

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

Panel: Mr. John Van Bastelaar, Chair
Dr. Mark Eltis
Dr. Vivian Habib
Dr. Patricia Hrynchak (by videoconference)
Mr. Hsien Ping (Albert) Liang

B E T W E E N:

The College of Optometrists of Ontario)	Ms. Julia Martin
)	Counsel for the College
)	of Optometrists of Ontario
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- and -)	
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Dr. Gregory Miller)	Self-represented
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)	Ms. Julie Maciura
)	Independent Legal Counsel
)	
)	Heard on March 4, 2019

DECISION AND REASONS FOR PENALTY

This matter came before a Panel of the Discipline Committee of the College of Optometrists of Ontario (the “College”) on March 4, 2019, at Victory Verbatim, 222 Bay Street, Suite 900, Toronto, Ontario.

The five members of the Discipline Panel referred to above were in attendance (Dr. Hrynchak attended via videoconference on consent of the parties), as well as Dr. Gregory

Miller; Ms. Julia Martin, counsel for the College, accompanied by Dr. Paula Garshowitz, Registrar; and Ms. Julie Maciura, independent legal counsel to the Discipline Panel. The purpose of the hearing was to consider what penalty would be most appropriate in relation to findings of professional misconduct made by the Panel against Dr. Gregory Miller (the “Member”) in a decision dated January 11, 2019

The hearing was called to order at approximately 9:40 a.m. on March 4, 2019. The Chair introduced the Panel and the other people present in the room.

Evidence and Submissions of College on Penalty

College Counsel began by taking the Panel to its decision on finding made on January 11, 2019 in which the Panel found that the actions of Dr. Miller constitute professional misconduct pursuant to clause 51(1)(b.1) of the *Health Professions Procedural Code* (the “Code”), being Schedule 2 to the *Regulated Health Professions Act, 1991*. The Panel found that Dr. Miller took patient A’s hand and put it on his genital area twice. The Panel found that this was touching and behaviour of a sexual nature and that it constituted sexual abuse of a patient as defined in section 1 of the Code.

College Counsel advised that the College was seeking revocation of Dr. Miller’s certificate, as well as a reprimand, funding for therapy and counselling for Patient A, and an order to post security for that funding, as well as costs.

Pursuant to subsection 51(6) of the Code, the Panel considered the victim impact statement of Patient A which was delivered orally by College counsel. Patient A described feeling humiliated that Dr. Miller used her body for his purposes without her permission. She felt that being a newcomer to Canada and a sick woman with limited experience in English, Dr. Miller felt he could take advantage of her. She said that she suffered from depression and what Dr. Miller did to her has added to her depression.

Patient A states that she is now scared of being trapped in small places because of what Dr. Miller did to her. She described an incident in which she panicked while being in a locked car waiting for her son. She started banging on the windows and started screaming for her son.

To this day Patient A cannot forget the shock of what Dr. Miller did and says that she has trouble trusting people now, especially male doctors. When she goes to see her blood specialist she hesitates when he asks her to move closer.

Patient A also described how keeping the incident a secret from her family has affected her nerves. She believes that the negative impact that telling them would have on her family’s feelings is not something she can handle. Patient A said that she does not think she has yet dealt with what Dr. Miller did to her and she is not sure she ever will.

College Counsel tendered as evidence two previous discipline decisions relating to Dr. Miller. The first was a 1979 decision and it was entered as Exhibit 9. The second decision was a 2003 decision and it was entered as Exhibit 10.

College Counsel reviewed the principles of sanction and reminded the Panel that the purpose of penalty has several aspects. The penalty that is ordered should protect the public and it should also serve as a general deterrence. The penalty should serve as a specific deterrence to Dr. Miller and if possible, it should also rehabilitate Dr. Miller. College Counsel also reminded the Panel that it should also consider the relevant mitigating factors in the case, including the fact that Dr. Miller cooperated with the prosecution and the investigation. While Dr. Miller has two previous discipline findings, neither of them related to sexual abuse. As well, the conduct in this case involved one patient rather than multiple patients.

However, College Counsel suggested that the aggravating factors in the case outweighed the mitigating factors. Sexual abuse is the most serious type of conduct that a health professional can commit, representing a complete breach between a patient and optometrist. Dr. Miller was in position of authority over Patient A. In the College's submissions, Dr. Miller's conduct is repugnant to both the public and the profession. He used his power and authority over Patient A for his own purposes.

College Counsel also suggested that the impact on Patient A is significant and that should be considered by the Panel. Patient A says she doesn't know if she will ever get over what Dr. Miller did to her. She says she has increased depression and she does not trust male health care professionals. She is afraid of being trapped in small spaces.

With respect to Dr. Miller's two prior discipline decisions, College Counsel submitted that the 1979 decision is not particularly helpful to the Panel as it involved only one standard of practice finding from many years ago. She asked the Panel to not put much weight on that decision.

