's role with the clinic, there were some days when he did not have students with him.

FINDING AND ANALYSIS

The onus is on the College to prove the allegations that Dr. Noriega committed the acts of professional misconduct alleged in the Notice of Hearing, namely: (i) sexual impropriety; and, (ii) conduct or an act relevant to the practice of medicine that, having regard to all the circumstances would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. The standard of proof is on a balance of probabilities. The College must show that it is more likely than not that the professional misconduct occurred. Proof must be based on evidence that is clear, cogent, and convincing.

The Committee carefully considered the evidence before it, and the submissions of counsel. Based on the totality of the evidence, the Committee finds that the College has proven the allegations against Dr. Noriega. This finding is made without reliance on the similar fact evidence introduced by the College. While the Committee did not rely on the similar fact evidence, the Committee notes that the similar fact evidence, when considered in accordance with the caution received from counsel for the parties and the Committee's independent legal counsel regarding the permissible and impermissible uses of similar fact evidence, further supports its finding.

The Committee finds that, with respect to the central issue, Ms X was credible. Her recollection of the sexual activity itself was clear, detailed, and consistently stated in her testimony, despite that these events occurred some 36 years ago.

The most compelling aspects of Ms X's testimony were her detailed description of the sexual acts perpetrated on her by Dr. Noriega, her stated conviction that she would never return to see him again after these events occurred, and her decision to keep a prescription for birth control pills with Dr. Noriega's name on it as proof that she had seen him at the material time, on the assumption that this would be useful in case she decided to come forward with her allegations.

In the view of the Committee, the totality of Ms X's evidence conveys an understandable and plausible narrative. She had become aware of the services of the teen health clinic through information distributed in her neighbourhood. She had gone there in order to obtain contraceptives. She had continued to attend the clinic regularly, although until reviewing her record recently, she had not recalled for how long she had been a patient there. She was, on her last visit to the clinic, subjected to intrusive and prolonged sexual touching by Dr. Noriega, while alone with him in an examination room. She decided at that point that she would never return, and she never did. She knew that what had occurred was wrong, but she was reluctant to come forward with her story, on account of her feelings of shame and embarrassment and some mistrust of authority based on her previous experiences with a sexually abusive stepfather who had been allowed to return to her home. Nevertheless she kept a prescription with Dr. Noriega's name on it, for many years, in case she decided to come forward with her allegations in the future. She struggled for years with whether or not she should do so. The issue resurfaced for her when she happened to see Dr. Noriega's name on television with respect to other complainants. She decided to contact the authorities at that time.

While the Committee did not attach undue weight to Ms X's demeanour in giving her evidence, it is noted that her demeanour tended to support her credibility. She presents as an unsophisticated, rather guileless individual, with nothing to hide. Her emotional

reaction during the course of her testimony, when describing her feelings of shame and embarrassment at having reached sexual orgasm during the touching by Dr. Noriega, were consistent with the content of her testimony and served to enhance her credibility.

Ms X freely acknowledged that her memory was poor for many of the particulars pertaining to her involvement with the teen health clinic, including how often she had attended there and over what period of time, and what specific assessments and procedures she had undergone there. It is understandable that she would not remember these details, given the passage of time; Ms X's explanation was that her involvement at the clinic, prior to the sexual impropriety, had been routine and non-threatening, therefore less likely to be remembered in detail. In the view of the Committee, this is a plausible, even likely, explanation for her poor memory. Ms X also acknowledged inconsistencies between some of her earlier statements, and her testimony at this time, pertaining to peripheral issues such as whether Dr. Noriega had questioned her about the extent of her sexual activity on the day the alleged sexual abuse occurred. Furthermore, Ms X was frank in admitting to her various struggles at that stage of her life, including in her schooling, her trouble with the law, and her drug use. The fact that she demonstrated a willingness to portray herself in a negative light with respect to these issues further enhances her credibility.

Counsel for Dr. Noriega argued that Ms X's evidence is so hopelessly conflicted, inconsistent and changing in substance that it cannot found a finding of professional misconduct. The Committee disagrees. Despite some of the frailties with aspects of her evidence, notably the inconsistencies identified and her poor memory for some of the contextual details, the Committee finds that, with respect to the central issue, her evidence was clear and consistent. In the Committee's view, the inconsistencies in Ms X's testimony and her inability to recall details on minor matters and surrounding circumstances as a result of the passage of time do not call the overall reliability of her evidence into question on the key issues in this case. The Committee accepts her evidence as credible and reliable for the reasons stated above.

