

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Citation: *College of Physicians and Surgeons of Ontario v. O'Brien*, 2023 ONPSDT 5

Date: January 25, 2023

Tribunal File No.: 22-002

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Simon Jonathan O'Brien

FINDING AND PENALTY REASONS

Heard: December 20, 2022, by videoconference

Panel:

Ms. Sherry Liang (chair)

Dr. Allan Kaplan

Dr. Roy Kirkpatrick

Mr. Peter Pielsticker

Ms. Linda Robbins

Appearances:

Ms. Carolyn Silver, for the College

Mr. Matthew P. Sammon, Mr. Ian MacLeod and Ms. Jessica Kras, for Dr. O'Brien

RESTRICTION ON PUBLICATION

The Tribunal ordered, under ss. 45-47 of the Health Professions Procedural Code, that no one may publish or broadcast the names or any information that would identify patients referred to during the Tribunal hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this order.

Introduction

- [1] The College's Inquiries, Complaints and Reports Committee (ICRC) referred allegations Dr. O'Brien committed misconduct to the Tribunal.
- [2] At the hearing, Dr. O'Brien and the College provided an Agreed Statement of Facts. Based on those facts, Dr. O'Brien admitted that he committed professional misconduct by failing to maintain the standard of practice of the profession and engaging in disgraceful, dishonourable or unprofessional conduct. The College and the member made a joint submission on penalty. The Tribunal found that the member committed professional misconduct as admitted and accepted the joint submission, ordering a reprimand and an eight-month suspension of the member's certificate of registration. The Tribunal also directed the member to pay costs to the College of \$6,000. These are the reasons for our findings.

Background

- [3] Dr. O'Brien is a psychiatrist. He holds leadership positions in the community in which he practises, including at a local hospital and university. In 2012, he started treating a patient with multiple serious psychiatric diagnoses, including borderline personality disorder. About a year after the patient started seeing Dr. O'Brien, she moved away from the community, but he continued to treat her. After 2014, most of the therapeutic relationship was conducted by email, phone and, to a lesser extent, text.
- [4] In the fall of 2014, the patient began a new job which gave her access to information about the member, including his private cell phone number, home address and unlisted landline. She also had access to information identifying his family members, their address and phone number. Although, before this, the patient only phoned the member at his office, she now began phoning his private residence and cell phone.
- [5] The patient used her access to the member's information to intimidate and threaten him. She sent the member emails commenting on the breadth of information about him to which she had access. She began sending him multiple emails daily and phoning him more frequently. Some of these emails were threatening in tone, including ones in which she stated that he should be afraid of her, that her husband

was bringing her a gun, that she hoped the member and his family would die and that she carried a knife. The patient often became particularly upset and/or threatened the member when he did not promptly respond to her emails or phone calls.

- [6] The member's therapeutic relationship with the patient continued through 2019, when the College began its investigation, until March 2020, when the patient was referred to another psychiatrist.

Email and telephone communications

- [7] The College obtained copies of the email communications between the patient and the member that were stored on the member's workplace servers. Its analysis of those emails revealed that between mid-2015 and early 2020, they exchanged almost 70,000 emails, averaging about 46 a day, seven days a week. During one two-month period, an average of almost 100 emails were exchanged daily and on one day, 166 emails were exchanged.
- [8] The patient initiated the email exchanges and sent most of them. Some of the emails that the member sent to the patient were casual in tone and the member admitted that, as such, they were unprofessional in the context of the treating relationship. In other emails, the member and the patient discussed sensitive matters such as feelings and sensitive transference phenomenon that she experienced during the treating relationship.
- [9] The College also obtained the patient's cell phone records. Based on these records, it learned that the patient phoned the member 1,244 times over the course of about six years. Fifty-eight of these calls were to the member's home and 519 to his cell phone. The patient also sent 3,888 text messages to the member's cell phone.
- [10] The member or his support staff called the patient more than a thousand times during this six-year span. He called her 152 times from his home and 166 times from his cell phone. The member sometimes called the patient from his home upon receiving information she was suicidal, sometimes spending more than 30 minutes with her on these calls. He also sent her 1,344 text messages.

