

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Judi Dianne Marcin, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the names or any information that could disclose the identity of the patients referred to orally or in the exhibits filed at the hearing under subsection 45(3) 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... 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: Ontario (College of Physicians and Surgeons of Ontario) v. Marcin,
2019 ONCPSD 4**

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

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

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

JUDI DIANNE MARCIN

PANEL MEMBERS:
DR. P. GARFINKEL (CHAIR)
MAJOR A. H. KHALIFA
DR. J. WATTERS
MR. P. GIROUX
DR. J. RAPIN

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

MS A. BLOCK

COUNSEL FOR JUDI DIANNE MARCIN:

SELF-REPRESENTED
MEMBER DID NOT ATTEND

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. G. FORREST

PUBLICATION BAN

Hearing Dates: July 24, 25 and 27 (penalty), 2018
Finding Decision Date: July 25, 2018
Penalty Decision Date: July 27, 2018
Written Decision Date: January 28, 2019

DECISION AND REASONS FOR DECISION

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario heard this matter at Toronto on July 24 and 25, 2018. At the conclusion of the hearing, the Committee released a written order stating its finding that the member committed an act of professional misconduct and is incompetent, with written reasons to follow. The Committee directed that the Hearings Office schedule a penalty hearing on July 27, 2018. At the conclusion of the penalty hearing, the Committee released its penalty and costs order, with written reasons to follow.

THE ALLEGATIONS

The Notice of Hearing dated March 8, 2017 and August 9, 2017 alleged that Judi Dianne Marcin committed an act of professional misconduct:

1. under clause 51(1)(a) of the Health Professions Procedural Code (“the Code”) which is Schedule 2 to the *Regulated Health Professions Act, 1991*, in that she has been found guilty of an offence that is relevant to her suitability to practice;
2. under paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O. Reg. 856/93”), in that she 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 she has engaged in conduct unbecoming a physician;
4. under paragraph 1(1)2 of O. Reg. 856/93 in that she has failed to maintain the standard of practice of the profession; and

5. under paragraph 1(1)1 O Reg.856/93 in that she has contravened a term, condition or limitation on a member's certificate of registration.

The Notice of Hearing also alleged that Dr. Marcin is incompetent as defined by subsection 52(1) of the Health Professions Procedural Code (the Code), which is Schedule 2 to the Regulated Health Professions Act, 1991.

RESPONSE TO THE ALLEGATIONS

Dr. Marcin did not attend the hearing, nor did counsel attend on her behalf. Dr. Marcin was deemed to have denied the allegations.

The College presented no evidence regarding the following allegations set out in Schedule A of the Notice of Hearing:

- that Dr. Marcin continued prescribing antidepressants in inappropriate doses and/or combinations despite having been advised that such prescribing failed to meet the standard of practice of the profession (paragraph 12); and
- that Dr. Marcin had made inaccurate and untruthful statements to the College regarding her treatment of family members (paragraph 18).

BACKGROUND

Dr. Marcin was a family physician and psychotherapist practising in Woodstock at the times in question. The alleged misconduct occurred prior to July 7, 2016, when Dr. Marcin ceased to be a member of the College.

The allegations of professional misconduct and incompetence arise from:

- the alleged breach of undertakings by Dr. Marcin to the College signed in April 2014 and April 2015 and a Registrar's investigation;
- Dr. Marcin's meetings with her clinical supervisor scheduled pursuant to the terms of an undertaking by Dr. Marcin to the College signed in December 2014;
- Dr. Marcin's criminal conviction in May 2016;
- a complaint by Patient A to the College regarding Dr. Marcin having borrowed monies from Patient A and failed to repay these funds.

April 2014 Undertaking (Graduated Work Hours on Return to Practice)

In April 2014, Dr. Marcin signed an undertaking to the College which set out, among other matters, that she would resume her clinical practice gradually following a period when she had not been practising. It specified the maximum hours per day and the weekdays each week that she could work. In May 2016, an analysis of her OHIP claims indicated that the number of hours Dr. Marcin worked each week exceeded the maximum to which she had agreed. She first exceeded the maximum in the third week after her return to work and continued to do so for the great majority of weeks thereafter.

In addition, Dr. Marcin billed OHIP for services on days of the week (Tuesday and Thursday) that were not permitted by her undertaking. Dr. Marcin had stated through her counsel at the time that the patients scheduled for appointments on those days had been rebooked to other days.

December 2014 Undertaking (Clinical Supervision)

In December 2014, Dr. Marcin agreed in an undertaking to have a supervisor in both her psychotherapy and family medicine practices and to meet periodically with the supervisor. A College compliance monitor testified that Dr. Marcin's supervisor reported to the College that the meeting scheduled for April 2, 2015 had been cancelled by Dr. Marcin because she was ill. The Committee heard evidence that Dr. Marcin had billed OHIP for services to six patients on April 2, 2015, five involving psychotherapy.

April 2015 Undertaking (Practice Restricted to Psychotherapy) and Registrar's Investigation

In April 2015, on the recommendation of her clinical supervisor, Dr. Marcin entered into an undertaking to cease practising family medicine and to restrict her practice to psychotherapy.

A Registrar's investigation was commenced after the College received a phone call from a pharmacist in February 2016.

An expert in family medicine and psychotherapy retained by the College reviewed office charts and pharmacy information. The expert testified that, in her opinion:

- Dr. Marcin had been practising family medicine outside the scope of psychotherapy after April 2015, based on multiple instances where she had ordered bloodwork and other tests, referred patients to specialists, and provided treatment for ongoing physical conditions;
- Dr. Marcin's care fell below the expected standard and she displayed a lack of judgment in that many of the charts lacked a proper history, exam and other notes, and in her prescribing of lansoprazole and antidepressants;
- Dr. Marcin provided ongoing care for her two of her family members for conditions that were chronic and neither minor nor urgent, contrary to College policy.

May 2016 Criminal Conviction

The College presented evidence of a criminal conviction against Dr. Marcin on May 19, 2016 for failure to comply with a probation order, specifically, for failure to pay restitution in the amount of \$100,356.60. The restitution related to Dr. Marcin's criminal conviction for fraud in 2012, for billing OHIP for services not provided.

Complaint by Patient A

In August 2016, the College received a complaint from Patient A. The College alleges that Dr. Marcin borrowed money from Patient A, was abusive to her and never repaid any of the money Patient A loaned her.

THE ISSUES

This case raised the following issues:

1. Did Dr. Marcin contravene a term, condition, or limitation on her certificate of registration and/or engage in disgraceful, dishonourable or unprofessional conduct, by breaching her April 2014 undertaking, by exceeding the total work hours per week permitted, and by working on prohibited days of the week?
2. Did Dr. Marcin engage in disgraceful, dishonourable or unprofessional conduct, by making an inaccurate and untruthful statement to the College and her supervisor regarding the reason for her non-attendance at a meeting scheduled with her supervisor on April 2, 2015 pursuant to the terms of the December 2014 undertaking,
3. In relation to her April 2015 undertaking and subsequent Registrar's investigation:
 - a) Did Dr. Marcin contravene a term, condition, or limitation on her certificate of registration, by breaching her April 2015 undertaking by practising family medicine outside the scope of psychotherapy?
 - b) Did Dr. Marcin fail to maintain the standard of practice of the profession, and/or is she incompetent, in her practice of family medicine?
 - c) Did Dr. Marcin fail to maintain the standard of practice of the profession, and/or is she incompetent, in her prescribing of antidepressants?

- d) Did Dr. Marcin engage in disgraceful, dishonourable or unprofessional conduct by 3 a) to c), i.e., by breaching her April 2015 undertaking, misrepresenting herself to third parties, failing to maintain the standard of practice of the profession in her family practice and prescribing of antidepressants, and in that she is incompetent in her family practice and prescribing of antidepressants?
4. Did Dr. Marcin fail to maintain the standard of practice of the profession and/ or did she engage in disgraceful, dishonourable or unprofessional conduct, in her provision of care to family members contrary to College policy?
5. Was Dr. Marcin found guilty of an offence relevant to her suitability to practise, did she engage in conduct unbecoming a physician, and/or did she engage in disgraceful, dishonourable or unprofessional conduct, by her 2016 criminal conviction for failing to comply with a probation order to pay restitution regarding her prior conviction for OHIP fraud.
6. Did Dr. Marcin engage in disgraceful, dishonourable or unprofessional conduct by borrowing money from and violating professional boundaries regarding Patient A?

LEGAL PRINCIPLES

Onus and Standard of Proof

The Committee recognizes that the burden of proof is on the College to prove the allegations of professional misconduct and incompetence. Non-attendance by Dr. Marcin and/or her counsel does not relieve the College of this burden. The standard of proof is a balance of probabilities, based on evidence which is clear, cogent, and convincing. There is no onus on Dr. Marcin to disprove the allegations.

Jurisdiction

Dr. Marcin has not been a member of the College since July 7, 2016. Section 14 of the Code states:

14 (1) A person whose certificate of registration is revoked or expires or who resigns as a member continues to be subject to the jurisdiction of the College for professional misconduct or incompetence referable to the time when the person was a member and may be investigated under section 75.

As set out below, the Committee concluded that the College and, accordingly, the Committee continue to have jurisdiction over Dr. Marcin with respect to conduct that occurred while she was a member of the College.

Failing to Maintain the Standard of Practice

A failure to maintain the standard of practice of the profession is an act of professional misconduct under paragraph 1(1) 2 of O. Reg. 856/93, the professional misconduct regulation, made under the *Medicine Act, 1991*. The standard of practice is defined as the standard that is reasonably expected of the ordinary, competent practitioner in the member's field of practice. It is not necessary to find that there has been harm in order to find that there has been a failure to maintain the standard of practice.

The Committee recognizes that the standard of practice may be established on the basis of evidence from experts, publications from the College, or guidelines published in particular areas of practice.

Disgraceful, Dishonourable or Unprofessional Conduct

Paragraph 1(1)33 of O. Reg. 856/93 is a ‘catch-all’ provision intended to capture serious or persistent disregard for professional values and/or obligations:

“an act or omission relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional”

The text ‘A Complete Guide to the Regulated Health Professions Act’ by Richard Steinecke notes that it is not intended that it be the values of the general population that are reflected, but rather the values of the profession itself. Members of the profession best understand the circumstances in which practitioners operate.

The text further states that the catch-all provision is not intended to capture the legitimate exercise of professional discretion or mere errors of judgment. Conduct need not be dishonest or immoral to fall within the definition. Conduct need not harm the physician’s patients or staff to be unprofessional. A serious or persistent regard for one’s professional obligations is sufficient. Both disgraceful and dishonourable conduct carry an element of moral failure, whereas conduct need not involve dishonest or immoral elements to be considered unprofessional.

Incompetence

The Code provides that:

52 (1) A panel shall find a member to be incompetent if the member’s professional care of a patient displayed a lack of knowledge, skill or judgment of a nature or to an extent that demonstrates that the member is unfit to continue to practise or that the member’s practice should be restricted.

Credibility and Reliability

The Committee recognizes the importance of assessing credibility and reliability. Credibility refers to the witness's sincerity and willingness to speak the truth as he or she believes the truth to be. Reliability relates to the witness's ability to accurately observe, recall and recount the events at issue. The Committee appreciates that an honest witness can still be mistaken and, consequently, his or her evidence while sincerely given, may be unreliable. As well, the Committee may find a witness' evidence to be reliable and credible on one point, while, at the same time, finding that the same witness is unreliable or not credible on another point.

When assessing credibility and reliability, the Committee should look to the totality of the evidence and assess the impact of any inconsistencies. Inconsistencies in the witness's evidence on minor matters of detail are normal and to be expected and do not generally affect the credibility of the witness. When inconsistencies are of a material nature about which an honest witness is unlikely to be mistaken, such inconsistencies may demonstrate carelessness with the truth.

