NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Fady Rizk Masoud Ghaly, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the names of the complainants and any information that could disclose the identity of any of the complainants referred to orally or in the exhibits filed in 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*, SO 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 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.

DISCIPLINE COMMITTEE
COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Citation: *College of Physicians and Surgeons of Ontario v.* Ghaly*,* 2021 ONCPSD 31

Date: June 23, 2021

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Fady Rizk Masoud Ghaly

FINDING AND PENALTY REASONS

Heard: February 8-10, 2021 by videoconference

Panel:

Mr. Pierre Giroux (chair)
Dr. Michael Franklyn
Ms. Linda Robbins
Dr. James Watters
Dr. Susanna Yanivker (dissent)

Appearances:

Ms. Carolyn Silver, Ms. Penelope Ng, for the College
Mr. Stephen Darroch, Ms. Jenny P. Stephenson and Mr. Hakim Kassam, for Dr. Ghaly
Ms. Kimberly Potter, Independent Legal Counsel to the Discipline Committee

Reasons of Mr. Pierre Giroux, Dr. Michael Franklyn, Ms. Linda Robbins and Dr. James Watters

Introduction

[1] Dr. Ghaly used a cellphone to surreptitiously record video of two clinic employees, without their knowledge or consent, when they were using the staff washroom. In a subsequent criminal trial, Dr. Ghaly pleaded guilty to the offence of mischief.

[2] In a hearing before us, Dr. Ghaly admitted these facts and that they constitute professional misconduct. Accordingly, we made a finding that Dr. Ghaly had engaged in professional misconduct, specifically that: 1. he had engaged in disgraceful, dishonourable or unprofessional conduct, and 2. he had been found guilty of an offence relevant to his suitability to practice.

[3] The parties disagreed as to what the penalty should be and, at the conclusion of the hearing, we reserved our decision. The College sought revocation of Dr. Ghaly's certificate of registration and a reprimand. Dr. Ghaly proposed a 14-month suspension, a reprimand, ongoing psychotherapy/counselling, and other measures. The key issues for us were:

a. Was Dr. Ghaly's misconduct so abhorrent and did it so undermine public confidence in the profession and its regulation in the public interest that he should be removed from the profession for that reason alone?

b. What is the risk to patients and the public of Dr. Ghaly engaging in further misconduct if he is permitted to resume practice?

[4] Our penalty decision is that Dr. Ghaly's certificate of registration should be suspended for 14 months, that he must attend for a public reprimand, and that he must continue indefinitely with psychotherapy/counselling with regular reports from his therapist to the College.

[5] Below, we set out the reasons for our finding, our penalty order, and our reasons for the penalty.

Agreed facts on the allegations of professional misconduct

[6] The parties submitted an Agreed Statement of Facts and Admission, summarized as follows:

a. Dr. Ghaly is a 45-year-old family physician authorized to practice independently in Ontario since 2015.

b. On November 22, 2017, Employee A, while using the staff washroom in the clinic where Dr. Ghaly worked, found a cellphone concealed on a shelf beside the toilet. When she looked more closely, she realized that the phone was video recording.

c. Employee A showed the cellphone to Employee B, who recognized it as Dr. Ghaly's. Employee B was aware of an incident six months earlier, at which time she was told that Dr. Ghaly had used his cellphone to record another employee while she was in the washroom.

d. The two employees found and watched a video on the cellphone that showed them in states of partial nudity using the toilet.

e. When Dr. Ghaly came out of an appointment room, he saw that Employee A was upset. He went into an office with her, closed the door, and asked her what the problem was. She told him she had found the cellphone recording in the washroom. Dr. Ghaly told her he was very sorry and that he would do anything to make it up to her.

f. When Dr. Ghaly realized that both employees knew about the cellphone, he said, "Please forgive me," and, "This is the first time. I won't do it again." When Employee B said that it was not the first time, Dr. Ghaly admitted that he had recorded other female employees in the washroom several times before. Dr. Ghaly tried to persuade the two employees not to report his conduct to the authorities.

g. The next morning, Dr. Ghaly's wife came to the clinic and told Employee A and Employee B that there were no copies of the videos and that Dr. Ghaly was going to get help.

h. Employee B called the police but, by the time they arrived, Dr. Ghaly had remotely wiped the phone clean and erased the video.

i. Both employees felt violated by Dr. Ghaly's actions.

j. The following day, Dr. Ghaly was charged with the offence of voyeurism.

k. About a year later, Dr. Ghaly appeared in court and pled guilty to a charge of committing mischief. He received a six-month conditional sentence and probation for 18 months afterward.

Admission by Dr. Ghaly that he had engaged in professional misconduct

[7] Dr. Ghaly admitted the facts in the agreed statement and that, based on those facts, he had committed professional misconduct.

[8] The College withdrew its allegation that Dr. Ghaly had engaged in conduct unbecoming a physician (under paragraph 1(1)34 of Ontario Regulation 856/93 made under the *Medicine Act*, *1991* (O. Reg. 856/93)).

Finding of Professional Misconduct

[9] We accept as correct the facts in the Agreed Statement of Facts and Admission and we accept Dr. Ghaly's admission. Accordingly, we find that Dr. Ghaly committed an act of professional misconduct, in that he:

a. 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); and

b. has been found guilty of an offence that is relevant to his suitability to practise (under clause 51(1)(a) of the Health Professions Procedural Code which is Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c.18).

Decision on Penalty

[10] Our decision is that:

a. Dr. Ghaly's certificate of registration be suspended for 14 months

b. Dr. Ghaly must appear for a public reprimand

c. Dr. Ghaly must continue indefinitely with psychotherapy/counselling, with regular reports from his therapist to the College, and that

d. other terms, conditions, and limitations be placed on Dr. Ghaly's certificate as set out in the order below.

[11] In arriving at our decision on penalty, we considered:

a. the parties' submissions on what the penalty should be and why;

b. evidence, in the form of:

i. Statements from the two employees directly affected,

ii. Testimony by Dr. Ghaly,

iii. An agreed statement of facts on penalty,

iv. Letters written on behalf of Dr. Ghaly.

c. previous cases involving voyeurism and other forms of serious sexual and other misconduct.

Submissions on Penalty

[12] The parties agreed that revocation is not mandatory for Dr. Ghaly's misconduct.

[13] The College submitted that only revocation of Dr. Ghaly's certificate of registration and a public reprimand would satisfy the accepted penalty principles. The College's position is that Dr. Ghaly's misconduct is so egregious that revocation is required to uphold public confidence in the profession and its ability to self-regulate in the public interest. Further, the College's submits that Dr. Ghaly has not been open and honest with his assessors and therapists and that the risk to patients and the public if he returns to practice is unacceptably high.

[14] Counsel for Dr. Ghaly submitted that Dr. Ghaly understands and accepts that a serious penalty must be imposed. Because he has taken responsibility, gained insight during therapy, and has strategies in place to prevent him reoffending, Dr. Ghaly's position is that the appropriate penalty is:

a. suspension of his certificate of registration for 14 months,

b. a public reprimand, and,

c. a requirement that he continue monthly counseling as long as he maintains his certificate, and that his counselor(s) provide quarterly reports to the College.

Evidence on Penalty

Employee A and Employee B wrote about the impact Dr. Ghaly's actions had on them.

[15] Employee A wrote that she had once looked up to Dr. Ghaly, who had encouraged her in her career. Her sense of deep hurt and betrayal is all the worse because she had felt safe with him, had confided in him and had worked tirelessly for him. She was humiliated, laughed at and bullied when Dr. Ghaly's misconduct became known publicly. She continues, three years later, to live with a pervasive sense of fear, suspicion, shame, sadness and vulnerability that she does not expect will ever disappear. Employee A has experienced negative impacts on her personal and family relationships and work life, and a loss of trust in men in particular and others.

[16] Employee B wrote about the shock, disbelief, and embarrassment she experienced as a result of Dr. Ghaly's actions.

[17] Both employees expressed concern that the videos recorded by Dr. Ghaly may be somewhere on the internet.

Dr. Ghaly testified about the events surrounding his misconduct and subsequent assessments and psychotherapy/counselling.

[18] Dr. Ghaly's testimony, where relevant, is incorporated in the analysis below. We found his testimony to be credible. Dr. Ghaly acknowledged the wrongfulness of his misconduct. He did not attempt to minimize his actions or the harm he has caused.

We found him to be genuinely remorseful. Nor did Dr. Ghaly avoid discussing private and personal matters. His accounts of facts and events were generally consistent with the reports of his various assessors and therapists, who also had other sources of information.

[19] Dr. Ghaly did not appear evasive, but his explanations on cross-examination were not entirely clear in two instances: in respect of an untruthful statement he made to a psychiatrist (Dr. Rootenberg), and his use of pornography in early 2018. These are addressed below.

Agreed Statement of Facts (Penalty)

[20] The Agreed Statement of Facts (Penalty) draws largely from the reports of Dr. Ghaly's psychiatric and psychological assessments and psychotherapy/counselling treatment sessions. The individual reports are appendices to the Agreed Statement. Where relevant, the facts and opinions are incorporated in the analysis below.

[21] Three forensic psychiatrists (Dr. Rootenberg, Dr. Bradford and Dr. Wilkie) assessed Dr. Ghaly at various times. They opined on the factors that led to his misconduct, the risk that he will re-offend, and risk management, among other matters.

[22] A psychologist (Dr. Arrowood) and a registered social worker/counsellor (Ms. Swayne) assessed and treated Dr. Ghaly at various times. A second psychologist (Dr. Penney) conducted psychological testing.

[23] The qualifications of the experts are not in dispute. We found their reports of considerable assistance. They had access to various sources of information including interviews with Dr. Ghaly and others, the reports of the other experts and College and Crown disclosure material. The contents of their reports and their opinions are for the most part consistent with each other and, where applicable, are incorporated below.

Letters in support of Dr. Ghaly

[24] Dr. Ghaly provided five letters of support from: the priest at his church, his clinic assistant, his own family physician, a family physician colleague and his wife. Each indicates that they are aware of the current discipline matter.

[25] The letters speak positively of Dr. Ghaly's personal qualities and attributes as a physician and are of some relevance in terms of family and community support.

[26] However, we agree with the reasoning in *College of Physicians and Surgeons of Ontario v. Gillen*, 2010 ONCPSD 14 that, in general, character evidence should not be given much weight when dealing with sexual offences. Although this case does not involve a sexual offence, but rather misconduct of a sexual nature, the same reasoning applies regarding the private nature of the misconduct having little connection with the external persona of the perpetrator.

Penalty Analysis

Penalty Principles

[27] In determining an appropriate penalty, we are guided first and foremost by our duty to protect the public. The potential risk to patients and the public from Dr. Ghaly reoffending is a primary issue in the analysis below.

[28] The need for the penalty to support public confidence in the integrity of the profession and the College's ability to regulate the profession in the public interest is a paramount issue for us as well.

[29] Other fundamental considerations are denouncing wrongful conduct; specific deterrence as it applies to the member; general deterrence in relation to the membership as a whole; and, where appropriate, rehabilitating the member. We find that rehabilitation of Dr. Ghaly is an appropriate objective.

[30] A penalty that is fair and reasonable must take carefully into account the facts and circumstances of the case and we must weigh the penalty principles accordingly. We need to consider aggravating and mitigating factors. The penalty should be proportionate to the misconduct. As a principle of fairness, like cases should be

treated alike. Accordingly, we should compare the penalties imposed in previous cases to this case, although we are not bound by previous decisions.

[31] We recognize that we do not need to find that Dr. Ghaly's is among the "most serious misconduct by the most serious offender" for revocation to be an appropriate penalty (*College of Physicians and Surgeons of Ontario v. McIntyre*, 2017 ONSC 116). Nor are we obliged to impose the least restrictive penalty on Dr. Ghaly. As well, if Dr. Ghaly's certificate of registration were to be revoked, he would be eligible to apply for its reinstatement one year later.

The Nature of Dr. Ghaly's Misconduct

[32] Dr. Ghaly's misconduct is very serious. On November 22, 2017, for his own sexual gratification, Dr. Ghaly deliberately hid a cellphone in the staff washroom at the medical clinic where he worked and video recorded two female employees without their knowledge or consent. The employees were partially unclothed and using the toilet. They would have had the highest expectation of privacy in this setting.

[33] Dr. Ghaly's gross invasion of the privacy of these individuals and the violation of their trust is shocking. He breached in an egregious way the basic respect for the individual and the boundaries that are expected in any setting, and that, in a healthcare workplace, are essential to effective professional relationships.

[34] Clinic staff, patients and the public at large have a fundamental expectation of ethical behaviour by physicians, both within and outside clinical settings. Dr. Ghaly has very seriously violated this expectation. His criminal actions and professional misconduct would seriously damage public confidence in the profession if they were not met by an appropriately serious penalty.

Aggravating Factors

[35] As a physician in the clinic, Dr. Ghaly was in a position of authority over Employee A and Employee B. Further, Employee A was Dr. Ghaly's office assistant, whose salary he paid and whose employment he controlled. Dr. Ghaly abused his position when he tried to dissuade Employee A and Employee B from reporting what he had done. Especially troubling is that Dr. Ghaly reminded Employee A of their work

together, told her of the consequences for him and his family, and told her he would do anything for her as long as she did not report his actions.

[36] Dr. Ghaly lied to Employee A and Employee B when he said that it was “the first time” he had made video recordings.

[37] Dr. Ghaly’s actions have caused profound and lasting harm to Employee A and Employee B, as described in their impact statements.

[38] Dr. Ghaly destroyed evidence. On the day after his actions were discovered, Dr. Ghaly went to an Apple Store to arrange to have the contents of his cellphone, including the video recording, erased remotely. Dr. Ghaly knew that the video could be used as evidence against him and he intentionally erased that evidence.

[39] Dr. Ghaly understood the wrongfulness of his actions. He planned them and took into account the possibility that he might be caught. He made a deliberate decision to video record in the staff washroom because he understood that the consequences would be more serious if he recorded patients.

[40] Dr. Ghaly’s actions on November 22, 2017 were not isolated or impulsive. To the contrary, Dr. Ghaly had deliberately and secretly video recorded other female staff in the staff washroom on perhaps ten occasions in the preceding months.

[41] Despite being caught making video recordings some months earlier by another employee, and despite promising that employee that he would not do so again, Dr. Ghaly resumed making video recordings in the staff washroom a few months later.

Mitigating Factors

[42] Dr. Ghaly admitted his misconduct almost from the time his actions were discovered.

[43] Dr. Ghaly’s admission to the misconduct allegations before the College spared the employees from testifying and reduced the expenditure of resources that would have resulted from a fully contested hearing.

[44] On the basis of the expert reports and Dr. Ghaly’s testimony, we find that:

a. Dr. Ghaly accepted responsibility for his actions and has not sought to blame anyone else or external circumstances. He reported his actions to the College himself and sought early assessment and treatment.

b. Dr. Ghaly has been diligent in his treatment. He has been strongly motivated to understand his actions and avoid reoffence. He has gained significant insight into his actions and the strategies aimed at preventing recurrence.

c. Dr. Ghaly has developed a thorough appreciation of the harm he caused and is remorseful for it.

d. Dr. Ghaly is deeply embarrassed by his actions and is highly motivated to avoid behaviour that would lead to further regulatory or legal involvement.

