Dr. Alfred ERNST

Discipline Hearing Committee Decision

Date Charge(s) Laid:	September 20, 2014
Date of Discipline Hearing:	August 28-29, 2018 April 4, 2019
Date of Penalty Hearing:	September 13, 2019

This matter proceeded to hearing before the Discipline Hearing Committee. The decision of that committee is attached.

In the Matter of *The Medical Professional Act, 1981*, R.S.S. 1980-81, c. M-10.1, and

DR. ALDRED ERNST,
Medical Practitioner of Rosetown, Saskatchewan

HEARING OF THE DISCIPLINARY HEARING COMMITTEE OF THE COLLEGE OF PHYSICIANS AND SURGEONS OF SASKATCHEWAN

Saskatoon, Saskatchewan
April 4, 2019

DECISION

Before: Alma Wiebe, Q.C. (Chair)
Dr. Dorie-Anna Dueck
Dr. Oluremi Adefolarin

Appearances: Bryan E. Salte, Q.C.,
for the College of Physicians and Surgeons
Colin Hirschfeld, Q.C., for Dr. Alfred Ernst

I. INTRODUCTION

1. Dr. Alfred Ernst was charged by the Council of the College of Physicians and Surgeons of Saskatchewan (the College) as follows:

> You, Dr. Alfred Ernst are guilty of unbecoming, improper, unprofessional, or discreditable conduct contrary to the provisions of Section 46(l) and/or Section 46(p) of *The Medical Profession Act, 1981*, S.S. 1980-81 c. M-10.1 and/or bylaw 8.1(b)(iii) of the bylaws of the College of Physicians and Surgeons of Saskatchewan, by excessive billing.
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> The evidence that will be led in support of this charge will include one or more of the following:
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> > a) you caused or permitted excessive billing for your services by claiming first patient surcharges when the circumstances did not justify the charge;
> >
> > b) you caused or permitted excessive billing by charging code 91S when the circumstances did not justify the charge; and
> >
> > c) you caused or permitted excessive billing by charging code 881L when the circumstances did not justify the charge; and
> >
> > d) you failed to exercise due diligence to ensure that you billed appropriately for first-patient surcharges and/or Code 91S and/or Code 881L.

2. This matter was heard by the Discipline Committee chaired by Graeme Mitchell, Q.C. (as he then was), on August 28 and 29, 2018. Mr. Mitchell was subsequently appointed to the Court of Queen's Bench and unable to complete this matter. Counsel for the College and Dr. Ernst agreed it could be dealt with by a substitute Chair based on the transcript of the hearing. Both counsel filed written submissions and oral argument was heard before me as Chair and the two members of the original panel, Dr. Dorie-Anna Dueck and Dr. Oluremi Adefolarin, on April 4, 2019.

II. LEGISLATION/BYLAWS

3. Sections 46(l) and 46(p) of the *Medical Profession Act, 1981*, SS 1980-81, c M-10.1 and the College of Physicians and Surgeons of Saskatchewan Regulatory Bylaws 8.1(b)(iii) read as follows:

> **Charges**
> 46 Without restricting the generality of "unbecoming, improper, unprofessional or discreditable conduct", a person whose name is entered on a register is guilty of unbecoming, improper, unprofessional or discreditable conduct, if he or she:
> ...

(l) makes or permits false or misleading statements to be made in an account for payment for services rendered by him when he knew, or when under the circumstances it was reasonable to conclude that he knew, that the statements were false or misleading;

...

(p) does or fails to do any act or thing where the council has, by bylaw, defined that act or failure to be unbecoming, improper, unprofessional or discreditable.

8.1 Bylaws Defining Unbecoming, Improper, Unprofessional or Discreditable Conduct

...

(b) The following acts or failures are defined to be unbecoming, improper, unprofessional or discreditable conduct for the purpose of Section 46(p) of the Act. The enumeration of this conduct does not limit the ability of Discipline Hearing Committees to determine that conduct of a physician is unbecoming, improper, unprofessional or discreditable pursuant to Section 46(o):

...

(iii) Charging a fee that is excessive in relation to the services performed.

III. EVIDENCE

4. The College called one witness, Mr. Marc Hoffort, a chartered accountant who reviewed out-patient records and billing information related to Dr. Ernst's locum in Nipawin, Saskatchewan from December 19 to December 22, 2008, to identify possible billing irregularities.

5. Hoffort prepared a summary of first or additional patient surcharges billed by Dr. Ernst during the period in question (December 19 to 22, 2008). This document, admitted in evidence, disclosed billings for 77 patient surcharges of which 35 were first patient surcharges and 42 were additional patient surcharges. Hoffort testified to those instances where it appeared from the records that Dr. Ernst billed a first patient surcharge even though he was in the hospital or in the attached nursing home attending on other patients when he saw the patient he charged as a first patient.

6. In cross-examination Mr. Hoffort acknowledged he did not have personal knowledge of the contents of the hospital records on which his summary was based and did not confirm the data in the records with hospital personnel. Further, discrepancies in the times recorded in the hospital records with respect to some of the patients listed in the summary were noted.

In a few instances, the witness agreed there may have been time between patients for Dr. Ernst to have left the hospital and returned thereby entitling him to a first patient surcharge on his return.

7. The only other evidence presented by the College were excerpts of a transcript of an interview conducted by the JMPRC (Joint Medical Professional Review Committee) with Dr. Ernst. Following argument by both counsel, the Discipline Committee ruled this transcript admissible on the grounds that admissions against interest are an exception to the hearsay rule and relevant to the matter before the Discipline Committee. In the transcript Dr. Ernst acknowledged a number of instances during the December 2008 weekend in Nipawin where he invoiced for a first patient surcharge in circumstances where the patient was an additional, not a first, patient. He also acknowledged charging under Code 91S and 881L in circumstances where those charges were not justified. In the transcript Dr. Ernst states several times that he did not know there was more than one code for removal of a foreign body from the eye and made no distinction in his billing for removal of embedded versus unembedded foreign objects. With respect to the use of Code 881L Dr. Ernst acknowledged several instances of incorrectly billing for excision of a nailbed in circumstances where the nailbed remained. The transcript suggests befuddlement on Dr. Ernst's part about the codes relating to removal of foreign bodies from the eye and toenail treatments.