The Committee found Dr. Noriega's evidence, in contrast, to be largely lacking in credibility.

Dr. Noriega's testimony was neither clear nor precise. He sometimes would not answer questions directly, and appeared to be evasive, attempting to obfuscate the issues. Some of his responses to questions appeared to be scripted and formulaic, as did some of his entries in the records reviewed, creating doubt as to whether what he said, and what he had charted, gave an accurate portrayal of his interactions with the complainant.

There was a disingenuous quality to Dr. Noriega's testimony that pervaded much of his evidence. Dr. Noriega tried to underplay the role of patient care at the clinic and the amount of time he spent with patients at the clinic in a way that the Committee found lacked credibility. For example, Dr. Noriega claimed that the purpose of his clinic was "teaching" and not to see patients. This evidence was contradicted by Ms S's evidence that the clinic's purpose was to see patients and her description of the clinic as patient-centered.

Dr. Noriega contradicted himself at times in his testimony, for example, with respect to the question of how many patients were typically seen in a morning at the teen health clinic. At other times, his testimony was contradicted by Ms S. Dr. Noriega stated, for example, that generally the clinic was not busy because it was perceived as "dirty"; Ms S testified that it was a busy clinic. Dr. Noriega stated that the teen health clinic's main function was teaching; Ms S stated that, although the educational role was prominent, the purpose of the clinic was patient care. Overall, Dr. Noriega appeared to be trying to over-emphasize and embellish his role at the teen health clinic as being almost exclusively focussed on teaching, for the evident purpose of supporting one aspect of his defence, which was that he would not have had the opportunity to sexually assault Ms X because a trainee would have been present with him at the material time.

Dr. Noriega's counsel argued that Ms X's allegation was highly improbable in light of the involvement of medical students in Dr. Noriega's practice and nurses in Ms X's care. The

Committee is satisfied that the evidence as a whole supports the conclusion that Dr. Noriega would have had the opportunity to assault Ms X in the manner in which she alleges.

The evidence does establish that Dr. Noriega had a prominent teaching role at the teen health clinic. The Committee accepts that, in his appointments with patients, medical trainees would often have been present. Furthermore, members of other disciplines, including nursing, would have been present in the clinic when the abusive acts are said to have occurred. The examining room was in close proximity to the reception desk, where, the evidence is, someone was always present.

However, the Committee does not find the evidence with respect to lack of opportunity convincing. The fact that Dr. Noriega usually had trainees with him, says nothing about his behaviour on those occasions where trainees were not present. The evidence of the complainant is that she was alone with Dr. Noriega. The evidence of Ms S confirms that Dr. Noriega would sometimes see patients alone. Dr. Noriega himself reluctantly admitted that this would sometimes be the case. Ms X's patient chart contains a notation that Ms X had a pelvic examination a few months previously. The entry in her patient chart for a date in January 1979, does not indicate that a sensitive examination was planned that day. As the sole pediatrician on duty at the clinic, Dr. Noriega, on account of his position of authority, could have created the opportunity to see patients alone, or taken advantage of the opportunity when it presented itself. This finding flows from the totality of the evidence before the Committee with respect to the functioning of the teen health clinic and Dr. Noriega's role within it.

The medical record of Ms X is of no assistance with respect to the Committee's finding. If the medical record were accepted as containing a complete and accurate record of everything that took place between Dr. Noriega and Ms X, then Dr. Noriega would be exonerated; however, if Ms X's allegations are true, the Committee doubts that any record of these would have been made in the chart.

It was suggested that it is implausible that Dr. Noriega would have run the risk of being interrupted in sexually abusing the complainant as alleged. The evidence is, however, that interruptions would have been infrequent and would have been initiated by a knock on the examination room door.

It is suggested that Ms X's evidence should not be believed because it is devoid of context. The crucial context, however, is established by the totality of the evidence. Although Ms X remembers virtually nothing regarding her involvement with the teen health clinic apart from that she attended there, that she saw Dr. Noriega, and that she was sexually assaulted by him on her final visit to the clinic, the evidence is that she attended there on seven occasions over the course of roughly one year; that she was compliant in following Dr. Noriega's advice and returning for scheduled follow-up appointments; that she did disclose personal issues and confided in Dr. Noriega and his staff indicating, essentially, that her relationship with Dr. Noriega was established, trusting, and therapeutic. This is the context in which her allegations of sexual abuse arise.

