

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Robert Joel Birnbaum, this is notice that the Discipline Committee made an order to prohibit the publication of the identity of Patient A, or any information that could disclose the identity of Patient A, under subsection 47(1) of the Health Professions Procedural Code (the "Code"), which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, as amended.

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...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. Birnbaum, 2020 ONCPSD 46

**DISCIPLINE COMMITTEE
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
which is Schedule 2 of the *Regulated Health Professions Act, 1991*,
S.O. 1991, c. 18, as amended.**

B E T W E E N:

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

- and -

DR. ROBERT JOEL BIRNBAUM

PANEL MEMBERS:

**DR. MELINDA DAVIE (CHAIR)
MS. LINDA ROBBINS
DR. MICHAEL FRANKLYN
MR. JOSE CORDEIRO
DR. VERONICA MOHR**

COUNSEL FOR THE COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO:

MS. SIMMY DHAMRAIT-SOHI

COUNSEL FOR DR. BIRNBAUM:

**MS. ANNE TARDIF
MR. JUSTIN MCCARTHY**

INDEPENDENT COUNSEL FOR THE DISCIPLINE COMMITTEE:

MR. JESSE HARPER

**Hearing Date and Decision Date: October 8, 2020
Release of Reasons Date: December 23, 2020**

PUBLICATION BAN

DECISION AND REASONS FOR DECISION

The Discipline Committee (the “Committee”) of the College of Physicians and Surgeons of Ontario (“the College”) heard this matter via videoconference on October 8, 2020. At the conclusion of the hearing, the Committee released its decision, stating its finding that the member committed an act of professional misconduct with written reasons to follow. A formal order was issued on October 9, 2020.

THE ALLEGATIONS

The Notice of Hearing alleged that Dr. Birnbaum 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. Birnbaum entered a plea of no contest to the allegations in the Notice of Hearing.

THE FACTS

The following facts were set out in a “Statement of Uncontested Facts and Plea of No Contest” which was filed as an exhibit at the hearing:

BACKGROUND

1. Dr. Robert Joel Birnbaum (“Dr. Birnbaum”) is a seventy-five (75) year old physician. He received his certificate of registration authorizing independent practice from the College of Physicians and Surgeons of Ontario (the “College”) on June 12, 1972.
2. Dr. Birnbaum resigned his membership with the College effective June 10, 2020.
3. At all relevant times, Dr. Birnbaum practiced family medicine and travel medicine in Ottawa, Ontario.

a) Dr. Birnbaum Engaged in Sexual Abuse of and Disgraceful, Dishonourable or Unprofessional Conduct in respect to Patient A

4. In and around early 2000, Patient A became a patient of Dr. Birnbaum. Dr. Birnbaum was Patient A’s family physician. Patient A knew Dr. Birnbaum as he had previously been the family physician of Patient A’s [family member].
5. Between approximately 2000 and 2009, as his family physician, Dr. Birnbaum regularly treated Patient A, for various health concerns...
6. In...2009, Patient A attended a medical appointment with Dr. Birnbaum. At this appointment, Dr. Birnbaum provided [treatment] to Patient A...Dr. Birnbaum also ordered bloodwork [for] Patient A...

