

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Rathe, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity of the sexual misconduct witness or any information that could disclose the identity of the sexual misconduct witness 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: Rathe, C.N. (Re)

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

IN THE MATTER OF a Hearing directed
by the Complaints Committee and the Executive Committee
of the College of Physicians and Surgeons of Ontario
pursuant to Sections 26(2) and 36(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. CHARLES NICHOLAS RATHE

PANEL MEMBERS:

**DR. W. KING
DR. B. TAA (PhD)
DR. R. SHEPPARD
G. DEVLIN**

Hearing Dates: **2009:** June 15 to 18, 2009
2010: July 5 to 8, July 19, September 1, October 1,
October 8 (did not proceed) and October 25
Decision Date: **May 31, 2011**
Release of Written Reasons: **May 31, 2011**

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee of the College of Physicians and Surgeons of Ontario (the “Committee”) heard this matter at Toronto on June 15 to 18, 2009 and July 5 to 8, July 19, September 1, October 1, October 8 (did not proceed) and October 25, 2010. At the conclusion of the hearing, the Committee reserved its decision on finding.

ALLEGATIONS

The Notice of Hearing (Schedules A, C, D, E and F) alleged that Dr. Charles Nicholas Rathe committed an act of professional misconduct:

1. under paragraph 1(1)2 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O/Reg. 856/93”), in that he failed to maintain the standard of practice of the profession; and
2. under paragraph 1(1)33 of O/Reg. 856/93, 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.
3. under paragraph 1(1)34 of O. Reg. 856/93, in that he engaged in conduct unbecoming a physician;
4. under clause 51(1)(b.1) of the Health Professions Procedural Code, which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18 (the “Code”) in that he sexually abused a patient; and
5. under clause 51(1)(a) of the Code, in that he has been found guilty of an offence that is relevant to his suitability to practise.

RESPONSE TO ALLEGATIONS

Dr. Rathe denied the allegations.

FACTS AND EVIDENCE

Overview of the Issues

Dr. Charles Nicholas Rathe is a family physician who at all the relevant times practised in Belle River, Ontario, a small community in the Windsor area. The College alleges that Dr. Rathe committed multiple acts of professional misconduct over a period of time between 2004 and 2006. The allegations pertain to a number of separate and discrete incidents and other concerns, some involving his patients, others not. The incidents in question, and the nature of the concerns arising from these incidents, are separate and largely distinct from one another. They will be addressed separately in this Decision, in the order in which they are set out in the Appendix to the Notice of Hearing (Exhibit 1).

The Committee heard the testimony of a number of witnesses pertaining to the various allegations against Dr. Rathe, and many documents were entered as Exhibits. A complete list of the Exhibits to this hearing is attached at Appendix A.

1. Notice of Hearing Schedule A

The Prescription of Ionamin to Patient 1

The College alleges that Dr. Rathe failed to meet the standard of practice of the profession with regard to his prescribing of the drug Ionamin to Patient 1, and that he thereby committed professional misconduct.

Summary of Evidence

The Committee heard the testimony of Dr. X, who was called by the College as an expert in family medicine. Dr. X conducted a review of Dr. Rathe's treatment of Patient 1 at the request of the College. The Committee heard that Dr. X has practised in family medicine since 1984, and that she has previously acted as a peer assessor and medical inspector for the College. A copy of her curriculum vitae was entered into evidence (Exhibit 9). Dr. X's qualifications as an expert in family medicine were not challenged by Dr. Rathe. The Committee accepted her as an expert.

The Committee heard that, in forming her opinion, Dr. X had reviewed Patient 1's letter of complaint to the College. She had also reviewed the patient's medical chart, and pharmacy records pertaining to the medications prescribed to her by Dr. Rathe. Copies of the chart and pharmacy records were entered into evidence (contained in the Joint Book of Documents, Exhibit 2). With respect to the drug Ionamin, she had reviewed the product monograph in the Compendium of Pharmaceuticals and Specialties (CPS) 2005 pertaining to this medication (Exhibit 10), in order to refresh her memory. During cross-examination, Dr. X admitted that, in her own practice, she had very rarely prescribed Ionamin, and thus had little personal experience with the drug.

It was Dr. X's opinion that, for the most part, Dr. Rathe's treatment of Patient 1 had met the standard of care. She found that Patient 1 presented a complex clinical picture, with a number of co-morbid medical and emotional issues. She was on multiple medications. It was Dr. X's view that most of the patient's concerns, as expressed in her letter of complaint to the College, did not reflect substandard care on the part of Dr. Rathe.

It was also Dr. X's opinion, however, that, with regard to Dr. Rathe's prescription of Ionamin to this patient, the standard of care was not met. Her concerns were that the documentation in the patient's chart was inadequate with respect to a number of issues pertaining to the use of Ionamin that, in her opinion, should have been thoroughly documented. These included initial and ongoing record of body mass index (BMI),

baseline cardiovascular assessment, ongoing record of vital signs, a record of discussions with the patient regarding the risks and benefits of this particular medication, and a recorded rationale for continued treatment with Ionamin. Dr. X also expressed concern that Ionamin had been prescribed to Patient 1 for longer than three months, which exceeds the CPS guidelines, and which could potentially expose the patient to an increased risk of serious side effects. Dr. X's conclusion was that Dr. Rathe failed to meet the standard of care with respect to the prescription of Ionamin to Patient 1.

Dr. Rathe called no evidence in his defence with respect to this allegation.

Findings

The Committee finds that this allegation has been proven to the requisite standard of proof.

The standard of care is what is reasonably expected of the competent practitioner in the member's field of practice. It is ordinarily established by way of expert evidence. The onus is of course on the College to prove, on a balance of probabilities, that the standard of care was not met. Proof is required by means of clear, cogent and convincing evidence.

The Committee finds that the evidence of the College's expert, Dr. X, is credible and reliable. She was clearly knowledgeable and experienced in family medicine. Although she had little personal experience with the use of Ionamin, she did have experience with patients who presented with issues related to obesity, and with weight management strategies. The Committee concluded that Dr. X's lack of personal experience with Ionamin did not seriously undermine her qualifications as an expert in family medicine. Moreover, Dr. X's qualifications as an expert were not challenged by Dr. Rathe.

The Committee notes that Dr. Rathe's overall management and treatment of this patient, save and except for his prescription of Ionamin, was felt to meet the standard of care. There was no evidence of actual harm to the patient.

The Committee was, however, presented with uncontradicted expert evidence that, on this one relatively narrow issue, Dr. Rathe's care was substandard. The Committee accepted Dr. X's conclusion that the documentation in the patient chart was inadequate in relation to what would be expected for a family practitioner prescribing Ionamin for weight loss, and that the extended use of Ionamin beyond three months, without a documented rationale to support this, did expose the patient to potential harm and failed to meet the standard of care.

The Committee finds that Dr. Rathe failed to meet the standard of care with respect to his prescription of Ionamin to Patient 1, and that this constitutes professional misconduct.

2. Notice of Hearing Schedule C

Interference with an investigation by the Ontario College of Pharmacists

The College alleges that Dr. Rathe engaged in disgraceful, dishonourable or unprofessional conduct by interfering or failing to cooperate with an investigation conducted by the Ontario College of Pharmacists on May 27, 2005. Specifically, the College alleges that Dr. Rathe removed physician medication samples from a pharmacy in Belle River, and refused to return them when requested to do so.

Summary of Evidence

The Committee heard the evidence of Mr. Z, an investigator with the Ontario College of Pharmacists, and of Mr. Y, a pharmacist in Windsor who was working, on a locum basis, at the Belle River pharmacy at the time of the incident in question. Several exhibits were entered into evidence, including diagrams of the layout of the pharmacy and letters pertaining to the investigation of the College of Physicians and Surgeons of Ontario (CPSO), which eventually resulted in the allegations against Dr. Rathe (Exhibits 5, 6, 7, and 8).

Mr. Z testified that he attended the Belle River pharmacy on May 27, 2005, in order to conduct an investigation on behalf of the Ontario College of Pharmacists. The investigation was into improper inventory practices at the pharmacy, including the unauthorized use by the pharmacy of physician samples. The Committee heard that Dr. Rathe's medical clinic is located adjacent to the pharmacy, in the same building, and that there is ready access between the two facilities.