Assessing credibility is ultimately a matter of judgment. There are a number of factors relevant to assessing credibility. Did the witness seem honest? Did the witness have an interest in the outcome? Did the witness seem to make accurate and complete observations? What were the circumstances of the observations? Were they unusual or routine? Did the witness seem to have good memory? Did any difficulty that a witness had seem genuine or made up? Did the witness seem to be reporting or simply putting together an account put together from other sources? Was the testimony reasonable or consistent? Did they say something different on an earlier occasion? Did any inconsistencies make the evidence more or less reliable and believable? Was it an honest mistake? Is there an explanation for the inconsistency? What was the witness's manner? The Committee is aware that appearance and demeanor can be highly unreliable in assessing the credibility of a witness.

The Committee is aware that additional considerations apply when assessing the evidence of expert witnesses. How qualified is the expert? Has the expert approached the issue in a neutral and objective fashion? Was the expert honest? How reliable was the evidence used by the expert? Was the testimony plausible, reasonable and consistent with the knowledge and understanding of the Committee? Did the expert's testimony stray beyond the scope of her proven expertise?

Proceeding in Dr. Marcin's Absence

At the outset of the hearing, the Committee had to consider whether it should proceed with the hearing given that Dr. Marcin did not attend, nor did she have counsel attend on her behalf.

The process for determining whether the proceeding may occur in the party's absence is governed by sections 6 and 7 of the *Statutory Powers and Procedure Act* (the "SPPA").

Under Section 6, the College must establish that reasonable notice was provided to the party, that such notice included: 1) reference to the statutory authority under which the hearing will be held, 2) a statement of the time, place and purpose of the hearing, and 3) a statement that if the party did not attend at the hearing, the tribunal may proceed in the party's absence and the party will not be entitled to any further notice of the proceeding.

Section 7(1) provides that where notice of an oral hearing has been given in accordance with the SPPA and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice of the proceeding.

The Committee also had regard to section 39 of the *Regulated Health Professions Act, 1991*, which provides that notice may be given by mail or by fax. If it is sent by mail to a person at their last known address, there is a rebuttable presumption that it was received by the person on the fifth day after mailing.

Evidence

The Committee heard evidence from staff members of the College's legal office and the hearings office regarding the Notice of Hearing and notice of the proceedings provided to Dr. Marcin. A number of exhibits were filed.

Catherine McDonnell

Ms. McDonnell is a legal assistant to College counsel in the College legal office. She identified a series of documents:

- Notice of Hearing dated March 8, 2017 (Exhibit 2);
- Cover letter dated March 8, 2017 (Exhibit 3) from College counsel to Dr. Marcin's counsel at McCarthy Tétrault, with the March 8, 2017 Notice of Hearing appended;
- Affidavit of Service dated March 8, 2017 (Exhibit 4) to the effect that the March 8, 2017 Notice of Hearing had been served on Dr. Marcin by sending a copy to her counsel at McCarthy Tétrault;
- Faxed cover page to College counsel from McCarthy Tétrault dated April 27, 2017 (Exhibit 5), with a copy of the March 8, 2017 Notice of Hearing appended, marked 'Received 03.22.17'.

The Notice of Hearing dated March 8 and August 9, 2017 (Exhibit 1) added allegations of inappropriate conduct with respect to Patient A to the allegations in the March 8, 2017 Notice of Hearing (Exhibit 2). The additional allegations are set out in paragraph 19 of Schedule A.

Ms. McDonnell testified that Dr. Marcin was not represented by counsel in respect of the additional allegations. The March 8 and August 9, 2017 Notice of Hearing was served on Dr. Marcin on August 9, 2017 by email and by regular mail (Exhibit 6) to her last known email (Yahoo) and regular mail (Woodstock) addresses.

Anita Smith

Ms. Smith is the hearings coordinator in the hearings office. She gave evidence about how the hearings office scheduled this hearing, as well as various preliminary matters.

Ms. Smith identified 21 documents bound together at numbered tabs as “Communications with Hearings Office” (Exhibit 8).

The Committee’s independent legal counsel (ILC) wrote on November 27, 2017 to College counsel and Dr. Marcin’s counsel at McCarthy Tétrault (Exhibit 8, tab 1) to confirm agreements reached and directions given at a pre-hearing conference on November 24, 2017. Counsel for Dr. Marcin had advised at the conference that they had received instructions to represent her on all of the allegations set out in the Notice of Hearing, including the final allegation regarding financial dealings with Patient A.

A Scheduling Order dated November 24, 2017 stated that a pre-hearing conference was held in the presence of counsel for Dr. Marcin, counsel for the College and ILC (Exhibit 8, tab 2). The Order directed that the hearing be scheduled for July 23 to 28, 2018 and a case management teleconference for February 14, 2018.

An email from February 13, 2018 from McCarthy Tétrault to the hearings office and others states that McCarthy Tétrault no longer represented Dr. Marcin in these proceedings and suggested that the hearings office communicate with her directly (Exhibit 8, tab 3).

Hearings office staff emailed McCarthy Tétrault on February 13, 2018, confirming the scheduled case management teleconference and asking that the call-in details be forwarded to Dr. Marcin (Exhibit 8, tab 4). In the next email, College counsel asked McCarthy Tétrault to advise about the best way to reach Dr. Marcin. McCarthy Tétrault responded that they could not disclose any personal contact information without her consent and suggested that the College use its latest available contact information.

With reference to a note to file dated February 22, 2018, (Exhibit 8, tab 5) Ms. Smith testified that on February 13, 2018, she called the phone number given in the register for Dr. Marcin but the number was out of service.

Hearings office staff emailed Dr. Marcin at her Yahoo email address on February 13, 2018 to remind her of the case management conference scheduled on the following day (Exhibit 8, tab 6). Ms. Smith testified that Dr. Marcin did not respond, nor did she attend the case management conference on February 14, 2018.

ILC emailed Dr. Marcin and others on February 14, 2018 to report on the case management conference (Exhibit 8, tab 7). No one had appeared on behalf of Dr. Marcin. It was agreed at the case management conference that Ms. Smith would write to Dr. Marcin at her last known email and regular mail addresses.

Ms. Smith emailed Dr. Marcin on February 22, 2018 (Exhibit 8, tab 8) with three attachments, including a letter confirming the July 23 to 27, 2018 hearing dates, time, and place and the Scheduling Order, described at tab 2, above. Ms. Smith testified that the materials were also sent by regular mail and by FedEx courier. The courier package was returned.

College counsel wrote on March 9, 2018 to Dr. Marcin, seeking her consent to release the July 23, 2018 hearing day, to commence the hearing on July 24, 2018 and asking for a response by March 21, 2018 (Exhibit 8, tab 9). Exhibit 8 tab 9 also contained a letter to Dr. King, pre-hearing and case management chair, from College counsel, dated March 23, 2018, with the same request and stating that no response had been received from Dr. Marcin by the requested date of March 21, 2018.

A Scheduling Order dated March 23, 2018, released the July 23, 2018 hearing date, with the hearing to proceed July 24 to 27, 2018 (Exhibit 8, tab 10). This was served on Dr. Marcin (Exhibit 8, tab 11).

College counsel emailed the hearings office on April 3, 2018 to notify that Dr. Marcin now resided at an address in Port Stanley, and provided that address (Exhibit 8, tab 12).

An affidavit of service, dated April 6, 2018, confirmed that Dr. Marcin had been served by mail to her Port Stanley address (Exhibit 8, tab 13) with:

- a. Letter to Dr. Marcin and College counsel from Ms. Smith, dated April 6, 2018, confirming the hearing dates (July 24 to 27, 2018), time and location. The letter was also emailed to Dr. Marcin.
- b. Scheduling Order setting the July 23 to 27, 2018 hearing dates and the February 14, 2018 case management teleconference
- c. Letter to Dr. Marcin from Ms. Smith, dated February 22, 2018 confirming the July 23 to 27, 2018 hearing dates
- d. Scheduling Order releasing the July 23, 2018 hearing date

In an email to Dr. Marcin on April 6, 2018, Ms. Smith stated that she had just received a new address for Dr. Marcin and has sent her a courier package with documents regarding hearing dates and procedures (Exhibit 8, tab 14). The documents were ones that had been sent previously by regular mail and email. Previous courier packages, but not regular mail, have been returned. Dr. Marcin acknowledged the email message by replying to it on the same day. She stated that she will look for the correspondence and has had problems with her email. She provided a new email address (Gmail).

Ms. Smith emailed Dr. Marcin at her Gmail address on April 11, 2018 to request the unit number of her residence to complete the delivery address for the courier (Exhibit 8, tab 15). Dr. Marcin replied by email with her full address in Port Stanley including unit number.

Exhibit 8 also contained, at Tab 16, a FedEx notice of delivery on April 12, 2018.

An email correspondence chain among Dr. Marcin (from her Gmail account), College counsel, ILC and Ms. Smith between April 30, 2018 and May 9, 2018 included:

- a. The initial email from College counsel (April 30, 2018) requesting that the hearings office schedule a case management conference and states the College has not received disclosure of the evidence, if any, that Dr. Marcin intends to call.
- b. An email from Ms. Smith (May 2, 2018) requesting availability of Dr. Marcin and other parties for a case management teleconference on May 11, 2018. Ms. Smith received no response from Dr. Marcin.
- c. An email dated May 8, 2018 from Ms. Smith to Dr. Marcin and other parties including the notice and details of the case management conference.
- d. An email dated May 9, 2018 from Ms. Smith to Dr. Marcin including the March 8, 2017 Notice of Hearing (Exhibit 2). Ms. Smith then emailed the March 8 and August 9, 2017 Notice of Hearing (Exhibit 1) shortly afterward.

An affidavit of service, dated May 11, 2018, (Exhibit 8, tab 18) confirms that Dr. Marcin had been served by mail to her Port Stanley address with:

- a. Letter from Ms. Smith to Dr. Marcin, dated May 9, 2018, notifying her of the case management conference scheduled for May 11, 2018.
- b. Email chain dated from April 30, 2018 to May 8, 2018 regarding scheduling and details of the case management conference and the Notice of Hearing (described above).

A FedEx notice of delivery of a package from the College to Dr. Marcin's Port Stanley address on May 10, 2018 was included at tab 19 of Exhibit 8.

Ms. Smith sent a letter to Dr. Marcin by regular mail (Port Stanley) and email (Gmail) on May 15, 2018 and May 17, 2018, respectively (Exhibit 8, tab 20). The letter confirmed the July 24 to 27 hearing dates, 9:00 a.m. commencement, and location of the hearing.

Case Law Concerning Proceeding in the Absence of the Member

Counsel for the College provided two cases for the Committee's consideration. The cases address the circumstances in which it is permissible to proceed in the absence of a party against whom the allegations are made under the SPPA.

In *Ahn v 4900 Bathurst Street Ltd*, 2014 ONSC 7325 (CanLII), a tenant occupying a rental unit appealed to the Divisional Court an Order of the Landlord and Tenant Board and a Review Order of the Board terminating his tenancy and evicting him. One of the grounds of appeal was that he had mistaken the date of the continuation of the hearing, was unable to complete his testimony, and was thus not reasonably able to participate. The court noted that he had not attended on the date on which he stated he had believed the hearing was to continue, he had had the Notice of Hearing mailed to him well before the hearing, and he had viewed the application file which had included the Notice of Hearing. The court dismissed the appeal, finding that the appellant was reasonably able to participate and that under section 7(1) of the *SPPA*, the Board was entitled to proceed with the hearing in his absence.

In *CPSO v Deep*, 2010 ONCPSD 20 (CanLII), the physician did not attend a hearing, nor was he represented by counsel. The Committee heard evidence on whether the physician had been properly served and given reasonable notice. It concluded that he had. The physician had specifically advised that he did not intend to act and/or participate in the hearing. The Committee found that the requirements for reasonable and proper notice had been met and that it was in the public interest to proceed with the hearing.

Analysis

Based on evidence of Ms. McDonnell and Ms. Smith and the extensive documentary evidence of the College's correspondence with Dr. Marcin outlined above, the Committee finds that reasonable notice of the hearing was provided to Dr. Marcin.

Dr. Marcin was represented by counsel with respect to all of the allegations at the pre-hearing conference on November 24, 2017, at which time the hearing dates of July 23 to 27, 2018 were set. Once she became self-represented, Dr. Marcin was served directly with documentation of the time, place, and purpose of the hearing and the information that if she did not attend, the hearing may proceed in her absence and she would not be entitled to any further notice in the proceeding. In these circumstances, the Committee found that the relevant statutory requirements have been met and that it has the authority to proceed.