7. In...April 2009, Patient A contacted Dr. Birnbaum using an electronic platform called Facebook Messenger. Patient A...reached out to Dr. Birnbaum for support and guidance...
8. Patient A wrote to Dr. Birnbaum on Facebook Messenger...Patient A stated that...he could benefit from [Dr. Birnbaum's] advice. Dr. Birnbaum immediately replied to Patient A and the two engaged in several days of communications over Facebook Messenger. Dr. Birnbaum suggested that the two of them meet at a bar. Patient A agreed.
9. Patient A met Dr. Birnbaum at a bar. Dr. Birnbaum told Patient A that the bar was noisy and suggested that they go to Dr. Birnbaum's apartment which was around the corner.
10. Patient A attended at Dr. Birnbaum's apartment where he and Dr. Birnbaum drank wine and smoked cannabis. The two of them then engaged in sexual contact including performing oral sex on one another. When Patient A awoke at 4:00 a.m., Dr. Birnbaum asked Patient A "wasn't that fun?".
11. After the sexual encounter, Dr. Birnbaum and Patient A continued an intimate relationship. They communicated and saw each other regularly. Dr. Birnbaum counselled Patient A...Dr. Birnbaum's communications with Patient A also became more intimate including discussions about sex...Dr. Birnbaum also introduced Patient A to his friends and family.
12. About a week after their first sexual encounter, Dr. Birnbaum reviewed Patient A's bloodwork results and issued Patient A a prescription...

13. In and around May of 2009, Dr. Birnbaum underwent a triple by-pass surgery. Patient A slept at the hospital while Dr. Birnbaum underwent surgery and provided Dr. Birnbaum support. Following the surgery, Dr. Birnbaum moved into Patient A's home... Dr. Birnbaum and Patient A also spent time at Dr. Birnbaum's home.

14. At some point following the commencement of the sexual relationship, Dr. Birnbaum asked another physician, Dr. M, who worked at the same clinic with Dr. Birnbaum, to take over as Patient A's primary care physician. However, during the sexual relationship, Dr. Birnbaum continued to act as Patient A's physician and continued to provide care and treatment to Patient A.

15. Dr. Birnbaum married Patient A in 2010. Patient A separated from Dr. Birnbaum in 2017.

16. Throughout their sexual relationship and marriage, Dr. Birnbaum continued to act as Patient A's physician and continued to provide care and treatment to Patient A.

17. During the investigation, the College obtained a copy of Dr. Birnbaum's patient records for Patient A. The patient records show that between February 2000 to June 2013, Dr. Birnbaum acted as Patient A's physician by providing regular care and treatment to him. The patient records also show that between 2009 (when Dr. Birnbaum commenced a sexual relationship with Patient A) to June 2013, Dr. Birnbaum continued to provide care and treatment to Patient A...

18. During the investigation, the College obtained data from the Ontario Health Insurance Program ("OHIP") for all claims submitted to OHIP by Dr. Birnbaum for services rendered to Patient A between the time period December 1, 1999 to December 1, 2017. A copy of the OHIP data is attached at Tab A to the Statement of Uncontested Facts and Plea of No Contest.

19. The OHIP data shows that:

- Between February 3, 2000 to June 26, 2013, Dr. Birnbaum submitted fifty-four (54) claims to OHIP for services rendered to Patient A;
- Between February 3, 2000 to March 31, 2009, among the various codes billed to OHIP, Dr. Birnbaum submitted claims under billing code...on eight (8) different dates, including on March 31, 2009 as detailed in paragraph 6 above; and
- On June 26, 2013, Dr. Birnbaum submitted two (2) claims to OHIP for services rendered under billing codes...and ...

20. During the investigation, the College obtained a copy of pharmacy records from Shoppers Drug Mart, Store #628 in Ottawa for all prescriptions issued by Dr. Birnbaum and filled by Patient. A copy of the pharmacy records is attached at Tab B to [the] Statement of Uncontested Facts and Plea of No Contest.

21. The pharmacy records show that:

- Between March 2008 and October 2017, Dr. Birnbaum prescribed Patient A numerous medications...
- Between March 2009 and October 2017, Dr. Birnbaum issued over fifty (50) prescriptions to Patient A.

22. During the investigation, the College obtained data from the Narcotic and Controlled Drug Claims on the Narcotics Monitoring System (the "NMS" data) for the date range of April 1, 2012 to October 31, 2019 in respect to Dr. Birnbaum and Patient A. A copy of the NMS data is attached at Tab C to the Statement of Uncontested Facts and Plea of No Contest.

