

**THE DISCIPLINE COMMITTEE OF THE COLLEGE
OF OPTOMETRISTS OF ONTARIO**

Panel: Ms. Ellen Pekilis, Chair
Dr. Linda Bathe
Dr. Dino Mastronardi
Dr. Patrick Quaid
Mr. John Van Bastelaar

B E T W E E N:

The College of Optometrists of Ontario)	Ms. Bonni Ellis
)	Counsel for the College
)	of Optometrists of Ontario
)	
- and -)	
)	
Dr. Jon Barnes)	Ms. Lisa Spiegel
)	Counsel for Dr. Jon Barnes
)	
)	Ms. Julie Maciura
)	Independent Legal Counsel
)	
)	Heard on March 22, 2018 and April 19, 2018

DECISION AND REASONS

This matter came before a Panel of the Discipline Committee of the College of Optometrists of Ontario (the “College”) on March 22, 2018 and April 19, 2018, at Victory Verbatim, 222 Bay Street, Suite 900, Toronto, Ontario.

The purpose of the hearing was to consider allegations of professional misconduct referred by the Inquiries, Complaints and Reports Committee against Dr. Jon Barnes (the “Member”).

The five members of the Discipline Panel referred to above were in attendance, as well as Dr. Jon Barnes and his counsel, Ms. Lisa Spiegel; Ms. Bonni Ellis, counsel for the College, accompanied by Dr. Paula Garshowitz, Registrar; and Ms. Julie Maciura, independent legal counsel to the Discipline Panel.

The hearing was called to order at 9:45 a.m. on March 22, 2018. The Chair introduced the Panel and the other people present in the room. The hearing did not finish on March 22, 2018 and so it resumed on April 19, 2018.

Publication Ban

On March 22, 2018, at the request of the College and on consent of Dr. Barnes, the Panel made an order banning the publication, broadcasting or disclosure of the name of the patients and/or any information that would disclose the identity of the patients, other than the fact that a patient was also an employee of the Member.

The Panel's reasons for making the publication ban are that personal health information or other matters may be disclosed at the hearing, which are of such a nature that the harm created by disclosure would outweigh the desirability of adhering to the principle that hearings be open to the public.

Allegations and Evidence

College counsel took the Panel through the Notice of Hearing, which was filed as Exhibit 1.

The Notice of Hearing made the following allegations against Dr. Barnes:

1. You have committed an act or acts of professional misconduct as provided by subsection 51(1)(b.1) of the *Health Professions Procedural Code of the Optometry Act, 1991*, S.O. 1991, c. 35, as amended, in that, between approximately 2002 and 2016, you sexually abused Patient A, Patient B, and/or Patient C when you engaged in behaviour and/or made remarks of a sexual nature towards Patient A, Patient B, and/or Patient C, who were also staff, including, but not limited to when you:
 - a) wrote comments of a sexual nature in various places in the workplace where they would see them;
 - b) made verbal, sexual comments to them, about them, and/or about others in their presence; and/or
 - c) engaged in behaviours of a sexual nature towards them in the workplace.

2. You have committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code of the Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 1.14 of Ontario Regulation 119/94 in that, between approximately 2002 and 2016, you failed to maintain the standards of practice of the profession when you:
 - a) noted, in patient records, inappropriate commentary about patients and/or their relatives, including comments of a sexual nature, not relevant to care; and/or
 - b) engaged in unprofessional behaviours in the office, including engaging in the sexual harassment of staff.

3. You have committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code of the Optometry Act, 1991*, S.O. 1991, c. 35, as

amended, and defined in paragraph 1.36 of Ontario Regulation 119/94 in that, between approximately November 2016 and March 2017, you contravened, by act or omission, the Act, the *Regulated Health Professions Act, 1991* or the regulations under either of those Acts and, in particular, you contravened subsection 76(3) of the *Health Professions Procedural Code* when you applied white-out to or otherwise redacted notations you had made in patient charts and, in so doing, did or attempted to conceal or destroy information relevant to the College's investigation.

4. You have committed an act or acts of professional misconduct as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 1.39 of Ontario Regulation 119/94 in that, between approximately 2002 and 2016, you engaged in conduct or performed an act that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable, unprofessional or unethical and, in particular, you:
 - a) noted, in patient records, inappropriate commentary about patients and/or their relatives, including comments of a sexual nature, not relevant to care;
 - b) wrote sexual comments in various places in the workplaces where staff could see them including on post-it notes and the white board;
 - c) made verbal, sexual comments to staff;
 - d) engaged in sexual behaviours towards staff, including when you showed them sexual images and/or videos;
 - e) acted in a physically aggressive manner in the office, including but not limited to banging your fists on furniture, slamming doors, and/or throwing furniture;
 - f) shared a staff member's private health information with other staff; and/or
 - g) acted in a verbally and/or emotionally abusive manner towards staff.

Agreed Statement of Facts

College counsel entered an Agreed Statement of Facts that was signed by Dr. Barnes and a College representative and was marked as Exhibit 2.

The Agreed Statement of Facts provided as follows:

THE MEMBER

1. Dr. Jon Barnes ("the Member") has been registered with the College of Optometrists of Ontario ("the College") in the general class since May 1990, after receiving his Optometry degree from the University of Waterloo, School of Optometry earlier that year.

2. The Member has had a solo practice in Beaverton since 1990 (“Beaverton” or “the Beaverton Clinic”). At the time of the incidents set out below, the Member was working three and a half days per week at Beaverton and employed up to three staff members.
3. Between 1990 and 1999, the Member also worked in various group practices; in Orillia between 1990-1995, in Oshawa between 1992-1993, and in Barrie between 1996-1999.
4. In 2004 the Member opened a second solo practice in Stouffville (“Stouffville”). At the time of the events described below, the Member was working one and a half days at his Stouffville practice and employed up to two staff members.
5. At the time of the events at issue in this matter, the Member was a member in good standing at the College and was subject to the jurisdiction of the College.
6. The Member has no prior discipline history with the College.

THE COMPLAINT

7. On November 4, 2016, the College received a written complaint from Person A, who had been employed by the Member as an optometric/administrative assistant at the Beaverton Clinic for over twelve years.
8. In her complaint, Person A alleged that the Member had made inappropriate, often sexual remarks, about patients since she had started working there, despite her advising him of her disapproval. Some of the Member’s comments about patients were verbal while others he wrote and drew in the patient’s health records where staff members, including Person A would see them.
9. Person A also alleged that the Member had acted unprofessionally on a number of occasions in the office. Specifically, Person A indicated that the Member had repeatedly made comments of a sexual nature to staff members, including Person A, and written comments and images of a sexual nature in places where staff members, including Person A, would see them. These comments were not about patients. According to Person A, the Member made at least one verbal comment of a sexual nature per week throughout her twelve years of employment.
10. Person A also advised the College that the Member had several outbursts in the office, when he was displeased.
11. Person A indicated that she had never seen the Member act inappropriately with a patient and has never received a complaint from a patient that the Member acted inappropriately.
12. Person A included with her written complaint:
 - photographs of health records containing notations of a sexual nature about patients written by the Member;
 - the names of other patients in relation to whom the Member had written similar comments in their health record; and
 - photographs of sexual comments and imagery the Member had written on a white board located in an area of the Beaverton Clinic accessed by staff but not visible to patients.