Dr. Marcin did not offer any reason for her non-attendance, nor did she request an adjournment to allow her or new counsel to attend. There was no suggestion that Dr. Marcin or counsel on her behalf would attend if the hearing was held on an alternate date. The Committee decided that it was in the public interest that the scheduled hearing proceed despite the absence of Dr. Marcin or counsel on her behalf.

THE EVIDENCE

The Committee heard testimony on behalf of the College from:

- Jeffrey Hutchison, Ministry of Health program manager
- Rita van der Heiden, College compliance monitor
- Elaine Stone, College investigations manager
- Dr. Irene Cohen, family physician and psychotherapist
- Jacob Poranganel, College investigator
- Patient A

A number of exhibits were filed, including documents relating to a criminal finding of guilt (Issue 5). College counsel submitted a Book of Authorities.

Jeffrey Hutchison

Mr. Hutchison is a Ministry of Health program manager whose role entails oversight of payment accountability, including post-payment review, i.e., review of OHIP claims submitted by Ontario physicians. He described how the Ministry routinely collects and retains information on claims made by and paid out to physicians.

Mr. Hutchison testified with respect to the OHIP claims for time-based services submitted by Dr. Marcin, specifically psychotherapy, and how such claims can be used to estimate how much time Dr. Marcin was working in a given period. This evidence relates to her compliance with her April 2014 undertaking and the limitations contained in that undertaking on the total hours and days of the week which Dr. Marcin was permitted to work.

Mr. Hutchison identified the data file delivered to the College in response to a request for information on billing submitted by Dr. Marcin for services beginning March 26, 2014. The cover letter and electronic data (USB key) were filed as Exhibit 30.

Mr. Hutchison then gave evidence about the interpretation of fee codes as set out in the Schedule of Benefits, and specifically the code K007, which is applicable to individual psychotherapy. The payment rules for K007 and related codes are given in the General Preamble of the Schedule (page GP37, filed as Exhibit 31). In general, K007 is calculated and payable in time-based units, where units represent consecutive 30-minute increments of direct patient contact. For one unit, the minimum time spent in direct patient contact must be 20 minutes; for two units, 46 minutes; for three units, 76 minutes; for four units, 106 minutes; and so on. Time spent in record keeping in the absence of the patient, in providing care relating to family medicine, or in other office or administrative activities is not counted.

Rita van der Heiden

Ms. van der Heiden is a compliance monitor in the College's Compliance Monitoring and Supervision Department and has been involved in monitoring matters related to Dr. Marcin's practice.

Ms. van der Heiden testified regarding the analysis of Dr. Marcin's OHIP billings and appointment logs in relation to her compliance with the work hour restrictions in her April 2014 undertaking, and the circumstances around Dr. Marcin's cancellation of the April 2, 2015 meeting with her supervisor, relating to her December 2014 undertaking.

In an undertaking on November 11, 2013, related to an incapacity matter, Dr. Marcin agreed to cease practising medicine. The incapacity matter was resolved by an undertaking on March 26, 2014 (Exhibit 33) in which Dr. Marcin agreed, in part:

- To continue to cease to practice.
- To participate in the Physician Health Program (PHP), with periodic reports to the College, and that to return to practice:
 - Dr. Marcin needed to provide 15 days' notice to the College.
 - The PHP must provide a letter of recommendation.
 - The ICRC may request specific terms, conditions, and limitations on her certificate of registration.
 - An appropriate monitoring agreement must be entered into.

April 2014 Undertaking (Graduated Return to Practice)

Dr. Marcin did return to practice and agreed to a further undertaking dated April 21, 2014 (Exhibit 34) that was supplemental to the March 26, 2014 undertaking. The April 2014 undertaking reflected the recommendation for a graduated return to practice that is set out in the PHP letter of March 18, 2014, which is appended to the undertaking.

The April 2014 undertaking specified the number of hours per work day and specific days of the week that Dr. Marcin may work as a term, condition or limitation on her certificate of registration. For example, Dr. Marcin was restricted to working four hours on Monday, Wednesday and Friday, i.e., 12 hours per week maximum, in each of the first two weeks of her return to practice. In weeks three to six, she was restricted to a maximum of six hours per day on Monday, Wednesday and Friday (i.e. 18 hours per week). In weeks seven to eight, she was allowed to work a maximum of six hours per day on Monday, Wednesday, Thursday and Friday (i.e. 24 hours per week). Beginning in the ninth week after resuming practice and continuing thereafter, Dr. Marcin was permitted to work six hours per day, five days per week, for a maximum of 30 hours per week.

Ms. van der Heiden monitored Dr. Marcin's compliance with her undertakings. Based on OHIP billing data, she observed that Dr. Marcin breached the restriction on maximum allowable work hours per week.

Ms. van der Heiden analyzed OHIP billing data for a period from March 26, 2014 to April 11, 2016 (Exhibit 36). She explained her understanding of time-based billing for psychotherapy that the number of time units billed correlates to a minimum number of minutes spent in direct patient contact providing psychotherapy services. For example, 20 minutes is the minimum time in direct patient contact when one unit is billed, and so on.

Ms. van der Heiden testified that she analyzed Dr. Marcin's weekly psychotherapy billings to estimate the minimum time Dr. Marcin must have spent in providing such services following her return to practice. Billings for any other services were not considered in the analysis, nor was there any inclusion for time that may have been spent in other practice-related activities. The Committee notes that the work hour limits in Dr. Marcin's undertaking were not limited to direct patient contact and that it encompassed all of her clinical activities, including those outside patient contact.

For the first and second weeks, the total number of time units billed indicated that Dr. Marcin spent a minimum of 9.57 and 8.43 hours respectively, providing psychotherapy services. The maximum permitted for all clinical activities in those weeks was 12 hours.

For weeks three to six, Dr. Marcin billed for a minimum of 19.20, 21.73, 14.57 and 15.43 hours respectively, and thus exceeded the allowed 18 hours weekly in weeks 3 and 4.

Dr. Marcin's billings exceeded the permitted 24 hours per week in weeks seven and eight. From weeks nine to 23, her billings exceeded the allowed 30 hours weekly in every week but one.

An increase to a maximum of 40 hours of work per week, specifically eight hours per day five days per week, was approved by the PHP on October 8, 2014 (Exhibit 37). In the first week in which she was allowed to work a maximum of 40 hours, Dr. Marcin billed time units corresponding to 45.57 hours for psychotherapy services alone. In the period October 8, 2014 to April 4, 2016, Dr. Marcin's billings indicate that she exceeded the allowed maximum 40 hours per week in 68 of 79 weeks.

Further, Ms. van der Heiden testified that she identified billings for psychotherapy services provided on May 13, 20 and 22, 2014, two Tuesdays and a Thursday (Exhibit 38) in weeks three and four. Dr. Marcin was not permitted to work on these weekdays, according to her practice restrictions.

Ms. van der Heiden testified that she had taken other steps to monitor Dr. Marcin's compliance with her undertaking to the College. Specifically, she reviewed Dr. Marcin's appointment logs. She testified that she found four patients scheduled for Tuesday May 13, 2014 and four patients for Tuesday May 20, 2014. Ms. van der Heiden sought more information, specifically whether Dr. Marcin had seen patients on those days. Ms. van der Heiden testified that Dr. Marcin's counsel responded in a letter dated November 14, 2014 (Exhibit 40) that she had not been working on Tuesdays at that time, and that the scheduled patients had been rescheduled when the terms of the undertaking were finalized.

December 2014 Undertaking (Clinical Supervision)

By the terms of her December 2014 undertaking (Exhibit 41), Dr. Marcin was required:

- to have a supervisor in both her psychotherapy and family medicine practices;
- to comply with recommendations of the supervisor; and
- to engage in remediation including regular meetings with the supervisor.

Ms. van der Heiden testified about the cancellation of a meeting that Dr. Marcin and her supervisor scheduled on April 2, 2015. She testified that in a report to the College, Dr. Marcin's supervisor stated that the meeting had been cancelled by Dr. Marcin as Dr. Marcin had indicated that she was ill that day. Ms. van der Heiden testified that OHIP records indicate that Dr. Marcin had billed OHIP for services provided to six patients on April 2, 2015, including psychotherapy for five patients. Ms. van der Heiden further testified that she requested more information. Dr. Marcin's counsel responded in a letter dated June 8, 2015 that Dr. Marcin had missed three meetings in April for reasons beyond her control in each instance. Specifically, she had been ill on one day and had insufficient funds to pay her supervisor on the other two days (Exhibit 43).

April 2015 Undertaking (Restricted Scope of Practice)

In March 2015, Dr. Marcin's supervisor recommended that Dr. Marcin cease practising family medicine as her office lacked appropriate facilities and providing psychotherapy and family medicine services to the same patient on the same visit was inappropriate in terms of boundaries.

In an undertaking with the College in April 2015, Dr. Marcin agreed to cease practising family medicine and to restrict her practice to psychotherapy (Exhibit 23).

Ms. van der Heiden testified that concerns about Dr. Marcin's compliance with this undertaking arose subsequently. She identified a February 5, 2016 memorandum she had written to the College's Investigations and Resolutions Department, detailing a call she had received from a

pharmacist in Woodstock about prescriptions written by Dr. Marcin for blood pressure and diabetes medications (Exhibit 42).

Elaine Stone

Ms. Stone is currently a manager of a College investigations team and was involved as an investigator with matters relating to Dr. Marcin's practice. Ms Stone testified regarding the College's investigation of Dr. Marcin's scope of practice following her April 2015 undertaking, and her provision of care to family members.

April 2015 Undertaking (Restricted Scope of Practice)

In her April 2015 undertaking, Dr. Marcin agreed to cease practising family medicine outside the scope of psychotherapy (Exhibit 23).

Ms. Stone testified that a Registrar's investigation was commenced following a phone call from a pharmacist in Woodstock in February 2016 about a prescription written by Dr. Marcin. A patient had presented the pharmacist with a prescription for medication for high blood pressure, i.e., a medication that was not related to psychotherapy. The pharmacist was aware from the College register of Dr. Marcin's practice restriction.

Ms. Stone obtained from the pharmacist the details of prescriptions issued or authorized by Dr. Marcin after April 16, 2015. Ms. Stone made similar requests of other local pharmacies.

Ms. Stone retained Dr. Cohen as an expert. The pharmacy prescribing information was provided to Dr. Cohen for her review (Exhibit 19).

In addition, Ms. Stone attended at Dr. Marcin's office and reviewed patient charts looking for evidence of prescribing. She removed 30 original patient charts, scanned copies of which were

provided to Dr. Cohen (Exhibit 19). The charts are identified in the ‘Acknowledgement & Receipt’ document dated February 25, 2016 (Exhibit 24).

Ms. Stone provided Dr. Cohen’s initial report to Dr. Marcin’s counsel at McCarthy Tétrault and received a written response dated June 20, 2016.

College counsel submitted that the June 20, 2016 letter from Dr. Marcin’s counsel is admissible as an exception to the hearsay rule in that it is a statement by a party that is contrary to the party’s own interest. The Committee heard advice from its independent legal counsel and concluded that the letter was admissible in evidence as an admission (Exhibit 26).

In the letter, her counsel stated, “Dr. Marcin does not contest the accuracy of the factual findings made in Dr. Cohen’s reports and acknowledges a breach of her undertaking dated April 16, 2015.”

Providing Care to Family Members

Ms. Stone testified that Patients Z and Y were two of Dr. Marcin’s family members, respectively. She testified that when she had looked for their patient charts at Dr. Marcin’s office, Dr. Marcin had confirmed that there were none.

Ms. Stone wrote to Dr. Marcin’s counsel at McCarthy Tétrault on March 8, 2016, providing a list of the 72 different medications that Dr. Marcin had prescribed on or after April 16, 2015, a pharmacy profile that includes medications prescribed to Patients Z and Y, and a copy of the College policy ‘Treating Self and Family Members’ published February 2007 (Exhibit 27). She requested clarification of Dr. Marcin’s relationship to Patients Z and Y.