[45] Dr. Ghaly has been in unrestricted, full-time practice for three years since his actions in November 2017, with no suggestion of inappropriate conduct.

Prior Cases

[46] The parties brought to our attention a number of prior cases for comparison with this one. We had a particular interest in how the Committee understood and addressed the damage to public confidence in the profession that arises from physicians engaging in voyeurism and other sexual and serious misconduct.

[47] In the prior cases where the Committee specifically identified the need to maintain public confidence as a paramount issue, serious concerns about public protection were identified as well.

[48] In several of the prior cases, the misconduct included voyeurism. We find the prior College cases involving voyeurism (each resulting in revocation) and the cases at other colleges (resulting in varied penalties) different from this case, as described in greater detail below.

[49] In several recent cases of very serious sexual and other misconduct, where the Committee found that the physician had demonstrated insight, engaged in rehabilitative measures, and/or was at low risk of reoffending, the Committee

concluded that lengthy suspensions would properly fulfill the penalty principles, including the need to maintain public confidence.

Cases involving voyeurism at this College

[50] The College presented three cases of physicians who had engaged in voyeurism (although, as in this case, not all of those cases resulted in a criminal conviction for voyeurism). In each instance, the physician's certificate of registration was revoked.

[51] In *College of Physicians and Surgeons of Ontario v. Hwang*, 2019 ONCPSD 33, Dr. Hwang surreptitiously video recorded friends in the bathroom of their home when he was their guest, two women in states of nudity in bedrooms in his own home, and a female patient during a clinical encounter. He was criminally convicted of voyeurism. He pleaded no contest to allegations of professional misconduct. The Committee accepted a joint submission on penalty that included revocation. The Committee commented on, among other issues, public trust and the negative impact on the reputation of the profession when a physician engages in criminal conduct, such as voyeurism, outside the practice of medicine.

[52] Dr. Hwang's misconduct is the most similar of the three cases to Dr. Ghaly's, in that it was planned, deliberate, repeated, taken surreptitiously in highly private settings without knowledge or consent, and was for his own sexual gratification. The cases differ, however, in that Dr. Hwang recorded a patient as well as others, and was convicted of voyeurism. With Dr. Hwang's plea of no contest, there was no evidence as to whether he accepted responsibility for his actions or had gained insight into his behaviour, nor was there evidence on the risk of him re-offending.

[53] In *College of Physicians and Surgeons of Ontario v. Johnston*, 2016 ONCPSD 45, Dr. Johnston pleaded no contest to the allegation of conduct unbecoming a physician. He had accessed and purchased child pornography – characterized by the Committee as among the most serious forms of misconduct possible - and surreptitiously recorded two individuals (who were not his patients) defecating and urinating in a public washroom. He was acquitted of a criminal charge of voyeurism. Mitigating factors were few. There was no evidence that Dr. Johnston had taken any steps to address his behaviour or mitigate the risk of reoffence.

[54] The Committee accepted a joint submission on penalty that included revocation. The Committee wrote that there is an expectation of moral behaviour by persons granted the privilege to practise medicine, and noted the importance of a penalty that protects the public and maintains public confidence in the profession and its regulation.

[55] In *College of Physicians and Surgeons of Ontario v. Onzuka*, 2013 ONCPSD 27, the Committee found that Dr. Onzuka had engaged in repeated acts of sexual abuse of patients over a prolonged period. In one instance, he disrobed an unconscious female patient and then videotaped her and touched her for a sexual purpose. In a second instance, he sexually touched and attempted to have sexual intercourse with a female patient with diminished consciousness in an emergency room. He was convicted of sexual assault and incarcerated.

[56] The Committee accepted a joint submission on penalty which included revocation. The Committee characterized Dr. Onzuka's conduct as "totally repugnant." The Committee's findings differed from those in the present case in that the Committee found Dr. Onzuka had engaged in sexual abuse of a patient.

[57] The facts of these three cases reflect significantly more serious misconduct than Dr. Ghaly's. Dr. Johnston and Dr. Onzuka engaged in extremely serious forms of misconduct in addition to voyeurism, and Dr. Hwang's and Dr. Onzuka's misconduct involved patients. As well, Dr. Hwang was convicted of voyeurism and Dr. Onzuka of sexual assault.

[58] In addition, the physicians made a plea of no contest in each of the cases, rather than admitting their misconduct as Dr. Ghaly has done. There was little or no suggestion that the physicians had accepted responsibility or acquired insight. Nor was there evidence about therapy, rehabilitative measures or risk of re-offence.

[59] Lastly, there was a joint submission on penalty, which was accepted in each case, and as a result the decisions do not fully articulate the Committee's analysis of the suitability of other penalties. The primary issue for the Committee in the prior cases would have been whether the jointly proposed penalty would bring the administration of justice into disrepute, or would otherwise be contrary to the public interest (*R. v. Anthony Cook*, 2016 SCC 43).

Cases involving voyeurism at other professional colleges

[60] We considered four cases in which non-physicians engaged in voyeurism, two put forward by the College where the penalty was revocation, and two by counsel for Dr. Ghaly in which suspensions were imposed.

[61] In *College of Chiropodists of Ontario v. Bassaragh*, 2020 ONCOCOO 3, the member hid a camera in the clinic washroom and secretly recorded nine individuals using the toilet. There was evidence that he was remorseful, had accepted responsibility for his actions and had been compliant with treatment. The opinion of a forensic psychiatrist was that he was at very low risk of re-offending. However, Mr. Bassaragh was dishonest in aspects of a statement he presented at his disciplinary hearing.

[62] Mr. Bassaragh had been criminally convicted of voyeurism, for which revocation was mandatory. The Discipline Committee of the College of Chiropodists of Ontario (CCO Discipline Committee) wrote that it would not do otherwise even if it had the discretion to do so, although it also noted that it was presented with no specific alternative to consider. The CCO Discipline Committee commented that Mr. Bassaragh had engaged in a significant breach of trust that called into question public safety and public confidence in the ability of the college to regulate the profession.

[63] *Bassaragh* has similarities to the case before us in terms of the nature of the misconduct, although Dr. Ghaly was not convicted of voyeurism and revocation is not mandatory.

[64] In *Ontario College of Teachers v. Hachborn*, 2018 ONOCT 52, the member hid a camera in the staff washroom at his school and, over a lengthy period, made video recordings of staff using the toilet for his own personal gratification. He was convicted of voyeurism. Mr. Hachborn admitted his misconduct. The Discipline Committee of the Ontario College of Teachers (OCT Discipline Committee) found him to be remorseful and drew from the record of his criminal proceedings the observations that he had accepted responsibility, had sought counselling and was considered at low risk to reoffend.

[65] The OCT Discipline Committee accepted a joint submission for revocation, noting the egregious nature of Mr. Hachborn's misconduct, including his abuse of a position of trust and authority. The OCT Discipline Committee commented that Mr. Hachborn's misconduct severely undermined public confidence in the profession and public trust.

[66] In *Royal College of Dental Surgeons of Ontario v. Willenburg*, 2015 (unreported), the member concealed a camera in an office washroom/changeroom and video recorded two clinic staff, one of whom was also a patient. He was criminally convicted of voyeurism. He had developed a sexual fixation with a clinic assistant but did not meet the criteria for a diagnosis of voyeurism. Dr. Willenburg admitted his misconduct, cooperated with his college, and had engaged fully in ongoing psychological counselling. The Royal College of Dental Surgeons of Ontario (RCDSO) disciplinary committee heard and accepted evidence that he took full responsibility for his actions and was deeply remorseful.

[67] The RCDSO disciplinary committee accepted a joint submission on penalty that included a five-month suspension and reprimand.

[68] In *College of Nurses of Ontario v. Ramel*, 2012 CanLII 99761 (ON CNO), the member had been criminally convicted of attempted voyeurism, which the CNO Discipline Committee found to be relevant to his suitability to practise. The CNO imposed a penalty including a four-month suspension, practice restrictions and a program of remediation. This case is of minimal assistance given the very few facts available.

[69] The assistance of *Bassaragh*, *Hachborn*, and *Willenburg* is modest. Although the disciplinary panels in *Bassaragh* and *Hachborn* concluded that revocation was the appropriate penalty despite some evidence of insight and low risk of reoffence, revocation was mandatory in *Bassaragh* and the penalties in *Hachborn* and *Willenburg* were based on joint submissions. The extent to which the reasons for these penalty decisions focus on public confidence varies.

Cases in which public confidence in the profession was a paramount issue, met with revocation.

[70] The College presented three cases in which the reputation of the profession and its ability to regulate in the public interest was of paramount importance, relevant to the College's assertion that maintaining public confidence requires revocation of Dr. Ghaly's certificate.

[71] In *College of Physicians and Surgeons of Ontario v. Gillen*, 2010 ONCPSD 14, Dr. Gillen applied for reinstatement of his certificate of registration. He had been found in 1989 to have engaged in sexual misconduct in respect of a patient. His certificate was then revoked in 2003 for sexual misconduct involving another patient. Dr. Gillen was convicted of sexual assault in respect of the second incident and served a custodial sentence. His reinstatement application was denied.

[72] The Committee found that Dr. Gillen had a fundamental lack of understanding of his sexual misconduct and did not have an appropriate plan in place to prevent further offending behaviour. With these serious concerns, the Committee concluded that public protection would not be sufficiently ensured if Dr. Gillen's certificate were to be reinstated. The Committee wrote further that the trust of the public would be irreparably harmed if the public could no longer have confidence that they would be protected from "repeat sex offenders, who are not rigorous about their relapse prevention plan and who use power and control to serve their own needs."

[73] In *College of Physicians and Surgeons of Ontario v. Minnes*, 2015 ONCPSD 3, Dr. Minnes was found to have engaged in intrusive and coercive sexual behaviour with a teenaged female at a summer camp, who was not his patient but with whom he was in a position of trust. He had also engaged in intrusive and unwanted touching of female staff at a hospital over a number of years. The Committee ordered revocation.

[74] The Committee based its decision on the appalling nature of Dr. Minnes' misconduct, the need to protect the public, and the need to maintain public confidence in the integrity of the profession and the College's ability to govern itself effectively. The Committee observed that while public protection is one of the paramount concerns in determining penalty, public confidence was also a

paramount consideration. The Committee found that Dr. Minnes had not accepted responsibility for his actions, nor was there expert evidence about possible deviant sexuality, insight on Dr. Minnes' part, risk of reoffence or ongoing therapy. The Committee observed that it had no information from which to conclude that Dr. Minnes was safe to return to practice.

[75] In *College of Physicians and Surgeons of Ontario v. Kitakufe*, 2010 ONCPSD 15, Dr. Kitakufe had been convicted of defrauding OHIP and conspiring to traffic in a controlled substance. He recruited as many as 500 individuals who were not his patients, many of whom were vulnerable. He claimed for services to them and improperly wrote opioid prescriptions. Dr. Kitakufe had a prior discipline history at the College and in the United States. However, he had committed to psychotherapy, accepted responsibility for his actions and expressed remorse. Expert opinion was that, although Dr. Kitakufe's "journey to developing insight" was incomplete, the risk of re-offending was low to moderate. In its decision imposing revocation, the Committee considered the reputation of the profession, maintaining public trust and confidence in the profession, and serious issues of public safety.

[76] The reputation of the profession and confidence in the College's ability to regulate in the public interest was a paramount concern in *Gillen*, *Minnes*, and *Kitakufe*. In each instance, however, the Committee articulated serious issues of public protection as well. The Committee in each case appears to have carefully weighed all of the penalty principles and did not order revocation solely on the basis of maintaining public confidence.

[77] *Minnes*, *Johnston*, and *College of Physicians and Surgeons of Ontario v. Hyson*, 2019 ONCPSD 10, are useful for us to consider in the present case, insofar as they are cases in which the Committee ordered revocation was ordered for physicians who engaged in sexual misconduct outside the context of clinical practice.

Cases of abhorrent physician misconduct, met with suspension

[78] Counsel for Dr. Ghaly drew our attention to several cases of abhorrent misconduct, i.e., behaviour that would have engaged the principle of public confidence in the profession. In none of them was the physician's certificate revoked.

[79] In *College of Physicians and Surgeons of Ontario v. Lee*, 2020 ONCPSD 21, Dr. Lee engaged in sexual abuse of three patients, in the form of sexual comments to two patients and sexual touching of the third patient.

[80] At the initial penalty hearing in 2017, the Committee directed revocation, but in 2019, the Divisional Court allowed Dr. Lee's appeal as to penalty. The Divisional Court wrote, among other things, that the Committee had focused on the physician's misconduct and the need for specific deterrence, but had failed to balance the evidence in respect of other penalty principles and did not adequately consider whether penalties other than revocation might achieve the desired objectives (*College of Physicians and Surgeons of Ontario v. Lee*, 2019 ONSC 4294). The Divisional Court returned the matter of penalty for rehearing. At the rehearing, the Committee found that a 12-month suspension would have been proportionate and consistent with the prior case law; however, since Dr. Lee had already been out of practice involuntarily for a significant period of time, no further suspension was sought or found to be warranted by the Committee.

[81] In *College of Physicians and Surgeons of Ontario v. Yaghini*, 2017 ONCPSD 29, the Committee found that Dr. Yaghini had engaged in sexual abuse of a minor female patient on two occasions by making inappropriate remarks and attempting to kiss her on the lips. Expert psychiatric testimony was that Dr. Yaghini's risk of re-offence could not be demonstrated to be measurably above that of the general population. The Committee found that Dr. Yaghini had gained some insight but had not yet come to terms fully with his actions.

[82] The Committee directed a nine-month suspension, which it termed a very serious penalty. The Committee wrote that such "serious and egregious" misconduct reflects on the profession as a whole, raising doubts in the public mind as to the true motives of physicians, whom they trust to put their patients' interests first. However, the Committee did not accept that revocation was required to maintain the reputation of the profession or public confidence in the ability of the College to regulate in the public interest.

[83] In *College of Physicians and Surgeons of Ontario v. Gebien*, 2020 ONCPSD 20, the Committee found that Dr. Gebien forged prescriptions for fentanyl, including using

colleagues' signatures. To assist in obtaining the drugs, he recruited other individuals including some over whom he was in a position of authority. He was convicted of knowingly using a forged document as if it were genuine and trafficking.

[84] The Committee found Dr. Gebien's misconduct egregious but also noted that it occurred in the context of drug addiction and that he had shown significant ability to rehabilitate himself. The Committee concluded that a 14-month suspension with terms, conditions and limitations on Dr. Gebien's certificate would sufficiently serve the penalty principles, including public protection and the need to maintain public confidence in the College's ability to regulate the profession in the public interest.