Mr. Z, in his evidence, stated that in conducting his investigation he located some physician samples of medication amongst the inventory, and set them aside. He stated that he was interrupted for about 15 minutes while he took a telephone call and, when he returned, the samples were gone. He informed Mr. Y, the pharmacist on duty, and stated to Mr. Y that the samples should be returned. Mr. Z testified that Mr. Y then left the pharmacy and entered the medical clinic, where Dr. Rathe was, but returned shortly without the samples.

Mr. Z acknowledged that he had no direct knowledge with respect to what had happened to the samples. He didn't see Dr. Rathe remove them from the pharmacy, nor did he see anyone else remove them. He didn't approach Dr. Rathe directly to enquire where the samples had gone. Nor did Mr. Z take subsequent steps to obtain a search warrant, or to obtain the tapes from the pharmacy video surveillance system, in order to pursue further the whereabouts of the missing samples. Mr. Z indicated that, under the circumstances, he didn't feel that it was necessary to take these further steps.

Mr. Y, the pharmacist who was working at the Belle River pharmacy on the day in question, also gave evidence before the Committee. After the commencement of his evidence, the College submitted that Mr. Y's testimony at the hearing was in contradiction to his earlier statements to the College investigator, Mr. V, as reflected in a letter which Mr. Y had written to Mr. V dated March 6, 2007 (Exhibit 8). The College, therefore, requested that Mr. Y be declared an adverse witness. A voir dire was conducted with respect to this issue. The Committee heard the evidence of Mr. Y and submissions of both parties. The relevant case law provided by counsel was reviewed. The Committee

decided that there were material contradictions between Mr. Y's testimony at the hearing and his earlier statements to the College, and as a result declared him an adverse witness.

Mr. Y's evidence, essentially, was that he had no direct knowledge with respect to who had removed the medication samples from the pharmacy. Although he had earlier stated to the College investigator that he had approached Dr. Rathe to enquire about the samples after being alerted of their disappearance by Mr. Z, and that Dr. Rathe had refused to return them, in the end (at the hearing) Mr. Y informed the Committee that this was not the case. He made vague reference to perhaps having spoken to someone else in Dr. Rathe's office about the samples, but not to Dr. Rathe directly. Mr. Y stated that his memory with respect to the incident was poor. He explained his earlier contradictory statement to the College investigator as having been given on account of what he perceived to be an overly aggressive investigation, and perceived pressure to tell the investigator "what he wanted to hear".

Dr. Rathe called no evidence in his defence with respect to this allegation.

Findings

The Committee concluded that this allegation has not been proven by the College to the requisite standard of proof described above.

The Committee finds that there are obvious difficulties with respect to the evidence adduced by the College in support of this allegation. Mr. Z, the investigator with the College of Pharmacists of Ontario, was clear, consistent, and credible in his evidence. He had, however, no direct knowledge with respect to the events in question. His testimony was not supported by physical evidence which might have been available, such as the surveillance videotapes which were not obtained.

The evidence of Mr. Y, the pharmacist on duty, in the end was unconvincing. He gave a number of different accounts with respect to the missing samples and his efforts to locate

them, in his earlier statements to the College and in his testimony before the Committee. These inconsistencies in Mr. Y's evidence undermined his credibility. He stated that he could not now recall much of what had occurred. Essentially, Mr. Y was found to have no reliable knowledge with respect to the allegation that Dr. Rathe had personally interfered with the Ontario College of Pharmacists' investigation by removing medication samples from the pharmacy, and failing to return them when requested to do so.

The evidence was neither clear nor convincing and therefore the Committee concluded that this allegation was not proven to the requisite standard.

3. Notice of Hearing Schedule C

Conduct unbecoming a physician at a school concert

The College alleges that Dr. Rathe engaged in rude, inappropriate, hostile and/or aggressive behaviour at a school concert on February 2, 2006, and that this behaviour constitutes conduct unbecoming a physician.

Summary of Evidence

The College called three witnesses who were in attendance at a school concert for students, and their families, at a Windsor school on February 2, 2006. The witnesses called were Ms E, a parent of a student at the school; Ms F, a teacher at the school; and Ms G, employed as a teacher's assistant at the school at the time. The College heard that Dr. Rathe's child was a student at the school, and that Dr. Rathe was in attendance at the concert.

All three witnesses testified that, after the concert had ended and as people were moving towards the back of the room, they observed a loud verbal altercation between Dr. Rathe and an individual identified as Ms H, who was also a parent of a student at the school. All three stated in their evidence that Dr. Rathe was angry, that his voice was loud, and that

his language was profane. Ms H was also observed to be angry. None of the witnesses could say how the altercation had started. They had only become aware of it after the disturbance had escalated with loud voices and profanity. No physical violence was observed.

Dr. Rathe, in his defence to this allegation, called his wife, Ms J. Ms J testified with respect to a history of conflict between her family and Ms H. The Committee heard that there was a history of acrimony between Ms H and the Rathe family dating to September 2004, when the local Children's Aid Society had apparently investigated the Rathe's in response to allegations of child abuse and neglect which had been made by Ms H. The Committee heard that the Rathes in due course had initiated legal proceedings against Ms H, alleging abuse of process and defamation of character. These proceedings were eventually settled out of Court. Copies of some documentation related to this issue were entered as evidence (Exhibits 25, 26, & 27). Ms J further stated that she had been present at the school concert on February 2, 2006, and that she had witnessed "a heated argument" between Dr. Rathe and Ms H.

Findings

The Committee finds that this allegation has been proven to the requisite standard.

The panel found no reason to doubt the credibility of any of the witnesses who gave evidence with respect to this allegation. The three witnesses called by the College, and Ms J who was called by the defence, all were straightforward, consistent, and believable in their testimony. There was external consistency between the various accounts of the altercation in question. Although the recollections of the various witnesses were not identical, neither would this have been expected, given the passage of time and the known frailties of eye witness evidence. With respect to the central issue, that is, the nature of Dr. Rathe's conduct at the material time, there was a high degree of corroboration between the accounts of the witnesses.

The Committee finds the evidence clear, cogent and convincing. The Committee finds that Dr. Rathe engaged in a loud, verbally aggressive, and egregiously profane outburst, while in a state of rage, at a school concert. This was a public event at which children and their families were in attendance. Although the Committee accepts the defence's evidence that context and provocation might assist in understanding the reasons for Dr. Rathe's behaviour, it is the behaviour itself which is at issue. Regardless of what might have provoked his outburst, Dr. Rathe had a responsibility to control his behaviour and to manage his anger in a fashion which did not subject the public to verbal abuse. The Committee finds that his behaviour was conduct unbecoming a physician.

4. Notice of Hearing Schedule D

Disgraceful, dishonourable or unprofessional conduct during an encounter with a patient and her family

The College alleges that, on November 26, 2006, Dr. Rathe behaved in a rude and objectionable manner towards Mr. S, who was the son of Dr. Rathe's patient, Patient 2, during the course of an office visit by Patient 2 which was also attended by her son.

Summary of Evidence

The Committee heard the evidence of Mr. S. He testified that he had attended Dr. Rathe's office on November 26, 2006, along with his mother, Patient 2, who was 64 years of age at that time. The Committee heard that Patient 2 had been a patient of Dr. Rathe's since approximately 2001.

Mr. S stated that he was concerned about a large number of tests that Dr. Rathe had apparently ordered on his mother. He testified that he asked Dr. Rathe about the tests. His evidence was that Dr. Rathe, in response, disparaged and insulted him. He stated that Dr. Rathe accused him of whining like a baby, challenged his "tough guy attitude", and taunted him in an objectionable and confrontational fashion. This caused Mr. S and his

mother to walk out of the examination room. Patient 2, thereafter, did not continue as Dr. Rathe's patient.

Mr. S acknowledged that his mother had, until the date in question, been entirely satisfied with the care provided by Dr. Rathe while she had been his patient. A copy of Patient 2's medical chart was entered into evidence (contained in the Joint Book of Documents, Exhibit 2), which confirms that she had been seen many times over the years, with no previous unpleasant encounters until the one occasion when her son had attended her appointment with her as described. The medical chart further records that, on November 26, 2006, Mr. S is described as rude and abusive towards Dr. Rathe. The chart states that Mr. S threatened Dr. Rathe. In his evidence before the Committee, Mr. S denied that this had been the case.

