

Indexed as: Rosenberg (Re)

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

IN THE MATTER OF a Hearing directed
by the Complaints Committee of
the College of Physicians and Surgeons of Ontario
pursuant to Section 36(1) and Section 26(2)
of the *Health Professional Procedural Code*,
being Schedule 2 of the *Regulated Health Professions Act*,
1991, S.O. 1991, c. 18, as amended.

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. ROBERT ARLEN ROSENBERG

PANEL MEMBERS: DR. R. MACKENZIE (CHAIR)
DR. N. DE
J. FREDERICK
P. BEECHAM
DR. J. THOMPSON

Hearing Dates: February 11 & 12, 2002
February 3 – 5, 2003

Decision/Released Date: March 21, 2003

Penalty Hearing Date: February 5, 2003

Penalty/Released Date: March 21, 2003

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee of the College of Physicians and Surgeons of Ontario ("CPSO") heard this matter at Toronto on February 11-12, 2002 and February 3 to 5, 2003.

PUBLICATION BAN

Pursuant to subsection 47(1) of the Health Professions Procedural Code (the "Code"), which is Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c.18, as amended, the Committee ordered that no person shall publish the identity of the patient or any information that could disclose the identity of the patient.

ALLEGATIONS

The Notice of Hearing alleged that Dr. Rosenberg committed acts of professional misconduct:

1. under paragraph 29.30 of Ontario Regulation 548 ("O. Reg. 548"), R.R.O. 1990, the *Health Disciplines Act*, R.S.O. 1990, in that he engaged in sexual impropriety with a patient;
2. under clause 51(1)(b.1) of the Code, in that he sexually abused a patient;
3. under clause 1(1)33 of O. Reg. 856/93 made under the *Medicine Act*, 1991, S.O. 1990, in that he engaged in acts relevant to the practice of medicine that having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and
4. under paragraph 27.33 of O. Reg. 548, in that he engaged in conduct or an act relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

While the particulars in Appendix 1 to the Notice of Hearing dealt with other matters, at the outset of the hearing, counsel for the College informed the Committee that the

College would only be proceeding with the allegations as they relate to the incidents of sexual abuse and sexual impropriety.

RESPONSE TO ALLEGATIONS

Dr. Rosenberg denied all allegations set out in the Notice of Hearing.

EVIDENCE FOR THE COLLEGE

The Complainant

The complainant testified that she became a patient of Dr. Rosenberg on or about February 1988. She continued as his patient until the spring of 1998. Throughout this entire period, she maintained that he was her primary care physician. She attended him for medical care on a regular and frequent basis. Dr. Rosenberg's medical records were entered as an exhibit and supported the complainant's testimony in this regard.

In approximately December 1991, the complainant testified that the relationship began to evolve from a purely doctor-patient interaction into a social one. Dr. Rosenberg invited her to his apartment for coffee and kissed her when she left. Shortly thereafter, they began to see each other socially on a regular basis and the relationship became sexual. The complainant then separated from her husband and ultimately moved into an apartment in the same building as Dr. Rosenberg. At this point, Dr. Rosenberg moved in with her. At some point during this time frame, she began working for Dr. Rosenberg as an office assistant.

When the complainant purchased a house. She provided the down payment and Dr. Rosenberg serviced the mortgage payments. Dr. Rosenberg moved in with her, and the two of them lived together in the house for approximately two years. The complainant had three daughters who were young adults at the time, all of whom lived in the house at varying periods of time. The panel heard evidence from the Manager of Registration of the CPSO that Dr. Rosenberg had notified the College in writing that this was his mailing address from June 3, 1996 until July 30, 1997.

The complainant testified that Dr. Rosenberg provided her with medical care throughout the period of time that they were living together. These clinical encounters occurred in different places, including the office and their home. OHIP records were entered as an exhibit and the panel was taken to several entries in which Dr. Rosenberg billed for services provided to the complainant as “special visits to home”.

In the summer of 1996, the complainant’s mother died. Dr. Rosenberg accompanied the complainant to the funeral out of town where he became quite angry with her and threatened not to drive her and the children back home. The complainant identifies this incident as the beginning of the deterioration in their personal relationship. She recalls becoming very despondent following her mother’s death and continued to see Dr. Rosenberg as a physician for help in dealing with her emotional problems. By September 1996, the complainant was functioning so poorly that she applied for disability benefits and stopped working for Dr. Rosenberg. Dr. Rosenberg completed the medical report for her disability application, and the panel took note that he cited her diagnoses as “clinical depression, migraine headache”.

The complainant and Dr. Rosenberg stopped living together sometime in 1996, but they continued to see each other socially and she continued to attend at his office for medical treatment. In June 1998, she decided to formally terminate the doctor-patient relationship.