23. The NMS data shows that:

- Between July 7, 2012 and October 19, 2017, Patient A filled a total of twelve (12) prescriptions on twelve (12) separate dates issued by Dr. Birnbaum...

24. In addition to the care and treatment outlined above, during the marriage, Dr. Birnbaum also provided other care and treatment to Patient A

...

b) Dr. Birnbaum Engaged in Disgraceful, Dishonourable or Unprofessional Conduct by Inappropriately Combining Treating and Personal Relationships With Patient A and his Children

25. Between approximately the early 2000's and 2009, Dr. Birnbaum was the family physician for Patient A's family member, X.

26. Between approximately the early 2000's and 2008, Dr. Birnbaum was the family physician for Patient A's family member, Y.

27. X was Dr. Birnbaum's patient at the time Dr. Birnbaum commenced a personal and sexual relationship with Patient A in April 2009. During this time, X accompanied Patient A to Dr. Birnbaum's house for a family dinner. X met Dr. Birnbaum's daughters and granddaughters.

28. Sometime in 2009, X transferred his care to another physician in Dr. Birnbaum's clinic as X was uncomfortable having Dr. Birnbaum as his physician.

29. During the time that Dr. Birnbaum was married to Patient A, Dr. Birnbaum provided care and treatment to X...

c) Dr. Birnbaum Engaged in Disgraceful, Dishonourable or Unprofessional Conduct by Issuing Prescriptions to Patient A Under Another Physician's Name, Without Their Knowledge or Consent

30. Between approximately 2013 and 2020, Dr. Birnbaum practiced at the Riverside Travel Medicine Clinic in Ottawa. Dr. Birnbaum shared office space with another physician named Dr. T.

31. Patient A was never a patient of Dr. T. Patient A had only met Dr. T once in a social setting.

32. During the investigation, the College obtained a copy of pharmacy records from Shoppers Drug Mart, Store #628 in Ottawa for all prescriptions issued by Dr. T to Patient A. A copy of these pharmacy records is attached at Tab D to [the] Statement of Uncontested Facts and Plea of No Contest.

33. The pharmacy records show that:

- Between March 2015 and January 2017, nine (9) prescriptions were issued to Patient A under Dr. T's name;...

34. Dr. Birnbaum inappropriately obtained the above prescriptions under Dr. T's name for Patient A.

d) Dr. Birnbaum Engaged in Disgraceful, Dishonourable or Unprofessional Conduct by Providing Inaccurate and Misleading Information to the College During its Investigation

35. Dr. Birnbaum repeatedly provided inaccurate and misleading information to the College during its investigation.

Dr. Birnbaum's Response to College Investigation dated August 29, 2018

36. In Dr. Birnbaum's initial response to the College investigation dated August 29, 2018, Dr. Birnbaum stated that "[a]t no point prior to our relationship did I act as [Patient A]'s family physician or as a primary care provider." Dr. Birnbaum further stated that "there was not a physician-patient relationship between [Patient A] and myself when we began our relationship." This was inaccurate and misleading information. In fact, Patient A's patient records and OHIP records [at Tab A to the Statement of Uncontested Facts and Plea of No Contest] establish that Patient A had been Dr. Birnbaum's patient from approximately February 3, 2000 onwards and was Dr. Birnbaum's patient at the time he commenced a sexual relationship with Patient A.

Dr. Birnbaum's Response to the College Investigation dated October 2, 2019

37. In a further response to the College investigation dated October 2, 2019, Dr. Birnbaum stated that "during his marriage to [Patient A], he did provide care to [Patient A] for minor conditions" and further stated that "on a few occasions" he renewed Patient A's prescriptions. This was misleading and inaccurate information. In fact, the pharmacy records [at Tab B and Tab D of the Statement of Uncontested Facts and Plea of No Contest] and NMS data [at Tab C of the Statement of Uncontested Facts and Plea of No Contest] show that Dr. Birnbaum issued numerous prescriptions for various medications to Patient A during their marriage.