Dr. Marcin’s counsel responded in a letter dated March 30, 2016 (Exhibit 28), which the Committee admitted on the same basis as Exhibit 26. The response included the statement that Dr. Marcin does not contest the accuracy of the documents attached to Ms. Stone’s March 8,

2016 letter and acknowledges a breach of her April 16, 2015 undertaking. Dr. Marcin also confirmed that Patients Z and Y are two of her family members, respectively and that she has read and understands the College policy on treatment of family members.

Dr. Irene Cohen

Dr. Cohen, the expert retained by the College, testified with respect to the following:

1. had Dr. Marcin practised family medicine outside the scope of psychotherapy following her April 2015 undertaking,
2. had Dr. Marcin maintained the standard of practice of the profession during that time and displayed a lack of judgment, and
3. had Dr. Marcin provided care to family members, contrary to College policy?

Dr. Cohen is a family physician who has practised in Ontario for 27 years, full-time in a London clinic until 2013 and now part-time at a student health centre. A copy of her curriculum vitae was filed as Exhibit 16. Dr. Cohen stated that she has always had a ‘generalist’ family practice that has included GP psychotherapy. She has recognized an increased need for mental health services among her patients over the years, and about 30% of her clinical encounters at the student health service involve such services.

Dr. Cohen has taught medical students and family medicine residents. She has had a special interest in boundary issues. She was an instructor in the ‘*Understanding Boundaries and Preventing Boundary Violations in the Doctor-Patient Relationship*’ course at Western University for several years. Dr. Cohen is a physician facilitator and instructor in the ‘*Navigating Boundaries in the Doctor-Patient Relationship*’ course given by IMG Ontario and the Touchstone Institute.

Dr. Cohen has given opinions about standards of practice in about twenty College cases. She has not previously testified at a discipline hearing. She has been qualified as an expert in family

medicine in a criminal case. She has reviewed and completed the 'Acknowledgment of Expert's Duty' (Exhibit 17).

The Committee accepted Dr. Cohen as an expert to provide opinion evidence with respect to the scope of family medicine outside of psychotherapy and standards of practice in family medicine and psychotherapy.

Dr. Cohen was requested to provide an opinion whether Dr. Marcin was practising family medicine outside the scope of psychotherapy after April 16, 2015. She reviewed copies of the 30 office charts, the pharmacy records for most of those patients, and the pharmacy records of eight additional patients including DM and MM on a USB (Exhibit 19).

Dr. Cohen identified the two reports she submitted to the College. The first report, dated April 23, 2016, summarized her review of the first 15 of the 30 patient charts and the pharmacy records of the eight patients for whom only those records were available (Exhibit 20). The second report summarized her review of the remaining 15 patient charts and was dated May 9, 2016 (Exhibit 21).

Overall Opinion

Dr. Cohen opined that Dr. Marcin had continued to practise family medicine outside the scope of psychotherapy after April 16, 2015. Her opinion was based on a review of the records which indicated that Dr. Marcin ordered investigations, made referrals, and prescribed medications for a wide range of conditions that are not part of psychotherapy, and Dr. Marcin's letters written to third parties on behalf of her patients that were not consistent with a practice limited to psychotherapy.

Dr. Cohen testified that Dr. Marcin had prescribed medications for infections, elevated blood pressure, elevated cholesterol, erectile dysfunction, asthma, and possible heart conditions. She found that Dr. Marcin had ordered x-rays, ultrasounds and bloodwork outside the scope of

psychotherapy, and had made referrals to specialists for conditions that were physical, not psychological.

Further, Dr. Cohen found that Dr. Marcin had written prescriptions where there was no evidence of history or examination in the charts for the type of diagnosis being treated. In her opinion, Dr. Marcin had failed to meet the standard of practice of family medicine.

Scope of Practice

Dr. Cohen explained the format of the individual patient summaries in her report. Dr. Cohen concluded that Dr. Marcin had provided family practice care outside the scope of psychotherapy for 29 of the 30 patients whose charts she reviewed. According to Dr. Cohen, Dr. Marcin confined her care to psychotherapy only for Patient #19.

Among the eight patients for whom there were only pharmacy records, Dr. Cohen concluded from the nature of the prescriptions written by Dr. Marcin that Dr. Marcin had been treating five patients for conditions that were within family practice outside the scope of psychotherapy.

As well, Dr. Cohen testified that Dr. Marcin had represented herself in letters to third parties as the primary physician of one patient (Patient #1) and as the primary care physician of another (Patient #6). Dr. Marcin expressed clinical opinions on matters that were not related to psychotherapy and, in the case of Patient #1, Dr. Cohen found no examination or other notes in the patient's chart that would support Dr. Marcin's opinions.

Standard of Practice: Family Medicine and Prescribing

Dr. Cohen testified that, in the charts of 28 of the 29 patients for whom Dr. Marcin had provided family medicine care outside the scope of psychotherapy, there was no proper record of history or examination related to their physical condition(s). In respect of the one remaining patient, there was an examination recorded related to a hand infection, but no proper documentation

related to other conditions for which Dr. Marcin had prescribed ibuprofen, Senokot, or Colace. In Dr. Cohen's opinion, in prescribing and providing other forms of care in the absence of proper documentation, Dr. Marcin failed to meet the standard of practice of family medicine and showed a lack of judgment.

Dr. Cohen provided evidence regarding Dr. Marcin's prescribing of lansoprazole. Lansoprazole is a proton pump inhibitor, a type of medication used in the treatment of heartburn, gastric reflux and stomach ulcers. Dr. Marcin prescribed lansoprazole to four patients: #3 Patient J, #11 Patient K, #15 Patient L and #16 Patient M. Dr. Cohen's evidence was that Dr. Marcin prescribed lansoprazole at higher than recommended doses in three of the patients, exposing them to increased risk of concerning side effects including infections of the bowel. Moreover, proper history and examination were absent in all four patient charts. Accordingly, in Dr. Cohen's opinion, Dr. Marcin failed to meet the standard of practice of the profession in her prescribing of lansoprazole.

Dr. Cohen also expressed concern about Dr. Marcin's prescribing for Patient X (#24). She identified a notification written by a pharmacist to Dr. Marcin in December 2015 (Exhibit 21). The pharmacist raised a concern about Patient X's complex regimen of multiple medications in light of the difficulty that Patient X had with remembering and concentrating. Dr. Cohen testified that she observed no response or change in Dr. Marcin's prescribing for Patient X. She opined that this showed a lack of judgment and was a failure to meet the standard of the profession on Dr. Marcin's part.

Standard of Practice: Psychotherapy Prescribing

With respect to prescribing by Dr. Marcin in her psychotherapy practice, Dr. Cohen identified higher than recommended doses – “very high” in some instances - and combinations of medications that raised concerns. Dr. Cohen testified that for Patient #1, Dr. Marcin prescribed multiple antidepressants at higher starting doses than usual. Doing so increased the risk of side effects such as confusion, sleepiness, nausea, and diarrhea, as well as serotonin syndrome.

Serotonin syndrome is a dangerous side effect in which high levels of serotonin in the brain can result in mortality. Dr. Cohen had similar concerns about Patients #3, 8, 9, 11, 13, and 26 as well as Patients Z and Y, two of Dr. Marcin's family members. With respect to Patient Z, for example, Dr. Cohen opined that bupropion XL 450 mg daily would be considered a very high dose, yet Patient Z was prescribed 600 mg daily.

Dr. Cohen's opinion was that such prescribing does not meet the standard of practice of the profession. Dr. Cohen was also of the opinion that the pharmacy records related to Dr. Marcin's psychotherapy practice show a lack of judgment on Dr. Marcin's part.

Care Provided to Family Members

Among the patients for whom only pharmacy records were available were Patient Y and Patient Z. Dr. Cohen understood them to be two of Dr. Marcin's family members, respectively. She noted that Dr. Marcin had prescribed or authorized prescriptions for 22 different medications for Patient Z and 16 different medications for Patient Y. As well, she noted that ten medications were prescribed for both Patient Z and Patient Y, usually in the same doses and on the same dates.

Dr. Cohen's report shows that Dr. Marcin wrote or authorized 108 prescriptions for Patient Z between April 24, 2015 and February 11, 2016, and 66 for Patient Y between May 15, 2015 and February 11, 2016 (Exhibit 20, pp35-43).

Dr. Cohen concluded from the nature of the conditions for which the medications are used that Dr. Marcin was practising family medicine outside the scope of psychotherapy in the care she provided to her two family members. Further, Dr. Cohen expressed concern that Dr. Marcin risked adversely affecting the quality of her two family members' care.

Dr. Cohen testified that prescribing medication to family members is, with limited exceptions, contrary to College policy and opined that Dr. Marcin acted in contravention of the College

policy. Policy #7-06, originally approved November 2001, update published February 2007, was filed as Exhibit 22. The College policy provides that physicians should generally refrain from treating themselves or family members. Objectivity becomes a concern when treating a family member and the physician's ability to provide good quality care may be adversely affected. It is acceptable to treat a family member for a minor condition or in an emergency situation, and only when another qualified health care professional is not readily available. In circumstances when it has been acceptable to treat a family member, the physician must then transfer care to another qualified health practitioner as soon as possible. The policy advises that physicians who do not comply with the policy may be subject to allegations of professional misconduct.

In Dr. Cohen's opinion, among the 'multitude' of conditions Dr. Marcin was treating were conditions that were chronic, serious, and neither minor nor emergencies.

Found Guilty of an Offence

The College sought to file in evidence five documents pertaining to two separate criminal proceedings against Dr. Marcin bound together as 'Criminal Finding of Guilt':

- Tab 1. Certified copy of the indictment of Judi Dianne Marcin, March 22, 2012
- Tab 2. Certified transcript of proceedings at guilty plea, with statement of agreed facts attached, March 22, 2012
- Tab 3. Certified copy of the indictment of Judi Dianne Marcin, September 20, 2016
- Tab 4. Certified transcript of proceedings at trial, January 25, 2016
- Tab 5. Certified transcript of sentencing hearing, September 20, 2016

College counsel noted that the 2012 conviction is not before the Committee at this time and was introduced in evidence only to provide necessary context for the 2016 conviction which is at issue in this hearing.

College counsel submitted that the indictments at Tabs 1 and 3 should be accepted in evidence as exemplified documents, and that they proved Dr. Marcin's convictions as follows:

- Tab 1 - on March 22, 2012 Dr. Marcin pleaded guilty to defrauding the Ministry of Health and Long Term Care of a sum exceeding \$5000, with the court imposing a suspended sentence, probation of 18 months, community service 100 hours, and restitution of \$100,356.60 by the end of the period of probation. Tab 1 is a certified copy of Dr. Marcin's indictment, which records Dr. Marcin's guilty plea and the sentence imposed.
- Tab 3 - on May 19, 2016 Dr. Marcin pleaded guilty to failing to comply with the terms of her probation, specifically paying restitution in the amount of \$100,356.60, with a sentence of twelve months' probation, 21 days in jail, and restitution of \$97,856.60 outstanding. Like Tab 1, Tab 3 contains a record of Dr. Marcin's plea of guilt and the sentence imposed. Counsel filed the original certified copy obtained from the court.

Counsel cited *Tatomir* 1989 ABCA 233 (CanLII), paragraphs 20-22, in which the court referred to existing common law, which holds that judicial documents can be proved by exemplification under seal of the court to which the record belongs and that no notice is required. This was reaffirmed in *R.v John* 2015 ONSC 2040 (CanLII), paragraph 26, which states that, at common law, an exemplification of a court document is admissible without notice.

As well, College counsel cited section 22.1 of the Ontario *Evidence Act*, which provides that proof that a person has been convicted of a crime is proof, in the absence of evidence to the contrary, that the person committed the crime once all possibilities for appeal are no longer available.

College counsel characterized the transcripts at Tabs 2, 4, and 5 as public documents, certified copies of which can be received in evidence as provided for in section 29 of the *Evidence Act*. Counsel submitted that they are admissible as proof of what was said in court, although not necessarily of its truth, citing *R. v. W.B.C.* 2000 CanLII 5659 (Ont CA). Counsel further asserted

that Dr. Marcin's admission of guilt in the transcript of her trial on the charge of failing to comply with a probation order on January 25, 2016 (Tab 4, p2) can be taken as true and is admissible as a statement contrary to her own interests, an exception to the hearsay rule.