13. Person A also included with her complaint the names of various other employees who she claimed had observed and been subject to the Member's inappropriate behaviours, including Person B, who had worked for the Member as a receptionist at both Beaverton and Stouffville from May 2015 until December 2016, when she went off on a stress leave. At the time she went on stress leave, the College had begun investigating these matters. She was involved in the investigation.
14. Person A indicated in her complaint that the Member's inappropriate behaviours were mostly confined to Beaverton, with the exception of writing comments about patients in their health records, which she understood was taking place at both Clinics.

THE COLLEGE'S INVESTIGATION

15. As part of its investigation, the College appointed a firm of investigators to attend Beaverton to obtain the health care records for the patients identified by Person A. An investigator from that firm obtained those health care records (20 in total) in November 2016.
16. In early January 2017, the investigator interviewed Person A and Person B. During her interview, Person B confirmed many of Person A's allegations regarding the Member's behaviour and conduct at Beaverton.
17. Both Person A and Person B provided the investigator with names of additional patients in relation to whom the Member had written inappropriate comments or images in their health records.
18. The investigator, and another investigator from her firm, attended both Beaverton and Stouffville on January 23, 2017 to obtain the health records for the patients identified by Person A and Person B during their respective interviews (27 in total). The investigators also obtained additional patient health care records from each of the Beaverton and Stouffville Clinics, after looking for records for female patients in relation to whom the Member had provided care in recent years, which contained written comments and/or images. In total, 75 charts were seized on this date, 43 from Beaverton and 32 from Stouffville.
19. Approximately one third of the health records for these patients had white-out applied in them. In many instances, what was written under the white-out was still legible upon careful and close inspection of the pages.
20. During their interviews, Person A and Person B identified other staff members who had worked for the Member, who they believed had also been subject to the Member's behaviours and comments of a sexual nature, including Person C.
21. Person C was still employed by the Member at Stouffville at the time she was interviewed by the investigator on February 8, 2017. She remains employed at this time.
22. With respect to other individuals who had worked for the Member, the investigator also interviewed Person D, Person E, and Person F, all of whom worked at Beaverton and all of whom are women.
23. Person A, Person B, Person D, and Person F all advised the investigator that they had resigned their employment with the Member due to his inappropriate behaviour towards them personally and in the office generally. According to Person B and Person D, they resigned after they became sick, due to work stress. If the Member were to testify he would state that he was advised by Person D

that she resigned because she was unhappy she was not making as much money as Person C. He was aware that during the period of time she resigned she was, indeed, under significant stress, but was advised by her that it was due to personal issues.

24. During her January 2017 interview, Person A also advised the investigator that another healthcare professional, who had rented an office from the Member at the Beaverton Clinic ("Person G"), might also have information regarding the Member's inappropriate conduct.
25. When the investigator interviewed Person G, he confirmed that he had rented an office in the Member's Beaverton Clinic from approximately 2005 to 2010, which he attended approximately once per week. Person G advised the investigator that he had heard the Member make numerous comments of a sexual nature in the office, including comments about patients. Person G expressed the view that the Member was sexually abusive and disrespectful towards Person A. However, Person G indicated that the Member was always professional in front of patients. According to Person G, one of the reasons he stopped renting the office was because the Member made him feel uncomfortable. If the Member were to testify, he would state that he had been advised by Person G that he no longer required his office space because he was retiring. He would also testify that he was surprised Person G advised the College investigator that the Member made him feel uncomfortable, because the Member was not the only person involved in the banter.
26. The investigator also interviewed several patients, (not Person A, Person B or Person C), all of whom confirmed that:
 - a) the Member had never acted inappropriately towards them, including making remarks or engaging in behaviours of a sexual nature towards or in front of them;
 - b) they had never seen any images of a sexual nature during their appointments;
 - c) they had never seen the Member acting violently or angrily; and
 - d) the Member had always acted professionally towards them.

PERSON A, PERSON B, and PERSON C WERE PATIENTS

27. During their respective interviews, both Person A and Person B advised the investigator that they were patients prior to working for the Member. Both Person A and Person B also advised the investigator that they had continued to receive optometric care from the Member during the period of their employment and that he had written inappropriate comments in health records, including the health record of Person A.
28. The investigators obtained the health records for Person A and Person B on January 23, 2017, at which time, the patient health record for Person C, who had been employed by the Member at Stouffville in an administrative capacity since approximately 2002, was also obtained.
29. The records confirmed that the Member had provided optometric care to Person A, Person B, and Person C.
30. With respect to Person A, the Member provided her with optometric care approximately one to two times per year from 1999 to 2016.

31. With respect to Person B, the Member provided her with optometric care on at least five occasions between 2015 and 2016.
32. With respect to Person C, the Member provided her with frequent optometric care between 2006 and 2016.
33. The Member admits and agrees that he provided optometric care to Person A, Person B, and Person C, as described in paragraphs 29-32 and that all three were “patients” for the purpose of the definition of “sexual abuse” in the *Health Professions Procedural Code*.

THE MEMBER’S CONDUCT

a. Sexual Comments and Images in Patient Records

34. In total, the investigators obtained 95 patient charts from Beaverton and Stouffville. There were inappropriate comments written in more than half of the charts, the vast majority of which were sexual in nature and reflect the Member’s opinions regarding the breasts of his female patients. In some records, the Member had also drawn images. The non-sexual comments that the Member wrote about his patients in their health care records were completely unrelated to care and inappropriate.
35. Some of the comments the Member wrote in his patients’ health care records were as follows:
 - Boom Boom (3 charts)
 - Nice Altitudes
 - Slung, Boom!
 - Ba Boom, Big round juicys [sic]
 - Wife douchebag
 - Small discs but ☺
 - Massive guns
 - Displayed very well, Mom’s slung!
 - Frugal old fuck!, cheap, gruff/ stinky old fucker!
 - Wife is an asshole
 - Display ok
 - Slung, Pow Pow!
 - Nice big tits for a small old gal
 - Rockin’ Rack
 - Junkin’/ Trunkin’ + Jostlin’ + hoppin’
 - WA...Tata’s, OMG – Guns!, Well Displayed
 - Mom...So hot
 - Nice Display, super display today
 - Yummy!
 - B☹ Bad, Wicked B☹
 - 1x great price cos she has great tits! ☺
 - Nut job
 - Nipping out ☺
 - Massive tits

- MILF ☺
 - Crazy jugs, Super slung
 - Nice tits (examples of some of these comments are at Tab A)
36. The comment “MILF”, which stands for “Mother I’d Like to Fuck”, was written on Person A’s health care record.
 37. If the Member were to testify, the Member would say that, at the time he made this notation, which the Member knew Person A would see, Person A smiled at the Member, indicating her understanding that it was stated as a joke. The Member would testify that he placed this comment in Person A’s record to make her laugh.
 38. The Member also wrote “Jon (Big cock) Barnes” on his own health record.
 39. Person A, Person B, Person C, Person D, Person E, and Person F all confirmed that they had seen comments such as these, which the Member had written in patients’ health care records.
 40. Person C advised the investigator that the comments did not bother her. However, although the Member did not understand it at the time, the Member’s comments and drawings were offensive and upsetting to the other employees.
 41. The Member admits that he wrote comments and drew images of a sexual nature in patients’ health care records, including the comments and images described above and that he continued doing so after being asked to stop. He was aware his staff would see such comments.
 42. If the Member were to testify, he would state that at all times he wrote such comments as a joke. The Member would further testify that, although Person A would sometimes roll her eyes or make comments like “Stop it Mr.”, he believed by her tone, the way in which she would tease him back, and because of their casual and personal rapport, that Person A was “in on the joke” versus the “joke” being at her expense. Despite his perception of how the comments were received, the Member acknowledges the comments ought not to have been made.
 43. The Member further admits that he wrote inappropriate, non-sexual, comments, unrelated to care, in patient health care records.
 44. There is no evidence to suggest that any patients were aware of such comments. There is no indication whatsoever that patient care was in any way impacted.

