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

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

B E T W E E N:

THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. THOMAS JOSEPH BARNARD

PANEL MEMBERS:

DR. L. THURLING (CHAIR)
R. PRATT
DR. C. CLAPPERTON
B. TAA (Ph.D)
DR. F. SLIWIN

Hearing Dates: November 28, 2006
Decision Date: November 28, 2006
Release of Written Reasons Date: January 9, 2007

DECISION AND REASONS FOR DECISION

The Discipline Committee of the College of Physicians and Surgeons of Ontario (the “Committee”) heard this matter at Toronto on November 28, 2006. The Committee found that Dr. Barnard committed an act of professional misconduct and delivered its written penalty order with written reasons to follow.

THE ALLEGATION

The Notice of Hearing, as amended, alleged that Dr. Barnard committed an act of professional misconduct:

1. under paragraph 1(1)33 of 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 ALLEGATION

Dr. Barnard entered a plea of no contest to the allegation.

Rule 3.02(1) of the Rules of Procedure of the Discipline Committee states:

3.02(1) Where a member enters a plea of no contest to an allegation, the member consents to the following:

- (a) that the Discipline Committee can accept as correct the facts alleged against the member on that allegation for the purposes of the proceeding only;
- (b) that the Discipline Committee can accept that those facts constitute professional misconduct or incompetence or both for the purposes of the proceeding only; and
- (c) that the Discipline Committee can dispose of the issue of what finding ought to be made without hearing evidence.

FACTS AND EVIDENCE

The following Statement of Facts was filed as an exhibit and presented to the Committee:

PART I - FACTS

1. Dr. Thomas Joseph Barnard (“Dr. Barnard”) is a 58-year-old family physician who practises in Leamington, Ontario.
2. The College conducted an investigation into four public complaints, as well as pursuant to section 75 of the *Health Professions Procedural Code*, with respect to the manner in which Dr. Barnard implemented block fees for uninsured services in his family practice. The time period covered by the investigation was approximately 2003 to late 2005. Copies of the current College policy on block fees and uninsured services, as well as the previous version of the policy on uninsured services are attached at tabs 1 and 2 respectively [to the Statement of Facts].
3. From 2003 to September 2004, patients of Dr. Barnard were not given a copy of the College policy regarding block fees for uninsured services, or told where they could obtain a copy of the policy.
4. From 2003 to September 2004, some patients of Dr. Barnard were not offered the alternative of paying for uninsured services individually at the time that services are provided, rather than paying a block fee.
5. From 2003 to September 2004, some patients of Dr. Barnard were not provided with information with respect to what the block fee covered and did not cover.
6. From 2003 to September 2004, Dr. Barnard did not use a signed contract/consent for patients who paid a block fee.

Activities of Dr. Barnard’s Office Assistant

7. Ms X was Dr. Barnard’s office assistant until early in May, 2005, when she was terminated. One of Ms X’s responsibilities was collecting payment of block fees for uninsured services. During 2003 and 2004, and unbeknownst to Dr. Barnard, a few patients were told by Ms X that if they did not pay a block fee for uninsured services,

they would be discharged from Dr. Barnard's practice. In some such cases, Ms X unilaterally decided to discharge those patients from Dr. Barnard's practice. Some but not all of these discharged patients had not paid block fees.

8. Dr. Barnard was not aware that Ms X pressured some patients to pay the block fee, threatened some patients with being discharged from the practice if they did not pay, and did discharge some patients who had not paid. However, Dr. Barnard acknowledges that he is responsible for properly supervising his office staff, and for ensuring that they act in accordance with his professional obligations.

The Gold Card

9. From 2003 to September 2004, some but not all patients who paid a block fee for uninsured services were given a "gold member" card on which the patient's name and the expiry date of the block fee was indicated. The gold card contained a phone number which was separate from Dr. Barnard's main office line. A copy of a blank gold card is attached at tab 3 [to the Statement of Facts].

10. Dr. Barnard's office required two separate phone lines to deal with the volume of telephone calls and voice mails received from patients after hours. The two phone lines were not intended to confer preferential treatment on those patients who paid block fees.

11. Some of Dr. Barnard's patients formed the impression that patients who paid the block fee and were given a "gold member" card would be given preferential access to insured services. In particular, some patients formed the impression that patients who paid the block fee would be given appointments sooner than patients who did not, or that patients who did not pay the block fee would be required to see Dr. Barnard at a walk-in clinic at which he also worked, which could have required a longer wait than coming to his office.

PART II - ADMISSION

12. Dr. Barnard does not contest the allegation that he committed 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 unprofessional, pursuant to paragraph 1(1) 33 of O.Reg. 856/93.