8. Counsel for Dr. Ernst called three witnesses, Betty Lou Ernst, Eleanor Head and Dr. Ernst.

9. Betty Lou Ernst testified she has been preparing Dr. Ernst's billings since 1991 and was performing those duties at the time in 2008 when the charges against Dr. Ernst arose. She prepared the MCIB (Medical Care Insurance Branch) submission report (invoice) for the dates December 19 to 22, 2008. Ms. Ernst said she recalled the weekend in Nipawin in December 2008. She went with her husband, Dr. Ernst, and they stayed at the golf course hotel, approximately a five minute drive from the hospital.

10. With respect to billing, Ms. Ernst testified she recalled a visit from a member of the Medical Services Branch around 2008 to conduct a seminar at Dr. Ernst's clinic at which problematic billing codes were discussed.

11. Specifically, in cross-examination, Ms. Ernst said her husband determined whether a first patient surcharge was to be charged with respect to each patient and noted this for her for billing purposes. He did not do the same with respect to removal of foreign bodies from eyes. She was told by billing personnel at the clinic to use a certain billing code for this procedure and that is what she did. She was aware there was more than one code for removal of foreign bodies from the eye but did not discuss this with her husband. Likewise with respect to removal of toenails. She acknowledged each of these two procedures had three possible billing codes, only one of which she routinely used.

12. Ms. Ernst said she was aware of three previous occasions on which the JMPRC conducted a review and ordered Dr. Ernst to reimburse Medical Services Branch for overpayment but never discussed this with her husband. Specifically, at page 143 of the transcript, the following are the questions and her answers:

> Q. All right. And you were aware as a result of those three previous reviews and orders to repay money that billing was very important. Had you never discussed this with your husband?
> A. No.
>
> Q. And he never raised the issue with you that I've been ordered to repay money on three separate occasions; now we have to be careful that we bill right; let's go through the code and see – and make sure we're actually billing this appropriately? He never did that with you?
> A. No.
>
> Q. So the clinic just carried on and continued to bill as it had without paying any attention as to whether it was the right way to bill or the wrong way to bill?
> A. When we were told it was the wrong way to bill, we changed.

13. In re-examination Ms. Ernst said she thought the relevant codes were raised with her at a billing review after December 2008 and that she has billed under code 90S for all foreign body removals from the eye since.

14. Eleanor Head testified she has worked as a billing clerk at the Rosetown Medical Clinic since 2001 or 2002 but, except for one short period, was not responsible for Dr.

Ernst's billings. She said Medical Services Branch personnel met with clinic staff in 2002 and again in the fall of 2008 or spring of 2009. Ms. Ernst was present. Ms. Head testified that MSB personnel, in fall of 2008 or early spring 2009, attended at the clinic "because of multiple problems". Staff received information on various billing codes including surcharge codes, removal of foreign bodies from eyes and toenail resections. Ms. Head testified they were told to bill 91S (the higher amount) for removal of foreign bodies from the eye if freezing was required and the lower amount if not. A simple wedge resection of the toenail was to be billed at the lower code while removal of the nail and deadening of the nail bed was to be charged at the higher code.

15. Ms. Head testified that when she is unsure as to which code is to be billed, she consults the physician for whom she is preparing the billing to determine precisely which procedure was done and which code is to be used.

16. Dr. Ernst testified he has practiced as a physician in Rosetown since 1967. In December 2008 he agreed to do a locum at the Nipawin Hospital Emergency Department for a weekend which he described as "extremely busy". He denied billing first patient surcharges for patients seen when he was already in the hospital. He said he determined the billing code for each patient and recorded it on the outpatient form. He also recorded the time he saw each patient. Disposition time (discharge) was generally recorded by a nurse or LPN. First patient surcharges were claimed only for the first patient seen by Dr. Ernst after he was called to the hospital. It was a busy emergency room so he usually had more than one patient to see after he arrived.

17. Dr. Ernst testified that an 881L was billed when an anesthetic was used to remove all or part of a nail. He recalled this being the instruction received at a conference at some point and suggested the fee schedule was not clear about which code was to be used for this procedure.

18. Regarding the 91S code, Dr. Ernst testified this code was billed for removal with the use of anesthetic of a foreign body embedded in the eye followed by removal of the rust ring.

19. Dr. Ernst acknowledged the cases referred to by the College in support of the charges detailed in (b) and (c) were billed at a higher rate than they should have been. He stated it was not his intention to bill a larger fee than the schedule permitted both with respect to the 91S (eyes) and 881L (nails) codes but said "I know I am accountable" and "I didn't realize that there was those two codes". He also stated "I thought they [billing personnel] were doing the right billing" and that corrections had been made since learning his billing was inappropriate.

20. In cross-examination Dr. Ernst acknowledged he was advised in 1980, 1985 and 1994 by the Medical Care Insurance Branch (MCIB) his use of first patient surcharges was being reviewed. He also agreed he had been before the JMPRC on two occasions prior to the one leading to this hearing concerning billings. Dr. Ernst was unwilling to agree that he admitted erroneous billings of first patient surcharges during the Nipawin weekend to the JMPRC saying he was under duress in his meeting with the JMPRC and "I wasn't sure what was going on". Also, his wife said some of the surcharges were legitimate

21. Regarding the weekend in Nipawin Dr. Ernst stated that on two or three occasions he was called back by the nurse after leaving the hospital because he had missed a patient. He maintained that all first patient surcharges in Nipawin were legitimate and that nurses, he thought, recorded the time he arrived at the hospital in response to their call rather than the time they called him. He recalled no attendances at the nursing home during the Nipawin weekend. He agreed that a first patient surcharge would be inappropriate in a circumstance where he saw a patient when he was already in hospital or arriving from the nursing home.

22. Dr. Ernst gave no clear answer in cross-examination to the question of how a lay person (Ms. Ernst) would determine which code to bill in the cases where Dr. Ernst's notation was "fb removal" (foreign body removal) and where no discussion occurred between him and his wife as to the specifics of the foreign body removal.

