

NOTICE OF PUBLICATION BAN - AMENDED

In the College of Physicians and Surgeons of Ontario and Dr. Peter Robert Schwarz, this is notice that the Discipline Committee ordered that there shall be a ban on publication or broadcasting of the name, or of any information that could disclose the identity of Ms D, Ms E and Ms F, 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.

The Tribunal also made an order under subsection 47(1) of the Code, which was amended on February 11, 2022, to provide that Patient A’s name may be published. The original order, dated November 26, 2018, remains in effect in relation to Nurse A, Nurse B, and Nurse C, banning the publication of their names or any information that could identify them. There may be significant fines for breaching this order.

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

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

- (a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or
- (b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

**Indexed as: Ontario (College of Physicians and Surgeons of Ontario) v. Schwarz,
2019 ONCPSD 9**

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

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

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. PETER ROBERT SCHWARZ

PANEL MEMBERS:

**DR. P. ZITER
MR. M. KANJI
DR. E. SAMSON
MR. J. LANGS
DR. W. McCREADY**

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

**MS C. SILVER
MS R. AINSWORTH**

COUNSEL FOR DR. SCHWARZ:

**MR W. BRYNAERT
MR D. BLIMKIE**

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MS Z. LEVY

Hearing Dates:	November 26 to 30 and December 3, 2018
Decision Date:	March 8, 2019
Release of Reasons Date:	March 8, 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 November 26 to 30 and December 3, 2018. At the conclusion of the hearing, the Committee reserved its decision.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Peter Robert Schwarz committed an act of professional misconduct:

1. under clause 51(1)(b.1) of the Health Professions Procedural Code which is schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18 (the “Code”) in that he engaged in sexual abuse of a patient; and
2. under paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O. Reg. 856/93”), in that he has engaged in 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.

RESPONSE TO THE ALLEGATIONS

Dr. Schwarz denied the first and second allegations as they relate to Patient A as set out in paragraphs 1, 2 and 3 of Schedule A to the Notice of Hearing. Dr. Schwarz admitted to the second allegation as set out in paragraph 4 of Schedule A to the Notice of Hearing, that he has engaged in an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, in relation to three nurse complainants.

BACKGROUND

It is alleged that Dr. Schwarz engaged in sexual abuse and/or in disgraceful, dishonourable or unprofessional conduct in relation to a single patient, Patient A, over the period of October 2, 2015 to December 4, 2015 by, among other things, making inappropriate and/or sexual comments to Patient A and engaging in inappropriate, sexual and/or physical contact with Patient A (the touching of her breast and buttocks during medical visits). Dr. Schwarz denies the allegations.

It is also alleged that Dr. Schwarz engaged in disgraceful, dishonourable and unprofessional conduct in regards to three nurses at a hospital, by making inappropriate and/or sexual comments and engaging in inappropriate, and/or sexual behavior and contact. Dr. Schwarz admits that allegation.

THE ISSUES

This case raises two issues as follows:

1. Did Dr. Schwarz engage in sexual abuse and/or disgraceful, dishonourable or unprofessional conduct with respect Patient A; and
2. Did Dr. Schwarz engage in disgraceful, dishonourable or unprofessional conduct with respect to Nurses A, B and C by behavior and remarks of a sexual nature?

THE LAW

Burden and Standard of Proof

The onus is on the College to prove the allegations in the Notice of Hearing. The standard of proof is the civil standard, on a balance of probabilities (See *F.H. v. McDougall* [2008] 3 SCR

41). The allegations must be proved on the basis of evidence that is clear, cogent, and convincing.

Sexual Abuse of a Patient

Subsection 1(3) of the Code states that “sexual abuse” of a patient by a member means:

- (a) sexual intercourse or other forms of physical sexual relations between the member and the patient,
- (b) touching, of a sexual nature, of the patient by the member, or
- (c) behaviour or remarks of a sexual nature by the member towards the patient.

The Code also states in subsection 1(4) that:

- (4) For the purposes of subsection (3), “sexual nature” does not include touching, behaviour or remarks of a clinical nature appropriate to the service provided.

To fall within the meaning of sexual abuse as defined in the legislation, the Committee must find the alleged sexual misconduct occurred with a patient. A finding of sexual abuse is not made out if a physician engages in sexual activity with someone other than a patient. If sexual activity occurred with someone other than a patient, such as a former patient, the circumstances may still give rise to a finding of disgraceful, dishonourable or unprofessional conduct.

Disgraceful, Dishonourable or Unprofessional Conduct

Paragraph 1(1)33 of Ontario Regulation 856/93 made under the *Medicine Act, 1991* (“O.Reg. 856/93”) states:

- 1. (1) The following are acts of professional misconduct for the purposes of clause 51 (1) (c) of the Health Professions Procedural Code:

33. 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.

There is no statutory definition of “disgraceful, dishonourable or unprofessional conduct.”

“A Complete Guide to the Regulated Health Professions Act” by Richard Steinecke states the following regarding disgraceful, dishonourable or unprofessional conduct, at 6:60:20(5):

The catch-all provision is not intended to capture the legitimate exercise of professional discretion or mere errors of judgment. However, conduct need not be dishonest or immoral to fall within the definition. A serious or persistent disregard 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. Conduct need not be proved to harm the patient to be unprofessional.

Issue #1 - Did Dr. Schwarz engage in sexual abuse and/or disgraceful, dishonourable or unprofessional conduct with respect Patient A?

THE EVIDENCE

The Committee heard the testimony of Patient A , and her family member, Witness G, on behalf of the College. The Committee heard the testimony of Dr. Schwarz, Sharon Carricato, and Witness D, called by counsel for Dr. Schwarz. Various exhibits were filed, including clinical records contained in a joint book of documents and two video recordings.

Testimony of Patient A

Patient A gave evidence that she moved to City 1 and became Dr. Schwarz's patient in 2009 after her previous physician retired. She had several medical conditions, including thyroid disease, high cholesterol, eczema, asthma and recurrent bouts of abdominal pain and vomiting, which had been diagnosed as a specific condition.

Patient A testified that she had been prescribed Synthroid for her thyroid condition and was also in receipt of a prescription for medical marihuana. An eligible medical condition letter and Health Canada Authorization to possess dried marihuana for medical purposes were entered as Exhibits 4 and 5 respectively.

Patient A testified that she was authorized to possess 15 grams of marihuana but used 3 grams or less, per day. She smoked, or used it in an edible form, growing and processing it herself. She described the variety of marihuana she used as being low in THC and high in CBD. She described THC as the intoxicating ingredient and CBD as the medicinal ingredient.

Patient A testified that her use of marihuana in this fashion did not cause intoxication or impairment and she was able to drive, perform the functions of daily living and her sense of perception was not affected. She stated that Dr. Schwarz was aware of her use of marihuana and did not disapprove. She testified that he instructed her on a method of extracting a concentrated form using either Butane or another solvent, although she had not tried it. When asked if Dr. Schwarz discussed his own use of marihuana, she stated that he reported that it made him paranoid.

Patient A testified that she had seen a specialist about a problem with her cervix and had had an abnormal Pap test and had a subsequent loop electrosurgical excision procedure (LEEP) and "cone" procedure. She understood that there were cancer cells present and that she had an HPV infection. She "Googled" information about HPV and realized the virus could also be in her mouth as it was sexually transmitted. Common sense told her that it could be in her "butt" and

mouth if it was in her cervix. She testified that she had a desire to be checked as it was “scary” and at the time of the hearing it still scared her.

Patient A testified that subsequently, she went to see her dentist and asked him to check her mouth for HPV related lesions. She said her dentist became embarrassed because she told him that she enjoyed giving oral sex. She found his embarrassment and discomfort to be amusing. She stated she was not trying to embarrass the dentist and was trying to make light of the situation. The dentist checked her mouth and found no HPV related problems.

Patient A then described a visit to Dr. Schwarz on October 2, 2015. Her purpose at that visit was to get a requisition for blood work to check her thyroid and cholesterol status. She testified that during that visit, she told Dr. Schwarz about the dental visit and that the dentist was embarrassed. She stated that Dr. Schwarz laughed and as she was preparing to leave, he said that “it’s funny he (the dentist) was embarrassed and it’s funny that you like doing that.”

Patient A testified that Dr. Schwarz opened the door for her and she left the room first and as she entered the hallway she replied, “not any more and you are lucky I have self-control.” Patient A testified that her comment “not any more” meant “I don’t like oral sex anymore”. The second part of her comment, “you are lucky I have self control” was intended as a joke and a comeback. She did not mean it literally but the comment implied “that I would suck his dick.”

Patient A testified that she had never made a sexual joke to Dr. Schwarz before and neither had he made a sexual joke to her. She testified, “I didn’t think he liked me like that” and “I never felt uncomfortable around him before.”

Patient A denied saying the words “I was dreaming of giving you a blowjob” and further stated that she would not use that term because she considers it stupid. She used the term “suck dick” to refer to oral sex, and does not use the term “blowjob.”

Following the October 2, 2015 appointment, Patient A described having her blood work done as ordered by Dr. Schwarz. She testified that she received a phone call from Dr. Schwarz's secretary on October 15th saying that the doctor wished to see her and giving her an appointment for Tuesday the 20th of the next week (five days later). It was not common to receive a call back from Dr. Schwarz's office. She became very worried that this meant her laboratory tests were abnormal. She decided not to wait and so attended as a walk-in patient the next day, October 16, 2015.

Patient A testified that Dr. Schwarz seemed more casual than usual when he came into the room for the appointment. He greeted her by her last name, which was unusual. He rubbed her back and said to her "don't talk like that in the hallway, someone might hear you". This was in reference to the remarks about oral sex she made at that previous appointment. Patient A testified that she then asked about her blood work and he said it was okay. He told her that the specialist wanted her to have the HPV vaccine and to stop smoking. She found this unusual, as she was already aware of the specialist's opinion. She then asked about her cholesterol and he said it was okay and asked her "how much weight did you lose?" She replied "75 pounds - no 65 pounds as I have put 10 back on." He asked "where?" She responded to say "right here", and to show him her abdominal fat roll by grabbing it in her two hands.

Patient A testified that he responded by grabbing her roll of fat and by saying, "that's not fat." He then "grabbed my boob" and said, "The fat didn't go there either." Patient A described that she sat there "frozen" and in disbelief as to what just happened. Patient A testified that Dr. Schwarz then told her to stand up and he put both of his arms around her from the front and placed his hands on her "butt," rubbed the area and said, "the fat didn't go there either."

Patient A described Dr. Schwarz's hands as making cupped, circular motions while on her buttocks and his hand to be making a soft rubbing motion while on her breast.

Patient A testified that then, she stepped back away from Dr. Schwarz and he cupped her left breast again. Patient A said she stepped away again and he said "come here little one" and

hugged her and said, “again, don’t talk like that in the hallway.” Patient A testified she sat down again briefly and then to end the visit, the patient opened the door to the examining room and said, “Well, this has been an interesting visit.” She then left the office.

Patient A testified that she well understood the difference between a medical examination and being groped and was clear that what had happened at that appointment was groping.

Patient A testified that after she left the doctor’s office, she drove home and called her family member and told her what had happened. She stated that she was crying and upset when she spoke to her family member. Her family member told her to write down the details of what had occurred to ensure she had an accurate memory of the events. She elected instead to make a video recording, outlining her recollections, on her smart phone. She made it while in her bedroom immediately after she had talked to her family member.

The Committee was shown two videos (Exhibit 7) recorded on October 16, 2015 at 12.31 p.m.. Patient A was agitated and tearful in the videos.

Patient A was hospitalized on October 24th for an episode of vomiting and abdominal pain and subsequently returned to see Dr. Schwarz on December 4th, ostensibly to obtain a repeat prescription for a cream she used for eczema, and also to question him about what he had done. A copy of the prescription was introduced in evidence.