Dr. Rathe called no evidence in his defence with respect to this allegation.

Findings

The Committee finds that this allegation has been proven to the requisite standard.

The Committee found Mr. S to be a credible witness. His testimony was straightforward and consistent. Certain elements of his account were contradicted by notations in the patient chart. The Committee, however, accorded less weight to the written record that had been produced by Dr. Rathe, as opposed to the testimony of Mr. S, which the Committee accepted as credible. The Committee did not hear directly from Dr. Rathe with respect to his version of this encounter.

The Committee notes that the issue here is not the quality of the medical care which Dr. Rathe provided to his patient. The patient was in no way harmed or exposed to potential harm. Physicians, however, have an obligation to conduct themselves in a professional manner at all times towards patients and their families. Even if Dr. Rathe had felt that he was being inappropriately challenged or provoked by Mr. S, he is held to a higher

standard as a member of the profession. Rude and objectionable behaviour by the physician cannot be condoned.

The Committee finds that Dr. Rathe did engage in dishonourable and unprofessional conduct in relation to Mr. S on November 26, 2006, and that he has thereby committed professional misconduct.

5. Notice of Hearing Schedule E

Falsely representing that his patient was employed as his office manager and sexual abuse of a patient

The College alleges that Dr. Rathe engaged in disgraceful, dishonourable and unprofessional conduct by falsely representing that Patient 3 was employed as his office manager; and, that he engaged in a sexual relationship, including sexual intercourse, with Patient 3 while she was his patient, constituting sexual abuse of a patient.

Summary of Evidence

In support of these allegations the College called several witnesses and entered a number of documents into evidence. A summary of the salient evidence pertaining to these two separate but related allegations is as follows:

A. Falsely representing that Patient 3 was employed as Dr. Rathe's office manager

The Committee was provided with a copy of a handwritten note, authored by Dr. Rathe, stating that Patient 3 is employed as his office manager and is paid \$350 per week (Contained in the Book of Documents, Exhibit 12). The Committee heard the evidence of Patient 3 with respect to this allegation. She stated that Dr. Rathe had provided her with the note in order to assist her in obtaining a car loan. She testified that Dr. Rathe had attended the Windsor Hyundai car dealership with her, in January 2006, and had co-

signed the car loan on her behalf. Patient 3 stated that, in fact, she neither worked as Dr. Rathe's office manager nor was she paid \$350 per week. She did acknowledge that Dr. Rathe had paid her \$800 by cheque, dated April 28, 2006, and this cheque was entered into evidence (Exhibit 16). Although the memo line on the cheque states "CPSO files, payroll training, office management, 64 hours at \$12.50 per hour", it was Patient 3's evidence that this money, in fact, was to help her with her school expenses in the context of the close personal relationship that existed between her and Dr. Rathe at that time. She said that she thought that the memo line had been completed later, after she had cashed the cheque.

The Committee also heard the evidence of two employees of Dr. Rathe's clinic in Belle River, Ms P and Ms R. Both Ms P and Ms R were nurse practitioners at the clinic. Ms P had worked there from October 2003 to December 2005 part-time; Ms R worked full-time from June 2003 to October 2006. Ms P stated that, during her time at Dr. Rathe's clinic, she didn't know Patient 3. Ms R stated that she was aware that Patient 3 was a patient of Dr. Rathe's, and that she had met her on one occasion. Ms R stated that, to her knowledge, Patient 3 was never employed as office manager at Dr. Rathe's clinic.

Dr. Rathe, in his defence, called his wife, Ms J. Ms J testified that she had been married to Dr. Rathe since 2003. The couple have two children, both boys, born in 1997 and 2001. Ms J has degrees from the University of Toronto and from the University of Detroit. She has a successful professional career, and had worked in financial services for a large company from 2004 until September 2009. Ms J stated that she now works as manager of marketing portfolios for that same company.

Ms J testified that she had assisted in the management of Dr. Rathe's office activities for several years, including the payroll and other paperwork. She stated that she was very busy in her own career and that she could have used some help with the office; the paperwork was piling up. She stated that she was aware that Patient 3 was a patient of Dr. Rathe's. She testified that she first met Patient 3 when Patient 3 approached her asking for a job in Dr. Rathe's office. Ms J testified that she gave Patient 3 some assignments,

documents and other material that she could organize, but that it didn't work out. Patient 3 attempted to do the payroll but couldn't do it. Her efforts to organize the paperwork amounted to less than ten percent of what she was expected to do. Ms J testified that Patient 3 made many phone calls to her looking for direction with respect to the organization of paperwork.

Ms J stated her understanding that eventually Patient 3 had been fired from Dr. Rathe's practice for selling her medication. Subsequently, she stated, she contacted Patient 3 in order to ask her to return the documents from Dr. Rathe's office that she still had in her possession. Eventually, she arranged a meeting with Patient 3 in a restaurant in Tecumseh. The purpose of the meeting was to try to get Patient 3 to return the documents. At the meeting, however, Ms J testified that Patient 3 informed her that she'd never done any work for Dr. Rathe and that, furthermore, she'd been having an affair with Dr. Rathe and was angry that she had been terminated as his patient. Patient 3 asked for money, \$250,000, and threatened to go to the newspapers and the College if she wasn't paid.

The Committee was provided with no further evidence or documentation on this issue. No documentation was produced with respect to Patient 3's supposed role as office manager, nor anything to indicate that she had in fact been paid \$350 per week at any time.

Findings

The Committee finds that this allegation has been proven to the requisite standard.

The evidence with respect to this allegation is conflicting. Ms J testified that Patient 3 did do some work for Dr. Rathe, albeit this was limited and of poor quality, (less than ten percent, by Ms J's estimation) of what was expected of her. The work appears to have consisted of nothing more than organizing paperwork into a couple of binders. Patient 3, in her evidence, indicates that she never did any work whatsoever for Dr. Rathe. Two

nurse practitioners employed at Dr. Rathe's clinic were unaware that Patient 3 worked as office manager; Ms R, full-time nurse practitioner during the timeframe in question, would have known if Patient 3 had been working there in that capacity. No employment records or supporting documentation with respect to Patient 3's supposed role as office manager were produced, apart from one cheque in the amount of \$800, the purpose of which is in dispute. Patient 3 claimed that the money was a gift to her, in the context of her close personal relationship with Dr. Rathe at that time, to help her pay for her school expenses. The memo line on the cheque suggests that the payment was for the limited work that Patient 3 had done for Dr. Rathe.

The Committee finds that there is simply no evidence that Patient 3 ever worked as Dr. Rathe's office manager. Whatever work she may have done for Dr. Rathe would not have been consistent with an office manager's role. There is no evidence whatsoever that she was ever paid \$350 per week. The Committee did not hear from Dr. Rathe directly, and therefore has no explanation from him with respect to the nature of his business relationship with Patient 3. The Committee finds that his statement that Patient 3 was employed as his office manager is false.

The Committee also finds that, in making this false statement, Dr. Rathe has engaged in disgraceful, dishonourable and unprofessional conduct. Physicians have an obligation for honesty in their representations on behalf of their patients; maintenance of public confidence in the profession demands it.

B. Engaging in a sexual relationship with Patient 3, including sexual intercourse, while she was his patient, thus constituting sexual abuse of a patient

The Committee heard extensive evidence with respect to this allegation. The College called the complainant, Patient 3; Ms R, nurse practitioner in Dr. Rathe's office; Mr. V, investigator with the College; and Detective L of the Windsor Essex OPP. Several exhibits were entered into evidence, including OHIP records for Patient 3; pharmacy records for Patient 3; a copy of Patient 3's medical chart from the office of another of her physicians, Dr. M; telephone records of phone calls between Patient 3 and Dr. Rathe and

between Patient 3 and a cell phone registered to Dr. Rathe's wife, Ms J; and records of some voicemail messages from Dr. Rathe to Patient 3, along with transcriptions of these messages. Copies of documents pertaining to the purchase of an automobile from the Windsor Hyundai dealership were also entered into evidence. Finally, a DVD recording of Dr. Rathe's statement to Detective L was entered into evidence. (These various items are Exhibits 12 through 24.)