In the College's submission, the second decision, from 2003, is more of an aggravating factor than the first decision as it demonstrates a lack of respect by Dr. Miller for his regulatory obligations. In the 2003 case Dr. Miller entered in an undertaking with the College pursuant to which he agreed to seek out a recommended coach and submit five randomly selected records (and other records) for review and comment by the coach. He did not comply with that undertaking. The College submitted that the 2003 decision shows that Dr. Miller was given ample opportunity to have the coach's reports sent to the College but that it was not until the matter was referred to the Discipline Committee that Dr. Miller acted. He clearly understood what he needed to do and he had agreed to those obligations and yet he did not abide by them. The Panel in that case was quite concerned about the lack of respect shown by Dr. Miller for the profession and its self-governing policies by ignoring his obligations. College Counsel suggested that agreements with

members are essential to the operation of the College and Dr. Miller's failure to live up to his commitments is a serious breach.

While that case does not involve sexual abuse, in the College's submission it shows a lack of governability, as Dr. Miller did not respect the rules of the profession.

College Counsel then took the Panel to the statutory provisions in the Code relating to penalty. She clarified that this was not a case involving one of the more "frank" acts of sexual abuse in clause 51(5)3 of the Code which requires revocation. In her submission, this was a case where the Panel was required to order at least a reprimand and a period of suspension (pursuant to 51(5)1 and 2 of the Code) but that the Panel was not required to revoke Dr. Miller's certificate of registration. While clauses 51(5)1 and 2 (the requirements obliging a Panel to order a reprimand and at least a suspension) of the Code came into force after the time period in which the sexual abuse in this case occurred, in Counsel's submission the law should be applied retrospectively because the primary purpose of the provision was public protection.

While the Panel was not required to order revocation of Dr. Miller's certificate, it was College Counsel's submission that in the circumstances of this case it should order revocation (rather than a period of suspension).

College Counsel advised that the College would also be seeking funding for therapy and counselling (i.e., the program required under section 85.7 of the Code), as well as an order requiring Dr. Miller to post security to guarantee the payment of any amounts Dr. Miller may be required to reimburse the College for funding provided pursuant to that program. College Counsel advised the Panel that these particular provisions relating to funding (clauses 51(2)5.1 and 5.2 of the Code) were in force at the time of the conduct in this case and so there was no need to apply those provisions retrospectively.

With regard to the requirement to post security for funding, College Counsel asked for an order "requiring Dr. Miller to provide the College with a certified cheque in the amount of \$16,060 by April 4, 2019, representing security to guarantee the payment of any amounts he may be required to reimburse the College for funding under the program required under section 85.7 of the *Health Professions Procedural Code* in relation to Patient A. Any funds that have not been used for the purposes of the program required by section 85.7 of the *Health Professions Procedural Code*, shall be returned to Dr. Miller by the College, without interest, at the expiration of the 5-year time frame within which funding may be provided".

College counsel informed the Panel that the amount of \$16,060 is arrived at by applying the formula set out in Regulation 59/94 under the *Regulated Health Professions Act, 1991*, which provides that a person eligible for funding under the program required by section 85.7 of the Code is the same amount that the Ontario Health Insurance Plan

would pay for 200 half-hour sessions of individual out-patient psychotherapy with a psychiatrist. She confirmed that Patient A could seek treatment from someone other than a psychiatrist and that the reference to the amounts paid to psychiatrists under the Ontario Health Insurance Plan is merely a formula for determining the amount of funding to which a patient is entitled. The criteria applicable to the persons who may provide therapy and counselling is set out in subsection 85.7(7) of the Code.

A table of partial costs expended by the College was entered into evidence and marked as Exhibit 11. That table illustrates that the College had spent more than \$78,259 on the investigation and prosecution of this matter. That figure excluded the costs related to the penalty hearing on March 4, 2019 and certain costs related to the investigation.

Pursuant to the authority in section 53.1 of the Code, the College was seeking costs in the amount of \$37,000, payable within 30 days. This figure represented a little under half of the partial costs outlined in Exhibit 11.

College Counsel then took the panel through 10 different cases in support of its position on penalty. These cases were from the College of Optometrists as well as other regulatory colleges and dealt with sexual abuse and were provided to demonstrate the range of penalties that have been ordered in the past.

In Counsel's submission, the most helpful case on the facts was *CPSO v Lee* (2017 ONCPSD 46) at Tab 6. In that case the physician made sexual comments to more than one client and rubbed his groin against a client's hip while administering a trigger point injection. Revocation, a reprimand, reimbursement of and a requirement to post security for funding for therapy and counselling, and costs of \$20,500 were ordered in that case.