Patient A testified that her real intention was to confront Dr. Schwarz with his behavior and have her questions answered. She asked him “do you like me or do you just want to fuck?” Then she asked him what he was doing as they were both married with kids. Lastly, she wanted to know what he was doing, given that he was a doctor and she had only a grade 10 education. She then told him she wasn’t interested but that she would not “tell on him.”

Patient A testified that Dr. Schwarz responded to all her questions in order. Among other things, Patient A said Dr. Schwarz told her “I turned him on...it doesn’t matter that we’re married...it

doesn't matter that we have kids...it didn't matter that I only had my Grade 10...when two people like each other, nothing like that matters." Patient A testified that she told Dr. Schwarz she was not interested in "sexual activities," and then as she went to leave Dr. Schwarz "grabs my butt." She felt he had not listened to her and she could not believe what had just happened. Patient A testified that her recent hospitalization was not discussed that day. She subsequently reported these incidents to a doctor at the local hospital and she also reported the matter to the police.

On cross-examination, counsel for Dr. Schwarz suggested to the witness that the comments regarding oral sex were in fact an attempt to seduce Dr. Schwarz. Patient A vigorously denied this and stated that the comments were a "come back" to Dr. Schwarz's comment about the dentist being embarrassed.

Patient A was also cross-examined about the timing of the conversation regarding oral sex. It was suggested to her that in fact the conversation regarding oral sex had not occurred until October 16, 2015, as a secretary who was present that day would testify she had overheard aspects of that conversation. Patient A denied this vigorously and maintained the remarks were made on the October 2nd visit and that she believed she was called in to see him on October 16th, so that he could assault her.

Patient A testified that she had not found another family doctor and had lost faith in the medical profession.

Testimony of Witness G - Family Member of Patient A

Witness G is a family member of Patient A. She described herself as being close to Patient A and stated that they spoke most days by phone.

Witness G described a phone call from Patient A in which Patient A was very upset. It took five minutes for her to calm down enough to be understandable. After she finally had the situation

explained to her, Witness G advised Patient A to write everything down so that she wouldn't forget anything. Witness G testified that she was aware that Patient A chose instead to make a video recording. She described this call as being very different from their usual phone calls.

Witness G described Patient A as being without a filter and as having relatively low self-esteem.

Witness G used the term "blowjob" when discussing Patient A's allegations but later clarified that Patient A's terminology was "suck a dick." Witness G denied discussing the distinction between these two terms as being an issue in the hearing with Patient A.

Testimony of Dr. Schwarz

Dr. Schwarz studied medicine from 1989 until 1992 and has been in practice in City 1 since 1995 and at his current location since 2009. He is married with two children.

Dr. Schwarz testified he had two secretaries working in his office, with one of them being part time and largely filling in for the primary secretary.

Dr. Schwarz testified that he first saw Patient A in 2010 and had seen her on 58 occasions between 2010 and 2015. He described her as worried about her health.

Dr. Schwarz testified that when he saw Patient A on October 2, 2015, there was no discussion regarding her conversation with the dentist and that the conversation regarding oral sex did not occur. His part time secretary - Ms Carricato - was present that day, as his main secretary was on vacation. On cross-examination, Dr. Schwarz agreed that his note of October 2nd states that the patient was worried about HPV but that his handwritten notes did not identify the location of the HPV. When Dr. Schwarz created a typed transcription of his notes, he wrote "worried about HPV of cervix," which is what he assumed he probably meant when he wrote the transcript. Counsel for the College suggested that the patient could have said she was worried about HPV of the mouth, and that this chart entry could be an indication of a discussion about her visit to the

dentist. Dr. Schwarz initially denied that they could have discussed her concerns about HPV in her mouth on October 2nd but later conceded that was possible. However, he remained adamant that the comments about her dental visit occurred on October 16 because the dental visit comments only happened once, and preceded Patient A's joke about oral sex on October 16.

Dr. Schwarz asserted that he had not seen the letter from the specialist, dated September 24, 2015, at the appointment on October 2, 2015. He testified that letters from specialists could take seven to ten days to arrive in his office. He subsequently saw the letter from the specialist and instructed his secretary to call the patient in for a discussion about receiving the HPV vaccine and smoking cessation. On October 15th, Patient A was given an appointment for October 20th, as noted on the bottom of the specialist's letter in his secretary's handwriting.

Patient A came to see him the next day, October 16th, instead. Dr. Schwarz testified that Patient A declined vaccination and stated that she would refrain from sexual intercourse without a condom in future. He testified that he conducted a physical examination on that occasion and that he would have listened to her heart by placing his stethoscope above her left breast.

Dr. Schwarz testified that it was at that October 16th visit that Patient A recounted her visit with her dentist. As she was leaving, he testified that she said "you're lucky I have self control because I'm dreaming of giving you a blowjob." His secretary overheard some of that conversation and asked what that conversation was about. He was certain of the date because he found that day to be a memorable one. Dr. Schwarz maintained that the conversation took place on October 16th despite being shown records from the dentist's office (Exhibit 3, tab 3), which indicated that visit occurred on September 14th, and despite agreeing that Patient A's next visit at his office following the dentist's appointment was October 2nd.

Dr. Schwarz testified that the December 4th visit consisted of a discussion regarding her recent hospital admission.

Dr. Schwarz denied touching Patient A inappropriately.

Dr. Schwarz acknowledged that in his response to the College dated May 20, 2016 (Exhibit 8), he stated that the comments related to Patient A's dental appointment were made on December 4, 2015. Dr. Schwarz testified that he did not put enough time into the response to the College and that he wrote December 4 when he really meant October 16. He repeated that the discussion about HPV virus, her dentist, and the joke in the hallway all took place in one visit on October 16, 2015.

On cross-examination, Dr. Schwarz agreed that he knew the comment "I'm dreaming of giving you a blow job" was a potential boundary violation but that he did not make a note of that comment in Patient A's chart. His evidence was that he did not document it because he tries not to write negative comments in patient charts, as insurance companies could use that information in the future.

Dr. Schwarz agreed on cross-examination that in his letter of response to the College dated May 20, 2016 (Exhibit 8), he wrote that sometimes Patient A was in a state of mania, and at other times she was depressed. He referenced Patient A's use of cannabis because it would explain her erratic behavior. He agreed that he had never documented mania or depression as diagnoses in her patient record. Dr. Schwarz also agreed that there was no record in the chart to indicate troublesome cannabis use or that Patient A was impaired by it.

Testimony of Sharon Carricato

Ms Carricato testified that she had been working on October 2, 2015 as the other secretary was on vacation. She did not remember any inappropriate conversation between Dr. Schwarz and Patient A that day. Ms Carricato testified that she felt it unlikely she would have remembered a remark such as "you're lucky I have self-control" as it could refer to many things. She had no independent memory of Patient A, but felt she would recognize her if she saw her.

Testimony of Witness D

Witness D testified that she had worked with Dr. Schwarz from December 2008 and helped him establish his current office. She acted as an office manager as well as a secretary, submitting bills to OHIP and advertising for and hiring new staff. She agreed that she had a friendly relationship with Dr. Schwarz. Her husband had done work for Dr. Schwarz. They had socialized together on several occasions.

Witness D confirmed that she was not in the office on October 2, 2015 and provided airline and hotel receipts to confirm she was on vacation (Exhibits 14 and 15). This was also confirmed by the payroll calendar from Dr. Schwarz's office (Exhibit 16).

Witness D testified that she overheard a conversation between Patient A and Dr. Schwarz on October 16, 2015, in which she heard the comment that Patient A was dreaming of giving Dr. Schwarz a blowjob - she testified she caught the words "dreaming" and "blowjob" but could not say what the comment was verbatim. She testified that she heard Dr. Schwarz instruct the patient not to talk like that. She was able to overhear this conversation because she was just returning from a back file room when the patient exited the examining room. She agreed that she left her desk frequently, about 30 times a day, to go into this room. She was not aware of any other unusual interactions between Patient A and Dr. Schwarz, although she was in the office on the December 4, 2015 visit. Patient A had not appeared upset at that visit.

Witness D agreed that she had written a letter "to whom it may concern" dated September 16, 2016, when Dr. Schwarz was arrested. She referred in the letter to the comment regarding a blowjob, but used the word "wanting" instead of "dreaming." She testified that she had quoted Dr. Schwarz in parenthesis "[Patient A] don't talk like that" because she had a precise memory of what he had said.

Witness D agreed that she had shared several e-mails between herself and the College by copying Dr. Schwarz on her replies (Exhibit 18). She testified that she felt, as he was her boss, he

was entitled to see her communications with the College and she wanted to keep him advised about what was going on in the investigation to the extent she could.

Witness D agreed that the practice had been required to hire female monitors when the Inquiries, Complaints and Reports Committee (“the ICRC”) of the College made an interim order under section 37 of the Health Professions Procedural Code (Exhibit 19). These monitors had to be present in the examining room when Dr. Schwarz was seeing a female patient. The practice monitors were required to sign the patients chart to indicate that they had been present and to sign a logbook to be submitted to the College. One of these monitors sought a TB skin test from Dr. Schwarz. He performed the test without another monitor present, as the monitor “monitored herself.” The monitor’s patient chart was introduced into evidence (Exhibit 20).

Witness D agreed that she asked the other monitor to sign off on the chart, despite the fact she was not present. The other monitor did sign the chart. When the College compliance office made inquiries about this, Witness D told the College she had no idea how this had happened. In cross-examination, she admitted that she told the compliance monitor something that was not true. While she admitted lying to the compliance monitor, Witness D was adamant that she was not lying about the conversation between Patient A and Dr. Schwarz she overheard on October 16, 2015.

ANALYSIS

In this case, the Committee must decide on the totality of the evidence whether Dr. Schwarz’s conduct in relation to Patient A constitutes sexual abuse and/or disgraceful, dishonourable or unprofessional conduct.

In relation to the allegation of sexual abuse of a patient, Patient A was undisputedly Dr. Schwarz’s patient at the time of the events at issue, as evidenced by the patient record.

As in all situations where alleged sexual abuse occurs behind closed doors, the Committee must evaluate the allegations in the context of the objective credibility of the witnesses and of other evidence presented. The Committee heard from five witnesses who gave differing versions of the events of late 2015. Thus, assessment of the credibility of each witness was central to the Committee's decision making.

The Committee recognizes the importance of the credibility assessment of a witness and understands that it may accept all of what a witness said, some of it or reject the witness's evidence entirely. The Committee is aware of factors relevant to assessing credibility. The factors of particular importance to the Committee include:

- The probability or improbability of a witness's story? Did the evidence make sense? Was it reasonable? Was it probable? Was there a tendency to exaggerate?
- Did the witness have an interest in the outcome of the hearing that may influence the evidence?
- Was there contradictory evidence from another witness?
- Has the witness given a prior inconsistent statement that affects the reliability of the evidence?

The Committee has observed the witnesses as they give their evidence, considered how their evidence fits with other evidence, the presence or absence of inconsistencies and determined the presence or absence of inconsistencies, in reaching its assessments of credibility set out below. *Hajrizi v. Ottawa-Carlton School Board*, 2018 ONSC 3213, at para.47. Equally, in reaching its conclusions on credibility, the Committee is aware that the demeanour of a witness is considered a "notoriously unreliable predictor of accuracy." *Law Society of Upper Canada v. Neinstein*, 2010 ONCA, at paras. 66. As set out by the Court of Appeal in *R. v. Dyce*, 2017 ONCA 123 para. 11, looks can be deceiving and that there are simply too many variables to make the manner in which a witness testifies the only or the most important factor in a decision. The Committee has not made findings of credibility based on demeanour alone, or based primarily on the demeanour of witnesses.

