

College of Physicians and Surgeons of Nova Scotia

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

-and-

IN THE MATTER OF: A Settlement Agreement concerning Dr. Robert Wadden
recommended under Section 51 of the *Medical Act*

DATE HEARD: September 30, 2016

LOCATION: Halifax, Nova Scotia

HEARING COMMITTEE: Mr. Raymond Larkin, QC, Chair
Dr. Brian O'Brien
Dr. Celina White
Dr. Rajender Parkash

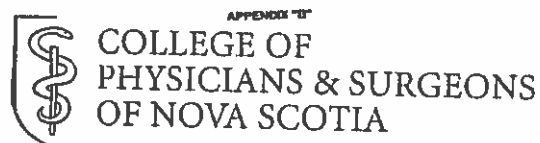
DECISION

1. On September 30, 2016, the Hearing Committee approved Investigation Committee 'A's recommendation of a settlement agreement between the College of Physicians and Surgeons of Nova Scotia and Dr. Robert Wadden, with reasons to follow. These are our reasons for approving the settlement agreement.

2. The settlement agreement between Dr. Wadden and the College is incorporated into this decision. It sets out the facts agreed to by Dr. Wadden and the College. In this case Dr. Wadden failed to comply with a previous settlement agreement which had been approved by the Hearing Committee on August 28, 2015 ("the 2015 settlement agreement"). The 2015 settlement agreement included a provision which stated as follows:

A permanent condition shall be placed on Dr. Wadden's license to practice medicine requiring him to have an attendant present when seeing any female patients. A sign to this effect, in the form attached as "Appendix B" shall be posted in Dr. Wadden's waiting room and in any examination room where he sees female patients.

3. The wording of the sign referred to in this condition was agreed to as part of the settlement agreement. The sign included the following text:



NOTICE OF RESTRICTION

The College of Physicians and Surgeons of Nova Scotia hereby gives notice that effective June 17, 2015, the following restriction is placed on the medical licence of Dr. Robert Wadden:

Female patients
will only be seen by
Dr. Robert Wadden
with an attendant
present.

4. The 2015 settlement agreement also included agreement on a lengthy suspension to be served in 2 three month periods. Dr. Wadden returned from the first three month period of suspension on October 13, 2015. He had not posted the sign agreed to in the 2015 settlement agreement before his return. He waited until the end of the day of his return to work and posted the sign at 5:45 p.m. Dr. Wadden's explanation for this failure to comply with the 2015 settlement agreement was that he had intended to post the sign but, since patients were already in the waiting room when he arrived, he was embarrassed so he waited until the end of the day.

5. Dr. Wadden had previously posted a different sign voluntarily in May of 2015, well before the 2015 settlement agreement. That sign stated:

Patients of Dr. Wadden will be seen with a nurse.

A picture of the waiting room wall with the May 2015 sign was provided to us at the hearing and is attached to this decision.

6. In the proposed settlement agreement before us, Dr. Wadden and the College agree that there were the following differences between the sign required by the 2015 settlement agreement and the one posted by Dr. Wadden in May 2015:

- a) The required sign was to be on CPSNS letterhead, representing an official communication from the College, rather than a discretionary decision initiated by Dr. Wadden;
- b) The required sign was to be entitled "Notice of Restriction" in large, bold letters, clearly communicating that the content was a restriction imposed by the College, as opposed to a practice assumed by the doctor;
- c) The required sign was to formally give notice that there was a restriction on Dr. Wadden's licence, a fact which is omitted from Dr. Wadden's sign;
- d) The required sign was to utilize bold letters to communicate the nature of the restriction and expressly stipulate that the restriction relates to female patients only.

7. In August 2016, an agent of the College went to Dr. Wadden's office and observed the sign required by the 2015 settlement agreement was posted in an inconspicuous location close to the ceiling in Dr. Wadden's waiting area. A picture of that sign appears as Schedule 3 to the proposed settlement agreement. It shows a sign posted high on the wall near the ceiling close to the corner of the waiting room. It is well above eye level as compared to another sign on the same wall which is posted at eye level.

8. Dr. Wadden admits that he did not post the sign which he had agreed to post as one of the conditions of the 2015 settlement agreement and he also admits that his actions constitute professional misconduct.

