

IN THE MATTER OF:            *The Medical Act, S.N.S. 2011, c. 38*

and

IN THE MATTER OF:            A Settlement Agreement between the College of Physicians and Surgeons of Nova Scotia ("the College") and Dr. Juan Rivas ("Dr. Rivas")

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**HEARING COMMITTEE DECISION**

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Date Heard:                      January 18, 2019

Location:                         Halifax, Nova Scotia

Hearing Committee:            Mr. Raymond F. Larkin, Q.C.  
Dr. Gisele Marier  
Dr. P. Scott Theriault  
Dr. Ethel Cooper-Rosen  
Mary Hamblin

Counsel:                         Daniel Wallace, Counsel for the College of Physicians and Surgeons of Nova Scotia

Andrea Pierce, Counsel to Dr. Juan Rivas

1. On January 18, 2019 the Hearing Committee accepted an amended Settlement Agreement between the College and Dr. Rivas with reasons to follow.

2. The Settlement Agreement reached between the College and Dr. Rivas was recommended for acceptance by the Investigation Committee and referred to the Hearing Committee for consideration in accordance with Section 103 of the Medical Practitioners Regulations, NS Reg. 18/2015. The proposed Settlement Agreement included the following allegations put forward by the College in its Notice of Referral to Hearing:

- a. Dr. Rivas violated the college-endorsed *CMA Code of Ethics* and the *Medical Act* when he failed to comply with his March 27, 2014 undertaking with the College to “have a chaperone present for all female breast examinations”. By failing to abide by the terms of his undertaking:
  - a. He breached his duty to co-operate with the College in the conduct of its professional conduct processes;
  - b. He undermined the privilege of physician self-regulation;
  - c. He failed to practice the art and science of medicine competently with integrity and without impairment;
  - d. He risked undermining his patients’ trust in the medical profession;
  - e. He risked undermining the public’s trust in the medical profession, and the College’s ability to regulate the practice of medicine; and,
  - f. He failed to preserve the integrity of the medical profession.
  
- b. Dr. Rivas violated the College-endorsed *CMA Code of Ethics* and the *Medical Act* when he provided false and/or incomplete information to the College in his letters dated January 2, 2014, January 30, 2017 and October 26, 2017. By providing false and/or incomplete information to the College:
  - a. He breached his duty to co-operate with the College in the conduct of its professional conduct processes;
  - b. He undermined the privilege of physician self-regulation;
  - c. He failed to practice the art and science of medicine competently with integrity and without impairment;
  - d. He risked undermining his patients’ trust in the medical profession;
  - e. He risked undermining the public’s trust in the medical profession, and the College’s ability to regulate the practice of medicine; and,
  - f. He failed to preserve the integrity of the medical profession.

### Legislative Context and Principles

3. This matter comes before the Hearing Committee in accordance with Section 51 of the *Medical Act*, which provides:

51 Where an investigation committee refers a matter to a hearing committee, the College may, before the commencement of a hearing by the hearing committee, enter into a settlement agreement with the respondent, to be dealt with in accordance with the regulations.

4. The Medical Practitioners Regulations describe the criteria to be applied by an Investigation Committee in recommending acceptance of a settlement agreement. Section 102(1) provides as follows:

102 (1) An investigation committee may recommend acceptance of a settlement agreement if it is satisfied that all of the following conditions are met:

- (a) the public is protected;
- (b) the conduct or its causes can be, or have been, successfully remedied or treated, and the respondent is likely to successfully pursue any remediation or treatment required;
- (c) the content of the proposed settlement agreement provides sufficient facts and admissions to support the agreed disposition;
- (d) settlement is in the best interests of the public and the profession.

5. The procedure to be followed by the Hearing Committee in considering a settlement agreement is set out in Section 103 of the Medical Practitioners Regulations as follows:

103 (1) If a hearing committee accepts a settlement agreement, the settlement agreement forms part of the order of a hearing committee disposing of the matter and, except as provided in subsections 104(3) and (4) for breaches of the settlement agreement, there is no hearing.

(2) If a hearing committee does not accept a settlement agreement, it must do 1 of the following:

- (a) suggest amendments to the settlement agreement and return it to the Registrar and the respondent for review;
  - (b) reject the settlement agreement, in which case the matter is referred to another panel of a hearing committee for a hearing.
- (3) If both the Registrar and the respondent do not agree with the amendments to a settlement agreement suggested under clause (2)(a), the settlement agreement is deemed to be rejected and the matter must be referred to another panel of the hearing committee for a hearing.
- (4) If both the Registrar and the respondent agree with the amendments to a settlement agreement suggested under clause (2)(a), the settlement agreement must be approved by a hearing committee.
- (5) A person who sits on a panel of a hearing committee that considers a settlement agreement must not sit on a panel of a hearing committee that conducts a hearing related to the same complaint.