Witness G

Witness G gave evidence in a straightforward manner and described Patient A's demeanour in a manner that the Committee finds is consistent with Patient A's demeanour in the videos of Exhibit 7. She was honest in her assessment of Patient A as being "without a filter." No evidence was introduced to suggest that she had any interest in the outcome of the proceedings. The Committee found her to be a credible witness.

Ms Carricato

Ms Carricato was a part time employee of Dr. Schwarz's. She testified that she had no recollection of the events of October 2, 2015 and did not know Patient A. She testified in a straightforward manner and the Committee found her credible and her evidence reliable.

Patient A

The Committee considered Patient A's evidence in light of the considerations set out above. With respect to probability and consistency with other evidence, the Committee notes that Patient A's evidence that she made the remarks about oral sex on October 2, 2015, then returned to see Dr. Schwarz on October 16 and again on December 4, 2015 made logical sense. The clearly documented visit to her dentist on September 14, 2015 (Exhibit 3, Tab 3) would logically have resulted in her recounting that encounter to her physician on the next possible occasion, namely October 2, 2015.

Patient A's joking innuendo regarding oral sex is consistent with her testimony and the testimony of Dr. Schwarz that they had a familiar relationship in which they discussed Dr. Schwarz's family, his vacations, his wife's health and his interest in her cannabis cultivation.

Further, her description of the events of October 16, 2015 was consistent with the testimony of her family member and the video evidence showing that she was extremely upset on October 16,

2015. Her agitated demeanour is consistent with what one might expect following a sexual assault. Post assault demeanour may be considered as evidence supporting a complainant's account; in this case, the Committee noted that it was consistent with Patient A's evidence although it was not determinative. *R. v. Chatta*, 1997 CarswellOnt 361, at para. 3-4.

Patient A testified about the appointments in October and December in a consistent, logical manner and her testimony, including her chronology of events, withstood vigorous cross-examination. Patient A conceded that her memory was poor for every day events, but maintained that her memory for the three appointment dates was clear, and her memory was consistent with the documentary and other witness's evidence as set out above. In short, Patient A's evidence about the key events made sense, and was consistent with the rest of the evidentiary record.

Patient A was open in recounting in her testimony her comments to the dentist that she liked oral sex and the resulting embarrassment and that she relayed this to Dr. Schwarz at the October 2, 2015 visit. She testified that when Dr. Schwarz said in response "it's funny he (the dentist) was embarrassed and it's funny that you like doing that," she said, "not any more and you are lucky I have self-control." Her evidence that she made the statement, "you are lucky I have self-control," is consistent with Dr. Schwarz's evidence, although he testified that she said this at the October 16th visit.

Patient A testified that her comment "not any more" meant "I don't like oral sex anymore". "[Y]ou are lucky I have self control" was meant as a joke and a comeback. She testified that she did not mean it literally but it implied "that I would suck his dick." Patient A was candid regarding the words that she used to refer to oral sex and that she does not use the term "blow job."

A motive or absence of motive to fabricate can also affect a witness's credibility. The Committee finds that Patient A has no apparent motive to fabricate her allegations. She is not seeking civil damages and expressed that she came forward so that other patients would be protected in the future. Patient A demonstrated no apparent animus towards Dr. Schwarz. She acknowledged that

she had had no previous concerns during her appointments with him. She testified that she had been willing to continue her patient-physician relationship with him after the first incident of alleged sexual abuse on October 16, 2015, as she felt he had made a mistake and she sought a way forward from this. However, she testified that she changed her mind when he allegedly sexually abused her a second time on December 4, 2015.

Dr. Schwarz's counsel suggested that Patient A made up the allegations because Dr. Schwarz rebuffed her advances. Patient A denied this and testified heatedly that she was not sexually attracted to Dr. Schwarz because he was not the type of man she finds physically attractive, and also she felt the two were incompatible because of the large differences in their education and social status. The Committee accepts Patient A's evidence that she was not interested in Dr. Schwarz and does not find that she was motivated to fabricate the allegations because she was rebuffed. Patient A had neither a financial nor a personal motivation to fabricate, and the absence of an apparent motivation to fabricate can be used as one factor in an assessment of credibility. *R. v. Batte*, 2000 CarswellOnt 2113, at paras.120-121 (Ont. C.a.); *R. v. D.C.*, 2017 ONCA 483, at para.8.

The Committee considered Patient A's prior untruthful statements. Specifically, on cross-examination, Patient A conceded that she was untruthful about the reason she gave for not attending a volunteer activity in the days following the alleged sexual abuse. Patient A testified that she told the lie as she was too upset to work and did not wish to reveal the true reason. Equally, Patient A conceded that she told Dr. Schwarz she would not report him to the police, but then reported him to the police, given the alleged second incident of sexual abuse. Counsel for Dr. Schwarz argued that Patient A was less credible as a result of these instances of untruthfulness. However, the Committee found Patient A's conduct in this regard did not diminish her credibility with respect to her evidence of the interactions between her and Dr. Schwarz in October and December 2015. Patient A's failure to disclose an incident of sexual abuse in the context of a volunteer activity does not support the inference that she would lie under oath about that abuse; equally, her decision to report Dr. Schwarz to the police after a second incident of sexual abuse occurred does not support the conclusion that she would lie

about what had transpired with Dr. Schwarz. The Committee finds Patient A demonstrated honesty in her testimony in conceding these points and that her explanations for not revealing the first incident as the reason for not attending the volunteer activity, and going to the police after the second incident, were reasonable.

The Committee did note Patient A's demeanour as she testified. It is aware of the Court of Appeal's caution with respect to the use of demeanour evidence. Further, while the Committee did find Patient A to be defensive at times and, as described by her family member, without a filter, this did not impair her credibility in the Committee's view. Rather, the Committee considered this to be a reasonable reaction to the suggestions made by counsel for Dr. Schwarz that she was a liar, impaired by marijuana use and mentally unstable. The Committee did not consider Patient A's demeanour to be relevant to its findings on credibility. Ultimately, the Committee finds Patient A credible and her testimony to be reliable applying the factors set out above.

Dr. Schwarz

The Committee applied the same framework when assessing Dr. Schwarz's evidence.

The Committee finds that Dr. Schwarz's evidence did not make logical sense in light of the sequence of events and was not consistent with other evidence.

Dr. Schwarz's assertion that the remarks concerning oral sex occurred on the October 16th appointment lacked logical consistency, in that the October 2nd appointment more closely followed the dental appointment of September 14th and there were four references to HPV in the medical record of October 2. In the Committee's view the totality of the evidence supports that the discussion regarding the dentist and the subsequent oral sex "joke" occurred on October 2nd when HPV was discussed, as opposed to Dr. Schwarz's assertion that the remarks about oral sex occurred on October 16th when his long time secretary was present. Further, as set out in more detail below, Dr. Schwarz made a prior inconsistent statement that the conversation about oral

sex occurred at the December 4, 2015 appointment, in his written response to the College investigator dated May 20, 2016 (Exhibit 8).

Also, the Committee found that Dr. Schwarz's explanation as to why he recalled Patient A for an appointment on October 20th (which occurred on October 16th) lacked logical consistency given the information set out in the medical record. Dr. Schwarz acknowledged that by the time of the October 2 appointment, he had received a letter from the specialist dated September 10, 2015, which contained a recommendation for HPV vaccination (Exhibit 3, tab 1, page 24). He testified that he missed the recommendation for vaccination in that letter but picked it up in the second letter from the specialist, which was received after the October 2 appointment due to delays in transcription and the mail. The Committee did not accept Dr. Schwarz's evidence that he missed the recommendation for vaccination from the specialist in the specialist's short and concise letter of September 10th, given that Dr. Schwarz had underlined other important elements in the letter, such as follow up plans. Dr. Schwarz's explanation that he generally only reads the final lines of a lengthy consult note would not have applied to this short and concise letter. Also, as indicated by the medical note of October 2, Dr. Schwarz had just seen Patient A two weeks previously and discussed HPV at that time. The Committee found Dr. Schwarz's explanation for recalling Patient A weak, which further detracted from his credibility.

Dr. Schwarz made a prior inconsistent statement in his letter of May 20th to the College investigator, wherein he stated that the remarks regarding oral sex were made at the December 4, 2015 appointment. While this was not a statement made under oath, the context in which the statement was made was a serious one in that Dr. Schwarz knew he was responding to the College regarding an allegation of sexual abuse. Dr. Schwarz attempted to explain the inconsistencies between his letter of May 20th and his evidence at the hearing by asserting that his response was rushed and he had not given the matter his full attention. This is not a credible explanation in the Committee's view for two reasons. First, Dr. Schwarz described the day that the oral sex remarks were made as "memorable" in his evidence before the Committee, which makes it difficult for the Committee to accept that he made a careless error regarding the date of events in his reply to the College. Second, by the time Dr. Schwarz was preparing his response,

the police had seized the patient file as part of their investigation but had already returned it to him in late April or early May. He had his medical record to refer to at the time of drafting his response. Dr. Schwarz acknowledged that he had had benefit of legal advice prior to submitting his response to the College and he was aware of the serious consequences of an adverse finding by the Discipline Committee, including revocation of his certificate to registration. The Committee finds his explanation disingenuous and to also undermine his credibility.

Further, Dr. Schwarz made statements to the College investigator regarding Patient A that were not supported by his medical record. For example, Dr. Schwarz stated in his letter to the College investigator that Patient A was sometimes in a state of mania and other times depressed (Exhibit 8). Dr. Schwarz acknowledged that there is no reference in Patient A's chart to either of these medical conditions or a referral by him to a psychiatrist or psychologist. Equally, Dr. Schwarz made assertions that Patient A's use of cannabis was troubling in his letter to the College investigator but he had not documented any concerns in the patient record. Finally, Dr. Schwarz did not note in his medical record for Patient A the oral sex conversation, although he conceded in his testimony that he was aware of its significance with respect to a potential boundary violation and that it was the physician's role to maintain boundaries. Dr. Schwarz testified that he tries to avoid placing negative comments in the patient record because this may cause concerns with future insurance claims. The Committee does not accept this as a reason to not document these concerns, if legitimate. Mental health issues, including substance use, are components of normal practice. The absence of this important information from the medical record, when contrasted with Dr. Schwarz's subsequent assertions to the College investigator, undermines his credibility. In the Committee's view, these were self-serving attempts by Schwarz to discredit Patient A.

Other aspects of Dr. Schwarz's medical records also detracted from his credibility. For example, his assertion that a simple drawn line next to an anatomical area, as seen in several patient encounter entries, indicated that he had examined a particular area, was troubling to the Committee when contrasted with the record of December 4th (Exhibit 3, tab 1), which shows a handwritten notation that the abdomen was soft and not tender, whereas no similar features were

mentioned elsewhere. The Committee found that given this one notation, contrasted with the presence of simple lines elsewhere, Dr. Schwarz's evidence that he had examined other areas without any other notations to support it was not credible.

The Committee did not rely on Dr. Schwarz's demeanour when testifying in reaching its conclusions with respect to his credibility and instead considered the other factors, as set out above, in finding that Dr. Schwarz was not a credible witness.

Witness D

Dr. Schwarz's full-time office manager and secretary, Witness D, gave evidence in a straightforward manner and much of her evidence was consistent with the documentary record. For example, she provided receipts to show that she was not in the office on October 2nd.

However, as set out below, the Committee found that Witness D was not credible with respect to the disputed interactions between Patient A and Dr. Schwarz, due to her longstanding close relationship with Dr. Schwarz, which resulted in at least one instance when she lied to the College about matters related to Dr. Schwarz.

Witness D testified that she had a close relationship with Dr. Schwarz. Her husband had done work for him. When Witness D became aware that Dr. Schwarz was facing potential sanction, she wrote a letter "To Whom it May Concern" (Exhibit 17) supporting Dr. Schwarz's version of the events. This letter was not written in response to a request by the police or the College. Rather, she wrote it in anticipation of such a request.