Further, there is no dispute that Ms X's involvement with Dr. Noriega ended suddenly and unexpectedly. She did not attend her last follow-up appointment which, in fact, she did not remember having made. The evidence establishes that she had attended all of her previous appointments. She had established a consistent therapeutic relationship with the physician. Her evidence is that she trusted Dr. Noriega as her physician. The abrupt termination of her involvement with the Clinic, therefore, would seem to require some explanation. The Committee accepts Ms X's evidence that the reason for this was the sexual touching perpetrated by Dr. Noriega.

The issue for the Committee to determine is whether the College has established on a balance of probabilities that Dr. Noriega subjected Ms X to protracted sexual stimulation under the guise of a medical examination, on the occasion of her last appointment with him at the teen health clinic at Hospital A in January 1979. The Committee's decision necessarily rests on a determination of the credibility of Ms X and Dr. Noriega, and the

reliability of their respective testimonies. In this regard, the Committee finds that Ms X's evidence with respect to the very issue in question was credible and reliable. It was sufficiently clear, cogent and convincing. The Committee accepts that the acts alleged occurred in the manner described by Ms X. The Committee rejects Dr. Noriega's blanket denial that these things happened. The Committee does not find Dr. Noriega credible.

The Committee finds that Ms X had the right to expect that Dr. Noriega would behave in a professional manner when she attended for medical appointments with him. His inappropriate sexual touching of her under the guise of a medical examination is in the Committee's view disgraceful, dishonourable and unprofessional conduct.

Accordingly, the Committee finds that the allegations contained in the Notice of Hearing are proven on a balance of probabilities. It is more likely than not that Dr. Noriega engaged in sexual impropriety with Ms X, as alleged, and that his conduct in doing so would reasonably be regarded by members as disgraceful, dishonourable, and unprofessional. The Committee requests that the Hearings Office schedule a penalty hearing pertaining to the findings made at the earliest opportunity.

**Indexed as: Ontario (College of Physicians and Surgeons of Ontario) v.
Noriega, 2015 ONCPSD 29**

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF PHYSICIANS AND SURGEONS OF ONTARIO**

IN THE MATTER OF a Hearing directed
by the Inquiries, Complaints and Reports Committee of
the College of Physicians and Surgeons of Ontario
pursuant to Section 26(1) of the **Health Professions Procedural Code**
being Schedule 2 of the ***Regulated Health Professions Act, 1991***,
S.O. 1991, c. 18, as amended.

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. ELEAZAR HUMBERTO NORIEGA

PANEL MEMBERS:

**DR. C. CLAPPERTON (CHAIR)
D. DOHERTY
DR. W. MCCREADY
DR. R. SHEPPARD**

Penalty Hearing Date: January 7, 2015
Penalty Decision Date: July 17, 2015
Release of Written Reasons: July 17, 2015

PUBLICATION BAN

PENALTY AND REASONS FOR PENALTY

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario delivered its written Decision and Reasons on Finding in this matter on November 3, 2014, and found that Dr. Noriega committed an act of professional misconduct, in that he engaged in sexual impropriety with a patient and in that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

The Committee heard evidence and submissions on penalty and costs on January 7, 2015, and reserved its decision.

EVIDENCE AND SUBMISSIONS ON PENALTY AND COSTS

Counsel for the College submitted that the appropriate penalty order in the circumstances of this case was revocation of Dr. Noriega’s certificate of registration and a public reprimand. The College also sought an order that costs in the amount of \$40,140.00 be paid by Dr. Noriega to the College. The costs are calculated for nine hearing days at the tariff rate of \$4,460.00 per day.

Counsel for Dr. Noriega submitted that revocation of his certificate of registration was not warranted. Counsel suggested that the appropriate penalty would be a suspension of Dr. Noriega’s certificate of registration for approximately twelve months, and the imposition of the following proposed conditions on his certificate of registration:

- “ a) that Dr. Noriega will not engage in any professional encounters with female patients in any jurisdiction without a College-approved practice monitor being present;
- b) that Dr. Noriega shall post a sign in his waiting room and examination rooms reflecting that he cannot be alone with a female patient or have any professional encounter without a College-approved practice monitor being present; and,

- c) that Dr. Noriega provide all of his female patients with a copy of both the Discipline Committee's Decision of November 3, 2014, in respect of this matter and all conditions on his certificate of registration, and that he have them sign and date a form acknowledging this."