9. The disposition of the matter in the proposed settlement agreement includes the following provisions:

14. Dr. Wadden's licence to practice medicine is suspended for a period of 4 weeks, commencing on October 11, 2016 and continuing to an including November 7, 2016. Dr. Wadden agrees he shall not engage in the practice of medicine in any jurisdiction during the period of his licence suspension in Nova Scotia.

15. For clarity, the following permanent condition shall continue in force:

A permanent condition shall be placed on Dr. Wadden's licence to practice medicine requiring him to have an attendant present when seeing any female patients. A sign to this effect, in the form attached as Schedule 1B to this Agreement shall be posted in Dr. Wadden's waiting room and in any examination room where he sees female patients. The sign all be posted prominently in each room in a location that can be immediately and readily viewed by patients. Dr. Wadden shall provide pictures of the signs, showing their locations in each room, for approval by the Registrar. Dr. Wadden agrees that from time to time, representatives of the College may attend at his office to view the location and content of the posted signs to ensure compliance, and that he shall allow access to his waiting room and examination room to College staff to facilitate this. He shall advise his office staff of this permission.

Mandate of the Hearing Committee

10. The jurisdiction of the Hearing Committee arises out of Section 51 of the *Medical Act*, S.N.S. 2011, c. 38 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 regulation.

11. The Medical Practitioner Regulations set out in detail the procedures for preparing and adopting a settlement agreement. The Investigation Committee can recommend acceptance of a proposed settlement agreement if it is satisfied of certain conditions. Regulation 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.

12. Where a settlement agreement is recommended to the Hearing Committee, the Committee has three options. It can accept or reject the proposed agreement or it may suggest amendments to the settlement agreement which would make it acceptable to the Committee.

13. At all times, the Hearing Committee must be mindful of the purposes of the *Medical Act* as stated in Section 5 of the *Act* which provides in part as follows:

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 member through...

14. In the particular circumstances of this case, the Hearing Committee has to decide whether or not the proposed settlement agreement is in the best interests of the public and the profession and in considering that question we must give due regard to the statutory mandate of the College 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 practise of medicine.

Settlement Agreements Generally

15. In this case, the College and Dr. Wadden have negotiated the terms of a settlement agreement and this agreement has been accepted by Investigative Committee 'A'. In our view, considerable deference should be given to the recommendation from Investigative Committee 'A'. In a decision of the Hearing Committee under the *Medical Act*, SNS 1995-1996, c. 10, an earlier Hearing Committee explained its posture of deference as follows:

5. Ordinarily a Hearing Committee considering a settlement agreement under Section 57 of the *Medical Act* will defer to the judgment of the investigative committee and the College on a settlement agreement. It is our general view that settlement agreements between the College and members should be encouraged. They provide an opportunity for the resolution of disciplinary matters which would be difficult to achieve in adjudication. Investigative committees are exposed to the member and the issues over a considerable period of time and are in a good position to assess the conduct of the member and the efficacy of a resolution. Settlement agreements are negotiated between legal counsel for the College and the member and give an opportunity for the member to influence the outcome and therefore to generate an acceptable solution. Formal adjudication of disciplinary matters can be very costly to both the member and the College; a proper settlement agreement avoids that cost and at the same time produces a disposition tailored to the specific issues raised by the member's conduct.

6. While we recognize that considerable deference is owed to the investigative committee we nevertheless would not agree to accept the recommendation of a settlement agreement if we were not convinced in a particular case that it was in the public interest to do so. We would certainly reject a recommendation to approve a settlement agreement if we thought it was not in the public interest.

Reference: Unreported Decision of the Hearing Committee dated July 9, 2013 at pages 3 and 4.

16. In considering whether to defer to the recommendation of the investigative committee, we recognize that the College and the physician involved negotiate a balance between public protection and fairness to the physician. In this negotiation, the College must take an objective view of the conduct of the physician and consider whether the terms of a settlement agreement fall within a reasonable range of terms that will protect the public. It is essential that a settlement agreement is reasonable and that a physician does not agree to an unreasonable settlement agreement simply to avoid a public hearing.