b. Sexual Comments and Images on the Whiteboard

45. On several occasions the Member wrote comments of a sexual nature on a whiteboard located in the lab area of the Beaverton Clinic. The whiteboard was out of view of patients.
46. For example, on different occasions, the Member wrote various comments after the words “Smile, Live, Laugh”, which Person A had written on the whiteboard as an inspirational message. On one day the Member added the words “& sink the pink” after the phrase, which Person A understood as referring to intercourse. On another day, the Member added the words “& eat hair pie, which Person A understood to be a reference to cunnilingus. The Member also added the words “smoke a hog” on a different day, which Person A understood to be a reference to fellatio. Person A provided the investigator with photographs of the whiteboard with the Member’s written comments.

47. On another occasion, Person A wrote “not coming” on the day sheet beside the name of a patient who had cancelled her appointment for later that day. The Member wrote “me either” beside this notation. Person A provided the investigator with a photograph of the day sheet containing both notations.
48. On a further occasion, the Member drew a picture of a penis with a circle through the tip and wrote the words “the Prince Albert”, which refers to a male, genital piercing. Person A provided the investigator with a photograph of this image.
49. Person G confirmed that he had seen inappropriate comments and images of a sexual nature that the Member had written on the whiteboard.
50. The Member admits that he wrote and/or drew the comments and images described above, that the comments were sexual in nature, and that they were intentionally written in places where the Member expected that they would be seen by staff. If the Member were to testify, he would state that he made such comments in an attempt at humour and not in order to cause hurt or upset.

c. Other Sexual Comments and Behaviours

51. With respect to other inappropriate comments to staff, Person A recalled one occasion when two elderly male patients brought her a jar of jam close to Christmas time. Later that day, the Member stated to Person A “you know that [Patient A] and [Patient B] are going home to think of you and jerk off?”
52. On another occasion, the Member commented to Person A that he should have bet her a blow job in the context of predicting the outcome of a hockey game.
53. On further occasions, the Member made comments to both Person A and Person D about paying for breast enhancement surgery for them, noting that it was a good investment for him because he had to look at their breasts every day.
54. Both Person A and Person B confirmed that the Member had written a comment on a post-it note, which he gave to them after an individual who worked in a neighbouring office had come by to borrow some milk for her coffee. This individual was also a patient of the Member (“Patient C”). The comment the Member wrote on the note was “RE: [Patient C] No milk but I got a full load of cream if she wants it”. At no time was Patient C aware of the Member having made this comment. In addition to telling the investigator about this incident, Person A also provided the investigator with a photograph of the original note.
55. On another day, the Member placed two bananas side-by-side on a counter in the office where Person A would see them. Under the smaller banana, the Member wrote the name of Person A’s husband on a post-it note, under the larger banana, the Member wrote his name on a post-it. Person A understood this to be a reference to penis size. Person A provided the investigator with a photograph of this.
56. Person D, Person E, Person F and Person G all advised the investigator that the Member often told them details about his sex life, including about his attendances and activities at a “swingers” resort in Jamaica.

57. If the Member were to testify, he would state that such personal issues were often shared in the Member's office setting. However, the Member would further testify that he never discussed his sex life with Person E.
58. Person A and Person F both advised the investigator that, in addition to discussing his attendances at the resort in Jamaica, the Member had also shown them images from the website of the resort, including images of topless women. Person A and Person F also both told the investigator that they had observed the Member watching pornographic videos on his computer at work.
59. According to Person A, the Member also showed her a photograph of his girlfriend engaged in oral sex with another man.
60. According to Person F, the Member also placed sexual images into patient health care records where she would see them. Person F further advised the investigator that the Member did this as a joke, but she did not find it funny.
61. In their respective interviews with the investigator, Person A, Person D, and Person F stated that they had asked the Member to stop making sexual comments and/or to stop engaging in such sexual behaviours, however, the Member simply laughed in response. Person B advised the investigator that she did not speak to the Member about his comments because he was her boss and she did not have the nerve.
62. The Member admits that he made the comments and engaged in the behaviours described in paragraphs 51-61, above. The Member further acknowledges that his behaviours and comments of a sexual nature were about, towards, and/or intended to be heard and viewed by staff, including Person A, Person B, and Person C, with whom he had an ongoing optometrist/patient relationship.

e. Verbally and/or Emotionally Abusive Conduct Towards Staff

63. According to Person A, the Member often yelled at her and other staff and used profanities when things did not go as he wanted, including when patients cancelled appointments. She also noted one occasion, which Person B also described to the investigator, when the Member broke a chair in an angry outburst and provided the investigator with a photograph of the broken chair.
64. If the Member were to testify, the Member would acknowledge that he was upset patients had not come to their appointments that day, because his office staff had not confirmed the appointments as was office protocol. He would further acknowledge that he got upset on this occasion and kicked over a chair, causing it to break.
65. Person E confirmed that the Member often raised his voice to Person A and that Person E felt the Member belittled Person A.
66. Person D and Person F confirmed that the Member often yelled and used profanities at the office, albeit not in front of patients, particularly when he was frustrated that things had not gone the way he wanted them.
67. If the Member were to testify, the Member would state that he now recognizes that his expressions of frustration and verbal assertiveness are inappropriate in a professional environment.
68. The Member admits that he engaged in the conduct described in paragraphs 63-66.

f. White-out Applied Over Comments in Patient Records

69. Person C confirmed with the investigator that she observed the Member applying white-out over inappropriate comments he had written about patients in their health records at Stouffville. The Member did this shortly after the investigator had first attended Beaverton to obtain patient records from that office at the same time he was advised that the College was conducting an investigation into the matters raised in the complaint filed by Person A.
70. The Member admits that he applied white-out over sexual and other inappropriate comments and images he had written in patient health care records after being advised that the College was investigating him for such conduct. He also states that he placed white-out on various records prior to the commencement of the investigation.
71. Of the 20 health care records obtained by the College on November 2016, 5 had white-out already applied when the investigator seized them and advised the Member of the complaint. Of the 76 records obtained by the investigators in January 2017, 28 had white-out applied to them.
72. If the Member were to testify, the Member would say that his intention in applying white-out to some health care records prior to the investigation commencing was in order to remedy the conduct, having regretted making such comments in the charts. While he did so on some charts when he came across the comments, he did not do so on all of the charts.
73. If the Member were to testify, he would also state that his intention in applying white-out to certain records after the investigation commenced was not to “cover-up” his misconduct, destroy evidence or to otherwise interfere with the College’s investigation. Indeed, the Member would state that he was aware the information he was covering could still be read if a reader wished to do so. Instead, the Member would testify that, immediately after receiving the complaint, he reflected on his conduct and sought to take steps to improve the office culture for his staff and for future staff by covering the inappropriate comments with white-out. Nothing that he covered contained information of a clinical nature.

g. Sharing Person A’s Personal Health Information

74. On or about August 31, 2016, a filing cabinet at Beaverton fell, injuring Person A, while she was working. According to Person A, she attended her doctor following this incident due to experiencing significant pain. Ultimately, Person A filed a claim with the Workplace Safety and Insurance Board (“WSIB Claim”). The Member was provided with personal health information about Person A in relation to her WSIB claim and shared some of that health information with Person B and Person C.