The Committee heard advice from its independent legal counsel and admitted in evidence the brief of documents 'Criminal Finding of Guilt', together with the original certified copy of the indictment at Tab 3 relating to the charge of failing to comply with a probation order (Exhibit 44). The Committee finds that the May 19, 2016 indictment is admissible pursuant to section 22.1 of the *Evidence Act* as proof of the fact that Dr. Marcin was convicted on May 19, 2016 of failing or refusing to pay restitution in accordance with the order of March 22, 2012. The Committee further admitted the transcripts of the proceedings (Tabs 2, 4, and 5) are admissible at common law as certified copies of what was said in court. Thus, the Committee was entitled to consider, and did consider, the admissions made by Dr. Marcin in those proceedings.

Patient A

Patient A is a woman now in her sixties. She testified that she became a patient of Dr. Marcin in 2012. Her husband had died unexpectedly. She was shocked. She stated that there were few doctors in the area and that a good friend had introduced her to Dr. Marcin. She thought that Dr. Marcin was a psychiatrist or psychologist and she wanted to see her about depression and stress. Also, she needed prescriptions refilled.

Patient A testified that Dr. Marcin asked her how she was doing financially. Patient A wondered why a doctor would ask her this question but she answered. She said that she or she and her husband had had "lots of RRSPs." Dr. Marcin asked her more about her finances and Patient A told her how much money she had in RRSPs.

Patient A testified that at one point, Dr. Marcin told her that she needed money to pay her hydro bill, and asked Patient A for it. Patient A said she had felt sorry for Dr. Marcin and gave her \$1,000. Dr. Marcin was going to pay her back.

Patient A testified that Dr. Marcin took her out for dinner in February 2016. When Dr. Marcin drove her home, Dr. Marcin said to her that she was “dealing with a bad man” she needed to pay money back to, and she needed money to pay lawyers. Dr. Marcin asked Patient A for \$40,000.

Patient A agreed, although she did not want to have to pay the financial penalty and additional taxes that would result from cashing in RRSPs, and she wanted Dr. Marcin to pay her back including the penalty and taxes. Patient A withdrew \$35,000 from an RRSP. She identified a cheque to herself from an investment company dated February 24, 2016 in the amount of \$35,000, with a handwritten notation ‘RSP cashed in’ and cheque stub with ‘RIF/LIF Withdrawal’ (Exhibit 9). Patient A also identified a bank account summary dated June 10, 2016 (Exhibit 10) which indicates that Patient A withdrew a total of \$32,000 from a credit line on March 1, 2016 in the form of a bank draft or money order for \$22,000 payable to Judi Marcin (Exhibit 11) and \$10,000 in cash.

Patient A testified that she gave the cash and the bank draft to Dr. Marcin at the end of March 2016 when Dr. Marcin dropped her off at her home after they had been out for dinner. Patient A wanted Dr. Marcin to write out a receipt in her own hand. She testified that Dr. Marcin was shocked to be asked to do so but complied. Patient A identified the handwritten receipt for a loan of \$32,000 from Patient A to Dr. Marcin, dated March 1, 2016, the loan and interest to be repaid as \$10,000 monthly beginning on May 1, 2016 (Exhibit 12).

Patient A testified that sometime later Dr. Marcin came to her house and, when Patient A asked her about being repaid, Dr. Marcin told her that she needed more money. Patient A stated that Dr. Marcin asked her for \$125,000 and told her that she (Dr. Marcin) would go to jail if she didn’t pay her fines. Patient A refused. Dr. Marcin was shocked and responded to her, “You’re mean.”

Patient A stated that she has not seen or heard from Dr. Marcin since. She has received no repayment at any time, either from Dr. Marcin or anyone else on her behalf. Patient A consulted a lawyer, who drafted a letter to Dr. Marcin on Patient A’s behalf (Exhibit 13).

Jacob Poranganel

Mr. Poranganel is a College investigator assigned to the investigation of Patient A's complaint, received August 20, 2016. He obtained billing data from OHIP showing that Dr. Marcin claimed psychotherapy fee codes for services to Patient A between 2012 and 2016.

Assessment of Credibility and Reliability

Although Dr. Marcin did not participate in the proceeding, the Committee nevertheless assessed the credibility and reliability of the witnesses in this case in the same manner as it would in any hearing, utilizing the principles set out earlier in these reasons.

The Committee found Patient A to be a credible and reliable witness. Her manner was straightforward. She referred occasionally to her letter of complaint to refresh her memory of minor details. She appeared troubled at times when recounting events, but was consistent in her testimony. The documentary evidence supported her testimony.

Mr. Poranganel, Mr. Hutchison, Ms. Stone and Ms. van der Heiden were clear and straightforward in their testimony. Their evidence was consistent with the documentary evidence filed.

The Committee found Dr. Cohen clear and straightforward in her evidence. She is well qualified and her opinions on the scope and standards of practice in family medicine and psychotherapy were informative. Her evidence was detailed and precise. Dr. Cohen made a point of correcting a minor error in her first report. She was able to support her overall views with details and examples in her report. Dr. Cohen was careful to limit her conclusions to those that could properly be drawn from the material she reviewed. For example, she made clear that, with respect to Dr. Marcin's psychotherapy practice, she had not reviewed the charts of her psychotherapy patients or interviewed Dr. Marcin, and could give an opinion only on her psychotherapy prescribing.

The Committee concluded that all of the witnesses were credible and reliable and accepted their evidence.

ANALYSIS AND FINDINGS

As set out below, the Committee found that Dr. Marcin committed acts of professional misconduct, in that she:

- was found guilty of an offence relevant to her suitability to practice;
- engaged in conduct or an act or omission relevant to the practice of medicine that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional;
- engaged in conduct unbecoming a physician;
- failed to maintain the standard of practice of the profession; and
- contravened a term, condition or limitation on her certificate of registration.

In addition, the Committee found that Dr. Marcin is incompetent in family medicine and in prescribing antidepressants.

As noted previously, in order to reach these conclusions, the Committee was required to determine a number of issues, which are addressed below.

- 1. Did Dr. Marcin contravene a term, condition, or limitation on her certificate of registration and/or engage in disgraceful, dishonourable or unprofessional conduct, by breaching her April 2014 undertaking, by exceeding the total work hours per week permitted, and by working on prohibited days of the week?**

Contravened a Term, Condition and Limitation

Dr. Marcin's April 2014 undertaking describes a gradual return to practice following a period when she had not practised. The maximum number of hours she was permitted to work and the

weekdays on which she was permitted to work were set out on a weekly basis. The restrictions are specified as a term, condition or limitation on Dr. Marcin's certificate of practice.

Total Work Hours per Week

Ms. Van der Heiden's billing analysis shows that the number of hours that Dr. Marcin spent just in providing directly psychotherapy treatment exceeded the maximum she had agreed to for all clinical activity, starting in the third week following her return to practice and continuing on in the great majority of subsequent weeks. In weeks nine to 23, for example, Dr. Marcin exceeded the 30 hours permitted in every week but one. When her maximum was then increased to 40 hours per week, Dr. Marcin exceeded this limit in 68 of the next 79 weeks.

The Committee accepted the evidence of the billing analysis and found that Dr. Marcin practised at least the number of hours calculated for the weeks in question. The Committee found that, in doing so, Dr. Marcin breached her April 2014 undertaking to the College and contravened a term, condition or limitation on her certificate of registration.

Prohibited Days of the Week

In reviewing Dr. Marcin's appointment logs, Ms. Van der Heiden noted that Dr. Marcin had patients scheduled on the Tuesdays of weeks three and four following her return to practice. Dr. Marcin submitted claims for services on both Tuesdays and the second Thursday of weeks three and four, weekdays not permitted at that time by her undertaking. Dr. Marcin's counsel wrote that Dr. Marcin had not in fact worked on those days and that the patients had been rescheduled to other days.

Based on the evidence in respect of Dr. Marcin's appointment logs and OHIP billings, the Committee found that Dr. Marcin worked on May 13 and May 20, 2014, days on which she was prohibited from working. In doing so, Dr. Marcin breached her April 2014 undertaking to the College and contravened a term, condition or limitation on her certificate of registration.

Disgraceful, Dishonourable or Unprofessional Conduct

Dr. Marcin has demonstrated serious and persistent disregard of her professional obligations by immediately and persistently breaching the practice restrictions she had agreed to in her April 2014 undertaking to the College. A restriction of a physician's practice is a serious matter and the College must be able to trust that a member will respect it and abide by it with diligence. Flouting such a restriction reflects a blatant disregard for the College's responsibility to govern the profession in the public interest.

The Committee found that Dr. Marcin engaged in disgraceful, dishonourable and unprofessional, by breaching the terms of her April 2014 undertaking and contravening a term, condition or limitation on her certificate of registration.

2. Did Dr. Marcin engage in disgraceful, dishonourable or unprofessional conduct, by making an inaccurate and untruthful statement to the College and her supervisor regarding the reason for her non-attendance at a meeting scheduled with her supervisor on April 2, 2015 pursuant to the terms of the December 2014 undertaking?

Ms. van der Heiden testified that Dr. Marcin's supervisor reported to the College that Dr. Marcin had cancelled a scheduled meeting on April 2, 2015 because she (Dr. Marcin) was ill on that day. Dr. Marcin billed for clinical services to six patients on that day. Dr. Marcin's counsel wrote that three meetings had been cancelled in April 2015, one because Dr. Marcin was ill and two because she had insufficient funds to pay her supervisor. The Committee accepted that it was entitled to rely on the statements by Dr. Marcin's counsel as admissions by Dr. Marcin and therefore admissible evidence.

However, on the evidence before it, the Committee is not prepared to make a finding that Dr. Marcin made an inaccurate and untruthful statement to the College and her supervisor about her planned meeting with her supervisor on April 2, 2015. The OHIP records do not demonstrate when during the day these patients were seen or that they occurred when Dr. Marcin was

scheduled to see her supervisor. The Committee was not prepared to conclude that Dr. Marcin made an inaccurate and untruthful statement in saying she was ill at the time of the scheduled meeting.

Therefore, the Committee found the allegation of disgraceful, dishonourable or unprofessional conduct, by making an inaccurate or untruthful statement regarding the April 2, 2015 meeting with her supervisor, not proven.

3. In relation to her April 2015 undertaking and subsequent Registrar's investigation:

a) Did Dr. Marcin contravene a term, condition, or limitation on her certificate of registration by breaching her April 2015 undertaking by practising family medicine outside the scope of psychotherapy?

For the following reasons, the Committee found that Dr. Marcin practised family medicine outside the scope of psychotherapy and, in doing so, breached her April 2015 undertaking to the College and violated a term, condition or limitation on her certificate of registration.

In her April 2015 undertaking to the College (Exhibit 23), Dr. Marcin committed to immediately cease practising family medicine and to restrict her practice to psychotherapy. She consented to this restriction being a term, condition, or limitation on her certificate. Dr. Marcin acknowledged in the undertaking that she had agreed in a prior undertaking to abide by the recommendations of her clinical supervisor and that her supervisor had recommended on March 5, 2015 that she cease to practise family medicine.

The Committee heard no evidence that the undertaking was not in force, and found that the April 2015 undertaking remained in full effect at the times in question.

Expert Opinion

The Committee found Dr. Cohen's evidence on the scope of practice of family medicine and psychotherapy informative, and accepted her opinion that Dr. Marcin practised family medicine outside the scope of psychotherapy after April 16, 2015.

In Dr. Cohen's opinion, Dr. Marcin provided care that was family medicine outside the scope of psychotherapy to 29 of the 30 patients whose office charts she reviewed and five of the eight patients with only pharmacy records. Dr. Cohen based her conclusions on the nature of the conditions for which Dr. Marcin had written prescriptions and provided other treatments, the kinds of testing that Dr. Marcin ordered, and the fact that Dr. Marcin had referred patients to specialists for conditions that were physical, not psychological. Examples of the conditions that were not within the scope of psychotherapy included many acute and chronic conditions that are typical of family medicine and are unrelated to psychotherapy.

