

**DISCIPLINE COMMITTEE
OF THE COLLEGE OF OPTICIANS OF ONTARIO**

PANEL: David Milne, Chairperson and Public Member
Peggy Dreyer, Professional Member
Neda Mohammadzadeh, Professional Member
Natalie Dalcourt, Professional Member
Susan Carlyle, Public Member

BETWEEN:

COLLEGE OF OPTICIANS OF ONTARIO)	<i>Rebecca Durcan</i>
)	College of Opticians of Ontario
- and -)	
)	
)	John Eikeland, self-represented
JOHN EIKELAND, C-409)	
)	<i>Andrea Gonsalves</i>
)	Independent Legal Counsel
)	
)	
)	Heard: October 17, 2016

DECISION AND REASONS

This matter came on for hearing before a panel of the Discipline Committee on October 17, 2016 at the College of Opticians of Ontario (the “College”) at Toronto.

The Allegations

The allegations against the Member as stated in the Notice of Hearing dated December 11, 2014 are as follows.

1. At all material times, John Eikeland (“Mr. Eikeland”) was a registered optician in Ontario.
2. Mr. Eikeland worked at One Stop Optical in Uxbridge Ontario but did not advise the College.

3. Mr. Eikeland is not a member of the following colleges:
 - a) College of Optometrists of Ontario;
 - b) College of Physicians and Surgeons of Ontario;
 - c) College of Chiropractors of Ontario;
 - d) College of Psychologists of Ontario; and/or
 - e) Royal College of Dental Surgeons of Ontario.

March 20, 2014

4. On or about March 20, 2014, E.T. saw a sign at One Stop Optical that said “Eye Exams.” As a result, E.T. entered One Stop Optical.
5. Mr. Eikeland completed an eye examination for E.T. at One Stop Optical and advised E.T. that he required eyeglasses for both distance and reading. Mr. Eikeland issued a prescription to E.T. which identified the Member as “Dr. John R. Eikeland.”
6. E.T. proceeded to attempt to submit the prescription as issued by Mr. Eikeland for insurance claim purposes and was advised that as Mr. Eikeland was not authorized to issue a prescription, the prescription could not be submitted to his insurance company for reimbursement.

Correspondence from the College

7. On or about April 17, 2014 and/or May 28, 2014, Mr. Eikeland failed to respond to registered correspondence from the College requesting him to provide a copy of E.T.’s patient health record.

Further Investigation

8. On or about September 19, 2014, an appointed investigator attended at One Stop Optical to obtain the original patient health record. The appointed investigator was advised by the owner of One Stop Optical, who is a member of this College (EL) that the original patient health record had been provided to Mr. Eikeland at his request so he could prepare his written submissions to the College.
9. Mr. Eikeland advised the appointed investigator that he did not have the patient health record.
10. Mr. Eikeland then advised EL that he “might have” the patient health record.
11. On or about September 23, 2014 Mr. Eikeland contacted the appointed investigator and advised that he found the patient health record but that he had a copy only.

12. The appointed investigator confirmed that the original patient health record was not located at One Stop Optical.
13. It is alleged that the Member engaged in the following acts of professional misconduct as set out in Ontario Regulation 828/93, section 1:
 - a) He contravened a standard of the profession (paragraph 2);
 - b) He failed to reply without sufficient reason to a registered letter from the College (paragraph 16);
 - c) He signed or issued, in his professional capacity, a document that he knew or ought to have known contained a false or misleading statement (paragraph 23);
 - d) He contravened a provision of the *Opticianry Act, 1991*, the *Regulated Health Professions Act, 1991* or the regulations under either of those Acts (paragraph 26); and/or
 - e) He engaged in conduct or performed an act, in the course of practicing opticianry that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional (paragraph 28).
14. Further particulars of the specified allegations of professional misconduct relied upon by the College are contained in the documentary disclosure provided to Mr. Eikeland in support of the allegations in the Notice of Hearing.
15. Counsel for the College advised the panel that the College was not calling any evidence with respect to the allegations set out in paragraphs 8 to 12 of the Notice of Hearing.

Member's Plea

The College advised the panel at the outset that it would not be calling any evidence regarding the allegations set out at paragraphs 8 to 12 of the Notice of Hearing.