[85] In *College of Physicians and Surgeons of Ontario v. Mukherjee*, 2019 ONCPSD 16, the Committee found that Dr. Mukherjee had engaged in abusive and threatening behaviour toward a nurse employee with whom he was in an intimate relationship and for whom he prescribed controlled substances. He was convicted of mischief - after deliberately damaging the front door of her house and deliberately driving his car into hers - and of uttering threats to cause death or bodily harm. He received a conditional discharge and engaged in considerable therapy. The Committee accepted a joint submission on penalty that included a six-month suspension and further rehabilitative measures.

[86] In *College of Physicians and Surgeons of Ontario v. Phipps*, 2019 ONCPSD 45, Dr. Phipps had engaged in sexual abuse of eleven patients by showing naked photographs of himself and, in some instances, by making sexual comments and touching of a sexual nature. A number of patients were profoundly harmed. Dr. Phipps had engaged in therapy for depression and alcohol use, and had gained insight into his misconduct and own health. The Committee heard expert psychiatric evidence that, with proper treatment, his risk of re-offence was low. The Committee directed a 14-month suspension with ongoing psychiatric treatment and practice monitoring.

[87] In *College of Physicians and Surgeons of Ontario v. Khan*, 2020 ONCPSD 24, Dr. Khan fondled a 16-year old male, who was not a patient, during a sleepover. He was found guilty of sexual assault some years later and received an absolute

discharge. The fact that he was found guilty of sexual assault was considered relevant to his suitability to practice. Dr. Khan was remorseful, had engaged in therapy, and posed no significant risk to the public. There had been no suggestion of problems in the intervening ten years. The panel rejected a joint submission for a 12-month suspension and imposed no penalty. This decision was under appeal at the time of Dr. Ghaly's hearing, and was therefore given little weight. We note that the appeal has subsequently been withdrawn.

[88] The misconduct in *Lee*, *Yaghini*, *Gebien*, *Mukherjee* and *Khan* varies widely and, in some instances, is even more serious than Dr. Ghaly's. We take from these cases that there may be facts and circumstances in which a suspension is an appropriate penalty for sexual and other very serious misconduct; that a lengthy suspension can be a serious penalty that serves the penalty principles, including supporting public confidence; that sexual misconduct involving patients is more serious than sexual misconduct that does not, all else being equal; and that insight and successful therapy can be relevant to penalty decisions.

Was Dr. Ghaly's conduct so egregious that revocation is required to maintain public confidence in the profession and its regulation?

[89] We agree with the view in *Gillen* and elsewhere that maintaining public confidence in the integrity of the profession and its regulation in the public interest is essential. We agree as well that maintaining public confidence can be a paramount consideration in determining penalty. Further, there are undoubtedly cases where the facts and circumstances are so serious that revocation is required to maintain public confidence, regardless of whether public protection and other penalty objectives are at issue.

[90] We do not find Dr. Ghaly's misconduct to be so deeply shocking and abhorrent that he no longer deserves the privilege of practising medicine. Dr. Ghaly's misconduct is less egregious than that in previous "voyeurism" cases at this College, and a number of mitigating factors are present that were not present in the prior cases. Dr. Ghaly's misconduct does not warrant revocation solely on the basis of public confidence.

[91] A serious penalty that includes a lengthy suspension, ongoing therapy and appropriate terms, conditions and limitations on Dr. Ghaly's certificate will assist in maintaining the reputation of the profession and the confidence of the public that it is being properly protected. Consistent with several prior cases of serious sexual and other misconduct, we do not find that revocation of Dr. Ghaly's certificate is the only penalty that will meet these objectives.

[92] In its analyses of the prior cases where maintaining public confidence in the profession was considered a paramount issue, the Committee identified serious public safety concerns as well. Public confidence in the profession and public protection are intertwined. As the Committee in *Gillen* wrote: "If the public does not have confidence and trust that the College is maintaining standards of professionalism, integrity, and quality, then public safety is also compromised." The reasons for revocation in each of the cases reflect the significant weight to both of these principles. By contrast, we find that Dr. Ghaly's misconduct does not raise significant questions of public safety, as detailed below.

[93] Lastly, we agree with the view in *Yaghini* that the public expects fair and reasoned penalty decisions, and that public confidence is supported by such decisions. Dr. Yaghini's misconduct was sexual in nature, "serious and egregious," and reflected adversely on the profession as a whole. However, the Committee did not accept that revocation of Dr. Yaghini's certificate was required to preserve the reputation and integrity of the profession and concluded that a lengthy suspension would properly serve that purpose.

<u>What is the risk to patients and the public of Dr. Ghaly reoffending if he returns to practice?</u>

Dr. Ghaly's diagnosis of voyeuristic disorder

[94] The question of the risk of Dr. Ghaly reoffending is critical to our penalty decision, particularly as we have concluded that maintaining public confidence does not, in itself, require revocation.

[95] Dr. Ghaly had been using internet pornography for several years prior to the offence in question. His use had increased over time, especially in 2015 when his family moved back to Ontario while he remained temporarily in Saskatchewan.

[96] At the time of his misconduct, Dr. Ghaly had an eight to nine-month interest in voyeurism and became sexually aroused when watching voyeuristic videos. The psychiatrists agree that Dr. Ghaly meets the criteria for a diagnosis of voyeuristic disorder. Dr. Ghaly does not have a major mental health condition, substance use disorder or personality disorder, nor is there any evidence of other deviant sexual behaviour. He has no history of antisocial behaviour or violence.

[97] We accept the expert evidence that voyeuristic disorder was the primary factor in Dr. Ghaly's misconduct, facilitated by stress in his relationship with his wife, his increasing use of pornography and other factors. The strength of Dr. Ghaly's drive to engage in voyeuristic activities, in Dr. Wilkie's view, is reflected in the number of video recordings he made and by his resumption of video recording some months after another employee discovered this activity earlier in 2017. It appears he experienced no significant consequences at that time.

What factors affect Dr. Ghaly's risk of re-offending?

[98] According to Dr. Wilkie, a forensic psychiatrist retained by the College, risk assessment is the identification and description of static and dynamic risk factors.

[99] She explains that static factors are those that are not expected to change over time, e.g., gender, antisocial traits. They are important to understanding long-term risk of reoffence.

[100] In Dr. Wilkie's opinion, Dr. Ghaly's voyeuristic disorder is chronic and can be seen as a static risk factor. It is not to be expected that the disorder will resolve with time or treatment, rather his voyeuristic tendencies require management that is ongoing.

[101] Static risk factors are used to arrive at an estimate of longer-term risk (e.g., using risk assessment tools such as those used by Dr. Rootenberg and Dr. Bradford). Dynamic risk factors can then be important, i.e., personal or situational factors that can vary over time. They provide information about near-term changes in the longer-term risk of reoffence.

[102] Dr. Ghaly's assessors and therapists identified a number of dynamic risk factors that contributed to his offending behaviour and could do so again in the future:

a. Decreasing intimacy with his wife

b. His use of on-line pornography

c. His use of cognitive distortions to justify his behaviour to himself

d. Being apart from his family

e. Falling away from his religious beliefs

f. Other sources of stress.

[103] Exposure to these risk factors, e.g., resuming his use of pornography or difficulties in his marriage, would increase his risk of engaging in offending behaviour. Some factors are under Dr. Ghaly's control, others are not.

[104] Dr. Ghaly's assessors and therapists also identified factors that are protective or that predict success in avoiding reoffence. Among them are that Dr. Ghaly:

a. has gained an understanding of the harms he has caused and is remorseful for them;

b. is embarrassed and humiliated by his actions and their consequences;

c. has been active and forthright in therapy (although the extent to which he has been forthright is of some debate, as discussed in detail below);

d. has family and community support;

e. has had a stable and successful career as a physician.

Expert risk assessments

[105] We looked to the expert opinions to understand the risk that Dr. Ghaly would reoffend, the form that reoffence might take, and the adequacy of the measures intended to minimize risk, specifically Dr. Ghaly's relapse prevention plan.

i. Psychiatric assessment by Dr. Rootenberg (December 2017 and January 2018)

[106] Dr. Ghaly retained Dr. Rootenberg, a forensic psychiatrist, shortly after the offence in question. Dr. Rootenberg focused on the offence and what had led up to it.

[107] Dr. Rootenberg used three formal risk assessment tools to estimate that the static risk of Dr. Ghaly committing a future violent or sexual offence is low.

[108] Taking into account all of the information available to him, Dr. Rootenberg concluded that Dr. Ghaly represents an overall low or very low risk to re-offend either sexually or violently with respect to members of the public and his patients. Among his reasons are that Dr. Ghaly acknowledges the wrongfulness of and accepts responsibility for his actions, has not attempted to deflect blame, now realizes the harm he has caused, deeply regrets that he did not think about such consequences, is highly motivated, has been an excellent participant in treatment, has a supportive social network and has had a productive and successful career as a physician. He noted that Dr. Ghaly had engaged in cognitive distortions (distorted or incorrect thoughts) to justify his actions to himself at the time of his misconduct. However, with therapy, Dr. Ghaly recognized that such thoughts were false and constituted excuses for behaviour that he knew was wrong.

[109] Dr. Rootenberg referred Dr. Ghaly for psychotherapy with Dr. Arrowood.

ii. Psychotherapy with Dr. Arrowood (January to March 2018)

[110] Dr. Arrowood undertook psychotherapy with Dr. Ghaly over three months. The purpose was to explore Dr. Ghaly's understanding of and motivations for his actions, to examine precipitating factors and stressors and to develop strategies to prevent future such behaviour. They also examined the consequences of his actions to those he filmed, his wife and family and himself. The chronic nature of Dr. Ghaly's voyeuristic disorder, the dynamic risk factors he must manage and his relapse prevention plan were the focus of his therapy with Dr. Arrowood (and later Ms. Swayne).

[111] Dr. Arrowood identified a number of factors that contributed to Dr. Ghaly's eventual plan to put a camera in the staff washroom. There was a lack of intimacy between

Dr. Ghaly and his wife, his use of internet pornography had increased and he had fallen away from his religious beliefs.

[112] Dr. Arrowood assessed Dr. Ghaly's risk of reoffence as extremely low, noting many of the factors listed above. He commented that Dr. Ghaly now understands that he had used cognitive distortions and rationalizing to justify his actions at the time. He noted Dr. Ghaly's social supports, his good relationship with his wife, devotion to his medical practice, strong motivation to be treated successfully and absence of any personality disturbance. Dr. Arrowood opined that Dr. Ghaly had a good grasp of the essential issues involved in his offending and in preventing relapse and found him an excellent participant in treatment.

[113] Dr. Wilkie discounted Dr. Arrowood's risk assessment in part because Dr. Arrowood did not use formal risk assessment tools. Nonetheless, many of Dr. Arrowood's observations and opinions are echoed in the reports of other experts and we are prepared to give some weight to his view of risk.

iii. Counselling/Psychotherapy with Ms. Swayne (June 2018 to January 2021)

[114] Ms. Swayne took over Dr. Ghaly's ongoing therapy when scheduling issues prevented Dr. Arrowood from continuing. She was familiar with Dr. Ghaly's case as she had earlier assisted Dr. Rootenberg in gathering collateral information.

[115] Ms. Swayne reviewed the work Dr. Ghaly had done with Dr. Arrowood, including the cognitive and behavioural strategies for managing risk and preventing relapse. Her sessions focused on ensuring that Dr. Ghaly was monitoring his thinking to avoid cognitive distortions, maintaining healthy boundaries, attending to self-care and engaging in mindfulness strategies.

[116] Ms. Swayne did not provide a risk assessment but opined that Dr. Ghaly had achieved his treatment goals by August 2018 and pointed out that he continued to meet regularly with her of his own accord. She described him as coping well and remaining committed to monitoring his thinking and managing his risk factors. In her view, the consequences of Dr. Ghaly's actions serve as a strong deterrent to him reoffending.

[117] Ms. Swayne is prepared to continue counselling Dr. Ghaly and, if required, provide ongoing reports to the College.

iv. Psychiatric Assessment by Dr. Bradford (April 2020)

[118] Dr. Bradford, a forensic psychiatrist, completed an evaluation and risk assessment of Dr. Ghaly.

[119] Dr. Bradford re-scored one of the risk assessment tools that Dr. Rootenberg had used (STATIC-99R), but not the others (which he believed would not have changed). He calculated the STATIC-99R score as two, different from the score of zero calculated by Dr. Rootenberg because Dr. Ghaly had by then been convicted of an offence for which the underlying behaviour was sexual in nature and had a history of two sexual charges, i.e. two counts of voyeurism. A STATIC-99R score of two corresponds to an “average” risk of re-offence.

[120] Nonetheless, Dr. Bradford opined that, based on all of the information available to him, Dr. Ghaly is at low risk of any future sexually deviant behaviour, and that his risk of any sexual contact with patients is extremely low. He commented that discovery and social exposure through criminal charges are often effective deterrents to future voyeuristic behaviour, even in the absence of treatment. He noted as well Dr. Ghaly’s clear understanding of the distress his actions have caused to those involved, his remorse, his engagement in treatment and the absence of any personality disorder or other sexual disorder.

v. Re-assessment by Dr. Rootenberg (May 2020)

[121] Dr. Rootenberg conducted a follow-up interview in 2020 during which Dr. Ghaly told him, among other things, that he had watched pornography one to two times in early 2018. Dr. Rootenberg’s assessment was unchanged.

vi. Independent opinion of Dr. Wilkie (September 2020)

[122] The College retained Dr. Wilkie to provide an independent opinion on the assessments by Dr. Rootenberg and Dr. Bradford and on the information provided by Ms. Swayne and Dr. Arrowood.

[123] Dr. Wilkie raised a number of key issues, including:

a. The risk assessments by Drs. Rootenberg and Bradford were based in part on Dr. Ghaly's self-reporting. As discussed below, Dr. Wilkie found there to be significant inconsistencies in his self-reports to different assessors and therapists.

b. Dr. Ghaly has a number of risk factors that could increase his risk of reoffending if they were active. These factors include the use of pornography, stress, social isolation and marital issues.

c. The risk of Dr. Ghaly reoffending can be considered low only if he remains engaged in his relapse prevention plan, i.e., management of his risk factors on an ongoing basis.

[124] Dr. Wilkie opined that purposeful deception by Dr. Ghaly could have influenced the results of his risk assessments and would be a barrier to his full engagement in treatment and relapse prevention. She opined as well that individuals with paraphilias such as voyeuristic disorder tend to underreport their engagement in the behaviour. As referenced above, and described in more detail below, Dr. Wilkie found it significant that Dr. Ghaly's estimates of the number of video recordings he made varied, and that there were discrepancies in when he made known that he had used pornography in early 2018

vii. Psychological Testing by Dr. Penney (December 2020)

[125] At Dr. Wilkie's suggestion, Dr. Penney conducted an assessment of Dr. Ghaly. One of two personality tests suggested that Dr. Ghaly may have been motivated to portray himself in a favourable light, and perhaps be disinclined to report certain areas of functioning where he may be experiencing difficulty. This pattern is not uncommon in evaluation settings and is not necessarily deliberate. Dr. Penney opined that there did not appear to be any purposeful efforts to deceive or under-report undesirable areas of his functioning on Dr. Ghaly's part.

viii. Addendum Report of Dr. Bradford (February 2021)

[126] Dr. Bradford was made aware of discrepancies in Dr. Ghaly's self-reporting of his behaviour. His risk assessment was unchanged.