23. Also in cross-examination Dr. Ernst stated that all of the nail removal billings referred to in the evidence were correctly billed using the appropriate code. He denied testifying to the opposite in examination-in-chief. He changed his mind again in cross-

examination saying that where 881L was billed it should have been 882L (the lower code) with respect to the nail resection cases. He said he had no explanation for why these cases were incorrectly billed. Dr. Ernst made reference to a physician's meeting where these billings were discussed but did not convey any learning from this to his billing clerk (Ms. Ernst). At the end of Dr. Ernst's testimony the Chair of the Discipline Committee confirmed with Dr. Ernst that the five cases in evidence of removal of foreign bodies from eyes were incorrectly billed. In response to further questions Dr. Ernst again said the nail removal cases were correctly billed.

24. In cross-examination Dr. Ernst was referred to a statement he made to the JMPRC: "Sometimes I get really frustrated with the whole billing system. I think I'm entitled to be paid, and I bill for things I know I shouldn't, but I think I'm entitled to it". Dr. Ernst said the context for this statement was regarding billing for time on hold while on the phone even though it was not billable time. The point he was trying to make to the JMPRC was that he should have been paid for his time on hold.

25. Responding to questions from the panel, Dr. Ernst testified it came as a surprise to him that there were three codes for toenail procedures. He was aware of only two until he attended a medical meeting either before or after 2008. He also testified that during the weekend in Nipawin he worked steadily from 5:00 p.m. on Friday, December 19, 2008 until 4:00 a.m. on Monday, December 22, 2008. During that time on two or three occasions he was called back to the emergency room because a nurse had forgotten to tell him about another patient waiting. He recalled that the nurse in question was new. He said that, to his recall, there was no room in the emergency department where he could lie down to rest or sleep. On redirect he acknowledged telling the JMPRC that in December 2008 the Nipawin Hospital had a room available for him to rest or sleep in the hospital during his stay:

> Q. But when you gave your information to the JMPRC, you said, yes, there is a room at the hospital I can stay?
> A. Yeah. It was only the separate part of what I can remember was – I don't know what it used to be, an obstetrical – no, it wouldn't be an obstetrical – I don't know what it was. It was in the hospital, but – somewhere, yeah.

26. By agreement of the parties the medical records for patients seen and billings submitted by Dr. Ernst as well as relevant portions of the payment schedule for

Saskatchewan physicians were entered as exhibits at the hearing along with the November 29, 2010 final report by the JMPRC with respect to Dr. Ernst. As already noted, the transcript of the JMPRC interview with Dr. Ernst was ruled to be admissible evidence in this hearing.

27. Of note in the payment schedule are the codes for weekend first patient and additional patient surcharges (Codes 816A, 836A, 818A, 838A, 819A and 839A). As expected, surcharges for additional patients are billed at half or less than half the amount payable for first patient seen. The codes for "removal of fingernail or toenail" (880L, 881L, 882L) are described respectively as simple evulsion or wedge excision, radical excision of nail bed or hemiphalangectomy and wedge resection with phenol or cautery or cryoablation. Payment for an 881L (radical excision) is significantly higher than codes 880L and 882L. The codes for removal of foreign bodies from the eye (90S, 91S, 106S) describe unembedded removal, embedded removal with local anesthesia and removal with general anesthesia, the latter drawing the largest fee.

28. Excerpts from the JMPRC hearing with Dr. Ernst on November 1, 2010 disclose Dr. Ernst's acknowledgement that he charged a first patient surcharge with respect to a number of patients seen in Nipawin where the charge should have been for an additional patient. He said he left the emergency room maybe once in the morning and once or twice in the afternoon and perhaps twice in the evening. Regarding the foreign body in the eye codes, Dr. Ernst stated he was not aware there was more than one code for this procedure. He acknowledged several instances of overcharging for nail procedures while in Nipawin.

IV. ARGUMENT

29. The parties agreed that the standard of proof in disciplinary matters is on a balance of probabilities. They did not agree on the characterization of the charge against Dr. Ernst. Counsel for the College argued it is a strict liability offense while Counsel for Dr. Ernst maintained it is a *mens rea* offense.

A. College Argument

30. Counsel for the College submitted the offense Dr. Ernst is charged with is presumed to be a strict liability offense in accordance with the Saskatchewan Court of Appeal in *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 (CanLII). Once the elements of the charge are proven, the onus shifts to Dr. Ernst to demonstrate he exercised due diligence to prevent the conduct charged from occurring. The College need not prove the conduct was deliberate but simply that it occurred. It is for the Discipline Committee to determine whether the conduct was unprofessional.

31. In this case, the College argued, there is no dispute about the fact Dr. Ernst billed inappropriately for removal of foreign objects from the eye and for nail procedures. First patient surcharges were also billed inappropriately. Dr. Ernst dictated the billing codes to be used by his billing clerks. He had an obligation to ensure appropriate billing through an appropriate billing process i.e. to exercise due diligence in this regard.

32. Counsel for the College addressed the matter of Dr. Ernst's credibility, noting a number of examples of internal inconsistency and inconsistency with previous statements. Further, Dr. Ernst did not demonstrate due diligence in his knowledge of billing codes or his oversight of billing practices in his office. Counsel argued, with respect to the surcharges, that it was physically impossible in the space of 53 hours for Dr. Ernst to have returned to the Nipawin hospital 35 times as his first patient surcharges indicate. Dr. Ernst acknowledged as much to the JMPRC and the evidence presented by Mr. Hoffort clearly demonstrates inappropriate first patient surcharge billings. Counsel argued this goes well beyond failure to exercise due diligence and constitutes deliberate and willful misconduct on Dr. Ernst's part.

B. Dr. Ernst's Submissions

33. Regarding the nature of the offense, Counsel for Dr. Ernst argued the presumption of strict liability is rebutted by the wording of Section 46(l) of *The Medical Professional Act*. The offense charged is a *mens rea* offense requiring proof Dr. Ernst knew his billings were false or misleading. Section 46(l) of the *Act* describes conduct unbecoming as "makes or permits false or misleading statements to be made in an account for payment for services

rendered by him when he knew, or when under the circumstances it was reasonable to conclude that he knew, that the statements were false or misleading". The language of intent in Section 46(l) changes the offense from strict liability to a charge requiring proof of *mens rea*.

