Health Professions Review Board
Suite 900, 747 Fort Street, Victoria, BC V8W 3E9

Complainant v. The College of Physicians and Surgeons of British Columbia

DECISION NO. 2017-HPA-045(a)

January 19, 2018

In the matter of an application (the "Application") under section 50.6 of the *Health Professions Act,* R.S.B.C. 1996, c. 183, as amended, (the "Act") for review of a complaint disposition made by, or considered to be a disposition by, an inquiry committee

BETWEEN:	The Complainant	**COMPLAINANT**
AND:	The College of Physicians and Surgeons of British Columbia	**COLLEGE**
AND:	A Physician	**REGISTRANT**
BEFORE:	Deborah Lynn Zutter, Panel Chair	**REVIEW BOARD**
DATE:	Conducted by way of written submissions closing on October 2, 2017	
APPEARING:	For the Complainant: Self-represented	
	For the Registrant Lara Zee, Counsel	
	For the College Michelle Stimac, Counsel	

DECISION ON APPLICATION FOR REVIEW OF AN INQUIRY COMMITTEE DISPOSITION

I STAGE 2 PROCEEDING

[1] This is a Stage 2 review of the Application to review a disposition of the College's Inquiry Committee.

II INTRODUCTION

[2] Both the Complainant and the Complainant's spouse (the "Patient") attended at the office of the Registrant, a cardiologist, for a consultation concerning irregularities of the Patient's heart. During the appointment the Registrant met with both the Complainant and the Patient in his office and then the Registrant conducted an examination and electrocardiogram assessment ("ECG") with the Patient alone in an

examination room. The Complainant and the Patient objected to the manner in which the Registrant conducted the examination and ECG.

III REVIEW BOARD JURISDICTION AND MANDATE

[3] The Review Board exists in part to provide, upon an application for review by a Complainant, impartial and objective reviews of complaint dispositions of Inquiry Committees of the health profession colleges of British Columbia. These are reviews of dispositions and not fresh examinations of complaints. In completing a review, I examine the entire record of investigation provided by the College, (the "Record") of the matter pertaining to the complaint and consider the Statement of Points with attachments provided by the College, the Registrant and the Complainant. My role is limited to reviewing the adequacy of the investigation and the reasonableness of the disposition by the Inquiry Committee. This is set out at s.50.6(5) of the *Health Professions Act,* R.S.B.C. 1996, c. 183, (the "Act") :

> 50.6(5) On receipt of an application under subsection (1), the review board must conduct a review of the disposition and must consider one or both of the following:
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> (a) the adequacy of the investigation conducted respecting the complaint;
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> (b) the reasonableness of the disposition.

[4] The powers of the Review Board for the conduct of reviews are set out in s.50.6(8) of the Act which states that:

> 50.6(8) On completion of its review under this section the review board may make an order:
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> (a) confirming the disposition of the inquiry committee;
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> (b) directing the inquiry committee to make a disposition that could have been made by the inquiry committee in the matter; or
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> (c) sending the matter back to the inquiry committee for reconsideration with directions.

IV COMPLAINT

[5] On May 20, 2016, the College received a complaint from the Complainant husband on behalf of the Patient, the wife. On May 24, 2016, the Complainant substituted an updated complaint based on what he stated were new details that had been brought to his attention. On June 3, 2016, the Complainant submitted a further revised and final complaint, updating the complaint based on further new information "as my wife felt embarrassed to talk about it until recently." The complaint form sought the following relief:

> - Would like to see a temporary suspension from practice.
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> - Would like to see [the Registrant] banned from ever performing tests involving

exposure of his female patients. If the testing is required, he should be required to hire a staff member to perform on his behalf.

- Would like to see formal discipline such as the College deems appropriate.

- Would like to see [the Registrant] ordered to attend mandatory training sessions related to patient communication and patient modesty/dignity.

- Would like [the Registrant] ordered to inform all of his patients of what tests he would like to perform, the reasons for which and that they have a right of refusal.

- Would like the fundamentals of performing ECG tests on female patients reviewed with [the Registrant] so as to ensure he has a better understanding of the need to respect patient's dignity and rights.

[6] The complaint arose from events that took place on May 12, 2016, on which date the Complainant and the Patient attended at the Registrant's office.

[7] The 36-year old female Patient was referred to the Registrant by her family physician. The May 5, 2016, referral letter advised the Registrant that the Patient had in September 2015 experienced "palpitations," that they had recurred over the past month, that there was some chest tightness but no pain, and that her husband, a paramedic, advised that her heart rate "is definitely irregular at times." The letter noted that the patient's "labs were within normal range" and that an ECG showed "normal."[1] The referral letter noted that a Holter monitor test was pending.[2]

[8] The ECG mentioned in the referral letter was conducted at a local LifeLabs facility on April 20, 2016. The Patient's letter to the College, received June 15, 2016, described that ECG, conducted by a female technician, as being done respectfully wherein only portions of her body were uncovered briefly as each electrode was affixed and then removed:

> When she brought me into the room where I was having the test, she asked me to remove my top and bra so she could connect the electrodes and gave a sheet as well as a blanket to cover up. When she came back in the room, I was lying on the bed with the sheet covering me and she told me she had to pull the sheet down in order to connect the electrodes. She only pulled the sheet down to expose the areas where the electrodes were going to be connected and connected the electrodes and wires at the same time. She connected the ones on the upper part of my body first and pulled the sheet up as best as she could so that I was not exposed. She then connected the electrodes and wires on the lower part of my body and performed the test noting that it was only about 30 seconds long. After the test, she disconnected the electrodes, barely having to pull the sheet down to remove them so I wasn't really exposed. As uncomfortable as I was with the test and having to be exposed, it was done professionally and with consideration for my privacy (and dignity).

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[1] The Record states that the blood tests were conducted on April 22, 2016.

[2] The Record states that the 24 hour Holter Monitor test was conducted on April 30, 2016 and the report was dictated late on May 5, 2016.

[9] The Patient's letter to the College stated that she was uncomfortable knowing the referral was to a male doctor, but she felt better knowing that her husband was going to be with her. She stated that she expected the consultation to be about the recent test results and that if anything else was required, it would happen in a hospital.

[10] The Patient's account was that after some discussion of her background and medical history, the Registrant "explained that my condition is simply a benign arrhythmia and that it would go away on its own but may come for a time and then go away again." After answering some questions posed by her husband, discussing the Holter monitor results and assuring her that there was no need to be concerned, the Registrant "pointed at me and said 'okay, come with me' and pointed at my husband and said 'you stay here.'[3] No other information was given on where we were going or what was happening. He had more than enough information from the test results, he gave his final diagnosis, what could it be?"

[11] The Patient stated that she followed the Registrant to a small examination room with an examination bed and an EKG machine, where the Registrant advised her to take everything off from the waist up and put the gown on with the opening in the back. The Patient stated that the Registrant then left the room and closed the sliding door, and that she hesitated for a moment but did as she was asked as she felt this was part of the procedure for the appointment. She stated that she took her bra and top off, put the gown on and the Registrant returned as she was tying the gown in the back. She states that he said "don't worry about tying that up, I'll be ripping it down in a minute anyway." The Patient stated that she felt intimidated but didn't feel there was anything she could do. The Registrant then took her blood pressure and listened to her heart. She states that "at this point there was still no mention of what he was doing or why I was in that room with a gown on." The Patient then stated:

> Next, [the Registrant] asked me to lie back on the bed and he pulled the gown down from the front, fully exposing my breasts. He had still made no mention of what he was doing but I assumed that he was doing another EKG. He attached the electrodes to the top part of my body (note that there was no inappropriate touching) and then attached them to my legs. I was fully exposed throughout this process. After the electrodes were attached, he then connected the wires to the electrodes. Again, I was fully exposed throughout the process. As he was attaching the electrodes and then the wires, he carried on a conversation about my mother being from Australia, his travels to Australia, etc. As all this was happening, while I engaged in the conversation because it helped distract what was going on, I stared up at the ceiling the entire time. [The Registrant] finally went to the EKG machine to start the test and while he walked over, he asked "what is the M". He was referring to small pendant that was on my necklace which has an "M" engraved on it for my daughter's name…. I was still exposed while the test was happening. After the test, [the Registrant] removed the electrodes and wires and finally pulled the gown back up. He said I could dress and would meet me back in his office. He took the tape from the EKG machine and left the room.

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[3] The Complainant's account of this part of the interaction was :"[The Registrant] explained that [the Patient's] heart is healthy and she simply has a benign arrhythmia that will go away on its own – nothing to worry about. Next, [the Registrant stood up, walked over to his door and said '[Patient], you can come with me'. I began to stand up and he said '[Complainant], you can wait here'."

