

THE MATTER OF THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA

AND

DR. BIN XU, A REGISTRANT

PENALTY DECISION

Dr. Karl Denk, (Chair)

Dr. Myrna Halpenny

Mr. Paul Durose

Hearing Date: The Penalty Hearing was conducted through written submissions.

Counsel for CDSBC: Mr. Thomas M. Lutes

Dr. Xu: not represented by counsel; no written submissions provided

Counsel for the Discipline Panel: Mr. William L. Roberts and Ms. Amy M. Nathanson

I. INTRODUCTION

1. A discipline hearing in relation to Dr. Xu took place on November 1-2 and 5-7, 2018. The Panel's Reasons for Decision are dated for reference June 12, 2019 (the "**Reasons**"). The Panel found the College of Dental Surgeons of British Columbia (the "**College**") proved 77 of the 84 charges in the Further Amended Citation issued on September 17, 2018 (the "**Citation**").
2. The Panel found that taken together, the issues with Dr. Xu's practice, including billing patients up front and not completing treatment, taking advantage of elderly and vulnerable patients, and the nature of his dealings with his patients and the College crossed a serious ethical threshold and amounted to professional misconduct.

3. The Panel also found a concerning pattern of deficiencies in the treatment Dr. Xu provided to his patients and as a result, found that Dr. Xu had practiced incompetently.
4. As directed by the Panel in the Reasons, the College served the Reasons on Dr. Xu by sending him a hard copy by Xpresspost and emailing him a copy.¹
5. After the Reasons were issued, the Panel sent an email to the College and Dr. Xu directing them to provide written submissions on the issue of the appropriate penalty. The Panel established the following timeline for submissions: the College's submissions were due by September 12, 2019; Dr. Xu's submissions were due by September 26, 2019; and the College was entitled to provide reply submissions by September 30, 2019.
6. The College provided its Submissions on Penalty to the Panel on September 12, 2019. The Panel sent the College's submissions to Dr. Xu by email and confirmed that he had until September 26, 2019 to provide his submissions.² Dr. Xu did not respond to any of the Panel's communications regarding the penalty submissions and did not provide any submissions to the Panel.
7. The Panel is satisfied that the proper attempts were made to elicit Dr. Xu's participation in the penalty portion of this hearing and it is prepared to provide its decision on penalty despite the fact that Dr. Xu did not provide any submissions.³

II. PENALTY PROPOSED BY THE COLLEGE

6. The College has asked the Panel to impose the following sanctions on Dr. Xu:
 - (a) A reprimand;
 - (b) Cancellation of Dr. Xu's registration with a condition that he not be permitted to reapply for a period of three years from the date of the penalty order;

¹ The Panel made an order on August 30, 2018, after the College had been unable to locate Dr. Xu to serve him with the Citation and hearing materials, permitting the College to serve Dr. Xu with the Citation by delivering it to his last known address and emailing it to his last known email address. The College used these same service methods to serve Dr. Xu with the Reasons. The affidavit of RG, dated September 11, 2019, indicates that there was no "bounce-back" with respect to the email the College sent to Dr. Xu attaching the Reasons. However, the Xpresspost package was returned to the College.

² The Panel did not receive any "bounce-back" of the emails it sent to Dr. Xu regarding penalty submissions.

³ See section 38(5) of the *HPA*.