Witness D agreed that she had shared several e-mails between herself and the College by copying Dr. Schwarz on her replies (Exhibit 18). She testified that she felt, as he was her boss, he was entitled to see her communications with the College and she wanted to keep him advised about what was going on in the investigation to the extent she could.

With respect to prior untruthful statements, Witness D admitted that she arranged for the monitors, whose mandate was to protect the public, to falsely sign off on medical records. This was disturbing to the Committee. Further, Witness D's reluctant admission of the facts of the matter, and her further reluctance to concede that she had lied to the College about it, were extremely damaging to her credibility.

The above actions demonstrated to the Committee Witness D's commitment and loyalty to Dr. Schwarz as her long-term employer, and the extent she would go to support him.

Therefore, the Committee did not accept Witness D's testimony that on October 16, 2015, she overheard Patient A say "dreaming" and "blowjob" and that Dr. Schwarz instructed the patient not to talk like that. The Committee finds that Witness D lacked credibility regarding what transpired at the appointments on October 16, 2015 and December 4, 2015, and therefore, rejected her evidence.

FINDINGS REGARDING ISSUE #1

The Committee finds that Patient A was a credible witness and her evidence reliable. The Committee also finds that Dr. Schwarz and his full-time office manager/secretary, Witness D, were not credible and their evidence was not reliable.

On the basis of its assessment of the witnesses' credibility and the consideration of the evidence as a whole, the Committee accepts Patient A's version of the events and concludes that Dr. Schwarz engaged in sexual abuse of Patient A by touching of a sexual nature, that is, by touching of her breasts and buttocks during office visits on October 16th and December 4th, 2015 in a manner that was not clinically indicated or appropriate.

Comments made by Dr. Schwarz to Patient A, such as his responses to her questions on December 4, 2015 that she turned him on and that it did not matter that they were both married, were clearly inappropriate and sexualized. The Committee finds that these remarks were made

by Dr. Schwarz based on its analysis outlined above, and that this constitutes sexual abuse of a patient by remarks of sexual nature.

Sexual abuse of a patient violates a patient's trust, autonomy and dignity. Such conduct towards a patient constitutes disgraceful, dishonourable or unprofessional conduct.

Therefore, the Committee finds that Dr. Schwarz committed an act of professional misconduct in that:

- he engaged in sexual abuse of Patient A, by touching of a sexual nature of the breasts and buttocks and by remarks of a sexual nature; and
- he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, by engaging in sexual abuse of Patient A.

Issue #2 - Did Dr. Schwarz engage in disgraceful, dishonourable or unprofessional conduct with respect to Nurses A, B and C by behavior and remarks of a sexual nature?

It was also alleged that Dr. Schwarz engaged in disgraceful, dishonourable or unprofessional conduct in relation to three nurses.

THE FACTS

An Agreed Statement of Facts and Admission was filed as an Exhibit and presented to the Committee:

PART I-FACTS

1. Dr. Schwarz is a 50-year-old family physician practicing in City 1, Ontario. Dr. Schwarz held privileges at a Hospital between 2003 and 2015.

Nurse A

2. Nurse A worked at the Hospital. During a night shift circa 2012, at approximately 11:30 p.m., Dr. Schwarz and Nurse A were standing alone near the nursing station. Dr. Schwarz hooked his finger into the rim of Nurse A's scrub pants, and pulled them down no more than two inches to view her lower back tattoo. He said, "What's that." Nurse A said "Whoa" and pulled away. In an effort to diffuse the situation without making it awkward, Nurse A then lifted her shirt slightly to allow Dr. Schwarz to see the tattoo, said "It's my tattoo," and left the room.

3. The incident made Nurse A highly uncomfortable. Afterwards, she no longer wanted to work the night shift with Dr. Schwarz, and arranged her schedule accordingly. She did not want to be alone in the department with him, especially at night. She subsequently reported the incident to the department's Chief of Staff.

4. After the event described above, Dr. Schwarz had no further incidents involving Nurse A.

Nurse B

5. Nurse B began working at the Hospital. During one early afternoon shift in the Hospital, circa 2010, Nurse B received lab results for a patient which required a physician's review. Nurse B went into the doctor's lounge to provide Dr. Schwarz with the lab results. Nurse B and Dr. Schwarz reviewed the results together. As they were exiting the doctor's lounge, Dr. Schwarz slapped Nurse B on the buttocks. Nurse B turned around and said, "Don't touch me like that."

6. After this incident, Nurse B felt uncomfortable around Dr. Schwarz. She would no longer go to the doctor's lounge in person to provide test results as she did not want to be subjected to this conduct again. She subsequently reported the incident to the department's Chief of Staff.

7. Sometime after this incident, Dr. Schwarz approached Nurse B while she was seated at a computer and squeezed her shoulders in a massage-like fashion. Nurse B gave Dr. Schwarz a

“dirty look,” after which he departed.

8. After the events described above, Dr. Schwarz had no further incidents involving Nurse B.

Nurse C

9. Nurse C began working in the Hospital. During one day shift, Nurse C entered the medication room to retrieve an item. The medication room is small: approximately six feet by seven feet. Dr. Schwarz followed Nurse C into the room and stood in the doorway, approximately four feet away from Nurse C. When Nurse C reached up to take down some medication, Dr. Schwarz said, “you have a lower back tattoo, that’s so sexy, can I see it.” Nurse C said “no.” She felt very uncomfortable, because she had no way out of the room. Dr. Schwarz laughed and walked away.

10. During another shift, after the first incident, Nurse C and Dr. Schwarz were alone in the Department. Nurse C was seated at a computer. Dr. Schwarz approached her from behind and began to massage her neck and shoulders. Nurse C stopped what she was doing and tensed up. She felt extremely uncomfortable. Dr. Schwarz continued the massage for approximately one minute before walking away.

11. On another occasion around the same time period, Dr. Schwarz made an inappropriate sexual comment to Nurse C. Nurse C felt uncomfortable and shut down the conversation.

12. As a result of these encounters, Nurse C tried to avoid Dr. Schwarz as much as she could while continuing to do her job.

13. After the events described above, Dr. Schwarz had no further incidents involving Nurse C.

PART II - ADMISSION

14. Dr. Schwarz admits the facts in paragraph 1 to 13 and admits that, based on these facts, he engaged in professional misconduct under paragraph 1(1)33 of Ontario Regulation 856/93

made under the *Medicine Act, 1991*, in that he engaged in 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.

FINDING REGARDING ISSUE #2

The Committee accepted as true all of the facts set out in the Agreed Statement of Facts and Admission. Having regard to these facts, the Committee found that Dr. Schwarz committed an act of professional misconduct, in that he has engaged in 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, regarding Nurse A, Nurse B and Nurse C.

SUMMARY OF FINDINGS

The Committee finds that Dr. Schwarz committed an act of professional misconduct in that:

- he engaged in sexual abuse of Patient A, by touching of a sexual nature of the breasts and buttocks and by remarks of a sexual nature.
- he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, by engaging in sexual abuse of Patient A.
- he engaged in 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, regarding Nurse A, Nurse B and Nurse C.

IMMEDIATE INTERIM SUSPENSION

Section 51(4.2) of the Code provides:

Interim suspension of certificate

(4.2) The panel shall immediately make an interim order suspending a member's certificate of registration until such time as the panel makes an order under subsection (5) or (5.2) if the panel finds that the member has committed an act of professional misconduct,

(a) Under clause (1) (a) and the offence is prescribed for the purposes of clause (5.2) (a) in a regulation made under clause 43 (1) (v) of the *Regulated Health Professions Act, 1991*;

(b) Under clause (1) (b) and the misconduct includes or consists of any of the conduct listed in paragraph 3 of subsection (5); or

(c) By sexually abusing a patient and the sexual abuse involves conduct listed under subparagraphs 3 i to vii of subsection (5). 2017, c. 11, Sched. 5, s. 19 (2). [emphasis added]

Subparagraphs 3 i to vii of subsection 51(5) state:

1. Revoke the member's certificate of registration if the sexual abuse consisted of, or included, any of the following:
 - i. Sexual intercourse.
 - ii. Genital to genital, genital to anal, oral to genital or oral to anal contact.
 - iii. Masturbation of the member by, or in the presence of, the patient.
 - iv. Masturbation of the patient by the member.
 - v. Encouraging the patient to masturbate in the presence of the member.
 - vi. Touching of a sexual nature of the patient's genitals, anus, breasts or buttocks.
 - vii. Other conduct of a sexual nature prescribed in regulations made pursuant to clause 43 (1) (u) of the *Regulated Health Professions Act, 1991*. 2017, c. 11, Sched. 5, s. 19 (3).

Given the Committee's findings of touching of a sexual nature of the patient's breasts and buttocks, the Committee makes an immediate interim order suspending Dr. Schwarz's certificate of registration, until such time as the Committee makes an order under subsection 5 or 5.2 of the Code.

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

NOTICE OF PUBLICATION BAN - AMENDED

In the College of Physicians and Surgeons of Ontario and Dr. Peter Robert Schwarz, this is notice that the Discipline Committee ordered that there shall be a ban on publication or broadcasting of the name, or of any information that could disclose the identity of Ms D, Ms E and Ms F, 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.

The Tribunal also made an order under subsection 47(1) of the Code, which was amended on February 11, 2022, to provide that Patient A’s name may be published. The original order, dated November 26, 2018, remains in effect in relation to Nurse A, Nurse B, and Nurse C, banning the publication of their names or any information that could identify them. There may be significant fines for breaching this order.

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

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

- (a) in the case of an individual to a fine of not more than \$25,000 for a first offence and not more than \$50,000 for a second or subsequent offence; or
- (b) in the case of a corporation to a fine of not more than \$50,000 for a first offence and not more than \$200,000 for a second or subsequent offence.

**Indexed as: Ontario (College of Physicians and Surgeons of Ontario) v. Schwarz,
2019 ONCPSD 54**

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

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

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. PETER ROBERT SCHWARZ

PANEL MEMBERS:

**MR. J. LANGS
DR. P. ZITER
MR. M. KANJI
DR. E. SAMSON**

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

**MS C. SILVER
MS R. AINSWORTH**

COUNSEL FOR DR. SCHWARZ:

**MR. W. BRYNAERT
MR. DARREN BLIMKIE**

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MS ZOHAR LEVY

**Hearing dates: September 10 and 11, 2019
Decision Date: December 2, 2019
Release of Reasons Date: December 2, 2019**

PUBLICATION BAN

PENALTY DECISION AND REASONS FOR DECISION

On March 8, 2019, the Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario delivered its written Decision and Reasons on liability in this matter. The Committee found that Dr. Peter Robert Schwarz committed an act of professional misconduct, in that:

- he engaged in sexual abuse of Patient A, by touching of a sexual nature of the breasts and buttocks and by remarks of a sexual nature;
- he engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, by engaging in sexual abuse of Patient A;
- he engaged in 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, regarding Nurse A, Nurse B and Nurse C.

On September 10 and 11, 2019, the Committee heard evidence and submissions on penalty and costs, and reserved its decision.

AGREED STATEMENT OF FACTS REGARDING PENALTY

Counsel presented the Committee with an Agreed Statement of Facts Regarding Penalty, as follows:

Relevant College History

1. In September 2008, the Inquiries, Complaints and Reports Committee (the “ICRC”) of the College of Physicians and Surgeons of Ontario (the “College”) received a report from the Chief of Staff at Sault Area Hospital regarding allegations that Dr. Peter Robert Schwarz (“Dr. Schwarz”) had engaged in sexually inappropriate behaviour towards two colleagues at the

hospital. The ICRC appointed investigators and conducted an investigation, the results of which were considered in July 2011. The ICRC issued a caution in person to Dr. Schwarz on the issue of unprofessional conduct towards colleagues. A copy of the July 2011 decision of the ICRC is attached at Tab 1 to the Agreed Statement of Facts Regarding Penalty.