[11] The member's phone calls and texts were in response to the patient's communications. The cell phone records show recurring patterns, including the patient calling the member's cell phone multiple times followed by calls to his private residence if there was no answer. These communications extended throughout the workday, late into the evening, on weekends and during the member's vacation. Since most of the communications between the member and the patient were over email, phone and text, the member did not bill the Ontario Health Insurance Plan (OHIP) for the majority of the time he spent treating this patient.

Confidential information

[12] In its investigation, the College learned that during the patient-physician relationship, the patient had sought assistance from the member with her work product by emailing various draft documents to him for his review and commentary. This work product included confidential personal information of third parties. By responding email, the member regularly reviewed the patient's work product and provided her with almost immediate feedback. In one email exchange, the patient asked the member, "[a]re you getting annoyed with me sending you files to read every day?" and he responded, "[n]o. Not at all," assuring her repeatedly that she was doing a "great job."

[13] The patient emailed confidential information to the member approximately 189 times. In many of these instances, the member commented and/or provided feedback.

The patient's chart

[14] The patient's chart with the member was close to 5,000 pages long. It contained a phone call log, some (but not all) of the work product containing confidential information the patient provided to the member and some (but not all) of the emails and text messages exchanged between them. During the College's investigation, the member acknowledged that he occasionally made changes to his own clinical notes found in the chart at her request. He retained a separate original copy of each note in the chart, which demarcated the changes on the face of the records.

Providing prescriptions for use by others

- [15] On one occasion, the member prescribed an anti-depressant, in the patient's name, for use by her husband. The patient expressed concern about her husband going through withdrawal without the medication and advised the member that it had previously been prescribed by another physician who was unavailable. She requested the prescription and the member provided it, without contacting the other physician or assessing the patient's husband.
- [16] On another occasion, the member prescribed medication in the patient's name, for use by her cat. The patient reported that her veterinarian had recommended the medication for the cat and expressed anxiety about being unable to afford the medication.

Failure to report to the Ministry of Transportation

- [17] Among the matters discussed between the member and the patient was her struggle with alcohol abuse. On one occasion, the patient reported to the member that she had been arrested and had her licence suspended for three days because of, among other things, careless/distracted driving. About six months later, the patient told him about getting into a car accident in a parking lot while impaired. The member did not report her to the Ministry of Transportation (MTO) as a safety risk.

College's expert report

- [18] The College retained an assessor to review the member's care of the patient. Among the assessor's conclusions was that the "all access" patient-physician framework, immediacy of responsiveness, casual tone and lack of in-person sessions represented an extreme departure from the standard of care. In the assessor's opinion, the patient drove the therapeutic frame and not the member, who is fundamentally responsible for this role. The member adopted a "submissive, appeasing" stance, which is contradictory to that required to do effective work with a patient who continually pushes boundaries. Any clinical gains were achieved in the setting of essentially 24/7 access to the member, which required him to sacrifice his professional standards, live under the threat of his family's exposure and psychological injury and strongly reinforced the patient's dependency.

- [19] The assessor also had concerns with the use of email to discuss the patient's psychiatric issues. She noted that the risk of miscommunication or misinterpretation is significantly heightened through email and the member did not discourage the patient from use of this medium for expression of safety risks and communications about very sensitive topics.
- [20] In the assessor's opinion, the member failed in his mandatory duty to report the patient as a driving safety risk to the MTO, following her self-report of impaired driving to him.
- [21] The assessor noted that the member has held multiple significant administrative positions, given expert evidence in civil cases involving professional conduct and medical malpractice and has extensive experience in physician health and fitness to practise. Given his experience and expertise, the assessor found it of "overwhelming" concern that he did not seek peer consultation or clinical supervision while treating the patient, until the College's investigation. In summary, the assessor held the opinion that the member's care of the patient did not meet the standard of practice of the psychiatry profession and demonstrated a serious lack of judgment.