THE COLLEGE’S STANDARDS & THE LEGISLATION

75. The College has published expectations regarding the relationship between optometrists and staff. Specifically, the document *Prevention of Sexual Abuse in Optometric Practice* (“the Sexual Abuse Prevention Standard”), which has been in place since 2005, speaks to the issue of sexual harassment in the workplace. Specifically, the Sexual Abuse Prevention Standard provides the following caution to optometrists:

While not dealt with in the RHPA, any form of harassment of office staff, including professional associates, may lead to allegations of professional misconduct.

76. Significantly, it goes on to note that:

A staff member who has received assessment or treatment services from an optometrist is considered to be a patient for the purpose of applying the sexual abuse provisions of the RHPA.

77. Sexual abuse is defined in section 1(3) of the *Health Professions Procedural Code* as follows:

Sexual abuse of a patient

(3) In this Code,

“sexual abuse” of a patient by a member means,

(a) sexual intercourse or other forms of physical sexual relations between the member and the patient,

(b) touching, of a sexual nature, of the patient by the member, or

(c) behaviour or remarks of a sexual nature by the member towards the patient.

78. Section 76(3) of the *Health Professions Procedural Code* provides as follows:

Obstruction prohibited

76(3) No person shall obstruct an investigator or withhold or conceal from him or her or destroy anything that is relevant to the investigation.

THE MEMBER’S APOLOGIES TO PERSON B & PERSON C

79. During her January 2017 interview, Person B advised the investigator that the Member had been extremely upset after the investigator attended Beaverton on November 16, 2016 to advise the Member of the complaint and to obtain the first batch of patient health care records. According to Person B the Member had tears in his eyes and apologized to her for having written the comments.

80. Person B also advised the investigator that she had received a text message from Person C on November 18, 2016, in which Person C advised her that “This has really shaken him up. We had a long talk last night. I had a massage & hair appt. so went back to the office to get my pay. He was still there at 8:00!! He did not look good. He was going through all the charts & whiting out...said to me he realizes now it wasn’t fair to have written what he did for us girls to see!...”

THE MEMBER’S RESPONSE TO THE COMPLAINT

81. The Member was provided an opportunity to respond to the complaint and did so, through his legal counsel, on January 23, 2017. In his response, the Member acknowledged most of the conduct attributed to him by Person A in her complaint.

82. The Member apologized and expressed remorse for his conduct and behaviour. Specifically the Member:

- stated that “it was never his intention to offend, hurt or embarrass [Person A] or any other members of his staff”;

- acknowledged “that his expressions of frustration and verbal assertiveness, which included the use of profanity, is inappropriate in a professional environment”; and
 - acknowledged that the comments he wrote in patients records were “inexcusable”, but “written with the intention of being humorous to both himself and his staff” while further acknowledging that “such comments have no place in a clinical chart”, noting that he “is embarrassed by this behaviour”.
83. In his response, the Member provided context as to the culture in his office that he helped create. If the Member were to testify, he would say that his patients are treated with the highest degree of professionalism and competence, but the culture among his office staff has always been informal, friendly and infused with humour. Jokes were frequently made between him and his staff members, including jokes of a sexual nature. He explained that these jokes, including jokes of a sexual nature were always intended to be humorous for all parties and were not intended to cause upset. He further acknowledges that at the time he made these jokes, he did not appreciate that they were badly received and/or hurtful.
84. The Member also described various remedial activities he had undertaken at his own initiative to address the conduct at issue, including:
- beginning (and subsequently completing) one-on-one counselling sessions on professional boundaries and sexual harassment in the workplace with an expert in communication, boundaries and anger management. This expert, who predominantly works with regulated health professions was aware of this College proceeding. She expressed her opinion that the Member possessed insight into his actions and was at low risk for reoffending (Tab B);
 - enrolling in (and subsequently completing) an on-line module course provided by the University of Fredericton entitled “Preventing Sexual Harassment at Work” (Tab C);
 - enrolling in ProBE, which is a three day small group ethics and boundaries course specifically designed for healthcare professionals (Tab D);
 - completed two educational courses offered by the College; (1) Professional Boundaries and Professionalism; and (2) Professional Ethics; and
 - reviewing the College’s guidelines on record keeping.
85. The Member did not attend the ProBe course at the College’s request in the context of the settlement discussions that led to the resolution of this matter.
86. The Member also arranged, at his own initiative and cost, to be assessed by a psychiatrist, who is also a forensic psychiatrist. The psychiatrist was aware of this College proceeding and was provided with a copy of the letter of complaint and all of its attachments as well as samples of the sexual comments written by the Member in health care records. After undertaking a complete psychiatric assessment, the psychiatrist’s evaluation did not reveal the presence of a major psychiatric disorder or evidence of a clinical sexual disorder (paraphilia). Furthermore, his evaluation did not reveal evidence to support the presence of clinically significant psychopathic or antisocial personality traits or disorder. Indeed, with specific regard to the latter, the psychiatrist saw no evidence to suggest a high probability of future violence nor did he interpret the Member’s

past behavioural patterns of being predatory in nature. Indeed, he concludes that he saw no evidence of a psychiatric syndrome being related to the allegations brought against the Member.

COMMENTS ATTRIBUTED TO THE MEMBER IN THE PRESS

87. On February 1, 2018, an article regarding the allegations against the Member was published online by YorkRegion.com, an online news publication of Metroland Media (Tab E).
88. In the article, the Member is quoted as saying, in relation to the allegations, “A lot of it is not really the truth...It revolves around two very disgruntled ex-employees and that’s where the gist of all this is about...The unfortunate thing is I’m answering to every little thing that has been said, whereas the two complainant ex-employees don’t have to answer to anything because there’s no college of crappy employees that I can go to. It’s sort of an embarrassing time in life because there has been no patients in 30 years of practising ever complain about me.”
89. If the Member were to testify the Member would say that, in stating that “a lot of it is not really true”, he was referring to certain allegations in the Notice of Hearing, which suggest that he was violent. He would further testify that he also told the reporter that he admitted to many of the allegations. The Member would state that the entirety of the conversation with the reporter was not reported. The Member would also say that his statement that not all allegations were true was in reference to additional and very serious allegations that were made by the complaint that were not substantiated by the College.
90. If the Member were to testify he would also state that he was intending to convey to the reporter that he had concerns with respect to the performance of two of his former employees. The Member does not believe that any concerns he had in respect of his previous employees in any way justifies his conduct.
91. The investigator contacted the publisher of the newspaper in an attempt to confirm whether the author of the article had made any audio or written recordings of the discussion that led to the comments attributed to the Member. However, a representative of the publisher advised the investigator that the author of the article was not willing to speak to her.