The Evidence of Patient 3

Patient 3 is a 25-year-old single mother of two daughters. She lives in a town in Ontario, a small community near Windsor. Patient 3's evidence was that she became Dr. Rathe's patient in 2005. OHIP records confirm that her first visit to Dr. Rathe's office was in June 2005 (contained in the Book of Documents, Exhibit 12). Patient 3 stated that she saw Dr. Rathe initially for problems with back pain. She also expected that he would be the family physician for herself and her young daughter. Patient 3 stated that she continued to be Dr. Rathe's patient until approximately July 2006. Patient 3 stated that Dr. Rathe prescribed opiate analgesic medications for her pain, including Oxycocet and Oxycontin, and that she became addicted to these medications.

In her evidence, Patient 3 stated that a sexual relationship commenced at some point between her and Dr. Rathe. Her testimony with respect to when this had started was unclear; she suggested that it was sometime in the summer or fall of 2005, although she stated that she couldn't specifically recall. Nor did Patient 3, in her evidence, provide any elaboration or any details as to how or why sexual activity had started between Dr. Rathe and herself. She stated that, eventually, "we were a couple". Patient 3 said that she met Dr. Rathe regularly and frequently, up to three times a week or more, for an extended period of time, up to the termination of their relationship which occurred in June – July 2006. She stated that sexual activity, including sexual intercourse, would often occur on these occasions. Patient 3 stated that she usually had sex with Dr. Rathe in a hotel in Windsor, during his lunch break, when he would drive from Belle River to Windsor to

meet her. On other occasions she would go to his house, and sexual activity would take place there as well.

Patient 3 testified that, on January 12 and 13, 2006, Dr. Rathe attended the Windsor Hyundai dealership with her and co-signed an application for a car loan. She had previously been unable to get a car loan because she wasn't working. She stated that Dr. Rathe gave her a written note, indicating that she was employed by him and paid \$350 per week, although she informed the Committee that, in fact, she was not employed by Dr. Rathe and not paid \$350 per week. This evidence has been referred to above. She stated that, subsequently, Dr. Rathe made the payments on the car.

Patient 3 stated that, in fact, she had never done any work for Dr. Rathe. She stated that she was not given any boxes of written material from Dr. Rathe's office for the purpose of organizing them. She stated that she did not work for Dr. Rathe as his office manager, nor was she being trained for that position; this, again, is referred to above.

Patient 3 testified that she ended her personal relationship with Dr. Rathe. She stated, "I left him", when he told her that he was going back to his wife, but that he would keep her "on the side". She said that Dr. Rathe had previously told her that he was separated from his wife. Patient 3's testimony with respect to the termination of her doctor-patient relationship with Dr. Rathe was unclear. She acknowledged a vague recollection of receiving a letter from Dr. Rathe informing her that she could no longer be his patient, but suggested that this was received a considerable period of time after she had stopped seeing him. In her words "that was much later".

Dr. Rathe appears to have stopped prescribing medication for Patient 3 in June 2006, based on pharmacy records (contained in the Book of Documents, Exhibit 12). The Committee heard that Patient 3's medical chart from Dr. Rathe's office is missing. Patient 3, in her testimony, expressed no knowledge of the missing chart. She stated that she did not take her chart from Dr. Rathe's office.

In her evidence, Patient 3 essentially admitted that, following the breakup of her relationship with Dr. Rathe and after he had ceased prescribing medication for her, she continued to try to obtain money and/or drugs from Dr. Rathe. Basically, she acknowledged having tried to blackmail him. She said that she was addicted to opiates and desperate to obtain these drugs. She wanted an ongoing supply of drugs from Dr. Rathe, or money which would help her to buy drugs, or both. Without a regular supply of drugs she experienced withdrawal symptoms and multiple relapses into opiate addiction, followed by multiple episodes of withdrawal when her supply ran out. Patient 3 admitted that she threatened to complain to the College and to inform Dr. Rathe's wife about their affair if Dr. Rathe didn't give into her demands. She wrote a number of letters and notes to Dr. Rathe in her attempts to get money and/or drugs from him, and these are referred to in this Decision as "the blackmail notes". She stated that these notes were all handwritten by her. She forwarded them to Dr. Rathe and left at least one on the windshield of his car. Patient 3 complained to the College in October 2006. Even after her initial complaint, she continued to try to blackmail Dr. Rathe into giving her drugs and/or money.

Patient 3 testified that Dr. Rathe had previously offered her money in exchange for her silence. She referred to different figures, up to \$500,000. She stated that Dr. Rathe had told her that a lawsuit would soon be settled in his favour, and that he would pay her out of the proceeds.

Patient 3 expressed no knowledge of any typed blackmail notes, copies of which were entered into evidence. She stated that she was not the author of these notes. She expressed no knowledge, also, of how her handwritten blackmail notes had come to be cut up into fragments. Copies of the note fragments were entered into evidence. Patient 3 stated that she had not cut up her notes herself. She stated that much of what she had written in the original notes (Exhibits 14, 15, 17, 18, 19, and 20) was missing.

Patient 3 testified that, throughout the events in question, she was also a patient of other physicians. She was a regular patient at Dr. M's clinic in Belle River, and a copy of her medical chart at this clinic was provided to the Committee (contained in the Book of

Documents, Exhibit 12). Patient 3 acknowledged that she at no time disclosed, to Dr. M or any other physician, that she was addicted to opiates or that she was having a sexual relationship with Dr. Rathe. She acknowledged, also, that she had on occasion been untruthful with her other physicians. She admitted, for example, that she had lied to Dr. M about suffering a miscarriage, as a reason for her apparent state of depression at that time, so that she could get a physician's note excusing her from work.

The Evidence of Ms R

Ms R was a nurse practitioner at Dr. Rathe's office while Patient 3 was a patient there. Her testimony bears both on the question of whether Patient 3 was employed as the office manager of the clinic, referred to above, and also on the issue of the relationship between Patient 3 and Dr. Rathe. With respect to the latter issue, it was Ms R's evidence that, sometime in June 2006, she became aware that Dr. Rathe had uncharacteristically made a late entry in Patient 3's chart. She approached Dr. Rathe and asked him about it. She recalled that Dr. Rathe, in response, became quiet and upset, apparently despondent, expressing fears for the future of his marriage and his career. He stated to Ms R "I might as well cash my chips in", or words to that effect. Ms R was concerned that he might be suicidal, but she satisfied herself that he wasn't. Ms R testified that she was aware of Dr. Rathe's struggles with addiction, and his personal "demons", in her word. She was concerned about him. She recalled Dr. Rathe having told her that there was nothing untoward going on between himself and Patient 3.

Post-offence Conduct

The College sought to introduce evidence of Dr. Rathe's "post-offence conduct", that is, his behaviour after the initial complaint was received by the College. It was suggested by the College that Dr. Rathe's conduct indicated consciousness of guilt, and was therefore relevant for the Committee to consider. There were two elements which the College proposed to introduce. First, the College sought to introduce evidence pertaining to the missing medical chart of Patient 3 and difficulties encountered by the College

investigator in ascertaining the whereabouts of the chart. Second, the College proposed calling Detective L of the Essex County OPP, to give evidence regarding the complaint made by Dr. Rathe to the police, pertaining to Patient 3.

The Committee heard argument regarding the admissibility of this evidence, and reviewed the case law which was provided by counsel. Essentially the admissibility of evidence of this nature depends on its potential relevance, whether it would be subject to exclusionary rules against hearsay or the introduction of evidence of bad character, and whether its potential probative value would outweigh its prejudicial effect.

The Committee decided that the evidence of Dr. Rathe's complaint to the police about Patient 3 should be admitted. Although this evidence was obviously of a circumstantial nature, and not directly related to the allegations against Dr. Rathe, the Committee determined that it was relevant with respect to the nature of Dr. Rathe's relationship with Patient 3 while she was his patient, and during the timeframe when the alleged misconduct by Dr. Rathe was said to have occurred. The Committee felt that Dr. Rathe's post-offence conduct in making a complaint to the police might shed light on his frame of mind and the motivation for his actions. The Committee accepted that this evidence was not being introduced as evidence of bad character, and that its potential utility was for a different reason. The Committee viewed its prejudicial effect as outweighed by its potential probative value.

In contrast, the Committee decided that the proposed evidence pertaining to the College's difficulties in locating Patient 3's missing medical chart should not be admitted. The Committee felt that any probative value would be quite limited.