- (c) Conditions for Dr. Xu's eligibility to apply for reinstatement:
- Successful completion of all years of a general dentistry program from among those listed in Schedule "A" of the College's bylaws;
 - Successful completion of the National Dental Examining Board examinations (written and OSCE);
 - Successful completion (pass or pass with conditions) of the Professional/Problem Based Ethics course provided by the Centre for Personalized Education of Physicians, or alternative ethics course determined by the College in the event the named course is no longer offered; and
 - Provision of evidence satisfactory to the College that Dr. Xu has satisfied any monetary legal judgment against him obtained by any of the patients identified in the Citation, in relation to the practice of professional dentistry in British Columbia.
- (d) In the event Dr. Xu's registration is reinstated, the following conditions will be placed on his dental practice:
- For a period of 36 months from the date of resumption of practice:
 - Dr. Xu must only practice as an associate under the direct supervision of a dentist approved by the College; and
 - Dr. Xu must not directly or indirectly participate in the billing or receipt of patient fees for services.
 - Dr. Xu must enter into a monitoring and inspection agreement with the College for a period of 24 months from the date of resumption of dental practice, by which:
 - His patient charts are reviewed by the College every six months;
 - The monitoring/inspecting representative of the College will report to the Inquiry Committee at least every three months on Dr. Xu's practice, or more frequently as the representative or Inquiry Committee deems necessary; and
 - Dr. Xu will pay all costs, including professional fees and reasonable College costs, related to this agreement.
- (e) A fine payable by Dr. Xu in an amount of \$40,000; and
- (f) A costs order in the amount of \$48,117.24, of which \$34,650.00 is attributable to legal fees and \$13,467.24 to disbursements incurred.

III. AUTHORITY UNDER THE HEALTH PROFESSIONS ACT

7. Section 39 of the *Health Professions Act*, RSBC 1996, c. 183 (the “*HPA*”) sets out the options available to the Panel if it has made a finding under section 39(1) of the *HPA*:

Action by discipline committee

- 39** (1)...
- (2) If a determination is made under subsection (1), the discipline committee may, by order, do one or more of the following:
- (a) reprimand the respondent;
 - (b) impose limits or conditions on the respondent's practice of the designated health profession;
 - (c) suspend the respondent's registration;
 - (d) subject to the bylaws, impose limits or conditions on the management of the respondent's practice during the suspension;
 - (e) cancel the respondent's registration;
 - (f) fine the respondent in an amount not exceeding the maximum fine established under section 19 (1) (w).
- ...
- (5) If the discipline committee acts under subsection (2), it may award costs to the college against the respondent, based on the tariff of costs established under section 19 (1) (w.1).
- ...
- (7) Costs awarded under subsection (5) must not exceed, in total, 50% of the actual costs to the college for legal representation for the purposes of the hearing.
- (8) If the registration of the respondent is suspended or cancelled under subsection (2), the discipline committee may
- (a) impose conditions on the lifting of the suspension or the eligibility to apply for reinstatement of registration,
 - (b) direct that the lifting of the suspension or the eligibility to apply for reinstatement of registration will occur on

- (i) a date specified in the order, or
- (ii) the date the discipline committee or the board determines that the respondent has complied with the conditions imposed under paragraph (a), and

(c) impose conditions on the respondent's practice of the designated health profession that apply after the lifting of the suspension or the reinstatement of registration.

...

(10) Before taking action under subsection (2), (5), (8) or (9), the discipline committee may consider whether, in the opinion of the discipline committee, the matter is an appropriate case for a refund to the complainant of all or part of any amount paid by the complainant to the registrant for or related to a service provided by the registrant or another person under the delegation or supervision of the registrant, and if so, whether a refund has been offered or made by the registrant.

IV. PRINCIPLES FOR IMPOSING PENALTIES IN PROFESSIONAL REGULATION DISCIPLINE PROCEEDINGS

9. Where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The penalties imposed must ensure that the public is protected from acts of professional misconduct and incompetence.
10. The College directed the Panel to the following extract from *Law Society of B.C. v. Ogilvie* [1999] LSDD 1 No. 45 (“*Ogilvie*”) as a helpful guide for decision makers in the context of professional regulation:
 10. The criminal sentencing provides some helpful guidelines such as: the need for specific deterrence, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-governing regulatory body, one must also consider the need to maintain the public’s confidence in the ability of the discipline process to regulate the conduct of its members.
11. In *Ogilvie*, the hearing panel set out the following factors as “worthy of general consideration” in disciplinary dispositions:
 - (a) the nature and gravity of the conduct proven;
 - (b) the age and experience of the respondent;