THE MEMBER’S ADMISSIONS & ACKNOWLEDGEMENTS

92. The Member admits that he engaged in the conduct attributed to him above.
93. The Member agrees and acknowledges that his conduct constitutes the types of misconduct alleged in the Notice of Hearing, all of which constitutes professional misconduct as defined in subsection 51(1) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35.
94. The Member admits that he sexually abused Person A, Person B, and Person C, who were also his patients, as alleged in paragraph 1 of the Notice of Hearing, when he made comments and engaged in behaviours of a sexual nature towards them, including when he:
 - a) wrote comments of a sexual nature in various places in the workplace where they would see them;
 - b) made verbal, sexual comments to them, about them, and/or about others in their presence; and

- c) engaged in behaviours of a sexual nature towards them in the workplace.
95. The Member admits that he failed to meet the standards of practice of optometry, as alleged in paragraph 2 of the Notice of Hearing, when he:
- a) noted, in patient records, inappropriate commentary about patients and/or their relatives, including comments of a sexual nature, not relevant to care; and
 - b) engaged in unprofessional behaviours in the office, including engaging in the sexual harassment of staff.
96. The Member admits that he contravened subsection 76(3) of the *Health Professions Procedural Code*, as alleged in paragraph 3 of the Notice of Hearing, when he applied white-out to or otherwise redacted notations he had made in patient charts and, in so doing, concealed and/or destroyed information relevant to the College's investigation.
97. The Member admits that he engaged in conduct or performed an act that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable, unprofessional and unethical, as alleged in paragraph 4 of the Notice of Hearing, when he:
- a) noted, in patient records, inappropriate commentary about patients and/or their relatives, including comments of a sexual nature, not relevant to care;
 - b) wrote sexual comments in various places in the workplaces where staff could see them including on post-it notes and the white board;
 - c) made verbal, sexual comments to staff;
 - d) engaged in sexual behaviours towards staff, including when he showed them sexual images and/or videos;
 - e) acted in a physically aggressive manner in the office;
 - f) shared a staff member's private health information with other staff; and
 - g) acted in a verbally and/or emotionally abusive manner towards staff
98. If the Member were to testify, the Member would say that, through this process, he has come to recognize and understand that his conduct was deeply inappropriate. He is extremely remorseful for the behaviour and comments described above and any discomfort he caused Person A, Person B, Person C, Person D, Person E, Person F and Person G. The Member would also state that he regrets the negative perception he created of himself and the profession, in their minds and the minds of the public.
99. By this document, the Member confirms that:
- a) He understands fully the nature of the allegations against him;
 - b) He has no questions with respect to the allegations against him;

- c) He understands that by signing this document he is consenting to the evidence as set out in the Agreed Facts being presented to a panel of the Discipline Committee;
- d) He understands that by admitting to the allegations, he is waiving his right to require the College to prove the case against him in a contested hearing;
- e) He understands that depending on the Panel's decision, its decision and reasons and/or a summary of its reasons, including reference to his name, will be published in accordance with the governing legislation and the College's by-laws, including in the annual report and any other publication or website of the College;
- f) He understands that any agreement between him and the College with respect to the proposed Order does not bind the Panel; and
- g) He understands and acknowledges that he is executing this Agreement voluntarily, unequivocally, free of duress, free of inducement or bribe, and that he has obtained legal advice from Lisa Spiegel of Miller Thomson LLP.

Plea

Dr. Barnes accepted the facts and allegations included in the Agreed Statement of Facts.

Submissions of the Parties on Finding

College counsel submitted that the onus is always on the College, even in an uncontested hearing. The College must prove the allegations on a balance of probabilities and it has done so in this case through the Agreed Statement of Facts and attachments. The evidence in the Agreed Statement of Facts establishes that it is more likely than not that Dr. Barnes engaged in the conduct attributed to him and that the conduct amounts to the type of misconduct to which he has made admissions.

With regard to the sexual abuse allegation, Persons A, B and C were Dr. Barnes' employees but they were also his patients. The *Health Professions Procedural Code* defines sexual abuse as including behaviour or remarks of a sexual nature by the Member towards a patient. In the College's submission the behaviour was clearly sexual in nature, and Dr. Barnes also agrees that it was.

With regard to the allegation in paragraph 3 of the Notice of Hearing, the application of white-out on the patient charts constitutes an attempt to conceal or destroy information relevant to the College's investigation.

With regard to the standards of practice allegations, College counsel submitted that the Panel did not need evidence on that point given that the conduct is so obviously below the standards, and this is particularly the case where the Member admits the conduct.

In relation to the admission that the conduct is disgraceful, dishonourable or unprofessional, College counsel suggested that it is not whether the Panel members personally think the conduct meets the definition but whether a member of the profession would view the misconduct that way. In counsel's

submission, any right-thinking member of the profession would view the behaviour as disgraceful, dishonourable and unprofessional.

Counsel for Dr. Barnes asked the Panel to make the findings against Dr. Barnes that were included in the Agreed Statement of Facts and she reiterated that the conduct of a sexual nature only relates to behaviour or remarks of a sexual nature and that there were no allegations of touching or other sexual abuse. If Dr. Barnes had not treated his employees then the behaviour would have been addressed as merely disgraceful, dishonourable or unprofessional conduct and that it gets elevated to the level of sexual abuse only because the employees were also patients of his. In her view, the primary relationship was the employment relationship.

Finding on Misconduct

After considering the Agreed Statement of Facts and the submissions of College counsel and counsel for Dr. Barnes, the Panel found that the facts supported the following findings of professional misconduct against Dr. Barnes:

1. The Member committed an act or acts of professional misconduct as set out in Allegation #1 of the Notice of Hearing, as provided by subsection 51(1)(b.1) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35, as amended, in that, between approximately 2002 and 2016, he sexually abused Patient A, Patient B, and Patient C when he engaged in behaviour and made remarks of a sexual nature towards Patient A, Patient B, and Patient C, who were also his staff, including but not limited to when he:
 - a) wrote comments of a sexual nature in various places in the workplace where they would see them;
 - b) made verbal, sexual comments to them, about them, and/or about others in their presence; and
 - c) engaged in behaviours of a sexual nature towards them in the workplace;

2. The Member committed an act or acts of professional misconduct as set out in Allegation #2 of the Notice of Hearing, as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 1.14 of Ontario Regulation 119/94 in that, between approximately 2002 and 2016, he failed to maintain the standards of practice of the profession when he:
 - a) noted, in patient records, inappropriate commentary about patients and/or their relatives, including comments of a sexual nature, not relevant to care; and
 - b) engaged in unprofessional behaviours in the office, including engaging in the sexual harassment of staff;

3. The Member committed an act or acts of professional misconduct as set out in Allegation #3 of the Notice of Hearing, as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 1.36 of Ontario Regulation 119/94 in that, between approximately November 2016 and March 2017, he contravened, by act or omission, subsection 76(3) of the *Health Professions Procedural Code* when he applied white-out to or otherwise redacted notations he had made in patient charts and, in so doing, concealed and/or destroyed information relevant to the College's investigation;

4. The Member committed an act or acts of professional misconduct as set out in Allegation #4 of the Notice of Hearing, as provided by subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35, as amended, and defined in paragraph 1.39 of Ontario Regulation 119/94 in that, between approximately 2002 and 2016, he engaged in conduct or performed an act that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable, unprofessional and unethical, and in particular, he:
 - a) noted, in patient records, inappropriate commentary about patients and/or their relatives, including comments of a sexual nature, not relevant to care;
 - b) wrote sexual comments in various places in the workplaces where staff could see them including on post-it notes and the white board;
 - c) made verbal, sexual comments to staff;
 - d) engaged in sexual behaviours towards staff, including when he showed them sexual images and/or videos;
 - e) acted in a physically aggressive manner in the office;
 - f) shared a staff member's private health information with other staff; and
 - g) acted in a verbally and/or emotionally abusive manner towards staff.