How reliable are the risk assessments? Has Dr. Ghaly been open and honest?

[127] The question of whether Dr. Ghaly has been open and honest with his assessors and therapists to date is critical to evaluating the risk that he will reoffend in the future. If he has not been open and honest, then he cannot be relied upon to remain vigilant in preventing relapses into voyeuristic behaviour and reoffence.

i. Dr. Ghaly's estimates of the number of video recordings he made varied

[128] Dr. Ghaly told Dr. Rootenberg (December 2017 to January 2018) that he had made six or seven video recordings, but wasn't sure of the number; Dr. Arrowood (January to March 2018), approximately ten recordings; Dr. Bradford (April 2020), eight to ten recordings (and Dr. Ghaly wrote six to ten recordings on a questionnaire in May 2020); and Dr. Wilkie (September 2020), an estimate of six to nine videos. Ms. Swayne does not report a specific number of recordings.

[129] Dr. Wilkie found the differences among these reports significant. Dr. Bradford found them minor and not significant.

[130] We see no meaningful differences or pattern in Dr. Ghaly's estimates that were given at various times over more than two years. We do not find that the differences demonstrate a lack of insight or an attempt to mislead his assessors and therapists.

ii. Dr. Ghaly's use of pornography in March or April 2018

[131] Dr. Ghaly watched pornography once or twice in March or April 2018 ("relapse"), a time when, he testified, he was experiencing stress because his wife and children were visiting family in Egypt, as well as from his ongoing legal and regulatory proceedings.

[132] In respect of when he made this information known to his assessors and therapists, Dr. Ghaly:

a. completed his initial assessment with Dr. Rootenberg in January 2018 (definitely before his relapse) and his therapy with Dr. Arrowood in early March 2018 (likely before his relapse);

b. in July 2018, told Ms. Swayne (who he began seeing in June 2018) that he needed to avoid pornography at any cost and that he had been doing so since November 2017;

c. at his assessment in April 2020, told Dr. Bradford that he needed to never look at pornography again and that he had not used pornography since November 2017;

d. at his re-assessment in May 2020, told Dr. Rootenberg that he had watched pornography once or twice in March or April 2018;

e. at his assessment in September 2020, told Dr. Wilkie that he was aware that his voyeuristic behaviour could escalate if he watched pornography and that he had last watched it in March 2018;

f. in January 2021, first told Ms. Swayne that he had relapsed once, “That’s it.”

[133] Dr. Ghaly testified that he had been truthful with Ms. Swayne and Dr. Bradford as he believed that he had avoided the use of pornography in the way that he had previously used it, i.e., for two or three hours per day, four days per week prior to November 2017, to the point that it interfered with his work. He distinguished such past heavy use of pornography from his watching it once or twice in early 2018 and finding it painful to do so. He spoke about the “bigger picture” of managing his risk factors and the significant progress he felt he had been making in his therapy.

[134] It seems likely that Ms. Swayne would have expected Dr. Ghaly to report that he had watched pornography in March or April 2018, whatever his experience of it was. However, we do not have her view on this or on how the fact of the relapse may have affected her overall opinion. Dr. Wilkie found the lack of reporting to be significant. Dr. Rootenberg and Dr. Bradford, when the information was brought to their attention (by Dr. Ghaly or otherwise), did not find it significant enough to

change their assessments. Dr. Bradford noted that the relapse occurred relatively early in Dr. Ghaly's treatment.

[135] Dr. Ghaly knew or should have known following his therapy with Dr. Arrowood (and clearly did know later) that watching pornography is an important risk factor for him re-engaging in offending behaviour. Although Dr. Ghaly described the experience of watching pornography in March or April 2018 as very different than it had been, and framed it in a larger context, his explanation of why he believed he had in fact been avoiding pornography hinges on his and others' interpretation of "avoiding," and is not especially compelling.

[136] That said, it is very unlikely the information would have come to light unless Dr. Ghaly reported it, and he did ultimately report it of his own accord to Dr. Rootenberg, Dr. Wilkie and Ms. Swayne. If he were motivated to conceal the information so that his assessment reports would be favourable, then it is unclear why he would mention it at all.

[137] To conclude, although the information about Dr. Ghaly's relapse became known only inconsistently to his assessors and therapists, and relatively late, neither well explained, we are not prepared to find that Dr. Ghaly intentionally withheld the information from his therapists and assessors. We also note that Dr. Rootenberg and Dr. Bradford did not find the information consequential.

iii. Dr. Ghaly made an untruthful statement to Dr. Rootenberg

[138] Dr. Ghaly told Dr. Rootenberg, at some point during his initial assessment, prior to beginning therapy, that he had erased his cellphone because he wanted to protect the personal information on it, and not because he wanted to remove evidence.

[139] Dr. Ghaly acknowledged in his testimony that he knew at the time he erased his cellphone that his true motivation was in fact to remove evidence. He testified further that, when he made the statement to Dr. Rootenberg some weeks later, he had "rationalized" his motivation and had not been honest with Dr. Rootenberg or even with himself.

[140] We find it more likely than not that Dr. Ghaly was aware when he met with Dr. Rootenberg why he had erased his cell phone and that Dr. Ghaly made an

untruthful statement to him. We view the significance of this finding as limited as it occurred before Dr. Ghaly began therapy and occurred in the context of his early admission of many other aspects of his misconduct and disclosure of personal and private matters.

iv. Conclusion in respect of whether Dr. Ghaly has been open and honest

[141] Overall, the assessors and therapists who have engaged with Dr. Ghaly over the past three years have found him to be motivated, diligent, and forthright in his interactions with them, including about aspects of his sexual behaviour that do not reflect favourably upon him. This is consistent with the conclusions of Dr. Ghaly's psychological testing which are that, while there may be some degree of positive impression management, there do not appear to be purposeful efforts on his part to deceive or under-report undesirable actions and thoughts.

[142] We conclude that, other than his untruthful statement to Dr. Rootenberg prior to beginning therapy, Dr. Ghaly has been generally open and honest and has not sought to conceal information or mislead his assessors and therapists.

Dr. Ghaly's relapse prevention plan

[143] We agree with Dr. Wilkie that the risk of reoffence by Dr. Ghaly depends very much on his relapse prevention plan. The plan itself must be sufficient and Dr. Ghaly must remain vigilant in adhering to it. He must manage his risk factors and guard against acting on his voyeuristic tendencies.

[144] Dr. Ghaly's relapse prevention plan includes:

a. ongoing psychotherapy with regular reports from his therapist to the College;

b. cognitive and behavioural strategies to effect complete abstinence from pornography and to manage other risk factors such as marital issues, isolation and stress;

c. ongoing self-monitoring for cognitive distortions, mindfulness, healthy communication with his wife, and other self-care strategies;

d. tools and strategies to occupy his spare time in a pro-social manner, including continued engagement in medical education, volunteer work with his church, engagement in sports, and developing positive social relationships.

[145] Expert opinion is generally supportive of the therapeutic approach taken by Dr. Arrowood and Ms. Swayne, and of the relapse management plan.

a. Dr. Wilkie describes Dr. Arrowood's treatment of Dr. Ghaly as cognitive-therapy based, focused on the identification of cognitive distortions and the development of a safety plan, and aligned with best practices in the treatment of paraphilias. She notes that the relapse prevention plan addresses the salient variables and is sustainable, but is dependent on Dr. Ghaly's vigilance and use of the cognitive and behavioural strategies to manage his voyeuristic interests.

b. Dr. Bradford opined that the psychological treatment in which Dr. Ghaly has engaged, specifically a cognitive behavioural treatment approach, should deter future misconduct.

c. Dr. Rootenberg opined that Dr. Ghaly's risk to reoffend remains low given his acceptance of responsibility and the insight he has gained in therapy.

[146] It is certain that Dr. Ghaly's adherence to his relapse prevention plan will be tested by one or more of his dynamic risk factors in the near future. For example, Dr. Ghaly will be removed from a busy clinical practice – which he finds very rewarding – for 14 months as part of his penalty and will have considerable uncommitted time. Dr. Ghaly will need to manage the absence of this activity with care and diligence.

What is the likely form reoffence would take?

[147] In Dr. Wilkie's view, one generally looks to past offending behaviour, and so the most likely scenario if Dr. Ghaly were to reoffend would be re-engagement in voyeuristic activities.

[148] Dr. Bradford and Dr. Rootenberg opined that the risk of Dr. Ghaly engaging in sexual contact with patients is extremely low.

[149] We conclude that the risk of Dr. Ghaly engaging in either voyeuristic activities or sexual contact involving patients is very low. Dr. Ghaly was aware when he originally made his plan that recording patients would expose him to much more serious consequences than would recording clinic staff. The criminal and regulatory consequences that have ensued will further heighten this awareness and serve as an even greater deterrent to him, as will his new-found insight into the harm he has caused.

Conclusions in respect of risk to patients and the public

[150] We find that Dr. Ghaly is genuinely troubled by the wrongfulness of his actions and the profound harm he has caused, and he accepts responsibility for them. With therapy, he has developed insight and an understanding that he lacked previously about his voyeuristic drive, his risk factors for re-engaging in offending behaviour, and the cognitive distortions that he used to justify his actions in his own mind.

[151] We conclude from the balance of contributing and protective factors and the consistent expert opinion that the risk of Dr. Ghaly reoffending is low as long as he is diligent in adhering to his relapse prevention plan. His relapse prevention plan is reasonable and Dr. Ghaly is strongly motivated to follow it and to avoid reoffence.

[152] Ongoing psychotherapy will assist Dr. Ghaly to adhere to his relapse prevention plan. Regular reporting will provide an independent view of his circumstances and status to the College. His therapist will be well aware of the details of his misconduct, his risk factors, the critical importance of his relapse prevention plan, and the questions raised in respect of self-reporting.

[153] His therapist's (and the College's) information about Dr. Ghaly's adherence to his relapse prevention plan will continue to depend largely on Dr. Ghaly's self-reporting. We accept Dr. Wilkie's observation that individuals with paraphilias tend to underreport their engagement in the behaviour. However, we have not found that Dr. Ghaly has sought to conceal information or mislead his assessors and therapists in any meaningful way. The details of his misconduct will be publicly available on the College register and are known, or were known at the time, in his community. We note that there is a letter of support from a clinic assistant which indicates that she is aware of Dr. Ghaly's misconduct.

[154] We also take some reassurance in terms of risk from the fact that Dr. Ghaly has been in full-time clinical practice for at least three years since his offence with no suggestion of improper behaviour. We are not aware that his practice was restricted in any way during this time or that there was monitoring of his conduct or routine reporting to the College.

[155] In summary, we conclude that Dr. Ghaly is very likely to manage his voyeuristic disorder satisfactorily and that the risk of Dr. Ghaly re-engaging in offending behaviour is low.

Specific deterrence

[156] A suspension of Dr. Ghaly's certificate for 14 months is a very serious penalty. The suspension and the requirement for ongoing therapy and reporting to the College will be a continuing reminder to him of his misconduct and its consequences. We expect that these measures, with the public exposure he has received, his knowledge of the harm he has caused, and his strong motivation to avoid further regulatory and legal interactions will be effective in deterring Dr. Ghaly from re-engaging in offending behaviour.

Denunciation and general deterrence

[157] The lengthy suspension of Dr. Ghaly's certificate and public reprimand will denounce his misconduct and will make the profession aware that such misconduct is wholly unacceptable and will not be tolerated.

Rehabilitation

[158] Rehabilitation is an appropriate penalty objective in this case. Dr. Ghaly has been diligent in engaging in therapy, has had significant success with it, and has practised uneventfully for the past three years. His misconduct aside, we have no reason to conclude that he is other than a well-qualified physician.

Conclusion

[159] Dr. Ghaly has engaged in egregious professional misconduct for which a very serious penalty is appropriate. In our view, a suspension of his certificate of registration for 14 months, a public reprimand, and a requirement for continuing

therapy and reporting to the College is a fair and reasonable penalty and will properly serve the accepted penalty principles.

Costs

[160] If the parties cannot agree on costs, we will consider written submissions on costs to be delivered by each party to the Hearings Office by two weeks after the release of this decision and then each party may deliver its response in writing by one week after that.

Order

[161] The Discipline Committee orders and directs:

1. Dr. Ghaly to attend before the panel to be reprimanded.

2. the Registrar to suspend Dr. Ghaly's certificate of registration for a period of fourteen (14) months, commencing at 12.01 a.m. on July 8, 2021.

3. the Registrar to impose terms, conditions and limitations on Dr. Ghaly's certificate of registration requiring:

    i. Dr. Ghaly to participate in ongoing counselling sessions on a monthly basis with a College-approved therapist, indefinitely; and

    ii. The therapist(s) involved in the treatment of Dr. Ghaly to provide quarterly written reports to the College.

4. Dr. Ghaly to inform the College if there is a change in his treating therapist(s) within five (5) days of the change.

5. Dr. Ghaly to inform the College of each and every location where he practices in any jurisdiction (collectively, his "Practice Location(s)"), within fifteen (15) days of the date he resumes practice following the suspension of his certificate of registration, and shall inform the College of any new Practice Locations within fifteen (15) days of commencing a practice at that location.

6. If the parties cannot agree on costs, the parties to make written submissions on costs within fourteen (14) days of this Order and then each party may deliver its response in writing seven (7) days thereafter.

Dissenting Reasons of Dr. Susanna Yanivker

[162] The Committee is unanimous in making the finding that Dr. Ghaly had engaged in professional misconduct in that: 1. He engaged in disgraceful, dishonourable or unprofessional conduct; 2. He has been found guilty of an offence relevant to his suitability to practice.

[163] I dissent on penalty and find that revocation of Dr. Ghaly's certificate of registration, a reprimand and costs is the appropriate penalty. In my view, revocation is not only reasonable, but is the only acceptable penalty under the circumstances.

[164] I do not agree that suspension is an appropriate penalty for Dr. Ghaly because I do not believe that the public is safe from Dr. Ghaly. Dr. Ghaly has not been open and honest with his assessors and therapists, and he continues to be at risk of reoffending.

[165] Even if I were of the opinion that the public would be adequately protected if his certificate of registration was suspended rather than revoked, I find that Dr. Ghaly's misconduct is so egregious that revocation is required to uphold public confidence in the profession and its ability to self-regulate in the public interest. Further, revocation is necessary to adequately denounce his misconduct.

The Facts

[166] I agree with the facts as they are laid out by my colleagues in the majority decision, although my interpretation of the facts may differ from that of my colleagues.