Professional Education

2. During the College investigation into issues at Sault Area Hospital, Dr. Schwarz completed the Boundary Issues Workshop at the University of Western Ontario, on April 17-18, 2009. In his response during the investigation, he wrote, “since receiving the complaint ... I have taken the College’s understanding boundaries issues course which the College offers which I found quite helpful and I have not had any complaints since then.”

3. In 2001, Dr. Schwarz agreed to complete a medical ethics course at the request of the Chief of Staff of Sault Area Hospital.

Compliance with Interim Order

4. On April 11, 2017, the ICRC imposed an interim order on Dr. Schwarz under then s. 37 of the Health Professions Procedural Code (the “Interim Order”). Among other things, the Interim Order prohibited Dr. Schwarz from engaging in any professional encounters with female patients except in the presence of a College-approved practice monitor, who is a female member of a regulated health profession (“Practice Monitor”). The order also required that Dr. Schwarz ensure that the Practice Monitor:

- Refrain from performing any other functions, except those required in the Practice Monitor’s undertaking, while observing him in any professional encounter with a female patient;
- Keep a patient log of all female patients with whom Dr. Schwarz had an in-person professional encounter;
- Initial the corresponding entry in the records of each patient noted in the Log;

- Submit the original Log to the College on a monthly basis; and
- Provide reports to the College on a monthly basis.

5. Monthly patient logs of all female patients attended on by Dr. Schwarz between April 2017 and March 2019 were provided to the College Compliance Manager [Monitor].

Approximately 6000 attendances on female patients were recorded in the patient logs. Monthly reports were provided to the College by the respective Practice Monitors.

6. In monitoring Dr. Schwarz's compliance with the Interim Order between April 2017 and March 2019, the College's Compliance department reviewed patient logs for completion. Five Compliance Managers [Monitors] and two Investigators also conducted eight unannounced inspections of Dr. Schwarz's office (although on one occasion the office was closed). Telephone interviews with Practice Monitors regarding compliance with the Interim Order were also conducted.

7. During the inspections, Compliance Managers [Monitors] and Investigators spoke with Practice Monitors and with Dr. Schwarz's secretary regarding Dr. Schwarz's compliance with the Interim Order. After concerns arose regarding three patients whose chart or patient log was unsigned, the respective patients were interviewed. Each patient confirmed that their respective patient encounters had occurred in the presence of a Practice Monitor.

8. The College Investigators and Compliance Managers [Monitors] identified one female patient whom Dr. Schwarz saw without a Practice Monitor present. She was not a pre-existing patient, but was one of Dr. Schwarz's Practice Monitors. On three days in May 2018, Dr. Schwarz engaged in professional encounters with her to conduct a two-step TB test, without another College-approved female Practice Monitor present to observe the encounters. Dr. Schwarz created a patient chart for this patient, took a medical history, and provided the two-step TB test.

9. The Investigators and Compliance Managers [Monitors] did not find that Dr. Schwarz failed to be accompanied by a Practice Monitor during any of the approximately 6000 female

patient encounters that occurred between April 2017 and March 2019 (other than with the one patient noted above). It is not possible to confirm that all patient logs were accurate or that Dr. Schwarz was accompanied by a Practice Monitor given the College is not in a position to interview every patient.

10. On June 12, 2018, College Compliance Monitor Rachel Rappaport Beck and College Investigator Jake Poranganel attended at Dr. Schwarz's office to conduct an unannounced compliance visit. During the visit, Mr. Poranganel sat with Dr. Schwarz and one of his Practice Monitors to review the charts for patients seen that day. Mr. Poranganel observed that there were no initials in the charts of two patients, although the corresponding patient log entries had been signed by this Practice Monitor confirming she was present during the encounter. Mr. Poranganel instructed Dr. Schwarz and the Practice Monitor not to do anything with the charts while he exited the office to bring in Ms. Rappaport Beck. While Mr. Poranganel was out of the office, the Practice Monitor signed both patient charts in the presence of Dr. Schwarz. Dr. Schwarz did not take any steps to prevent her from doing so.

11. The ICRC referred the alleged contravention of the Interim Order to the Discipline Committee on January 8, 2019, in relation to the incidents described above.

Reports

12. In December 2014, the Minister of Health and Long-Term Care for Ontario established a Task Force on the Prevention of Sexual Abuse of Patients and the Regulated Health Professions Act, 1991. In 2015, the Task Force published its report, *To Zero: Independent Report of the Minister's Task Force on the Prevention of Sexual Abuse of Patients and the Regulated Health Professions Act, 1991*. The 2015 report is attached at Tab 2 to the Agreed Statement of Facts Regarding Penalty.

13. In January 2000, the Minister of Health for Ontario established a Special Task Force to provide a submission to the Health Professions Regulatory Advisory Council regarding the complaints and discipline process for sexual abuse of patients at the regulated health professions

Colleges. The 2000 report, “*What about accountability to the patient?*” *Final Report of the Special Task Force on Sexual Abuse of Patients*, is attached at Tab 3 to the Agreed Statement of Facts Regarding Penalty.

14. In January 1991, the Council of the College established an Independent Task Force to advise on the policies, procedures and legislation related to sexual abuse of patients. The 1991 report, *Final Report of the Task Force on Sexual Abuse of Patients*, is attached at Tab 4 to the Agreed Statement of Facts Regarding Penalty.

EVIDENCE ON PENALTY

The College submitted a witness impact statement by Patient A and Dr. Schwarz’s counsel submitted letters of support on behalf of Dr. Schwarz.

SUBMISSIONS ON PENALTY

College counsel submitted that an appropriate penalty and costs order ought to include the following:

- revocation of Dr. Schwarz’s certificate of registration effective immediately;
- a reprimand, which is mandatory for any finding of sexual abuse;
- requiring Dr. Schwarz to reimburse the College fund for patient therapy and counselling in the amount of \$16,060.00 and to post an irrevocable letter of credit or other security acceptable to the College to guarantee payment of such amount; and
- requiring Dr. Schwarz to pay costs to the College for the severance motion and each day of the hearing at the tariff rate, for a total of \$81,630 [The Committee notes that this is a mathematical error and the total based on the current tariff rate and days is \$82,960.]

Counsel for Dr. Schwarz submitted that this was not a case that called for revocation. Rather, Dr. Schwarz’s counsel proposed the following as an appropriate penalty:

- a 5-month suspension of Dr. Schwarz's certificate of registration;
- the imposition of terms, conditions and limitations on Dr. Schwarz's certificate of registration to include an element of remediation and ongoing third-party monitoring of Dr. Schwarz's encounters with female patients;
- a reprimand;
- reimbursement of the College fund for patient therapy for Patient A, if required;
- costs of the liability hearing at the tariff rate.

In sum, while the parties agreed regarding the requirement for a reprimand, and to some extent regarding reimbursement of the fund for patient therapy, their further submissions were widely divergent with the College requesting revocation of Dr. Schwarz's certificate of registration and Dr. Schwarz requesting a moderate period of suspension and practice restrictions.

The parties agreed that the amendments to the RHPA do not apply retroactively such that there is no mandatory revocation for Dr. Schwarz's conduct. The Committee retains, however, the discretion to revoke Dr. Schwarz's certificate of registration pursuant to s. 51(2) of the Code.

PENALTY DECISION

In arriving at its determination of the appropriate penalty in this matter, the Committee considered:

- its findings from the liability stage of the hearing;
- the Agreed Statement of Facts on Penalty;
- the evidence as admitted by the Committee, including the witness impact statement given by Patient A, and the letters of support written on behalf of Dr. Schwarz;
- the submissions on penalty and costs and the case law submitted by counsel for the College and counsel for Dr. Schwarz.

After careful consideration, the Committee concludes that the appropriate penalty and costs order in this case is:

- revocation of Dr. Schwarz's certificate of registration effective immediately;
- that Dr. Schwarz be required to reimburse the fund for patient therapy in the amount of \$16,060.00 and post security to guarantee payment of that amount;
- a reprimand; and
- that Dr. Schwarz pay costs to the College for the one day severance motion and each day of the hearing, for a total of eight days, at the tariff amount.

REASONS FOR PENALTY DECISION

Penalty Principles

The Committee's determination of penalty is guided by well-established penalty principles:

- protection of the public;
- general deterrence of the profession and specific deterrence of the member from engaging in similar misconduct;
- denunciation of the misconduct;
- proportionality;
- maintaining the integrity of the profession and public confidence in the College's ability to regulate the profession in the public interest; and
- where appropriate, rehabilitation of the member.

The Committee also takes into account mitigating factors and aggravating factors.

Overview of Committee's Findings of Professional Misconduct

i) Patient A

As set out in its March 8, 2019 decision, with respect to Patient A, the Committee found that Dr. Schwarz had engaged in sexual abuse and disgraceful, dishonorable and unprofessional conduct.

The Committee found that Dr. Schwarz engaged in touching of a sexual nature of Patient A and made remarks of a sexual nature to her during two appointments in his office. The first incident occurred in October 2015, when Dr. Schwarz called Patient A for an unnecessary appointment and then proceeded to grope her stomach, breasts and buttocks, hug her and direct remarks of a sexual nature towards her. The second incident occurred in December 2015 when she returned to confront him about his behavior at the previous visit, and he again directed remarks of a sexual nature towards her and groped her buttocks.

(ii) The Nurses

With respect to Nurses A, B and C, the Committee found that Dr. Schwarz had engaged in disgraceful, dishonorable and unprofessional conduct in his actions towards three nurses with whom he worked. The finding in relation to his misconduct towards Nurses A, B, and C was made on the basis of an agreed statement of facts, which indicated that the events occurred between approximately 2010 and 2012. By Dr. Schwarz's own admission, he engaged in incidents of non-consensual sexualized touching, massaging and sexualized comments towards these three nurses.

Aggravating Factors

(i) Nature of the Misconduct - Patient A

Patient A gave evidence that she became Dr. Schwarz's patient in 2009. She trusted him and had gone to him for medical advice for multiple medical problems. This was a doctor-patient relationship that spanned many years. The fact that Dr. Schwarz took advantage of a vulnerable patient by putting his own sexual desires above the best interests of his patient was an aggravating factor.

Further, the Committee finds that Dr. Schwarz's sexual abuse was planned and deliberate.

The Committee found that the reason Dr. Schwarz gave in his testimony for calling Patient A back for a second appointment in October 2015 appointment at which he first sexually assaulted her was not credible. It was contrary to logic and common sense in light of the sequence of events, and not supported by the evidence, including his chart for Patient A. The Committee concluded that Dr. Schwarz concocted a reason to call Patient A in for an appointment because he was intrigued by a joke regarding oral sex, which the Committee found that she made at her prior appointment in October 2015. This underscores the planned and deliberate nature of the abuse.

The Committee found Dr. Schwarz's actions in December 2015, in directing further sexual remarks towards Patient A and in groping her buttocks, particularly shameful given the fact that Patient A was trying to set things straight by confronting Dr. Schwarz. His conduct at that appointment in December 2015 demonstrates that he viewed Patient A as a sexual target. The Committee finds his conduct completely incompatible with the basic tenets of the profession to act in the best interests of the patient and to do no harm.

The planned and deliberate nature of the abuse and the fact that it was repeated when Patient A attempted to confront Dr. Schwarz are aggravating factors.

(ii) Blaming Patient A for the Misconduct and Improper Attempts to Discredit Her

At the liability stage of the hearing, Dr. Schwarz tried to deflect blame and discredit Patient A by saying that her oral sex joke was a boundary violation *on her part*. At the penalty stage of the hearing, Dr. Schwarz's counsel submitted that the Committee should consider that but for Patient A's joke, the sexual assault would not have occurred.

