

**Indexed as: Ontario (College of Physicians and Surgeons of Ontario) v. Kesarwani,
2018 ONCPSD 7**

**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. ATUL KESARWANI

PANEL MEMBERS:

DR. P. CASOLA (Chair)
MAJOR A.H. KHALIFA
DR. D. HELLYER
MR. J. LANGS
DR. M. DAVIE

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

MS E. WIDNER

COUNSEL FOR DR. KESARWANI:

MR. P. CIANFARANI

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. R. W. COSMAN

Hearing Date: January 5, 2018
Decision Date: January 5, 2018
Release of Written Reasons: March 2, 2018

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 January 5, 2018. At the conclusion of the hearing, the Committee released a written order stating its finding that the member committed an act of professional misconduct and in that order, set out its penalty and costs order, with written reasons to follow.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Atul Kesarwani committed an act of professional misconduct:

1. 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 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.

RESPONSE TO THE ALLEGATIONS

Dr. Kesarwani admitted the allegation in the Notice of Hearing that he has engaged in conduct or an act or omission relevant to the practice of medicine that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

THE FACTS

The following facts were set out in the Agreed Statement of Facts on Liability which was filed as an exhibit and presented to the Committee:

BACKGROUND

1. Dr. Atul Kesarwani (“Dr. Kesarwani”) is a 59 year old physician practising medicine in Toronto, Ontario. Dr. Kesarwani practises in the area of plastic surgery in an Out-of-Hospital premises (“OHP”) and in a public hospital.
2. Dr. Kesarwani received his medical degree in Ontario in 1981. He received his certificate of registration authorizing independent practice in Ontario in 1983 and his specialist qualification in plastic surgery in 1987. Dr. Kesarwani was certified as a specialist by the Royal College of Surgeons of Canada in 1988.
3. At the relevant times, Dr. Kesarwani was the Medical Director of an OHP, Cosmedical Rejuvenation Clinic (“Cosmedical”), in Toronto, Ontario, that provides facial plastic and cosmetic procedures, as well as other cosmetic surgeries. Cosmedical has been operating as an OHP since 2006. Dr. Kesarwani has been Medical Director since Cosmedical began operating in 2006.

OUT OF HOSPITAL PREMISES INSPECTION PROGRAM (“OHPIP”)

4. The OHPIP is a College program that applies to all settings or premises outside a hospital that perform procedures involving the use of anesthesia or sedation as defined in O. Reg. 114/94, made under the *Medicine Act*, 1991, (“the Regulation”), attached at Tab A [to the Agreed Statement of Facts on Liability]. Part XI of the Regulation sets out the definition of “procedure” for the purposes of the OHPIP.
5. Mandatory standards for OHP premises are set out in Program Standards (“the Standards”), authorized under the Regulation, and attached at Tab B [to the Agreed Statement of Facts on Liability].
6. The OHPIP is overseen by the College’s Premises Inspection Committee (“PIC”) and by Program Staff.
7. In April 2010, Regulation 114/94 provided a 60-day window for all CPSO members performing or assisting in procedures in Out-of-Hospital premises (OHPs) to notify the College. By June 2012, all premises that existed prior to June 2010 had their inspection-

assessment completed. All premises where a member performs or may perform a procedure on a patient are subject to an inspection by the College once every five years after its initial inspection or more often, if, in the opinion of the College, it is necessary and advisable to do so. New premises or relocating premises continue to be inspected within 180 days of notification.

8. The OHPIP relies on self-reporting from Medical Directors and physicians. The Medical Director of an OHP is responsible for all the duties outlined in the Standards, including providing notification to the College of plans to operate a new OHP or plans to move an existing OHP.
9. In order to ensure patient safety and quality of care, strict adherence is required to the detailed requirements set out in the Standards. PIC must approve the premises following the inspection before any patient procedures can be performed. Procedures can only be performed if the premises receives a “Pass” or “Pass with Conditions” from PIC.
10. As set out in Standards 2.1.2 and 2.2.4, any member planning to operate a premise as an OHP, or planning to move an existing OHP, must notify the College. The premises must be inspected and receive either a “Pass” or “Pass with conditions” from PIC prior to providing OHP services to patients. This requirement applies without exception to all OHP premises. The only mechanism set out in the Standards for initiating this process is notification by a member to the College.