Reasons for Finding of Misconduct

Dr. Barnes was present at the hearing and he agreed with the College that the conduct set out in the Agreed Statement of Facts, which he admitted engaging in, constitutes professional misconduct. After considering the Agreed Statement of Facts and the submissions of counsel, the Panel found that the College proved the allegations on a balance of probabilities.

The Panel reviewed the facts and accepted that Persons A, B and C were patients as well as employees of Dr. Barnes. As patients, they are entitled to the benefit of laws governing the relationship and behavioural expectations of health professionals while treating patients.

It was obvious to the Panel that the conduct described in the Agreed Statement of Facts constituted professional misconduct. The Panel unanimously determined that the comments and behaviour did occur as

supported by Dr. Barnes' admission to the truth of the facts cited in the Agreed Statement of Facts. Dr. Barnes acknowledged that the facts constitute professional misconduct as defined in subsection 51(1)(b.1) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35 as amended; and of subsection 51(1)(c) of the *Health Professions Procedural Code* of the *Optometry Act, 1991*, S.O. 1991, c. 35 as amended and as further defined in paragraphs 1.14, 1.36 and 1.39 of Ontario Regulation 119/94. Dr. Barnes acknowledged that his conduct would reasonably be regarded by members of the profession as disgraceful, dishonourable, unprofessional or unethical.

The Panel indicated that it was prepared to proceed to the penalty phase of the hearing.

Joint Submission on Order and Costs

College counsel provided to the Panel a Joint Submission on Order and Costs that was signed by Dr. Barnes and a College representative and it was marked as Exhibit A on March 22, 2018 (since it is not evidence, it was not made a numbered exhibit). As a result of the hearing continuing on April 19, 2018, a revised Joint Submission on Order and Costs that was signed by Dr. Barnes and a College representative was entered and marked as Exhibit B.

The revised Joint Submission proposed the following Order:

1. Requiring the Member to appear before the Panel to be reprimanded at the conclusion of the hearing on April 19, 2018.
2. Directing the Registrar to suspend the Member's certificate of registration for four (4) months, uninterrupted, commencing on May 24, 2018.
3. Directing the Registrar to impose the following terms, conditions and limitations on the Member's certificate of registration:
 - a) that the Member successfully complete, at his own expense, with an unconditional pass, and within two (2) years of the date that this Order becomes final, both the ProBe Program on professional/problem-based ethics and the ProBe Plus follow-up module; and
 - b) that the Member shall provide the College with a certified cheque in the amount of \$48,180, by April 19, 2018, representing security to guarantee the payment of any amounts the Member may be required to reimburse the College for funding under the program required by s. 85.7 of the *Health Professions Procedural Code*, in relation to Person A, Person B and/or Person C (\$16,060 each), as referred to in the Agreed Statement of Facts. Any funds that have not been used for the purposes of the program required by s. 85.7 of the *Health Professions Procedural Code*, shall be returned to the Member by the College, without interest, at the expiration of the 5-year time frame within which funding may be provided.
4. Directing the Member to partially reimburse the College for its costs in relation to this proceeding in the amount of \$30,000 to be paid by post-dated cheques provided to the College by April 19, 2018, according to the following schedule:
 - a) one cheque dated April 19, 2018 in the amount of 10,000;

- b) one cheque dated December 22, 2018; in the amount of \$10,000; and
- c) one cheque dated September 22, 2019 in the amount of \$10,000.

A revised Undertaking was attached as Appendix “A” to the revised Joint Submission on Order and Costs, which stated as follows:

I, DR. JON BARNES hereby undertake, acknowledge and agree as follows:

1. I shall, by April 27, 2018, submit to the Registrar of the College (“the Registrar”) for approval, the following letters of apology:
 - a. a letter of apology to each of Person A, Person B, and Person C, as referred to in the ASF (Letters A, B, and C, respectively); and
 - b. a letter of apology to the public, my patients, and the profession (Letter D).
2. In the event that the Registrar does not approve of any of Letters A, B, C, and/or D (collectively “the Letters”), I shall provide the Registrar with revised versions of that/those Letter(s) within one week of being advised of the Registrar’s decision, and shall continue to do so until the Registrar provides written approval for all of the Letters.
3. Within one week of receiving written approval from the Registrar of Letters A, B, and C, I shall send signed copies of Letters A, B, and C to the College, which the College shall then deliver to Person A, Person B, and Person C, respectively.
4. Within one week of receiving written approval from the Registrar of Letter D, I shall arrange for letter D to be published, at my cost, in any online and/or print news publications of the College’s choosing with circulation in the Beaverton and Stouffville areas. The size and placement of the letter shall be pre-approved of the Registrar.
5. The College may publish Letter D on its website.
6. I shall maintain an active certificate of registration throughout the duration of this Undertaking, which requires, among other things, that I:
 - a) pay my annual fees by the deadline established by the College;
 - b) maintain professional liability insurance as required by the College; and
 - c) ensure that my registration is not subject to any administrative suspension.
7. This Undertaking shall take effect immediately following the acceptance by the Discipline Panel of the JSOC;
8. I shall not appeal the Discipline Panel’s Order, if that Order reflects what the parties have jointly requested in the JSOC;
9. I fully understand the terms of this Undertaking;

10. I signed this Undertaking voluntarily and without compulsion or duress;
11. A copy of this Undertaking will be attached to the JSOC, which will be filed as an Exhibit at my discipline hearing;
12. The Discipline Panel may make reference to this Undertaking, in whole or in part, in their Decision and Reasons;
13. In addition to any publication of the results of my discipline proceeding that the College is legally required to make, a copy of this Undertaking shall be posted on the College's register.
14. I acknowledge that, if the College has reason to believe that I breached or failed to comply fully with any of the terms of this Undertaking, I may be subject to investigation and/or discipline proceedings by the College; and
15. I have received independent legal advice regarding this Undertaking from Lisa Spiegel of the law firm Miller Thomson LLP.

ProBe Ethics and Boundaries Program

College counsel presented information about the ProBe Ethics and Boundaries program and this was filed as Exhibit 3. ProBe Canada is a course designed to fulfill regulatory college requirements for remedial education. It particularly focuses on ethics violations and unprofessional conduct, including sexual misconduct and disruptive behaviour. ProBe Plus is an additional follow-up module that provides a year of one:one follow-up guidance with a mentor.

Recordkeeping Course

College counsel presented email correspondence between the Registrar and the Coordinator of Quality Programs confirming that Dr. Barnes attended Dr. David White's recordkeeping course on December 15, 2017 and this correspondence was filed as Exhibit 4.

Three victim impact statements were read. The statements of Person A and Person C were read by College counsel. The statement of Person B was read by Person B herself.

The victim impact statement of Person A provided insight into the impact of Dr. Barnes' professional misconduct on her mental and emotional wellbeing. Person A advised that she was permanently and negatively changed by the professional misconduct, which she feels has ruined her quality of life. Dr. Barnes' professional misconduct left Person A describing herself as feeling sad, weak, depressed, guilty and anxious. Person A advised that her self-image as a strong and confident woman was eroded by Dr. Barnes' misconduct, and she now feels self-doubt and low self-worth. She blames herself for failing to stop Dr. Barnes' conduct and for not reporting the conduct earlier. As a result of his behaviour, she no longer trusts doctors and fears coming into contact with Dr. Barnes, or with any of the patients whose records were defaced with inappropriate comments. She suffers constant headaches and feels disgusted and dirty.