[12] The Patient stated that she returned to his office after getting dressed. Although the conversation among the Registrant, the Patient and the Complainant continued in the Registrant's office, there was no mention of the examination or the ECG. After the Registrant provided a prescription for a beta blocker to ease the symptoms, the Patient and Complainant left the Registrant's office. At this time the Patient told the Complainant what had occurred while she was out of the office and that she was uncomfortable with it. After reflecting on the experience, the Patient determined that what happened in the room was "not only unnecessary, but very unprofessional and disrespectful to me and my privacy. In short, it was wrong. This was confirmed when my husband confronted [the Registrant] the next day and he admitted the test was redundant."

[13] The Complainant's account of this part of the interaction is as follows:

> When [the Patient] returned to the office, the three of us spoke again. There was no mention made of the ECG test occurring or the result. One would think that if the ECG was needed, the result would be shared with the patient. I asked to see the Holter monitor test result to try to gain a better understanding of the condition. We were shown the graph with a quick repeat of the explanation that it's just a benign arrhythmia that will go away in its own time. We were given a prescription for a beta blocker to ease the symptoms (an extension of the prescription given by family doctor). Upon leaving the doctor's office [the Patient] shared with me that [the Registrant] took her to the exam room, performed an ECG and that is [sic] was done in such a way and the many reasons for which she was uncomfortable. My feelings are much the same. Note: I returned the following day to speak with [the Registrant] about the fact that we were feeling uncomfortable about the nature of the test and the reason for which it was performed. [The Registrant] stated that it's just standard procedure. I then questioned the need for the test given that he already had all the test results and had already made a diagnosis prior to seeing us. [The Registrant] admitted that the test was redundant and could give no other reason for which he felt the need to perform the test.

[14] The Patient described her impression of the event, and its impact:

> … I have never liked going to the doctor and it is because I am very private when it comes to my body. The only man who has ever seen me exposed was my husband. I prided myself on that, as did my husband, but that was taken away from us when [the Registrant] chose to perform a redundant test while leaving me exposed the entire time for no reason I can think of other than to "have a look" for his own self-gratification. I have only spoken about this to my husband and a co-worker who is a very good friend. I haven't told anyone in my family or my best friends because I feel so stupid that I let this happen in the first place. I'm afraid that they will say "why didn't you just leave" or "what didn't you get [your husband]" or "why didn't you say no" or "why didn't you ask what was happening". Every day I ask myself these questions and I don't have an answer. In that moment I just froze and felt powerless. I am a well-educated business executive and have always thought of myself to be fairly smart and intelligent but after this, I have never felt so stupid and unintelligent in all my life.

[15] The Patient stated that she was so upset by the events on May 12, 2016, that the necklace with the "M" which was a gift from her husband commemorating the first birthday of their daughter has been thrown away. The Patient stated that her dignity and privacy were taken away from her.

[16] The Complaint alleged that:

> - The Registrant "showed no consideration for the modesty of his patient when he had her remove her clothing and unexpectedly exposed her in order to conduct a test without permission and with no explanation as to why – both before and after the test was complete."
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> - The fact that the Registrant "chose to leave his patient exposed (both breasts) while he installed all of the other electrodes and cables is of huge concern. Our understanding is that the doctor (after having explained what he would like to do and why he would like to do it) should pull the gown just far enough to install the first two (upper) electrodes and then expose as required to install the electrodes around the breast with the patient being covered back up immediately after chest electrode and cable placement. This is our understanding based on speaking with others, research on the topic and past experience….
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> - Based on the College's Standards and Guidelines, the Registrant should have given the Patient the option of having her husband attend, and should have been alerted to her modesty given that she was tying her gown strap when he entered the room.
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> - Contrary to the College's Standards and Guidelines, the "scope of the examination and the reason for the examination were not explained to the patient."
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> - The Registrant breached the CMA ethical requirement to treat the patient with dignity when he "presumed he had the right to expose his patient without any explanation as to why and leave her that way far longer than necessary."
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> - "We are left feeling that a) [the Patient] was exploited for no reason and for no benefit of her own. b) No information was provided that would have helped us make an informed decision. c) No effort was made to communicate with us about where he was taking the patient or why. d) There was no recommendation to perform an ECG but it was performed anyways. Also: the ECG was of no benefit to the patient as a diagnosis had already been made. e) The ECG was not recommended and as such the right of refusal could not be respected. f) There was no consideration given to the fact that the patient's husband (support person) was left waiting and wondering where his wife had been taken and why."

[17] The Complaint posed several questions that overlapped with the allegations, including why the test was necessary at all ("we find it odd and creepy that a sensitive test by a male doctor on his female patient was performed redundantly"), why the test was not discussed in the office, why the husband was not allowed to be present, whether it was necessary to expose both breasts, why the Patient was not informed of the reasons she was being asked to undress, why the Registrant felt he "has the right to pull down the gown of his female patients thus exposing them without permission and without any advanced warning," why the Patient was left uncovered and exposed while he placed the electrodes and cables, why the Registrant commented on her necklace while she was lying naked and whether the Patient was "exploited for personal advantage."

[18] A College "Memo to File" states that on June 10, 2017, a College official spoke to the Complainant by phone, emphasized the importance of first-hand information and

asked whether the Patient would be open to an interview at the College by two women. The College staff member stated that "it would be ideal to have an interview with [the Patient] but also presented the option of a signed statement confirming that [she] agrees with the information in the complaint."

[19] On June 13, 2016, the Complainant emailed the College advising: "At this point, she really doesn't want to speak in person to with anyone about the incident" and has instead drafted a letter detailing her own version of events." The email stated that "given that [the patient] was in the room and I was not, she asked me to modify my complaint form description page to ensure 100% accuracy before signing." It stated that: "If an in-person interview becomes necessary in the future, please let me know and I'll revisit the option with her." The College responded on the same date stating: "We absolutely understand and will not pursue an in-person interview. If that changes in future, we will speak with you about it."

[20] The Patient's signed written account was submitted to the College on June 15, 2016. Her cover letter, which endorsed the complaint, stated that "I'm not really comfortable talking about this and prefer not to be interviewed at this time. Alternatively, I have enclosed a letter that provides my own account…."

[21] On June 21, 2016, the College provided all of the complaint material to the Registrant, stating that "**we require your response to the allegations contained in the complainant's correspondence**" [emphasis in original] and stating that "your response [requested by July 20, 2016) should address all identified concerns and include the following details relevant to the complaint:

- Whether the Patient was offered a chaperone; and
- Describe the communications with [the Patient] prior to and after you "pulled the gown down from the front."

[22] On July 7, 2016, the College's Senior Deputy Registrar delivered the complaint to the Inquiry Committee recommending that the matter be investigated by the Inquiry Committee on the basis that if the allegations "were admitted or proven" they may be concluded with at least a reprimand. This language refers to the jurisdictional test set out in s.32(3)(c) of the Act to determine whether a complaint is required to be disposed of by the Inquiry Committee.

[23] On July 21, 2016, the College granted the request of the Registrant's counsel for an extension of time to August 19, 2016, to respond.

V REGISTRANT'S RESPONSE

[24] On August 2, 2016, the College received the Registrant's response. After describing his 30 years' experience, the Registrant stated that: "From her letter it is apparent that even before seeing me, and also previously with a female cardio tech, she had felt extremely ill at ease in being exposed and examined, as is not infrequently the case in young and even sometimes older women." The Registrant stated that: "The crux of the problem seemed to be that the patient was surprised and offended by

manner in which I examined her heart; she mentions me pulling the gown down so as to auscultate the heart and perform the ECG."

[25] The Registrant then described "my usual practice" in conducting a consultation. He stated that for a new consultation, his office books a half hour, and he begins by inviting the patient and a family member into his office where he takes a history and reviews their concerns. He stated that:

> Following this encounter, I tell the patient that I will be performing an exam and escort them to the examining room directly beside my office, provide a gown, and ask that they remove all of the clothing from the waist up for the cardiac examination. I always leave the room to allow the patient to undress.
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> My technique in examining the heart is to start with the BP, then examine the posterior chest, so that the patient, any patient, has a moment to get used to being examined. I then proceed to the cardiac exam, usually lowering the gown slightly and listening at the 2nd left and right intercostals spaces, and auscultating the carotids, before lowering the gown further, especially on the left to observe the PMI, feel for an RV lift and then listen at the apex and lower left sternal border. Then, with the gown down I attach cardiac electrodes for an ECG, turn away from the patient while the ECG runs, which takes about 15 seconds. It is awkward with paper gowns to try to attach electrodes, then cover the patient up and run the ECG. Patients have not identified this as a problem in the past.
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> I then invite the patient to get dressed in privacy and return to my office where their spouse is waiting and we then discuss the problem, its etiology and pathology and its treatment.