6. In considering whether to accept a settlement agreement between a medical practitioner and the College, the Hearing Committee is governed by the purpose of the *Medical Act* and the duties of the College, generally, as set out in Section 5 of the *Medical Act*, which provides :

5 In order to

- (a) serve and protect the public interest in the practice of medicine; and
- (b) subject to clause (a), preserve the integrity of the medical profession and maintain the confidence of the public and the profession in the ability of the College to regulate the practice of medicine, the College shall
- (c) regulate the practice of medicine and govern its members through
  - (i) the registration, licensing, professional conduct and other processes set out in this Act and the regulations,
  - (ii) the approval and promotion of a code of ethics,
  - (iii) the establishment and promotion of standards for the practice of medicine, and
  - (iv) the establishment and promotion of a continuing professional development program; and

(d) do such other lawful acts and things as are incidental to the attainment of the purpose and objects of the College.

7. In accordance with Section 5, the mandate of the Hearing Committee is to serve and protect the public's interest in the practice of medicine. The public interest is first and foremost the protection of the public, but it is not limited to the protection of the public in the narrow sense. In our opinion, there is a strong public interest in regulating the conduct of medical practitioners in a manner that is fair and proportionate. Medical practitioners provide a public service that is critical to the well being of Nova Scotians. It is essential that the professional conduct process in the *Medical Act* be fair to them.

8. Section 5(b) of the *Medical Act* is particularly significant for our consideration of the proposed Settlement Agreement in this matter. The College has to be diligent in ensuring that undertakings given by medical practitioners for the protection of the public are followed. Compliance with undertakings made to the College and honest cooperation with the College are critical to the ability of the College to carry out its mandate to serve and protect the public interest in the practice of medicine. In our view, they are necessary to preserve the integrity of the medical profession and maintain the confidence of the public and the profession in the ability of the College to regulate the practice of medicine.

9. In considering a proposed settlement agreement in this legislative context, the Hearing Committee is generally inclined to defer to the judgement of the Investigation Committee on the specific aspects of a settlement agreement. In most cases, the Investigation Committee will have engaged with the medical practitioner and the issues arising from a particular complaint in considerable detail over a number of meetings. They will have more knowledge of the circumstances than the Hearing Committee.

10. Settlement Agreements are negotiated between the Registrar and the practitioner and will include reasonable compromises acceptable to the Investigation Committee. Resolving complaints reasonably without a formal hearing benefits both the College and the practitioner. If recommendations from the Investigation Committee fall within a reasonable range of dispositions, the Hearing Committee will accept a settlement agreement that is recommended.

11. Nevertheless, despite this general attitude of deference to the recommendations of the Investigation Committee, the members of the Hearing Committee must be satisfied that the disposition recommended by the Investigation Committee is in the public interest both in the sense of protecting the public and of fairness to the practitioner.

#### **Facts**

12. On March 27, 2014, Dr. Rivas signed an undertaking with the College stating that he, "will have a chaperone present for all female breast examinations".

13. This undertaking to the College arose from earlier proceedings involving Dr. Rivas with the College of Physicians and Surgeons of Manitoba. In 2013, a patient in Manitoba made a complaint of inappropriate touching against Dr. Rivas. The complaint was referred to the Investigation Committee of the Manitoba College. The Investigation Committee was unable to determine what happened, but noted in its decision as follows:

4. Dr. Rivas Hernandez advised that he will now always have the clerk or someone with him when he performs breast examinations. The Investigation Committee is supportive of this initiative. Generally, the Investigation Committee is of the opinion that it is good practice to have a chaperone present when performing breast examinations.

5. Dr. Rivas Hernandez is also registered in Nova Scotia and the Committee directed that the College of Physicians and Surgeons of Nova Scotia be advised of this complaint and Dr. Rivas Hernandez's statement regarding having a chaperone present for breast examinations.

6. ...

For the foregoing reasons, in accordance with clause 47(1)(b) and (f) of *The Medical Act*, the Investigation Committee resolved that:

- (a) By this Decision, the Committee supports Dr. Rivas Hernandez's decision to have a chaperone present when performing breast examinations in the future;
- (b) That the College of Physicians and Surgeons of Nova Scotia be informed of this complaint and Dr. Rivas Hernandez's statement regarding having a chaperone present for breast examinations; and,
- (c) Thereafter, no further action be taken at this time.

14. As provided for in the *Manitoba* decision, the Nova Scotia College was informed of Dr. Rivas' statement regarding having a chaperone present for breast examinations and on March 27, 2014 he agreed to undertake to the Nova Scotia College that he would have a chaperone present during breast examinations. In 2017, the Investigation Committee of the College considered whether Dr. Rivas had fulfilled his undertaking.