The victim impact statement of Person B provided insight into the impact of Dr. Barnes' professional misconduct on her mental and emotional wellbeing. Her victim impact statement indicates that Person B feels concerned and anxious on behalf of patients, and fearful of what might be written in their records. She blames herself for starting to normalize Dr. Barnes' misconduct over a period of time. She expressed fear as Dr. Barnes' patient when he closed the office door to provide her with an eye examination. Her trust in doctors has been eroded. She expressed great anger that she felt compelled to leave her job because of a moral dilemma arising from Dr. Barnes' misconduct. Person B expressed a sense of betrayal, shame, guilt and remorse arising from Dr. Barnes' misconduct.

The victim impact statement of Person C provided insight into the impact of Dr. Barnes' professional misconduct on her mental and emotional wellbeing. Her victim impact statement indicates that she did not feel either victimized or threatened by Dr. Barnes' professional misconduct. Person C expressed that she understood his behaviour to be attempts at humour.

College counsel made submissions as to why the revised Joint Submission on Order and Costs was appropriate in the circumstances of this case and why it met the various principles of sanction, including the most important, which is public protection.

College counsel reviewed the principles of sanction that are to be addressed in any penalty order, including the protection of the public, specific deterrence, general deterrence and remediation. College counsel noted that while the sexual misconduct was the most serious of the four heads of misconduct, the findings against Dr. Barnes were confined to remarks and behaviour. There was no evidence of sexual touching or physical contact. The facts of the case are shocking, and the misconduct serious, but it is nevertheless less serious than a situation involving physical, sexual contact.

The Order requires Dr. Barnes to achieve an unconditional pass in the ProBe program and then participate in the follow-on ProBe Plus program. These addresses public protection and remediation of the Member. Dr. Barnes will pay for the cost of the courses out of his own pocket. The Order includes a requirement that Dr. Barnes pay \$30,000 in costs and provide \$48,000 funding for potential therapy for Persons A, B and C, with any remainder not returned for 5 years. The purpose of the discipline process and any resulting orders is not punitive, but to public protection. However, the financial impact of the Order upon Dr. Barnes and his practice can be expected to provide both specific and general deterrence.

Dr. Barnes has voluntarily agreed to enter into an undertaking to make a published, public apology that may be expected to impact his practice. This will also address public protection as well as both specific and general deterrence.

College counsel reviewed both mitigating and aggravating factors.

Mitigating factors include the fact that Dr. Barnes had no prior discipline history. He admitted to all the alleged conduct. The evidence at paragraphs 79, 80 and 82 of the Agreed Statement of Facts shows that Dr. Barnes admitted to his behaviour right from the beginning of the process when the investigator attended and made an apology to Person B even before the complaint had gone before the College's Inquiries, Complaints and Reports Committee. An admission is mitigating at law for the reasons expressed in *R. v. Anthony-Cook* and is considered an expression of remorse. It suggests that Dr. Barnes is remediable. Dr. Barnes' admission of professional misconduct also saves time and expense, as well as saving the witnesses from having to testify. This is significant, as it means that the witnesses did not have to be exposed to cross-examination in a matter of sexual misconduct. Dr. Barnes immediately, voluntarily and proactively

undertook a wide range of remedial actions before the College's formal complaint process was underway. He took a university course regarding preventing harassment. He took two courses offered by the College; one on professional boundaries and ethics, and one on record keeping. He enrolled in the ProBe professional boundaries course in January, 2018. He was specifically asked by the College not to take it until the conclusion of this discipline process, so that any order arising from this discipline process could better inform the ProBe discussions. Dr. Barnes engaged a top expert, Dr. Martin, who does extensive work with physicians who have demonstrated ethical boundary issues. Dr. Martin's report in Tab B of the Agreed Statement of Facts includes her conclusion that she is confident that "this will never happen again".

Dr. Barnes additionally and voluntarily sought assessment by a forensic psychiatrist. The psychiatrist was aware of these College proceedings. Paragraph 86 of the Agreed Statement of Facts indicates that the psychiatrist concluded that there was no evidence that Dr. Barnes has a major psychiatric disorder or a clinical sexual disorder. The psychiatrist found no evidence to suggest a high probability of future violence nor did he interpret Dr. Barnes' behaviour as predatory. College counsel further pointed out that Dr. Barnes voluntarily entered into an undertaking with the College to write letters of apology to his patients, the profession and the public to be published in the media.

Aggravating factors include the fact that Dr. Barnes' inappropriate behaviour was not isolated but repeated and continued over an extended period of time. If he did not know the behaviour was wrong, he ought to have known. Additionally, Dr. Barnes was in a position of power with respect to Persons A, B and C. Despite the power imbalance, he was asked to stop but chose to treat those requests as not serious and continued his inappropriate behaviour. Two of the victim impact statements describe serious and negative personal impact upon Persons A and B.

College counsel provided the Panel with a Brief of Authorities and reviewed the cases, pointing out similarities and differences. Counsel concluded that the Order recommended in this case was reasonable and consistent with prior decisions, and addresses goals of public protection, general and specific deterrence, and remediation of the Member's behaviour. When compared with prior decisions in similar fact situations from other regulated professions, the proposed Order takes into account the fact that public mores and opinions regarding the gravity of sexual misconduct in the workplace are changing.

Defence counsel submitted that the proposed penalty was sufficient and appropriate in the circumstances. She agreed with College counsel that an admission is a mitigating factor at law. Dr. Barnes' admission substantially reduced the time and expense required for the discipline hearing, and relieved the witnesses of cross-examination. She emphasized that Dr. Barnes' expression of remorse and apology were made immediately upon receiving the complaint, and not as a result of the discipline hearing.

Dr. Barnes voluntarily sought out extensive remedial intervention from a range of courses and professionals. Dr. Barnes acknowledges that his behaviour was inappropriate, and now accepts that it is his responsibility to remember the power differential between himself as a doctor / employer and his patients and employees. Defence counsel stressed that there is no evidence that Dr. Barnes behaved improperly with his patients who were not employees. There is no evidence that patients saw the inappropriate notations in their files, the inappropriate comments on the office white board, or that Dr. Barnes' behaviour had any negative impact on patient care. The psychiatric evaluation showed no evidence of a criminal sexual disorder or any psychiatric syndrome related to behaviour. This did not excuse Dr. Barnes' inappropriate conduct but suggests that it is unlikely to be repeated.

Defence counsel submitted that through his voluntary remediation, Dr. Barnes has gained insight. Until he received the complaint he did not understand the impact his behaviour had on others, and that once he did he apologized and acknowledged his actions. Defence counsel submitted that Dr. Barnes' ability to develop insight is key to having confidence in his ability to better manage his conduct.

Defence counsel submitted that Dr. Barnes' application of white-out to cover inappropriate content in patient records was really an attempt to right a wrong by making sure his staff didn't come across such content, rather than an attempt to mislead the College's investigator.

The Panel understood that it should not vary or reject the revised Joint Submission on Order and Costs unless the proposed penalty is so far outside the range of appropriate penalties that it would be contrary to the public interest and would bring the administration of the discipline process into disrepute.