34. In support of this argument Counsel pointed to the payment schedule which allows for adjustments to be made where the schedule is misunderstood or misinterpreted. In other words inadvertent misapplication of the payment schedule is dealt with administratively rather than through disciplinary charges. Only the most egregious billing cases such as repeated offenses over a long period of time or fictitious billing for services never rendered will attract disciplinary proceedings. To prove the charge laid against Dr. Ernst the College must demonstrate more than mere carelessness or bad judgment, it must prove dishonest intent. At worst, Dr. Ernst may have honestly but incorrectly billed for some first patient surcharges, honestly believed he could bill 881L if the nail bed was treated and 91S whenever he used an anesthetic. Dr. Ernst did not bill for fictitious services or for patients not seen. Furthermore Dr. Ernst was not significantly enriched by erroneous billing. If he inadvertently misapplied the payment schedule, Dr. Ernst ought to have been dealt with through the assessment procedures in the payment schedule rather than through disciplinary proceedings.

35. Counsel also submitted the College failed to lead evidence to establish particular (d) of the charge (failure to exercise due diligence). To prove this element of the charge the College would have had to lead evidence of the standards against which to measure Dr. Ernst's conduct.

36. In the alternative, if the offense charged is one of strict liability, Counsel argued Dr. Ernst had in fact demonstrated due diligence by incorporating advice from Medical Services Branch into his billing procedures. His belief that he was billing appropriately, based in part on information received from Medical Services Branch, was a reasonable one.

37. In summary, Dr. Ernst's submissions were that the College had failed to prove:

(i) The standard expected of Dr. Ernst with respect to billing.

(ii) That Dr. Ernst made false or misleading statements in his accounts.

(iii) Specific intent or knowledge on Dr. Ernst's part that he was making or permitting to be made false or misleading statements concerning his accounts.

(iv) That the misapplication of billing for services provided was anything more than isolated occurrences.

(v) That Dr. Ernst engaged in deliberate, dishonest, immoral or fraudulent conduct.

38. Lastly, Dr. Ernst argued that, even if founded, his impugned conduct was not sufficiently serious to be considered unbecoming, improper, unprofessional or discreditable so as to warrant disciplinary action.

39. In reply Counsel for the College submitted:

(i) There was no evidence to support a finding that Dr. Ernst was mistaken about the billing codes. The Committee was urged to consider evidence only as opposed to speculation.

(ii) The insignificance of the amounts overbilled reflects the fact that the College charged Dr. Ernst for overbilling particular codes over the span of one weekend only.

(iii) The JMPRC and College mandates are distinct but complementary. The JMPRC collects for overpayment but does not determine whether the conduct of the overbilling physician is unprofessional. That is the role of the College.

(iv) The onus of proving due diligence lies with Dr. Ernst.

V. ANALYSIS AND DECISION

40. The charge against Dr. Ernst is set out in full in paragraph 1 above. It cites Section 46(l) **and/or** Section 46(p) of *The Medical Profession Act, 1981, supra.*

41. Section 46(p) of the *Act* mandates a finding of unprofessional conduct where the conduct in question falls within the acts or omissions defined in Bylaw 8.1.

42. Bylaw 8.1(b)(iii) prohibits charging a fee that is excessive in relation to the services performed.

43. Section 46(l) of the *Act* defines unbecoming, improper, unprofessional or discreditable conduct as making or permitting false or misleading statements to be made in an account for payment for services rendered when the physician knew or, under the circumstances, it was reasonable to conclude he knew the statements were false or misleading.

44. In *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33 (CanLII), Mr. Merchant was charged as follows:

> 1. [the appellant] is guilty of conduct unbecoming a lawyer in that he did correspond to various residents of Estevan, Saskatchewan, by letter dated August 10, 2004, with attached Retainer Agreement, which letter and Retainer Agreement were reasonably capable of misleading the recipient or the intended recipients.

45. A Discipline Hearing Committee of the Law Society found Merchant guilty of this charge. In doing so the Hearing Committee found that Mr. Merchant's conduct consisted of negligence in failing to safeguard against staff errors (sending the wrong Retainer Agreement to Estevan citizens). Notably, counsel for the Law Society acknowledged that the offense charged was a *mens rea* offence and went on to suggest the charge could be amended so that "failure to supervise" or administrative inefficiency rather than volitional conduct was the substantive feature of the offence.

46. The Saskatchewan Court of Appeal, in quashing the Hearing Committee's conviction, provided a comprehensive review of the mental ingredient to be established, depending on how the charge is framed. Citing the Supreme Court of Canada in *R. v. Sault Ste. Marie*, [1978] 2 SCR 1299, 1978 CanLII 11 (SCC) the Court held:

