

DISCIPLINE COMMITTEE OF THE COLLEGE OF KINESIOLOGISTS OF ONTARIO

IN THE MATTER of the *Regulated Health Professions Act*, 1991, S.O. 1991, c.18, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER of the *Kinesiology Act*, 2007, S.O. 2007, c. 10, Schedule 0, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER of allegations of professional misconduct/incompetence before the Discipline Committee of the College of Kinesiologists of Ontario as referred by the Inquiries, Complaints and Reports Committee against: Russell Rainey.

BETWEEN:)

)

COLLEGE OF KINESIOLOGISTS OF ONTARIO)

**Maya Pearlston
Steinecke Maciura LeBlanc**
for the College of Kinesiologists

)

-and-)

)

Nancy Leris
Attending for the College of
Kinesiologists

)

RUSSELL RAINEY)
Registration Number 14076)

Self-Represented

)

)

Russell Rainey
In attendance

)

)

Cynthia Kuehl
Independent Legal Counsel

)

Heard: May 12, 2020

)

Decision Released: May 26, 2020

)

Written Decision Date: May 19, 2020

Panel Members:

Mary Pat Moore, Chair, Public Council Member
Victoria Nicholson, Public Council Member
Ryan Wight, R. Kin., Professional Council Member

DECISION AND REASONS FOR DECISION

I. INTRODUCTION

[1] This matter was heard by a panel of the Discipline Committee (“the Panel”) on May 12, 2020, via videoconferencing.

[2] The hearing proceeded by an Agreed Statement of Facts. The College of Kinesiologists of Ontario (“the College”) and Russell Rainey (“the Registrant”) also proposed a Joint Submission on Penalty and Costs.

II. ALLEGATIONS

[3] The allegations against the Registrant are set out in the Notice of Hearing dated March 23, 2020, contained in the Hearing Brief of Documents (Exhibit #1, Tab 1).

[4] The allegations in the Notice of Hearing are set out in paragraph 3 entitled “The Text Messages”

3. It is alleged that on or about November 26, 27 and/or 28, 2019 the Registrant engaged in sexual behaviour or remarks by sending texts to the Patient that included the following:

- a. Yes:) show me your body after? I will too;
- b. "I guess all can do is share my blowjob stories then:);

- c. I feel bad:(you're such a trooper and such a young beautiful woman!
Keep your head up and don't go crazy; and/or
- d. "I mean you can't be too embarrassed! I gave a bj! Nothing more embarrassing than that"

[5] Specifically, it is alleged that the above conduct constitutes professional misconduct pursuant to clause 51(1)(b.1) of the Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991 (the "Code") as the Registrant sexually abused the Patient, namely he engaged in behaviour or remarks of a sexual nature towards the Patient.

[6] It is also alleged that the above conduct constitutes professional misconduct pursuant to clause 51(1)(c) of the Code as set out in one or more of the following paragraphs of section 1 of Ontario Regulation 316/12 made under the Kinesiology Act, 2007:

- a. Paragraph 1 - contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession, specifically Practice Standard - Professional Boundaries;
- b. Paragraph 50 - engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and/
or
- c. Paragraph 51 - engaging in conduct that would reasonably

be regarded by members as conduct unbecoming a member of the profession.

III. REGISTRANT'S POSITION

[7] The Registrant admitted the allegations set out in the Notice of Hearing as described in the Agreed Statement of Facts (Exhibit #2).

IV. AGREED STATEMENT OF FACTS

[8] Counsel for the College advised the Panel that the parties were presenting an Agreed Statement of Facts (ASF) for the Panel's consideration which provides as follows and may be accepted as true by the Discipline Committee of the College:

The Registrant

1. Russell Rainey (the "Registrant") became a member of the College of Kinesiologists of Ontario (the "College") in November 2016. Attached as Tab "A" is an excerpt of the Registrant's profile on the College Public Registry.
2. At all relevant times, the Registrant was a duly registered member of the College in the general class.

The Patient

3. Between May 2019 and December 2019, a patient (the “Patient”) retained the services of the Registrant to provide kinesiology services.

The Text Messages

4. It is agreed that on November 26, 27 and 28, 2019, the Registrant engaged in sexual behaviour or remarks by sending text messages to the Patient that included the following:

a. “Yes :) show me your body after ? I will too”;

b. “I guess all I can do is share my blowjob stories then :)”;

c. “I feel bad :(you’re such a trooper and such a young beautiful woman! Keep your head up and don’t go crazy”; and

d. “I mean you can’t be too embarrassed! I gave a bj! Nothing more embarrassing than that”.