The Committee's task at the penalty stage is, in part, to consider the blameworthiness of the physician. A physician is in a position of trust and authority with respect to his patients. It is the physician's responsibility, not the patient's, to maintain boundaries with a patient under any circumstances. The Committee does not accept that Patient A's comments about oral sex in any way lessened Dr. Schwarz's responsibility to act in a professional manner and in accordance with professional expectations or that this was an invitation to or justification for sexual abuse.

Dr. Schwarz's attempt to blame the patient for his misconduct demonstrates more than a lack of insight (which is not an aggravating factor) - it demonstrates a deliberate attempt to shift blame to a vulnerable patient and reinforce damaging sexual abuse myths that some complainants are the authors of their own misfortune. There is no place in our profession for this type of victim-blaming narrative.

Dr. Schwarz also tried to paint Patient A in a negative light and discredit her by abusing his position as her physician to suggest that she was not a reliable or credible witness. Dr. Schwarz made statements to the College investigator regarding Patient A that were not supported by his own medical records. For example, he stated that Patient A was sometimes in a state of mania and other times depressed. He also made accusations that her use of cannabis was troubling. His medical records regarding Patient A did not document any of these concerns, nor was there any evidence before the Committee that there was any truth to those claims. A physician is certainly entitled to vigorously defend allegations of professional misconduct. Challenging a complainant on her credibility and reliability is not an aggravating factor even if the Committee makes a finding of sexual abuse. In this case, however, the Committee found that Dr. Schwarz's characterization of Patient A and his attempt to discredit this trusting and vulnerable patient by concocting a false medical history went beyond simply mounting a vigorous defence to the allegations. He attempted to influence the College investigator and discredit Patient A by providing false information about Patient A's medical history and alleged drug use. His attempt to discredit Patient A by providing inaccurate information about her medical condition to the College investigator in this manner was improper and an aggravating factor.

Further, the Committee finds that Dr. Schwarz's medical records regarding Patient A from October and December 2015, did not accurately reflect the events of those days. The Committee has made findings of fact as to the events that occurred during the October and December appointments in its decision on liability. As Dr. Schwarz's medical records are inconsistent with the events that actually occurred, the Committee finds that those inconsistencies were deliberate and intended to cover up Dr. Schwarz's conduct. For example, to cover up the fact that the joke about oral sex was made during the October 2 appointment, Dr. Schwarz transcribed his

handwritten notes from that date to say that the patient was worried about HPV “of cervix”, even though there was no reference to cervix in the handwritten notes.

Dr. Schwarz was entitled to deny the allegations, and his denial is not an aggravating factor. However, the Committee found that Dr. Schwarz blamed the patient for the assault, tried to mislead the College by portraying Patient A as a person who should not be believed due to mania, depression and cannabis use, and created inaccurate medical records at the time of the assaults. His conduct in this regard, including his dishonesty and effort to cover up the abuse through his medical records and by lying about Patient A’s medical condition, was an aggravating factor in the circumstances of this case.

(iii) Impact of Misconduct on Patient A

Under section 51(6) of the Code, the panel shall, prior to making an order, consider any oral statement that has been made to the panel and any written statement that has been filed describing the impact of the sexual abuse on the patient.

The Committee considered the written statement from Patient A which was read aloud by Patient A, and a copy of which was filed.

In her statement, Patient A described suffering real and lasting harm from the abuse by Dr. Schwarz. She explained how she has ongoing fears about encountering Dr. Schwarz in the community and that this results in physical symptoms of panic. She stated she has to limit her activities and restrict places she used to go to and enjoy, in the fear that she might run into him. She described how her marriage and her relationship with her children have suffered. She has completely lost trust in the medical profession and no longer wants to seek medical care, despite her multiple medical issues. She described the profound negative effect on her of Dr. Schwarz’s describing her as a manic-depressed, drug-impaired, and mentally unstable woman.

The 2015 Task Force Report states at page 99 that victims of sexual abuse often experience, “self-blame; shame; isolation from friends and family; anger; loss of trust in health care

providers or authorities in general.” These feelings are clearly reflected in Patient A’s witness statement.

The Committee found that the impact of Dr. Schwarz’s misconduct on Patient A is an aggravating factor.

(iv) Nature of the Misconduct - the Nurses

The Committee considers the nature of the misconduct with respect to the nurses to be an aggravating factor, as it involved three different nurses, and for Nurses B and C, there were repeated violations of professional boundaries. In total, over two years, Dr. Schwarz engaged in six separate incidents of inappropriate conduct towards the three nurses. The Agreed Statement of Facts on Liability documents that Nurse A arranged her schedule to avoid working the night shift with Dr. Schwarz; Nurse B felt uncomfortable and would not go to the doctors’ lounge in person to provide test results as she did not want to be subjected to this conduct again; and Nurse C tried to avoid Dr. Schwarz as much as she could. The repeated nature of the misconduct and the fact that the nurses then had to take proactive steps to avoid feeling uncomfortable in their workplace (e.g. the impact of Dr. Schwarz’s conduct on the nurses) is an aggravating factor.

(v) Scope of Misconduct - Patient A and the Nurses

The Committee notes that Dr. Schwarz’s misconduct towards the nurses at the hospital occurred from 2010 to 2012 and that Dr. Schwarz’s sexual abuse of Patient A occurred at two appointments in 2015. Dr. Schwarz has demonstrated a lack of respect for professional boundaries and repeated disregard for the physical and sexual autonomy and integrity of women with respect to whom Dr. Schwarz was in a position of power and authority. The fact that this conduct took place over many years and involved sexually inappropriate conduct to both colleagues and a patient is an aggravating factor.

It is also particularly concerning that the professional misconduct at issue in this case post-dates Dr. Schwarz’s prior caution by the ICRC, and his completion of boundary and ethics courses.

Mitigating Factors

By admitting the allegations in respect of Nurses A, B, and C, Dr. Schwarz obviated the need for a contested hearing regarding these allegations, saving some costs and sparing the nurses from having to testify at a contested hearing on those allegations. Given the facts in this case, and the aggravating factors discussed above, the Committee was not persuaded, however, that Dr. Schwarz's admissions with respect to the nurses were sufficient to mitigate in favour of a lesser penalty.

The Committee considered the letters of support written by many patients describing the care Dr. Schwarz has provided to them and expressing concern about the underserved nature of the area where Dr. Schwarz practiced. It is well established that evidence of a member's good character and reputation should be accorded little weight in the face of sexual abuse findings. Such misconduct usually occurs in private and therefore is not reflected by a physician's reputation in his community. Further, while the Committee recognized many of these letters spoke to the underserved nature of the community where Dr. Schwarz practises, the Committee also recognizes that physicians in underserved areas must be held to the same standard as all physicians in the province. For these reasons, the Committee did not accord significant weight to the letters of support providing evidence of Dr. Schwarz's general reputation in the community and did not find that the fact that he practices in an underserved area to be a mitigating factor. Further, evidence with respect to the good care Dr. Schwarz has provided to other patients is not a relevant factor in determining an appropriate penalty for professional misconduct of this nature.

Lack of Potential for Rehabilitation and Concerns re Governability

The Agreed Statement of Facts on Penalty indicates that in September 2008, the ICRC received a report from the Sault Area Hospital regarding allegations that Dr. Schwarz had engaged in sexually inappropriate behaviour towards two colleagues at the hospital. The results of the investigation were considered by the ICRC in 2011. The ICRC issued a caution in person to Dr. Schwarz on the issue of unprofessional conduct towards colleagues. The Agreed Statement of

Facts also indicates that ten years prior, in 2001, the hospital had required him to take an ethics course.

The Committee did not hear evidence from the colleagues involved in the 2008 report and has not made any finding that Dr. Schwarz engaged in sexually inappropriate behaviour towards colleagues in 2008 (that report was considered by the ICRC in 2011). However, Dr. Schwarz was investigated for, and cautioned by the ICRC regarding alleged unprofessional conduct towards colleagues, in or around the same period when he engaged in disgraceful, dishonourable, or unprofessional conduct towards Nurses A, B and C.

The Committee also considered that, prior to engaging in the disgraceful, dishonourable or unprofessional conduct towards Nurses A, B and C and the sexual abuse of Patient A, Dr. Schwarz had taken the Boundary Issues Workshop in April 2009, during the investigation into the 2008 hospital report. During the investigation into his alleged inappropriate conduct with two colleagues at the hospital which resulted in an ICRC caution in 2011, Dr. Schwarz asserted that he found the boundaries course helpful. During the liability phase of the hearing, Dr. Schwarz confirmed in cross-examination that he knew the risk factors for potential boundary violations and how to avoid them, including the need to use appropriate professional communication with his patients. Dr. Schwarz knew that he should not call patients by nicknames or other monikers, and was aware of the dangers of being overly familiar with his patients, yet he admitted that he and Patient A had a familiar relationship in which they discussed Dr. Schwarz's family, his vacations, his wife's health, and his interest in Patient A's cannabis cultivation, causing those boundaries to be blurred. He also referred to her as "little one".

Despite the 2001 Ethics Course and the 2009 Boundaries workshop, and in fact within the same time frame as he was investigated and cautioned by the ICRC for unprofessional conduct towards colleagues, Dr. Schwarz persisted in behaviour that showed a disregard for boundaries and the requirement of professional conduct.

The Committee concludes that Dr. Schwarz lacks insight and has demonstrated that he has been unable to learn from a past caution and instruction, and that he is unable to remediate his behaviour. He has continued to engage in repeated boundary transgressions of a sexual nature over the course of years. This lack of insight is not an aggravating factor. However, it does inform the Committee's

views on the appropriate penalty in this case. In particular, given Dr. Schwarz's lack of insight, the Committee is concerned that further education would not assist to rehabilitate him. The lack of insight causes the Committee to have an increased concern for the public given the fact that Dr. Schwarz has been found in these proceedings to have carried out behaviour (crossing boundaries with colleagues) for which he was cautioned and provided with instruction previously. Contrary to learning from these experiences, Dr. Schwarz engaged in disgraceful, dishonourable and unprofessional conduct with three colleagues and sexually abused a patient.

The Committee also concludes that Dr. Schwarz is ungovernable. It has reached this conclusion because of a number of findings made by the Committee and because of a number of facts in the Agreed Statement of Facts on Penalty. First, the Committee has considered Dr. Schwarz's failure to heed a prior caution and act professionally towards his nursing colleagues, as set out above. Second, the Committee considered Dr. Schwarz's efforts to discredit Patient A by claiming she has medical conditions which he knew she does not, and the other instances during which Dr. Schwarz actively attempted to cover up his behaviour, as set out above. Third, the Committee considered that when Dr. Schwarz and a monitor were left alone with records, the monitor signed those records in Dr. Schwarz's presence despite the fact that they were both directed not to do so by the investigator. Finally, the Committee considered the uncontested evidence that Dr. Schwarz treated at least one female patient (the practice monitor), without any monitor present, in arguable breach of the Interim Order. The Committee has made no finding of breach of the Interim Order, as this is the subject of a separate allegation for which Dr. Schwarz has again been referred to the Discipline Committee. This panel has, however, considered the treatment provided to the practice monitor and the explanation provided by Witness D that they believed the monitor could monitor herself. Overall, given the failure to heed a prior warning from the College, the attempts to subvert the College investigation, the treatment of the practice monitor in light of the Interim Order, and the fact that Dr. Schwarz allowed his records to be altered by the practice monitor after the investigator had told them both not to alter the records, the Committee finds that Dr. Schwarz is not governable.