FINDING

The Committee accepted as true all of the facts set out in the Statement of Facts. Having regard to these uncontested facts, the Committee found that Dr. Barnard committed an act of professional misconduct under paragraph 1(1)33 of 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.

PENALTY AND REASONS FOR PENALTY

Counsel for the College and Counsel for the member made a joint submission as to an appropriate penalty and costs. The Committee reviewed the evidence, and considered the penalty proposed as well as mitigating factors.

The penalty proposed was a suspension of Dr. Barnard's certificate of registration for two months, one month of which would be suspended if several conditions are met relating to the administration of block fees in accordance with College policy. In addition, Dr. Barnard would be required to pay costs to the College in the amount of \$2,500.00. The Committee was told of several mitigating factors including Dr. Barnard's lack of any prior disciplinary record, and the high esteem in which he is held by many of his patients. His counsel filed, as an exhibit, a brief of letters from several of his patients attesting to their regard for him. Dr. Barnard has also been complying with College policy with respect to block fee billing for two years.

The Committee accepted the joint submission as an appropriate penalty in this case. The penalty serves to send a message to the public and the profession that Dr. Barnard's

conduct was not acceptable and will serve to deter further such conduct by Dr. Barnard and other members of the profession. The public is protected in that the penalty ensures that Dr. Barnard's patients will be charged for uninsured services in accordance with College policy in the future.

ORDER

Therefore, the Discipline Committee ordered and directed that:

1. The Registrar suspend Dr. Barnard's certificate of registration for two (2) months, commencing January 1st, 2007, one month of which will be suspended if Dr. Barnard complies with the following conditions:

- (1) Dr. Barnard will administer block fees for uninsured services in a manner that is consistent with the College's policy on block fees and uninsured services. In particular, Dr. Barnard will;
 - (i) provide patients with the alternative of paying for each uninsured service individually at the time that the service is provided;
 - (ii) inform patients of his billing practices and obtain patients' agreement to any fee before providing an uninsured service;
 - (iii) offer the option of a block fee in writing, indicating the services that are covered by the block fee and providing examples of those (if any) that are not covered;
 - (iv) either provide patients with a copy of the College's policy on block fees and uninsured services, or inform them how they may obtain a copy;
 - (v) provide patients with a written statement indicating the fees that will be charged for each service, if patients choose to pay for each uninsured service at the time it is provided rather than pay a block fee;
 - (vi) obtain written consent from patients for the payment option chosen, and maintain the written consent as part of patients' records;
 - (vii) use the form set out in Schedule A attached to this Order to obtain consent for block fees;
 - (viii) charge any block fee for uninsured services to cover a period of not less than three (3) months and not more than twelve (12) months;

- (ix) give patients the opportunity to rescind the decision to pay a block fee within a week of their original decision, in which case they will be required to pay for the services individually as provided;
 - (x) not discontinue seeing a patient or refuse to see a new patient because that person chooses not to pay a block fee; and
 - (xi) not offer to, or provide preferential services to patients who agree to pay a block fee.
- (2) Dr. Barnard will cooperate with inspections of his practice by representatives of the College for a period of nine (9) months after completion of the suspension, solely for the purpose of ensuring compliance with this order. Such inspections shall be conducted with at least 24 hours notice being given to Dr. Barnard before each visit. If any problems with Dr. Barnard's block fee practices are discovered within the 9-month time period, the College is entitled to extend the monitoring inspections for a further six (6) months.
2. Dr. Barnard pay to the College costs in the amount of \$2,500.00.
3. The results of this proceeding to be included in the register.

Schedule A

BLOCK FEES FOR UNINSURED SERVICES

Most of your medical needs are covered by the Ontario Health Insurance Plan (O.H.I.P.). But there are some services that are not covered. You can be charged for these services one by one, or you can be charged a block fee which would cover all the services which are not paid by O.H.I.P. for a six month period of time commencing in January and July of each year. The College of Physicians and Surgeons of Ontario has set out rules which doctors must follow if they wish to charge block fees. These are:

1. An annual/block fee must be identified as a fee for uninsured services for a period of not less than three months and not more than one year.
2. The services covered by this fee must be clearly stated, in writing, and understood by the patient.
3. The patient must be advised of the amount of the individual charges.
4. The patient must be given the option of paying individual charges for the uninsured services as they are rendered.
5. The decision as to whether or not to elect this form of payment must be the patient's, and must not be a condition of the patient's being accepted by the doctor.
6. The patient must be given a copy of this policy statement and indicate their acceptance of paying for uninsured services in this manner before being billed an annual fee. A copy of the policy of the College of Physicians and Surgeons of Ontario on block fees for uninsured services is available from the receptionist, or on the College's website at: <http://www.cpso.on.ca/Policies/blockfees.htm>.
7. Fees for the service of being available to render a service cannot be charged in advance and are not to be included in annual fees.