5. It is agreed that the above-noted text messages were inappropriate.

6. Although the Patient did not complain to the College about the text messages and the Registrant was not intentionally trying to engage in sexual abuse, it is agreed that making non-clinical comments about the Patient’s body and appearance and blowjobs amounts to behaviour or remarks of a sexual nature.

7. It is agreed that members of the profession must at all times refrain from engaging in any behaviour or remarks of a sexual nature.

8. It is agreed that the Registrant has recognized his error. He has expressed his remorse on several occasions to the Registrar. He has, since being made aware of the College's investigation, proactively reviewed the College standards and committed to taking any remedial courses as deemed necessary by the Discipline Committee.

Contravening a Standard of Practice of the Profession

9. It is agreed that members of the College must conduct themselves appropriately in their professional relationships with patients, including by refraining from behaviour that could be seen as inappropriate and refraining from engaging in a close personal relationship with a patient, as stipulated in the Professional Boundaries Practice Standard. Attached as Tab "B" is an excerpt of the relevant Standard.

10. It is agreed that the standards of practice of the profession, as set out in paragraph 9, were contravened by the Registrant.

11. As noted above, it is agreed that the Registrant has recognized his error. He has expressed his remorse on several occasions to the Registrar. He has, since being made aware of the College's investigation, proactively reviewed the College standards and committed to taking any remedial courses as deemed necessary by the Discipline Committee.

Acts of Professional Misconduct

12. It is agreed that the Registrant engaged in professional misconduct pursuant to clause 51(1)(b.1) of the Health Professions Procedural Code, being Schedule 2 to the *RHPA*, 1991 (the “Code”), as he sexually abused the Patient by engaging in behaviour or remarks of a sexual nature towards the Patient.

13. In addition, it is agreed that the Registrant engaged in professional misconduct pursuant to clause 51(1)(c) of Code, as set out in the following paragraphs of section 1 of Ontario Regulation 316/12 made under the *Kinesiology Act, 2007*:

a. Paragraph 1 – Contravening, by act or omission, a standard practice of the profession or failing to maintain the standard of practice of the profession, specifically Practice Standard- Professional Boundaries;

b. Paragraph 50 – Engaging in conduct or performing an act relevant to the practice of the profession that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional;
and

c. Paragraph 51 – Engaging in conduct that would reasonably be regarded by members as conduct unbecoming a member of the profession.

14. By this document, the Registrant admits to the truth of the facts referred to in paragraphs 1 to 13 above (the “Agreed Facts”)

15. By this document, the Registrant states that:

a. He understands fully the nature of the allegations against him:

b. He has no questions with respect to the allegations against him;

c. He admits to the truth of the facts contained in this Agreed Statement of Facts and Admission of Professional Misconduct and that the admitted facts constitute professional misconduct;

d. He understands that by signing this document he is consenting to the evidence as set out in the Agreed Facts being presented to the Discipline Committee;

e. He understands that by admitting the allegations, he is waiving his right to require the College to prove the case against him at a contested hearing;

i. He understands that the decision of the Discipline Committee and a summary of its reasons, including reference to his name, will be

published in the College's annual report and any other publication or website of the College;

j. He understands that any agreement between him and the College with respect to the penalty proposed does not bind the Discipline Committee; and

k. He understands and acknowledges that he is executing this document voluntarily, unequivocally, free of duress and free of bribe and that he has been advised of his right to seek legal advice.

16. In light of the Agreed Facts and the Admission of Professional Misconduct, the College and the Registrant submit that the Discipline Committee should find that the Registrant has committed professional misconduct.

V. PLEA INQUIRY

[9] The Chair of the Discipline Committee panel conducted an oral plea inquiry. The Registrant's answers confirmed that his admissions were voluntary, informed, and unequivocal. (Exhibit #3)

The Panel accepted the Registrant's Plea.

VI. DECISIONS ON FINDINGS

[10] The panel finds that the Registrant committed the acts of professional

misconduct as set out and admitted by the Registrant in paragraphs 12 and 13 of the ASF.

VII. **REASONS FOR FINDING**

[11] The Panel considered the ASF and found that the facts set out in that document, together with the Registrant's admissions, support findings of professional misconduct. Having reviewed the Notice of Hearing and the ASF, together with the attachments and including the Registrant's admissions, and having heard the submissions of College counsel and Registrant, and being satisfied that the Registrant's plea was voluntary, informed, and unequivocal, the Panel finds that the College discharged its onus to prove the allegations admitted to on a balance of probabilities.