Mr Eikeland advised the panel that he admitted to the allegation of fact set out in paragraph 7 of the Notice of Hearing. While the Member initially indicated that he admitted the allegation in paragraph 13(b) of the Notice of Hearing, he then expressed some uncertainty about the facts underlying that allegation. Consequently, in fairness to the Member, the panel recorded a plea of not guilty to that allegation. The Member denied the balance of the allegations in the Notice of Hearing.

The Evidence

The College has the onus of proving the allegations on the applicable standard of proof, that being the balance of probabilities. Evidence must always be sufficiently clear, cogent and convincing to satisfy the balance of probabilities standard.

The panel heard evidence from three witnesses; two were called by the College and Mr Eikeland testified in his own defence. At his own request, Mr. Eikeland participated in the hearing by conference call. With the consent of both parties, one of the witnesses, E.T., also testified by conference call. Various exhibits were identified and marked through the course of the testimony.

The key evidence of the three witnesses may be summarized as follows.

College Witness E.T.

E.T. is the complainant in this matter. E.T. testified that he attended at One Stop Optical in March 2014 as he felt he needed glasses and the store had a sign in the window, which read: "Eye Exams". E.T. was given an eye exam by Mr. Eikeland and was told he needed glasses. E.T. paid \$85.00 as the cost for the eye exam and requested a prescription from a store employee at the check-out counter. E.T. received what he believed to be a valid prescription, which indicated at the top "Dr. John R. Eikeland".

E.T. testified that he attempted to submit the prescription to his wife's insurance carrier for reimbursement. However, the insurance company refused to pay the claim as the insurance company had discovered that Mr. Eikeland was not registered as an eye doctor, nor was he a current member of the applicable College.

E.T. then took upon himself to have another eye exam performed by a doctor, Dr. Tracy Liu. E.T. then wrote a letter of complaint regarding this matter to the College. After submitting the letter of complaint, E.T. received a refund cheque in the mail from the Member's then-employer.

College Witness Bev Sloan

Ms Sloan is the Deputy Registrar at the College. Ms. Sloan testified that Nitasha Nanda, Manager, Professional Conduct at the College, had sent a letter to Mr Eikeland regarding the complaint filed by E.T. The letter, dated April 17, 2014, was sent by registered mail and a copy of it was tendered as evidence at the hearing. However, no reply was ever received from Mr. Eikeland. The College then followed up by sending a second letter to Mr Eikeland, dated May 28, 2014. A copy of that letter was also made an exhibit at the hearing. Again, the College did not receive any reply from Mr Eikeland. Both letters were sent by registered mail to Mr Eikeland at his home address.

Defence Witness John Eikeland:

Mr Eikeland testified that he does not hold himself out or refer to himself as "Dr.", that he does not write prescriptions, and that he did not issue the prescription in question. He testified that the handwriting on the prescription issued to E.T. was not his handwriting. Mr Eikeland testified that he did a "visual acuity test" on the complainant, E.T., and that he told E.T. he probably needed a prescription. He recorded the findings from his "visual acuity test" on a Patient Information Form for E.T. He thought E.T. was going to see the optometrist at One Stop Optical.

On cross-examination Mr. Eikeland advised that the information provided on the Patient Information Form was filled in by both himself and E.T. He acknowledged that the numbers on

the prescription issued to E.T. were exactly the same as the numbers on the Patient Information Form, which were recorded from the “visual acuity test” that he had performed on E.T.

The panel was advised during the hearing that Member is no longer a member of the College, having resigned in 2014. However, he was an active member during the events in issue.

Decision

The panel deliberated and found the Member to have engaged in professional misconduct as alleged in paragraph 13 of the Notice of Hearing. Specifically, the panel found the Member guilty of professional misconduct pursuant to section 1 of Ontario Regulation 828/93 under the *Opticianry Act, 1991*, S.O. 1991, c.34, namely:

- (paragraph 2) contravening a standard of the profession;
- (paragraph 16) failing to reply without sufficient reason to a registered letter from the College;
- (paragraph 23) signing or issuing, in the Member’s professional capacity, a document that the Member knows or ought to know contains a false or misleading statement;
- (paragraph 26) contravening a provision of the *Opticianry Act, 1991*, the *Regulated Health Professions Act, 1991* or the regulations under either of those Acts; and
- (paragraph 28) engaging in conduct or performing an act, in the course of practising opticianry that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.

Reasons for Decision

The Member admitted the allegation of fact set out in the Notice of Hearing, paragraph 7. As explained above, the remainder of the allegations were in dispute.