38. In addition, Dr. Birnbaum stated that he occasionally asked "Dr. [T] to provide him with prescriptions for [Patient A] and himself for minor conditions..." This was misleading and inaccurate information. Dr. T denied providing Patient A with any prescriptions.

Dr. Birnbaum's Response to the College Investigation dated October 18, 2019

39. In a further response to the College investigation dated October 18, 2019, Dr. Birnbaum stated that from April 30, 2009 onwards the medications he prescribed to Patient A were... Dr. Birnbaum stated that he “did not routinely prescribe medications for [Patient A]” and he “does not recall providing any other prescriptions to [Patient A].” In fact, this was inaccurate information as set out above.

PLEA OF NO CONTEST

40. Dr. Birnbaum does not contest the facts set out in paragraphs 1 to 39 above, and does not contest that, based on these facts, he engaged in professional misconduct, in that:

- (a) he engaged in sexual abuse of a patient 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; and
- (b) 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, under paragraph 1(1)33 of Ontario Regulation 856/93, made under the *Medicine Act, 1991*.

RULE 3.02 – PLEA OF NO CONTEST

Rule 3.02 of the Rules of Procedure of the Discipline Committee regarding a plea of no contest states:

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

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

FINDINGS

The Committee accepts as correct all of the facts set out in the Statement of Uncontested Facts and Plea of No Contest. Having regard to these facts, the Committee finds that Dr. Birnbaum committed an act of professional misconduct in that he engaged in sexual abuse of a patient and 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.

SUBMISSIONS ON PENALTY

A number of elements concerning penalty were agreed to by the parties. Counsel for the College and counsel for Dr. Birnbaum both submitted that the appropriate penalty should include: the revocation of Dr. Birnbaum's Certificate of Registration; that he appear before the Committee to be reprimanded; and pay costs to the College at the tariff rate for a half-day hearing in the amount of \$6,000.00.

Counsel for the College submits that an appropriate penalty should also include the posting of an irrevocable letter of credit or other security, in the amount of \$16,060.00, for funding for therapy and counselling for Patient A pursuant to section 85.7 of the Code. Counsel for Dr Birnbaum opposes the inclusion of this penalty term.

PENALTY AND REASONS FOR PENALTY

In consideration of the appropriate penalty, the Committee was guided by the well-recognized penalty principles. Firstly, public protection is the paramount consideration. The penalty must maintain the integrity of the profession and the public's confidence in the College's ability to regulate the profession in the public interest. The penalty should also serve as a specific deterrent to the member, and general deterrent to the profession. Further it is essential that the penalty imposed is proportional to the misconduct, and where applicable, provides for the rehabilitation of the member.

In arriving at a decision on penalty, it is the committee's task to weigh the penalty principles and to consider the specific facts and circumstances in the case.

Further, certain terms of the penalty are mandatory pursuant to the Code. Pursuant to s. 51(5.2)(b) of the Code, where the member has been found guilty of professional misconduct and the conduct includes or consists of any of the conduct listed in paragraph 3 of s. 51(5), as is the case here, the Committee shall reprimand the member and revoke the member's certificate of registration.

Aggravating Factors

The Committee considered the egregious nature of the misconduct to be an aggravating factor. The Committee accepts that Patient A was the victim of sexual abuse... In 2009, Patient A...reached out to Dr. Birnbaum, his trusted family physician, for advice. Dr Birnbaum had been Patient A's primary care physician since 2000, and physician to Patient A's [family member].

Dr Birnbaum's response during Patient A's time of need was to meet up with him at a bar and then invite him to his home where their first sexual encounter, involving oral sex, occurred. When Dr. Birnbaum and Patient A commenced their intimate relationship,

their physician-patient relationship had been firmly established over nine years. They were then married a short time later in 2010.