On cross examination, the complainant testified that she was very much in love with Dr. Rosenberg and continues to have loving feelings toward him. She agreed that she and Dr. Rosenberg had become formally engaged at some point, but she could not recall the exact date. She believes it was probably sometime in 1993. She presented herself thereafter as his fiancée, but acknowledges that they lived together for all intents and purposes as husband and wife. Dr. Rosenberg was unable to marry her because of unresolved issues in his first marriage. A number of photographs were entered as exhibits, which showed the complainant and Dr. Rosenberg travelling and attending family functions together. The complainant agreed that neither she nor Dr. Rosenberg ever tried to keep their relationship secret. After their separation, she attempted on numerous occasions to reconcile the relationship until June 1998. After that point, she

realized reconciliation was impossible, but she continued to see Dr. Rosenberg from time to time on a casual basis. Even subsequent to the complaint to the College, they have continued to communicate on a friendly basis.

EVIDENCE FOR THE DEFENCE

Counsel for Dr. Rosenberg introduced a brief of letters in support of Dr. Rosenberg as an exhibit to the hearing. In addition, the panel heard evidence from five patients of Dr. Rosenberg. All of the witnesses described Dr. Rosenberg as a sensitive, effective and caring family physician. All felt that he was thoroughly ethical at all times in his dealings with patients. The additional letters contained in the brief were similarly supportive of Dr. Rosenberg.

On cross-examination, counsel for the College determined that at least three of the witnesses were unaware of the nature of the proceedings against Dr. Rosenberg. The brief of letters was entered on consent and therefore the authors were not tested on cross-examination. However, counsel for the College drew the panel's attention to the fact that virtually none of the letters indicated that the authors were aware of the allegations that were set out in the Notice of Hearing.

FINDINGS OF THE COMMITTEE

The Committee finds that Dr. Rosenberg has committed professional misconduct with respect to all four allegations in the notice of hearing.

REASONS FOR DECISION

Although Dr. Rosenberg denied all allegations at the outset of the hearing, his counsel invited the Committee to make a finding against him in respect of allegations 3 and 4 in that he had engaged in conduct that was disgraceful, dishonourable and unprofessional.

The Committee understands that acts of professional misconduct involving sexual relationships with patients that occurred prior to January 1, 1994 are covered by the provisions of the *Health Disciplines Act* and that such acts subsequent to January 1, 1994 are governed by the *Regulated Health Profession Act, 1991*. However, the Committee

accepts unreservedly the College's position that contemporaneous sexual relationships with patients have always been unacceptable and particularly so when the doctor-patient relationship precedes the sexual one.

In this case, the Committee accepts the evidence that the complainant was Dr. Rosenberg's patient since 1988 and commenced a sexual relationship with him in 1991. The complainant's evidence in this regard was not challenged. Both the doctor-patient and the sexual relationship continued until 1998. It is abundantly clear that Dr. Rosenberg's misconduct spans both legislated periods.

Defence counsel argued that Dr. Rosenberg never engaged in a sexual relationship with the complainant under the guise of medical treatment. The Committee accepts the College's position that sexual misconduct is not to be considered as qualitatively different based on the location of the acts. The law is very clear in this respect. It prohibits sexual relationships with a patient wherever they take place and not just within the context of a medical encounter. The Committee also considered that Dr. Rosenberg billed for multiple medical "visits" that took place in the same home that he shared with the complainant.

Defense counsel argued strongly that the relationship between the complainant and Dr. Rosenberg had become a spousal one by September 1993 and that this now pre-existing spousal relationship was then caught by the passage of the legislation in January 1994. He further suggested it was open to the Committee to interpret that the legislation was not intended to capture this type of relationship. The Committee unequivocally rejects this line of argument. The legislation leaves no opportunity for discipline panels to "interpret" the intent of the legislators. Sex with a patient is sexual abuse, regardless of whether the sexual relationship has a positive or negative outcome. Dr. Rosenberg knew, or ought to have known that sex with his patient prior to 1994 was unacceptable. By January 1, 1994 he knew, or ought to have known that such misconduct was now sexual abuse and that the public and the profession had adopted a zero tolerance to such behaviour. Notwithstanding this knowledge, he made no effort to disengage himself from the complainant either personally or professionally.

The Committee also accepted the advice given by its independent legal counsel that laws do change from time to time requiring that changes in behaviour are necessary to ensure compliance with the law. This is particularly applicable to this case. Regardless of the inappropriateness of the sexual relationship in the first place, there is simply no

justification for Dr. Rosenberg not to have transferred the complainant's care to another physician once he was so clearly in breach of the accepted behaviour of his profession. In the Committee's opinion, his failure to do so is perhaps the most egregious aspect of his misconduct.