[26] The Registrant emphasized a publication setting out "what every medical student learns" - namely that for proper "Inspection, Palpation, Percussion and Resuscitation," the authors "recommend that the clinician be seated looking tangentially across the chest to observe such signs; clearly this cannot be done on a clothed patient."

[27] The Registrant stated that he understands that the occasional patient finds exposure of the chest embarrassing, and "I am sensitive to any verbal or non-verbal cues of discomfort. When there are such indications I might limit the examination minimizing exposure which unfortunately compromises thoroughness." He stated:

> I do not recall any such signs of discomfort with this patient nor did she or her husband express any apprehension at the prospect of being examined. Had they done so, or had I sensed it, I would have invited [the husband] to accompany us into the (small) examining room.

[28] The Registrant set out several points in response to the questions posed in the complaint:

> - I usually chat with the patient about almost anything (their work, their necklace, their grandchildren, or anything else that comes to mind) in order to try to put them at ease….

- I virtually always perform an ECG as part of a complete cardiac assessment… because … one is not infrequently surprised to document unsuspected Atrial Fibrullation, Flutter or other arrhythmias.

- it is my *usual* practice to tell the patient prior to moving into the examination room that I will be doing a cardiac exam and an ECG. [emphasis added]

- I invited [the husband] to remain in my office, as opposed to asking him to the waiting room, despite the fact that I leave personal belongings in my office. My examining room is small and unless the patient or husband specifically asks to come I generally don't bring them in though I certainly have no objection and frequently do invite family members (despite the lack of space), for e.g. if translation is necessary.

- I have never had a patient request a chaperone, though, should they state that they would feel more comfortable that way, obviously I would in no way object. I work with three female office assistants and any one of them would be available to chaperone if required.

- I examine patients in a sensitive and empathetic. [sic]

[29] The Registrant concluded:

> I am sorry that [the Complainant and Patient] took exception to what was in fact a routine cardiac assessment. In reviewing the letter, it is evident that she was apprehensive about being examined by a male physician even before entering the office. I wish her concerns had been brought to my attention in advance so that we could have reviewed whether I was the appropriate choice of consultant for her cardiac symptoms.
>
> I take great pride in my "bedside manner" and in being as affable and caring as possible since I am, like most clinicians, highly empathetic to the patient both in terms of the encounter and its implications and possible outcome. I am therefore deeply dismayed by the letter of complaint and the suggestion of some sort of impropriety. I would assure [the patient] that I approached her exam, as with all my patients, professionally and respectfully in order to assess and treat her medical problems.

[30] On August 9, 2016, the Registrant provided the College with the two enclosures (the family physician's referral letter and his consultation report) referenced in his letter.

[31] The College provided the Registrant's response and enclosures to the Complainant, stating: "Although you are not required to do so, we invite you to provide any further information which you feel may assist the College in its investigation" by August 30, 2016.

[32] On August 29, 2016, the College wrote to the Registrant acknowledging receipt of the referral letter and consult report and requesting that he provide "copies of any clinical notes and test results" pertaining to the Patient.

VI COMPLAINANT'S REPLY

[33] On August 29, 2016, the Complainant submitted a letter in reply to the Registrant's response, which they characterized as being "inaccurate, full of

contradictions, incomplete and very vague." Key points raised in that reply are summarized below:

- Given the Registrant's acknowledgement that young and even sometimes older women are not infrequently ill at ease in being exposed and examined "it is only logical that steps be taken to preserve the patient's dignity but in this case, none were."

- We have both had ECG's performed on us in the past and as such have a baseline for which to compare this test. We are well aware of the requirements for only exposing the patient as much as necessary, providing an adequate gown or drape, explaining the reasons for the wish to perform the test, obtaining permission and explaining what and why you're doing.

- While the Registrant described his usual practice, he did not in this instance, "review any concerns and did not tell the patient that he would be performing an exam." While the Registrant stated that "he tells the patient he will be performing an exam … he most definitely did not tell (or ask) us."

- The Registrant did not ask that the Patient remove her clothing for a cardiac examination. His "exact words" were directive: "take everything off from the waist up, put the gown on opening in the back" and with no indication of a cardiac examination.

- With regard to the Registrant's statement that it is "awkward" to perform an ECG with a paper gown the Complainants stated "Really? Awkward for who?" The Complainant alleged that it is a professional standard that the patient be provided with an adequate gown or drape.

- The Registrant's reliance on the text he referred to does not address why a cardiac exam was necessary in this case given the recent testing, is confusing given that he conducted the palpitation, percussion and ausculciation with the gown up, and does not explain why both her breasts were fully exposed for an extended period of time. They state:

> There was a visual inspection of the chest but no palpation, percussion and no further ausculciation to what was done with the gown up. Given this, what was the point of exposing the breasts for 6-7 minutes? What was the point at all? Was there really something to be gained (for [the Patient]) from simply visually inspecting her chest? If so, we would like to know what.

- The fact that the Patient attended the appointment with her husband and was tying the gown straps when he entered the room should have been a "non verbal cue" that she had discomfort with being exposed.

- Empathy was not reflected in the Registrant's directions; it would have been reflected in proper explanation, recommendations and efforts to preserve the patient's modesty.

- The Registrant's consult letter to the family physician does not accurately set out the examination that was in fact conducted.

- Given that I visited his office to question him the following day, he received the complaint form only a few weeks later and he recalls such details as 'inviting' me to remain in his office and that we didn't 'express any apprehension to the prospect of

being examined,' it's clear that he recalls this appointment just fine. As such, we question why he makes repeated references to his usual practice which is both unknown, irrelevant and does not address our complaints.

[34] On September 6, 2016, the College provided a copy of the reply letter to counsel for the Registrant.

VII FINAL INVESTIGATIVE STEPS

[35] On October 3, 2016, following an email exchange with the Complainant, the College wrote to the Registrant reiterating its request for "any clinical notes and test results" for the Patient.

[36] On November 8, 2016, counsel for the Registrant provided the College with the Registrant's records, consisting of the May 5, 2016, referral letter, the May 5, 2016, Holter test report and the May 12, 2016, consultation letter.

[37] On November 24, 2016, the Complainant emailed the College noting that the additional records did not include the in-office ECG: "We are primarily interested in seeing the ECG performed by [the Registrant] along with his clinical records. While we knew he went through the motions of performing an ECG, we have little confidence that the test was actually performed." On December 8, 2016, in a telephone conversation with the College's Director of Investigations, the Complainant expressed concerns with the length of the investigation and the completeness of the records, expressing doubt that an ECG had actually been performed by the Registrant.

[38] On December 9, 2016, the College wrote to Registrant's counsel in relation to the missing ECG results and other clinical records.

[39] On January 6, 2017, counsel for the Registrant sent the College additional records consisting of the pre-consult blood tests and ECG, together with an additional ECG test strip dated May 2016. Counsel stated that the Registrant "advises that he does not have any clinical notes for this patient." The College sent a copy of that letter and enclosures to the Complainant.

[40] On January 19, 2017, the Complainant emailed the College stating that given the Registrant's reluctance to admit that there were no clinical notes, "and the lack of any kind of details on the ECG report, we question its authenticity."

[41] On January 20, 2017, the College notified the Complainant that this matter would be put before the Inquiry Committee on February 16, 2017. The Registrant was notified of the same on January 26, 2017, at which time he was provided with the Complainant's January 19, 2017 email.

VIII INQUIRY COMMITTEE MEETING AND MINUTES

[42] On February 16, 2017, a four person panel of the Inquiry Committee (two physicians and two public representatives) met to consider the complaint. Five staff members, including three in-house lawyers and one outside legal counsel listed as a

guest, were also in attendance. The panel was provided with the relevant correspondence from both the Complainant and the Respondent.

[43] The Minutes reflect the Inquiry Committee's conclusion firstly that given the nature of the cardiac referral, the examination and the ECG were not inappropriate despite the recent tests:

> The Committee reviewed all the available information. The Committee noted that while [the Registrant] considered the visit to be routine and consistent with his standard practice, both the Complainant and the patient believed [the Registrant's] approach to the visit was inappropriate. More specifically, they were dissatisfied with [the Registrant's] decision to perform a cardiac examination and ECG, and the manner in which the examination was conducted. The Committee acknowledged the perception of the Complaint and the patient that the results of the previous Holter and ECG were sufficient, and [the Registrant] did not need to perform an additional ECG. The Committee noted that neither the Complainant nor the patient attended the visit expecting a further examination. However, the Committee noted that the patient was referred for evaluation of palpitations and that a standard cardiology assessment for a new patient presenting with palpitations requires a physical examination. The Committee expressed the opinion that the College would expect a cardiologist to perform an examination when evaluating a patient in this context. Similarly, since the performance of an ECG is routine at most cardiology assessments, the Committee did not consider it inappropriate for [the Registrant] to have performed a further ECG on the patient.