> [47] Prior to the *Sault Ste. Marie* case, there were only two recognized categories of offences: (1) the traditional criminal offence which required proof of a certain state of mind in relation to the commission of the prohibited act (knowledge combined with a volitional choice, or intent, or at minimum a reckless disregard for the consequences); and (2) the absolute liability offence, where the performance of the act alone was sufficient to establish guilt, regardless of state of mind. The *Sault Ste. Marie* case gave recognition for the first time to an intermediate category of offences described as "strict liability offences" (also referred to as "regulatory offences" or "public welfare offences") where a defendant could avoid culpability for a prohibited act by demonstrating on a balance of probabilities that: (1) due diligence was exercised and all reasonable steps were taken to avoid its commission; or (2) the defendant held a reasonable belief in a set of facts which, if true, would render the act or omission innocent.
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> [48] Thus, offences which are considered "criminal" in the true sense of the word populate the first category. In such cases, a conscious choice to perform a prohibited act, combined with knowledge that all or some of the relevant circumstances exist, is a well-recognized form of criminal culpability.
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> [49] Offences of absolute liability are those where the Legislature has said that if the prohibited act alone is proved, then guilt is established and punishment will follow — for example, a case of driving while suspended or prohibited, as in *Re B.C. Motor Vehicle Act*.[17]
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> [50] Regulatory offences that affect matters of public interest or concern fall into the intermediate category. These frequently involve controlled, restricted, or regulated spheres of activity rather than conduct prohibited on pain of criminal sanction. In strict liability offences, the onus is on the accused to establish on a balance of probabilities that he took all reasonable steps to avoid committing the offence. Or, as more recently articulated by Goudge J.A., speaking for the Ontario Court of Appeal, what must be established is that the "... accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system".[18]
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> [51] The rationale behind the creation of a third category of offences is that in regulatory situations, it is the defendant who has the relevant knowledge regarding the measures taken to avoid the particular breach in question. It was deemed proper to expect that the defendant would come forward with the evidence of due diligence. Thus, while the prosecution was required to prove beyond a reasonable doubt that the prohibited act has been committed, the defendant had to establish, on a balance of probabilities, that he or she had been duly diligent, taking all reasonable care to avoid offending. Alternatively, the defendant had only to establish the requisite reasonable belief in a state of facts that, if true, would render the act an innocent one.
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> [52] Therefore, a strict liability offence requires, at minimum, a fault element amounting to negligence before misconduct will be found. Negligence consists in an unreasonable failure to know the facts which constitute the offence, or the failure to be duly diligent in taking steps which a reasonable person would take.[19]

> [53] Accordingly, while lack of the requisite knowledge or intent constitutes a defence to a full *mens rea* offence, it is not a defence in law to a strict liability offence. Required instead is evidence that establishes on a balance of probabilities that all reasonable steps were taken by the defendant to prevent the commission of the prohibited act.
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> [54] If the *Sault Ste. Marie* classifications properly guide the analysis, the misconduct complained of would logically fall into a category in the nature of a full *mens rea* offence or a strict liability offence. By applying a fault standard amounting to negligence, the Hearing Committee, in effect, reasoned that the misconduct more closely resembled a strict liability offence, and that the defence of due diligence had not been made out by the appellant.
>
> [55] The wording of the charge reads as if the alleged misconduct involved deliberate action on the appellant's part. It says he did "correspond to various residents of Estevan" with a letter and retainer agreement reasonably capable of misleading those residents and makes no reference to negligence, a failure to adequately supervise staff or other such matters. Significantly, counsel for the Law Society confirmed that was the import of the charge when, in direct response to a question from the Chairman, he acknowledged the Committee was not dealing with a "strict liability offence". Accordingly, in the result, the charge had to be read as alleging deliberate or conscious action on the part of the appellant, and evidence of negligence or carelessness was insufficient to warrant the Committee's finding of conduct unbecoming.

47. In *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 (CanLII) Mr. Merchant was charged as follows:

> (i) breach a Court Order of Mr. Justice Smith dated June 4, 2003 (the "Smith order") that required his firm to pay certain settlement proceeds due to his client, M.H., into court pending determination of a related family property issue;
>
> (ii) counsel and/or assist his client, M.H., to act in defiance of a Court Order of Mr. Justice Smith dated June 4, 2003;

48. The Court referred to *Merchant* (2009) and the definition of conduct unbecoming in *The Legal Profession* Act, stating at para. 62:

> [62] This definition of conduct unbecoming is necessarily broad and can encompass a wide range of potentially unethical conduct. **In short, the degree of fault required to be established in any case will vary depending on the particulars of the allegation and its context**. [emphasis added]

49. The Court then went on to affirm the presumption that regulatory type offences are strict liability offences:

> [64] The presumption that regulatory type offences are strict liability offences has recently been reaffirmed in *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers*, 2013 SCC 63 (CanLII), 451 N.R. 113:
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> > 31 A court inquiring into the nature of an offence must interpret the relevant statutory provision. In doing so, it must take account of the presumption established by this Court that regulatory offences are generally strict liability offences. In *Lévis (City) v. Tétreault*, 2006 SCC 12 (CanLII), [2006] 1 S.C.R. 420,

at para. 16, LeBel J. explained this as follows, citing the presumption of statutory interpretation articulated by this Court in *Sault Ste. Marie*:

> Classifying the offence in one of the three categories now recognized in the case law thus becomes a question of statutory interpretation. Dickson J. noted that regulatory or public welfare offences usually fall into the category of strict liability offences rather than that of *mens rea* offences. As a general rule, in accordance with the common law rule that criminal liability ordinarily presupposes the existence of fault, they are presumed to belong to the intermediate category:
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> Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. **An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. [p. 1326]** [emphasis added]

[65] Apart from this presumption, there is also a notion in some jurisprudence that if a disciplinary tribunal is given the power to determine what type of actions constitute conduct unbecoming, then it must also be able to determine what, if any, mental element is required to find a person guilty of the charge. This reasoning is best summarized by the Newfoundland Supreme Court in *Dunne v. Law Society of Newfoundland* (2000), 2000 CanLII 28785 (NL SC), 191 Nfld. & P.E.I.R. 129. In explaining that professional misconduct could be a strict liability offence, Rowe J. (as he then was) wrote:

> 30 In my view, the appropriate standard should be akin to strict liability, bearing in mind that professional disciplinary matters differ from criminal or quasi-criminal offences and that Benchers have authority to define professional misconduct within the relevant constitutional, statutory and common law framework.