15. The Settlement Agreement between Dr. Rivas and the College includes the following account of the Investigation Committee's inquiries:

12. In his October 26, 2017 letter to the Investigation Committee, in response to questions, Dr. Rivas indicated on every occasion when a patient requires he conduct a breast examination at Family Focus, he has always secured the presence of a chaperone. He tells patients he does not do breast examinations without the presence of a chaperone.

13. As part of its investigation, the Investigation Committee obtained Dr. Rivas' MSI billings for January 1, 2016 and November 15, 2017, as well as relevant charts. The documents demonstrated Dr. Rivas had performed numerous breast examinations in that period of time, and not just one, as he stated in his January 30, 2017 letter. At the time, Dr. Rivas wrote the January 30, 2017 letter, he had performed 19 breast examinations in the previous 13 months.

14. During its February 13, 2018 interview, the Investigation Committee asked Dr. Rivas to reconcile what he said in the January 30, 2017 letter about only performing one breast examination, with his MSI billings and office charts.

Dr. Rivas said when he wrote the January 30, 2017 letter he did not realize how many times he performed breast examinations, and he probably provided misleading information when he said he did not. He said from 2016 onwards he did not record exactly what examinations were done. Dr. Rivas explained he “didn’t realize how many times I had been doing the breast examinations and I didn’t exactly having a clear picture in my mind what had been done in 2016.”

15. Dr. Rivas initially told the Committee every time he did a breast examination, from 2016 onwards, his goal was always to have a witness in the room. Later in his interview, he agreed that he could not recall whether he always had a chaperone present for breast exams. Towards the end of his interview, Dr. Rivas told the committee in some cases he knew he needed to have a chaperone present, did not have one, and carried out the examination without a chaperone present.

16. Further, in the Settlement Agreement, Dr. Rivas made the following admissions:

16. Dr. Rivas admits that he violated the College-endorsed *CMA Code of Ethics* and the *Medical Act* when he failed to comply with his March 27, 2014 undertaking with the College to “have a chaperone present for all female breast examinations”. By failing to abide by the terms of his undertaking:

- a. He breached his duty to co-operate with the College in the conduct of its professional conduct processes;
- b. He undermined the privilege of physician self-regulation;
- c. He failed to practice the art and science of medicine competently with integrity and without impairment;
- d. He risked undermining his patients’ trust in the medical profession;
- e. He risked undermining the public’s trust in the medical profession, and the College’s ability to regulate the practice of medicine; and,
- f. He failed to preserve the integrity of the medical profession.

17. Dr. Rivas violated the College-endorsed *CMA Code of Ethics* and the *Medical Act* when he provided false and/or incomplete information to the College in his letters dated January 2, 2014, January 30, 2017 and October 26, 2017. By providing false and/or incomplete information to the College:

- g. He breached his duty to co-operate with the College in the conduct of its professional conduct processes;
- h. He undermined the privilege of physician self-regulation;
- i. He failed to practice the art and science of medicine competently with integrity and without impairment;
- j. He risked undermining his patients’ trust in the medical profession;
- k. He risked undermining the public’s trust in the medical profession, and the College’s ability to regulate the practice of medicine; and,
- l. He failed to preserve the integrity of the medical profession.

17. In the proposed Settlement Agreement, the College and Dr. Rivas agree to a three month suspension of his license to begin upon acceptance of the Agreement by the Hearing Committee.

18. In addition, Dr. Rivas and the College agreed to the following:

19. Dr. Rivas agrees that the Committee's June 5, 2018 interim restrictions that he "have a chaperone present for all female breast examinations" shall remain in effect.

19. As to costs, Dr. Rivas agrees to pay the College \$7,500 inclusive of HST, representing a portion of the College's cost of investigating the matter, and further agrees that those costs shall be payable by Dr. Rivas within one year of the Hearing Committee's acceptance of the Settlement Agreement.

#### **Disposition**

20. In this matter, the Hearing Committee is satisfied that the conduct outlined above, including the admissions of Dr. Rivas, would reasonably be regarded as unprofessional and, having regard to all of the circumstances, constitutes professional misconduct. Dr. Rivas breached his undertaking to the College to have a chaperone present for all female breast examinations. In our view, the breach of his undertaking to the College constitutes serious misconduct. In order to perform its mandate to serve and protect the public interest and practice of medicine the College needs, in appropriate circumstances, to be able to accept the undertaking of a medical practitioner as the best way to protect the public. Breaches of those undertakings by a medical practitioner not only undermines the College's protection of the public but it risks undermining the confidence of the public in the medical profession and in the College's ability to regulate the practice of medicine.

21. Dr. Rivas has admitted to providing false or incomplete information to the College, and that by providing false or incomplete information he breached his duty to cooperate with the College in the conduct of the professional conduct process. Dr. Rivas admits that this conduct undermined the privilege of physician self-regulation and risked undermining the public's trust in the medical profession, and the College's ability to regulate the practice of medicine. He admits that he failed to preserve the integrity of the medical profession and failed to practice the art and science of medicine competently and with integrity. In our view this constitutes serious professional misconduct.