The Criminal Proceedings

[167] The police charged Dr. Ghaly with voyeurism. In his criminal court proceedings, he pled guilty to mischief. During this discipline hearing, counsel for the College stated:

> While revocation is not mandatory for Dr. Ghaly's sexual misconduct, it is notable that the legislature has indicated that voyeurism is an offence for which a physician ought to be revoked. That is, under the current regulations, if a member is convicted of voyeurism under s.162 of the *Criminal Code*, the mandatory

revocation provisions of the Health Professions Procedural Code would apply.

[168] Although Dr. Ghaly was not criminally convicted of voyeurism, his voyeuristic acts and related conduct are so serious they should lead to revocation.

Penalty principles

[169] The penalty principles are laid out in the majority decision.

[170] I recognize that revocation is a very serious penalty with a great impact on the physician. Nevertheless, in the circumstances, I find that suspension does not satisfy the penalty principles, because it does not adequately protect the public, maintain the public's confidence in the College's ability to regulate the profession in the public interest, or adequately denounce the gravity of Dr. Ghaly's misconduct.

Protection of the public

[171] Protection of the public is paramount and stands out as the guiding principle. I am not as confident as my colleagues that Dr. Ghaly does not pose a threat to the public. That his conduct occurs in secret and monitoring depends on Dr. Ghaly to disclose it, requires special consideration. As discussed in greater detail below, I find that Dr. Ghaly repeatedly lied, minimized and covered up his conduct.

Protection of the public is not the only penalty principle under consideration

[172] Even if I were as confident as my colleagues that the public is safe, I find that Dr. Ghaly's conduct broke the public trust, shamed our profession and undermined its integrity. Only revocation will maintain the public's confidence in the profession and in the ability of the College to regulate the profession in the public interest.

[173] The privilege of self-regulation requires that the public be able to count on the College to ensure removal of physicians who commit misconduct of a nature so grave that they are not suitable to practise. Dr. Ghaly's misconduct reaches this level of gravity, and thus warrants revocation.

The core issues of this case as proposed by Dr. Ghaly

[174] I disagree with the assertion by counsel for Dr. Ghaly that the core issues of this case are Dr. Ghaly's remorse, insight and rehabilitation. While these are relevant to

this case and to Dr. Ghaly, they do not define it. This view overly shifts the focus and the narrative to Dr. Ghaly's feelings and his journey. It downplays Dr. Ghaly's misconduct and its implications to the public, the profession and the women he surreptitiously recorded and victimized.

Additional Evidence

Impact on the women Dr. Ghaly surreptitiously recorded

[175] Employee A described that she felt traumatized when she recalled seeing Dr. Ghaly's face on his phone as he adjusted the camera towards the toilet so he could watch her. To this day, she always feels like someone is watching her.

[176] After word got out about Dr. Ghaly's behaviour, people in the community knew that Employee A worked at the clinic being discussed in the news. She said that she was laughed at, blamed and bullied, even sometimes by patients. Consequently, she felt publicly humiliated, and was made to feel like a joke. She could not stand being looked at as "that girl that got creeped on", felt ashamed, needed counselling and was unable to work. She explained that, as a result, she lost significant income and her savings were depleted, but she said that "No amount of money can repair the damage you have done to me."

[177] She felt that Dr. Ghaly took her innocence when he preyed upon her as a young girl. The experience caused her to no longer trust men and to change how she dresses. She hoped that Dr. Ghaly understood the impact of what he did to her and she stated, "This was disturbingly wrong what you've done to me…No female should ever be in a situation like this."

[178] Employee B stated that for months after she found Dr. Ghaly's recordings, she could not sleep and was shaking when she had to deal with everything in her life. She stated that she was scared that her privacy could be gone, that she was on the internet, and that she could not forget that a co-worker could do this to her.

The Nature of the Act

Dr. Ghaly's selection of location and his decision to record clinic staff

[179] In the bathroom of their workspace, which they shared with trusted colleagues including Dr. Ghaly, staff had a reasonable expectation of even greater security, privacy and safety than in a public bathroom outside of the clinic. These women had no options but to use the facilities provided to them and Dr. Ghaly exploited this fact. Dr. Ghaly's clinic staff were vulnerable. The violation of trust was therefore greater than if Dr. Ghaly had made the recordings in a public bathroom. It is highly concerning that even though he had a professional relationship with these women in that they trusted and looked up to him, and that he likely cared about them, this was not sufficient to deter Dr. Ghaly from violating them.

[180] For several reasons, the women working at Dr. Ghaly's clinic were particularly vulnerable:

- Compared to a hospital where staff could use any number of bathrooms, in Dr. Ghaly's clinic staff had limited options. Dr. Ghaly had only to wait patiently before these women would eventually use the washroom. Dr. Ghaly took advantage of this. Employee A felt preyed upon, and I agree. His behaviour was predatory.

- The women working in Dr. Ghaly's clinic were particularly vulnerable since they did not know that they were being filmed. They could not have agency to take measures to protect themselves from repeated recordings and returned to the same bathroom only to be subject to further violations by Dr. Ghaly, which continued until he was caught. As set out below, this requires special consideration.

- In a larger centre or hospital there would be layers of supervisors to whom staff could report misconduct. By contrast, the women in Dr. Ghaly's clinic were working in a private clinic where there were limited options to report concerns to supervisors who could help them.

- Dr. Ghaly was in a position of power over Employee A because he was: 1. her employer and 2. significantly older than she was.

- As Dr. Ghaly was the employer of Employee A, her livelihood depended on him, and on doing what he requested. There would have been immense pressure on her to do his bidding to conceal his misconduct.

- By virtue of their trust of a colleague, the women working in Dr. Ghaly's clinic were more vulnerable.

[181] Dr. Ghaly took advantage of and exploited all these circumstances.

Dr. Ghaly's strategy to record his staff

[182] We will never know with certainty whether Dr. Ghaly recorded patients in his clinic. We have nothing but his word on the matter, in part because Dr. Ghaly destroyed the evidence on his phone to avoid consequences to himself.

[183] However, Dr. Ghaly testified that he did not secretly record patients in his clinic, and that instead, even though he knew that it was wrong to do so, he chose to record his female staff because he understood that should he be caught, the consequences to him would be less severe.

[184] If we accept that Dr. Ghaly did not record patients because he chose not to, this demonstrates that Dr. Ghaly was able to choose to refrain from recording the women working in his clinic. He refrained from recording his patients when he perceived a sufficient threat to himself. It follows that he chose not to refrain from recording and harming women when he felt safe and if it served his purposes.

[185] Dr. Ghaly's ability to refrain from recording one group of people, his patients, is inseparable from the culpability of choosing to record another group, the women in his clinic. Dr. Ghaly testified that the consequences to the people he taped did not enter into his considerations. So, when he sought to pleasure himself, he was unhampered by concerns for the women he targeted. They paid the price for his misconduct because Dr. Ghaly was doing his best to ensure that he did not.

[186] I agree with the majority decision where it states at paragraph 34 that, "…the public at large have a fundamental expectation of ethical behaviour by physicians, both within and outside clinical settings," and it is expected that physicians place the wellbeing, safety and dignity of those around them above their own sexual desires.

That Dr. Ghaly chose to put his sexual desires first and engaged in behaviour which he knew was wrong demonstrates a disturbing failure in his ethical conduct and a lack of integrity. If Dr. Ghaly could choose to refrain from the behaviour when it served his needs, it is reasonable to expect that he could and should have chosen to refrain in the interest of public safety, to prevent harm to others and when it served the values of society and this profession.

Dr. Ghaly's Surreptitious Recording of People in Vulnerable States

[187] Dr. Ghaly's chronic voyeurism is considered to be a risk factor that will not change over time. He will always have to manage it. He may learn techniques to assist him, but these may fail, and his behaviour may escalate. It is critical to ask, if this happens; can we depend on Dr. Ghaly's integrity to act as a firewall to shield the public from him?

[188] The covert nature of Dr. Ghaly's voyeuristic behaviour requires special consideration. It will always occur in secret and unless he is caught or self-reports, nobody will be aware of the behaviour so it could continue indefinitely. Many people could be harmed over a prolonged time period.

[189] Further, the secrecy of these circumstances creates a particular state of vulnerability for those being filmed. When partially naked and using a bathroom, people have the highest expectation of not only privacy, but of safety. This is particularly true when they are in a trusted environment such as their workplace, that being a physician's clinic no less.

[190] Future colleagues could have their guard down and not know to look for signs that they are being violated by their work colleague. The crime would be perpetrated in secret, and they would not be able to say, "No," nor would they be able to report a physician's misconduct. These circumstances would and did allow Dr. Ghaly to continue his violations repeatedly until he was caught.

[191] Physicians are often around people who, for many reasons, are vulnerable. Patients can be vulnerable. By virtue of their age, level of illness – mental or physical - their level of consciousness or their state of undress, people may not be

in a position to advocate for themselves. Dr. Ghaly has already demonstrated that he is comfortable choosing to record people who are in a vulnerable position.

[192] It is particularly when in vulnerable states that the public depends on a physician's integrity to stand between them and any type of violation, thereby ensuring their safety and wellbeing. It was precisely in such circumstances that Dr. Ghaly's integrity failed.

Integrity and suitability for the profession

[193] Dr. Ghaly explained that at the time of the acts, in his mind, "as long as nobody noticed the camera of the phone nobody would get hurt. I'm not like hurting anybody physically, I am not doing any direct harm to them, and as long as it is not known there's no harm." Even though Dr. Ghaly says he now understands that this thinking was completely wrong, that Dr. Ghaly ever believed this is shocking. This is not the thinking of a person with a robust ethical drive or integrity.

[194] The public and the profession deserve better than a physician who chooses to engage in misconduct because he believes he can get away with it since nobody will know about it. The public and profession absolutely depend on physicians whose personal code of conduct meets the bar for the level of trust awarded them. This does not include a physician who takes advantage of people when they are vulnerable and unaware of the misconduct and harm being perpetrated upon them.

[195] For numerous reasons, physicians can be in a position of power over patients, and patients are vulnerable to physicians' actions. Dr. Ghaly has demonstrated that he harms vulnerable people. That is a trait inconsistent with being a physician.

[196] The public should never have to worry about safety in the presence of a physician. Dr. Ghaly's presence in the profession ensures that they do. We should be extremely reluctant to allow people who take advantage of vulnerable people to be around vulnerable people.

[197] Dr. Ghaly exploited numerous power differentials including: employer – employee, young – old, male – female. We should be extremely reluctant to allow people who abuse their positions of power to be in a position of power. For the public to trust the profession it needs to know that physicians who abuse their power, and take

advantage of people in vulnerable states, will generally not be allowed to remain in the profession.

[198] Dr. Ghaly engaged in voyeuristic behaviour for months, and it is of great significance that ultimately it was not Dr. Ghaly's moral code or integrity that stopped his voyeuristic activity, it was the courage of his staff who came forward and the criminal justice system that stopped him. Indeed, Dr. Ghaly testified that if he had not been caught, he would have likely continued making the recordings.

[199] Dr. Ghaly testified that he now recognizes that his ideas around lack of harm were rationalizations. This insight is good. However, he came to this realization too late to remain part of this profession. The public and the profession expect that physicians come to this profession with certain critical characteristics intact. In my view, integrity is a prerequisite for this profession, not something that you can attempt to learn on the job after failing repeatedly.

[200] In summary, it is because of the tremendous trust that the public places in physicians that members of the public allow themselves to be in vulnerable states around doctors, yet it is precisely in this type of a circumstance that Dr. Ghaly repeatedly demonstrated that he cannot be trusted.

[201] When faced with the decision between his own sexual desires and the well-being of the women over whom he had both power and opportunity, and in the absence of perceived consequences to himself, Dr. Ghaly showed a repeated lack of integrity and demonstrated that he could not be counted upon to act in the best interests and safety of those around him, particularly when they were vulnerable. If he were allowed to remain in the profession, public safety and public trust in the profession and confidence in the College's ability to regulate in the public interest would be undermined.

Additional aggravating circumstances not found in the majority decision

[202] Further aggravating factors include:

- Dr. Ghaly's victims were in a vulnerable state in that they were unaware that they were being violated and were unable to advocate for themselves.

- Dr. Ghaly violated the women working in his clinic when he recorded them without their consent. He violated them, yet again, each time he viewed and masturbated to images of them using the toilet.

- In addition to the other power imbalances discussed, Dr. Ghaly's recording of women without their knowledge or consent demonstrates a man using women's bodies for his own purposes and can be viewed as an attempt to exercise male power over women.

- Even though it was a designated staff washroom, it was possible that patients in his clinic could have used the washroom and been recorded.

- Dr. Ghaly undermined the dignity of the women he recorded.

- Dr. Ghaly surreptitiously recorded at least three different women.

- When caught the first time in mid-2017, Dr. Ghaly promised to stop making recordings and seek treatment. He did neither of these things.

- Dr. Ghaly exploited his staff's sense of comfort and safety.

- Dr. Ghaly was significantly older than Employee A who was a young woman in her mid-20's.

- Dr. Ghaly demonstrated manipulative behaviour:

    - During his attempt to persuade Employee A to keep quiet, Dr. Ghaly asked her to remember everything he did, how they worked together, and to think about what the consequences might be for him and his family. Not only was this hypocritical, given that these were the very factors that he ignored when he decided to record Employee A, but this line of persuasion was an attempt to exploit their friendship and incite guilt in Employee A about reporting him.

    - After masturbating to recordings of female employees using the toilet, Dr. Ghaly would come to work and play the part of a colleague as though nothing had happened. It is highly concerning

that he was able to successfully deceive and manipulate his staff with this charade for several months between the time he was first caught in mid-2017, and November 2017 when he was caught for the second time and reported.

- Not only did Dr. Ghaly intentionally destroy evidence of his misconduct by erasing his phone, he lied to Dr. Rootenberg by telling him that he only did so to protect his privacy.

- Dr. Ghaly knew his true motivations for erasing his phone and for lying about them during his assessment by Dr. Rootenberg. Dr. Ghaly's initial testimony that his lie to Dr. Rootenberg was a result of a lie to himself, did not appear to be credible. This is set out below.

- As set out below, Dr. Ghaly demonstrated limited insight on critically important behaviours and choices, downplayed and minimized his behaviour, and at times, his testimony did not appear to be credible.

Analysis of mitigating factors in majority decision

[203] I disagree with my colleagues' statement at paragraph 42 that "Dr. Ghaly admitted his misconduct almost from the time his actions were discovered" and that this was significantly mitigating. To the contrary, Dr. Ghaly not only failed to admit his actions, he went to great lengths to conceal them:

- Dr. Ghaly did not admit his behaviour to his staff when he was caught. Being caught in the act and exposed is not the same as an admission. There is a critical difference between Dr. Ghaly admitting his behaviour to his staff of his own accord, and his *inability to deny it* because his staff were able to see the recordings of themselves on his phone.

- Further, when he was discovered in November 2017 for the second time, Dr. Ghaly lied about his previous behaviour to his staff by telling them that it was the first time he had made recordings.