[12] The Panel finds that The Registrant committed acts of professional misconduct pursuant to subsection 51(1)(b.1) of the Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991 (the "Code") as he sexually abused the Patient by engaging in behaviour or remarks of a sexual nature towards the Patient. By making non-clinical comments about the Patient's body and appearance and blowjobs, these text messages amount to behaviour or remarks of a sexual nature.

[13] Finally with respect to the Panel's findings that the Registrant's conduct was disgraceful, dishonourable, and unprofessional pursuant to clause 51 (1) (c), the Panel was satisfied that the Registrant's behaviour was disgraceful and dishonourable. The Registrant's text messages breached personal and professional boundaries between the Registrant

and the Patient. The Panel was satisfied that the Registrant's conduct was unprofessional. The Panel was satisfied that the Registrant's conduct was more than incompetent or careless. The Registrant knew or ought to have known that he was committing misconduct by sexual abusing the Patient and by breaching professional standards by engaging in behaviour or remarks of a sexual nature towards the Patient was wrong.

VIII. JOINT SUBMISSIONS AS TO ORDER

[14] Counsel for the College advised the Panel that an agreement had been reached with respect to the order that was being proposed by the parties regarding the appropriate sanction and costs in Joint Submission on Penalty and Costs (JSPC) (Exhibit 4).

1. The Registrant is required to be reprimanded by a panel of the Discipline Committee following the hearing.

2. The Registrar is directed to suspend the Registrant's Certificate of Registration for a period of one (1) month, commencing on a date to be selected by the Registrar, of which one (1) month shall be suspended if the Registrant completes the terms, conditions and limitations set out in paragraph 3 of this Order within two (2) months of the date of this Order.

3. The Registrar is directed to immediately impose the following specified terms, conditions and limitations on the Registrant's

Certificate of Registration, all of which are to be completed at his own expense and within three (3) months of the date of this Order:

a. Requiring the Member to successfully or unconditionally pass the College's Ethics and Professionalism e-Learning Module;

b. Requiring the Member to review all written College standards and provide written confirmation of review to the Registrar; and

c. Requiring the Member to complete, to the satisfaction of the Registrar, a written paper of approximately 1,000 words concerning appropriate professional boundaries and boundary violation issues.

4. The Registrant is required to reimburse the College for funding provided to the Patient under the program required under section 85.7 of the Health Professions Procedural Code, being Schedule 2 to the *RHPA*, 1991.

5. The Registrant is required to pay to the College costs in the amount of \$2,000.00 within one (1) year of the date of this Order. The Registrar is authorized to impose an installment plan to ensure regular and consistent payment of the costs order.

IX. SUBMISSIONS ON ORDER

Counsel for The College

[15] Counsel for the College submitted in support of the JSPC that:

- The Panel should consider the principles of general and specific deterrence, rehabilitation, and ensuring public protection.
- A reprimand would express disappointment and disapproval of the Discipline Panel Committee to the Registrant.
- In addition, Counsel for the College presented the Panel with a Brief of Authorities (Exhibit #5) which contained the relevant legislation and three (3) Decisions from Discipline Committees of health regulatory colleges which had imposed similar penalties for sexual remarks. The Brief also contained *Law Society of Upper Canada v. Archambault, 2017 ONLSTH86* including a reference to *R v Anthony-Cook, 2016, SCC 43* setting out the proper legal test for deciding whether it is appropriate to depart from a joint submission.
- Counsel for the College submitted that the JSPC addressed the principles above by sending a message to other Registrants of the penalty awaiting them for professional misconduct and a specific deterrence to the Registrant for his misconduct. It also addresses his misconduct issues and provided for appropriate rehabilitation.

The Registrant

[16] The Registrant agreed with the submissions of College Counsel. He had taken steps to remediate. Additional mitigating factors were his remorse and his co-operation with College. The penalty is aimed appropriately at his professional misconduct.