The Committee considered whether imposing terms, conditions or limitations on Dr. Schwarz's certificate of registration would offer sufficient public protection. However, the Committee finds that allowing Dr. Schwarz to practice medicine, even with safeguards in place, would put the public and his colleagues at continued risk, given Dr. Schwarz's failure to remediate his behaviour towards women even after an ICRC caution and prior courses in appropriate boundaries and ethics. Further, there was an absence of any evidence that Dr. Schwarz could be remediated or has taken any steps towards remediation. Dr. Schwarz did not provide any expert

opinions to speak to his remediation, nor did he testify about his efforts to remediate himself and their efficacy. No explanation has been provided as to why Dr. Schwarz engaged in this professional misconduct, or to satisfy the Committee that this behaviour would not be repeated.

The Committee specifically considered Dr. Schwarz's submission that he be permitted to continue to practise with a practice monitor for female patients. The Committee finds that this would not be sufficient to protect the public and would undermine public confidence in the integrity of the profession. In reaching this conclusion, the Committee considered the 2015 Task Force Report which recommended, at page 122, "immediate stoppage of any decision-making body under the RHPA placing gender restrictions on the scope of practice where a health professional has been found to have sexualized contact with one or more patients". The task force explained at page 120, "it becomes readily apparent that the imposition of gender restrictions... is missing the point and continues to place the public...at risk for future sexual abuse. It also falls short of zero tolerance standard, since the implicit message of imposing a gender restriction as a condition of ongoing practice is that the public trust has only been violated with part of the population. Once a health professional is found to have sexually abused a patient, the health professional has, by extension, betrayed the public's trust in preserving the safety and well-being of all patients."

In 2017, the Legislature amended the Code to provide, in section 51(4.1), "... a panel [of the Discipline Committee] shall not make any order directing the Registrar to impose any gender-based terms, conditions or limitations on a member's certificate of registration." This amendment is consistent with the recommendations of the 2015 Task Force to protect the public.

While counsel for Dr. Schwarz submitted, and counsel for the College did not contest, that the legislative prohibition on gender-based terms, conditions or limitations does not apply where the events giving rise to the findings took place prior to 2017, the Committee, in any event, does not accept that gender-based practice monitoring would be sufficient to protect the public in Dr. Schwarz's case. It is clear that the safeguards provided by a practice monitor are not absolute and their efficacy relies on the good faith participation of the physician, his staff and the practice monitor. There was evidence that Dr. Schwarz treated a female patient (his practice monitor) without the other monitor present. Witness D then asked another practice monitor to sign off on the chart although she was not present for the treatment, and then told the College compliance monitor that she had no idea how that happened. On another occasion, according to the Agreed Statement of Facts on Penalty, Dr. Schwarz took no steps to prevent a practice monitor from initialling charts even though he and she were directed not to touch the charts by the College

investigator. His actions demonstrate a disregard for the monitoring and restrictions placed on the him by the College. This conduct on the part of Dr. Schwarz and his staff supports the Committee's conclusion that there would not be sufficient good-faith participation in any practice monitoring order to protect the public.

The Committee also concluded that, in light of the findings that Dr. Schwarz has repeatedly violated professional boundaries by making sexual comments and otherwise behaving inappropriately towards coworkers, a term requiring a practice monitoring arrangement in which a subordinate co-worker is required to oversee his patient contacts would not be in the public interest.

Penalty Principles

Taking into account all of the above, with respect to each of the penalty principles, the Committee found as follows:

- Protection of the public:** The Committee found that protection of the public was the paramount penalty principle in this case. Dr. Schwarz has engaged in repeated sexual misconduct with women over whom he has authority. He has sexually abused a patient on more than one occasion - the second time after the patient confronted him and expressed her concern. He appears to have no insight into his misconduct and no plan for rehabilitation. Prior efforts to address boundary concerns and sexualised behaviour with female colleagues did not stop him from engaging in the professional misconduct at issue in this case. Further, he continues to blame his patient for the sexual abuse, suggesting that it was her conduct that led to the abuse. The Committee also had evidence that he has failed to abide by the terms of his current undertaking, in particular with respect to the obligations of his practice monitor. The 2015 Task Force Report states at page 77 that the "assumption that a boundary violator will confine himself to a single boundary violation, and the dependence by the college on abusers informing their patients that the abuser's practice has been restricted, fail to uphold the zero tolerance standard in the RHPA." Given the foregoing, the Committee does not accept that a suspension and a gender-based practice monitor would be sufficient to protect the public.

- **General deterrence:** The Committee notes that as a result of the legislative change to the Code, Dr. Schwarz's conduct would result in mandatory revocation if it took place after 2017. Despite the inapplicability of those amendments to this case, the Committee concludes that general deterrence in this case would still be best served by revocation. As noted by the 2015 Task Force Report at page 77, "Decisions and penalties imposed by colleges that do not uphold the zero tolerance standard minimize the severity of the behavior and its significant adverse impact on the patient." The Committee agrees with this statement and finds that revocation in this case is necessary as members of the profession must understand that sexual abuse is never the patient's fault and will not be tolerated. Further, there is no place in the profession for those who repeatedly violate the trust and dignity of their colleagues and engage in repeated sexualised misconduct.
- **Specific deterrence:** Dr. Schwarz engaged in the harassment of female colleagues while being investigated and cautioned by the College for that same behaviour. His boundary violations with Patient A occurred after he had completed an ethics and a boundaries course and - on his own evidence - despite knowing that his behaviour with her (nicknames, discussing his own family) blurred appropriate boundaries. He has engaged in conduct which is inconsistent with the terms of his current undertaking to the College. He has displayed no insight into his misconduct and has no plan for rehabilitation. The Committee is not satisfied that that a period of suspension or terms, conditions and limitations on his certificate of registration providing for oversight by a practice monitor or further educational courses would be sufficient to deter him from further misconduct.
- **Upholding the integrity of the profession and maintaining the public's confidence in the College's ability to regulate the profession in the public interest:** The Committee finds that this penalty principle would be best served by revocation. The Committee concludes that were Dr. Schwarz to be suspended and then allowed to resume practice with a practice monitor in place, public confidence in the College's ability to regulate the profession in the public interest would be negatively impacted. In reaching this conclusion, the Committee considered, amongst other evidence, the 2015 Task Force Report, and the aggravating factors outlined above.

- **Rehabilitation of the member:** The Committee notes the absence of evidence that Dr. Schwarz can be rehabilitated. In this regard, the Committee again considered that Dr. Schwarz engaged in disgraceful, dishonourable and unprofessional conduct by harassing nursing colleagues and by sexually assaulting a patient after completion of a medical ethics course and a boundaries course, and after being cautioned by the ICRC with respect to professional conduct. The Committee did consider that during the period when Dr. Schwarz was practicing with a practice monitor in place, there was only one confirmed breach of the Interim Order, in administering a TB test to his practice monitor. However, the fact that there was such a breach and that Dr. Schwarz was willing to compromise the independence of the practice monitor by establishing a physician-patient relationship with her is of concern to the Committee and further supports the conclusion that Dr. Schwarz cannot be rehabilitated.
- **Denunciation of Misconduct:** Given the Committee's findings with respect to Dr. Schwarz, revocation is necessary to denounce Dr. Schwarz's misconduct in the strongest possible terms.

Proportionality and Prior Decisions

The penalty must be proportionate to the misconduct. Although the Committee is not bound by its prior decisions, a review of cases of a similar nature is useful to establish a reasonable range of penalties. Although no two cases are identical, it is a principle of fairness that cases of a similar nature should result in similar penalty orders. With the guiding principles and specific facts of this case in mind, the Committee carefully reviewed the case law presented by both parties, and considered their arguments regarding the similarities and differences between those cases and this one.

Many of the cases presented to the Committee had some similarities with Dr. Schwarz's case, but all of them had distinguishing features.

The Committee considered that the penalty must be proportionate, including an analysis of the nature of the conduct and the doctor's blameworthiness, as set out in *College of Physicians and Surgeons of Ontario v. Lee*, 2019 ONCS 4294 (para 102).

Revocation is not reserved for only the most serious misconduct, as reaffirmed by the Divisional Court in *College of Physicians and Surgeons of Ontario v. McIntyre*, 2017 ONSC 116 (*"McIntyre"*), which stated:

The principle of the "least restrictive sanction" referred to by the Supreme Court of Canada in *Solomon* (which is a criminal case) is a well-known criminal law principle of sentencing... which requires the judge to take into account that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances." There is no equivalent statutory provision governing the imposition of penalties by a discipline committee, which is not surprising given that the central function of the committee is not to "punish" offenders, but rather to govern its members for protection of the public.

Given the Committee's finding that Dr. Schwarz's behaviour was predatory in nature (calling Patient A back for an appointment in order to facilitate sexual abuse), that Dr. Schwarz took steps to cover his actions up and discredit Patient A including making false claims about her mental health, and that Dr. Schwarz's harassing conduct towards his nursing colleagues was repeated over years despite having taken boundaries and ethics courses, the Committee found that the following cases were similar in material ways.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Beirsto*, 2017 ONCPSD 43 (CanLII) (*"Beirsto"*), the Committee revoked the physician's certificate of registration for findings of sexual abuse and disgraceful, dishonourable or unprofessional conduct in respect of one patient. The acts included sexual abuse by stroking the patient's buttocks, and disgraceful, dishonourable or unprofessional conduct by crossing boundaries by hugging, kissing, a back massage, and inappropriate comments. The Committee in *Beirsto* was persuaded that revocation was required to address public safety, even without applying the then-recent

amendments to the *RHPA* that mandated revocation for touching of a sexual nature of the buttocks. The Committee reached that conclusion in light of Dr. Beirsto's history, his apparent lack of insight, and his failure to proactively incorporate practice changes that might protect the public. This Committee found the *Beirsto* case helpful and similar to the case of Dr. Schwarz in that it involved only one patient, and that there was a consistent failure to incorporate practice changes despite being given opportunities to remediate. The Committee notes that the case of Dr. Schwarz had the additional aggravating factor of a finding of failure to respect professional boundaries with three nurses.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Krishnalingam*, 2016 ONCPSD 8 (CanLII) ("*Krishnalingam*"), the Committee revoked the physician's certificate of registration for findings of sexual abuse and disgraceful, dishonourable or unprofessional conduct involving one patient, including sexual comments, grabbing and hugging the patient, and attempting to kiss her. Again, this Committee concluded that nothing short of revocation would meet the goals of protecting the public, maintaining public confidence in the integrity of the profession, and adequately expressing the membership's and general public's abhorrence of sexual abuse of patients by their physicians, particularly in light of Dr. Krishnalingam's lack of insight. The Committee cited the doctor's discipline history as an aggravating factor but this Committee found the *Krishnalingam* case to be sufficiently similar to this case, despite the fact that Dr. Schwarz has no prior discipline record.

There were also certain helpful similarities between this case and *Ontario (College of Physicians and Surgeons of Ontario) v. Minnes*, 2015 ONCPSD 3 (CanLII) ("*Minnes*"). In *Minnes*, the Discipline Committee found that Dr. Minnes engaged in disgraceful, dishonourable and unprofessional conduct. The case involved an attempted sexual assault of a 17-year-old non-patient camp counselor (Dr. Minnes was the camp physician), and misconduct of a sexual nature towards nurses at a hospital. The Committee ordered revocation of Dr. Minnes's certificate of registration, although it was not mandatory. The physician's conduct in that case towards the camp counsellor was more egregious than Dr. Schwarz's misconduct towards Patient A. However, this case is similar to the *Minnes* decision, wherein the Committee noted that the incidents in the hospital were concerning because they demonstrated a pattern of intrusive and

unwanted touching of female staff, which continued over a number of years with different staff members. In a similar fashion, Dr Schwarz's behavior persisted over years, despite the fact that he was required to take an ethics course, was investigated by his hospital, was cautioned by the ICRC, and took a boundaries course. Dr Schwarz's behaviour did not change despite his hospital privileges being suspended and attempts at remediation detailed above. Dr. Schwarz's conduct towards the nurses alone may not have been sufficient for revocation, but in combination with another, more serious incident, revocation is appropriate, taking into account the serious misconduct reflected in both findings together.