In determining the penalty order, the Committee considered the findings in its Decision and Reasons for Decision in this matter dated November 3, 2014. The Committee also considered the evidence filed at the Penalty Hearing, which included the victim impact statement of Ms X dated October 4, 2011 (Exhibit 12); two previous decisions of the Discipline Committee of the College of Physicians and Surgeons pertaining to Dr. Noriega, dated November 23, 2003 and July 17, 2013 (Exhibits 13 and 14); and, a Brief of Supporting Letters filed on behalf of Dr. Noriega (Exhibit 15). The Committee also reviewed the relevant case law submitted by both counsel, and carefully considered the written and oral submissions made by counsel.

DECISION ON PENALTY AND COSTS

For the reasons that follow, the Committee decided that, in light of all the circumstances of the case, revocation of Dr. Noriega's certificate of registration is appropriate. The Committee also requires that Dr. Noriega appear before it to be reprimanded. The Committee further orders that Dr. Noriega pay costs in the amount of \$40,140.00.

REASONS FOR DECISION ON PENALTY

▪ *Principles*

The principles relevant to the imposition of penalty in disciplinary proceedings are well-established. The protection of the public is the paramount consideration. Other principles include maintenance of public confidence in the reputation and integrity of the profession and in the principle of effective self-governance in the public interest; general deterrence as it applies to the membership as a whole; specific deterrence as it applies to this particular member; and the potential for rehabilitation of the member. The weighing of these principles, in light of the specific facts and circumstances of the case, is the task to be undertaken by the Committee in determining a just penalty. Aggravating and

mitigating factors, if any, pertaining to the conduct in question are considered.

Proportionality is an important element to be considered by the Committee. The most severe penalties should be imposed for the most serious transgressions.

▪ ***The Committee's Finding***

The Committee has found that Dr. Noriega committed an act of professional misconduct by engaging in sexual impropriety with his patient Ms X on one occasion in January 1979, and that this conduct, having regard to all of the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. The specific findings are contained in the Committee's Decision and Reasons for Decision dated November 3, 2014, and will not be repeated here in full. A brief summary is as follows.

The Committee found that Dr. Noriega subjected Ms X to protracted sexual stimulation under the guise of a medical examination, on the occasion of her last appointment with him at the teen health clinic at Hospital A in January 1979. Ms X, a teenager at the time, had been Dr. Noriega's patient at the clinic for approximately one year. She had seen him regularly over that period of time and had developed a trusting therapeutic relationship with him. At her last appointment with Dr. Noriega, while she was alone with him in the examination room, he had stimulated her clitoris with his fingers over a period of several minutes, causing her to experience an orgasm. She felt embarrassed and ashamed, she resolved never to return to the teen health clinic, and she never did. She did not disclose what had occurred for many years until, in 2008, she happened to see Dr. Noriega's name on television in relation to another matter. She felt an immediate emotional reaction on seeing his name, spoke to her husband about what had occurred many years before, and then contacted the police.

▪ ***The Applicable Legislation***

The professional misconduct in this case occurred 36 years ago. The legislation governing these proceedings is therefore different than if the misconduct had occurred more recently. Specifically, the *Health Disciplines Act* of 1974 applies, and not the current *Regulated Health Professions Act, 1991*. Under the *Health Disciplines Act*, Dr.

Noriega has been found to have committed two acts of professional misconduct: sexual impropriety; and conduct relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. The *Health Disciplines Act*, in section 60(5), describes the powers of the Discipline Committee in penalizing such findings of professional misconduct. The Committee has a wide range of discretion to exercise in imposing the penalty. The Committee may revoke the certificate of registration of the member, but revocation is not mandatory under this legislation, even for cases of what would now be described as the sexual abuse of a patient under the *RHPA* where it is now mandatory. The Committee also has the power to impose other sanctions on the member, including suspension of the certificate of registration, the imposition of restrictions on the certificate of registration, a reprimand, and the imposition of a fine up to a maximum of \$5,000.00.