[44] The Minutes go on to state that while the examination might be considered routine from the Registrant's perspective, "such is not the case for his patients":

> Many female patients would consider a standard cardiology examination to fall under the category of a "Sensitive Examination". The Committee noted [the Registrant's] statement that he would have had no objection to performing the assessment of the patient in the presence of the Complainant or another chaperone, but that this was not offered because he did not perceive that the patient was uncomfortable with his standard practice. The Committee noted the contrast between the patient's description of the ECG as performed at Lifelabs, when exposure was minimal and discreet, versus her experience with the ECG performed by [the Registrant], when she was fully exposed throughout the preparation and performance of the ECG. *The Committee was critical of [the Registrant] for failing to ensure an appropriately sensitive draping practice during his examination and performance of the ECG for this patient*. The Committee noted that [the Registrant] clearly failed to perceive the discomfort of his patient in this instance.
>
> The Committee noted the patient's perception of [the Registrant's] question regarding her necklace and acknowledged that it is not uncommon for physicians to engage in "small talk" during a consultation to put patients at ease.
>
> *The Committee noted that there was no reason to question the authenticity of the ECG submitted by [the Registrant].* The Committee noted that the consultation letter of [the Registrant] is considered to be his clinical notes and acknowledged that for the majority of consultant physicians, the consultation letter is the only clinical documentation of the visit. In this regard, the Committee expressed the view that [the Registrant] recorded the presenting complaint and history in appropriate detail.

> *The Committee concluded with criticism of [the Registrant] for his failure to perform an appropriately sensitive examination of the patient in this instance. The Committee expressed further criticism of [the Registrant] for his failure to acknowledge and discussion the results of the Holter monitor in his consultation report to the family physician. In light of the foregoing, the Committee directed that [the Registrant] attend at the College for a concluding interview with Registrar staff, pursuant to section 33(6)(b) of the Health Professions Act, to discuss the issues raised in the complaint and the concerns of the Committee.* [emphasis added]

[45] The Minutes conclude with the instruction that College legal counsel arrange for an interview with the Registrant and write to the parties.

[46] At the time of the complaint there were two College Guidelines of particular relevance:

> "Sensitive Examinations." With respect to physical examinations, this guideline states that "the scope of the examination and the reasons for examination should be explained to the patient" and that "a patient must be provided with an adequate gown or drape." It states that while a chaperone is not mandatory "physicians should consider carefully whether a chaperone would contribute to an individual patient's feeling of comfort and security."
>
> "Sexual Boundaries in the Patient-Physician Relationship", which alerts physicians to the existence of power imbalances in the patient-physician relationship, encourages physicians to carefully consider the use of chaperones and provides that the scope of the examination and the reasons for the examination should be explained to the patient.

It appears that the Inquiry Committee's reference to "Sensitive Examination" and "appropriately sensitive examination" references the foregoing.

[47] As will be discussed in more detail below, the Minutes are silent regarding the key complaint allegation that the Registrant failed to appropriately communicate the scope and reasons for the Sensitive Examination to the Patient.

IX COLLEGE LEGAL COUNSEL'S LETTERS

[48] On March 15, 2017, counsel for the College wrote to the parties "on behalf of the Inquiry Committee." Counsel wrote a nine page letter to the Complainant, and a two page letter to counsel for the Registrant which enclosed the longer letter to the Complainant.

[49] After summarizing the Complaint, the Registrant's response and the investigative history, the letter turned to the "Committee Discussion", noting that: "The mandate of the Committee was to determine whether the medical practice and conduct of [the Registrant] was consistent with the standard expected of a cardiologist practicing in British Columbia."

[50] Under the heading, "Committee Discussion", counsel's letter contained certain additions to what the Minutes state regarding the Committee's discussion. In particular,

the letter adds the statement, not present in the Minutes, that "The Committee acknowledged the statement that the extent of the physical examination of the eyes and abdomen were not consistent with the documentation; the Committee was unable to comment further on this aspect of the complaint."

[51] Given the detail set out in the Minutes, it is not entirely clear what to make of this addition included in a letter sent a full month after the Inquiry Committee meeting. While it would have been far preferable to have seen evidence in the Record (or in the letter itself) that the Inquiry Committee approved counsel's letter prior to its release, I am in this case prepared to accept the statement that counsel's letter was sent "on behalf of" the Inquiry Committee.[4]

[52] Counsel's letter concluded:

> The Committee directed that [the Registrant] attend at the College for an interview with Registrar staff to discuss the issues raised in the complaint, and the criticisms of the Committee. College guidelines concerning "Sensitive Examinations" will also be reviewed with [the Registrant] at the time of the interview.
>
> This report will be retained in the permanent College file of [the Registrant], available for consideration in the context of any future concerns.

X THE APPLICATION FOR REVIEW AND COMPLAINANT'S STATEMENT OF POINTS

[53] On April 12, 2017, the Complainant filed an application for review.

[54] The application for review does not challenge the adequacy of the investigation. It does however argue that the disposition was unreasonable on the grounds that (a) the decision to perform the ECG was poorly addressed; (b) the authenticity of the ECG is not addressed; (c) the "small talk" component of the complaint is not addressed; (d) the inconsistencies in wording are not addressed; (e) the manner in which the ECG was performed was poorly addressed; (f) the manner of communication with the patient was not addressed; and (g) the matter of medical inaccuracies is not addressed.

[55] On June 19, 2017, the Complainant submitted his Statement of Points. In summary, the Complainant argued the disposition was unreasonable because:

- The Committee failed to consider or reference its own Standards in deciding this complaint, in particular the Standard entitled *Physical Examinations and Procedures*, which includes:

  …..

  2. Inquire whether a patient wishes to have another person of their choice present during the physical examination or procedure, particularly with sensitive examinations or when disrobing is required.

[4] The Review Board has previously warned that staff letters should not "usurp the role" of the relevant College Committee: Decision No. 2015-HPA-065(a) at paras. 107, 120 and 302.

…..

5. Not make any remarks or gestures that may or could reasonably be interpreted as sexualized by the patient.

…..

9. Provide the patient with a gown or cloth to drape during the physical examination or procedure if disrobing is required, and only expose the area specifically related to the physical examination or procedure. Frequently both a gown and a drape are required to ensure patient privacy and comfort.

- The Committee stated that the events in question were not largely in dispute when there was a dispute about key events.

- The Committee stated that all parties agreed that the Patient was "asked" to disrobe when they alleged that she was "told" to disrobe with no explanation as to why.

- The Committee failed to criticize the Registrant for failing to explain and obtain consent for performing the examination.

- The Committee failed to recognize that a redundant test is contrary to the CMA Code of Ethics which permits only beneficial tests, not tests that would be redundant.

- The Committee's emphasis on the Registrant's perception of the Patient's comfort level ignored its own Standard which requires physicians to inquire whether a patient wishes to have another person present, particularly in a sensitive examination.

- The Committee's criticism of the Registrant for failing to ensure an appropriately sensitive draping practice is "not enough to address the problem."

- The Committee failed to identify the problem with the "small talk" in this case – "there is a difference between chatting about the weather … and inquiring about a piece of jewellery lying between the exposed breasts of your brand new topless female patient…"

- The Committee failed to question the authenticity of the ECG given the time it took to disclose, the fact that it does not appear like an official medical record and is "little more than a random ECG with the patient's name and date hand written in the top right corner, and its difference from the Lifelabs ECG.

- The Committee failed to comment on tests that the Registrant did not perform.

[56] In support of his Statement of Points to the Review Board, the Complainant appended the College's Professional Standard entitled "Physical Examinations and Procedures." This Standard, dated June 6, 2017, sets out the College's position that: "Except in emergency situations, physicians must always obtain patient consent before proceeding with a physical examination or procedure, which includes clearly explaining the rationale for the physical examination or procedure and what it will involve." It also directs physicians to: "[i]nquire whether the patient wishes to have another person of their choice present during the physical examination or procedure, particularly with sensitive examinations or when disrobing is required," and, in disrobing situations, the

physician is to “only expose the area specifically related to the physical examination or procedure.”

[57] The Complainant also submits that the Inquiry Committee’s remedial outcome of “criticism” was unreasonable. He asks the Review Board to direct the Inquiry Committee to “modify its disposition to include disciplinary action against the Registrant,” and to direct the Inquiry Committee to suspend the Registrant’s application for 3 months, to direct that he attend training in order to accord with College standards, and to complete follow up checks to ensure compliance.