- Apart from his communications with his staff as discussed above, we do not have any information regarding what Dr. Ghaly admitted or denied to

other people involved from the time he was discovered, such as to the police, nor going forward during the process of negotiating his plea deal for the criminal court.

- Apart from telling his wife, the first admission we know about was to his assessor Dr. Rootenberg, and Dr. Ghaly was already lying to him at the time of this assessment about the motivations for erasing his phone.

- Dr. Ghaly subverted the course of justice when he destroyed the recorded evidence of his actions. This is contrary to the notion that he admitted his actions.

[204] For the above reasons, I do not give the notion of Dr. Ghaly's early admissions significant weight as a mitigating factor.

[205] I disagree with the statement at paragraph 44 that Dr. Ghaly "accepted responsibility for his actions…" To the contrary, I believe that Dr. Ghaly did not accept responsibility:

- Had he done so, he would have sought counselling when he was first caught by the pharmacist, or better still of his own accord when he began to even consider recording a non-consenting woman. Taking responsibility would mean taking ownership of the conduct and taking action to terminate it. Dr. Ghaly did not do this. Rather, Dr. Ghaly simply continued making recordings until he could no longer escape responsibility because it was forced upon him by discovery, then the criminal justice system.

- Further, remotely erasing evidence of his conduct in an effort to decrease potential consequences to himself stands in stark contrast with the notion that Dr. Ghaly took responsibility. Clearly, this was the action of a person attempting to evade responsibility.

[206] With reference to Dr. Ghaly's self-reporting of his actions to the College as a mitigating factor, I note that it was mandatory that Dr. Ghaly report to the College immediately upon being charged (and that he do so on his annual College registration renewal package). After he was charged on November 23, and on the

advice of the Canadian Medical Protective Agency which he contacted for his defence, Dr. Ghaly reported to the College on December 1, 2017, as was his duty. Certainly, if Dr. Ghaly had failed to disclose his charges and criminal proceedings to the College, this would have been an aggravating factor. However, by reporting them, he simply met the bar for the College's expectations. Performing your duty, as you have committed to do and as is expected of you is minimally mitigating.

[207] I disagree that Dr. Ghaly's apparent diligence in his therapy or that early treatment is a significant mitigating factor. Early therapy could have been due to Dr. Ghaly's effort to avoid or minimize negative consequences to himself and records show that early assessment for Dr. Ghaly was requested by his legal defence team. Certainly Dr. Ghaly was entitled to mount a vigorous defence, and this included his right to seek forensic assessments and engage in counselling as necessary. While he may have also, by that time wished for and personally benefited from therapy in the form of rehabilitation, it would be an assumption to attribute his assessments and engagement in therapy to any particular diligence on the part of Dr. Ghaly:

- Dr. Ghaly's assessment by Dr. Rootenberg was requested not by Dr. Ghaly but by Dr. Ghaly's criminal trial legal defence team.

- Dr. Ghaly's assessment with Dr. Bradford in August 2020 was requested by the legal defence team representing Dr. Ghaly for his College discipline hearing.

- The evidence demonstrates that Dr. Ghaly stopped seeing Ms. Swayne in August 2018, two months after their sessions began, when she felt he had reached his treatment goals. Dr. Ghaly did not go back to her again until November 2018 when continuation of therapy was mandated by the criminal court.

- Dr. Ghaly was compliant with the requirement of his conditional sentence and probation that he participate in therapy. The judge stated that should he breach these terms, he would be brought back before the court. That Dr. Ghaly complied with the court order does little to mitigate his misconduct. He did what was expected of him by the courts and this does not reflect any special diligence on his part.

- Dr. Ghaly submitted to an assessment by Dr. Wilkie, the College-appointed expert. Had he refused to do so, it would not have reflected well on him.

- Further, Dr. Ghaly was in therapy with Ms. Swayne in the summer of 2018 and stayed with her after he was no longer required to do so at the end of his probation in autumn of 2020. However, both of these time periods preceded either his criminal court hearing (autumn 2018) or his College hearing (early 2021). His engagement in therapy during these times may have, at least in part, reflected an effort to be seen in a favourable light at his court and College proceedings, rather than any particular diligence on his part.

[208] Dr. Ghaly had numerous opportunities to seek and engage in therapy in the absence of an impending court or hearing date. For example, when he began to even consider surreptitiously recording women, after he started to do so and was caught for the first time by the pharmacist, or at any point afterwards. At these times, despite the opportunity to seek and engage in therapy, when he did not perceive consequences to himself, he did not seek it at all.

[209] As a mitigating factor, my colleagues stated at paragraph 44 that “Dr. Ghaly is deeply embarrassed by his actions and is highly motivated to avoid behaviour that would lead to further regulatory or legal involvement.” I disagree that this is of any significant weight as a mitigating factor. Such embarrassment and motivation on the part of a perpetrator can simply lead to further bad behaviour or serious misconduct.

- While embarrassment and motivation for regulatory and legal avoidance may have pertinence to the penalty principle of specific deterrence and possibly to the assessment of Dr. Ghaly’s risk of re-offending, they are not significant mitigating factors.

- Any person would be expected to feel embarrassment when such abhorrent behaviour comes to light, and any person would be expected to be motivated to avoid repercussions to themselves.

- Further, Dr. Ghaly has already demonstrated that a person's high motivation to avoid repercussions by the legal or regulatory system does not necessarily lead to improved behaviour. This desire led to concerning behaviour such as:
    - lying that he would never do it again, and would get help when he was caught the first time
    - lying to his staff that he had never previously recorded them when he was caught the second time
    - trying to persuade and manipulate his staff to conceal his conduct
    - erasing his phone remotely and then lying about the reasons he did so to his therapist and giving questionable testimony to the Committee about his motives for doing so.

[210] It is speculation that Dr. Ghaly's high motivation to avoid the law and the regulator might decrease his risk of re-offending. If this were true, it should have mitigated against him engaging in the misconduct at first instance. By his own admission, he turned his mind to the possibility of getting caught and explained that this was the reason he did not target patients – as the consequences (to him) would be more significant. Despite the risk of getting caught and the legal consequences that would naturally follow, he engaged in the misconduct – repeatedly.

[211] Not only does Dr. Ghaly's high motivation to avoid the law and the regulator fail to mitigate his past misconduct, but Dr. Ghaly's behaviours, as set out above, demonstrate that a person's high motivation to avoid external consequences imposed by legal or regulatory bodies can take many forms, a number of which were, on the part of Dr. Ghaly, aggravating behaviours in and of themselves.

[212] Dr. Ghaly's embarrassment and shame are his to bear as expected, and his high motivation to avoid legal or regulatory repercussions is a neutral point at best.

[213] I strongly disagree that Dr. Ghaly's "unrestricted, full-time practice for three years since his actions in November 2017, with no suggestion of inappropriate conduct," as set out in paragraph 45 of my colleagues' reasons, is a mitigating factor, nor do

I find this to be reassuring as suggested by my colleagues. My concerns with this line of reasoning are:

- First, it is the expectation that a physician should be capable of practising without inappropriate conduct; therefore, doing so is not a significant mitigating factor.

- Second, Dr. Ghaly may have been in unrestricted practice, but the past three years did not reflect his normal life and work circumstances. In the year after his arrest, he was undergoing therapy along with various assessments and was preparing for his criminal court date in autumn of 2018. After his court dates, between November 2018 and November 2020, Dr. Ghaly was serving his six-month conditional sentence in the community, followed by his 18-month parole, after which he was preparing for this hearing.

[214] Therefore, for the majority of the last three years since his arrest, Dr. Ghaly's practice was in fact subject to oversight by the criminal justice system and subsequently he was under greater scrutiny than would be the case during normal times. Dr. Ghaly's conduct may have reflected these circumstances, not the circumstances of "normal" life.

[215] The aggravating factors in this case greatly outweigh the mitigating factors.

Prior Cases

[216] I agree with the summaries of prior cases as set out in the majority decision, however, my interpretations of the implications of these cases differ from those of my colleagues.

Cases involving voyeurism at this College

[217] *Hwang:* I agree with the College that this is the most similar case to Dr. Ghaly's. The Committee was presented with a joint submission on penalty which included revocation. It was evident that Dr. Hwang's revocation which was accepted by the Committee as the appropriate penalty, was not only due to recording his patient (who was not in a state of undress and off camera for most of the recording) but

was also due to the recording of non-patients. I understand that Dr. Hwang pleaded no contest and did not demonstrate that he engaged in rehabilitation, and that Dr. Hwang had recorded a patient. However, the Committee stated in *Hwang* that "for a physician to engage in criminal conduct, such as voyeurism, outside of the practice of medicine reflects negatively on the reputation of the profession as a whole and must be denounced." I agree with this statement. While Dr. Hwang was criminally convicted of voyeurism and Dr. Ghaly was not, Dr. Ghaly's plea deal does not change that nevertheless, he engaged in voyeuristic behaviour which reflects negatively on the reputation of the profession as a whole. I do not believe that suspension can adequately address this issue, nor can it denounce Dr. Ghaly's conduct.

[218] *Johnston*: The Committee accepted a joint submission on penalty which included revocation, and wrote that "There is an expectation of moral behaviour by persons granted the privilege to practise medicine…" I agree with this statement and find that Dr. Ghaly's conduct fell well below these expectations. The Committee in *Johnston* also noted the importance of a penalty that protects the public and maintains public confidence in the profession and its regulation. Only revocation of Dr. Ghaly's licence will achieve this goal.

[219] *Onzuka*: This physician was found to have engaged in repeated acts of sexual abuse of patients over a prolonged period. There was limited information about the aggravating and mitigating circumstances of this case. I note that Dr. Onzuka had also engaged in therapy despite the lack of an order requiring him to do so, however little detail was provided. I found this case to be of limited assistance.

[220] I agree with my colleagues' analysis of these cases, in that the physicians' behaviours were more serious than Dr. Ghaly's. There was also little or no suggestion that the physicians had accepted any level of responsibility for their actions. Despite these differences, the strongest penalty does not need to be reserved only for the most serious offences. Dr. Ghaly's conduct may not have been as serious as the conduct of these physicians, but it was sufficiently serious to warrant revocation.

[221] After engaging in the behaviour for months, although Dr. Ghaly did eventually take some level of responsibility for his actions and sought therapy, these factors do not alter revocation as the most appropriate penalty for his conduct because suspension will not maintain public trust and the integrity of the profession, nor will it adequately denounce Dr. Ghaly's misconduct.

Cases involving voyeurism at other professional colleges

[222] *Bassaragh*: Chiropodist Mr. Bassaragh had been criminally convicted of voyeurism, for which revocation was mandatory. The views expressed by the discipline committee in *Bassaragh* have relevance to this case. Citing public safety and public confidence as key issues, the committee wrote that it would have revoked even if it had the discretion not to do so. I believe this line of reasoning to be applicable to Dr. Ghaly. In this case, we have the discretion not to revoke, but the consequences of non-revocation would be that we inadequately address the issue of the public's confidence in the regulation of the profession.

[223] *Hachborn*: Even though Mr. Hachborn, a teacher, showed remorse, took responsibility, had sought counselling and had not recorded students, the discipline committee accepted the joint submission that revocation was warranted. They referred to the egregious nature of Mr. Hachborn's misconduct, including his abuse of a position of trust and authority. The committee commented that Mr. Hachborn's misconduct severely undermined public confidence in the profession and public trust. Although Mr. Hachborn placed a camera in the staff washroom and no students were recorded, the committee stated that a student could have used that washroom and been caught on the recording device. It considered this to be an aggravating factor. Several of the elements of this case are similar to those of Dr. Ghaly's.

[224] *Willenburg*: The committee accepted the joint submission on penalty to suspend. When caught, unlike Dr. Ghaly, Dr. Willenburg, a dentist, immediately admitted to his misconduct and did not erase the evidence.

[225] First, I believe that the public expects all members of the public, regardless of profession, not to secretly record people.

[226] Next, with reference to the cases set out above, there may well be some differences in terms of the professional conduct the public expects of members of different professions, however there is a heightened importance to the public's trust and confidence of people who work with populations who may be vulnerable, or in which there may be a significant power differential. Medicine is one of many such professions which also include the professionals discussed in the cases involving voyeurism from other colleges. The revocations in these cases reflect the integrity and conduct expected of members of these professions.

[227] Similarly, the public places great trust in physicians and rightfully has high ethical expectations of physicians. It is necessary that physicians can be counted upon to reliably meet these expectations, otherwise the public will believe that their trust is misplaced. Dr. Ghaly did not meet these expectations.

Cases in which public confidence in the profession was a paramount issue, met with revocation

[228] We considered three cases in which the reputation of the profession and the College's ability to regulate in the public interest were of paramount importance (*Gillen*, *Minnes*, and *Kitakufe*). These cases were relevant to the College's assertion that maintaining public confidence requires revocation of Dr. Ghaly's certificate. Dr. Hyson's case was also discussed.

[229] I agree with my colleagues' analysis of these cases and their pertinence to Dr. Ghaly.

Cases presented by Dr. Ghaly in which abhorrent physician misconduct met with suspension

[230] I agree with my colleagues' analysis of *Lee*, *Yaghini*, *Gebien*, *Mukherjee*, and *Khan*. However, I disagree with their conclusion that Dr. Ghaly deserves the privilege of practising medicine.

[231] The absence of the worst possible behaviour is not sufficient to maintain the privilege of practising medicine, nor to justify suspension as the most appropriate penalty. That these physicians were not revoked due to the various circumstances of their cases does not alter the need to do so for Dr. Ghaly. In his case,

suspension will fail to support public confidence in the integrity of the profession and the profession's ability to regulate itself in the public interest.

Dr. Ghaly's testimony and credibility

[232] I agree that Dr. Ghaly showed remorse, and openly testified about private matters. I found his testimony on these matters to be credible. While I also found most of his overall testimony to be credible, there were portions of his testimony that concerned me. I noted that when he testified around certain critical issues, he rationalized and substituted clear answers with his own self-analysis and explanations, and he was at times, evasive. This is discussed below.

Dr. Ghaly's honesty and risk of reoffending

[233] This case has special circumstances that must be considered because Dr. Ghaly conducted his behaviour in secret. Anyone he films will not be able to report the conduct (unless he is caught), so we must rely solely on Dr. Ghaly's self-reporting. Therefore, since it is relevant to Dr. Ghaly's risk of reoffending, we must ask: If Dr. Ghaly's behaviour changes in a way that could impact his risk of re-offending, or escalates such that he is on the precipice of secretly recording women again, or begins to do so, could we count on him to voluntarily report this to a person who could help him stop?

[234] When considering this question, and those posed in the majority decision, I agree that the question of whether Dr. Ghaly was open and honest with his assessors is critical, as is his current level of insight.

[235] In these matters, I disagree with my colleagues' conclusions that:

- Other than his untruthful statement to Dr. Rootenberg prior to beginning therapy (about the motivation for erasing the phone), Dr. Ghaly has been generally open and honest and has not sought to conceal information or mislead his assessors and therapists.

- It is significant that it was Dr. Ghaly who ultimately reported his viewing of pornography in 2018 and that this suggested that if he were motivated to

conceal the information so that his assessment reports would be favourable, then it is unclear why he would mention it.