- (c) the previous character of the respondent, including details of prior discipline;
- (d) the impact on the victim;
- (e) the advantage gained, or to be gained, by the respondent;
- (f) the number of times the offending conduct occurred;
- (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
- (h) the possibility of remediating or rehabilitating the respondent;
- (i) the impact on the respondent of criminal or other sanctions or penalties;
- (j) the impact of the proposed penalty on the respondent;
- (k) the need for general and specific deterrence;
- (l) the need to ensure the public's confidence in the integrity of the profession; and
- (m) the range of penalties imposed in similar cases.⁴

12. More recently, in *Edward Dent (Re) LSBC 5* ("*Dent*") the hearing panel consolidated the *Ogilvie* factors under the following four headings:

- (i) nature, gravity and consequences of conduct;
- (ii) character and professional record of the respondent;
- (iii) acknowledgement of the misconduct and remedial action; and
- (iv) public confidence in the legal profession including public confidence in the disciplinary process.⁵

13. The hearing panel in *Dent* also noted that counsel appearing before the hearing panel have an obligation to point out which factors play a primary role and which factors play a secondary role. Secondary factors do not have to be referred to in the panel's reasons unless they tip the scales one way or another.⁶

V. COLLEGE'S SUBMISSIONS ON PENALTY

14. The College's submissions on the consolidated *Ogilvie* factors are summarized below. Ultimately, the College submitted that Dr. Xu's conduct warrants a penalty at the highest end of the regulatory spectrum.

(i) The Nature, Gravity and Consequences of the Conduct

15. The College emphasized the fact that the Panel found Dr. Xu practiced incompetently and committed professional misconduct over a three year period, more than 70 times, in

⁴ *Ogilvie*, para 10 of Penalty Decision.

⁵ *Dent* at paras 19-23.

⁶ *Dent* at para17.

relation to two dozen patients, across many areas of general practice, including diagnosis and treatment planning, record keeping and billing.

16. The College characterized Dr. Xu's conduct as including a pattern of preying financially on his patients. In many cases, Dr. Xu asked for cash payments in advance of treatment and then failed to attend appointments, provide treatment, or provide refunds.
17. In terms of the gravity of the misconduct, the College highlighted Dr. Xu's treatment of two patients: SYSZ and FCW. Dr. Xu provided SYSZ braces that did not fit properly and caused her significant pain. He failed to attend appointments or provide her with proper instructions regarding her braces. He also failed to provide her the refund he promised. FCW was an elderly man who paid Dr. Xu \$85,000 up front for an extensive implant treatment plan for himself and his wife. Dr. Xu did not complete FCW's treatment, did not provide a refund to FCW, and the treatment Dr. Xu provided to FCW was substandard.
18. The College noted that many of the witnesses at the hearing gave evidence about the financial impact and embarrassment they suffered as a result of Dr. Xu's conduct. The College submitted that the "impact on the victims" in this case must be considered extreme.
19. The College submitted that this grouping of the *Ogilvie* factors is a primary factor for the Panel's assessment of the appropriate penalty for Dr. Xu. The College submits that every aspect under this grouping is aggravating and that there is no evidence of any mitigating circumstances.

(ii) Character and Professional Conduct Record of the Respondent

20. When Dr. Xu withdrew from practice he was 54 years old and had been practising dentistry since 1985 in China, and then in Canada after he became a registrant in the College in February 2005. The College submitted that Dr. Xu must be considered an experienced dentist who should have been capable of practising competently and meeting quality of care standards. The College submitted that there was no evidence before the Panel of impairment issues, or any explanation for Dr. Xu's substandard care, his failure

to respond to his patients or the College, and his financial predation, all of which are aggravating factors.

21. Although Dr. Xu does not have a professional conduct record, the College submitted that this is a neutral factor. The College submitted that this grouping of the *Ogilvie* factors is secondary.