The Evidence of Detective L

The Committee heard the evidence of Detective L, of the Essex County OPP. Detective L's evidence pertained to a complaint of fraud and misrepresentation, which had been made by Dr. Rathe against Patient 3, in August 2007. The Committee heard that Dr.

Rathe had attended the Belle River OPP station at that time for the purpose of making this complaint. His interview with Detective L was cautioned and videotaped. After hearing the submissions of counsel regarding best evidence, the Committee decided that, rather than rely on the unaided memory of Detective L with respect to the contents of this interview, the Committee should be provided with the actual videotape. In due course this was produced to the Committee (Exhibit 24).

Dr. Rathe's interview with Detective L discloses the following. Dr. Rathe told the detective that Patient 3 was a former patient of his whom he had hired to do part-time work in his office, approximately eight hours per week, from the fall of 2005 until May-June of 2006. Dr. Rathe stated to Detective L that he had fired Patient 3 from his practice because he had learned that she was selling her medication. He stated that, in the fall of 2006, he had been contacted by the Toronto Dominion Bank because he was supposedly in default on a car loan. He informed Detective L that, at the time, he knew nothing about a car loan with TD Bank. He stated that he obtained the lease documents and stated his view that they were fraudulent. He told Detective L that he surmised that Patient 3 had stolen his wallet, along with his identification and his credit cards, from his office. He surmised that she had gone to the car dealership with a man who had impersonated him, and that she had obtained a fraudulent car lease in his name. Dr. Rathe had claimed to Detective L that he had been having lunch with a friend on the day the car lease was signed. Dr. Rathe further stated that Patient 3 had later complained to the College that Dr. Rathe had carried on a sexual relationship with her. He stated that he had not done so. Dr. Rathe told Detective L that Patient 3 had left him notes asking for money.

The Evidence of Mr. V

The College called Mr. V, an investigator with the College since 2002. Mr. V testified that he had investigated the complaint from Patient 3, which was received by the College in October 2006. During the course of his investigation he had interviewed Patient 3 on a number of occasions and received some materials from her, including documents pertaining to her purchase of a vehicle which Patient 3 claimed Dr. Rathe had co-signed

for her, cell phone records, and tape recordings of voicemail messages which had been left on her phone by Dr. Rathe and Ms J. Mr. V had also driven with Patient 3 to the area of Dr. Rathe's house, and the house had been identified by Patient 3. Mr. V had followed up on Patient 3's allegations regarding the car loan by eventually tracking down further documentation from the car dealership, which had by that time closed down, apparently bankrupt.

The Evidence of Ms J

The defence called Ms J.

Ms J's testimony pertained to three separate issues. She testified with respect to the allegation that Dr. Rathe had engaged in conduct unbecoming a physician at the school concert in February 2006; this issue was dealt with earlier in this Decision. Ms J testified also with respect to the allegation that Dr. Rathe had falsely represented that Patient 3 worked for him as his office manager and was paid \$350 per week; this evidence, also, has been dealt with earlier in this Decision. Finally, Ms J gave evidence with respect to the allegation that Dr. Rathe had been involved in a sexual relationship with Patient 3 and had thereby sexually abused his patient.

Some aspects of Ms J's evidence have already been covered, but for the sake of context are set out again briefly. Ms J testified that she was aware that Patient 3 was a patient of Dr. Rathe. She testified that Patient 3 had been engaged by her to do some limited work for Dr. Rathe, primarily organizing and filing paperwork. She testified that she gave Patient 3 some assignments in this regard, documents and other written material that she could help organize, but that it didn't work out. She testified that Patient 3 made many telephone calls to her, looking for direction with respect to her work activities.

Ms J testified that she was aware that Patient 3 had wanted help buying a car. She had discussed her request with Dr. Rathe, but no decision had been made. Ms J stated that, in the fall of 2006, she became aware that the Toronto Dominion Bank had stated to Dr.

Rathe that he was in default of a car loan. The relevant documentation was obtained from the bank. Ms J stated that, at the time, she couldn't understand why Dr. Rathe's name appeared on the loan application. She stated that she asked Dr. Rathe about it and he told her that he didn't remember having signed it. She stated that Dr. Rathe further told her, at some point, that he had relapsed into drug addiction, and that he had been using Demerol, around that time. Ms J stated that three handwriting experts had confirmed that the signature on the loan application was not that of Dr. Rathe. Ms J believed, at the time, that Dr. Rathe was the victim of fraud.

Ms J stated her understanding that eventually Patient 3 had been fired from Dr. Rathe's practice for selling her medication. She stated that, subsequently, she contacted Patient 3 in order to ask her to return the documents from Dr. Rathe's office that she still had in her possession. Eventually, a meeting was arranged and she met Patient 3 in a restaurant in Tecumseh. The purpose of the meeting, according to Ms J, was to try to get Patient 3 to return the documents. At the meeting, however, Ms J testified that Patient 3 informed her that she had never done any work for Dr. Rathe, but that she had been having an affair with him, and that she was angry that she had been terminated as his patient. Patient 3 asked for money, in the amount of \$250,000, and threatened to go to the newspapers and the College if she wasn't paid.

Ms J testified with respect to her knowledge of Dr. Rathe's drug addiction and his emotional problems, which she identified as "bipolar disorder". She acknowledged that trying to deal with his mood swings, his relapses into drug addiction and related problems had taken a toll on her. She acknowledged that she had contemplated a marital separation in the fall of 2006. She stated, however, that Patient 3's allegation that she had been having an affair with Dr. Rathe was not a factor in her considering a separation at that time. She stated that she did not consider Patient 3 to be a credible person.

Ms J, in her evidence, acknowledged that she worked long hours in her professional career. She commuted daily to her place of employment in Michigan, and she was away from home a lot. She sometimes worked on weekends. She acknowledged that she often

wouldn't know when Dr. Rathe had relapsed into drug use, although she would sometimes notice behavioural changes, and changes in his mood, which might have indicated a relapse. Ms J admitted "he doesn't tell me when he's using". She would sometimes learn about previous relapses in retrospect, although she wouldn't have been aware of these at the time. She stated that this was the case regarding Dr. Rathe's purported relapse in 2005 – 2006, which he apparently disclosed to her in late 2006 as a possible explanation for how he could have signed the car loan, and then had no recollection of having done so. She acknowledged that Dr. Rathe had lied to her in the past regarding his drug use.

Findings

The Committee finds that this allegation has been proven.

There is no dispute about the fact that Patient 3 was Dr. Rathe's patient between June 2005 and June/July 2006. This is established by the evidence of Patient 3, corroborated by the nurse practitioner who worked in Dr. Rathe's office at that time, and confirmed by Patient 3's OHIP records and pharmacy records of prescriptions written for her by Dr. Rathe. There is no evidence to the contrary.

The issue for the Committee to decide is whether Dr. Rathe had a sexual relationship with Patient 3 during the time that she was his patient, thereby constituting sexual abuse of a patient. The College relied on the evidence of the complainant, Patient 3, supported by the evidence of several other witnesses and documents which were entered into evidence, and on the evidence of Dr. Rathe's post-offence conduct which, it is suggested, indicates consciousness of guilt. The defence relied only on the evidence of Ms J.

Patient 3's credibility

The Committee finds that there are obvious difficulties with the credibility of Patient 3. In her testimony she tended to respond to questions in a brief and concrete fashion, without

much elaboration. She was often vague and imprecise with respect to historical details. She could not say, for example, exactly when the sexual relationship with Dr. Rathe had started. She admitted that her memory was poor and she sometimes appeared confused. Moreover, Patient 3 admitted dishonesty in the past, for example, when she lied to Dr. M in order to obtain a physician's note excusing her from work. She acknowledged a history of substance abuse, including addiction to opiates and past use of cocaine. She suggested that her recollections with respect to some of the specifics pertaining to her relationship with Dr. Rathe were impaired, because of a substance-induced "haze" she was in at the time. The content of some of her assertions appeared improbable, for example, her statement that she was planning to enter law school. Finally, of course, Patient 3 acknowledged that she had been attempting to blackmail Dr. Rathe for money and/or drugs, over an extensive period of time.