[66] This line of thinking was also supported by the Federal Court of Canada in *Laperrière v. Macleod*, 2010 FC 97 (CanLII), 362 F.T.R. 189. In explaining the unique nature of professional misconduct claims, the Court stated:

> 90 The *sui generis* nature of professional misconduct proceedings has been recognized by the Federal Court of Appeal within the context of proceedings involving bankruptcy trustees in *Canada (Attorney General) v. Roy*, 2007 FCA 410 (CanLII) at paragraph 11, referring to the decision of the Quebec Court of Appeal in *Béliveau v. Comité de discipline du Barreau du Québec*, 1992 CanLII 3299 (QC CA), [1992] R.J.Q. 1822. Consequently, principles of criminal law do not necessarily apply to professional conduct proceedings. However, though professional conduct proceedings are *sui generis*, "there are similarities and overlapping elements in terms of the fault required for a finding of guilt" *Canada (Attorney General) v. Roy, supra,* at paragraph 11).
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> 91 A *sui generis* approach to professional misconduct cases appears to be appropriate in determining if a particular alleged professional misconduct is subject or not to a defence of due diligence or reasonable care. **The availability of such a defence in a particular case will depend on the nature of the alleged misconduct and on the terms of the legislative or regulatory provisions which are claimed to have been breached.** [emphasis added]

[67] Law societies are statutorily given the power to discipline members and therefore to frame the wording of the charge describing the alleged misconduct. The foregoing reasoning in *Dunne* and *Laperrière*, with which I agree, acknowledges that speaking generally law societies implicitly have the discretion to determine the requisite mental

element needed to prove that misconduct, provided that such discretion is exercised appropriately based on the relevant legislative and regulatory provisions in play.

[68] The charges in this case, unlike in *Merchant* (2009), are not cast as *mens rea* offences. In my view, the Law Society properly framed each count as a strict liability offence. Nothing in the *Act* or the Code of Professional Conduct imparts any type of mental requirement into the offence. There is no express or necessarily implicit reference to any deliberate action or any other conduct that would make the *mens rea* fault standard applicable. The wording of the offences in this case does not, therefore, have the specificity of action present in *Merchant* (2009). As observed in *Merchant* (2009), conduct unbecoming can be established through negligence or total insensibility to the requirements of acceptable practice. Moral turpitude is not required.

[69] In this case, the Law Society did not insert any words that would indicate the conduct unbecoming charge hinged on a finding of intention. Examples of such words are "intentionally" or "knowingly." The charges in this case merely say "did" (breach) and "did" (counsel and/or assist). "Did" merely refers to the action of doing something and does not, in itself, impart any type of mental element. One of the definitions that the *Oxford English Dictionary* provides for the word is "perform, effect, engage in." The word "did" alone does not impart any *mens rea* into the charge.

[70] That said, the absence of such words is not determinative if the nature of the charge and the circumstances as a whole nevertheless lead to the conclusion *mens rea* is required. Whether such is the case must be looked at reasonably. In this case, given the nature of the charge, the governing Codes of Conduct and the circumstances as a whole, it is reasonable the offences are strict liability ones. It is not inherent in a charge of conduct unbecoming by breaching a court order that moral turpitude is required. One can conceive of the charge being established by evidence showing the action required by the court order was not performed and evidence the cause was negligence or inadvertence.

[71] The sections of the Code of Professional Conduct applicable to count 1 and count 2 read as follows:

> Chapter XIII
> The lawyer should encourage public respect for and try to improve the administration of justice.
>
> Chapter I
> The lawyer shall discharge with Integrity all duties owed to the clients, the court, other members of the profession and the public.

[72] The Law Society is justified in holding lawyers to a strict liability standard in this context. A lawyer is an officer of the court and owes a duty thereto. Compliance with court orders is a fundamental aspect of a lawyer's obligations to the court and the rule of law. Strict adherence to the terms of a court order is among the most important duties and responsibilities of a lawyer. Breaching a court order is harmful to the public and the profession, regardless of the subjective state of mind of the lawyer. It would be strange indeed if once having found on an objective basis a lawyer's actions have thwarted the spirit and letter of a court order that such conduct could be absolved by the lawyer's belief he did not thwart the order or had no intention to do so. Despite the harsh penalties that can be associated with conduct unbecoming charges, strict liability standards ensure the public is receiving competent and diligent legal services and respect for the administration of justice is preserved. This ground of appeal fails.

50. These decisions from the Saskatchewan Court of Appeal make clear the presumption that conduct unbecoming is generally charged as a strict liability offence. The exceptions are where the legislation under which the charge is laid contains words requiring proof of intention such as "knowingly". Where that is the case, the regulatory body must establish whatever mental element is stipulated in the legislation. In this case Section 46(l) requires proof the physician knew, or under the circumstances it was reasonable to conclude he knew, statements made in an account for payment were false or misleading.

51. The charge against Dr. Ernst is framed in the alternative. He is charged under Section 46(l) **and/or** Section 46(p) which references Bylaw 8.1(b)(iii). Section 46(l) is a *mens rea* offense requiring proof Dr. Ernst knew or it is reasonable to infer he knew statements in his billings were false or misleading. Section 46(p) referencing Bylaw 8.1(b)(iii) is a strict liability offence requiring proof only that the act of charging a fee excessive in relation to the services performed occurred.

52. Charging in the alternative in this case creates ambiguity. The words "and/or" in the charge mean Dr. Ernst is either charged under Section 46(l) or Section 46(p) or both. In this case, given the differing requirements of proof in the two subsections, it matters which option is chosen. One requires proof of the act **and** knowledge that the account was false or misleading while the other requires proof of the act of excessive billing only. While charging in the alternative does not alter the standard of proof (balance of probabilities), it affects the College's burden of proof.

53. We examined the rules of statutory interpretation to determine the meaning of "and/or". In *Sinclair v Sinclair*, 2013 SKCA 123 (CanLII) the Saskatchewan Court of Appeal cited *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) which states at page 84:

> Ambiguity *must* be resolved one way or another and it may be resolved on somewhat speculative grounds.
>
> [25] She [Sullivan] discusses problems surrounding the use of the word "and" and "or" at p. 81 of *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law, 2007):
>
> > Both "and" and "or" are inherently ambiguous. "And" is always conjunctive in the sense that it always signals the cumulation of the possibilities listed before and after the "and." However "and" is ambiguous in that it may be joint or joint and

> several. In the case of a joint "and" every listed possibility must be included: both (a) and (b); all of (a), (b), and (c). In the case of a joint and several "and," all the possibilities may be, but need not be, included: (a) or (b) or both; (a) or (b) or (c), or any two, or all three. In other words, the joint and several "and" is equivalent to "and/or."
>
> From this, a re-reading of the section is no less ambiguous. A provision that the court may appoint an administrator where (a) a person dies intestate and (b) special circumstances exist does not make it clear as to whether both (a) and (b) must exist in order for the court to be able to appoint an administrator.
>
> [26] The courts can look to the practicalities to obtain a workable result. In *Berardinelli v. Ontario Housing Corp.*, 1978 CanLII 42 (SCC), [1979] 1 S.C.R. 275, Estey J. said at p. 284, "...When one interpretation can be placed upon a statutory provision which would bring about a more workable practical result, such an interpretation should be preferred if the words invoked by the Legislature can reasonably bear it...," which takes us to a history of the section.