DISGRACEFUL, DISHONOURABLE OR UNPROFESSIONAL CONDUCT

11. On July 6, 2016, Program Staff contacted Dr. Kesarwani to confirm the address of Cosmedical in preparation for an OHPIP inspection-assessment visit scheduled as part of the five-year cycle. Dr. Kesarwani confirmed the practice address on file with the OHP program and told Program Staff that he was planning a move in the future. Program Staff advised Dr. Kesarwani that any new location must be inspected and assessed and receive approval from PIC prior to performing any OHP procedures. The practice address on file with the OHP program was Suite 112, 20 York Mills Road in Toronto (the “previous location”). The previous location had been approved by PIC as an OHP premises.

12. On August 5, 2016, Program Staff received Cosmedical's Pre-visit Questionnaire and Policy and Procedures Manual for the upcoming 5-year inspection-assessment. The address noted in the Pre-visit Questionnaire, attached at Tab C [to the Agreed Statement of Facts on Liability], was not the practice address on file with the OHP program. The practice address noted in the Pre-visit Questionnaire was Suite 214, 10 York Mills Road.
13. On August 15, 2016, in response to telephone inquiries from Program Staff, Cosmedical contacted the College and confirmed that the OHP had recently relocated to Suite 214, 10 York Mills Road (the "new location") and had stopped performing OHP procedures at the previous location on August 15, 2016.
14. On August 18, 2016, as a result of the above information, PIC directed an unannounced inspection of the new location.
15. On August 18, 2016, the unannounced inspection was conducted by a Nurse Assessment Coordinator. Dr. Kesarwani informed the Nurse Assessment Coordinator that he had moved Cosmedical to its new location at the end of March 2016 and he stated that he had only been performing non-OHP Botox injections at the new location since the move. However, when asked for his controlled substances records and surgical logs, Dr. Kersarwani acknowledged that he had in fact been providing OHP procedures at the new location since the move. The surgical logs confirm that OHP procedures had been performed since the move and prior to the unannounced inspection. A copy of the Unannounced Assessment Report dated August 18, 2016, is attached at Tab D [to the Agreed Statement of Facts on Liability].
16. The Unannounced Assessment Report was considered by PIC on August 24, 2016. The premises received a "Fail". Cosmedical was not permitted to provide OHP procedures until the outstanding deficiencies were addressed and a site inspection was conducted. Attached at Tab E [to the Agreed Statement of Facts on Liability] is a copy of PIC's decision letter dated August 24, 2016, which sets out the following outstanding conditions:
 - (a) As per OHPIP Standards 2.5 Medical Director Responsibilities: The medical director must notify College staff in writing of the new name and address of this premises.

- (b) As per OHPIP Standards 5.6 Nurse Qualifications: The Committee requires a copy of current CNO status documentation for all nursing staff. Current BLS certificates are required for E.D (RN) and G.A (RPN). Current ACLS is required for RN's M.J.E., C.B., L.T., and M.S. The BLS/ACLS courses must include both a hands-on and theory component.
- (c) As per OHPIP Standards 5.7 Other Staff Qualifications: The Committee requires N.A.'s current certificate for training in reprocessing and sterilization, valid within the past 5 years. The Committee also requires evidence that N.A. has had manufacturer training for the use of the autoclave.
17. At the August 24, 2016 meeting, PIC referred the file to the College's Investigation and Resolutions Department for further investigation.
18. On October 6, 2016, College investigators conducted an unannounced inspection at Cosmedical. Staff at Cosmedical advised the investigators that Cosmedical was not operational and no procedures had been performed since August 24, 2016.
19. A further inspection-assessment of the new location was conducted by the OHP program on October 17, 2016. A copy of the report of that inspection, dated October 20, 2016, is attached at Tab F [to the Agreed Statement of Facts on Liability]. As set out in the report, deficiencies were noted by the Nurse Assessment Coordinator.
20. The report was considered by PIC on December 7, 2016. The premises again received a "Fail" based on deficiencies outlined in PIC's decision letter dated December 9, 2016, attached at Tab G [to the Agreed Statement of Facts on Liability]. Cosmedical was not permitted to provide OHP procedures until the following outstanding conditions were met:
- a. As per the OHPIP Standard 5.5 Nurse Qualifications and 8.1 Quality Assurance, Monitoring Quality of Care: G.A. RPN has a restricted registration and in accordance with the College of Nurses of Ontario (CNO) Standards, she may not circulate independently, but she may function as a scrub nurse. An RPN may not function in a circulating capacity without an RN as a resource, circulating alongside. The Committee

requires a written understanding of these restrictions and a revised outline of G.A.'s duties and responsibilities at the premises.