Decision on Order and Costs

College counsel presented a table of partial costs incurred for the hearing up to and including March 22, 2018, with the total of partial costs being \$63,355, and this table was filed as Exhibit 5.

After deliberating and considering the submissions of counsel, the Panel determined the penalty was fair and reasonable, being neither too lenient nor too onerous and made the Order on penalty and costs as jointly submitted by counsel for the parties.

Reasons for Order

The Panel believed that the revised Joint Submission on Order and Costs addresses public protection, confidence in regulation of the profession and remediation with the requirement that Dr. Barnes successfully complete with an unconditional pass both the ProBe Program on professional/problem-based ethics and the ProBe Plus follow-up module. These remedial activities also address specific deterrence. The four month suspension of Dr. Barnes' certificate of registration addresses both specific and general deterrence. Subsection B.3.b of the Order, which requires Dr. Barnes to post a certified cheque is intended to support access to appropriate mental health support by Person A, B or C under s. 85.7 of the *Health Professions Procedural Code* and is not intended to be punitive. Similarly, the requirement that Dr. Barnes partially reimburse the College for its costs of this discipline process is not intended to be punitive, but to ensure that the profession at large does not have to bear all the costs of the discipline process arising from his misconduct. However, the Panel recognizes that the significance of the aggregate sums that Dr. Barnes will be required to pay may be viewed as both a general and specific deterrent to any future misconduct of a similar nature.

Upon reviewing the revised Joint Submission on Order and Costs against examples of orders included in past cases, the Panel concluded that the revised Joint Submission on Order and Costs was within the range of what had been ordered in past cases dealing with similar seriousness of conduct, taking into account both the aggravating and mitigating factors.

The Panel considered the mitigating factors. The Panel took note of the fact that Dr. Barnes' professional misconduct did not cross the line into actual sexual touching or physical sexual acts. Further, the Panel noted that there was no evidence that Dr. Barnes behaved inappropriately towards patients other than those

patients who were also his employees. Dr. Barnes expressed immediate remorse when confronted by the investigator, had no prior discipline history and made a full admission to all alleged conduct early in the process. This saved time and resources in the discipline process, and saved Persons A, B, and C from the disruption and stress of serving as witnesses at a contested hearing where they would be subject to cross-examination. The Panel viewed Dr. Barnes' early and voluntary participation in remedial assessment and training as a mitigating factor. In particular, the Panel referred to the following passage found in the expert report of Dawn Martin at Tab B of Exhibit #2:

“ . . . he [Dr. Barnes] was embarrassed, ashamed and took ownership for his poor judgment. As well, from the beginning he accepted responsibility and did not try to make any excuses for his behaviors or choices. In my experience, these are the signs of someone who is at low risk for recidivism.”

Additional mitigating factors include the fact that Dr. Barnes made prior apologies to Person B and has voluntarily entered an undertaking to make both private and public, published apologies for his behaviour which are likely to negatively impact his practice and reputation.

The Panel also considered the aggravating factors including the long term, repeated nature of his behaviour. The behaviour continued despite requests from his patients, who were also employees, to stop. The Panel had noted as a mitigating factor that there was no evidence to suggest that Dr. Barnes was unable to appropriately regulate his behaviour when treating patients. However, the Panel noted that Dr. Barnes did not appropriately regulate his behaviour around his employees with whom he had a doctor/patient relationship. The Panel noted that this was an aggravating factor, as it suggests that Dr. Barnes did indeed understand at some level that his behaviour was inappropriate. He felt enabled to disregard this awareness due to the power imbalance that exists between both an optometrist and patient as well as between an employer and an employee. By characterizing his behaviour as a joke in the face of requests to stop, he sought to legitimize his behaviour at the expense of others and showed inappropriate appreciation of his impact on others. The Panel noted that he did apologize at an early stage in the process when confronted with a formal complaint, but he did not apologize when he was asked to stop by his patients who were also employees. It took a formal complaint and investigation to bring him to acknowledge that his behaviour was inappropriate.

The Panel considered the inappropriate remarks inserted into patient records as an aggravating factor. This behaviour indicated to the Panel that Dr. Barnes did not take seriously the professional requirements regarding record keeping. He did not consider the potential impact of his actions upon patients should the records containing inappropriate contents ever have been accessed by the patients themselves or other professionals who might need to access the records to provide services.

The Panel took into account the serious, negative consequences of Dr. Barnes' behaviour on the mental and emotional state of Persons A and B as expressed in their victim impact statements. The Panel took into account the published article containing negative comments about Persons A and B attributed to Dr. Barnes at paragraphs 87 – 88 of the Agreed Statement of Facts. While the statements in paragraphs 89 – 90 suggest that the reporter quoted him out of context, the Panel viewed Dr. Barnes' threshold decision to participate in the interview and make comments about patients who were also employees as an example of poor decision making and lack of judgment that amount to an aggravating factor.

The Panel also considered the victim impact statement of Person C, which indicates that there were multiple ways to interpret the effect of Dr. Barnes' behaviour on others.

The Panel concluded that, taking into account the overall goal of public safety, the seriousness of the

conduct in this situation and the aggravating and mitigating factors, the proposed Order was fair and reasonable and would not bring the administration of justice into disrepute.

The Panel felt that it was appropriate to order Dr. Barnes to pay \$30,000 towards the costs of the investigation, prosecution and hearing in this matter as partial reimbursement of the College's expenses in relation to the discipline process, so that the profession at large is not required to bear the full disciplinary burden arising from his professional misconduct.

At the conclusion of the hearing and after confirming that Dr. Barnes had waived his right to appeal and the Panel administered the reprimand to Dr. Barnes, a copy of which is attached to this decision.

Dated this 22 day of May, 2018, at Toronto, Ontario.

(Signed)

Ms. Ellen Pekilis, Chair

TEXT OF PUBLIC REPRIMAND**College of Optometrists of Ontario and Dr. Jon Barnes****April 19, 2018**

You have been found guilty of four allegations of professional misconduct.

The Panel views your conduct as disgraceful, dishonourable, unprofessional and unethical.

As part of its penalty order, this Discipline Panel has ordered that you receive a reprimand. This reprimand will be part of the public portion of the register, and, as such, part of your record with the College.

Your behaviour to patients who were also staff members was disrespectful and unprofessional. You failed to appreciate the power imbalance that existed as both an optometrist and an employer. You did so repeatedly, over a long period of time, and disregarded boundaries when your employees, who were also patients, repeatedly expressed their discomfort.

You have shown disrespect to patients by making highly inappropriate and offensive comments about them and including them in their patient records. Patient records are sacrosanct. There are numerous situations where patient records are routinely viewed by the patient themselves or by third parties, including other health practitioners or in the course of insurance litigation. We are concerned about the potential impact on those patients. Moving forward, we expect that you will limit all comments on patient records to those which are professional and appropriate to the clinical care being provided.

We were dismayed by the comments attributed to you by the media about your employees, who were also your patients. We remind you that professionals have a high duty of patient confidentiality to maintain. You need to bear this in mind when engaging with the media.

The victim impact statements demonstrate that you have brought the profession of optometry into disrepute and eroded public trust in all health professionals.

We expect you to comply with the full order, including the voluntary undertaking that you have entered into with the College. We expect as a result of this hearing and its outcomes that your professional interactions and understanding of boundaries will be reformed.