54. To attempt to resolve the ambiguity created by the wording of the charge, we carefully studied the context – in this case the particulars of the charge (a) to (d). The use of the words "caused or permitted" in (a), (b) and (c) signify direct action on Dr. Ernst's part in billing excessively or negligence in failing to ensure appropriate billing as described in (d). On its face, proof of either "caused or permitted" on a balance of probabilities is sufficient to make out the charge.

55. Unfortunately, the manner in which the particulars of the charge are framed is of little assistance in determining whether Dr. Ernst is charged under Section 46(l) or Section 46(p) or both. Section 46(l) uses the words "makes or permits false or misleading statements". Bylaw 8.1(b)(iii) simply refers to "charging a fee that is excessive". The particulars of the charge against Dr. Ernst incorporate some of the wording of both of these provisions with the words "caused or permitted excessive billing". Particular (d) (failed to exercise due diligence) invokes a strict liability interpretation, essentially defining "permitted" in the charge.

56. In previous cases the College has frequently charged its members under Section 46(o) and/or Section 46(p) both of which, on their faces, have been read as creating strict liability offences. We were referred to one case decided by the CPSS Discipline Committee on August 17, 2016 concerning Dr. Rajakumar where the charge against the member was framed in the alternative under Section 46(l) and/or Section 46(o) and/or Section 46(p) of

The Medical Profession Act. Dr. Rajakumar raised the question as to whether the offence charged was a strict liability or a *mens rea* offense. The Discipline Committee concluded that the factual basis for the charge had not been proven and it was therefore unnecessary to determine whether proof of *mens rea* was required.

57. To determine whether that result pertains here, we turn now to the evidence. We start by noting, that while Dr. Ernst, in argument, contested some of the specific evidence of improper billing, his primary defence was that he had reason to believe his 881L and 91S billings were appropriate. As for first patient surcharges he argued, though some may have been incorrectly billed, "there was nothing false or misleading" about this. He did not bill for fictitious services, services not performed or patients not seen. He characterized his conduct as "inadvertent mistakes" and not serious enough to constitute unprofessional conduct or warrant disciplinary action. The overbilled amount, at worst, was minimal and the evidence did not establish repeated offences over a long period of time.

58. We are satisfied that the evidence amply establishes overbilling and that the *acteus reas* of the charge has been proven.

59. While counsel for Dr. Ernst found some discrepancies in the testimony of Mark Hoffort, the evidence of excessive billing remained overwhelming. It stretches credulity to suggest the number of first patient surcharges billed over a 53 hour period is more likely than not legitimate particularly in light of Dr. Ernst's statements to the JMPRC in this regard. Dr. Ernst's acknowledgment in his testimony at the hearing and in his interview with the JMPRC also confirm excessive billing in charging 91S and 881L codes for procedures not warranting them.

60. Furthermore, we agree with the College that Dr. Ernst's credibility and reliability as a witness was questionable. His evidence was contradictory, inconsistent with statements given to the JMPRC, scattered and evasive. Examples of this are detailed in paragraphs 22 and 24 above.

61. Both Dr. Ernst and Ms. Ernst were vague about what they were told concerning the relevant fee codes and when they received this information. In any case, both testified they did not discuss billings or billing codes with each other. Dr. Ernst recalled a meeting where toenail removal codes were discussed but testified he was still not clear about these codes. It seemed he had not taken the time, even in anticipation of testifying at his own disciplinary hearing, to familiarize himself with the subject of the hearing. Although he acknowledged being notified on three previous occasions by MCIB of reviews of his billings and twice being reassessed by the JMPRC, he was vague about what these reviews and reassessments were about. Taken as a whole, including frequent diversions from the questions asked, it was difficult to determine Dr. Ernst's position on key aspects of the case. For these reasons we were unable to accord much weight to his testimony on relevant issues. As a consequence we relied more heavily on the documents presented including copies of original hospital records and Dr. Ernst's billing records in concluding that excessive billing occurred in the three categories charged – first patient surcharges, Code 91S and Code 881L.

62. Having examined the evidence and come to a conclusion with respect to the *acteus reas* of the offence charged we carefully reviewed the evidence to determine the reason(s) for overbilling. Was it inadvertent error as Dr. Ernst argued, negligence or intentional?

63. What struck us about the uncontradicted evidence of both Ms. Ernst and Dr. Ernst was that on three previous occasions they had experienced formal billing reviews and, according to Ms. Ernst, been ordered to repay money as a result. Ms. Ernst testified that despite this she and her husband never discussed the billing codes in question or the importance of accurate billing. Ms. Ernst testified she did not think the specific codes pertaining to removal of foreign bodies from the eye were raised in the previous billing reviews. They were raised after the Nipawin weekend and since then she has used the lower code for all foreign body removals from the eye. Her colleague, Ms. Head, testified it is necessary in circumstances where more than one code applies, to determine precisely which procedure was done in order to bill it under the appropriate code. While Ms. Head had these conversations when necessary with the physician for whom she was invoicing, Ms. Ernst and Dr. Ernst testified they did not talk to each other about codes or billings. Neither, it seems, did they discuss changes in billing practices as a consequence of the JMPRC

reviews/reassessments or information gleaned from other sources. The evidence was that they simply did not talk to each other about billings for the codes in question. The right hand did not know what the left was doing.

64. It is impossible from this evidence to conclude due diligence was exercised by Dr. Ernst to ensure appropriate billing. Ms. Ernst, Ms. Head and Dr. Ernst each testified to one instance where each learned something about one or more of the codes in question. Ms. Head's evidence was clearest in this regard however she was not responsible for Dr. Ernst's billings. Ms. Ernst and Dr. Ernst, while they may have gleaned useful information in their respective educational sessions, did not share this information with each other. From this evidence we could not detect due diligence on Dr. Ernst's part or that he held a reasonable belief in a state of facts which if true would render the overbilling innocent. Simply put, the evidence did not support this finding.