The panel heard evidence from the complainant E.T. that he attended at One Stop Optical in Uxbridge on March 20, 2014, where the Member was employed as an optician, and requested an eye exam. E.T. received the exam from the Member and was told he needed glasses. After receiving the exam, E.T. asked for a prescription from the store receptionist. E.T. paid for the exam and a prescription was issued. The prescription, which was entered as an exhibit at the hearing, had a heading at the top of the document showing the name of the Member as “Dr. John R. Eikeland”. E.T. took the prescription and submitted it to his wife’s insurance provider, which rejected the claim as they had checked and found out that the name on the prescription was not a doctor authorized to issue a prescription. E.T. then wrote a letter of complaint to the College. Subsequent to the College receiving the letter of complaint, E.T. received a refund of the \$85.00 that he had paid for the “Eye Exam”. The panel found E.T. gave his evidence in a clear and

concise manner without any apparent attempts to embellish the facts as he saw them. The panel found this witness to be believable.

The second witness, Ms. Sloan of the College of Opticians, testified that the College sent the Member two registered letters advising him of the complaint made against him by E.T. The letters were sent to both the Member's home address and his business address on record with the College at the time. The first letter included a copy of the complaint and copies of relevant sections of the *Health Professions Procedural Code*. Both letters requested copies of E.T.'s patient records and the Member's response to the complaint. The College did not receive any replies to their letters sent to the Member. The panel found this witness to be forthcoming and credible in her testimony.

Mr. Eikeland admitted to performing a screening on the complainant. He testified he does not call himself "Dr." and that he did not issue the prescription to E.T. The Member further testified that as a matter of course he refuses to pick up any registered mail at all, as he assumes that registered mail brings bad news.

Under cross-examination the Member testified that he did not have the original patient record of E.T. but only a copy of the patient record. The Member was questioned on how information from the Patient Information Form, which forms part of the patient record, showed up on the issued prescription bearing his name, if he had not issued the prescription. The Member attempted to provide an explanation that the store receptionist had issued the prescription, but still could not explain how the receptionist had obtained a document which was a part of the patient's health record without the Member being present. Nor could he explain why, if he was present when the receptionist issued the prescription, he permitted that to occur. The Member was unable to explain similarities between the issued prescription and information recorded on the Patient Information Form, which he recorded after performing an "extended visual acuity test" or refraction. The panel does not accept, as the Member invited us to do, that the information was provided by the complainant, a lay person, as opposed to the Member, who was a person trained to provide the information. Nor could the Member explain their transfer to a prescription. Further Mr. Eikeland has no authority to issue a prescription and he provided no reasonable explanation as to how the prescription with the information contained therein might have been issued without his input.

Based on his answers to questions put to him in cross-examination, the panel found the Member's evidence was less than credible and certainly self-serving. His attempts on a number of occasions to deflect off the issues at hand was felt to be his way of avoiding the questions put to him.

Based on the evidence the panel found the Member guilty of all the allegations of misconduct in paragraph 13 of the Notice of Hearing, as follows.

1. The Member contravened a standard of the profession. The College did not call expert evidence regarding the standards of the profession alleged to have been breached by the Member, but submitted that there is an unwritten standard that members of the profession of opticianry do not issue prescriptions. The panel accepts College Counsel's argument that the Member's conduct is so egregious and the standard he breached is so well known that expert evidence is not necessary. In particular, the panel notes that s 27(2) of the

Regulated Health Professions Act, 1991, SO 1991, c 18 defines as a “controlled act” “prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers”, and s 27(1) prohibits a person from performing a controlled act in the course of providing health care services to an individual unless the member is authorized by a health profession Act to perform the controlled act. The *Opticianry Act, 1991* does not authorize Members of this College to prescribe eye glasses. The Member contravened a standard of the profession by allowing the issuance of a prescription for eye glasses.