The College is asking the Committee to revoke Dr. Noriega's certificate of registration, in addition to requiring him to appear for a public reprimand and pay costs. Dr. Noriega's counsel is asking for the Committee to suspend his certificate of registration for approximately twelve months, and to impose restrictions on his practice. It is evident that the sanctions requested by both parties are available to the Committee under the provisions of the *Health Disciplines Act*, the legislation in force at the time of the conduct found to be professional misconduct.

ANALYSIS

Counsel for Dr. Noriega submitted that, where a penalty short of revocation can satisfy the penalty objectives, this should be imposed consistent with the "principle of restraint". This appears to be an accepted principle of sentencing in the criminal context, and has previously been referenced in some Discipline Committee decisions of the College, as in *Lee (re)* [2010], which quotes the Supreme Court of Canada in *R. v. Solowan*. The Court states in this case that [in the criminal context] a court should "impose the least restrictive sanction appropriate in the circumstances".

Whether or not this principle is applicable in discipline cases, the Committee finds that in the circumstances of this case there is no penalty short of revocation that would adequately address the objectives of penalty. The principle of proportionality, and the crucial issues of protection of the public and maintenance of public confidence in the ability of the profession to govern itself in the public interest, compel the conclusion that Dr. Noriega's certificate of registration must be revoked.

▪ ***Previous Findings of Professional Misconduct***

The Discipline Committee has made two prior findings of professional misconduct by Dr. Noriega. The relevant decisions have been entered into evidence (Exhibits 13 and 14). These findings relate to conduct that took place subsequent to the conduct that was the subject matter of the finding in this case. Accordingly, they cannot be and were not used by the Committee as "prior findings" that justify a heavier penalty than the November 3, 2014 finding would otherwise warrant. Subsequent misconduct can be looked to for the purpose of ascertaining the member's prospects for rehabilitation. It was for this purpose they were considered.

2003 Discipline Proceeding

On November 24, 2003, the Discipline Committee found that Dr. Noriega had committed an act of professional misconduct in that he sexually abused a patient, and that he had engaged in disgraceful, dishonourable or unprofessional conduct. The patient was Ms Q. (This Committee heard her testimony in a *voir dire* in this case in the College's application to admit her evidence as "similar fact evidence" with respect to the allegations of Ms X). Ms Q, a teenager at the time, had been touched in a sexual fashion by Dr. Noriega in April and May 2002. Dr. Noriega pleaded no contest to Ms Q's allegations. The Committee accordingly found the professional misconduct to have taken place and based on a joint submission, ordered that his certificate of registration be suspended for eighteen months, nine months of which were to be suspended on successful completion of the College Medical Ethics and Informed Consent course and the College Boundary course. The Committee also ordered that Dr. Noriega be reprimanded, and that he not examine any female patient unless accompanied by a

member of the College of Nurses of Ontario or the College of Physicians and Surgeons of Ontario or, where the patient is less than twelve years of age, a parent or guardian.

This Committee ruled that Ms Q's evidence was admissible as similar fact evidence with respect to the allegations pertaining to Ms X. The Committee did not, in the end, find it necessary to rely on Ms Q's evidence in making its finding with respect to Ms X. The evidence pertaining to Dr. Noriega's sexual abuse of Ms Q is, however, relevant to these proceedings for reasons to be stated below.

2013 Discipline Proceeding

On February 28, 2013, after a contested hearing, a previous panel of the Discipline Committee found that Dr. Noriega had committed professional misconduct in that he had engaged in disgraceful, dishonourable or unprofessional conduct. The conduct in question was Dr. Noriega's failure to comply with an undertaking which he had given to the College on July 22, 2009, in the context of the College's investigation into Ms X's allegations which was ongoing at that time. Specifically, he had failed to post a sign in his waiting room and his examination room notifying the public of restrictions on his practice; he had failed to ensure that a chaperone was present during the entirety of his female patient encounters between July 2009 and February 2010; and he had misled the College Investigator in February 2010 when he told her that he did not see female patients in the consultation room. The Committee suspended his certificate of registration for six months, and ordered that he be reprimanded.