XI STAGE 2 SUBMISSIONS OF THE COLLEGE AND REGISTRANT

[58] On July 18, 2017, I wrote to the parties noting that the Standard referenced by the Complainant entitled *Physical Examinations and Procedures* was dated June 6, 2017, (13 months after the examination in this case) and asked that the College provide the Review Board with any guideline that was in place at the time of this examination.

[59] On August 15, 2017, following the College’s provision of two guidelines and a document from its Resource Manual,[5] I wrote to the parties directing this matter to a Stage 2 hearing, set a submissions schedule, and posed a question arising from the item in the Sensitive Examinations Guideline which states: “The scope of the examination and the reasons for the examination should be explained to the patient.”

[60] On September 14 and 15, 2017, the College and Registrant filed their Statements of Points. The College and Registrant submit that the disposition was reasonable and also made submissions regarding the adequacy of the investigation.

[61] With respect to the adequacy of the investigation, the College submits that the elements of the complaint - whether the ECG was indicated, whether the Registrant’s conduct prior to and during the ECG met the College’s standards, whether his demeanor and overall patient care met expected standards and whether his clinical notes and documentation were sufficient – all related to a single event. The College submits that its actions in obtaining information from the Complainant and Patient, a response from the Registrants and a review of the medical records was sufficient, particularly where, as here, each party was given the information and responses of the other during the investigation. The College submits that “the law does not require the Inquiry Committee to pursue every avenue of investigation” (Decision No. 2014-HPA-139(a) at para. [22]) and argues that in the circumstances here, the investigation was adequate. The Registrant agrees, emphasizing that the Inquiry Committee has a screening role and that the investigation “went beyond a cursory investigation.” The Registrant emphasizes that the College is not obliged to investigate every area proposed by a complaint regardless of relevance, that College does not have unlimited resources and that “[t]here is nothing more the College could have done in investigating the allegations made by the Complainant patient given her decision to not attend for an interview.”

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[5] As noted by the College, the guideline “Sensitive Examinations” had already been provided as part of the College Record on May 19, 2017.

[62] With respect to the reasonableness of the disposition, the College cites previous Review Board and court decisions that help define the concept of reasonableness as distinct from correctness. It argues that this complaint was:

> … essentially about how [the Registrant] proceeded with a cardiology examination. While some expectations are clearly communicated to the public, for example with respect to sensitive examinations, the application of these standards and guidelines, which require the exercise of discretion and judgment, to the practice of medicine is best adjudicated by the Committee. The *HPA* has empowered the Committee thusly and the College submits that significant deference for the Committee's decisions must follow.

[63] The College submits that the Minutes reflect not only the standards the Inquiry Committee was applying but how the Inquiry Committee applied them to the Registrant's care and conduct. The Minutes also reflect the Committee's consideration that its public protection mandate would be addressed under s.33(6)(b) with the Registrant's attendance at the College for an interview with Registrar staff. The College submits that the disposition letter "offers a clear line of reasoning from the information collected, through the analysis applied by the Committee, to the outcome."

[64] With respect to the Review Board's question about the guideline, the College emphasizes that the "Sensitive Examinations" guideline is a guideline and not a standard. The College refers to a passage from its website that explains the difference:

> A standard reflects the minimum standard of professional behavior and ethical conduct on a specific topic or issue expected by the College of all physicians in British Columbia. Standards also reflect relevant legal requirements and are enforceable under the [*HPA*] and College Bylaws under the *HPA*.
>
> A guideline reflects a recommended course of action established based on the values, principles and duties of the medical profession. Physicians may exercise reasonable discretion in their decision making based on the guidance provided.

[65] The College submits that while the Committee "did not specifically engage in a comparison of the language of the guideline with the language used in [the Registrant's] response letter," the Committee had that letter and it specifically referenced his response that "It is my usual practice to tell the patient prior to moving into the examining room that I will be doing a cardiac exam and an ECG."

[66] The College submits that a review is not a re-hearing of the complaint in which the panel may undertake its own assessment whether the Registrant's conduct met expectations. The College also submits that the disposition in this case - an interview with the Registrar – was a reasonable remedial disposition. Emphasizing the concept of deference, and citing previous Review Board decisions that have upheld similar dispositions as being reasonable, the College submits:

> Interviews allow for a thorough discussion about any concerns raised or identified in a complaint and review by the Committee and for an organic discussion unbound by the rigidity of written correspondence. "Registrar staff" indicates that the interview is to take place with the Registrar or Deputy Registrar, all of whom are physicians with knowledge of the complaint and the concerns of the Committee.

[67] The College submits finally that the Review Board has no jurisdiction to grant the relief sought by the complainants (i.e., disciple, suspension, practice conditions and education), and is limited to one of the dispositions set out in s.50.6(8) of the Act.

[68] The Registrant also submits that the disposition was reasonable. The Registrant argues that many of the issues raised by the Complainant are "critiques of the adequacy of the College's reasons" or attempts to reargue the complaint, but they "fail to address the reasonableness of the disposition as a whole." Citing many of the same authorities as the College, the Registrant submits that the disposition is "transparent, intelligible and justified," and that its remedial approach in requesting the consent of the Registrant to attend for an interview at the College was objectively reasonable given the nature of the criticism. With respect to the Review Board's question, the Registrant submits that the failure to address an issue does not mean the Committee approved the conduct, but rather reflects its expertise in determining what issues ought to be addressed in the disposition. The Registrant also submits that the Committee is not required to address every issue in its disposition – the sole issue is whether the disposition is "globally reasonable."

XII COMPLAINANT'S REPLY

[69] The Complainant's reply emphasizes the guidelines and standards, and argues that the submissions of the College and Registrant fail to explain why the standards and guidelines do not apply to the Registrant, and takes issue with the suggestion that the Registrant "can exercise his discretion and judgment with respect to the application of the Standards and Guidelines including those related to sensitive examinations."

XIII DECISION AND ANALYSIS

A. Adequacy of the investigation

[70] I agree with the College and Registrant (and implicitly with the Complainant who did not contest this point) that the investigation was adequate. The Inquiry Committee obtained information from the Complainant and the Patient (including offering the patient an in-person interview), provided the complaint material to the Registrant, invited and obtained a response from the Registrant, followed up with the Registrant for additional records, provided the Registrant's response to the Complainant, permitted the Complainant to reply, and placed all relevant material before the Inquiry Committee panel for consideration. While it is always possible to do more in any investigation, sufficient investigative steps were taken in this case given the nature of the complaint.

[71] I have considered whether the Registrant's reference to his "usual practice" should have required the Inquiry Committee to take further investigative steps such as requesting a further response from the Registrant or requesting that he attend for an interview to expand on his specific recollection of the consultation. In my view, the answer is no. Having reached this decision regarding the adequacy of the investigation, I am left with the question of what value to the Inquiry Committee is a Registrant's response that provides a description of "usual practice" without the additional statement of whether the Registrant does or does not recall what was done on the date in

question. At this juncture, the real issue, as noted below, is whether its disposition was reasonable.

B. Reasonableness of the disposition

[72] In assessing the "reasonableness of the disposition" test set out in s.50.6(5)(b) of the Act, I begin by adopting the following general discussion set out in Review Board Decision No. 2015-HPA-138(a) – 140(a) (Group File 2015-HPA-G21):

> [168] To summarize, the Review Board is not to simply "re-run" the college investigation or substitute its judgments for that of the Inquiry Committee on the merits. The Review Board's role is instead to assess the adequacy of the investigation and the reasonableness of the disposition. Obviously, assessing adequacy and reasonableness requires examining and evaluating what the Inquiry Committee has done.
>
> [169] The statutory duty to review for adequacy and reasonableness means that some investigations will be found to be inadequate and some dispositions will be found to be unreasonable. While the Review Board must not exceed its role, it cannot abdicate its role either. If the colleges were given absolute deference in determining what steps are "enough" in an investigation, or absolute deference in how they dispose of the complaint –if every Review Board finding of inadequacy or unreasonableness was a "failure" to give the college proper deference – the reforms establishing the Review Board would have been rendered pointless.
>
> [170] Thus, while the Inquiry Committee must not be treated as if it was the Discipline Committee, we should also avoid the temptation to underplay or diminish the significance of its "screening role." I doubt the Legislature would have created the Review Board if it thought the Inquiry Committee's "screening role" was of marginal importance or significance. In fact, the Review Board was created because complainants did not have any other effective remedy to challenge the outcomes of that process: Review Board Decision No. 2009-HPA-0027(a). By creating the Review Board, the Legislature has said that what happens at that front end of the college complaint process matters, and the Review Board's role is to offer a remedy where it concludes that the investigation and disposition have exceeded the bounds of adequacy and reasonableness.
>
> [171] The Review Board has been given exclusive jurisdiction to assess adequacy and reasonableness. It has developed principles to help it in applying these tests. Those principles are in my view very well summarized in Review Board Decision No. 2013-HPA-216(a), at paras. [22-39], which analysis I adopt.