(iii) Acknowledgement of the Misconduct and Remedial Action

22. In terms of acknowledging his misconduct, the College referred to the recording of an interview Dr. Xu had with College staff at the start of its investigation in which Dr. Xu indicated that he accepted and understood some of the concerns expressed by the College.
23. However, the College has not heard from Dr. Xu since he voluntarily withdrew from practice on January 20, 2017, and despite extensive efforts, the College has been unable to locate him. The College submitted that Dr. Xu's voluntary withdrawal from practice is a neutral factor as he only did so on the eve of a section 35 proceeding where the College was seeking an immediate suspension.
24. The College pointed out that Dr. Xu did not make any admissions that would have shortened the hearing and did not participate in the hearing. Dr. Xu's failure to participate means that he did not provide any explanation for his conduct or express contrition for it.
25. This grouping of *Ogilvie* factors includes considerations of rehabilitation and mitigating circumstances. The College submitted that there was no evidence to support or refute whether Dr. Xu can be rehabilitated and no evidence of mitigating circumstances, such as physical or mental health challenges or personal or financial difficulties.

(iv) Public Confidence in the Dental Profession Including Public Confidence in the Disciplinary Process

26. The College highlighted that its sole duties under the *HPA* are to "serve and protect the public" and to "exercise its powers and discharge its responsibilities... in the public

interest.”⁷ The College submitted that public protection, and the public’s confidence in the regulatory process should be an overriding consideration for the Panel in this case.

27. The College submitted that the sheer number of proven charges against Dr. Xu was “alarming” and that a penalty that does not address the extent of Dr. Xu’s unprofessional conduct would be contrary to the public interest and the College’s regulatory mandate.
28. With respect to the concepts of specific and general deterrence, the College submitted that the penalty it has proposed is intended to send a clear message to Dr. Xu, to dentists generally, and to the public that Dr. Xu’s conduct is not acceptable in the practice of dentistry.
29. The College submitted that this grouping of *Ogilvie* factors is the second primary factor the Panel should consider in determining the appropriate penalty for Dr. Xu.

VI. DECISION

30. The Panel has considered the College’s submissions, the evidence from the hearing and the relevant authorities and legislation in reaching its decision.
31. The Panel recognizes that the fundamental purpose for imposing sanctions for professional misconduct is the protection of the public. Some of the factors that may be taken into account in determining how best to protect the public include deterrence, rehabilitation and denunciation of the conduct.⁸
32. The Panel agrees with the College’s submission that the two primary factors it should consider are “the nature, gravity and consequences of the conduct” and “public confidence in the dental profession, including public confidence in the disciplinary process.”
33. As the College put it, this is not a case of a single area of professional concern or a short-term failure to meet the applicable standards of practice. The Panel has found that Dr. Xu committed numerous offences in relation to numerous patients. Dr. Xu’s conduct was

⁷ HPA, section 16(1)(a) and (b)

⁸ James T. Casey, *The Regulation of Professions in Canada*, (Scarborough, Ontario: Carswell, 2012) at 14-5 to 14-6.

serious, both in terms of his substandard treatment, and the manner in which he treated his patients.

34. Dr. Xu repeatedly failed to properly diagnose issues, develop appropriate treatment plans, or obtain informed consent. He provided root canal treatment on several patients when it was not advisable to do so, and failed to provide patients with a referral to a specialist when he was unable to complete the root canal treatment. Dr. Xu also provided treatment that was not necessary or age appropriate.
35. Dr. Xu missed appointments, collected payment in advance for treatments he did not perform, was evasive and difficult to contact, and abandoned patients without completing their treatment. In the case of WSK, in an attempt to avoid providing her with a refund for treatment she had paid for but he did not provide, Dr. Xu misled WSK by purporting to show her that he had treated these teeth, when he knew he had not.
36. The evidence of the witnesses at the hearing made it clear that Dr. Xu's conduct had a considerable impact on his patients and their families. The impact was financial, emotional and, in some cases, his patients suffered pain and discomfort as a result of his substandard practice. The fact that many of his patients were elderly and vulnerable makes Dr. Xu's conduct particularly troubling.
37. In the absence of any evidence or explanation from Dr. Xu, the Panel is unable to determine whether Dr. Xu may be rehabilitated or whether there are any mitigating factors.
38. The Panel finds that Dr. Xu's numerous and serious incidents of misconduct with aggravating factors warrants a clear denunciation of his conduct and a significant penalty.
39. One of the ways to ensure public confidence in the disciplinary process is to ensure the sanctions fall within the range of sanctions in similar cases. To provide some guidance with respect to the appropriate penalty, the College referred the Panel to several disciplinary decisions and consent orders from the College.
40. The most similar case is *Duvall*. After a hearing (that Dr. Duvall did not attend) the panel found him guilty of 41 of the 48 allegations made against him. These allegations