The Committee accepted the College's position that character evidence should be given little or no weight in the liability phase of a discipline hearing. Further comment on this evidence will be provided in the reasons for the penalty decision.

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PUBLICATION BAN

PENALTY DECISION AND REASONS FOR PENALTY

This matter came on for hearing at the College of Physicians and Surgeons on February 11 to 12, 2002 and February 3 to 5, 2003. The Discipline Committee of the College of Physicians and Surgeons of Ontario (“CPSO”) rendered its decision and reasons on finding and the following order as to penalty and costs on March 21, 2003.

ORDER AS TO PENALTY AND COSTS

- 1) The Discipline Committee directs the Registrar to revoke Dr. Rosenberg’s certificate of registration effective immediately;
- 2) The Discipline Committee requires Dr. Rosenberg to appear before the panel to be reprimanded, and the fact of the reprimand to be recorded on the register;
- 3) The Discipline Committee orders Dr. Rosenberg to reimburse the College for funding up to the amount of \$10,000.00 provided for the complainant under the programme required under s. 85.7 of the *Health Professions Procedural Code*, and directs Dr. Rosenberg to post security acceptable to the College to guarantee the payment of any amounts Dr. Rosenberg may be required to reimburse under this order.
- 4) The Discipline Committee orders Dr. Rosenberg to pay to the College within 30 days of the date of this order the partial costs of this hearing fixed in the amount of \$10,000.00.

PENALTY ORDER IN ABSENCE OF S.51(5)

If there was no mandatory penalty under the Code, the Committee is of the view that the appropriate penalty would be identical to the order set out above.

REASONS FOR PENALTY DECISION

Under subsection 51(5) 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, the Committee is bound to apply the mandatory penalties set out in items 1 and 2 above. It understands that the ordering of costs rests fully within its discretion. In this case, the Committee accepts the College’s position that costs should follow where the hearing is brought on for misconduct that the member ought to have known was unacceptable. The Committee understands that Dr. Rosenberg’s decision to deny the allegations at the outset of the hearing cannot weigh against him in determining penalty. However, by so doing he did nothing to mitigate the necessity for bringing the matter to a full hearing before the Discipline Committee. Inasmuch as the cost order represents only a fraction of the true costs of the investigation and hearing, the Committee feels this is an appropriate order under the circumstances.

The Committee is well aware of the principles of penalty that apply in a professional disciplinary tribunal. These include protection of the public, specific and general deterrence, maintenance of public confidence in the profession and its ability to regulate itself and finally, rehabilitation of the member.

Counsel for Dr. Rosenberg argued that this was a unique case in that Dr. Rosenberg’s behaviour was not predatory, nor did the sexual encounters occur within the actual context of his medical practice. The Committee was not persuaded by this argument. As articulated in the Decision and Reasons for Decision on finding, sexual relationships with patients are prohibited wherever they take place, not just within the context of a medical encounter. Similarly, lack of predation cannot be considered as a mitigating factor in sexual abuse of a patient.

Counsel for Dr. Rosenberg further argued that the lack of evidence of predatory behaviour and the fact that this was a single relationship that took place over a number of years would obviate the need for specific deterrence. Even if the Committee were to accept this position, it is fully aware that the principle of protecting the public goes

beyond protecting them only from the possibility of Dr. Rosenberg re-offending. It is well understood that both society and the medical profession have accepted unequivocally a zero tolerance towards physicians who sexually abuse their patients. Sexual abuse is the most egregious breach of trust between a doctor and his patient. In spite of severe penalties being imposed for this type of misconduct, doctors are still being brought before discipline tribunals to answer allegations of sexual abuse. Absolute condemnation of such behaviour is the only appropriate way to ensure that the profession gets the message. In the Committee's opinion, revocation is the only option that adequately addresses all the principles of penalty in this situation.

The Committee was also not persuaded that somehow Dr. Rosenberg was "caught by the legislation" that came into effect in January 1994. If this were true, then he could have taken some action to mitigate the misconduct. In fact, Dr. Rosenberg made no effort whatsoever to terminate the doctor-patient relationship at that point or at any time thereafter. The Committee was particularly disturbed by the fact that he regularly billed OHIP for "special home visits" for medical treatment in the home he shared with the complainant. This is hardly the behaviour of someone who is concerned about being caught out in a change of the rules.

As indicated in the Decision and Reasons for Decision on Finding, the Committee heard evidence from character witnesses and received a brief of letters in support of Dr. Rosenberg as an exhibit to the hearing. The Committee accepts the College's position that such evidence should be given little if any weight in determining the penalty in this case. The character evidence speaks to the standard of Dr. Rosenberg's care in general. This is not a case of breach of standards, and this evidence therefore provides little assistance to the Committee in determining penalty in this case.