- b. As per OHPIP Standard 4.1.6.1: General Physical Standards, Emergency Measures: The Committee understands that the premises has an elevator that has a back- up power source in the event of a power failure. However, the Committee requires an evacuation policy that covers all types of emergencies, including fire. In the event that the elevators cannot be accessed, the Committee requires a policy outlining the emergency measures for transporting patients down stairs.
- c. As per OHPIP Standard 4.2.3.1 Procedure Room/Operating Room Physical Standards, Equipment: The Committee requires the centrifuge (Medispin) Model 120 (Serial Number 4201991) to be inspected by a biomedical technician and the resulting report is to be provided to the Committee.
- d. As per OHPIP Standard 4.1.2.1: General Physical Standards, Electrical and OHPIP Standard 4.2.3.1 Procedure Room/Operating Room Physical Standards, Equipment: The Committee requires the newly purchased Zoll defibrillator to be inspected by a biomedical technician and the resulting report is to be provided to the Committee. Evidence should be provided that this defibrillator is certified by the CSA or licensed for use in Canada.
- e. As per OHPIP Standard 7 Infection Control: The premises must have a sterilizer that is certified by CSA or licensed for use in Canada and it should hold an active licence. The Committee understands that the premises will be purchasing a new sterilizer that will meet these requirements and should provide the evidence of purchase and valid licensing to the Committee. If the sterilizer is not brand new and/or has been refurbished, it must be inspected by a biomedical technician and the resulting report should be provided to the Committee.

21. On January 26, 2017, following receipt of information and documentation from Dr.

Kesarwani, Cosmedical received a “Pass with Conditions” from PIC that allowed the clinic to resume OHP procedures. A copy of PIC’s decision letter dated January 26, 2017, is attached at Tab H [to the Agreed Statement of Facts on Liability].

ADMISSION

22. Dr. Kesarwani admits the facts specified above, and admits that, based on these facts, he engaged in professional misconduct under:
 1. 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 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.

FINDING

The Committee accepted as correct all of the facts set out in the Agreed Statement of Facts on Liability. Having regard to these facts, the Committee accepted Dr. Kesarwani’s admission and found that he committed an act of professional misconduct 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.

JOINT SUBMISSION ON PENALTY

Counsel for the College and counsel for Dr. Kesarwani made a joint submission as to an appropriate penalty and costs order.

The proposed order included the following:

1. Suspension of Dr. Kesarwani’s certificate of registration for 3 months.
2. Dr. Kesarwani is to appear before the panel to be reprimanded.

3. The Registrar is to impose terms, conditions and limitations on Dr. Kesarwani's certificate of registration, to be implemented at his own expense, which include:
 - i) Dr. Kersawani will successfully complete the PROBE course in ethics and professionalism.
 - ii) Approval of the College's Out of Hospital Premises program ("OHPIP") is required before Dr. Kesarwani resumes the Medical Director role in an Out of Hospital Premises. The full details of the terms, conditions and limitations are set out in the order below.
4. Dr. Kesarwani is to pay costs of this proceeding to the College in the tariff amount of \$5,500.00, within 30 days of the day of this Order.

PENALTY AND REASONS FOR PENALTY

The Committee is aware that a joint submission on penalty must be accepted, unless to do so would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. That being said, it is the Committee's duty to ensure that the proposed penalty satisfies the principles that the courts have approved in determining an appropriate and just penalty. Those principles include: protection of the public, specific and general deterrence, denunciation of the specific professional misconduct, maintenance of public confidence in the medical profession and the College's ability to regulate the profession in the public interest, and where appropriate, rehabilitation of the member.

The Committee must consider the aggravating and mitigating factors that are specific to the case and relevant in determining the appropriate penalty. While the previous decisions of the Discipline Committee can serve as a guide in determining the penalty, the Committee recognizes that no two cases are identical and that the Committee is not bound by its prior decisions. Similar cases, however, may be considered by the Committee in determining whether the jointly proposed penalty is just in the circumstances.

Aggravating Factors

The Committee finds Dr. Kesarwani's deliberate misleading of the College in its inspection and approval process of the Out of Hospital Premises Inspection Program (OHPIP) as a very serious act of professional misconduct. Dr. Kesarwani was untruthful with the College and the College's Nurse Assessment Coordinator.