65. In short, the College has met its burden under the strict liability requirements and Dr. Ernst has not met his reverse onus.

66. The question then is whether, if the charge against Dr. Ernst is a *mens rea* offence, the requisite intent has been established by the College. As already stated, Section 46(l) of the *Act* requires proof that Dr. Ernst knew or, under the circumstances, it was reasonable to conclude he knew that statements made in an account for payment for services rendered by him were false or misleading.

67. From Dr. Ernst's statements to the JMPRC, it is clear he now knows and acknowledges overbilling in the three categories with which he is charged. The question is whether he knew or it can be inferred he knew this at the time the bill was rendered.

68. The evidence from which such inference may be made derives primarily from Dr. Ernst's previous statements to the JMPRC where he acknowledged sometimes, in frustration, knowingly billing illegitimately [para. 23 above].

69. With respect to the weekend in Nipawin he told the JMPRC he billed first patient surcharges in a number of instances where that was not warranted and that it was he who determined whether to charge a first patient surcharge. He then made a notation as to the code to be used for billing purposes. There is no way to read this other than Dr. Ernst consciously and knowingly recorded 35 first patient surcharges during his weekend in Nipawin, almost as many as those for additional patients.

70. We have concluded from all of the evidence that Dr. Ernst, with full knowledge of the circumstances under which he could legitimately charge a first patient surcharge, recorded this charge when he knew it to be false. He alone determined these surcharges. This is not a matter of error on the part of Ms. Ernst or nurses at the hospital as Dr. Ernst suggested.

71. Another fact we took into account was that this is the third time Dr. Ernst has been before the JMPRC for illegitimate billings and not the first time concerning first patient surcharges. The evidence was that previous reviews have resulted in reimbursement by Dr. Ernst for excessive billings. This is a significant factor in determining whether, under the circumstances here, it is reasonable to conclude he knew his billings were false or misleading in 2008. As indicated earlier, the fact that this did not engender communication between Dr. Ernst and his billing clerk, Ms. Ernst, suggests more than carelessness or negligence. It suggests recklessness which implies knowledge. Reckless behavior is behavior one chooses despite knowing the possible consequences.

72. In *Law Society of British Columbia v. Sas*, 2016 BCCA 341, the panel discussed recklessness and willful blindness, relying on the decision in *Sansregret v. The Queen*, [1985] 1 SCR 570, 1985 CanLII 79 (SCC), at 584, and 587 to 588:

> [p. 584] Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.
>
> ...

> [p. 587] ... Where the accused is deliberately ignorant as a result of blinding himself to reality the law presumes knowledge ....
>
> ... Having wilfully blinded himself to the facts before him, the fact that an accused may be enabled to preserve what could be called an honest belief, in the sense that he has no specific knowledge to the contrary, will not afford a defence because, where the accused becomes deliberately blind to the existing facts, he is fixed [p. 588] by law with actual knowledge and his belief in another state of facts is irrelevant.

73. With respect to removal of foreign bodies from eyes and resection of toenail billings, the evidence is less clear. Both Dr. and Ms. Ernst, after decades of practice, seemed confused by the applicable codes.

74. Regarding his billings for 881L and 91S services, Dr. Ernst argued both inadvertence and honest belief as the reasons for overbilling. We have already concluded, based on Dr. Ernst's admissions, that the overbilling in all three categories occurred. We heard no evidence to support a finding of inadvertence from either Dr. Ernst or Ms. Ernst. At the JMPRC Dr. Ernst referred to errors and incorrect billings without explanations as to their origins. In his testimony at the hearing he made reference to a medical meeting where the codes for nailbed treatments were discussed. He gave no indication as to when this meeting occurred. Accordingly, we cannot find honest belief on Dr. Ernst's part that he was acting in accordance with information received at a medical meeting when he billed for services in December 2008.

75. As for the 91S billings, the evidence does not satisfy us that Dr. Ernst held any honest belief based on MSB information as to the use of this code. Ms. Head testified as to her understanding of the use of the 91S code. Ms. Ernst said she was told by "the girls that did the billing" to use the 91S code for removal of a foreign body from an eye. In any case, neither, according to the evidence spoke to Dr. Ernst about this so as to provide any basis for an honest belief on his part.

76. The *de minimis* argument put forward by Dr. Ernst (i.e. the amount of the overbilling was negligible in amount) does not assist us. While the amount in play here may factor into sentencing considerations if Dr. Ernst is found guilty, it is not a measure of whether or not

conduct unbecoming occurred. Neither does the amount in question confirm inadvertence on Dr. Ernst's part as suggested by his counsel.

77. In short, based on all of the evidence, we are satisfied that the *mens rea* requirements of Section 46(l) of the *Act* have been met and that, in all of the circumstances, it is reasonable to conclude that Dr. Ernst knew his billings were false.

78. Counsel for Dr. Ernst argued that even if the College could prove the elements of the charge against Dr. Ernst, this Committee must be satisfied that the impugned conduct is serious enough to be construed as unprofessional conduct so as to warrant disciplinary action. In this case the College's Bylaws, specifically 8.1(b)(iii), specifies that charging a fee that is excessive in relation to the services performed is, by definition, conduct unbecoming.

79. Even if that were not so, we have no difficulty in concluding in the circumstances of this case, particularly in light of his previous encounters with the JMPRC, that Dr. Ernst's conduct was worthy of disciplinary action. The fact that administrative measures are provided for in the payment schedule to deal with assessment, verification, reassessment, etc. does not, in our view, prohibit the College from charging a member for excessive billing.

DATED at Saskatoon, Saskatchewan, this 14 day of June, 2019.

Alma Wiebe, Q.C.,
Chair of the Disciplinary Hearing Committee

Dr. Dorie-Anna Dueck,
Member of the Disciplinary Hearing Committee

Dr. Oluremi Adefolalin,
Member of the Disciplinary Hearing Committee