Member's expert report

- [22] The member obtained his own expert report, some of which is quoted in the Agreed Statement of Facts. This expert described the situation in which the member found himself as truly unique, in that it involved a patient with a severe personality disorder who used her employment to gain access to the member's personal and family data and then used this knowledge to intimidate and threaten him.
- [23] In this expert's opinion, the member helped the patient overall over many years. He also noted that the member made many attempts to transfer the patient's care, which the member documented along with the refusals by other psychiatrists to accept the patient. The expert found several issues demonstrating a lack of skill or judgment, including not setting firmer boundaries on the member's response to emails and in his use of informal and casual emails in the therapeutic relationship. The expert agreed with the College assessor's opinion on other issues demonstrating a lack of skill or judgment.

The member's admissions

- [24] The member admits that he failed to maintain the standard of practice of the profession and engaged in disgraceful, dishonourable or unprofessional conduct by:
- a. failing to maintain boundaries through the content/nature, tone, timing, and frequency/volume of text, email, and telephone communications with the patient;
 - b. engaging in clinical encounters and communication with the patient without remuneration;
 - c. altering the patient's chart at her request and without noting the alterations, despite maintaining in the record the original clinical notes which demarcated the changes;
 - d. failing to terminate his professional relationship with the patient at an earlier date;
 - e. failing to seek earlier professional support and/or supervision with respect to his treatment of the patient;
 - f. inappropriately accepting and engaging with the patient's work product containing confidential information, which was sent to his email;
 - g. failing to expressly and directly instruct the patient to stop sharing work product containing confidential information with him.

Finding on professional misconduct

- [25] We found that the member failed to maintain the standard of practice of the profession and engaged in disgraceful, dishonourable or unprofessional conduct. The professional misconduct includes failing to maintain boundaries in the content, tone, timing and frequency of text, email and telephone communications with the patient. He engaged in many clinical encounters and communications with her without pay, thus reinforcing the blurring of boundaries. The member's misconduct includes altering the patient's chart at her request, despite his disagreement with the changes and failing to terminate the professional relationship at an earlier date.

- [26] The member's misconduct affected persons outside the physician-patient relationship. He was complicit in violating the privacy of third parties when he permitted the patient to share confidential information with him and provided feedback to her.
- [27] While we have concluded that the above events constitute professional misconduct, we agree with the expert's description of the circumstances as truly unique. The member was faced with a patient who was able to use his personal information to intimidate him into crossing professional boundaries. We acknowledge the extreme challenges confronting the member in continuing to treat this patient. However, the member showed a lack of judgment in allowing this dysfunctional dynamic to continue for many years. Of the lapses of judgment, perhaps the most serious and consequential was his failure to seek help, until confronted with the College's investigation.

Finding on penalty

- [28] The parties made a joint submission on penalty, agreeing that the member should receive a reprimand and an eight-month suspension of his certificate of registration. They also agreed that the member should pay the College \$6,000 in costs.
- [29] Because the parties agree, the question for us is whether the proposed penalty would bring the administration of justice into disrepute. A joint submission on penalty will be rejected only where it causes "reasonable and informed persons, aware of all of the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe the proper functioning of the justice system" has broken down. See *R. v. Anthony-Cook*, 2016 SCC 43 at para. 34 and *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303 at para. 9.
- [30] It is not our role on a joint submission to consider whether we agree with the proposed penalty or whether it is a penalty that we would order following a contested hearing and a finding of misconduct. The question is not whether the proposed penalty is the most appropriate fit, but rather, whether it is contrary to the public interest in a way that would bring the administration of justice into disrepute: *College of Physicians and Surgeons of Ontario v. Gutman*, 2021 ONPSDT 50 at para. 15.