2. The Member failed to reply without sufficient reason to a registered letter from the College. Specifically, he did not respond to the two letters from the College, dated April 17, 2014 and May 28, 2014, both of which the College sent to him by registered mail and both of which requested copies of the complainant’s health records. Failure to reply to communications from the College is a breach of the College regulations and is misconduct. The reason the Member gave for his failure to respond, namely that he does not pick up registered mail because he assumes that registered mail brings bad news, is not sufficient to excuse his failure to respond to communications from the College requesting patient records for the purpose of addressing a complaint.
3. The Member signed or issued, in his professional capacity, a document that he knew or ought to have known contained a false or misleading statement. The prescription provided to E.T. at One Stop Optical on March 20, 2014, contained a false or misleading statement in that it described Mr Eikeland as “Dr John R. Eikeland” and it purported to be a prescription. The Member knew or ought to have known that the prescription contained a false or misleading statement because the document which purported to be a prescription identified the member as “Dr. John R.Eikeland”, leading the patient to believe he was a person authorized by law to issue the said prescription. The Member signed or issued that document in his professional capacity in that he allowed it to be issued by his workplace, in his name, and with the results of his “visual acuity test”.
4. The Member contravened a provision of the *Opticians Act*. As set out above, s 27 of the *Regulated Health Professions Act, 1991* designates “prescribing or dispensing, for vision or eye problems, subnormal vision devices, contact lenses or eye glasses other than simple magnifiers” as a “controlled act”, which a person is prohibited from performing in the course of providing health care services to an individual unless the member is authorized by a health profession Act to perform the controlled act. The *Opticianry Act, 1991* does not authorize Members of this College to prescribe eye glasses. The panel accepts the College’s argument that the Member prescribed eye glasses contrary to the *Regulated Health Professions Act, 1991* by leading his patient to believe that he was authorized to perform an eye exam and that he was authorized to issue a prescription.
5. The Member engaged in conduct or preformed an act, in the course of practicing opticianry that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. Specifically, he issued or allowed to be issued a document under his name purported to be a prescription knowing full well that he as an optician he has no authority under the *Opticianry Act, 1991* to issue such a document. Further that he allowed the patient to believe that he was a person who was authorized to conduct an eye exam and authorized to issue a prescription with the

results of the said eye exam. This conduct would be regarded by members as disgraceful, dishonourable or unprofessional because members of the profession would regard this members' actions of so blatantly breaching the provisions of the Opticianry Act as to bring the practice of the profession of Opticianry into disrepute.

PENALTY

Evidence and Submissions of the Parties on Penalty

The College sought the following sanctions:

1. A reprimand to be delivered to the member within 30 (thirty) days of the date of the panel's Order;
2. Should Mr. Eikeland become a member of the College, an immediate suspension of Mr. Eikeland's certificate of registration for six (6) months;
3. Should Mr. Eikeland become a member of the College, the imposition of specific terms, conditions and limitations on Mr. Eikeland's certificate of registration, all of which are at the expense of Mr. Eikeland:
 - a) Requiring him to successfully complete, in the opinion of the Registrar, a course, pre-approved by the Registrar, in ethics, within one year of the issuance of the certificate of registration;
 - b) Requiring him to undergo and co-operate with four (4) random inspections at his place(s) of practice within two years of the issuance of a certificate of registration;
 - i. Costs of each inspection shall not exceed \$500.00 and shall be paid in full to the College within fifteen (15) days of each inspection.

College counsel argued that the penalty it proposed appropriately addresses the key principles of penalty, in that what was proposed protects the public interest, addresses concerns of both specific and general deterrence, and fairly considered the need for remediation. College counsel emphasized the need to deal with the issue and severity of the misconduct of which the Member has been found guilty, and the need for the College to exercise its mandate of public protection and to discourage the proliferation of this type of conduct amongst its members.

In support of its position, the College relied on two cases that address similar situations. One case concerned the Member. In 2009, a panel of the Discipline Committee found the Member committed professional misconduct for having prepared and dispensed glasses without a prescription from a physician or optometrist. The Member admitted to the allegations in that case and the parties agreed to a joint disposition. The Member received a reprimand and a two-week suspension of his certificate of registration, and certain terms and conditions were imposed. College counsel argued that the fact this case is the second finding by the Committee that the Member committed professional misconduct is an aggravating factor. The College sought a

longer suspension in this case because the Member appears to have fallen into similar habits despite the consequences of his conduct in 2009.

The second case relied upon by College counsel was decided in 2013 and concerned the conduct of Jaspal Mamak, a member who was found to have caused documents to be issued improperly. The Mamak case involved a number of patients and an element of insurance fraud. Mr Mamak's certificate of registration was revoked. College counsel argument that the Mamak case shows the high end of the range of penalty for the kind of conduct at issue in this case.

College counsel acknowledged by way of mitigating factors that the Member admitted one of the factual allegations.