X. THE PANEL'S ORDER

[17] The Panel accepts the JSPC presented by the parties and makes an order as follows:

1. Requiring the Member to be reprimanded by the panel following the hearing.
2. Directing the Registrar to suspend the Registrant's Certificate of Registration for a period of one (1) month, commencing on a date to be selected by the Registrar, of which one (1) month shall be suspended if the Registrant completes the terms, conditions and limitations set out in paragraph 3 of this Order within two (2) months of the date of this Order.
3. Directing the Registrar to immediately impose the following specified terms, conditions and limitations on the Registrant's Certificate of Registration, all of which are to be completed at his own expense and

within three (3) months of the date of this Order:

- a. Requiring the Member to successfully or unconditionally pass the College's Ethics and Professionalism e-Learning Module;
 - b. Requiring the Member to review all written College standards and provide written confirmation of review to the Registrar; and
 - c. Requiring the Member to complete, to the satisfaction of the Registrar, a written paper of approximately 1,000 words concerning appropriate professional boundaries and boundary violation issues.
4. Requiring the Registrant to reimburse the College for funding provided to the Patient under the program required under section 85.7 of the Code.
 5. Requiring the Registrant to pay to the College costs in the amount of \$2,000.00 within one (1) year of the date of this Order. The Registrar is authorized to impose an installment plan to ensure regular and consistent payment of the costs order.

XI. REASONS FOR ORDER

[19] The Panel is aware that when presented with a JSPC, we are not to depart from such a joint submission "unless satisfied that the recommended disposition would be contrary to the public interest and would bring the administration of justice into disrepute." *R v Anthony-Cook*, 2016, SCC 43.

[20] In deciding the appropriate Order in this case, we remind ourselves that the primary purpose of these proceedings is protection of the public. In addition, we must consider both the interests of the profession as a whole as well as the particular circumstances of the Registrant.

[21] In considering the public interest, we are mindful that the public must have confidence in the profession's ability to regulate itself effectively and in a manner that protects the public.

[22] When we consider the interests of the profession, we recognize that this Discipline Committee owes a duty to enforce and maintain the high standards of practice that the public expects of our members and that members expect of themselves. In each case, the Discipline Committee must consider the extent to which a message to the profession is required to make it clear that the conduct in question will not be tolerated.

[23] We must consider the unique and particular circumstances of Mr. Russell Rainey. The Order must be appropriate, fair, and reasonable to the Registrant's circumstances.

[24] The Panel agreed the proposed Order (JSPC) was reasonable and appropriate having regard for the facts of the case. The Panel thinks that the Order adequately addresses the issues of public protection, sends a message of general deterrence to the membership, and provides specific deterrence to the Registrant.

[25] The Panel also considered the Order to be consistent with the need to deal sternly with regard to sexual abuse. It addresses the need for public confidence in professional self-regulation by demonstrating the seriousness with which the College addresses sexual abuse of patients. By making this Order, the public's confidence in the College's ability to regulate its members is maintained.

[26] The Panel considers that the Order gave due consideration to both the aggravating and mitigating circumstances in this case and by giving each factor the appropriate weight, struck an acceptable balance among the factors. The Panel noted the seriousness of this matter for protection of the public. College Counsel presented three cases that established a range of reasonable actions. It is the Panel's view that the Registrant's case fell within these parameters.

[27] In reaching our decision, the Panel considered the submissions of both the Registrant and the College counsel.

[28] The Panel decided to deliver the Registrant's reprimand following the hearing on May 12, 2020. A copy of the reprimand is attached as Appendix 1.

I, Mary Pat Moore sign this Decision and Reasons for Decision as Chairperson of this Discipline Panel and on behalf of the panel members listed below:

May 19, 2020

Mary Pat Moore

Chairperson

Date

Victoria Nicholson, Public Council Member
Ryan Wight, R. Kin., Professional Council Member

XII. APPENDIX 1

The Panel delivered the following reprimand to the Registrant:

1. Your conduct is totally unacceptable to your fellow kinesiologists and to the public. Of particular concern to us is the fact that your conduct involved misconduct set out in paragraphs 9, 10, 11, 12, and 13, of the Agreed Statement of Facts.
2. You have brought discredit to the kinesiology profession and to yourself.
3. Public confidence in this profession has been put in jeopardy.
4. The result of your misconduct is that you let down the public, the kinesiology profession, and yourself.
5. It is necessary for us to impress upon you the seriousness of your misconduct.

6. The fact that you have engaged in misconduct is a matter of significant concern that reflects poorly upon yourself and the profession. You have let down the public which places its confidence in members of this profession.
7. We wish to make clear to you that, although the Order we imposed is appropriate in relation to our findings, a more significant Order will likely be imposed by another Discipline panel in the event that you are ever found to have engaged in further professional misconduct.
8. By your actions, you have caused significant damage to the reputation of the profession as a whole and cast a shadow over your own integrity.
9. The practice of kinesiology is a privilege that carries with it significant obligations to the public, the profession, and to oneself. Through your conduct, you have failed in your obligations.