related to substandard care, inappropriate treatments, inappropriate contact with patients, and failure to comply with a previous agreement with the College.

41. The panel found that Dr. Duvall's incompetence was serious, covered many areas of general practice, and the number of errors was alarming. The panel determined that Dr. Duvall's registration must be cancelled and that he must complete all years of a general dentistry program, as well as complete the National Dentistry Examination before he was entitled to apply to reinstate his registration. The panel ordered Dr. Duvall to pay costs in the amount of \$95,000.
42. The misconduct in *Duvall* was serious. However, the Panel finds that it does not rise to the level of Dr. Xu's conduct and that Dr. Xu's conduct requires a more serious penalty.
43. First, the Panel finds that to adequately address Dr. Xu's conduct and protect the public and its confidence in the disciplinary process, Dr. Xu's registration with the College must be cancelled, effective immediately.
44. As set out above in paragraph 6(b), the College has proposed that Dr. Xu should have to wait three years before he is entitled to reapply for registration in the College. The Panel finds that in the circumstances, a longer period is appropriate and orders that Dr. Xu is not permitted to reapply for registration in the College for five years from the date of this decision.
45. The Panel accepts the conditions on Dr. Xu's eligibility to apply for reinstatement proposed by the College in paragraph 6(c) above. One of these conditions is that before Dr. Xu is eligible to apply for reinstatement he must provide evidence to the College that he has satisfied any monetary judgements against him obtained by any of the patients set out in the Citation.
46. The College drew the Panel's attention to section 39(10) of the *HPA*, which allows a panel to consider whether the case is an appropriate one for a refund to the complainant of all or part of an amount paid for service provided by the registrant and if so, whether a refund has been offered or made.

47. The Panel found that many of Dr. Xu's patients were entitled to a refund from Dr. Xu (for example, BML for substandard bone graft treatment and MYL for the partial denture he paid for and never received). Based on Dr. Xu's pattern of taking advantage of his patients financially and the manner in which he did so (offering a discount for seniors or having one of his staff attend a patient's work to collect a cash payment), the Panel accepts that this condition proposed by the College is appropriate.
48. The Panel also agrees the conditions proposed by the College and set out in paragraph 6(d) above should be placed on Dr. Xu's practice in the event his registration with the College is to be reinstated. Oversight by the College and other practitioners will ensure that Dr. Xu maintains the appropriate level of practice and competency.
49. As set out a paragraph 6(e) above, the College has proposed that Dr. Xu pay a fine in the amount of \$40,000. The Panel finds that the circumstances of this case warrant the maximum fine permitted under the College's bylaw 10.07, and orders that Dr. Xu pay a fine in the amount of \$50,000.

Costs

50. Section 39(5) of the *HPA*, permits the Panel to award costs to the College against Dr. Xu, based on the tariff set out under section 19(1)(w.1) of the *HPA*.
51. Section 10.08 of the College's bylaws establishes a tariff of costs set out in Schedule "G" (the "**Tariff**") to partially indemnify parties for costs incurred in the preparation for and the conduct of a discipline hearing under section 38 of the *HPA*. Section 2 of the Tariff provides that an award of costs includes a cost component and the actual costs of all reasonable and necessary disbursements incurred by the College.
52. The College is seeking recovery of its tariff costs in the amount of \$34,650.00. The Panel has reviewed the Tariff of Costs attached as Schedule "A" to the College's submissions and finds that the units the College has claimed are reasonable. The College has also confirmed that its tariff costs are less than 50% of its actual costs for legal representation for the purpose of the hearing, as per section 39(7) of the *HPA*.

