

Names of Third Parties have been Redacted

IN THE MATTER OF THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA
AND DR. MICHAL KABURDA, A REGISTRANT

DECISION

Dr. Arnold Steinbart
(Chair)

Dr. Myrna Halpenny

Mr. Paul Durose



Panel

Hearing Dates: July 23 & 24, 2014 Vancouver, B.C.

Counsel for the CDSBC: Thomas M. Lutes and Greg Cavouras

Counsel for the Discipline Panel: Ms. Catharine Herb-Kelly Q.C.

Dr. Kaburda: Did not appear and no counsel

Introduction

[1] A Panel of the Discipline Committee of the College of Dental Surgeons of British Columbia (CDSBC) was appointed pursuant to section 38 of the *Health Professions Act (HPA)* to hear and determine allegations in a Citation issued pursuant to section 37 of the *HPA* against Dr. Michal Kaburda, a registrant.

[2] The hearing took place in Vancouver on July 23 and 24, 2014. Dr. Kaburda did not attend. The College led evidence establishing that he had been properly served with the Citation and had notice of the date and location of the hearing pursuant to section 37(2) of the *HPA*. Accordingly, the Panel decided to proceed in his absence pursuant to section 38(5) of the *HPA*.

[3] The particulars of the offences described in the Citation allege the following:

1. **Beginning in or about March 2013 and with respect to your patient Ms. K [redacted] you refused to disclose or transfer the patient's dental records, upon request.**
2. **In or about April 2013 to December 2013, you failed to respond to College inquiries and requests for information in a substantive and timely**

manner with respect to a complaint into your refusal to disclose or transfer the dental records of patient Ms. K.

- 3. In or about August 2013 through December 2013, you failed to respond to College inquiries or requests for information in a substantive and timely manner, or at all, with respect to a complaint from your patient, Ms. K, about the dental services you provided to her.**

[4] This is the Panel's decision as to whether the alleged offences have been proven and if so, how to characterize the conduct in accordance with the *HPA*.

Evidence

I. Dr. Kaburda's dealings with his patient, Ms. K

[5] Ms. K, the complainant, required implants to replace two of her lower teeth and her jaw was out of alignment. On the recommendation of a co-worker she went to Dr. Kaburda for treatment. He placed 2 implants in 2010 and attempted to correct her bite utilizing invisalign appliances. Ms. K said that she saw Dr. Kaburda for 2 years but stopped in 2011 because he was closing his practice.

[6] Her regular dentist, Dr. Y [redacted], referred her to Dr. C [redacted] in September 2011 for a consultation. Dr. C prepared a report in which he made several observations about her dental health and among other things recommended possible restoration of the implants. He determined that Ms. K required further extensive treatment.

[7] Ms. K obtained a second opinion regarding the implants from Dr. MC [redacted] on April 18, 2012. He agreed with Dr. C's clinical findings and made recommendations regarding restoration of the implants. She also saw Dr. W [redacted], an orthodontist, on February 18, 2013. He recommended braces for all her teeth and began this work in May 2013.

[8] She testified that Dr. Y and Dr. W attempted to obtain her records from Dr. Kaburda without success.

[9] In March 2013, Ms. K sought legal advice from Mr. M [redacted] regarding Dr. Kaburda's failure to provide her records. She signed a document dated March 20, 2013 authorizing him to release her records to Mr. M. On April 18, 2013, Mr. M advised Dr. Kaburda that if he sent the records to Dr. Y, it would not be necessary to forward them to him (M). Neither Dr. Y nor Mr. M received Ms. K's records.

[10] Ms. K sent a letter of complaint ("First Complaint") dated April 14, 2013 to the CDSBC regarding Dr. Kaburda's failure to provide her records to her and her various dental practitioners.

[11] On August 8, 2013, Dr. Kaburda wrote to Mr. M and among other things noted that his chart for Ms. K consisted of *300 + separate paper based document and growing* and that he would *be pleased to accommodate the Attorney's request for a photocopy of the entire file...* but required an advance of \$600.00 "*as a co payment*".