Patient 3's evidence was clearly contradicted, with respect to one issue, by the testimony of Ms J. Ms J stated that she had been involved in trying to train Patient 3 for office work pertaining to Dr. Rathe's practice, largely organizing and filing paperwork, and that she had met with her on one occasion, and spoken to her on the telephone many times, for this purpose. Ms J stated that Patient 3 had been given boxes of written material and had organized about ten percent of them, and that she had failed to return the remaining boxes when asked to do so. Ms J's testimony on this issue appeared, to the Committee, to be straightforward, consistent and credible. Patient 3, however, flatly denied that any of this had occurred. She stated that she had done no work for Dr. Rathe, that she had never been paid by him for work activities, that she had never been given boxes of written material, and that she had never met Ms J prior to the meeting in July 2006, which occurred after she had apparently been terminated as Dr. Rathe's patient. This discrepancy in the evidence of the two witnesses remains unresolved.

With respect to the central issue, however, whether a sexual relationship existed between Patient 3 and Dr. Rathe while she was his patient, Patient 3's evidence was consistent. Although she didn't provide a great deal of detail, the main elements of her story were maintained throughout, despite extensive cross-examination. Moreover, the Committee

found her story to be consistent with the large amount of circumstantial evidence also before the Committee. There is a commonsense logic to Patient 3's account which, reduced to its essentials, can be summarized as follows. Dr. Rathe prescribed opiates for Patient 3 to which she became addicted. Within a few months of becoming his patient she entered into a romantic relationship with him, which included regular sexual intercourse. Dr. Rathe told her at the time that he was separated from his wife. Eventually Dr. Rathe told her that he was going back to his wife, but offered to maintain a relationship with her "on the side". She objected to this arrangement and terminated the relationship with Dr. Rathe. Dr. Rathe then stopped prescribing opiates for Patient 3. Deprived of a major source of the drugs to which she was addicted, she experienced multiple episodes of withdrawal followed by relapse into opiate addiction. She knew that Dr. Rathe had financial resources. She knew that her sexual relationship with Dr. Rathe was prohibited, and that consequently she had leverage over him. She launched a scheme to blackmail Dr. Rathe for money and/or an ongoing supply of drugs, threatening to report the nature of their relationship to his wife, and to the College, if he didn't comply. Dr. Rathe refused to pay her and she followed through with her threat and did report it to the College, albeit continuing to try to blackmail him during the initial stages of the College investigation. Despite the difficulties with Patient 3's credibility, which have been described above, the Committee found nothing incredible about this account.

The Committee finds that Patient 3's acknowledgement of her poor memory for some of the specifics of her relationship with Dr. Rathe does not seriously detract from her credibility. This would be consistent with the passage of time and her admitted addiction to opiates at the material time. Furthermore, her admitted dishonesty with respect to some issues, including her attempts to blackmail Dr. Rathe and her having lied to another of her physicians, don't significantly discredit her evidence with respect to the central issue of her alleged sexual relationship with Dr. Rathe, in the view of the Committee. Her willingness to portray herself in a negative light, while consistently maintaining the crucial aspects of her testimony, was found by the Committee to be credible.

The defence submits that Patient 3's failure to report any of this to her other physicians damages her credibility. The Committee finds that this is not the case. Clearly, the nature of her relationship with Dr. Rathe was one of the last things she would have reported to her other physicians. Patient 3 was addicted to opiates. She knew that her sexual relationship with Dr. Rathe was prohibited. It is not sensible to suggest that she would have risked jeopardizing her supply of drugs, and her relationship with Dr. Rathe, by volunteering this information to others.

The Committee attached little weight to the content of the blackmail notes. These notes were of little assistance, apart from confirming the existence of the blackmail scheme, which was admitted by Patient 3. The handwritten notes had been cut into fragments, and any potential coherence that might have been contained in these notes was thereby lost. Although Patient 3 wrote in one note "I can be very believable", with the possible inference that she was anticipating making a false report to the College but doing so in a believable fashion, it is difficult to attach much weight to this phrase without a more complete context. As indicated above, the handwritten notes, as they were produced for the Committee, consisted of fragments. It was Patient 3's evidence that much of what she had written was missing. Although the defence submits that it was Patient 3 herself who cut the notes into fragments, and that she delivered them to Dr. Rathe in this state, her motivation for submitting incoherent blackmail notes would be difficult to understand. With respect to the typewritten notes, Patient 3 denied having written these. The authorship of these typewritten notes remains unknown. As such, the Committee was unable to attach any weight to their contents.

Dr. Rathe's failure to testify

The College invites the Committee to draw an adverse inference from Dr. Rathe's failure to testify in his own defence. The Committee heard argument on this issue and reviewed the case law provided by counsel. The Committee accepts that a prima facie case has been established by the College with respect to all the allegations against Dr. Rathe, that

is, the College has presented evidence that, if believed, would lead to a finding against Dr. Rathe.

After deliberating on this issue, however, the Committee is not prepared to draw an adverse inference from Dr. Rathe's failure to testify. The Committee recognizes that the onus is entirely on the College to prove the allegations on a balance of probabilities, and based on clear, cogent and convincing evidence. There is no onus on Dr. Rathe to prove anything. He is not obligated to present any evidence in his own defence, and he is not obligated to testify. The Committee finds it unnecessary to describe this as a "right to remain silent". It is simply a logical conclusion based on the nature of the process.

The Committee notes, however, that Dr. Rathe's decision not to testify leaves the Committee with no alternative explanation for the large amount of circumstantial evidence which is consistent with Patient 3's account. There is no competing narrative to stand in contrast to Patient 3's story. As stated above, the Committee finds that Patient 3's evidence, with respect to the central issue, was understandable, consistent, and logical. It was also uncontradicted by Dr. Rathe.

The Committee heard many suggestions from defence counsel during the course of the hearing with respect to alternative explanations for, and alternate inferences that might be drawn from, the evidence. These pertained to issues such as the content of the missing patient chart, the alleged presence of an "opiate contract" on the chart, the allegation that Patient 3 had been selling her medication, Dr. Rathe's reason for terminating Patient 3 from his practice, the reasons for the multiple telephone calls between Dr. Rathe and Patient 3, and the possibility of Dr. Rathe having relapsed into drug use in 2005 – 2006, amongst others. In the end, however, the Committee was presented with no evidence to support any of these suggestions. The Committee cannot speculate on evidence that was not heard. The Committee's decision is based on the evidence that is before it.

The Committee finds that Dr. Rathe's complaint to the police about Patient 3, the contents of which are confirmed in his videotaped interview with Detective L which was

entered into evidence, contains multiple falsehoods. In the Agreed Statement of Facts presented to the Committee (Exhibit 11), Dr. Rathe admits that he co-signed the loan application at the Windsor Hyundai dealership. Yet, some 18 months later, he initiates a complaint with the OPP pertaining to Patient 3, claiming fraud and misrepresentation, which he must have known was false. His false story to the police is detailed and elaborate. His actions in making this complaint were planned, deliberate, and premeditated. Despite the difficulties with Patient 3's credibility that have been referred to earlier, there is no evidence that she at any time engaged in such blatant falsehoods as did Dr. Rathe in his complaint to the police. The only reasonable inference with respect to Dr. Rathe's motivation in making these false allegations to the police is that he was attempting to discredit Patient 3's credibility in anticipation of future legal proceedings, before the College or elsewhere.

It is further submitted by defence counsel that Dr. Rathe is the innocent victim of blackmail by an unbalanced and devious former patient. This assertion is, of course, not supported by the testimony of the witnesses called by the College, notably Patient 3 herself, and the Committee finds, also, that it is not supported by the weight of the considerable circumstantial evidence also before the Committee.

The most crucial elements of this evidence, in the view of the Committee, are as follows. There were over 300 telephone calls between Dr. Rathe, or a telephone registered to Dr. Rathe's wife, and Patient 3 over an approximately four month period. While some of these might be accounted for by the work-related calls referred to in the evidence of Ms J, the sheer number of the calls, and their timing, requires further explanation. The content of the voicemail messages left by Dr. Rathe referring to meeting Patient 3 at "the usual place", his statement that his wife was monitoring their phone calls, and commenting on her option of taking "the gainful approach", are simply not understandable in the context of a doctor-patient relationship, but are consistent with Patient 3's evidence. Dr. Rathe's actions in co-signing the car loan for Patient 3, then denying that he had done so, and later attempting to lay a false complaint with the police alleging that he had been defrauded by Patient 3, are consistent with her evidence of a close personal relationship

and Dr. Rathe's subsequent attempts to discredit her in anticipation of future legal proceedings. Dr. Rathe's actions, and his inferred motivation to the extent that these things can be known through the evidence heard by the Committee, are simply not those of an innocent victim of a blackmail scheme. They are consistent with the evidence of Patient 3.