17. On the other hand, a physician may accept terms that are reasonable, but not attractive, to avoid a full formal hearing. This is illustrated by the 2015 settlement agreement. The account given of Dr. Wadden's conduct by the complainant and that given by Dr. Wadden himself were significantly different. In a formal hearing that difference would be resolved by a Hearing Committee which would assess the credibility of the evidence presented by the witnesses in a hearing. Depending on that assessment of credibility and the facts determined by the Hearing Committee, a Hearing Committee might take the view that a more serious penalty was required than a six month suspension. Dr. Wadden agreed to a very significant suspension and he agreed

to post an embarrassing sign in his waiting room. By doing so, he avoided the uncertainties of the outcome of a public hearing.

18. In our view, it is important to bear in mind that the effectiveness of settlement agreements as a means of protecting the public while ensuring fairness to physicians, is undermined when the terms of the settlement agreement are ignored.

19. Clause 5(b) of the *Medical Act* mandates the College 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”. The use of conditions and restrictions in a settlement agreement as a means of protecting the public while permitting a medical practitioner who has been involved in professional misconduct to continue to practise would be jeopardized if the College concluded that practitioners could ignore those conditions or restrictions. This would not benefit the public or the profession itself.

Conclusions

20. In this case, Dr. Wadden failed to comply in a timely manner with the condition that he post the agreed upon sign in his patient waiting room. He returned from his suspension and saw patients on October 13, 2015, without first posting the sign in his waiting room. He had no valid excuse for this failure to comply with the settlement agreement.

21. Dr. Wadden’s explanation for his failure to post the sign in a timely manner is that he was too embarrassed to post the sign with patients in the waiting room. While it was no doubt embarrassing to post the sign, he could have posted it before the patients arrived. Although it was his practice since May 2015 to see all patients accompanied by his nurse, this doesn’t justify ignoring the posting condition in the 2015 settlement agreement.

22. The sign required by the 2015 settlement agreement unequivocally told patients that the College had restricted Dr. Wadden’s practice. It made it clear that the restriction related to female patients. The use of bold letters in the key parts of the sign indicated the intention that these restrictions would be easily visible to patients in the waiting room.

23. We can draw no other conclusion but that Dr. Wadden deliberately sought to avoid the posting condition by posting the sign where it would not be easily seen. The pictures provided to us make it clear that there was ample space for the sign at eye level on the wall in the waiting room. The only purpose of positioning the sign where it could not be readily seen was to avoid advising patients that the College had restricted his practice in respect of seeing female patients.

24. There is no doubt that the condition that Dr. Wadden post a sign advising his patients that the College has restricted his practice in respect of seeing female patients is embarrassing for him. However, that does not justify deliberately avoiding compliance with the posting condition in the 2015 settlement agreement. The balance struck in the 2015 settlement

agreement of imposing a significant suspension on Dr. Wadden and protecting the public by notifying patients of the restriction on his practice was undermined by his conduct.

25. We see no reason to reject the agreement between Dr. Wadden and the College that his conduct in this matter constituted professional misconduct.

26. As to penalty, Dr. Wadden and the College have agreed to a four week suspension from his practice. There is no doubt that this is a significant sanction. In our view, however, a four week suspension is proportionate to Dr. Wadden's conduct.

27. In *Re Noriega*, [2013] O.C.P.S.D. No 18, the Ontario College of Physicians and Surgeons Discipline Committee imposed a six month suspension on a physician who breached an undertaking to post a sign notifying the public of practice restrictions, had failed to comply with his undertaking that a chaperone would be present in any professional encounters with female patients and mislead the College Investigator in addressing these issues. The Committee stated at paragraph 6 as follows:

6 The foregoing findings are serious as they go to the heart of the governance of the profession. To protect the public, the College must be able to rely upon undertakings made by its members.

28. With respect to the six month penalty the Committee stated:

14 This penalty will demonstrate to the member and the membership that disregard for an undertaking given by a member to the College will be dealt with severely. The public will be protected by the strong and clear message that disregard of a College undertaking is a serious act of professional misconduct which calls for a significant penalty.

29. It has to be noted that Dr. Noriega's breach of undertaking with the College was considerably more serious than the breach of condition by Dr. Wadden in this case because Dr. Noriega had not only failed to post the required sign but had failed to ensure that a chaperon was present in professional encounters with female patients.