Uninsured services include telephone conversations with Dr. Barnard and repeat prescriptions by phone, return to work notes and completion of forms for insurance and disability, long-distance phone calls, missed appointments without 24 hours notice, transferring and copying medical records, pre-employment physicals, wart removal and removal of skin lesions without medical indications and TB skin tests. A complete list of uninsured services and their individual cost is available from the receptionist. Patients can avoid paying for uninsured services individually as they arise by electing to pay a block fee of \$_____ for six months.

Should you wish to pay for uninsured services by payment of a block fee please sign this form and return it to the receptionist.

I wish to pay for uninsured services by payment of a block fee. I have read and agree to the terms set out above.

Name:

Within seven (7) days after agreeing to pay a block fee for uninsured services, a patient may rescind the decision to pay the block fee (in which case, the patient would be required to pay individually for any uninsured services).

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B. TAA (Ph.D.)
DR. F. SLIWIN

Hearing Date:	November 28, 2006
Decision Date:	November 28, 2006
Release of Written Supplementary Reasons:	July 3, 2007

SUPPLEMENTARY DECISION AND REASONS FOR DECISION

After the Discipline Committee of the College of Physicians and Surgeons of Ontario (the “Committee”) issued its Decision and Reasons for Decision (“Reasons”) in this matter on January 9, 2007, counsel for Dr. Barnard asked that the Reasons be “corrected”. In a letter to the Hearings Office dated January 25, 2007, Ms. Z stated, “Dr. Barnard’s plea of no contest was only with respect to the allegation of unprofessional conduct”. She requested that the first paragraph of the section headed “Response to the Allegation” be amended. It currently reads “Dr. Barnard entered a plea of no contest”, to which she requested that the words “to the allegation of unprofessional conduct” be added.

By letter dated April 4, 2007, counsel for the College stated that the position of the College was that there was no need to make any changes to the Reasons. She further stated that “as a legal matter the plea is to the allegation of disgraceful, dishonourable or unprofessional conduct as it is set out in the relevant regulation (and as the final order ... reads).”

Subsequently, Mr. Y, one of the defence counsel asked that the Finding on page 5 of the Reasons be amended. The second sentence currently reads:

“Having regard to these uncontested facts, the Committee found that Dr. Barnard committed an act of professional misconduct under paragraph 1(1)(33) of 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.”

He asked that the following be added at the end:

“, in the sense that on those facts, members would reasonably regard the conduct in question as being unprofessional”.

Decision

The Committee has carefully reviewed all the documents provided to it and has decided not to change the Reasons. The documents reviewed by the Committee were:

1. Order, November 28, 2006

2. Decision and Reasons, January 9, 2007
3. Transcript of hearing, November 28, 2006
4. Letter: Ms. Z to W, Hearings Office Manager January 25, 2007
5. Letter: Mr. V, Independent Legal Counsel to the Discipline Committee to Ms. X, counsel for the College, April 3, 2007
6. Letter: Ms. X to Mr. V, April 4, 2007
7. Letter: Mr. V to Ms. Z, April 5, 2007
8. Letter: Mr. Y to Mr. V, April 9, 2007

The allegation against Dr. Barnard was that he committed an act of professional misconduct. At page 2 of the Reasons, the allegation is set out, “in that he has engaged in an act or omission ... that ... would reasonably be regarded by members as *disgraceful, dishonourable or unprofessional*”. (Emphasis added.) The transcript of the hearing shows that Mr. Y stated that the member entered “a plea of no contest to the allegation” and Dr. Barnard confirmed that that was correct. The panel therefore did not agree with adding the words “to the allegation of unprofessional conduct” at the end of the section on page 2 entitled “Response to the Allegation”.

Mr. Y was concerned that the Reasons reflect the fact that Dr. Barnard’s no contest plea was “on the basis” that the facts alleged were of conduct that was unprofessional as opposed to disgraceful or dishonourable. Paragraph 12 of the Statement of Facts, which is repeated verbatim at page 5 of the Reasons states that:

“12. Dr. Barnard does not contest the allegation that he committed 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 unprofessional, pursuant to paragraph 1(1)33 of O.Reg. 856/93.”

The panel, therefore, unanimously rejects the request to amend the wording of its reasons as proposed by defence counsel.