The Committee found that Ms J was a credible witness. Her evidence was clear, consistent, understandable and believable. She frankly admitted to her struggles coping with Dr. Rathe's drug addiction and to earlier problems in the marriage. As noted earlier, there was a significant discrepancy between Ms J's evidence and that of Patient 3, with respect to whether or not Patient 3 was at any time working for Dr. Rathe, and this discrepancy remains unresolved.

The Committee notes, however, that Ms J can only testify about events of which she has knowledge. She was often away, consumed by the demands of her career. She admitted that Dr. Rathe wasn't always honest with her, with respect to his drug use for example. Moreover, she remains committed to Dr. Rathe as his spouse, and therefore presumably is somewhat lacking in objectivity with respect to his conduct. It is reasonable to expect that she would tend to believe his explanations over those of one of his patients, particularly a patient who, according to her, had proven to be an unreliable employee and who made, to her, incredible accusations.

The onus is, of course, on the College to prove this allegation on a balance of probabilities, based on clear, cogent and convincing evidence. The Committee considered the evidence in its entirety, and the thorough submissions of counsel. The Committee finds it more likely than not on the basis of the clear and cogent evidence that it accepts, as set out above, that Dr. Rathe did engage in a sexual relationship, including sexual intercourse, with Patient 3 while she was his patient. Accordingly, the Committee finds the Dr. Rathe has committed professional misconduct by sexually abusing his patient.

6. Notice of Hearing Schedule F

Conviction for an offence relevant to Dr. Rathe's suitability to practice medicine, and professional misconduct in relation to the incident which resulted in the conviction

The College alleges that Dr. Rathe's behaviour during the course of what is described as an incident of "road rage" on December 4, 2004, which culminated in him committing an assault on a member of the public for which he was criminally charged and subsequently convicted, is disgraceful, dishonourable, or unprofessional conduct, and conduct unbecoming a physician. The College further alleges that this is a conviction for an offence relevant to Dr. Rathe's suitability to practise medicine.

Summary of Evidence

The facts with respect to this allegation are not in dispute. The Committee received in evidence a copy of the Reasons for Judgment of Madam Justice M. Rawlins who, following a contested trial, convicted Dr. Rathe of one count of Assault contrary to Section 266 of the *Criminal Code*, on December 18, 2007 (contained in the Joint Book of Documents, Exhibit 2). The incident in question has been characterized as one of "road rage". Madam Justice Rawlins found that Dr. Rathe had punched Ms N, in the face during the course of a confrontation, which had originated between Dr. Rathe and the victim's mother by the side of the road. Dr. Rathe had become enraged at the two women because they had allegedly cut him off in traffic. He had been charged with two counts of Assault and was convicted of one. Dr. Rathe was sentenced to 12 months probation for this conviction. A copy of his Probation Order was entered into evidence.

Dr. Rathe called no evidence in his defence with respect to these allegations. It was submitted by defence counsel that the assault conviction had been appealed, but the Committee was provided with no evidence in this regard.

Findings

The Committee finds that the allegations has been proven to the requisite standard.

The facts are not in dispute; they were established in Provincial Court. Dr. Rathe committed a criminal assault on a female victim by punching her in the face while enraged. This occurred outside any clinical or professional context. There is no evidence that the victim knew that Dr. Rathe was a physician at the time of the incident.

The Committee finds that this is disgraceful, dishonourable and unprofessional conduct, and conduct unbecoming a physician. Regardless of context or provocation, assault is never an acceptable response to conflict. The public has a right to expect that physicians will not resort to violent criminal behaviour to resolve disagreements. Maintenance of public confidence in the profession demands that conduct of this nature be denounced. The fact that the victim, at the time, would not have known that Dr. Rathe was a physician is of no consequence; the matter eventually was heard in open Court, and became part of the public record. It could well have been reported in the media. It thus became public knowledge, accessible to Dr. Rathe's patients, their families, and the community at large, that Dr. Rathe had behaved in this fashion.

While the Committee accepts that there might be some criminal offences which are not relevant to a member's suitability to practise medicine, depending on case-specific facts and circumstances, the Committee finds that this is not one of those cases. The Committee notes an earlier Decision of the Discipline Committee in the *College of Physicians and Surgeons of Ontario and Freeman* (2008) where a conviction of common assault in relation to a traffic incident resulted in the member admitting to an allegation of conduct unbecoming a physician (the College withdrew the allegation of "found guilty of an offence relevant to suitability to practice"). The Committee stated that the public invests a great deal of trust in physicians and behaviour outside the clinical context must be worthy of that trust. Assault is never acceptable. As stated above, the public must have confidence that members of the profession will not resort to criminally assaultive

behaviour under any circumstances. The Committee finds that Dr. Rathe's conviction for Assault is relevant to his suitability to practise medicine.

The Committee directs that the Hearings Office schedule at the earliest opportunity a penalty hearing pertaining to the findings made.

Appendix A – List of Exhibits

1. Notice of Hearing
2. Joint Book of Documents
- 3, 4. Dictionary definitions of profane words
5. Diagram of the pharmacy in Belle River
- 6, 7, 8. Correspondence between Mr. Y and the College
9. Curriculum Vitae of Dr. X
10. CPS Product Monograph for Ionamin
11. Agreed Statement of Facts – Schedule E
12. Book of Documents – Schedule E
13. Cassette tape of voicemail messages
- 14, 15, 17, 18, 19, 20. “Blackmail” notes
16. Cheque payable to Patient 3 – April 28, 2006
21. Handwriting sample of Patient 3
- 22, 23. Enhanced recordings of portions of Patient 3’s interview with the College
24. DVD recording of Dr. Rathe’s statement to the OPP
- 25, 26, 27. Correspondence pertaining to Ms H and the CAS investigation
28. Transcription of portions of Dr. Rathe’s sworn affidavit

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Charles Nicholas Rathe, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity of the sexual misconduct witness or any information that could disclose the identity of the sexual misconduct witness 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, in relevant part:

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: Rathe, C.N. (Re)

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

IN THE MATTER OF a Hearing directed
by the Complaints Committee and the Executive Committee
of the College of Physicians and Surgeons of Ontario
pursuant to Sections 26(2) and 36(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. CHARLES NICHOLAS RATHE

PANEL MEMBERS:

DR. W. KING (CHAIR)
DR. B. TAA (PhD)
DR. R. SHEPPARD
G. DEVLIN

Penalty Hearing Date: October 27, 2011
Penalty Decision Date: January 24, 2012
Release of Written Reasons: January 24, 2012

PUBLICATION BAN

DECISION AND REASONS ON PENALTY AND COSTS

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 May 31, 2011, and found that Dr. Charles Nicholas Rathe has committed acts of professional misconduct, in that he failed to maintain the standard of practice of the profession; in that he 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; in that he engaged in conduct unbecoming a physician; in that he sexually abused a patient; and, in that he has been found guilty of an offence that is relevant to his suitability to practise.

The Committee heard evidence and submissions on penalty and costs on October 27, 2011, and reserved its decision.

EVIDENCE AND SUBMISSIONS ON PENALTY

The Committee was informed by counsel for the College that Dr. Rathe’s certificate of registration is expired as of August 2010, for failure to renew. Nevertheless, it was agreed by the parties that the Committee continues to have jurisdiction over Dr. Rathe pursuant to s.14(1) of the Health Professions Procedural Code (“the Code”).

Counsel for the College submitted that the suitable order as to penalty and costs in this case is revocation of Dr. Rathe’s certificate of registration, a requirement that Dr. Rathe appear before the Committee to be reprimanded, and further requirements that he reimburse the College for funding provided to his patient pursuant to s.85.7 of the Code by posting an irrevocable letter of credit, and that he reimburse the College for costs of the hearing in the amount of \$23,725.

In support of this submission, counsel for the College relied on the fact that Dr. Rathe had been found to have sexually abused a patient and that the abuse included sexual

intercourse. For such a finding of sexual abuse, revocation of Dr. Rathe's certificate of registration and a reprimand are mandatory under s.51(5) of the Code.