[73] I am also in agreement with the following comments made in Review Board Decision No. 2015-HPA-138(a) – 140(a) (Group File 2015-HPA-G21), where the Review Board stated:

> [211] The key point is that since only a small number of formal citations are issued each year, the Inquiry Committee's decisions about what informal actions to take or recommend are obviously critical to protecting the public.
>
> [212] The Review Board's role is to determine whether the disposition was reasonable. While the Review Board rarely intervenes with such dispositions, if the disposition was unreasonable - for example because it cries out for an explanation, or shows a failure to

consider key factors, or shows a clear lack of proportion in its statutory duty to protect the public -the Review Board can return the matter to the Inquiry Committee or issue its own disposition.

[74] I refer also to the following passages from Review Board Decision No. 2015-HPA-144(a) – 147(a) (Group File 2015-HPA-G23) at paras. [99] and [101], where I stated:

> [99] The reasonableness standard means that I may not merely substitute my views for that of the Registrar. Rather, I must have regard to what the Registrar has concluded and grant a remedy only if what the Registrar has done is unreasonable. As noted above, this includes assessing whether the Registrar arrived at his conclusion in a fashion that is transparent, intelligible and justified. Review Board decisions make clear that while a disposition decision need not provide detailed archival reasons on every aspect of every complaint, it must provide a meaningful response on the key issues on the complaint….
>
> [101] As previous Review Board decisions make clear, the failure to address a key issue on a complaint can render a disposition unreasonable, particularly where the Review Board is in no position to conclude, either on the record or as a matter of medical competence, the outcome would inevitably have been the same had the issue been addressed: Review Board Decision No. 2014-HPA-102(a); 2014-HPA-103(a); 2014-HPA-104(a) at paras. [44] and [70-90]. As stated in Review Board Decision No. 2013-HPA-216(a), at para. [39]:
>
> > [39] Given the accountability purposes of the legislation, one aspect of this is that the Review Board's reasonableness assessment necessarily and properly gives special weight to the importance of an inquiry committee justifying its decisions (or that of the Registrar) in a transparent and intelligible way in the s.34 summary that the inquiry committee is obligated to provide to the complainant. This does not require that inquiry committees issue lengthy archival reasons. However, on its review the Review Board is to look to see whether and how inquiry committees have explained themselves on key issues, and –given the obligations under s. 16(2)(i.1) -to avoid too readily assuming that an inquiry committee has "implicitly" considered or decided thus or so where such an assumption is not readily evident or cannot be readily drawn from the Record. This is one example of where the Review Board's "reasonableness" review, given the statutory context and the purposes of the legislation, may appropriately differ from the reasonableness test as it might be applied by a court.

[75] The importance of addressing key issues was succinctly set out in Review Board Decision No. 2016-HPA-080(b); 081(b) (Group File No. 2016-HPA-G07):

> [103] The Registrar exercises a screening role and must have some leeway to assess what are the key issues. At the same time, some issues "cry out for explanation:" Review Board Decision Group File No. 2015-HPA-G21 at para. [212]. The screening role exercised by the Inquiry Committee and the Registrar is a key part of the College's public interest mandate, and the Review Board exists in part to remedy the harms that can arise when key issues are missed. The failure to speak to a key issue harms the Complainant, who might understandably feel they have not been heard, and can create the impression that the College has not taken seriously its mandate to protect the public interest….

[76] Finally, I concur with the comments made in Review Board Decision No. 2016-HPA-146(a), which stated as follows regarding the application of the "reasonableness of the disposition" test:

> [63] It is recognized that inquiry committees are "screening" bodies, that their panels include medical professionals, that their time is limited, that they issue numerous decisions every year (sometimes numerous decisions per day), and that it would be too much to require them to deliver lengthy and detailed reasons as if they were the discipline committee. At the same time, these committees, which are supported by College staff, exercise an important part of the College's public interest mandate. The legislature's decision to make their dispositions subject to reasonableness review means that these panels are not to be seen as infallible or entitled to blind deference. While reasonableness review does not allow the Review Board to simply second guess inquiry committee medical judgments, reasonableness review would be meaningless if it did not at least require Inquiry Committees to reasonably explain themselves in a fashion commensurate with the realities of the complaint they are dealing with….
>
> [64] What is a reasonable explanation will obviously depend on the circumstances. As was stated in another Review Board decision, some dispositions "cry out for explanation": Review Board Decision Group File No. 2015-HPA-G21 at para. 212.

1. The complaint that the Registrant failed to explain the scope and reason for the examination

[77] A central component of the complaint in this case was that the "scope of the examination and the reason for the examination were not explained to the patient." paragraphs [10] and [16] above. As also described above (para. [33]), the Complainant responded to the Registrant's response by stating: "While the Registrant described his usual practice, he did not in this instance 'review any concerns and did not tell the patient that he would be performing an exam.' While the Registrant stated that "he tells the patient he will be performing an exam … he most definitely did not tell (or ask) us." The Complainant alleges that the Inquiry Committee failed to reasonably address this complaint, which alleged not only the failure to explain before conducting the test, but the failure to do so while the Registrant and Patient were in the examination room.

[78] The *Guideline on Sensitive Examinations* in effect at the time expressly stated:

> 1. The scope of the examination and the reasons for examination should be explained to the patient.
>
> 2. If the patient refuses a part or the whole examination, it should not be done. The refusal should be noted in the chart. It may be possible to reschedule an essential examination to be done in the presence of a chaperone of the patient's choice…

[79] Point 1 above is repeated in identical terms in a separate college guideline in effect at the time: "*Sexual Boundaries in the Patient-Physician Relationship*" (p. 3). This Guideline also states:

> It is not unusual for a patient to consider the behavior of a physician to be sexually motivated, even where the physician had not consciously considered the behavior to be

> sexualized. This most frequently occurs during examinations conducted without adequate explanations and without expressed patient consent.

[80] I agree with the Complainant that the disposition was unreasonable insofar as the Inquiry Committee Minutes and Counsel's letter failed to address the allegation that the scope of the examination, and the reasons for the examination, were not explained to the patient.

[81] The issue of informed consent was a key issue on the complaint, and was not an issue the Inquiry Committee could reasonably gloss over. I note that the disposition expressly addressed the draping issue. I also note that in addition to its express reference to the draping issue, the Inquiry Committee added a criticism that had not been raised in the complaint - namely, the failure to report to the GP on the Holter. In the circumstances, it was not too onerous or inconsistent with its screening role to require the Inquiry Committee to directly address the key allegation that informed consent to the examination was not properly obtained.

[82] With regard to the importance of addressing the issue of informed consent, I am not persuaded by the submission that the subject was at the time part of a "guideline" rather than a standard. Clearly, and reasonably, the Inquiry Committee did not view the status of a "guideline" as preventing it from expressing regulatory criticism of the Registrant for "failing to ensure an appropriately sensitive draping practice during his examination and performance of the ECG for this patient." Indeed, it would be ironic if the inclusion of a subject in a guideline prevented the Committee from exercising its broader mandate, on particular facts, "to determine whether the medical practice and conduct of [the Registrant] was consistent with the standard expected of a cardiologist practicing in British Columbia." In this case, the matter in question went to the important issue of informed consent in a sensitive examination, a matter that transcends any particular guideline.

[83] A decision cannot be "globally reasonable" if it fails to address a key issue. Nor can I characterize this failure as simply falling within the Committee's latitude to determine what issues should be addressed in the disposition.

2. The complaint about the Registrant's question regarding the Patient's necklace

[84] Another allegation that was unambiguously central to the complaint was the allegation arising from the Registrant's question about the necklace the Patient was wearing while exposed after the Registrant had pulled down her gown. The fact that the comment was made as alleged was not in dispute before the Committee.

[85] The Registrant stated: "I usually chat with the patient about almost anything (their work, their necklace, their grandchildren or anything that comes to mind)", and he expressed pride in his "bedside manner." The Complainant argues that "the Committee failed to identify the problem with the "small talk" in this case – "there is a difference between chatting about the weather … and inquiring about a piece of jewellery lying between the exposed breasts of your brand new topless female patient…"

[86] The Inquiry Committee "noted the patient's perception of [the Registrant's] questions regarding her necklace and acknowledged that it is not uncommon for physicians to engage in "small talk" during a consultation to put patients at ease." To this extent, the Inquiry Committee reasonably recognized the significance of this part of the complaint.