[12] On the same day Dr. Kaburda included 2 pages of Ms. K's records with a letter to Dr. W in which he explained his reasons for refusing to send all of Ms. K's records in part as follows:

- A. *Demands of Dr. W Inc. can not be accommodated as the proposal will place a financial impediment within the parameters of "Affordability" that the Clinic of Dr. M. Kaburda Inc (DMKInc.) has been accountable to, under a Contractual Arrangement with Ms. K, since March 18, 2008.*
- B. *Requests of DPAWInc. are not relevant to the present status of Stomatognathic Health, a Homeostasis in the Stomatognathic area of Patient: Ms. K.*

[13] It appears from paragraph A. that Dr. Kaburda had some sort of financial reason for refusing to provide the records, but the suggestion that they are not relevant to her dental health in paragraph B. does not make sense.

[14] After Mr. M sent the authorization, Dr. Kaburda spoke to Ms. K by telephone. She reiterated her request for her records. He told her he was not obliged to send them due to the Canadian *Privacy Act*. She never received the records.

[15] On August 15, 2013, Ms. K submitted a second complaint ("Second Complaint") in which she alleged that Dr. Kaburda's dental treatment was poor causing her additional problems and that he provided orthodontic treatment when he is an oral surgeon.

[16] Ms. K commenced an action against Dr. Kaburda in Small Claims Court on August 22, 2013 seeking damages for negligence and failure to provide her records. She depleted her insurance benefits while under Dr. Kaburda's care and has had to pay for restorative work herself.

[17] She served Dr. Kaburda with her Notice of Claim, but he ignored it. She took default judgment after he failed to attend mediation and has an outstanding order against him for \$6736.25. She filed a Summons to Payment Hearing on February 18, 2014. When Dr. Kaburda did not attend the payment hearing on May 2, 2014, she obtained a warrant for his arrest. This seems to have attracted his attention as the warrant was cancelled. Ms. K was to attend a further hearing in Small Claims Court on July 24, 2014, the day after she testified before this Panel.

II. Dr. Kaburda's Dealings with the CDSBC

[18] The CDSBC's complaint investigation department responded to Ms. K's letters of complaint. Dr. S [redacted] was the responsible complaint investigator assisted mainly by complaint officers, Ms. G [redacted] and Ms. L [redacted].

[19] Ms. W [redacted], Director of Professional Regulation sent Dr. Kaburda a letter dated April 29, 2013 asking him to provide a response to the First Complaint and his records, including radiographs, to the CDSBC by May 20, 2013. This letter was sent to an address in New Westminster where Dr. Kaburda had practiced dentistry. He did not respond. Dr. S

sent a follow up letter by courier to the same address and to Dr. Kaburda's email address on May 27, 2013 asking for the records and a response by June 7, 2013.

[20] Ms. G tried to call Dr. Kaburda. On May 28 he left a message that he had not received the April 29th letter and provided a fax number where it could be sent. On May 29th, Ms. G received an email from Dr. Kaburda providing her with a new mailing address in White Rock.

[21] By letter dated May 28th 2013, Dr. S sent copies of the First Complaint and Ms. W's April 29th letter to Dr. Kaburda's new mailing address by courier and email. The deadline for response remained June 7, 2013.

[22] On June 4, 2013, Dr. Kaburda spoke twice to a CDSBC employee, Ms. M [redacted]. Her notes documenting the conversations indicate that in the first phone call he said he was entitled to charge \$5000.00 for Ms. K's records and that the CDSBC ought to dismiss her complaint. In the second conversation, he wanted to speak to Ms. W about *alternative dispute resolution or another type of remediation*.

[23] On June 5, 2013, Dr. Kaburda spoke with Ms. L by telephone about many matters related to the First Complaint. He told her that the CDSBC did not have authority to ask for the records and he was not required to provide them. In her affidavit, she described Dr. Kaburda's demeanour as "agitated", "belligerent" and "quite upset". She found some aspects of the conversation confusing but generally understood that Dr. Kaburda would not provide the CDSBC with Ms. K's records.

[24] On June 14, 2013, Dr. S sent Dr. Kaburda a letter suggesting the complaint could be dealt with expeditiously if he provided the records to Ms. K in accordance with the CDSBC's *Recordkeeping Guidelines* by June 21, 2013.