Dr. Kesarwani must understand that the regulations and standards of the OHPIP, as well as all policies and regulations of the College serve to protect the public. Public protection is the paramount objective of the College. The public deserves to be able to expect that when they attend an Out of Hospital Premises (OHP), that it meets the standards set by the College.

The College relies upon self-reporting from Medical Directors and physicians of OHPs when changes are made, including relocating to a new space. The College has made the process of reporting relatively easy by enlisting an online process as the reporting tool. Dr. Kesarwani chose not to notify the College in March 2016 when he moved his OHP. He was given a further opportunity to notify the OHPIP when the Program Staff called him in July 2016 to arrange for the mandatory five-year inspection-assessment. Again, Dr. Kesarwani chose to not be truthful. The system relies on and expects honesty from the members of the medical profession generally and in the operating of the OHPIP. Dr. Kesarwani's dishonesty jeopardizes the reputation of the entire profession and has impeded the College in its regulatory function. Dr. Kesarwani's dishonesty not only reflects poorly on his individual governability, but also on the profession as a whole.

Mitigating Factors

Dr. Kesarwani's cooperation and agreement to an admission of the allegations against him and agreement to proceed with a joint submission on penalty demonstrates insight on the part of Dr. Kesarwani into his professional misconduct and has saved the time and expense of a contested hearing. As well, the Committee notes that Dr. Kesarwani has no prior discipline history with the College.

Case Law

The case law presented to the Committee did not include any cases, which were the same as this case. They did show that the penalty of a three-month suspension is in line with other cases of physicians' dishonesty with the College.

Costs

The Committee is in agreement that that this is an appropriate case in which to order that Dr. Kesarwani pay costs to the College, at the College's tariff for a one-day hearing, in the amount of \$5,500.00.

Reasons for Penalty

The proposed three-month suspension of Dr. Kesarwani's certificate of registration sends a strong message to him and the profession that flouting the College's requirements will not be tolerated. That approval of the College's OHPIP is required before Dr. Kesarwani resumes the Medical Director role in an OHP will serve the interest of public protection. The requirement that Dr. Kesarwani successfully complete the PROBE course in ethics and professionalism will serve to address his deficiencies in those areas and to assist in his rehabilitation.

ORDER

The Committee stated its finding of professional misconduct in paragraph 1 of its written order of January 5, 2018. In that order, the Committee ordered and directed on the matter of penalty and costs that:

1. The Registrar suspend Dr. Kesarwani's certificate of registration for a three (3) month period, effective January 6, 2018 at 12:01 a.m.
2. Dr. Kesarwani appear before the panel to be reprimanded.

3. The Registrar impose the following terms, conditions and limitations on Dr. Kesarwani's Certificate of Registration:

- (i) Dr. Kesarwani will successfully complete the PROBE course in ethics and professionalism, at his own expense, within 6 months of the date of this Order, or any alternate course in ethics and professionalism approved by the College. Dr. Kesarwani will agree to abide by any recommendations of the PROBE program and provide proof of completion to the College;
- (ii) Approval of the College's Out of Hospital Premises program is required before Dr. Kesarwani resumes the Medical Director role in an Out of Hospital Premises.

4. Dr. Kesarwani to pay to the College its costs of this proceeding in the amount of \$5,500 within thirty (30) days from the date of this Order.

At the conclusion of the hearing, Dr. Kesarwani waived his right to an appeal under subsection 70(1) of the Code and the Committee administered the public reprimand.

TEXT of PUBLIC REPRIMAND
Delivered January 5, 2018
in the case of the
COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO
and
DR. ATUL KESARWANI

Dr. Kesarwani,

The Committee is dismayed at your professional misconduct. It demeans not only you personally, but also reflects poorly on the entire medical profession.

The Committee finds that you deliberately mislead the College's inspection and the investigative process. When the College intervenes, it is expected that the member will be forthright and honest with the College and scrupulously adhere to the required standards. Misleading the College investigation is a very serious matter.

As an experienced Medical Director of an Out- Of -Hospital premises, this Committee expects honesty in your dealings with the College and compliance with all standards.

Non-compliance with standards puts patients at risk of harm and does not serve the public interest which is foremost in the College's mandate.

Dr. Kesarwani, the Committee expects your full attention to all applicable requirements while serving the public interest. The Committee hopes that you will complete your career without another appearance before the Discipline Committee.

This is not an official transcript