- Dr. Ghaly did not intentionally keep his pornography viewing from his therapists.

- Dr. Ghaly currently demonstrates adequate insight.

[236] Further, I put significant weight on the views of expert Dr. Wilkie. She found the lack of reporting of Dr. Ghaly's 2018 viewing of pornography to be significant and opined that purposeful deception by Dr. Ghaly could have influenced the results of his risk assessments and would be a barrier to his full engagement in treatment and relapse prevention. She also stated that individuals with voyeuristic disorder tend to underreport their engagement in the behaviour and she found it significant that there were discrepancies in when Dr. Ghaly made known that he had used pornography in early 2018.

Failing to disclose his viewing of pornography

[237] In March 2018, Dr. Ghaly had his first relapse and watched pornography again.

[238] It is significant that after telling Dr. Arrowood during their January to March 2018 sessions that he had not viewed pornography since his arrest and that he had no intention of returning to this behaviour, he did so almost immediately after these sessions, in March 2018.

[239] It is critical that Dr. Ghaly chose not to disclose his viewing at the time he engaged in the behavior. Dr. Ghaly testified that because he will always have a risk of re-offending, he must vigilantly manage his risk factors. Yet he did not disclose that he watched pornography until years had passed. This does not constitute vigilant management of risk factors.

[240] Dr. Ghaly did not disclose his viewings when assistance from his therapist would have been most crucial to prevent escalation. He told Dr. Rootenberg two years after his viewings and, after keeping it from her for almost three years, he told his primary therapist, Ms. Swayne, just one month before this hearing, which brings into question what motivations he had for making the disclosure at that time.

[241] My colleagues asked why Dr. Ghaly would disclose his viewing of pornography at all if his goal was to conceal it; I would answer that we do not know. That he disclosed it later is not evidence that he had not attempted to conceal it earlier.

[242] Ultimately, Dr. Ghaly's reasons for his delayed admission do not matter. The point is that for years after he watched pornography, nobody who was best placed to help him knew about it because he chose not to tell them.

[243] That escalation did not occur, according to Dr. Ghaly, does not change the fact that, even though he stated that he must do so, he chose not to vigilantly mitigate the possibility. Instead of telling his therapists that he had relapsed, he did not disclose it.

Minimizing, rationalizing and ongoing lack of insight

[244] Although Dr. Ghaly acknowledged that, for him, pornography is a "killer" and a gateway behaviour that must be avoided at all costs, when questioned about why he did not disclose his viewing of pornography to his therapist, he answered that he didn't think that it was something "major" to tell her.

[245] Dr. Ghaly's claim that he understands the seriousness of watching pornography, and his statement that he did not think that watching pornography was a major behaviour which warranted discussion with his therapist as soon as possible, are inconsistent and reflect Dr. Ghaly's ongoing lack of insight.

[246] During this hearing, Dr. Ghaly told us that when he watched pornography in March 2018, he was avoiding it, and had not used it like he did before. He stated that he had been open and honest about this to his therapists based on his understanding of the questions, but that maybe he misunderstood them because words and questions can be confusing. This line of testimony was not believable and seemed to rest on semantics. Dr. Ghaly knew that watching pornography was an important risk factor for him. By suggesting to us that he failed to disclose it because he got confused by the questions made him appear evasive.

[247] Furthermore, at this hearing, Dr. Ghaly would not acknowledge that he *should* have told his therapists that he had relapsed by viewing pornography again.

[248] The fact is that Dr. Ghaly watched pornography and didn't tell anybody even when his therapists questioned him on the matter. Moreover, even though his relapse occurred early in his therapy, years later, at this hearing, Dr. Ghaly appeared to stand by his decision to keep silent about it, explaining that he did not think that it was a major factor to disclose.

[249] Ultimately, we cannot count on Dr. Ghaly to be open and forthcoming with key disclosures around relapses. Further, it would seem that unless his therapists pose questions to him in a very particular manner, he will sidestep them.

[250] Finally, the duration between Dr. Ghaly's resumption of pivotal behaviours (relapsing and watching pornography) and his disclosure of them is critical in the prevention of their escalation. Yet we know that Dr. Ghaly delayed disclosing watching pornography for two to three years, and stands by this, as he did not concede at this hearing that he should have told those who were treating him.

Dr. Ghaly's risk of re-offending

[251] On the STATIC-99R risk assessment tool, Dr. Bradford scored Dr. Ghaly in the average range of risk to reoffend sexually. However, the overall composite assessment of risk by Dr. Bradford was that Dr. Ghaly was at low risk to reoffend, when taking into account other risk assessment tools and Dr. Ghaly's engagement in an ongoing risk management plan.

[252] Dr. Wilkie stated that Dr. Ghaly's risk assessment was intricately tied to his risk management. It is clear that Dr. Ghaly must be following his risk management plan to be assessed as low risk. Dr. Ghaly stated that he understood that his risk factors must be vigilantly managed. However, his failure to disclose his relapse suggests that he was not following his risk management plan to vigilantly manage his risk factors. This brings into question the confidence with which we are able to view him as low risk for reoffending.

<u>Further lack of insight</u>

[253] Further indicators of Dr. Ghaly's lack of insight include the following:

- It was baffling that Dr. Ghaly testified that when he had the long discussion with Employee A, during which he tried to manipulate and persuade her to conceal his behaviour, he felt that he was also considering her interests. This suggests a startling current lack of insight into his intentions at the time.

- Dr. Ghaly testified that his risk of going back to voyeuristic activity is “close to impossible.” This suggests that although he states that he understands the implications of being diagnosed with chronic voyeuristic disorder or recurrent voyeurism, which must be vigilantly managed, he underestimates his own chances of re-offending. Nobody but Dr. Ghaly described his risk as almost impossible. Dr. Ghaly’s current belief on this matter suggests that he does not have adequate insight and continues to minimize his potential threat to others.

Lying about erasing evidence and other issues

[254] Further concerns about lack of sincerity include the following.

[255] I agree with counsel for the College that Dr. Ghaly was not candid with us about lying to Dr. Rootenberg. Not only did Dr. Ghaly lie to Dr. Rootenberg about the reason he erased his phone, he also gave testimony which was not credible, and was possibly misleading.

[256] Initially, Dr. Ghaly told us that his lie to Dr. Rootenberg about the motivations to erase his phone stemmed from being dishonest with himself, and that he had not “unpacked” the behavior and had convinced himself that he was merely trying to preserve his privacy. Dr. Ghaly was suggesting that he hadn’t known his own true motivations for the phone erasures when he spoke to Dr. Rootenberg.

[257] Yet later in his testimony, Dr. Ghaly admitted that his motivation for erasing the phone was to remove evidence that could be used against him. He said that he lied to Dr. Rootenberg about this because he knew that this information could be used against him in his criminal proceedings, and he wanted a favourable report. Given that Dr. Ghaly had a clear, self-serving goal and plan of action, which he executed by erasing his phone then lying about the reason to his assessor, his initial

testimony to us that he had not known his own motivation, was inconsistent with his actions and choices at the time and was not credible. It would appear that in his testimony to us, Dr. Ghaly attempted to mitigate his lie to Dr. Rootenberg and present himself in a more favourable light by trying to pass this off as a lie to himself, even though he had specific goals and had known his true motivation all along.

[258] Dr. Ghaly confirmed that he was aware that Dr. Rootenberg's (and possibly Dr. Arrowood's) reports could be, and in fact were, used in his criminal proceedings. His erasure of the phone was deliberate to destroy evidence against him. Due to his lie to Dr. Rootenberg on this matter, the motivations behind his decision to erase the phone did not appear in Dr. Rootenberg's report. Instead, the report stated that Dr. Ghaly had erased the phone to protect his privacy, rather than the real reason, which was that Dr. Ghaly intentionally destroyed evidence so that it could not be used against him.

[259] By the time Dr. Ghaly had his criminal court hearing in autumn of 2018, he had already relapsed and watched internet pornography again. Dr. Ghaly testified that he understood that Ms. Swayne's report could be used in various proceedings and that his viewing of pornography could have changed her reports. The information about his relapse did not appear in Ms. Swayne's report because he had not disclosed it to her.

[260] Based on his own testimony, Dr. Ghaly had clear-minded understanding that assessor reports could be used in proceedings, and this may have impacted what he chose to disclose. Subsequently at least two assessor reports did not contain accurate information because of Dr. Ghaly's lies or lack of disclosure.

Dr. Bradford's report and addendum

[261] In August 2020, Dr. Ghaly's counsel requested an assessment by Dr. Bradford. His report referenced Dr. Arrowood's March 2018 report, Ms. Swayne's July 2019 report and Dr. Rootenberg's March 2018 assessment report, all of which Dr. Bradford stated were relevant to his evaluation of Dr. Ghaly. Yet, none of these reports include the fact that Dr. Ghaly had lied to Dr. Rootenberg about

intentionally deleting evidence, or that he had relapsed and watched pornography again, nor did Dr. Ghaly tell Dr. Bradford that he had taken these actions.

[262] In February 2021, Dr. Ghaly's defence team requested that Dr. Bradford provide an addendum opinion which factors in Dr. Wilkie's opinion, Dr. Penny's psychological assessment and Dr. Ghaly's viewing of pornography in March 2018. Dr. Bradford did not alter his opinion and concluded that Dr. Ghaly reported that although he watched pornography, he did not engage in illicit voyeuristic behavior. I do not find Dr. Bradford's unaltered opinion reassuring because for years, Dr. Ghaly kept the information to himself.

Conclusions on Dr. Ghaly's disclosures and insight

[263] Although during his therapy Dr. Ghaly appeared to be open to discussing his voyeurism (which was public knowledge), risk factors, feelings on the matter, and personal life, when it came to critical information such as a relapse, despite ample opportunities over multiple therapy sessions, he was not open and honest, and side-stepped his practitioners' questions. Consequently, critical behaviours and motivations remained secret.

[264] This is not a coincidence. Dr. Ghaly has shown steadfast awareness regarding consequences and harm that might come to him and he demonstrated that he concealed and destroyed information in an effort to avoid these. His omissions to his therapists are no exception, and his attempt to tell us that his lie to Dr. Rootenberg was a consequence of a lie to himself was not credible.

[265] It would seem that when asked questions, Dr. Ghaly tailors his responses based on his self-serving goals, his audience and his perception of their level of scrutiny of him, along with the implications (to him) of their conclusions. This does not reflect open and honest communication.

[266] Dr. Ghaly was not open and honest with his therapists when it mattered most and does not concede that he should have told them about his relapse. As set out above he continues to rationalize and minimize his behaviours and demonstrates a lack of insight around key issues that persists to this day. This is good reason to

believe that in the future, he may continue to rationalize lack of disclosures, relapses or other changes in dynamic risk factors in a similar manner.

[267] This is concerning because when he faces inevitable changes to his dynamic risk factors, should Dr. Ghaly begin watching pornography again or recording women, we cannot count on him to voluntarily bring forward this critical information to those who may be able to help him. He did not tell us that he should have done so with reference to watching pornography, "his killer," in March 2018, stating that he didn't think that it was a major issue to bring forward.

[268] Dr. Ghaly's risk of reoffending is intricately tied to successful management of this risk factors, and he has already failed in his vigilance to manage them.

[269] Consequently, we cannot be confident about Dr. Ghaly's risk of reoffending.

College's ability to monitor Dr. Ghaly

[270] Given the outcome of this hearing, Dr. Ghaly will be permitted to continue practising medicine. It is therefore reasonable to ask if the monitoring method planned will be dependable and effective.

Counselling and reports as a method of monitoring

[271] Although the College has long used various methods of monitoring to successfully oversee physicians in practice, in the circumstances of this case, I agree with counsel for the College that if Dr. Ghaly were to continue to practise medicine, the College would have limited ability to monitor him or ensure that he will seek appropriate treatment if his dynamic risk factors were to overwhelm him.

[272] As it currently stands, Dr. Ghaly will be continuing his counselling with Ms. Swayne, who will provide reports to the College. However, as discussed above, Dr. Ghaly's reporting record suggests that if he were to reoffend or relapse, as he did in 2018, he would be unlikely to disclose this, which could prevent him from obtaining treatment.

[273] Dr. Ghaly will be aware that any reports from his therapist to the College stating that he is watching pornography or considering surreptitiously recording women again, could impact his ability to continue practising medicine. We have already

seen that Dr. Ghaly will lie to assessors (Dr. Rootenberg) so that a report will be in his favour; and we have seen that Ms. Swayne's report did not contain accurate information (Dr. Ghaly's relapse was not present in her report) as a result of Dr. Ghaly's lack of disclosure to her until almost three years after his relapse.

[274] Further, Dr. Ghaly has also demonstrated that he will go to great lengths to conceal his misconduct; he convinced staff to not report his misconduct when he was first caught, lied to staff when he was caught again and destroyed evidence of misconduct by erasing his phone.

[275] Dr. Ghaly's monitoring plan depends entirely on the notion that he will voluntarily choose to come forward with information about his conduct. However, his failure to disclose relapses to his assessors in a timely fashion and his track record demonstrate that his actions have been consistent with avoiding harm and consequences to himself.

[276] It is evident that we cannot count on Dr. Ghaly to be forthcoming, and the idea that Dr. Ghaly will report potentially self-incriminating behaviour, given the lengths to which he went to conceal his acts, would significantly jeopardize any monitoring system which is built upon this assumption.

[277] This brings into question how effectively the College will be able to protect the public through the plan to monitor Dr. Ghaly.

<u>Monthly counselling and quarterly reports</u>

[278] In addition to the concerns set out above, it is unclear to me what factors were used to determine that the frequency of monthly counselling sessions with quarterly reports will be sufficient in an attempt to monitor Dr. Ghaly.

[279] While monthly sessions have been apparently adequate in the time leading to this hearing, Dr. Ghaly is likely to face significant challenges to his dynamic risk factors due to:

- inability to practise medicine during his suspension;
- possible stress from the impacts of loss of income;

- stress from scrutiny due to the publication of his hearing outcome on the College website;

- stress from public scrutiny and possible media coverage of his case (the media previously wrote about Dr. Ghaly and may choose to do so again);

- stress from the challenges his family will face as they navigate these challenges.

[280] Given that at least one of these dynamic risk factors (not practising medicine) and possibly more will challenge Dr. Ghaly, monthly sessions and quarterly reports may not be sufficient and I do not see a mechanism within the monitoring system to actively shift to address these issues.

Dr. Ghaly's therapy

[281] The enormous importance and value of therapy, along with support from family and community, cannot be overemphasized. Whether due to his own wishes for treatment, the advice of his legal defence teams or mandated by the criminal court system, I recognize that Dr. Ghaly nevertheless complied with therapy and participated. He made efforts to develop healthy stress outlets, and re-engaged with his community, church and family. I acknowledge that this process could not have been easy for Dr. Ghaly and I commend him on his efforts. They will likely decrease his chance of reoffending.