[25] On June 16, 2013 Ms. G again spoke to Dr. Kaburda who advised that he did not want to provide the records on the basis of a contractual relationship with the CDSBC. He said that he did not need to provide them. Ms. G did not understand Dr. Kaburda's rationale for refusing to provide Ms. K's records. She said his demeanour was agitated and dismissive and so she terminated the discussion.

[26] On August 1, 2013 Ms. G sent Dr. Kaburda an email pointing out that the CDSBC was still waiting for his response and that Dr. S wanted to speak with him by telephone. Dr. S thought there may be a reason why the records had not been sent and a telephone discussion might help solve the problem.

[27] She provided 3 possible dates in August for a teleconference and asked Dr. Kaburda to respond the next day. She spoke to him on August 2, 2013. He reiterated his position that he had a contractual relationship with the CDSBC. This was a difficult telephone call for Ms. G because Dr. Kaburda was argumentative, threatening and demeaning toward her. Ultimately she was forced to end the conversation. No date for a teleconference was arranged.

[28] Finally, Dr. S spoke to Dr. Kaburda by telephone on August 13, 2013. Dr. Kaburda said he would not release the records relying on the *Canada Health Act* to support his position. Dr. S did not understand his rationale.

[29] As noted, Ms. K submitted a Second Complaint raising competency issues by letter dated August 15, 2013. On August 28, 2013, Dr. S sent the Second Complaint to Dr. Kaburda and asked for the records by September 18, 2013. The records were not received and so Dr. S advised Dr. Kaburda by letter dated September 19, 2013 that his failure to release the records and to respond to the standard of practice concerns would be referred to the Inquiry Committee.

[30] When the Inquiry Committee reviewed the matter it decided to meet with Dr. Kaburda. Dr. S wrote to him on October 22, 2013 and November 25, 2013 proposing dates for such a meeting but he did not respond.

[31] Ms. L followed up with Dr. Kaburda by email on December 5, 2013. She tried to arrange the meeting.

[32] The CDSBC received a rambling letter from Dr. Kaburda dated December 4, 2013 in which among other things he asked for a deferral of the meeting and an *in house judicial review*. He said he would not comply with Ms. W's request for his records because of previous litigation he had engaged in against the CDSBC:

1. *The Corporate Directors of, DMK Inc, we have been advised not to participate or accommodate and or acknowledge the compositions in the letter of April 29, 2013...*
2. *"Dentist Provider of Health Services" by DMK Inc., having experienced successful litigation against the "Old CDSBC"...Practitioner...has reserved the right not to acknowledge in any manner or form or to condone in any manner, all recognizable creative directives and or unsanctioned by CDSBC directives that present an immediate interference upon the Clinic of DMK Inc; by a beaurocratic process initiated by an employee from a Not for Profit Corporation, a Trust such as CDSBC.*

[33] On December 16, 2013 the Inquiry Committee referred the two complaints to the Discipline Committee.

[34] It is important to note that because of Dr. Kaburda's refusal to provide his records Dr. S was unable to begin an investigation into the Second Complaint and this matter remains outstanding.

Decision

[35] The onus of proof is on the CDSBC which must prove its case according to the civil standard of proof on a balance of probabilities: *F(H) v. McDougall*, 2008 SCC 53 (CanLii). In *McDougall*, the Supreme Court of Canada stated that *evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test* (paragraph 46).

[36] The Panel has applied the standard articulated in *McDougall*. This approach is consistent with the standard applied by the Panel in *Re Duvall*, August 21, 2013.

1. Beginning in or about March 2013 and with respect to your patient Ms. K you refused to disclose or transfer the patient's dental records upon request.

[37] The evidence is clear and uncontroverted that Dr. Kaburda failed to provide Ms. K's dental records to her, to her lawyer, Mr. M, and to other dentists pursuant to their requests. Mr. M and the requesting dentists were acting on behalf of Ms. K. The Panel is of the view that his failure to respond to their requests amounted to failure to respond to Ms. K's requests for her records.

[38] The Panel is aware that Dr. Kaburda provided 2 pages from Ms. K's chart to Dr. W. However, he confirmed that the record consisted of more than 300 pages. Since he treated Ms. K for approximately 2 years, it is certain that the records he sent to Dr. W were so incomplete that it is not possible to conclude that there was even partial compliance with the numerous requests for her records.