30. In *Re Sweet*, [2008] O.C.P.S.D. No. 8, the Ontario College of Physicians and Surgeons Discipline Committee approved a joint submission by a physician and the College calling for a two month suspension for failure to comply with the condition that he display a sign in plain view to patients entering his office waiting room notifying patients that he was restricted from prescribing certain controlled substances. The Committee approved the two month suspension for the following reasons:

7 The Committee took into consideration the fact that this is Dr. Sweet's third discipline hearing, and it is the second time that he has been found to be in breach of an order of the Discipline Committee. Self-regulation by the College is

a privilege and, as such, it is a vital importance that members abide by all orders of the College. Dr. Sweet was well aware that it was his responsibility to make sure that a sign was posted with regard to his restriction on prescribing narcotics, wherever he practised medicine.

8 The Committee considered the fact that Dr. Sweet admitted to the allegation, thereby negating the need for a full hearing, to be a mitigating factor.

9 The Committee felt that the penalty of a two month suspension properly reflects its disapproval of Dr. Sweet's conduct. It will serve as a general deterrent to the members of the College, by underlining that breaching an order of the Committee is not acceptable. As well, the penalty will serve as a specific deterrent to Dr. Sweet. The terms, conditions and limitations that are currently on Dr. Sweet's certificate of registration will remain in force and continue to serve as protection for the public.

31. The circumstances in *Re Sweet* are similar but not exactly the same as those in the proposed settlement agreement between Dr. Wadden and the College. Dr. Sweet was notified by the College that he had failed to post the required sign and he waited ten weeks after receiving this notice before posting the sign. Nevertheless, the decision of the Ontario College of Physicians and Surgeons Discipline Committee in *Re Sweet* supports the view that a suspension from practice can be an appropriate sanction for breach of a posting condition.

32. In *Re Saul*, [2014] O.C.P.S.D No. 25, the Ontario College of Physicians and Surgeons Discipline Committee accepted a joint submission from the physician and the College that a two month suspension from practice was appropriate for breach of an undertaking to post a clearly visible sign in the waiting rooms of his practice locations indicating that he had relinquished his prescribing privileges with respect to certain drugs. In addition to failing to comply with the posting condition, the physician had prescribed certain drugs in violation of the undertaking. The Committee indicated its reasons for accepting the two month suspension as follows:

16 Dr. Saul's professional misconduct in breaching his Undertaking has implications in terms of patient care and professional governance. Both are important. In the Committee's view, any breach of an undertaking is a serious matter. In this case, breaching the Undertaking was repeated many times and in different ways. Serious consequences must follow. As the professional regulator, the College relies on the honesty and integrity of its members. It is the obligation of the members to comply with the orders of the College Committees and undertakings made to the College. A failure to comply undermines effective self-governance in the public interest. The Committee, in its reprimand, paid particular attention to the importance of the members of the College complying with orders and undertakings.

17 Suspensions of a certificate of registration is a serious consequence. A two month suspension in this matter is fully justified. The serves to denounce the misconduct and serves as both a specific deterrent to Dr. Saul and a general deterrent.

33. Here again, unlike the physician in *Re Saul*, Dr. Wadden did not breach the substance of the restriction which was imposed on him; he ensured that female patients would only be seen by him with an attendant present. However, again, the decision in *Re Saul* indicates that a suspension may be appropriate where there is a breach of a posting condition.

34. In our view, the four week suspension in the proposed settlement agreement in this matter appropriately falls at the low end of penalties imposed in similar cases. We see no reason to reject the recommendation of Investigation Committee 'A' that we approve the proposed settlement and there is no reason for us to suggest amendments to the settlement agreement.

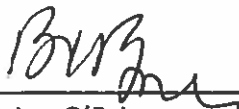
35. The Hearing Committee concludes that the proposed settlement agreement is in the best interests of the public and the profession. In particular, we think that the proposed settlement agreement is necessary to give effect to the statutory mandate of the College to preserve the integrity of the medical profession and maintain the confidence of the public in the profession and the ability of the College to regulate the practise of medicine.

36. The Hearing Committee has approved the recommendation of the Investigation Committee 'A' on September 30, 2015. These reasons for decision incorporate the settlement agreement as recommended by Investigation Committee 'A' including the agreed upon disposition.

Dated at Halifax, Nova Scotia this 17th day of October, 2016.



Raymond F. Larkin, Q.C., Chair



Dr. Brian O'Brien



Dr. Celina White



Dr. Rajender Parkash