In *Ontario (College of Physicians and Surgeons of Ontario) v. Crozier*, 2016 ONCPSD 43 (CanLII) ("*Crozier*"), the Committee revoked Dr. Crozier's certificate of registration after receiving a joint submission on penalty. In that case, there were findings of sexual abuse, disgraceful, dishonourable or unprofessional conduct and Dr. Crozier had been found guilty of an offence relevant to his suitability to practise (a conviction for sexual assault regarding one patient). The sexual misconduct consisted of fondling the breasts and nipples of one patient, hugging and fondling the breasts of a second patient, and making sexual comments to both patients, who were found to be very vulnerable. There were also findings of boundary crossing with respect to a third patient to whom Dr. Crozier paid large sums of money to try to prevent her from reporting him. All three patients saw Dr. Crozier for psychiatric care. Although not mandated at the time for the acts of sexual abuse found to have occurred, the Committee ordered revocation on the basis of a joint submission on penalty, given the nature of the misconduct within the context of psychiatric care and in relation to three patients, two of whom were found to be very vulnerable. The *Crozier* case is an example of discretionary revocation for sexual abuse consisting of touching of the breasts, which the Committee concluded was similar to the sexual abuse committed by Dr. Schwarz. The Committee also considered that Patient A was a vulnerable patient who had a longstanding relationship with Dr. Schwarz as did the patients in *Crozier*.

There are sufficient similarities between this case and the cases cited above to satisfy the Committee that revocation for Dr. Schwarz's conduct is within the range of prior penalties for conduct that is roughly similar to Dr. Schwarz's conduct even without considering mandatory

revocation, although the Committee acknowledges that there are factors unique to this case that differ from the cases described above.

The Committee also reviewed other cases in which the penalty imposed for sexual abuse was a period of suspension rather than revocation. The Committee ultimately did not find those cases to be as similar to this case as those cited above. Specifically, the Committee notes that some of the decisions were much older, made up to 17 years ago, and may have resulted in a different penalty if the facts arose at the same time as the facts in Dr. Schwarz's case.

For example, *Ontario (College of Physicians and Surgeons of Ontario) v. Sharma*, 2004 ONCPSD 9, was decided fifteen years ago, prior to the release of the 2015 Task Force Report. Still others were distinguishable as they were the result of a joint submission on penalty, which the Committee must accept unless to do so would be contrary to the public interest and bring the administration of justice into disrepute, such as *Ontario (College of Physicians and Surgeons of Ontario) v. Muhammad*, 2013 ONCPSD 23. In one case, the Committee felt that the physician was governable and remediable; *Ontario (College of Physicians and Surgeons of Ontario) v. Al Abdulmohsin*, 2018 ONCPSD 4. This was not the Committee's conclusion with respect to Dr. Schwarz.

The Committee recognizes that revocation of Dr. Schwarz's certificate of registration is at the higher end of the range of penalties previously ordered by the Committee for similar professional misconduct. The Committee is of the view, however, that revocation is proportionate and appropriate given the specific facts of this case, including the aggravating factors, the absence of evidence of potential for remediation, and the application of the penalty principles as set out above. Specifically, the Committee considered the nature of the misconduct towards Patient A and the three nurses, Dr. Schwarz's dishonesty in responding to the College regarding Patient A, Dr. Schwarz's and his office staff's failure to ensure strict compliance with the practice monitoring requirements, and the impact that Dr. Schwarz's conduct has had on Patient A.

The Committee has concluded that revocation is within the reasonable range of penalties previously imposed for similar misconduct, albeit at the high end. However, even if revocation

would mark a departure from the range of penalties previously imposed (which in our view it does not), penalty ranges can be increased where justified by the facts of a case, changing societal values, and a need for greater denunciation; see *R. v. Stuckless*, 2019 ONCA 504, and *College of Physicians and Surgeons of Ontario v. Peirovy*, 2018 ONCA 420. The Committee considered those decisions, and especially the comments of the Court of Appeal in *Peirovy*, at paragraph 72, where the Court of Appeal emphasized that: “The legislature gave the Discipline Committee the task of fashioning penalties that will favour the goal of eradicating sexual abuse of patients while taking into account and balancing other relevant factors. Unlike criminal sentences, which are determined by the courts pursuant to the *Criminal Code*, self-regulated professions are mandated to make these determinations.” The Court of Appeal went on to state at paragraph 83, “The Discipline Committee was in the best position to assess whether the range of penalties previously imposed for similar misconduct or a wholesale change was required.”

To the extent the penalty of revocation marks a departure from previous penalties, the Committee considers this to be an appropriate case to depart from the previous penalty range. First, it is required by the facts of the case, since here (as in *Beairsto*, *supra*), the Committee finds that revocation is the only penalty that will protect the public. It is also the penalty that best fulfils the well-established penalty principles as set out above; it would be inconsistent with the penalty principles to permit this physician, who engaged in the deliberate and targeted sexual abuse of a patient, and then the subsequent re-victimization of that patient through his efforts to discredit her, to remain in practice in any capacity.

Second, societal values regarding sexual assault have been changing over decades. This is best exemplified in the 2015 Task Force Report, which was released in the same year as Dr. Schwarz’s sexual abuse of Patient A. The 2015 Task Force Report speaks to the failure of previous discipline decisions to inspire public confidence and to the legislative changes which have emphasized decreased societal tolerance for certain acts. Relying on the comments in the 2015 Task Force Report does not constitute retroactive application of societal values because the Report was contemporaneous with the abuse.

Finally, given the clear direction from the Court of Appeal that it is the role of the Discipline Committee to fashion penalties that will favour the goal of eradicating sexual abuse, greater denunciation is needed here than allowing Dr. Schwarz to return to practice, in light of his conduct as described in this decision and in the liability decision.

Summary

The Committee determined that revocation of Dr. Schwarz's certificate of registration was required in this case for the reasons set out above. In summary, revocation is necessary:

- To protect the public from a physician who has engaged in sexual abuse of his patient and in sexualized behaviour with nurse colleagues even after being cautioned about appropriate behaviour with professional colleagues. Dr. Schwarz's previous failure to comply with practice restrictions compromises the Committee's ability to fulfill its public protection mandate. The Committee cannot be certain he would comply with any restrictions imposed on his certificate of practice;
- To deter Dr. Schwarz and the profession from engaging in such behaviour;
- To denounce Dr. Schwarz's conduct in the strongest possible terms. Sexual abuse of a patient is an extreme violation of the patient's and the public's trust;
- To be proportionate to the nature of the misconduct and its impact on the patient and nurses. Dr. Schwarz engaged in sexual abuse, and also in disgraceful, dishonourable and unprofessional behaviour, the latter with both a patient and with several coworkers. Patient A's witness impact statement clearly speaks to the harm caused by such a profound breach of trust;
- To uphold public confidence in the integrity of the profession and in the College's ability to regulate the profession in the public interest, in particular, given heightened societal concerns around the issue of sexual misconduct in the medical profession. Revocation is the only penalty sufficient in this case to maintain public confidence in the profession and in the ability of the College to govern the profession; and
- To reflect the absence of any evidence that Dr. Schwarz could be or was rehabilitated. The Committee has seen no indication that Dr. Schwarz is remediable; on the contrary, the evidence indicates that past attempts at educating and rehabilitating him did not work.

This also makes the Committee doubt that further educational intervention is sufficient to mitigate the risk of repeat transgression that he poses to the public.

The Committee carefully considered the nature and seriousness of the misconduct by Dr. Schwarz and the circumstances of the case in the context of the penalty principles. The Committee notes that while revocation is the most serious penalty that it can order, it is not reserved for only the most serious conduct. The central function of this Committee is not to punish the physician, but to govern the College's members and ensure public protection. Only revocation will allow the Committee to fulfil its overriding function of public protection.

Sexual abuse of a patient is an extreme violation of the patient's and the public trust, and Dr. Schwarz's conduct demonstrates disregard for professional parameters of a doctor-patient relationship and conduct towards female colleagues in the workplace.

Patient A stated in her testimony that she came to see her healthcare provider because she was worried about her diagnosis of HPV and needed medical help. She was frightened and vulnerable and indicated that she trusted and liked Dr. Schwarz. This speaks to the power differential and depth of trust between this vulnerable patient and her physician. Her witness impact statement clearly speaks to the harm caused by such a profound breach of trust. Dr. Schwarz targeted his abuse at a vulnerable long-term patient with whom he had built up a strong rapport.

In the Committee's view, Dr. Schwarz's actions and behavior demonstrate dishonesty and show that he constitutes a continuing risk to the public. All of this contributed to the Committee's conclusion that revocation is the appropriate and necessary penalty in this case, with reference to the unique facts of this case and the penalty principles.

In light of the foregoing, the Committee has made the penalty order set out in this decision.

OTHER PENALTY ELEMENTS

The parties agree that a reprimand should form part of the penalty, as it is mandatory for findings of sexual abuse.

With respect to funding for counselling, the College submitted that Dr. Schwarz reimburse the College for funding provided to Patient A and to post a letter of credit to the College to guarantee payment in the amount of \$16,060. Dr. Schwarz submitted that the penalty should include funding for Patient A's therapy if required. In Patient A's witness impact statement, she confirmed that she was already seeing a College-funded psychotherapist and that "when that runs out, I don't know what I will do. Hopefully I will be ok by then." As Patient A is availing herself of therapy, the Committee finds that an appropriate penalty requires reimbursement and posting a letter of credit in the amount of \$16,060.

COSTS

The Committee concluded that this was an appropriate case in which to require that Dr. Schwarz pay hearing costs to the College based on the daily tariff rate for six days of the liability hearing, one day of the penalty hearing, and one day for the severance motion. As the Committee did not accept Dr. Schwarz's submissions on penalty, it has assessed the costs amount for the full day of the penalty hearing, not the half day as submitted by Dr. Schwarz.

ORDER

Therefore, the Committee ordered and directed that:

1. The Registrar revoke Dr. Schwarz's certificate of registration, effective immediately;
2. Dr. Schwarz is required to reimburse the College for funding provided to the patient under the program required by s. 85.7 of the Code, in the amount of \$16,060, and to post

an irrevocable letter of credit or other security acceptable to the College, in that amount, to guarantee payment of any amounts he may be required to reimburse;

3. Dr. Schwarz is required to appear before the Committee to be reprimanded within 60 days of the date of this Order;
4. Dr. Schwarz is required to pay costs to the College in the amount of \$82,960.00, within 90 days of the date of this Order.

College of Physicians and Surgeons of Ontario
and
Dr. Peter Robert Schwarz

Public Reprimand, delivered June 25, 2021

This is not an official transcript

Dr. Schwarz:

As you know, the practice of medicine is a privilege accorded by the people of Ontario through the College of Physicians and Surgeons of Ontario.

The College has a duty to govern the medical profession in the public interest. Its overriding mandate is to protect the public while maintaining the integrity of the profession.

Your conduct is repugnant and incompatible with the tenets of the medical profession. You have brought immeasurable shame to yourself and the profession and have left indelible scars on your patient and co-workers.

We were shocked by your cavalier attitude. You failed to engage in good faith with the monitoring and practice restrictions previously imposed on you by the College. Despite many warnings and attempts at rehabilitation and even medical supervision, you clearly demonstrated that you are ungovernable and a risk to your patients and co-workers.

You provided no evidence to explain your misconduct or of any attempts at remediation. Your continued misconduct involving so many individuals makes our decision to revoke your license the only appropriate result. This will protect the public from your predatory behavior and serve as a specific and general deterrent to the profession.