In response to the College's position, the Member argued that the College had not proved its case and that based on his evidence the proposed penalty was too severe. He made arguments about the College's regulation, or lack of regulation, of those that are in his view dispensing and refracting improperly.

Penalty Decision

The panel deliberated and decided to make the following order:

1. The Member is required to appear before the panel to be reprimanded within 30 (thirty) days of the date of this Order;
2. Should Mr. Eikeland become a member of the College, the Registrar is directed to immediately suspend Mr. Eikeland's certificate of registration for six (6) months;
3. Should Mr. Eikeland become a member of the College, the Registrar is directed to impose the following terms, conditions and limitations on Mr. Eikeland's certificate of registration, all of which are at the expense of Mr. Eikeland:
 - a) Requiring him to successfully complete, in the opinion of the Registrar, a course, pre-approved by the Registrar, in ethics, within one year of the issuance of the certificate of registration;
 - b) Requiring him to undergo and co-operate with four (4) random inspections at his place(s) of practice within two years of the issuance of a certificate of registration;
 - i. Costs of each inspection shall not exceed \$500.00 and shall be paid in full to the College within fifteen (15) days of each inspection.

Reasons for Penalty Decision

The panel considered what would be an appropriate penalty that would address the severity of Mr. Eikeland's misconduct, bearing in mind that any penalty must address the College's mandate

to protect the public, and it must address the objectives of specific and general deterrence, and rehabilitation and remediation. The panel found that the position of the College on penalty addresses the primary mandate of the College to protect the public, as well as to maintain the standards of practice for the profession and to instill confidence in the members of the profession by the public.

The Members' arguments did not seem to address his conduct but rather to address the lack of the something that was deficient in the rules or scope of practice to allow members to practise in this fashion and that the College was behind the times.

Having considered the above arguments the panel found that the terms of the penalty sought by the College are appropriate in this case and that these terms addressed all the specific factors needed to be considered when forming an appropriate penalty.

COSTS

Following the hearing, the panel permitted the parties to file written submissions on costs.

Evidence and Submissions of the Parties on Costs

The College argued that this is an appropriate case to award costs. The College acknowledged that costs are not intended to be punitive and are not considered part of the sanction. However, this is Mr. Eikeland's second time before the panel for similar conduct. There is an argument that he ought to have known that such conduct would lead to a hearing. The College argued that the costs being sought are reasonable and proportionate and in line with other orders of this Committee, and noted in particular the following cases:

1. College of Opticians of Ontario and Adam Plimmer ,2013 – Costs Ordered \$10,000
2. College of Opticians of Ontario and Guido Panacci , 2006 - Costs ordered \$12,000
3. College of Opticians of Ontario and Balbir Kumar Ghai, 2005 – Costs ordered \$10,000

Despite being given an opportunity to respond to the College's submissions, the Member failed to make any submissions on costs.

Costs Decision

The panel deliberated and made the following order:

Mr. Eikeland is required to pay the College a portion of its costs in this matter in the amount of \$10,000 as set out below:

- 1) Payments are to be paid by credit card in the amount of \$500.00 per month with the first payment due within one month of the date of this order.

2) Subsequent payments will be charged to Mr. Eikeland's credit card monthly on the 30th of each month in the amount of \$ 500.00 until the order has been fulfilled.

Reasons for Costs Decision

The Committee considered the main factors which should be taken into account when making a cost order. Subsection 53.1 of the *Health Professions Procedural Code* permits the panel to make orders for costs in appropriate cases. The following are factors that should be considered when determining the appropriateness and quantum of a costs order:

1. Whether the costs award would address the type of infraction the member was found guilty of and the severity or potential risk to his patient(s),
2. The perception of the public and other members of the profession of the amount of the cost would go to defray the cost actually expended to prosecute the member's misconduct, and
3. Whether a costs award would serve to deter other members of the profession to engage in similar violations of the regulations.

The panel considered all the above factors and found that a costs award to the College in the amount of \$10,000.00 is appropriate. A costs award of \$10,000.00 is not punitive but does reflect the seriousness of the misconduct found by the panel, it defrays the costs actually expended by the College to prosecute the Member's misconduct, and serves as a deterrent to other members of the profession.

I, **David Milne**, sign this decision and reasons for the decision as Chairperson of this Discipline panel and on behalf of the members of the Discipline panel as listed below:



March 7, 2017

David Milne, Chairperson and
Public Member

Date