53. The College is seeking to recover disbursements in the amount of \$13,467.24. The Panel has reviewed the disbursements set out in Appendix “A” to the College’s submissions and finds that they are reasonable and were necessary for the College to incur.
54. In the circumstances of this case, the Panel is satisfied that it should award costs against Dr. Xu in the total amount of \$48,117.24.
55. The Panel is of the view that the following penalty provides a meaningful punishment to Dr. Xu, significant deterrence to other practitioners and a clear message to the public that such conduct will not be tolerated.
56. Therefore, the Panel imposes the following on Dr. Xu:
- (a) Dr. Xu is reprimanded;
 - (b) Dr. Xu’s registration with the College is cancelled effective immediately. Dr. Xu is not be permitted to apply for reinstatement of his registration with the College for a period of five years from the date of this decision;
 - (c) Before Dr. Xu is eligible to apply for reinstatement of his registration with the College he must:
 - Successfully complete all years of a general dentistry program from among those listed in Schedule “A” of the College’s bylaws;
 - Successfully complete the National Dental Examining Board examinations (written and OSCE);
 - Successfully complete (pass or pass with conditions) the Professional/Problem Based Ethics course provided by the Centre for Personalized Education of Physicians, or alternative ethics course determined by the College in the event the named course is no longer offered; and
 - Provide evidence satisfactory to the College that he has satisfied any monetary legal judgment against him obtained by any of the patients identified in the Citation, in relation to the practice of professional dentistry in British Columbia.
 - (d) In the event Dr. Xu’s registration with the College is reinstated, he shall have the following conditions placed on his dental practice:
 - For a period of 36 months from the date of resumption of dental practice:

- Dr. Xu must only practice as an associate under the direct supervision of a dentist approved by the College; and
 - Dr. Xu must not directly or indirectly participate in the billing or receipt of patient fees for services.
 - Dr. Xu must enter into a monitoring and inspection agreement with the College for a period of 24 months from the date of resumption of dental practice, by which:
 - His patient charts are reviewed by the College every six months;
 - The monitoring/inspecting representative of the College will report to the Inquiry Committee at least every three months on Dr. Xu's practice, or more frequently as the representative or Inquiry Committee deems necessary; and
 - Dr. Xu will pay all costs, including professional fees and reasonable College costs, related to this monitoring and inspection agreement.
 - (e) Dr. Xu must pay a fine in the amount of \$50,000, to be paid to the College; and
 - (f) Dr. Xu must pay costs to the College in the amount of \$48,117.24, of which \$34,650.00 is attributable to legal fees and \$13,467.24 is attributable to disbursements incurred by the College.
57. The Panel directs that the College serve this decision on Dr. Xu by sending a copy to his last known address and by emailing a copy to his last known email address.
58. Pursuant to section 39.3 of the *HPA*, the Panel directs the Registrar to notify the public of the Panel's decision. The Panel also reminds the Registrar of its obligations under the College's bylaw 10.05 with respect to providing notice of this disciplinary action.

59. Pursuant to section 40(1) of the *HPA*, Dr. Xu has the right to appeal this order to the Supreme Court of British Columbia.

By the Discipline Committee:



Dr. Karl Denk

Dated: December 03/2019

Dr. Myrna Halpenny

Dated: _____

Paul Durose

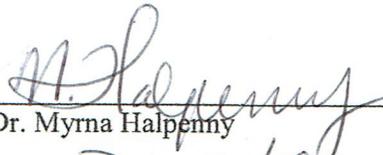
Dated: _____

59. Pursuant to section 40(1) of the *HPA*, Dr. Xu has the right to appeal this order to the Supreme Court of British Columbia.

By the Discipline Committee:

Dr. Karl Denk

Dated: _____



Dr. Myrna Halpenny

Dated: Dec. 2/19

Paul Durose

Dated: _____

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By the Discipline Committee:

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Dated: _____

Paul Durose

Paul Durose

Dated: DECEMBER 3, 2019