Counsel for the College filed documentation pertaining to Dr. Rathe's prior history with the College. This consisted of a previous finding of professional misconduct by the Discipline Committee, dated February 1, 2006, and several decisions and reasons by the Complaints Committee between 1997 and 2001. The facts pertaining to these earlier findings and decisions were reviewed. It was the submission of the College that the underlying facts in these prior matters establish a longstanding pattern of unacceptable conduct by Dr. Rathe, which includes rude and abusive behaviour towards his patients, difficulties with anger control, dishonesty, failure to take responsibility for his actions, and lack of respect for the authority of the College. It was submitted that Dr. Rathe's behaviour has not changed over many years, despite repeated sanctions, and despite attempts to provide him with opportunities for remediation. As a result, the College submitted that Dr. Rathe is ungovernable.

Counsel for the College submitted this was an appropriate case to order the payment of costs, and that the quantum of costs sought for the hearing was calculated on the basis of seven full hearing days at the usual rate of \$3,650 per day. The College excluded in its request for costs the costs of the portion of the hearing pertaining to the one allegation which the Committee found was not proven.

Defence counsel made no submission on the penalty for the finding of sexual abuse of a patient.

With respect to the balance of the Committee's findings, defence counsel requested that the Committee craft separate penalties for each of the separate findings made against Dr. Rathe. The stated rationale for this approach was that, in the event that one or more of the Committee's findings is later overturned on appeal, the remainder of the penalties would stand; and, that it would serve the membership to know which particular findings attract which penalties.

Counsel for Dr. Rathe submitted that the finding of disgraceful, dishonourable or unprofessional conduct during an encounter with a patient and her family (Schedule D in the Notice of Hearing) justified a reprimand accompanied by a two month suspension of Dr. Rathe's certificate of registration. It was submitted that the appropriate penalties for each of the other findings against Dr. Rathe, with the exception of the finding of sexual abuse of a patient, should be reprimands. Defence counsel filed with the Committee, in support of his position, several previous decisions of the Discipline Committee, each of which contained some similarities to the individual findings made against Dr. Rathe.

Counsel for Dr. Rathe did not dispute the College's request for costs of the hearing, but did request that Dr. Rathe's reimbursement of the College's fund for his patient's therapy be limited to \$16,060. This amounts to the OHIP reimbursement for 200 half hour sessions of psychotherapy. The College accepted this submission.

DECISION AND REASONS ON PENALTY AND COSTS

The Committee carefully considered the submissions of counsel for the College and counsel for Dr. Rathe. The Committee also reviewed the multiple findings which it had made against Dr. Rathe and considered the documents filed regarding his history before the Complaints Committee and Discipline Committee of the College.

The Committee considered the request of defence counsel, that it impose separate penalties for each of the separate findings against Dr. Rathe. For the following reasons, the Committee decided that it would not adopt this approach.

The Committee concluded that, in the circumstances of this case, it should consider the totality of the findings against Dr. Rathe in arriving at a decision on penalty. The Committee felt that to fragment and compartmentalize its findings would detract from the overall significance of the patterns of Dr. Rathe's misconduct.

The Committee, in arriving at its decision on penalty, considered the need to protect the public, to address issues of specific and general deterrence, and to consider the remedial

needs, if any, of the member. The speculative outcome of a possible future appeal is not a factor to be considered. Although the Committee found some merit in the defence suggestion that it would benefit the membership to know which individual findings are sanctioned in a particular fashion, it concluded that, in the circumstances of this case, this consideration is outweighed by the importance of considering the totality of the relevant findings. In this regard, the Committee relied on the following in determining the appropriate penalty to impose with respect to Dr. Rathe.

Dr. Rathe has been found to have committed the most serious form of professional misconduct, namely, the sexual abuse of his patient. The Committee accepted the evidence of the complainant that Dr. Rathe carried on a sexual relationship with her for many months while she was his patient. The Committee finds Dr. Rathe's behaviour in this regard to have entailed a most egregious violation of his professional obligations to his patient. Misconduct of this nature must be sanctioned in the strongest possible terms. The protection of the public, and maintenance of public confidence in the integrity of the profession, would, in the view of the Committee, compel the revocation of Dr. Rathe's certificate of registration, even if this were not mandated by statute.

The Committee was struck by the pattern of unacceptable conduct repeatedly demonstrated by Dr. Rathe over a period of almost 20 years, despite many previous attempts by the College to sanction his misbehaviour and to offer him opportunities for remediation. The nature of his misconduct has included rude, objectionable, and abusive behaviour towards his patients and their families, dishonesty and deceit, poor anger control accompanied by unacceptable outbursts of rage, and failure to accept responsibility for his behaviour. Treatment and rehabilitative initiatives, when apparently pursued by Dr. Rathe in the past, have evidently been unsuccessful in addressing these distressing patterns of ongoing misconduct. Dr. Rathe has previously been before both the Complaints Committee, on several occasions, and the Discipline Committee, on account of issues of this nature. He has by his repeated conduct demonstrated overt disregard for the authority of the College. In the view of the Committee, the above factors are properly considered aggravating with respect to its decision on penalty.

The Committee is cognizant of the distinction between Discipline Committee decisions and decisions of the Complaints Committee. For this reason, it did not attach undue weight to the latter. Nevertheless, in the view of the Committee, a review of the documented issues of concern to the Complaints Committee did assist in confirming the longstanding, persistent and repetitive nature of Dr. Rathe's unacceptable behaviour.

Defence counsel submitted that context and provocation should be considered a mitigating factor with respect to one of the findings against Dr. Rathe, namely the finding of conduct unbecoming a physician at a school concert (Schedule C in the Notice of Hearing). The Committee does not accept this submission. A consideration of the totality of the evidence relied on in arriving at an appropriate penalty makes it clear that this incident is far from being attributable to isolated victim-related or situational factors, and, in fact, reflects longstanding patterns of emotional and behavioural control problems on the part of Dr. Rathe.

Defence counsel submits that, with respect to most of the findings against Dr. Rathe, no actual harm was found to have occurred. The Committee accepts that, with the exception of the finding pertaining to the prescription of Ionamin (Schedule A in the Notice of Hearing), Dr. Rathe's clinical skills and judgment were not at issue. The Committee, however, did not accept that the lack of harm to his patients was a mitigating factor. Firstly, the Committee heard no evidence with respect to the actual harm, or lack thereof, caused by Dr. Rathe's behaviour. Secondly, the Committee finds that Dr. Rathe could well have caused serious harm to the patient he was found to have sexually abused. If conduct has the potential to cause harm to patients, it is not a mitigating factor that, perhaps by good luck, actual harm has not been caused. It is the exposure of patients to the potential for harm that is key. The protection of the public is the overriding principle that guided the Committee in its deliberation on penalty.

Revocation of Dr. Rathe's certificate of registration and a public reprimand are mandatory under s.51(5) of the Code. Even if this were not the case, the Committee was left with no doubt that, considering the totality of the multiple findings against Dr. Rathe

and his previous history with the College, that revocation of his certificate of registration was the only suitable penalty to address the protection of the public and to maintain public confidence in the integrity of the profession. General deterrence with respect to the membership is also addressed through a strong statement that the types of misconduct committed by Dr. Rathe will not be tolerated. The Committee did not consider specific deterrence to be a significant factor in Dr. Rathe's case, as he has demonstrated through his conduct over the years to be undeterred by College sanctions. Similarly, despite occasional references in the evidence to Dr. Rathe's mental health and addiction issues, the Committee heard no evidence in this regard and was, therefore, unable to make any findings on this matter or to incorporate rehabilitative or remedial considerations into its decision on penalty.

ORDER

The Committee therefore orders and directs that:

- 1) the Registrar revoke Dr. Rathe's certificate of registration, effective immediately;
- 2) Dr. Rathe appear before the Committee to be reprimanded, on a date to be fixed by the Committee which shall be no later than three (3) months from the date that this Order becomes final;
- 3) Dr. Rathe reimburse the College for funding provided to his patient under the program required under section 85.7 of the Code, and that he post an irrevocable letter of credit or other security acceptable to the College, in the amount of \$16,060, to guarantee the payment of any amount for funding provided under that program;
and
- 4) Dr. Rathe pay costs to the College in the amount of \$23,725.

By operation of the Code, the results of this proceeding will be recorded in the Register of the College.