- [31] We are satisfied that the proposed penalty is not contrary to the public interest. The parties provided us with other cases in which the Tribunal considered similar misconduct. While they all differ in their facts, they show that the Tribunal has considered suspensions an appropriate penalty where the professional misconduct includes a breach of privacy. The Tribunal has also ordered suspensions where physicians engaged in breaches of professional boundaries, including with respect to psychiatric patients.
- [32] In these cases, the Tribunal was satisfied that suspensions served as general and specific deterrence, signalling to the member and the public at large that misconduct of that nature will not be tolerated. Ordering the penalty of a suspension also maintains public confidence in the College's ability to regulate the profession in the public interest. In cases when it has ordered reprimands, the Tribunal described them as also supporting the goals of general and specific deterrence, as an expression of its disapproval of the member's conduct.
- [33] Although every case referred to us involves its own unique set of facts and circumstances, the eight-month suspension to which the parties have agreed is more severe than any in those cases. As we state above, our task on a joint submission is not to determine whether the proposed penalty is the best fit, but whether it is contrary to the public interest. In *Anthony-Cook* (at para. 63), the Supreme Court disapproved of the court "tinkering" with a joint submission. On the facts before us, the proposed suspension is not contrary to the public interest in a way that would bring the administration of justice into disrepute.

Letters of support

- [34] The member provided a brief of 169 letters of support, from colleagues and others who have had professional dealings with him. It is evident that he is held in extremely high esteem amongst his peers and those whom he has mentored or worked with during his career. Many wrote about his professionalism, compassion and integrity. The writers seem generally aware that the member faced College proceedings, in that most of the letters are addressed to the ICRC. However, they do not refer to the particulars of the professional misconduct allegations.
- [35] Although the letters are helpful to the Tribunal in understanding the member's professional context and reputation, we can give them little weight in our decision.

They do not bear on the question of whether the facts support our finding of professional misconduct and, in the circumstances before us, provide neither an aggravating nor mitigating factor on the question of penalty (see *College of Physicians and Surgeons of Ontario v. Shapiro*, 2020 ONCPSD 44).

ORDER

[36] For the above reasons, we ordered:

- a. Dr. O'Brien to attend before the panel to be reprimanded;
- b. the Registrar to suspend Dr. O'Brien's certificate of registration for eight months commencing January 13, 2023 at 12:01 a.m.;
- c. Dr. O'Brien to pay costs to the College in the amount of \$6,000 by January 20, 2023.

ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL

Tribunal File No.: 22-002

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Simon Jonathan O'Brien

The Tribunal delivered the following Reprimand
by videoconference on Tuesday, December 20, 2022.

*****NOT AN OFFICIAL TRANSCRIPT*****

Dr. O'Brien,

You have admitted to having failed to maintain the standard of practice of the profession and engaging in disgraceful, dishonourable or unprofessional conduct during a prolonged interaction with a patient.

Your misconduct included boundary violations, alterations in the patient's chart at the patient's request, failure to terminate the patient relationship earlier and failure to seek professional support in dealing with a patient whose management was challenging to you. You showed a lack of judgment by receiving and reviewing confidential documents from the patient without discouraging this behaviour, prescribing drugs inappropriately to a family member of your patient and failing to notify the Ministry of Transportation when you had reasonable grounds to suspect that your patient should not be driving.

We note your efforts to educate yourself about professional boundaries, your willingness to take responsibility for your actions and your strong support within your community.

It appears from the many letters of support we received that this episode is an aberration in an otherwise exemplary life of service in the medical profession. We trust that the insights you have gained through this process will help you resume that exemplary service after your suspension.

While we have decided to accept the joint submission on penalty, we acknowledge the unique and extraordinarily challenging circumstances, including threats to your and your family's safety, which were the background to your professional misconduct.