She explained why many of the other the cases in the College's Penalty Brief were quite different on their facts from Dr. Miller's situation, for example, where they involved more than one patient, involved different kinds of touching, also involved remarks of a sexual nature or where the registrant had a prior history of sexual abuse.

With respect to the issue of rehabilitation and why in the College's view it was not a relevant principle in this case, College counsel took the panel to the *CPSO v. Mitchell* decision at Tab 8 and in particular at paragraph 19. The Panel in that case stated that Dr. Mitchell's total and utter disregard for the College's role to protect the public makes it clear that this is not a case where rehabilitation is possible. College Counsel suggested that Dr. Miller similarly had disregard for the College's role in protecting the public.

Submissions of Member on Penalty

Dr. Miller did not tender any evidence on the issue of penalty but did make submissions on his own behalf.

Dr. Miller agreed that he had two prior discipline findings against him but noted that neither of them involved any hint of verbal or sexual abuse. Dr. Miller also stated that he had been a member of the College for almost 50 years.

Dr. Miller reviewed all of the cases in the College's Brief of Authorities on Penalty and distinguished those cases, explaining to the Panel why he felt they were not applicable to his case, including the fact that many of the cases dealt with conduct against more than one client, or included verbal abuse as well as sexual abuse, involved conduct that occurred over a long period of time, or where the practitioner had a prior history of sexual abuse.

With respect to the College's request for an order requiring him to reimburse the College and post funding for security for funding for therapy and counselling for Patient A, Dr. Miller pointed out that Patient A reported a past history of depression and there may be other extenuating circumstances that would figure into the cost of treatment for her. While his submissions on this point were not entirely clear, the Panel interpreted Dr. Miller as saying that he should not be responsible for the total possible funding (\$16,060) that Patient A might access because she has a prior history of depression unrelated to the events in this case.

Dr. Miller submitted that in all the circumstances he does not pose a danger to the public and so revocation is not warranted.

Dr. Miller suggested that if the Panel determined that a suspension was appropriate, then a suspension in the range of one month was warranted.

With respect to the issue of costs, Dr. Miller felt that the College was being generous to only seek half of the (partial) costs expended so far, and as such he really was not objecting to the amount it was seeking.

Reply Submissions of the College

In very brief reply submissions, College Counsel suggested that based on the facts of the case and the caselaw she had presented to the Panel, a suspension of one month would be severely inadequate. College Counsel submitted that if the Panel did not agree with the College that revocation was warranted, then a very long suspension should be ordered.

Decision on Penalty and Costs

After considering its findings, the evidence before it, and the submissions of the parties, the Panel made the following ordered as to Penalty and Costs:

1. The Registrar is directed to revoke Dr. Miller's certificate of registration;
2. Dr. Miller is required to appear before the panel to be reprimanded;
3. Dr. Miller is required to reimburse the College for funding provided for Patient A under the program required under section 85.7 of the *Health Professions Procedural Code*;
4. Dr. Miller shall provide the College with a certified cheque in the amount of \$16,060 by April 4, 2019, representing security to guarantee the payment of any amounts he may be required to reimburse the College for funding under the program required under section 85.7 of the Health Professions Procedural Code in relation to Patient A. Any funds that have not been used for the purposes of the program required by section 85.7 of the *Health Professions Procedural Code*, shall be returned to Dr. Miller by the College, without interest, at the expiration of the 5-year time frame within which funding may be provided; and
5. Dr. Miller shall partially reimburse the College for its costs in relation to this proceeding in the amount of \$37,000 to be paid in full by April 4, 2019.

Reason for Decision on Penalty

The Panel carefully considered the findings it had made, as well as the evidence presented and the submissions made by the parties.

The Panel considered whether a suspension, as compared to revocation, would be an appropriate penalty and it determined that even a lengthy suspension would not be appropriate. Certainly a suspension of one month as suggested by Dr. Miller would be grossly inadequate for the conduct in which the Panel found Dr. Miller to have engaged.

Dr. Miller did not admit that he touched Patient A. However, after hearing from both Dr. Miller and from Patient A, the Panel found that that he engaged in the conduct as alleged. It is very difficult to remediate a registrant by imposing a suspension and requiring remedial work, such as therapy, or an ethics or boundaries course, if the registrant does not accept responsibility for their actions. However, the Panel understands that failure to

demonstrate remorse is not an aggravating factor. Instead it is merely the absence of a mitigating factor. The Panel's decision to revoke was not influenced by Dr. Miller's decision to contest the allegations against him. The Panel's penalty decision was based on the conduct that it found Dr. Miller to have committed.

The College has a zero tolerance policy for sexual abuse. This policy is also articulated in section 1.1 of the Code itself.

Sexual abuse of a patient and in particular, the unwanted physical touching of a sexual nature, is one of the most severe violations of the patient-practitioner relationship. It is a complete breach of moral and ethical guidelines. It cannot be explained or excused in any way. It is not an error or a momentary lapse of judgement but a total abuse of power that breaches all societal norms and all professional rules.