▪ *Present Discipline Proceeding*

The professional misconduct for which the Committee is now penalizing Dr. Noriega occurred before the events that were the subject of the 2003 and 2013 discipline hearings. The Committee is aware of the significance of the chronology. The Committee is imposing a penalty on Dr. Noriega solely for the misconduct he engaged in with respect to Ms X. He is not being penalized for the subsequent misconduct he committed, including the sexual abuse of Ms Q. Moreover, the fact that subsequent incidents of professional misconduct have occurred is not properly considered an aggravating factor

with respect to his sexual impropriety with Ms X. At the time that he committed professional misconduct in relation to Ms X, in 1979, this was Dr. Noriega's first such transgression. The usual logic underlying the imposition of harsher penalties for repeat misconduct, therefore, does not apply. The Committee understands that in the criminal law context this doctrine is known as "the Coke principle". The Committee reviewed some of the case law in this area, including the decision of the Ontario Court of Appeal in *R. v. Cheetham*. In determining the appropriate penalty in this case, it cannot be said that he failed to "learn his lesson" through the impact of previous sanctions; there had been no previous sanctions when he committed sexual impropriety with Ms X.

▪ ***The Subsequent Misconduct***

Both counsel for the College and counsel for Dr. Noriega were in agreement that Dr. Noriega's subsequent misconduct is not an aggravating factor with respect to penalty in relation to Ms X. The subsequent misconduct, however, is relevant for other reasons.

Firstly, Dr. Noriega was found to have sexually abused another adolescent female, Ms Q, 23 years after he had committed sexual impropriety with Ms X. The actual behaviour, in each instance, was strikingly similar. A pattern of deviant conduct is therefore established; Dr. Noriega's behaviour with Ms X is now known not to have been an isolated incident. The Committee finds that this tends to negate any mitigating aspects which might be suggested based on the elapsed 36 years since the initial misconduct occurred. The passage of time evidently did not assist Dr. Noriega in developing insight into his deviant behaviour, accepting responsibility for it, or in being able to refrain from doing it again.

Secondly, Dr. Noriega's failure to abide by the conditions of the undertaking he entered into with the College on July 22, 2009, and his subsequent misleading of the College Investigator with respect to this, raises very serious concerns for this Committee. The conditions of the undertaking had been crafted in order to protect the public while the allegations which led to the current proceeding were being investigated. Dr. Noriega presumably understood the rationale for these conditions, and the importance of the

issues at stake; yet, he failed to ensure that his practice monitor was present with him in the examination room, and he failed to post the required signs informing his patients and their families of the restrictions on his practice. Later, he misled the College Investigator during the course of her investigation. The Discipline Committee at that time found that Dr. Noriega had demonstrated a flagrant disregard for the terms of the undertaking.

The fact of Dr. Noriega having failed to comply with conditions of a previous undertaking, put in place specifically for the purpose of protecting the public, seriously undermines the submission of his counsel that the goals of penalty can be addressed by a proposed penalty which would include conditions on Dr. Noriega's certificate of registration. The Committee has no confidence whatsoever that Dr. Noriega would now abide by conditions and restrictions on his practice, when he failed to do so in what is described as a deliberate demonstration of flagrant disregard, on a previous occasion.

▪ ***Proportionality***

The principle of proportionality dictates that the most serious misconduct should attract the most severe sanctions. There is no dispute that revocation of a physician's certificate of registration is the most severe penalty that can be imposed by the Discipline Committee. The Committee reviewed the case law submitted by counsel on this issue, including the decision of the Divisional Court in the *College of Physician and Surgeons v. Boodoosingh (1990)*, in which the Court reversed the decision of the Discipline Committee to revoke Dr. Boodoosingh's licence to practice, and substituted a three month suspension, noting "the penalty of revocation should be reserved for repeat offenders and the most serious cases".

The Committee is struck by the particularly abhorrent nature of the sexual impropriety committed by Dr. Noriega with Ms X. This was a teenager who, in many respects, was the epitome of vulnerability. She had developed what she believed to have been a trusting therapeutic relationship with Dr. Noriega over a period of approximately one year. Dr. Noriega took advantage of her sexually, in a most egregious fashion, masturbating her to

orgasm under the guise of a medical examination. Ms X was seriously traumatized as a result. As she indicates in her impact statement (Exhibit 12):

“...I have had so much anger; hurt, shame, and such a personally responsible feeling for any other victim he has affected since me! I feel the burden of being responsible for any victim after me because I was too afraid to come forward. I truly trusted Dr. Noriega...I have suffered very low self-esteem...I’ve had a difficult time trusting other male doctors...I do know that after all these years the feeling does not get better or disappear, and it is impossible to cover-up and hide!”