The Committee is dismayed by Dr. Birnbaum's disregard for the inherent power imbalance that exists in the physician-patient relationship. Patient A...turned to Dr. Birnbaum, his physician, for assistance. Dr. Birnbaum took advantage of this power imbalance to satisfy his own personal needs. He did so at his patient's expense and despite the potential harm it could cause.

Especially concerning to the Committee is that Dr. Birnbaum continued to prescribe medication to Patient A throughout the course of their relationship and marriage. Until 2017, Dr. Birnbaum continued this prescribing relationship despite, in 2009, asking another family physician to take over Patient A's care. In the Committee's view, the chronicity of Dr. Birnbaum's contravention of College policy with respect to treating family members is a significant aggravating factor. Dr. Birnbaum was aware of his professional obligations and made a conscious choice to disregard them over several years.

Another aggravating factor that the Committee finds is that Dr. Birnbaum repeatedly provided false and misleading statements to College investigators. Particularly, Dr. Birnbaum was dishonest with College investigators regarding his concurrent sexual and treating relationship with Patient A. By providing this false information, Dr. Birnbaum impeded the investigative process. Physicians are expected to cooperate with the College as their governing body.

Mitigating Factors

The sole mitigating factor the Committee finds is that Dr. Birnbaum's plea of no contest saved witnesses from testifying, and the College the time and expense of a contested hearing.

The Committee does not accept the argument put forth by Dr. Birnbaum's counsel that it should be considered a mitigating factor that he was under significant stress in 2009 having undergone open heart surgery shortly after initiating the intimate relationship with Patient A. Dr. Birnbaum's health issues do not excuse his actions. Dr. Birnbaum demonstrated a blatant disregard of the professional boundaries that must always be respected in the physician-patient relationship.

Posting of Security

Section 51(2) of the *Code* provides that the Committee may make an order, if the act of professional misconduct was the sexual abuse of a patient, requiring the member to:

5.1. Reimburse the College for funding provided for that patient under the program required under section 85.7; and

5.2. If the panel makes an order under paragraph 5.1, requiring the member to post security acceptable to the College to guarantee the payment of any amounts the member may be required to reimburse under the order under paragraph 5.1.

Section 85.7 of the *Code* sets out the eligibility criteria for persons subject to sexual abuse by a member to seek funding for therapy and counselling. A finding of sexual abuse need not be made in advance of a person being deemed eligible. Rather, a person is eligible for funding if it is alleged, in a complaint or report to the college, that the person was sexually abused by a member while the person was a patient of the member. Patient A is eligible to seek this support, should he so desire.

Committee's Analysis Regarding Funding for Therapy

The Committee finds that there is an evidentiary basis for it to infer that Patient A may participate in therapy or counselling. It is noteworthy to the Committee that Patient A has already applied to the College for funding for therapy and counselling and was found to be eligible, though he had not accessed the funding at the time of the hearing. Though an Order by the Committee in respect of the posting of security for therapy costs remains discretionary, the Committee is of the view that it is warranted in this case.

It is in the public interest that Patient A, and others who have been sexually abused by a physician, have access to therapy and counselling. In the Committee's view, requiring Dr. Birnbaum to bear the cost of funding for therapy and counselling is a strong affirmation of a physician's foundational responsibility to do no harm.

Counsel for Dr. Birnbaum submitted that the objectives of the funding benefit, namely to acknowledge the harm caused to the patient as well as general deterrence, is sufficiently achieved by the penalty elements agreed upon by the parties (i.e. revocation, a public reprimand and costs). Counsel further submitted that the family and civil proceedings that have been launched by Patient A would better address the costs of any future therapy undertaken.

The Committee disagrees with this proposed approach as the outcome of the civil and family proceedings are unknown. Therefore, in the Committee's view, the existence of the civil proceedings have no bearing on its penalty Order. The Committee is also cognisant of the fact that Dr. Birnbaum may choose to bring a motion to the College to vary this disputed penalty term, sometime in the future, based on the outcomes of the family and civil proceedings (though the Committee makes no comment at this time as to the merits of such a motion).