[87] The difficulty is that while the Inquiry Committee "noted" the Patient's perception, and acknowledged that "small talk" is common in order to put patients "at ease," these statements completely side-stepped the key allegation that the statements themselves were inappropriate in the context. The Sensitive Examinations Guideline and the Sexual Boundaries Guideline both state that physicians "should be careful to ensure that any remarks or questions that are asked cannot be construed as demeaning, seductive or sexual in nature."

[88] How did the Inquiry Committee assess this part of the complaint? Given its role and given the nature of this complaint, and having regard to the Inquiry Committee's mandate to protect the public – what College counsel called the mandate of the Committee "… to determine whether the medical practice and conduct of [the Registrant] was consistent with the standard expected of a cardiologist practicing in British Columbia" - it was not reasonable for the Inquiry Committee to avoid addressing this allegation squarely.

3. The Chaperone issue

[89] The Complaint alleged that Registrant did not give the Patient the option of having her husband attend the examination room, and that he was instead told to "stay here." As noted above, item 2 of the Sensitive Examinations Guideline states:

> 2. If the patient refuses a part or the whole examination, it should not be done. The refusal should be noted in the chart. It may be possible to reschedule an essential examination to be done in the presence of a chaperone of the patient's choice…

[90] The Sexual Boundaries Guideline states:

> Although chaperones are not mandatory, a physician should consider carefully whether a chaperone would contribute to an individual patient's feeling of comfort and security. Also, a chaperone may protect the physician from unfounded allegations. If a patient asks to have an appropriate support person in the room, that request must be honoured. Signage indicating that a chaperone is available or a printed policy regarding the provision of chaperones may be helpful.

[91] On this issue, the Committee did comment. It stated: "The Committee noted [the Registrant's] statement that he would have had no objection to performing the assessment of the patient in the presence of the Complainant or another chaperone, but that this was not offered because he did not perceive that the patient was uncomfortable with his standard practice." I take this to be an implicit finding that the Committee was not prepared to find that the Registrant had a proactive duty to invite the Complainant into the examination room unless the Complainant asked for one.

[92] While the Standard *Physical Examinations and Procedures* (enacted in 2017) now imposes a positive duty to "inquire whether a patient wishes to have another person of their choice present during the physical examination or procedure, particularly with sensitive examinations or when disrobing is required," it was in my view reasonable for the Inquiry Committee, given the relevant guidelines in place at the time, to take the view that this was not a clear regulatory expectation in 2016. This of course only underlined the importance of the Inquiry Committee giving separate regulatory consideration to the issue of proper communication and explanation, discussed above.

4. The allegation that the test was redundant

[93] The Complainants allege that the Committee "failed to recognize that a redundant test is contrary to the CMA Code of Ethics which permits only beneficial tests, not tests that would be redundant." The Complainant submitted to the College that all the recent testing should have been sufficient, that since the Registrant was prepared to provide his opinion in the office before taking the Patient into the examination room, those tests did not add anything to the data already collected and that the Registrant himself admitted the next day that the tests were redundant.

[94] In my view, it was reasonable for the Inquiry Committee to conclude that the testing was not redundant. The Inquiry Committee clearly accepted the Registrant's statement that: "I virtually always perform an ECG as part of a complete cardiac assessment… because … one is not infrequently surprised to document unsuspected Atrial Fibrullation, Flutter or other arrhythmias." I take this to mean that even when there has been recent cardiac testing, it is still good practice for a consulting cardiologist to seek to conduct his own test on the date of consultation.

[95] The Inquiry Committee squarely addressed this issue. It concluded that it would have expected such testing to be done. This issue falls squarely within the Committee's medical expertise, and is a conclusion that appears entirely reasonable from a patient care perspective. I find this conclusion, which is a distinct issue from the manner in which testing is alleged to have been approached, explained and performed, was reasonable.

5. The authenticity of the ECG

[96] The Complainant argues that the Committee should have questioned the authenticity of the ECG given the time it took to disclose the test strip and the fact that the test strip does not appear like an official medical record and is "little more than a random ECG with the patient's name and date hand written in the top right corner, and its difference from the Lifelabs ECG."

[97] The Committee expressly considered this issue. It stated that "there was no reason to question the authenticity of the ECG submitted by [the Registrant]." In my opinion, that was a reasonable conclusion, which did not require further explanation. The allegation suggests dishonesty, even fraud. That is a very serious allegation. It was reasonable for the Inquiry Committee to reject such an allegation when it was based solely on its form and the time it took to produce. With regard to the form, the medical members on the Inquiry Committee should be taken should be taken as having

been conversant with why an in-office ECG strip might not bear the same form as an ECG conducted by LifeLabs.

6. "The Committee failed to comment on the tests the Registrant did not perform"

[98] After receiving the Registrant's response, the Complainant and the Patient filed a nine page reply with the College. Point #12 in that reply commented on the Registrant's May 12, 2016, consultation report to Patient's family physician. With regard to the heading "Examination," the Complainant stated that "there was no careful examination of the eyes, there was no examination, at all, of the abdomen, there may have been a visual inspection only of the neck but she was not even asked to turn her head and definitely no palpitation or auscultation, and there was a visual examination of the chest but no palpitation, no percussion and no further auscultation to what was done with the gown up. Given this, what was the point in exposing the breasts for 6-7 minutes?"

[99] As noted above, counsel's letter stated that the Committee "also acknowledged that you disputed [the Registrant's] documentation that indicated the head, neck and abdomen, were examined." Later, the letter states: "The Committee acknowledged the statement that the extent of the physical examination of the eyes and abdomen were not consistent with the documentation; the Committee was unable to comment further on this aspect of the complaint." As noted above, I am reluctantly prepared to accept these statements as accurately reflecting the Inquiry Committee's consideration of this issue.

[100] In my opinion, it was not unreasonable for the Inquiry Committee to have addressed this issue summarily. First, it is only indirectly related to the main subject matter of the complaint. Second, given when the allegation arose, it was within the Committee's discretion not to prolong the process to obtain a further response from the Registrant on issues that could just as likely have reflected differing recollections where only two people were in the room, or even an innocent error which would not change the overall disposition of the complaint. While it is true that the Committee did, on its own motion, criticize the Registrant for failing to include the Holter monitor results in the Report, that result was a matter of record, not in dispute.

XIV REMEDY

[101] The Review Board's remedial authority is set out in s.50.6(8) of the Act as follows:

> 50.6(8) On completion of its review under this section the review board may make an order:
>
> (a) confirming the disposition of the inquiry committee;
>
> (b) directing the inquiry committee to make a disposition that could have been made by the inquiry committee in the matter; or
>
> (c) sending the matter back to the inquiry committee for reconsideration with

directions.

[102] As noted above, I have concluded that the Inquiry Committee's disposition was unreasonable because it failed to address two key complaint allegations: (a) that informed consent was not obtained; and (b) that the statements about the Patient's necklace while she was exposed were not appropriate. The issue then becomes what remedial disposition is appropriate.

[103] Ordinarily, a finding of unreasonableness due to a failure to address key issues would result in an order sending the matter back to the Inquiry Committee to address those issues. In this case, however, the investigative evidence collected by the college could give rise to only one reasonable outcome. That outcome is regulatory criticism by the Inquiry Committee on the basis that the Registrant failed to provide informed consent, and made an inappropriate comment regarding the Patient's necklace.

[104] On the informed consent issue, the Inquiry Committee obtained the evidence of the Complainant and the Patient. It gave the Registrant the opportunity to respond, as required by s.33(5) of the Act. Following that process, the Inquiry Committee had, on one side, the very specific and categorical allegations of the Complainant and the Patient that he did not seek informed consent, and on the other the Registrant's general statement of "usual practice" on this issue, together with the Registrant's very specific statements on other issues. The Inquiry Committee then provided the Registrant's response to the Complainants, who specifically stated:

> While the Registrant described his usual practice, he did not in this instance "review any concerns and did not tell the patient that he would be performing an exam". While the Registrant stated that "he tells the patient he will be performing an exam … he most definitely did not tell (or ask) us."

[105] No further submission was made or offered by the Registrant, who was represented by counsel, and the Inquiry Committee had no obligation to follow up with the Registrant to ask him to "clarify" his statement or to be more "specific." The Inquiry Committee was entitled to proceed on the basis that the Registrant had given the statement he was going to give.