The Committee has no difficulty finding that Dr. Noriega’s misconduct with the complainant, Ms X, is of the most serious nature. The descriptor “the most serious” will logically apply to a range and variety of offending behaviours. Each case will have unique characteristics that will distinguish it to some extent from the others. As noted by the Law Society of Alberta in *Adams and Law Society of Alberta (1997)*, “it will always be possible to find someone whose circumstances and conduct are more egregious than the case under consideration”. The relative severity of the misconduct in question will be determined by all the circumstances of the case.

With respect to Dr. Noriega, he is a pediatrician who took advantage of his position of trust and authority, derived from a physician/patient relationship, to sexually victimize, in a most intrusive and offensive fashion, a vulnerable teenager. In the view of the Committee, this easily falls within the range of “the most serious” forms of professional misconduct. It is deserving of the most severe penalty.

▪ ***The Protection of the Public***

It is self-evident that the public must be protected from pediatricians who sexually abuse their adolescent patients. Misconduct of this nature is likely to cause serious harm. The patients affected are often severely traumatized, as was Ms X. Their families, the wider community, and the medical profession as a whole are also harmed through the erosion of public confidence and trust in the profession.

This Committee has been presented with no evidence which would assist in understanding the origins of Dr. Noriega’s deviant behaviour. If, as suggested by his

counsel, Dr. Noriega's certificate of registration was suspended for a limited period of time, he would be free to return to practice without any necessity for the risk factors pertaining to potential recidivism, whatever they may be, having been addressed. It is a reasonable inference, accordingly, that he would remain at risk for future misconduct of this nature. The fact that there are no allegations of subsequent sexual misconduct against him in the past eleven years does not inspire confidence in the Committee that the risk to the public has been eliminated. The circumstances of this case would in fact suggest otherwise; Dr. Noriega has demonstrated a pattern of transgressions separated by a lengthy period of time, and his previous behaviour, demonstrates a complete disregard of the terms of his undertaking, requiring him to only see female patients in the presence of a chaperone. This indicates to the Committee that there is a continuing risk to the public.

▪ ***Maintenance of Public Confidence in the Integrity of the Profession***

Maintenance of public confidence in the integrity of the profession is of crucial importance in a case of this nature. In the view of the Committee, a strong statement of denunciation is required in order to ensure that public confidence is preserved. The Committee referred to the decision of the Law Society of Alberta in the case of *Adams and Law Society of Alberta (1997)*, which states:

"...professional bodies are those to whom the government has seen fit to grant monopoly status. With the monopolistic right comes certain responsibilities and obligations. Chief amongst them is self-regulation. Self-regulation is based on the legitimate expectation of the government and the public that those members of a profession who are found guilty of conduct deserving of sanction will be regulated – and disciplined – on an administrative law basis by the profession's statutorily prescribed regulatory bodies. ...a professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favourably and unfavourably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of crucial significance to the mandate of the professional disciplinary bodies."

The issue of what is required to maintain public confidence in the integrity of the profession, and in effective self-governance in the public interest, is independent of the issue of risk to the public. As noted in the criminal context in *R. v. J.R. (Ontario Court of Appeal 2003)*:

“While the respondent’s conduct in the 20 years between the offences and his arrest demonstrates that he poses little risk of re-offending, the passage of time does not diminish the need for a denunciatory sentence given the seriousness of these crimes”.

In the view of the Committee, similar considerations apply here. In the context of professional self-regulation, the nature of the penalty required to maintain public confidence in effective self-governance might well evolve over time. Societal standards shift, as the public becomes more aware of the problems associated with physician sexual misconduct and its potential impact on patients. This may be especially germane when it comes to pediatricians; children have inherent vulnerabilities that require an extra measure of protection.

Changing perceptions regarding sexual abuse of patients by some physicians has resulted in the legislative changes now contained in the *Regulated Health Professions Act*. If Dr. Noriega’s conduct with respect to Ms X had been governed by this Act, revocation of his certificate of registration would have been mandatory. Although the Committee is aware that in determining a penalty for misconduct which occurred many years in the past, it is doing so in the present. The Committee must impose a penalty which is consistent with the judicious application of the relevant principles, in light of all the facts of the case.

Children and their families need to have absolute confidence that their physicians will behave in a completely professional and trustworthy fashion towards them. Dr. Noriega’s actions have flouted this expectation in a most egregious and offensive fashion. The Committee finds that a suspension of his certificate of registration, accompanied by restrictions on his practice, is simply an inadequate response to misconduct of this nature. Dr. Noriega’s conduct must be denounced in the strongest possible terms. No measure short of revocation of his certificate of registration would suffice.