The Committee noted from Dr. Cohen's reports that within just five days of signing her undertaking, Dr. Marcin had prescribed medications to four patients for conditions that are in the scope of family medicine outside psychotherapy.

Dr. Marcin wrote letters to third parties on behalf of two patients, in which she identified herself as their primary or primary care physician and opined on matters that were not related to psychotherapy.

Dr. Marcin responded to Dr. Cohen's reports in a letter from her then counsel in June 2016 (Exhibit 26). Dr. Marcin stated that she does not contest the accuracy of the factual findings in Dr. Cohen's reports and she acknowledged a breach of her April 2015 undertaking to the College.

In conclusion, the Committee found that Dr. Marcin practised family medicine outside the scope of psychotherapy after her April 2015 undertaking to the College. In doing so, she breached the

terms of her undertaking and contravened a term, condition or limitation on her certificate of registration. Dr. Marcin's actions were not inadvertent, isolated or inconsequential. Rather, her conduct involved a substantial number of patients, encompassed a broad range of conditions outside the scope of psychotherapy, began very early after she committed to restricting her practice, and was ongoing.

- b) Did Dr. Marcin fail to maintain the standard of practice of the profession, and/or is she incompetent, in her practice of family medicine?**

Failed to Maintain the Standard of Practice

In terms of her consideration of standard of practice, Dr. Cohen's letter of appointment asked that she consider what is reasonably expected of a competent practitioner in the member's field of practice. The Committee noted that Dr. Marcin did not contest the accuracy of the factual findings in Dr. Cohen's reports.

No Documentation of Proper History or Examination

Dr. Cohen found no proper history or examination in 28 of the 29 office charts of patients who Dr. Marcin was treating for family medicine conditions outside the scope of psychotherapy. In Dr. Cohen's opinion, in this pervasive lack of documentation, Dr. Marcin failed to meet the standard of practice of the profession and showed a lack of judgment.

Prescribing

Dr. Cohen opined that Dr. Marcin failed to meet the standard of practice of the profession in her prescribing of lansoprazole, a type of medication used in the treatment of heartburn, reflux and stomach ulcers. Dr. Cohen testified that Dr. Marcin prescribed lansoprazole at unnecessarily high doses, higher than recommended, without justification in three of four patients. The Committee accepted Dr. Cohen's opinion in this regard. The patients were thereby exposed to an increased

risk of significant side effects. Relevant history and examination were absent from all four patient charts.

Also, Dr. Cohen testified about a concern conveyed in writing by a pharmacist to Dr. Marcin about her prescribing for Patient X, specifically what the pharmacist viewed as a complex regimen of multiple medications in a patient who had difficulty with remembering and concentrating. In her view, the absence of any response by Dr. Marcin or change in her prescribing demonstrated a lack of judgment and was a failure to meet the standard of practice.

It is a professional expectation that physicians communicate and collaborate respectfully with others involved in the provision of health care in order that patients receive safe and effective care. The Committee found that Dr. Marcin did not meet this expectation in her conduct relating to the concerns of Patient X's pharmacist.

Conclusion

The Committee accepted Dr. Cohen's opinion that Dr. Marcin failed to maintain the standard of practice of the profession in family medicine and displayed a lack of judgment in the deficiencies identified above. The Committee finds that Dr. Marcin failed to maintain the standard of practice of the profession in family medicine by her pervasive failure to adequately document clinical evaluations, her improper prescribing of lansoprazole and her failure to communicate and collaborate appropriately with another health care professional.

Incompetence

As noted above, the Code provides that a panel shall find a member to be incompetent if the member's professional care of a patient displayed a lack of knowledge, skill or judgment of a nature or to an extent that demonstrates that the member is unfit to continue to practise or that the member's practice should be restricted.

Dr. Marcin showed a consistent lack of judgment and consistently failed to maintain the standard of practice in her family medicine practice, exposing her patients to the risk of harm or injury. The Committee was struck by the pervasiveness, magnitude, and persisting nature of these deficiencies. The Committee noted that Dr. Cohen did not opine on Dr. Marcin's knowledge or skill. However, the Committee is aware that the basis of Dr. Marcin's agreement to cease family practice was her clinical supervisor's concerns about that component of her practice. The Committee is in no position to determine whether the clinical supervisor's concerns were justified as no evidence was led on this point. However, the important point is that Dr. Marcin was aware of concerns expressed by her clinical supervisor and she acknowledged them, yet, in Dr. Marcin's seriously flawed judgment, it was acceptable to continue to practise family medicine almost immediately after signing the undertaking that she would cease doing so. This lack of judgment is directly of a nature and extent that demonstrates that the member is unfit to continue to practise or that her practice should be restricted.

In conclusion, the Committee found that Dr. Marcin is incompetent in family medicine in that she displayed a lack of judgment in her provision of family medicine care to patient of a nature or to an extent that demonstrates that she is unfit to continue to practise or that her practice should be restricted.

- c) Did Dr. Marcin fail to maintain the standard of practice of the profession, and/or is she incompetent, in her prescribing of antidepressants?**

Failed to Maintain Standard of Practice

The evidence pertaining to the standard of practice in prescribing antidepressants arises from Dr. Cohen's review of prescribing in the 30 office charts and the pharmacy records for eight additional patients. Dr. Cohen did not otherwise evaluate her psychotherapy practice. The Committee noted again that Dr. Marcin did not contest the accuracy of the factual findings in Dr. Cohen's reports.

Dr. Cohen identified concerns with Dr. Marcin's prescribing of antidepressants in eight patients in total, six from among the office charts and two for whom there were only pharmacy records. Specifically, she observed that Dr. Marcin had prescribed antidepressants at very high doses and/or in combinations in these patients that exposed them to increased risk of side effects including the potentially fatal serotonin syndrome.

Dr. Cohen was of the opinion that by prescribing very high doses and/or combinations of antidepressants in these eight patients, Dr. Marcin failed to meet the standard of practice and displayed a lack of judgment in her prescribing of antidepressants.

The Committee accepted Dr. Cohen's opinion and found that Dr. Marcin failed to maintain the standard of practice of the profession and displayed a lack of judgment in her prescribing of antidepressants.

Incompetence

The deficiencies in Dr. Marcin's antidepressant prescribing were not isolated. Indeed, deficiencies were identified by Dr. Cohen in eight of the 38 patients whose health information she reviewed. Although the Committee heard no evidence of actual harm to patient, Dr. Marcin exposed her patients to increased risk, including serious and potentially fatal side effects.

The Committee found that Dr. Marcin is incompetent in that she displayed a lack of judgment in her prescribing of antidepressants to patients of a nature or to an extent that demonstrates that she is unfit to continue to practise or that her practice should be restricted.

- d) **Did Dr. Marcin engage in disgraceful, dishonourable or unprofessional conduct by breaching her April 2015 undertaking, misrepresenting herself to third parties as a primary care physician, failing to maintain the standard of practice of the profession and in her lack of judgment such that she is incompetent?**

The College must be able to trust that a member will regard a practice restriction with the utmost seriousness and abide by it with diligence. Failing to do so represents a serious disregard for the College's authority and responsibility to govern itself in the public interest. Dr. Marcin has demonstrated serious and persistent disregard of her professional obligations by resuming family practice almost immediately after giving her undertaking to the College to cease that practice.

Further, Dr. Marcin has ignored her practice restriction and misrepresented herself in letters to third parties on behalf of two patients on matters not related to psychotherapy.

The Committee has found serious deficiencies in Dr. Marcin's clinical care, deficiencies which have involved a significant number of patients over an extended period of time and that have exposed patients to unnecessary risk of harm. Dr. Marcin's conduct falls far outside the legitimate exercise of professional judgment or errors in judgment and clearly reflects a serious and persistent disregard for professional values and obligations.

In conclusion, the Committee found that Dr. Marcin's conduct as outlined constitutes conduct or an act or omission relevant to the practice of medicine that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

4. Did Dr. Marcin engage in disgraceful, dishonourable or unprofessional conduct, and/or did she fail to maintain the standard of practice of the profession, in her provision of care to family members contrary to College policy?

Disgraceful, Dishonourable or Unprofessional Conduct

Dr. Marcin's counsel confirmed that Patients Z and Y were two of Dr. Marcin's family members (Exhibit 28). Ms. Stone testified that Dr. Marcin confirmed to her at the time of her office visit that there were no office charts for either.

Based on her review of the pharmacy records, Dr. Cohen concluded that Dr. Marcin was practising family medicine in prescribing multiple medications for her two family members, i.e., Patients Y and Z. Dr. Cohen testified that Dr. Marcin prescribed medications for her two family members over an extended period of time for a 'multitude of conditions' that were not minor and that did not involve emergencies. Moreover, many were chronic conditions that required ongoing care.

College policies reflect the expectations for the professional conduct of physicians practising in Ontario and serve as a benchmark against which the conduct of individual physicians is measured. Few, if any, physicians can be unaware of the College's policy prohibiting more than incidental or emergency treatment of family members or others with whom the physician has a close, personal relationship (see *CPSO v Esmond* 2016 ONCPSD 4 (CanLII)). Dr. Marcin's care for her two family members met none of the criteria for an exception to the policy.

The rationale for the College policy on providing care for family members is, in essence, that the quality of care of a family member is too easily compromised. The reasons for this are several. Treating family members more than episodically can give rise to a physician-patient relationship and prevent the family member from developing a good relationship with a more appropriate physician. Family members may intentionally not disclose sensitive but important health information. The physician's ability to conduct a complete and proper assessment, obtain

informed consent, and maintain proper medical records may be compromised, particularly if there is an expectation of care outside the physician's regular place of work. The physician may be inclined to over-treat or under-treat a family member, fail to present all available treatment options, or accede to inappropriate patient requests, such as for unnecessary tests or prescriptions. The physician may be reluctant to make a mandatory report about a family member. Lastly, the physician's opinion may be unduly influential and, at the same time, a family member may be reluctant to seek a second opinion (see *CPSO v. Garcia*, 2017 ONCPSD 6 (CanLII) at pp. 45 to 46).

The Committee accepted Dr. Cohen's analysis and opinion regarding Dr. Marcin's prescribing for her two family members, Patients Z and Y in relation to the College policy. The Committee found that Dr. Marcin provided ongoing care for family members that did not meet the criteria for an exception to and was contrary to College policy. Also, her violation of the policy was compounded by the fact that she provided care within a scope of practice from which she was prohibited, and she maintained no proper clinical records. The Committee found that by so doing, Dr. Marcin engaged in disgraceful, dishonourable or unprofessional conduct.

Failed to Maintain the Standard of Practice

The Committee accepted Dr. Cohen's analysis of Dr. Marcin's prescribing of antidepressants for a number of patients, including Dr. Marcin's two family members, and Dr. Cohen's opinion that such prescribing failed to meet the standard of practice in terms of prescribed dosage and potential side effects. Further, Dr. Marcin maintained no proper clinical records in relation to the care she provided to her two family members. Clinical records are essential to track a patient's history, identify patterns, problems, and opportunities for care, and to facilitate collaborative care. The lack of proper records immeasurably impairs a physician's ability to provide comprehensive, quality care to patients. Lastly, as noted above, few, if any, physicians can be unaware of the College policy on providing care for family members. The policy is intended to ensure that physician's family members receive high quality care that is not compromised by a familial relationship with the physician providing that care. Yet Dr. Marcin provided care for

both of her family members in clear contravention of the policy, repeatedly, over long periods of time, and for serious, chronic conditions.

The Committee found that Dr. Marcin failed to maintain the standard of practice of the profession in her prescribing for her two family members, failing to keep proper records of their care, and willfully contravening College policy on providing care for family members.

- 5. Was Dr. Marcin found guilty of an offence relevant to her suitability to practise, did she engage in conduct unbecoming a physician, and/or did she engage in disgraceful, dishonourable or unprofessional conduct, by her 2016 criminal conviction for failing to comply with a probation order to pay restitution regarding her prior conviction for OHIP fraud.**

The Committee found that Dr. Marcin has been found guilty of an offence by failing to comply with a probation order by failing to pay restitution in relation to her prior conviction for OHIP fraud.