Counsel for Dr. Birnbaum also submitted the Committee should take into account that Patient A has not yet accessed any funds for therapy or counselling. While this may be a

relevant consideration, it is not a prerequisite to an order for the posting of security that the patient has sought the funds. The Committee recognizes that for various reasons, victims of sexual abuse may not seek therapy or counselling until some time after the discipline proceedings in respect of the member have been concluded. This is consistent with the legislative framework, which provides a means by which the physician may be ordered to pay security for future costs.

Where there is evidence at the time of the discipline proceedings as to whether the patient may seek therapy in the future, as is the case here, this evidence is to be taken into account. Given the facts and circumstances of this case, the Committee chooses to exercise its discretion and order the member to post security for any future therapy or counselling costs.

Prior Cases

Although prior Committee decisions are not binding as precedent, the Committee has accepted as a principle of fairness that generally, like cases should be treated alike. Counsel for the College and Counsel for Dr. Birnbaum submitted books of authorities in support of their penalty positions. These were reviewed by the Committee and a number of cases are summarized below.

Cases Submitted by College

1. In *Ontario (College of Physicians and Surgeons of Ontario) v. Gilbert*, 2019 ONCPSD 8 the facts were similar to those in the matter at hand. Dr. Gilbert, a psychiatrist, was treating a vulnerable patient with mental health problems. Dr. Gilbert breached professional boundaries by sharing personal information with the patient, and spending time with the patient and his wife. This escalated into a sexual relationship that went on for several years. Dr. Gilbert continued to treat the patient during their relationship and wrote numerous prescriptions for the

patient during this time. Dr Gilbert also made false statements to the College as to the timing of the sexual relationship.

Dr. Gilbert pled no contest to sexual abuse and disgraceful, dishonourable or unprofessional conduct. The penalty included the same components as the College is seeking in this case: revocation of Dr. Gilbert's certificate of registration, a reprimand, as well as reimbursement to the College's fund for patient therapy and counselling. Dr. Gilbert was also Ordered to pay costs to the College.

2. In *Ontario (College of Physicians and Surgeons of Ontario) v. Margaliot*, 2016 ONCPSD 53, Dr. Margaliot, a plastic surgeon, was contacted by a patient that he had previously operated on through social media. They met socially and the relationship escalated into a sexual relationship. Dr. Margaliot continued to treat and prescribe for the patient after the sexual relationship had begun. The Committee accepted as true all the facts set out in Dr. Margaliot's plea of no contest and found that he had engaged in sexual abuse and disgraceful, dishonourable or unprofessional conduct. Again, the penalty included the same elements proposed by the College in the matter at hand: revocation of Dr. Margaliot's certificate of registration; a public reprimand; and reimbursement to the College's fund for patient therapy and counselling. Dr. Margaliot was also Ordered to pay costs to the College.
3. In *Ontario (College of Physicians and Surgeons of Ontario) vs Kerfoot*, 2020 ONCPSD 19, a vulnerable patient turned to his psychiatrist, Dr. Kerfoot, for assistance, and a sexual relationship ensued. During the 13-month relationship, Dr. Kerfoot treated and wrote prescriptions for the patient. Dr. Kerfoot was also not forthcoming with the College about the nature of the relationship. Dr. Kerfoot entered a plea of no contest to sexual abuse and disgraceful, dishonourable or

unprofessional conduct. Again, the penalty included reimbursement to the College's fund for patient therapy and counselling.

Case Submitted by Dr. Birnbaum

The member relies on *Ontario (College of Physicians and Surgeons of Ontario) v. Sliwin*, 2017 ONSC 1947, in which a decision of the Discipline Committee had been appealed to the Divisional Court. The patient's evidence was that her sexual relationship with Dr. Sliwin was not exploitative, but rather consensual. Therefore, the complainant did not feel she would require counselling and she did not make any attempt to access counselling. Unlike in the matter at hand, at the time of the appeal a civil suit had already been settled.