[39] The CDSBC's Practice Guidelines include a document entitled *Dental Recordkeeping Guidelines*. The Guideline in force at the time of these events says:

Patients have the right by law to access a copy of their complete dental record and dentists are obligated by law to provide copies of what the patient has requested, including radiographs, study models, photographs and other items.

[40] The Panel has concluded that Dr. Kaburda's failure to comply with the requests from Ms. K, her lawyer and other dentists is a clear breach of the Guideline. His reliance on the *Privacy Act* to support his refusal to provide them was misguided since Ms. K was seeking her own records.

[41] Further, his refusal to provide them is not supported by case law. In *McInerney v MacDonald* [1992] 2 S.C.R. 138 the Supreme Court of Canada made it clear that health care practitioners owe their patients a fiduciary duty to provide access to their medical records:

The fiduciary duty I have described is sufficient to protect the interest of the patient. The trust-like "beneficial interest" of the patient in the information indicates that, as a general rule, he or she should have a right of access to the information and that the physician should have a corresponding obligation to provide it.... to ensure the proper function of the doctor-patient relationship and to protect the well-being of the patient. If there has been improper conduct in the doctor's dealing with his or her patient, it ought to be revealed. (Page 152)

[42] The Panel finds that the CDSBC has proven the offence particularized in paragraph 1 of the Citation.

[43] The Panel will address the second and third allegations together.

2. **In or about April 2013 to December 2013, you failed to respond to College inquiries and requests for information in a substantive and timely manner with respect to a complaint into your refusal to disclose or transfer the dental records of patient Ms. K.**
3. **In or about August 2013 through December 2013, you failed to respond to College inquiries or requests for information in a substantive and timely manner, or at all, with respect to a complaint from your patient, Ms. K about the dental services you provided to her.**

[44] There does not appear to be a specific obligation in the CDSBC's *Code of Ethics* or *bylaws* requiring a registrant to cooperate in an investigation. However, the case of *Artinian v. College of Physicians and Surgeons* (1990) 73 O.R. (2d) 704 is authority for the general proposition that a professional has a duty to cooperate with his or her regulatory authority and that it is an offence to fail to do so. In that case it was argued that there was no such duty. The Court said:

We disagree. Fundamentally, every professional has an obligation to co-operate with his self-governing body.

[45] Ms. W, Dr. S, Ms. G and Ms. L collectively made many attempts to obtain the records, but they were never forthcoming. The Panel notes that Dr. Kaburda was rude and difficult for the Complaint Officers to deal with.

[46] When it was looking into the First Complaint, the CDSBC gave Dr. Kaburda two deadlines by which to provide Ms. K's records – May 30, 2013 and June 7, 2013. Efforts by the CDSBC to obtain these records continued after the deadlines had passed and were unsuccessful. Upon receipt of the Second Complaint he was asked again to provide the records by September 18, 2013. He never produced the records to the CDSBC.

[47] When the Inquiry Committee considered the two complaints it decided to meet with Dr. Kaburda. To that end, Dr. S sent him two letters dated October 22, 2013 and November 25, 2013 proposing dates for such a meeting, but Dr. Kaburda never responded to these letters.

[48] One last attempt was made to arrange such a meeting by email dated December 5, 2013. Dr. Kaburda responded by a letter that is confusing and difficult to understand – the bottom line was that no such meeting was arranged and Ms. K's records were never sent to the CDSBC with the result that it has not been possible to investigate the Second Complaint.

[49] The reasons Dr. Kaburda gave for refusing to provide the records are perplexing and difficult to distill. He referred to his contractual relationship with the CDSBC. It is not apparent how this “contractual relationship” entitled him to avoid his obligation to provide records to the CDSBC. On one occasion he referred to the Canada *Health Act* but he did not explain how this statute exempted him from cooperating in the investigation. His various explanations are inconsistent with the principle in *Artinian* and are without merit.

[50] The Panel concludes that the CDSBC has established the offences particularized in paragraphs 2 and 3 to the standard articulated in *McDougall*. The evidence is clear and uncontroverted that Dr. Kaburda failed to provide the CDSBC with Ms. K’s records; he failed to provide dates to the Inquiry Committee for a meeting; and there is no reasonable explanation for his conduct.