The Committee accepted the indictment as an exemplified document that proves Dr. Marcin's conviction on May 19, 2016 of failing to comply with the terms of a probation order, specifically failing to pay restitution in the amount of \$100,356.60.

As well, the Committee accepted the transcript of Dr. Marcin's trial on January 25, 2016 as proof of what was said in court at that time. Further, the Committee accepted the truth of Dr. Marcin's admission of guilt on the charge of failing to comply with a probation order during that proceeding, on the basis that it is a statement contrary to her own interest.

The context for Dr. Marcin's offence in 2016 is a conviction in 2012 for defrauding OHIP, for which Dr. Marcin received a suspended sentence with probation of 18 months and was required to complete community service of 100 hours and pay restitution of \$100,356.60.

Dr. Marcin's 2016 conviction arose from her failure to pay the required restitution. This offence was viewed as a serious one by the court, which sentenced her to 21 days in jail, 12 months' probation and payment of the balance of the restitution, \$97,856.60.

The Committee has previously found that having been found guilty of OHIP fraud is relevant to a member's suitability to practise medicine. The Committee is aware that it is not to make a finding in relation to the 2012 conviction for the underlying OHIP fraud. The Committee found that Dr. Marcin's 2016 conviction for failure to comply with a probation order by failing to pay the restitution in relation to her OHIP fraud, as relevant to her suitability to practise medicine. Dr. Marcin's conduct in failing to comply with the court's order to make restitution for her OHIP fraud reflects a serious disregard of professional values and obligations.

The Committee found that Dr. Marcin's conduct in this regard also constitutes conduct unbecoming a physician, as it reflects negatively on the reputation of the profession as a whole. Further, it constitutes conduct or an act or omission that is relevant to the practice of medicine and would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

6. Did Dr. Marcin engage in disgraceful, dishonourable or unprofessional conduct by borrowing money from and violating professional boundaries regarding Patient A?

The College alleged that Dr. Marcin borrowed money from Patient A, failed to repay her, was abusive to her, and seriously violated professional boundaries.

Dr. Marcin provided psychotherapy services to Patient A between 2012 and 2016 according to OHIP billing data.

The Committee accepted Patient A's testimony that Dr. Marcin asked her about her financial situation when she first became her patient, shortly after Patient A's husband had died suddenly. Patient A was seeking help for stress and depression. Dr. Marcin asked Patient A for money to pay a bill and Patient A gave her \$1,000.00. In February 2016, Dr. Marcin again told Patient A

that she needed money and asked for \$40,000.00. Patient A cashed in some of her savings and gave Dr. Marcin \$32,000.00 as a loan. Dr. Marcin wrote out a receipt and repayment schedule when Patient A insisted. Later, when Dr. Marcin came to Patient A's house, Patient A asked Dr. Marcin about repayment of the loan. In response, Dr. Marcin told her she needed more money and asked Patient A for \$125,000.00. Dr. Marcin said to her, "You're mean" when she refused. Patient A testified that she has never received any repayment, despite retaining a lawyer who wrote to Dr. Marcin.

The Committee found that Patient A was a vulnerable patient, whom Dr. Marcin took advantage of almost from the time she first became her patient. Dr. Marcin took little account of Patient A's interests, allowed her own personal needs to dominate their relationship, and repeatedly grossly violated professional boundaries. Dr. Marcin's telling Patient A that she was 'mean' when Patient A refused to give her even more money is a further reflection of Dr. Marcin's profound disregard for even basic professional values and obligations.

Accordingly, the Committee found that Dr. Marcin engaged in conduct or an act or omission relevant to the practice of medicine that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

SUMMARY OF FINDINGS

The Committee found that Dr. Marcin committed an act of professional misconduct and is incompetent as follows:

- Dr. Marcin contravened a term, condition, or limitation on her certificate of registration, and engaged in disgraceful, dishonourable or unprofessional conduct, by breaching her April 2014 undertaking regarding her work hours and working on prohibited days of the week.

- Dr. Marcin contravened a term, condition, or limitation on her certificate of registration, by breaching her April 2015 undertaking by practising family medicine outside of the scope of practice.
- Dr. Marcin failed to maintain the standard of practice of the profession in her practice of family medicine, by failing to adequately document clinical evaluations, in improper prescribing of lansoprazole and in failing to communicate and collaborate appropriately with another health care professional regarding Patient X. Dr. Marcin's lack of judgment is such that she is incompetent in family medicine.
- Dr. Marcin failed to maintain the standard of practice of the profession and displayed a lack of judgement in her prescribing of antidepressants to patients. Dr. Marcin's lack of judgment is such that she is incompetent in her prescribing of antidepressants.
- Dr. Marcin engaged in disgraceful, dishonourable or unprofessional conduct, by breaching her April 2015 undertaking by practising family medicine outside of her scope of practice, in misrepresenting herself to third parties as primary care physician, in failing to maintain the standard of practice of the profession in family medicine and prescribing antidepressants, and in that she displayed a lack of judgement such that she is incompetent in family medicine and prescribing antidepressants.
- Dr. Marcin engaged in disgraceful, dishonourable or unprofessional conduct and failed to maintain the standard of practice of the profession, in providing care to family members contrary to College policy.
- Dr. Marcin has been found guilty of an offence relevant to her suitability to practice by failing to comply with a probation order to pay restitution in relation to a prior conviction for OHIP fraud. This conduct also constitutes conduct unbecoming a physician and disgraceful, dishonourable or unprofessional conduct.
- Dr. Marcin engaged in disgraceful, dishonourable or unprofessional conduct by violating professional boundaries in relation to and borrowing money from Patient A.

The Committee found that the allegation of disgraceful, dishonourable or unprofessional conduct in relation to making an inaccurate and untruthful statement to the College regarding the

scheduled meeting with her supervisor on April 2, 2015, in accordance with her December 2014 undertaking, was not proven.

DECISION AND REASONS ON PENALTY

Submissions on Penalty

College counsel submitted that the appropriate penalty would be immediate revocation of Dr. Marcin's certificate of registration, a reprimand and a costs order for three hearing days in the amount of \$30,540.00.

Proceeding in Dr. Marcin's Absence

Counsel for the College submitted that the penalty hearing should proceed as scheduled in the absence of Dr. Marcin or counsel on her behalf, on the basis that Dr. Marcin had been provided reasonable notice of the hearing dates and that, as provided for in the relevant sections of the RHPA and SPPA, the hearing may proceed in her absence and she would not be entitled to further notice.

The Committee considered the facts of this case, including that Dr. Marcin had been provided with ample notice of the hearing and had not indicated any desire to participate in the hearing, and concluded that it was appropriate to proceed with the penalty hearing.

Jurisdiction with respect to a Revoked Physician

As provided for in section 14 of the Code, Dr. Marcin continues to be subject to the jurisdiction of the College for conduct that occurred during the time when she was a member, i.e., prior to July 7, 2016.

College counsel submitted that the Committee has jurisdiction to revoke the certificate of registration of a member whose certificate is already revoked and that, in this instance, there are cogent reasons for doing so.

College counsel cited *Dumchin* 2016 ONSC 626 (CanLII) in which a nurse resigned his registration while under investigation for professional misconduct. He was subsequently found by a panel of the Discipline Committee of the College of Nurses of Ontario to have committed professional misconduct on the basis of criminal convictions for possessing and making available child pornography. The panel decided that, while revocation would be the appropriate penalty, it lacked jurisdiction to revoke a non-existent certificate. The College appealed. The Divisional Court granted the appeal and ordered revocation of the nurse's certificate of revocation, holding that

- The *Registered Health Professions Act, 1991* (RHPA) and the Code 'must be given a broad and purposive interpretation in keeping with the College's duty to act in the public interest. Interpretations that lead to absurd results and/or undermine the College's abilities to carry out its duties are inconsistent with this legislative intent and are to be avoided (para 33).
- The panel had construed the 'continuing jurisdiction' provided for in section 14 of the Code too narrowly (para 37).
- The only limitation on the College's continuing jurisdiction is that the alleged conduct must be "referable to the time when the person was a member" (para 39).
- "...in the context of professional regulation, a "certificate of registration" does not mean a piece of paper confirming one's membership in the profession," but rather, "means the entitlement to practice in a regulated profession" (para 41).

College counsel submitted that the logic articulated in *Dumchin* is no different whether a member's certificate has been resigned as in *Dumchin*, or already revoked as in this proceeding, or allowed to expire.

Two additional cases were proposed as instructive.

In *Kamermans* 2017 ONCPSD 42 (CanLII), a finding of professional misconduct on a number of grounds was made on the basis of an agreed statement of facts. The physician had a history of repeated investigations and orders, and his certificate had been revoked three years earlier for professional misconduct and incompetence. The Committee found that revocation was the appropriate penalty, despite the physician's revoked status, because of concerns about governability and the view that effective rehabilitation was unlikely.

In *Foote* 2016 ONCPSD 17 (CanLII), the physician admitted engaging in conduct that would be regarded as disgraceful, dishonourable or unprofessional in that he provided fraudulent letters in support of his application for an elective at a medical school outside Ontario. His postgraduate education certificate had expired before the proceedings. The Committee cited the analysis in *Dumchin* in finding that it did have jurisdiction to suspend or impose terms, conditions or limitations on the physician's certificate of registration.

The Committee found that it has jurisdiction in this proceeding to impose revocation and/or other penalties as appropriate.

EVIDENCE ON PENALTY

The College called Ms. Carolyn Gora as a witness and provided a book of authorities. Ms. Gora is the manager of the hearings office. Among the responsibilities of the hearings office is ensuring that the decisions of the Committee are properly distributed to the parties and published on the College's public register and in legal databases, such as CanLII, where the public has access free of charge.

Ms. Gora testified that Dr. Marcin had been the subject of allegations before the Discipline Committee in the past. She identified the document 'Decision and Reasons for Decision' in *Marcin* 2016 ONCPSD 7, filed as Exhibit 45. Those allegations were heard on January 13 and

February 29, 2016. The decision was released with written reasons on March 30, 2016. The penalty hearing was on July 7, 2016 and the penalty order was made on the same date. The penalty ordered was a reprimand, immediate revocation of Dr. Marcin's certificate of registration, and costs of \$10,000. Written reasons on penalty were released on July 28, 2016.

DECISION ON PENALTY

At the conclusion of the penalty hearing on July 27, 2018, the Committee ordered and directed that Dr. Marcin's certificate of registration be revoked effective immediately, that she appear before the Committee to be reprimanded, and that she pay to the College its costs for three hearing days in the amount of \$30,540.00, with reasons to follow, which are set out below.

REASONS FOR DECISION ON PENALTY

The principles which guide the imposition of penalty in College disciplinary proceedings are well established. The protection of the public is paramount. The penalty should strive to maintain the public's confidence in the integrity of the profession and in the College's ability to govern the profession in the public interest. The penalty should serve as a specific deterrent to the member and as a general deterrent to the profession. The penalty should express the profession's denunciation of the member's misconduct. The penalty should serve to rehabilitate the member when appropriate. The penalty should be proportionate to the misconduct and be reasonably consistent with previous disciplinary decisions in similar cases.

It is for the Committee to weigh these principles in light of the specific facts and circumstances of the case, including both aggravating and mitigating factors, in order to arrive at a penalty which is just and appropriate.

Aggravating Factors

Nature of the Misconduct

The Committee was struck by the remarkable scope, seriousness, and ongoing nature of Dr. Marcin's misconduct. Her behaviour demonstrates blatant disregard for the welfare of her patients, her professional responsibilities, the health care system, and the profession's ability to govern its members in the public interest.

Dr. Marcin committed a gross boundary violation in her relationship with Patient A and did so repeatedly. Dr. Marcin put her own interests first and ignored the serious adverse impact of her behavior on a vulnerable psychotherapy patient.

Dr. Marcin exposed a large number of patients, including her two family members, to the risk of serious harm and injury by her failing to maintain the standard of practice of the profession and by her incompetence. In her pervasive failure to keep proper records, practising family medicine when she had acknowledged she should not, and in her inappropriate prescribing, Dr. Marcin has demonstrated an unacceptable disregard of the most fundamental professional responsibilities to her patients.