Counsel for Dr. Noriega submits that we consider the absence of any findings of sexual abuse or misconduct since 2002 as a mitigating factor. Dr. Noriega has been subject to restrictions on his certificate of registration since November 2003, following the Discipline Committee’s decision with respect to the sexual abuse of Ms Q. Since July

2009 he has been subject to the conditions of an undertaking which he gave to the College while Ms X's allegations were being investigated. There is no evidence that he has committed further sexual abuse while subject to these restrictions and conditions.

The absence of further evidence of sexual misconduct hardly qualifies as a mitigating factor, in the view of the Committee. Dr. Noriega cannot be given credit for not having abused any more patients. His history of misconduct is clear, as is his failure to abide by restrictions on his practice, which were previously put in place to protect the public.

The Committee considered Dr. Noriega's personal circumstances as outlined by his counsel, and the letters of support from families of some of his patients, which were filed on his behalf. The Committee accepts that the revocation of Dr. Noriega's certificate of registration will have very serious consequences for him. This is to be expected under the circumstances. Significant hardship could well result. This issue, however, is not a central concern of the Committee. The Committee is concerned with arriving at a just penalty which, in all the circumstances of the case, achieves the goals of public protection, maintenance of public confidence in the integrity of the profession, and specific and general deterrence. We note, also, that revocation is not necessarily a "professional death sentence". Dr. Noriega will, in fact, be able to apply for reinstatement of his certificate of registration.

The Committee accepts that the letters of support from the families of some of Dr. Noriega's patients, submitted on his behalf, indicate that these individuals consider him to be compassionate, dedicated, trustworthy, and skilled. These letters of support, however, are of only very limited utility in light of the finding of sexual impropriety made in this case. As noted by previous panels of the Discipline Committee in similar cases, it is not unusual for a physician to be very highly regarded by many patients, and to be thought of as a competent and trustworthy physician, but to have behaved with another patient in a most appalling and egregious fashion. Sexual misconduct, by its nature, is usually a secretive activity which occurs in private. While the Committee accepts that Dr. Noriega has shown himself capable of conducting himself in an exemplary fashion with

other patients, in the view of the Committee this does not mitigate the severity of the offending behaviour which he has been found to have engaged in.

CONCLUSION

In conclusion, for the reasons stated above, it is the decision of the Committee that Dr. Noriega's certificate of registration must be revoked.

The Committee accepts the joint position of the parties that as part of the penalty that Dr. Noriega be publicly reprimanded. The Committee accepts the College's submission regarding costs, given the serious nature of the intentional misconduct.

ORDER

The Committee therefore orders and directs that:

1. the Registrar revoke Dr. Noriega's certificate of registration, effective immediately;
2. Dr. Noriega appear before the Committee to be reprimanded, and that the reprimand be recorded on the register; and
3. Dr. Noriega pay costs to the College in the amount of \$40,140.00, based on nine hearing days at the tariff rate of \$4,460.00 per day.

TEXT of PUBLIC REPRIMAND
Delivered May 26, 2016
in the case of the
COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO
and
DR. ELEAZAR HUMBERTO NORIEGA

Dr. Noriega, the Committee has found that you committed the most serious form of professional misconduct, the sexual abuse of a young adolescent patient in your care.

Your misconduct must be denounced in the strongest terms. You misused your position of trust and authority with respect to this unfortunate and disadvantaged young girl, for your own selfish interests. As a pediatrician you were well aware of your privileged status with respect to a vulnerable adolescent in your care. Yet you chose to victimize this troubled young girl with no apparent concern for the grievous harm which you caused. This harm is not limited to the trauma which was inflicted on this individual patient, but extends widely to include the medical community and the public at large. The maintenance of public trust in the integrity of the profession, and of confidence in the College's ability to protect the public from predatory and abusive physicians, are dealt a serious blow by your misconduct.

The Committee is truly disturbed by your behaviour. This is a very unfortunate way for you to end your medical career. You will be remembered as a physician who violated the trust of his patient in a most egregious and offensive fashion. We can only hope that, on reflection, you can learn to take responsibility for your misconduct, and to come to terms with the harm that you have done.

This is not an official transcript