[51] The Panel must determine how to characterize Dr. Kaburda’s conduct in accordance with the *HPA*. Counsel for the CDSBC submitted that Dr. Kaburda’s conduct is professional misconduct.

[52] Section 26 of the *HPA* defines *professional misconduct* to include *sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession*. Section 26 says *unprofessional conduct includes professional misconduct*.

[53] In his submissions, counsel for the CDSBC addressed the difference between *unprofessional conduct* and *professional misconduct*. He suggested that *professional misconduct* generally refers to misconduct that is more egregious than *unprofessional conduct*.

[54] The Panel has considered the definitions in section 26 and has decided to characterize conduct that it regards to be of a more serious or egregious nature as *professional misconduct*, rather than *unprofessional conduct*, since the definition of that phrase includes *unethical conduct* and *infamous conduct*. This is consistent with the approach taken in *Re Duvall, supra*.

[55] Counsel for the CDSBC referred to *Law Society of BC v. Dobbin* [1999] LSBC 27 which held that failure to cooperate in an investigation by a regulatory body is professional misconduct. In that case, a complaint was made against a lawyer who failed to respond to communications from the Law Society on numerous occasions over a 10-month period. A panel of the Discipline Committee determined that the lawyer’s failure to respond did not amount to professional misconduct or conduct unbecoming. The Discipline Committee sought a review of the panel’s decision by the Benchers who overturned the panel’s decision holding that the failure to respond to the Law Society was professional misconduct.

[56] The decision contains a number of relevant observations:

The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy. (para. 20)

[57] And further:

The Benchers wish to ensure that members are under no illusions as to their duty to respond nor as to how the Benchers will deal with a failure to discharge that duty: we repeat, responding promptly, candidly and completely to Law Society communications is the cornerstone of our right to self-govern. (para. 23)

[58] In addition to *Dobbin*, the Law Society of B.C. found that the failure by a lawyer under investigation to provide certain records and available dates to meet with the Law Society amounted to professional misconduct in *Law Society of BC v. Tak* 2011 LSBC 01.

[59] Ms. K's dental health and the financial struggles she has faced since being treated by Dr. Kaburda demonstrate why it is important for dentists to provide their patients' consultants and subsequent treating practitioners with records. It is clear she has significant dental problems and has been put to a great deal of upset, inconvenience and frustration because of Dr. Kaburda's refusal to provide her records.

[60] In this case, there was no rational justification for refusing to provide the records to Ms. K, or the various dentists she consulted or was treated by. Dr. Kaburda's failure to do so is unacceptable and was harmful to her well being. His ongoing refusal was a breach of his fiduciary duty to her and is a very serious matter.

[61] Further, Dr. Kaburda's refusal to cooperate with the CDSBC in its investigation by providing records and other information, his mistreatment of CDSBC employees and failure to meet with the Inquiry Committee are all troubling. The lack of records effectively prevented the CDSBC's investigation into the Second Complaint. To date, this has prevented it from carrying out its statutory mandate to protect the public generally and Ms. K in particular.

[62] One of Dr. Kaburda's more alarming explanations for his behaviour was his suggestion that he does not recognize the authority of the CDSBC as set out in his December 4th letter quoted above. His refusal to cooperate on this basis is a very serious breach of his professional responsibility.

[63] Dr. Kaburda treated the CDSBC employees and his patient with contempt. His reasons for failing to cooperate with both Ms. K and the CDSBC are without any legal or logical justification, all of which means that the offences as proven are of such an egregious

nature that they must be characterized as professional misconduct.

Arnold Steinbart DMD

Dr. Arnold Steinbart, Chair

Dated: Oct. 14, 2014

Dr. Myrna Halpenny

Dated: _____


Mr. Paul Durose

Dated: _____

nature that they must be characterized as professional misconduct.

Dr. Arnold Steinbart, Chair

Dated: _____



Dr. Myrna Halpenny

Dated: Oct. 15/2014

Mr. Paul Durose

Dated: _____

nature that they must be characterized as professional misconduct.

Dr. Arnold Steinbart, Chair

Dated: _____

Dr. Myrna Halpenny

Dated: _____

Paul Durose
Mr. Paul Durose

Dated: October 15, 2014