By treating her two family members over an extended period for serious, chronic conditions, Dr. Marcin failed to maintain appropriate professional boundaries and jeopardized the quality of their care. In these actions, she has failed to act with due regard to the policy of the College.

Dr. Marcin's misconduct is marked by dishonesty and deception. Dr. Marcin misrepresented herself to third parties and gave opinions unrelated to psychotherapy when her practice was restricted to psychotherapy. Further, Dr. Marcin's ongoing failure to repay any of the money loaned to her by Patient A has resulted in significant harm to a vulnerable patient.

A reasonable physician would make absolutely certain that he or she knew the full and precise nature of any conditions imposed on his or her practice and would ensure to abide by those conditions with diligence. Dr. Marcin, however, has breached two undertakings that she made to the College in an egregious way. She breached her April 2014 undertaking by working more hours per week than she had agreed to. She first did so in just the third week after her return to work, and she persisted in breaching her undertaking almost continuously into 2016. In her April 2015 undertaking, Dr. Marcin acknowledged that her clinical supervisor recommended that she no longer practice family medicine, and she agreed that she would limit her practice to psychotherapy. Despite this, within a short period of time, Dr. Marcin was practising family medicine. Neither breach was a single, inadvertent event, rather they were intentional and ongoing and the latter breach put at risk numerous patients with a wide range of family medicine conditions.

Lastly, Dr. Marcin has failed to comply with a probation order of the court by failing to make restitution in relation to a prior criminal conviction for defrauding OHIP. As a consequence, she has a further criminal conviction.

2016 Discipline Finding

In *CPSO v Marcin* 2016 ONCPSD 7 (Exhibit 45), the Discipline Committee made twelve findings of professional misconduct in relation to Dr. Marcin. It found that Dr. Marcin's conduct was marked by purposeful dishonesty, lack of personal integrity, incompetence and ungovernability. The Committee remarked on the breadth and seriousness of her misconduct which included:

- Defrauding OHIP and the resulting criminal conviction;
- Seriously violating professional boundaries with a vulnerable psychotherapy patient;
- Billing OHIP in respect of the same individual for services that were not provided, and highly irregular record-keeping;
- Fabricating a false and misleading patient record for the same individual;

- Providing inaccurate and misleading information to a College investigator;
- Failing to maintain the standard of practice of the profession and incompetence in her narcotic prescribing;
- Breaching a term, limitation or condition on her certificate by prescribing narcotics when expressly prohibited from doing so; and
- Breaching an undertaking with the College by failing to fulfill the terms of a monitoring and rehabilitation plan.

The allegations in the current case arise from conduct that overlapped with that which the Committee considered in *Marcin* 2016. The Committee thus does not view the 2016 finding as representing prior discipline history or as an aggravating factor on penalty. The Committee does consider it an indication that Dr. Marcin's misconduct in the current case is not isolated in nature. However, the Committee is of the view that, regardless of any evidence of other misconduct, the appropriate penalty in this case would still include revocation.

Governability

According to Steinecke (*A Complete Guide to the Regulated Health Professions Act*, 2017, 6:80.30(8)), the concept of ungovernability suggests a pattern of conduct that demonstrates that the member is unprepared to recognize his or her professional obligations and the regulator's role. It may be viewed as an aggravating factor in determining the proper sanction to impose, generally revocation. Among the factors relevant to determining whether a member is ungovernable are:

- The nature, duration and repetitive character of the conduct
- Any prior discipline history
- Any character evidence
- The existence or lack of remorse, i.e. recognition and understanding of the seriousness of the misconduct
- The degree of willingness to be governed

- Medical or other evidence that explains the misconduct
- The likelihood of future misconduct, having regard to any treatment or remedial efforts
- The member's ongoing cooperation in addressing the outstanding matters that are the subject of the misconduct

Consideration of these factors in relation to the evidence before it leads the Committee overwhelmingly to the view that Dr. Marcin is ungovernable. For example, the Committee is deeply concerned by the deliberate and repeated nature of Dr. Marcin's breaches of her undertakings to the College. They do not represent a lack of awareness or knowledge, or carelessness on her part. Rather, they represent a willful disregard and lack of concern:

- for the advice of her clinical supervisor;
- the recommendations of the Physician Health Program for a graduated return to practice;
- for her commitments to the College, which were explicit and unambiguous, and
- for the authority of the College.

The fact that Dr. Marcin breached both undertakings almost immediately after agreeing to them suggests that she had never had any intention of abiding by them. Dr. Marcin has demonstrated a profound lack of personal and professional responsibility and integrity.

The Committee had before it no evidence of remorse or medical or other evidence to explain the misconduct.

Lastly, the Committee notes that Dr. Marcin failed to comply with a probation order of the court, behavior that led to a second criminal conviction and a jail sentence.

For these reasons, the Committee concludes that Dr. Marcin is ungovernable.

Mitigating Factors

Dr. Marcin made some admissions during the investigation. Through her counsel, she stated that she did not contest the accuracy of the factual findings in Dr. Cohen's report. As well, Dr. Marcin acknowledged that she had breached her April 2015 undertaking to the College and that Patients Z and Y are her family members. While those admissions did not dispose of the need for the College to prove all of the elements of its case (as would have been the case, for example, if Dr. Marcin had agreed to an agreed statement of fact or submitted a plea of no contest), this did nevertheless shorten at least some aspects of the hearing. For clarity, the Committee is aware that the failure to make admissions or to plead no contest can never be an aggravating factor, but simply notes that the limited scope of the admissions made must be kept in mind in determining the effect of this mitigating factor when compared to other cases in which full admissions have been made.

Prior Cases

The Committee considered a number of prior cases, being aware that each is unique, with a unique set of facts and mitigating and aggravating factors. Prior decisions may be of assistance in determining an appropriate penalty, but the Committee is not bound by them.

In *CPSO v Kaminski* 2018 ONCPSD 15 (CanLII), a family physician breached a cease-to-practice undertaking and contravened a term, condition, or limitation on his certificate of registration by continuing to practice after he had agreed not to do so. The physician entered a plea of no contest with respect to the allegation and did not oppose the proposed penalty which was revocation despite the earlier expiry of the physician's certificate. The Committee emphasized the reliance of the College on its members abiding by undertakings and orders, and the serious nature of breaches. The misconduct was more limited than in the present proceeding.

In *CPSO v Mayberry* 2017 ONCPSD 52 (CanLII), a family physician breached an undertaking to cease prescribing narcotics. He had been cautioned previously about a prior breach. The

physician admitted the misconduct. The Committee accepted the joint submission on penalty which included a two-month suspension and reprimand. Again, the misconduct was considerably more limited than in the present proceeding.

In *CPSO v Sweet* 2017 ONCPSD 40 (CanLII), a physician appeared before the Committee for the fifth time, having serially breached various undertakings and orders and been found to have failed to maintain the standard of practice and to be incompetent. The physician's cavalier attitude, failed attempts at remediation, and pattern of appearances before the Committee over a number of years led the Committee to find him ungovernable. The Committee accepted his irrevocable undertaking to cease to practice and would otherwise have imposed revocation. The Committee noted (p18):

A physician with the privilege to practice must accept the authority of the College, whose job it is to protect the public. Breaches of undertakings and Committee orders are considered very seriously by the Committee, as they show disregard for the College, put the public at risk, and undermine the public's confidence in the College's role of governing the profession in the public interest.

The Committee notes that by contrast with the circumstances in *Sweet* 2017, Dr. Marcin has not 'serially' breached her undertakings, i.e., she has not breached an undertaking after having been found to have breached an undertaking previously. As well, the Committee heard no evidence about prior attempts at remediation with respect to Dr. Marcin.

In *CPSO v Glumac* 2016 ONCPSD 14 (CanLII), a psychiatrist engaged in a wide range of misconduct and was found incompetent. The misconduct included borrowing money from a vulnerable patient and other boundary violations, sexual abuse, disgraceful, dishonourable or unprofessional conduct, and failing to maintain the standard of practice. The penalty was revocation and a reprimand.

In *CPSO v Roche* 2017 ONCPSD 13 (CanLII), a psychiatrist committed a lengthy series of serious boundary violations with a highly vulnerable patient, including hiring the patient to care for her following surgery and then failing to pay her as agreed. The Committee further found that the physician had failed to maintain the standard of practice of the profession and incompetence, and that the majority of the examples of her misconduct arose from her exploiting her patients to meet her own selfish needs and giving little thought to the devastation she caused. The Committee accepted the jointly submitted penalty of a reprimand in light of the physician's resignation and undertaking never to reapply; otherwise, revocation would have been warranted.

In *CPSO v Esmond* 2016 ONCPSD 4 (CanLII), a physician provided care for a family member for serious medical conditions over a period of years. In addition, the physician provided and received care from a physician with whom he was in a supervisory role. The physician cooperated fully and the Committee ordered a four-month suspension and reprimand.

In *CPSO v. Garcia* 2018 ONCPSD 35 (CanLII), a physician provided medical services for a family member on more than one occasion, engaged in inappropriate and excessive prescribing of controlled substances, and attempted to obtain confidential health information without a patient's consent. There were a number of mitigating factors and the Committee accepted a joint submission on penalty that included an eight-month suspension, remediation, supervision and various monitoring measures.

In *CPSO v Moore* 2002 ONCPSD 16 (CanLII), a physician admitted to having been found guilty of an offence relevant to his suitability to practice, namely defrauding OHIP by submitting false claims. The physician made full restitution of \$75,000.00. The Committee considered the misconduct an egregious breach of professional trust and lent its weight to the view that "in most cases of substantial premeditated fraud, the penalty of revocation should be the norm." In this instance, the Committee ordered a 12-month suspension, six months of which would be suspended on payment of a fine and costs, and a reprimand.

In *CPSO v Scott* 2002 ONCPSD 15 (CanLII), a physician admitted to having been found guilty of an offence relevant to his suitability to practice, specifically defrauding OHIP by submitting false claims over several years in the amount of \$592,600.00. The Committee found that the only appropriate penalty was revocation.

The cases provide examples of prior decisions relating to breaches of undertakings and orders, wide-ranging and/or serial misconduct, serious boundary violations with vulnerable patients, ungovernability, failure to meet standards of practice, incompetence and having been found guilty of an offence relevant to the suitability to practice. There is no single case with facts analogous to those in the current proceeding. However, it is clear that revocation is well within the range of penalties for the wide-ranging misconduct, ungovernability, and incompetence the Committee has found in Dr. Marcin's case.

CONCLUSION

Considering the totality of Dr. Marcin's professional misconduct, her ungovernability, and her incompetence, the Committee concluded that immediate revocation of Dr. Marcin's certificate of registration and a reprimand are a just and appropriate penalty, and are reasonably consistent with penalties imposed in previous cases insofar as they are similar. Revocation will address the paramount need for public protection in the face of egregious misconduct and incompetence. Moreover, revocation is necessary to adequately maintain public confidence in the integrity of the profession and in the College's ability to regulate the profession effectively in the public interest.

The Committee notes that physicians have a statutory entitlement to seek reinstatement of their certificate after one year, in the absence of a finding of sexual abuse, and that the possible date for an application for reinstatement by Dr. Marcin will be delayed by this newly imposed revocation. In addition, it would be necessary for Dr. Marcin to demonstrate she has remediated her deficiencies such that she no longer poses a risk to patient safety and that she is suitable to

practise medicine, as conditions of reinstatement. Also, she would have to answer to a widened multiplicity of findings now having been twice revoked.

The magnitude and pervasiveness of Dr. Marcin's misconduct and incompetence in the context of ungovernability are such that the Committee is of the view that rehabilitation is not possible.

A reprimand will allow the Committee to express its abhorrence of Dr. Marcin's conduct in a public forum. It may serve as specific deterrent and will make the profession aware that such conduct will not be tolerated.

COSTS

The Committee found that this is an appropriate case in which to award costs at the tariff rate for three hearing days.

ORDER

Therefore, the Committee ordered and directed that:

1. Judi Dianne Marcin appear before the panel to be reprimanded.
2. the Registrar revoke Judi Dianne Marcin's certificate of registration effective immediately.
3. Judi Dianne Marcin pay to the College its costs of this proceeding in the amount of \$30,540.00 within thirty (30) days from the date this Order becomes final.