The Panel was of the view that a suspension would not be in the interests of the public as the suspension would automatically be lifted at the end of the suspension period. Dr. Miller would not have to demonstrate any insight or remediation in his behaviour in order to get his certificate of registration back. On the other hand, after revocation, Dr. Miller would have to demonstrate that he is entitled to a certificate of registration in the future.

While Dr. Miller can apply for reinstatement of his certificate after five years, the onus will be on him to demonstrate to a future Discipline panel that he ought to be reinstated. It would be up to Dr. Miller to demonstrate that he is not a risk to the public and that he has been remediated. Given the seriousness of the conduct the Panel found him to have committed, the Panel believes that the onus should be on Dr. Miller to demonstrate in future that he should be reinstated.

The Panel found that the patient was a vulnerable person. She was a newcomer to Canada. She suffered from depression. She did not have a great facility with the English language. She was alone in a closed room with Dr. Miller, a health professional who held a position of authority over her, when he took her hand and put it on his genital area. Dr. Miller's actions towards Patient A have had a lasting impact on her. She still feels violated to this day and does not feel that she has really been able to deal with what happened to her. She felt trapped in the room with him. She expressed shame about what he did to her and because of her family situation she has had to keep the incident secret for years, which has added to the stress she feels about what Dr. Miller did.

The Panel finds that Dr. Miller violated the trust that the public places in health professionals when he took Patient A's hand and placed it on his genital area, not once, but twice. That conduct is deserving of the most serious sanction that can be ordered.

Revocation will send a signal to Dr. Miller and the entire profession that there is truly a zero tolerance policy when it comes to sexual abuse of patients.

This is the third time Dr. Miller is before a Discipline panel. While the first instance was many years ago and does not have much bearing on this case, his second time at discipline is in fact relevant here and the Panel considered it to be an aggravating factor. His conduct towards the College in 2003 in breaching his undertaking demonstrates that he is prepared to breach a specific promise to the College. That represents an inability or an unwillingness to abide by his regulatory responsibilities. His discipline history also increases the risk that Dr. Miller may misconduct himself again in future if his certificate is only suspended rather than revoked.

Dr. Miller did not have legal representation during the penalty phase. He did not call any character witnesses to testify on his behalf nor tender any letters of character reference. As such, the Panel was given nothing upon which it might reasonably justify a suspension instead of revocation.

The caselaw presented by the College demonstrates that revocation, for the sexual touching that the Panel found occurred in this case, is the appropriate penalty and is fair, reasonable and proportionate in the circumstances of this case. The cases provided by the College show that regulated health professionals have received serious sanctions from discipline panels for sexual remarks even when there was no physical contact. Unwanted sexual touching of the kind that Dr. Miller engaged in is much worse than sexual remarks.

Revocation in this case will ensure specific and general deterrence. It will ensure that Dr. Miller cannot engage in this type of conduct in the future because he will not be a member of the College again unless he shows a future panel that indeed he has been rehabilitated. And revocation will serve as a deterrent to the rest of the profession to let them know that the College takes sexual abuse seriously and will enforce its zero tolerance policy. The Panel is confident that this Order will protect the public and restore trust in the profession.

The Order to reimburse the College, and post security for any funds that must be reimbursed, up to \$16,060, is also reasonable and appropriate in this case. It would not be appropriate to look to Dr. Miller's peers to pay (via their registration dues) for any therapy or counselling that Patient A needs because of the sexual abuse. It is appropriate that this cost be borne by Dr. Miller.

With respect to the costs order, the Panel agrees with both the College and Dr. Miller that \$37,000 in costs is reasonable given the total amount of (partial) costs expended by the College. This is an appropriate case for a costs order. It is not fair that Dr. Miller's peers in the province should bear the entire cost of the investigation and prosecution in this matter. It is appropriate that Dr. Miller share some of those costs. Given that he cooperated with the College and did not unduly lengthen the hearing, it is also appropriate that the College did not seek the entire amount of its costs from Dr. Miller.

With regard to the reprimand, the Panel agreed with College Counsel that the penalty provisions in the Code should be applied retrospectively and so it is of the opinion that it is required to order a reprimand, but if the Panel is wrong in that regard, it would have exercised its discretion to order a reprimand in any event. The type of conduct engaged in by Dr. Miller warrants a reprimand from his peers so that he may understand how his actions have tarnished the reputation of the optometry profession.

It is open to Dr. Miller to seek reinstatement after five years if he is able to demonstrate to a future panel of the Discipline Committee that he should be granted a certificate of registration again.

Dated this 25 day of March, 2019, at Port Elgin, Ontario.

(Signed)

Mr. John Van Bastelaar, Chair