[106] The Inquiry Committee did however have a duty to reasonably assess the information before it within its screening role. In my view, based on the investigative evidence, the only rational conclusion it could have reached was to sustain the complaint allegations on this issue, and make a finding of regulatory criticism against the Registrant for failing to provide informed consent. It would have been unreasonable for the Inquiry Committee to have concluded that it could not confirm a very specific allegation that there was a failure to obtain informed consent in the face of a statement of "usual practice," particularly in the context of a response that was case specific on other issues. In the circumstances, the only reasonable outcome the Inquiry Committee could arrive at within its public interest screening role (as it did on the draping issue) was regulatory criticism on the basis that the scope of the examination and the reasons for examination were not explained to the Patient, and there was nothing in the Record to support "reasonable discretion" not to obtain informed consent.

[107] With respect to the Registrant's comment about the necklace, the investigative record was just as clear - the Registrant did not deny making the specific statement but simply referred to "small talk." In my view, the only reasonable outcome on this complaint was that the comment was inappropriate in the context, and warranted regulatory criticism. No reasonable Inquiry Committee could conclude that it would fall within a male physician's reasonable discretion to make small talk about an object in the area of female patient's exposed breasts. Even where one's intention in making the comment is innocent, it should be obvious that a reasonable female patient could perceive the comment to be sexualized. The occasion for misunderstanding is clear and obvious. No reasonable inquiry committee could have concluded that such a comment was benign or that it was in the public interest for the Inquiry Committee to decline to comment on this issue.

[108] The issue then becomes how my conclusions on these issues impact the larger reasonableness of the ultimate disposition made by the Inquiry Committee in this matter:

> In light of the foregoing, the Committee directed that [the Registrant] attend at the College for a concluding interview with Registrar staff, pursuant to section 33(6)(b) of the Health Professions Act, to discuss the issues raised in the complaint and the concerns of the Committee. [emphasis added]

[109] Having found the disposition unreasonable for failing to make two additional findings of regulatory criticism, it is my view that the appropriate remedy is to send the matter back to the Inquiry Committee with the direction that it issue a new disposition that incorporates the two additional regulatory criticisms directed by the Review Board, and that reconsiders the remedial options available to the Inquiry Committee in ss.33(6) and 36(1) of the Act in light of the comment made below:

> 33(6) After considering any information provided by the registrant, the inquiry committee may
>
> > (a) take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,
> >
> > (b) in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the registrant,
> >
> > (c) act under section 36, or
> >
> > (d) direct the registrar to issue a citation under section 37.
>
> 36 (1) In relation to a matter investigated under section 33, the inquiry committee may request in writing that the registrant do one or more of the following:
>
> > (a) undertake not to repeat the conduct to which the matter relates;

(b) undertake to take educational courses specified by the inquiry committee;

(c) consent to a reprimand;

(d) undertake or consent to any other action specified by the inquiry committee.

[110] In reconsidering the issue of what remedial disposition is appropriate, the Inquiry Committee is directed to consider not only the fact that it is dealing with two additional regulatory criticisms, but also significant concerns that arise from a disposition that merely requires a registrant to "attend at the College for a concluding interview with Registrar staff," without more.

[111] On the latter issue, it is useful to note the concerns expressed in Decision No. 2015-HPA-G21 at paras. [219-222]:

> [219] Was it reasonable in this case for the Inquiry Committee to merely set out its "expectation" that Registrant 2 will, in future, prominently record informed consent discussions in his records?
>
> [220] A reasonable person might fairly ask how the Inquiry Committee's "statement of this expectation" could, by itself, be meaningful and reasonably protective of the public interest given its stated importance of this issue without one or more of:
>
> (a) an additional statement that it will at a future date monitor the Registrant's practice for such notes (Review Board Decision No. 2015-HPA-027(a));
>
> (b) a request for concrete action by the Registrant (such as a letter or educational course) specifically addressing this issue; or
>
> (c) an undertaking not to repeat that conduct in the future.
>
> [221] It is possible that the Inquiry Committee decided to not require any additional steps because it had complete confidence that Registrant 2 would implement the necessary changes without the need for any follow up, and that therefore public protection required nothing more. That is possible, but it would be speculation on my part. If the Inquiry Committee thought that, it should have said so.
>
> [222] This is not a case where I can deduce the reasonableness of the Inquiry Committee's rationale from the Record. This is a disposition that cries out for an explanation or, if it cannot be adequately explained, a reconsideration by the Inquiry Committee.

[112] The concerns with the remedial disposition the Inquiry Committee issued in this case are as follows:

> First, while College By-law 4(3), under the heading "Investigation", authorizes the Committee to require a registrant to attend for an interview, the legal force of a "direction" to attend before the Registrar for an interview as part of the final Disposition (a disposition under s. 33(6)(b) of the Act) is less than clear. In this regard, I note the contrast between the language used by the Committee in its Minutes and counsel's letter to the Complainant which "direct" the Registrant to attend at the College, and the more

> oblique language in College counsel's closing letter to Registrant's counsel which states "The Committee directed that the matter be concluded upon [the Registrant's] attending at the College for an interview with Registrar staff". With this type of disposition, it appears that the Registrant must still decide whether to attend.
>
> Second, even if the registrant may be required to attend or does attend, what if it become apparent at the interview that he has insufficient insight into the issues, calling into question the efficacy of the remedial disposition? Is a disposition reasonable if it fails to provide a provision for further inquiry committee consideration or action if it becomes apparent that it has failed to achieve its remedial purpose in the public interest?
>
> Third, from the perspective of a complainant and the public interest, the "interview with a registrant" is very much a black box. A complainant (or even the inquiry committee itself) may understandably be left asking: "did the interview take place? What was its outcome? Was the public interest served?"

[113] In my view, these concerns are not merely matters of remedial judgment; they speak to reasonableness because they go to the basic efficacy of a remedial disposition intended to achieve a particular remedial objective in the public interest.

[114] I note that when the Inquiry Committee issues one of the specific statutory dispositions listed in s. 36(1) – for example, to request that a registrant undertake not to repeat particular conduct, or to take educational courses, or to consent to a reprimand – the Inquiry Committee will not necessarily know how the registrant will respond upon receiving that disposition either. However, for these dispositions, the Act provides safeguards. Section 36(2) states that: "If a registrant refuses to give an undertaking or consent requested under subsection (1), or if a registrant fails to comply with an undertaking or consent given in response to a request … the inquiry committee may direct the registrar to issue a citation for a hearing by the discipline committee regarding the matter." This makes clear that the inquiry committee must revisit the file if a registrant refuses to consent. It is also noteworthy that even if a registrant does consent to a request under s.36(1), the Act creates transparency by requiring the complainant to be given a written summary of the consent and a right to request a review: s.36(1.1).

[115] In this case, the Inquiry Committee chose an option that is outside s.36(1), one that it took as being implicit in s.33(6)(b) of the Act - to require the registrant to attend for an interview. It is not apparent why the Inquiry Committee opted for this implicit remedy rather than one of the several specific options listed in s.36. Having done so, however, it was not reasonable to have fashioned that remedy without a built-in public interest safeguard either to address circumstances where the registrant's response is unsatisfactory, or to report to the complainant if it was.

[116] These concerns, significant as they are, are easily addressed if an inquiry committee favours this sort of remedial measure, as for example by including a term in the disposition stating that the Inquiry Committee reserves the right to take additional remedial action if the Registrant does not attend the interview by a specified date or the interview is deemed unsatisfactory, and by directing the Registrar to report to the Complainant if the interview has taken place and as to what was the outcome of that meeting.

[117] Despite the fact that sending this matter back to the Inquiry Committee will prolong the complaint process for all parties and will entail additional administrative costs, I find that the key issues that were not addressed in the Inquiry Committee's decision are of sufficient concern to the Complainant, the Patient and to the public interest that these expenditures are warranted. In addition, I wish to give the Inquiry Committee full latitude to formulate a new remedial disposition under s.33, having read these reasons and taking into account any past conduct history for this Registrant.

XV ORDER

[118] For the reasons I have given, I am sending this matter back to the Inquiry Committee for reconsideration with the direction that the Inquiry Committee issue a new disposition letter that:

A. Incorporates the additional regulatory criticisms that (a) the Registrant failed to explain to the Patient both the scope of the examination and the reasons for examination, and (b) the Registrant made an inappropriate statement to the Patient while she was exposed.

B. Reconsiders and explains its remedial disposition in this matter, having regard to all of the options set out in ss.33(6) and 36(1) and any past conduct history involving this Registrant.

[119] In the course of this review I have considered all of the information before me whether I specifically referenced it herein or not.

"Deborah Lynn Zutter"

Deborah Lynn Zutter, Panel Chair
Health Professions Review Board