[282] However, Dr. Ghaly did not obtain therapy even though he promised to do so after he was caught the first time in mid-2017. This was a significant failure on his part because in the ensuing months, Dr. Ghaly indulged his desires and harmed the women working in his clinic. It was not until after he was caught and charged in November 2017 that he began therapy.

[283] It is my hope that Dr. Ghaly will derive great benefit from counselling and his new-found family and community support, but these factors do not alter the fact that Dr. Ghaly could not be counted upon to act in the best interests of those around him by obtaining therapy before his arrest. Dr. Ghaly did not protect the public and may fail to do so again. Particularly in such circumstances, the College must demonstrate that it regulates in the best interest and safety of the public.

[284] Dr. Ghaly deceived his colleagues and violated the public trust. If Dr. Ghaly were to remain in this profession, members of the public may perceive that they cannot count on the regulator to protect them by removing such physicians. Nothing short of revocation is required to preserve the integrity of the profession and public confidence in the ability of the College to regulate the profession in the public interest.

Dr. Ghaly's narrative and wish to practise medicine

[285] I understand that Dr. Ghaly feels that he has made significant progress with his therapy and believes that he is a now a totally different person than he was when he engaged in his misconduct. This narrative brings the issues of this hearing back to Dr. Ghaly and his journey, which as set out above, are not at the heart of this hearing.

[286] Regardless of his therapy and his journey, protection of the public and the integrity of the profession supersede Dr. Ghaly's wish to remain in this profession.

[287] Additionally, regardless of his current feelings on the matter, by harming the women working in his clinic, Dr. Ghaly disgraced himself and the profession and jeopardized public trust.

[288] While Dr. Ghaly may rebuild trust in his personal life, the broken trust of the public cannot be repaired.

Dr. Ghaly's criminal conviction

[289] Dr. Ghaly has already served the sentence mandated by the criminal court system. He completed his sentence of incarceration in the community and his probation, and he now has a right to be a free member of society. The Committee's penalty is not intended to be punitive. However, professional regulatory measures necessarily differ from the purposes of the criminal justice system. The practice of medicine is not a freedom or a right, it is a privilege. If Dr. Ghaly manages to refrain from reoffending, he will have met the minimum bar to stay away from the criminal court system and further sentences, but this does not mean that he has met the bar to be a member of this profession.

Penalty for Dr. Ghaly

Consideration on penalty and comparison between suspension and revocation

[290] Dr. Ghaly committed grave and abhorrent acts. This is particularly concerning when the misconduct occurs in secret, such that the public cannot protect itself. Suspension, however lengthy, cannot address Dr. Ghaly's deficiency in integrity and lack of suitability for this profession. Only revocation can do so by ensuring that physicians who display serious failures in integrity are removed from the profession. In this manner, the public will be able to trust the profession and have confidence that the College is able to regulate in the interest and safely of the public, particularly when a physician has set aside the safety of the public in favour of their own desires. Should Dr. Ghaly remain, members of the public may believe that they need to protect themselves from physicians.

[291] As physicians are a subset of the public, there will be physicians who, like other members of the public, struggle with various challenges, including paraphilias and addictions. Dr. Ghaly chose to refrain from seeking therapy in favour of harming others. His presence in this profession would undermine the notion that physicians with these struggles should have the insight, integrity and will to seek help and therapy instead of indulging in behaviours that harm others. Should Dr. Ghaly remain in this profession, the membership may perceive that it is acceptable to put off the hard work of introspection and therapy, as Dr. Ghaly chose to do, unless or until one is caught. This may compromise public safety.

[292] Dr. Ghaly took deliberate steps to erase evidence of his voyeuristic behaviour because he knew that it could be used against him. By destroying this evidence, Dr. Ghaly subverted the course of justice. These actions must be factored into this penalty. Only revocation adequately denounces Dr. Ghaly's interference with evidence and sends a message to the members that such behaviour will not be tolerated.

[293] Dr. Ghaly carefully selected and targeted the female staff at his clinic to avoid severe consequences to himself. Imposing a suspension validates his strategy and allows him to achieve his intended goal. Only revocation sends the message that

physicians who use such strategies in order to protect themselves from the consequences of choosing to harm people, will not be tolerated.

[294] In her victim impact statement, Employee A said that “It’s 2021 and young women like me are speaking out.” Failing to impose an adequate or appropriate penalty, which in this case is revocation, undermines the enormous courage it took for the women in Dr. Ghaly’s clinic to come forward. When people who have been seriously harmed by a physician come forward, the profession must not tolerate the presence of these physicians; otherwise the result may be that in the future, people will be discouraged from coming forward and reporting physician misconduct.

[295] I note the words of the Divisional Court in *Moore v. The College of Physicians and Surgeons of Ontario*, 2003 CanLII 7722 at para 7:

> In our view, the sentencing process involves a balancing of various factors with the protection of the public being the guiding principle. These factors include general and specific deterrence, proportionality, as well as the need for the College of Physicians and Surgeons to maintain its credibility in the community and with its members as a self-governing body.

[296] In my considerations on penalty, I also had regard for *Bolton v. Law Society*, [1994] WLR 12 at paras. 15-16, where the following comments are made in addressing the purposes of penalty, which equally apply to physicians and the medical profession:

> …to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission.
>
> …the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.
>
> …He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic… Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be

> able to point to real efforts made to re-establish himself and redeem his reputation.
>
> All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness…the consequence for the individual and his family may be deeply unfortunate and unintended…The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

[297] I believe that members of the public should not have to worry about the integrity, probity and trustworthiness of a physician nor should they have to protect themselves from physicians. Dr. Ghaly's integrity, probity and trustworthiness are most certainly in question, and his continued presence in this profession would undermine these concepts. We cannot expect the public to trust the profession or the regulator if we do not remove physicians who violate trust.

[298] While he may redeem himself in the eyes of those close to him, the damage Dr. Ghaly has caused to this profession would be irreparable if he were permitted to remain.

[299] Furthermore, with reference to a case already discussed in the context of this hearing, I also had regard for the words of the Discipline Committee in the 2010 reinstatement application hearing of *Gillen*, addressing the expectations of a self-regulating body at p. 64:

> That responsibility includes not only maintaining public safety but also the confidence of the public in the medical profession. The two go hand-in-hand. If the public does not have confidence and trust that the College is maintaining standards of professionalism, integrity, and quality, then public safety is also compromised.

[300] In summary, suspension fails to adequately satisfy the penalty principles. Only revocation of Dr. Ghaly's certificate of registration to practice medicine will:

- act as a general deterrent to the members at large;
- adequately denounce his misconduct and send a message that members of the profession and the regulator will not tolerate it; and

- demonstrate to the public and the members that they can count on the College to regulate the profession and act in the interest of public safety.

[301] I recognize that that revocation is a very serious penalty with a great impact on the physician, but in the case of Dr. Ghaly, the bar for revocation has been met and revocation is necessary. The goal is not to be punitive, particularly as Dr. Ghaly served his criminal sentence. However, for the many reasons set out above, our most valuable asset, our “collective reputation” which earns us our public trust, must be protected even if this causes misfortune for an individual physician. Dr. Ghaly made his choices – he prioritized himself and his desires, at the expense of the safety and dignity of those around him. We too must make our choices - by prioritizing our professional integrity, public trust, and public safety.

Summary

[302] Dr. Ghaly repeatedly chose his own sexual gratification over the well-being of others. The women he recorded believed that they were safe while they were partially naked using their workplace bathroom. Because they were unaware that they were being recorded, they could not say, “No” or report him, so Dr. Ghaly continued recording and watching them. He could have stopped or sought help at any time but chose not to, despite promising to do so. Instead, perceiving fewer consequences to himself, he acted with impunity and continued to harm the women working in his clinic until he was forced to stop.

[303] As set out above, Dr. Ghaly abused his positions of power and perpetrated his act on people in a vulnerable state, and as such should not be allowed around vulnerable people over whom he has power.

[304] Dr. Ghaly continues to demonstrate limited insight around disclosure of critical information, such as his relapse of viewing pornography. If there are significant changes in his dynamic risk factors such that Dr. Ghaly’s behaviour threatens to or actually escalates, we cannot be confident that Dr. Ghaly will seek help by disclosing relapses and other necessary information to his therapists in a timely fashion.

[305] This brings into question Dr. Ghaly's ability to vigilantly manage his risk factors, which he must do to be considered low-risk for re-offending. This raises concerns about the confidence with which we are able to view him as low risk for reoffending.

[306] Dr. Ghaly has proven that he acts in his own best interests even when it means layering lie upon lie to conceal his behavior and cover his tracks. From the time he engaged in voyeuristic behaviour, he manipulated and deceived his staff, lied repeatedly when he was caught, abused his authority, destroyed evidence, lied about doing so, and disclosed what he wished, to whom he wished, and only when he wished to do so, not when he should have. Dr. Ghaly's behaviour demonstrates that he lacks the integrity that is rightfully expected of people in this profession.

[307] It is critically important that Dr. Ghaly's behaviour, due to its nature, will always be conducted in secret. This warrants special consideration because unless he reports it himself, Dr. Ghaly will be able to continue indulging his desires (as he did in 2017) until he is caught and reported by someone else.

[308] Dr. Ghaly exploited people when they were vulnerable, unable to advocate for themselves, or protect themselves from him. Especially during such vulnerable states, the public must be able to rely on a physician's integrity. This is precisely when Dr. Ghaly's integrity failed repeatedly. Consequently, because we cannot keep him away from vulnerable people, Dr. Ghaly should not be allowed around vulnerable patients.

[309] The public must know that we as a profession are not represented by, nor stand by Dr. Ghaly's misconduct. He should not be permitted to remain a member of the profession.

[310] Only revocation of Dr. Ghaly's certificate of registration will adequately denounce his behaviour, send a message of intolerance to the public and the membership and maintain the integrity of this profession.

[311] Revocation need not be reserved for only the most heinous conduct. Dr. Ghaly's conduct was sufficiently abhorrent and grave to warrant revocation. Further, due to its secret nature, combined with his lack of disclosure and insight around key issues, revocation is necessary.

Conclusion

[312] My colleagues asked in paragraph 3 of their decision, was Dr. Ghaly's misconduct so abhorrent and did it so undermine public confidence in the profession and its regulation in the public interest that he should be removed from the profession for that reason alone? I answer, yes.

[313] Dr. Ghaly should not remain in this profession. Dr. Ghaly repeatedly and decisively closed the door on the privilege of being a member of this profession when, for months and until he was arrested and forced to stop, he chose to exploit, violate and betray the women in his clinic by making them the unwitting stars of his secret bathroom pornography for the purposes of his sexual gratification.

[314] I would find that revocation (along with reprimand and cost of the proceedings) is the only appropriate penalty for Dr. Ghaly. Anything less tolerates his misconduct, fails the public, shames the profession, irreparably damages public trust and fails the women Dr. Ghaly targeted, surreptitiously recorded and victimized.

NOTICE OF PUBLICATION BAN

In the College of Physicians and Surgeons of Ontario and Dr. Fady Rizk Masoud Ghaly, this is notice that the Discipline Committee ordered that no person shall publish or broadcast the names of the complainants and any information that could disclose the identity of any of the complainants referred to orally or in the exhibits filed in 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*, SO 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 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.

DISCIPLINE COMMITTEE
COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

Citation: *College of Physicians and Surgeons of Ontario v. Ghaly,* 2021 ONCPSD 33

Date: July 13, 2021

BETWEEN:

College of Physicians and Surgeons of Ontario

- and -

Dr. Fady Rizk Masoud Ghaly

REASONS ON COSTS

Heard: in writing

Panel:

Mr. Pierre Giroux (chair)
Dr. Michael Franklyn
Ms. Linda Robbins
Dr. James Watters
Dr. Susanna Yanivker

Appearances:

Ms. Penelope Ng, for the College
Mr. Stephen Darroch, for Dr. Ghaly
Ms. Kimberly Potter, Independent Legal Counsel to the Discipline Committee

Introduction

[1] On June 23, 2021 we issued our decision on finding and penalty in this proceeding.

[2] The parties had not addressed costs in the hearing before us. Therefore, we directed that:

> If the parties cannot agree on costs, the parties to make written submissions on costs within fourteen (14) days of this Order and then each party may deliver its response in writing seven (7) days thereafter.

[3] By email received July 6, 2021, College counsel advises that the parties have agreed as follows:

> … the parties agree and jointly submit that an appropriate costs order would require Dr. Ghaly to pay costs to the College in the amount of $15,555.00, payable to the College by no later than August 6, 2021.

[4] The email goes on to state that the costs were calculated based on 1.5 days of hearing at the tariff rate of $10,370 per day.

Decision

[5] We find the proposed costs order to be reasonable and accept it.

Order

[6] The Discipline Committee orders and directs:

- Dr. Ghaly to pay costs to the College in the amount of $15,555 by no later than August 6, 2021.

DISCIPLINE COMMITTEE
COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

In the matter of:

College of Physicians and Surgeons of Ontario

- and -

Dr. Fady Rizk Masoud Ghaly

Reprimand delivered by the Discipline Committee
by videoconference on Tuesday, July 20, 2021.

*****NOT AN OFFICIAL TRANSCRIPT*****

Dr. Ghaly:

In the Agreed Statement of Facts presented to this panel, you have acknowledged and accepted as fact that you surreptitiously recorded video of two of your employees without their knowledge or consent when they were using the toilet in the staff washroom.

Further you abused your authority as an employer when you tried to convince these employees not to report you. You then destroyed the evidence of these recordings in an obvious attempt to avoid responsibility for your actions. Clearly, you have engaged in conduct that would reasonably be considered by members of the profession to be disgraceful, dishonourable or unprofessional. This conduct also formed the basis of a finding of guilt to the offence of mischief under the Criminal Code, which we have found to be an offence relevant to your suitability to practice medicine.

To say that your conduct was deeply abhorrent, harmful and destructive to your victims would be an understatement. It is profoundly disturbing that you chose to direct this activity at colleagues and shows that you knew such actions were wrong yet you resumed this activity even after previously being discovered. It is clear you did not target patients due to your stated belief that the potential consequences would not be as severe if you were caught.

Over the past several years, you have undergone therapy and counselling that has enabled you to confront your paraphilia, acknowledge the impulses, and manage your stressors in both your professional and personal life. The majority of this panel accepts that this has provided you with a guardrail by which you can move forward. Your commitment to maintaining these therapeutic activities indefinitely was paramount to the decision by a majority of this panel to suspend your certificate of registration for a period

of fourteen months, rather than revoking your certificate of registration. As you are aware, our dissenting panel member believes that when you betrayed your colleagues, you shamed this profession, and irreparably broke the public trust. She believes that you displayed a lack of integrity which demonstrates that you do not belong in this profession.

The majority of the panel expects that you have learned from this experience and expects that you will not waver in your commitment and vigilance to control such voyeuristic behaviour. Let us be clear, this should never have happened and should never happen again.

Finally the majority of the panel is placing a great deal of trust in you and it would be a travesty if you were to abuse it.