The appeal court vacated the order to reimburse the College for funding for therapy on the grounds that there was no evidence from which it could infer that the complainant may seek therapy or counseling. As well, the outcome of the civil suit was taken into consideration.

The Committee does not find this case persuasive due to the distinguishing features as compared to Dr. Birnbaum's situation. In *Sliwin*, the patient was not bothered by the sexual relationship and there was no indication she may seek therapy or counselling in the future. In contrast, in this case, the patient has already applied to the College for funding for therapy and counselling.

Generally, prior cases regarding the posting of security for therapy costs will be of limited assistance to the Committee in determining whether security for therapy costs is warranted in future cases. This requires a fact-specific inquiry into whether there is evidence in the particular case to permit the Committee to draw an inference that a particular patient may seek funding for therapy in the future.

CONCLUSION

The Committee accepts the College's proposed penalty Order. Protection of the public is ensured through revocation of Dr. Birnbaum's certificate of registration. It also assists in maintaining the integrity of the profession, and the College's ability to regulate the profession in the public interest. It also serves as a general deterrent to the profession that this type of misconduct will not be tolerated. As detailed above, it is mandatory in this case.

The reprimand (which is also mandatory) and the order of costs similarly satisfy these penalty principles.

In respect of the disputed term concerning reimbursement to the College for funding for therapy, the Committee orders that such term be included in the penalty Order. In so exercising its discretion, the Committee notes that the sexual abuse occurred at a vulnerable time in the patient's life. The patient turned to Dr. Birnbaum, his family physician, for help. This is one of the most egregious forms of sexual abuse as the patient's vulnerabilities were exploited. The patient has applied for funding for therapy and there is sufficient evidentiary basis to conclude that the patient may seek that therapy.

ORDER

The Committee stated its findings in paragraph 1 of its written order of October 9th, 2020. In that order, the Committee ordered and directed on the matter of penalty and costs that:

2. The Registrar to revoke Dr. Birnbaum's certificate of registration effective immediately.

3. Dr. Birnbaum attend before the panel to be reprimanded.
4. Dr. Birnbaum reimburse the College for funding provided to the patient under the program required under section 85.7 of the Code, by posting an irrevocable letter of credit or other security acceptable to the College, within thirty (30) days of [the October 9, 2020] Order in the amount of \$16,060.00.
5. Dr. Birnbaum to pay costs to the College in the amount of \$6,000.00 within thirty (30) days of the date of [the October 9, 2020] Order.

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

TEXT of PUBLIC REPRIMAND
Delivered October 8 2020
in the case of the
COLLEGE OF PHYSICIANS and SURGEONS of ONTARIO
and
DR. ROBERT JOEL BIRNBAUM

Dr. Birnbaum:

The practice of medicine is a great privilege. Patients turn to us in times of need, and they expect and deserve professionalism at all times. Physicians are always in a position of power in relation to our patients. A power imbalance must always be respected. To disregard the boundaries that you ought to have known about risked great harm to your patient at a most vulnerable time in his life, regardless of your romantic feelings, and is truly reprehensible. You put your own needs ahead of your patient's.

You clearly flouted a basic tenet of your profession, especially as you continued to treat your spouse as a patient with many assessments and prescriptions for many ailments over the years of your relationship.

Additionally, it is a great disappointment to the Committee that you were not forthright and clear during the investigation about your continued doctor/patient relationship with your spouse when your misconduct came to light. A physician in practice for as long as you ought to have known the College policies, and certainly have abided by them. It further demonstrates your selfish, self-serving style of conduct.

Your resignation in June of 2020 does not spare you the revocation of your Certificate of Registration, but know that it is the appropriate consequence for such abuse of your privilege. Our paramount responsibility as physicians is to do no harm, and the College must protect the public. It is a great shame that your long career comes to an end this way.

This is not an official transcript