22. The disposition in the Settlement Agreement has two aspects. One is the imposition of a three month suspension of Dr. Rivas' license; and, the other is a restriction in his practice requiring that he have a chaperone present for all female breast examinations.

23. The Hearing Committee accepts the imposition of a three month suspension of Dr. Rivas' license to practice. A three month suspension is a severe penalty, but it is an appropriate penalty in all of the circumstances of this case. It sends a strong message to the public, and to the medical profession, that the failure to follow undertakings given to the College concerning the practice of medicine is completely unacceptable, as is attempting to mislead the College by false or incomplete information. There is an important public interest in ensuring that the College has the flexibility to accept undertakings to protect the public, and that those undertakings will be rigorously enforced. Medical practitioners should know when they give an undertaking to the College concerning their practice that a breach of the undertaking is to be regarded as serious misconduct.

24. The three month penalty is consistent with reported decisions in other jurisdictions. In *College of Physicians and Surgeons of Ontario v Eleazar Humberto Noriega* (July 17, 2013), the Discipline Committee of the College of Physicians and Surgeons of Ontario imposed a six month penalty for breach of an undertaking that included a prohibition from engaging in any professional encounters with female patients except in the presence of his practice monitor and

a requirement to post a sign in his waiting room and each of his examination rooms notifying the public of his practice restrictions. Dr. Noriega failed to ensure that the required sign was posted in his waiting room and failed to ensure that his practice monitor was present with him when he had professional encounters with female patients. The Discipline Committee considered that this deliberate and serious breach of an undertaking made to the College justified a six month suspension.

25. In *Ontario College of Physicians and Surgeons v Li*, 2007 CarswellOnt 10145, the Discipline Committee of the Ontario College of Physicians and Surgeons imposed a three month suspension for breach of an undertaking that required him to examine female patients aged 10 years or older in the company of a monitor. The Discipline Committee accepted a jointly submitted penalty of three months, given the seriousness of Dr. Li's conduct and the importance of compliance with undertakings made to the College.

26. In *Ontario College of Physicians and Surgeons v Mohammad Rassouli-Rashti*, the Discipline Committee of the College of Physicians and Surgeons of Ontario imposed a three month suspension on the basis that this penalty would serve as a general deterrent to the membership, showing that attempting to obstruct the College in an investigation into behavior that is harmful to the public will not be tolerated.

27. In keeping with the principle that the Hearing Committee should generally defer to the judgement of the Investigation Committee, the Hearing Committee accepts that the penalty of a three month suspension falls within a reasonable range of penalties consistent with the significance of the professional misconduct involved in this case, and previous decisions in similar cases.

28. However, the Hearing Committee was not able to accept the disposition recommended in the Settlement Agreement in its entirety. Paragraph 19 of the proposed Settlement Agreement provided that an interim restriction by the Investigation Committee that Dr. Rivas “have a chaperone present for all female breast examinations” shall remain in effect. This disposition would constitute an indefinite limitation on Dr. Rivas’ practice resulting from approval of the Settlement Agreement by the Hearing Committee.

29. The Committee was not satisfied that this aspect of the proposed Settlement Agreement was supported by sufficient facts and admissions. On the contrary, there is no evidence that Dr. Rivas has engaged in any inappropriate touching or examination of a patient’s breast.

30. In the opinion of the Hearing Committee, it is sound practice for Dr. Rivas to have a chaperone present when conducting female breast examinations, or, indeed, intimate examinations more generally. However, in the absence of any finding of inappropriate conduct by Dr. Rivas with respect to female breast examinations, the Hearing Committee does not see any basis for making that sensible practice into an order approved by the Hearing Committee in the circumstances of this case.

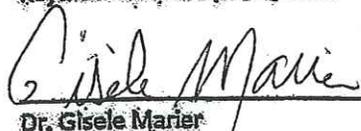
31. Under Section 103 of the Medical Practitioner Regulations, the Hearing Committee had the option to suggest amendments to the Settlement Agreement. At the hearing on January 18 the Committee suggested, and counsel for the College and Dr. Rivas agreed, that paragraph 19 of the proposed Settlement Agreement be deleted. With the deletion of paragraph 19, the Hearing Committee was satisfied that the proposed Settlement Agreement was appropriate and approved the Settlement Agreement as amended.

32. With the approval of the Settlement Agreement, as amended, by the Hearing Committee, the three month suspension imposed on Dr. Rivas began on January 18, 2019 and the time began for his payment of costs within one year of the Hearing Committee’s acceptance of the Settlement Agreement.

Decision issued this 5<sup>th</sup> day of February, 2019.



Raymond F. Larkin, Q.C., Chair



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