

IN THE MATTER OF *THE PSYCHOLOGISTS ACT, 1997* AND BYLAWS AND IN THE
MATTER OF A COMPLAINT AGAINST CHARLES SWIFT, OF REGINA,
SASKATCHEWAN

DECISION

of

Saskatchewan College of Psychologists

DISCIPLINE COMMITTEE

Discipline Committee Members:

Mary Hampton, EdD, Chair
Wayne Schlapkohl, PhD
Angelina M. Baydala, PhD
Patricia Crassweller, MA
Gordon Glaicar, Public Representative

Karen Prisciak, Q.C., appearing on behalf of the Professional Conduct Committee
Charles Swift, R.Psych., appearing on his own behalf
Merrilee Rasmussen, Q.C., legal counsel for the Discipline Committee

INTRODUCTION:

[1] The Discipline Committee convened on March 27, 2009 at the offices of the College of Psychologists, 348 Albert Street, Regina, Saskatchewan, being the location and date agreed to by the parties for the hearing in this matter.

[2] Charles Swift is a Member of the Saskatchewan College of Psychologists (hereinafter referred to as the College) and at all times material to the complaints against him was a Psychologist registered and licensed to practice in the Province of Saskatchewan. The Notice of Hearing containing the formal complaint against him alleged that Mr. Swift was guilty of professional misconduct and/or professional incompetence, within the meaning of *The Psychologists Act, 1997*, based on the following particulars:

1. He inappropriately administered and used the MMPI-2 assessment as he had Ms X complete the psychological test at her home which test then formed part of the therapeutic treatment plan used in the psychological treatment of Ms X, contrary to the Canadian Code of Ethics for Psychologists, 3rd ed., 2000, II.5, II.9 and III.4.
2. He failed to securely store confidential files of Ms X in that he could not produce the files upon her request and reported the file as missing to the police on May 8, 2007, contrary to the Canadian Code of Ethics for Psychologists, 3rd ed., 2000, I.41.
3. He failed to release Ms X's files upon her request and/or the request of her

designated psychologist, contrary to the Canadian Code of Ethics for Psychologists, 3rd ed., 2000, II.1 and IV.17.

[3] An Agreed Statement of Facts and Documents was submitted to the Discipline Committee. Mr. Swift admitted the facts to which charge #1, as set out above, related, and in effect pled guilty to the charge. While he was in agreement with the recitation of events in relation to charges #2 and #3, he did not agree that the facts as agreed to support a finding of guilt with respect to those charges made against him.

FACTS:

[4] The following summarizes the events that occurred giving rise to charges #2 and #3:

[5] Ms X received psychological services from Mr. Swift for about a year, when she decided to end their therapeutic relationship. She made an appointment with him for 8:00 a.m. on May 8, 2007 specifically for the purpose of obtaining her file. When she arrived for the appointment, the file could not be found and Mr. Swift reported it stolen to the police. Later in that same day, the file appeared on Mr. Swift's desk. Also on that same day, Ms X made a complaint to the College of Psychologists.

[6] On May 9, 2007, Mr. Swift received a letter from the College, advising him that a complaint had been made. The letter also contained this sentence: "The PCC [Professional Conduct Committee] would strongly recommend that **you do not** make contact with the complainant through any means to discuss this complaint, as in doing so you may be perceived of as trying to influence the investigation [by the PCC into the complaint]" [emphasis in the original].

[7] Ms X contacted Mr. Swift by email on May 9, 14 and 27, 2007, to inquire about her missing file. He did not respond to her because of the sentence in the letter from the College that he received on May 9, 2007 advising of no contact in relation to the complaint.

[8] By letter dated July 14, 2007, received by the College on July 16, 2007, Mr. Swift advised the College that, among other things, Ms X's file had been located.

[9] On September 13, 2007 Mr. Swift inquired by telephone and was advised by the Deputy Registrar of the College that he could release Ms X's file to her new psychologist if he had a signed authorization from her to do so. The new psychologist phoned Mr. Swift in late September and again on October 1, 2007, requesting the file and Mr. Swift refused to provide it. The reasons he provided for his refusal were that Ms X had made a complaint against him and his lawyer had advised him not to contact her.

[10] On October 11, 2007, the new psychologist wrote requesting the file, which letter referred to a consent that was not actually included in the letter. Mr. Swift informed the new psychologist that the consent was missing by letter dated October 22, 2007.

[11] On October 25, 2007, Ms X's legal counsel wrote to Mr. Swift requesting release of the file and enclosing a consent dated October 12, 2007. Sometime after November 9, 2007, a consent was provided to Mr. Swift from the new psychologist, which consent was dated November 9, 2007.

[12] Mr. Swift was absent from his office on a hunting trip from October 27 to 30, 2007 and November 1 to 5, 2007, and he was also absent from November 9 to 13, 2007 visiting his children.

[13] On October 30, 2007, the Deputy Registrar of the College wrote to Mr. Swift requesting release of the file and on November 23, 2007, Ms X's legal counsel wrote again.

[14] Mr. Swift delivered the file to the new psychologist on November 27, 2007.

[15] In his submissions to the Discipline Committee, Mr. Swift advised, with respect to charge #2, that his files are kept in a filing cabinet in his personal office within the clinic where he works. The cabinet, and his office door, are locked when he is not in attendance at the clinic. The filing cabinet and his office door are not locked when he is at the clinic, and the files are therefore accessible when he might be briefly out of his office, although still in the clinic. Mr. Swift advised also that he has never had a file go missing before in 14 years of practice. He believes that he is the "victim of theft" and as such did not fail to keep his files secure.

[16] In relation to charge #3, it was Mr. Swift's submission to the Discipline Committee that he did not reply to Ms X's inquiries about her file in May because the College told him not to contact her. He described his situation as a "catch 22". He also said that the College was aware on July 16, 2007 that he had found the file. Implicit in his submission was the notion that the College ought to have done something to advise Ms X that the file had been located. In addition, he said that he contacted the College in September 2007 to ask about handing over patient files and was advised by the Deputy Registrar that he could only do so with Ms X's authorization. It was the lack of authorization that was the reason for his not handing over the file before November 9, 2007, when he received the consent from the new psychologist. He also said that he handed over the files on November 27, 2007, well within the 30-day period provided for under *The Health Information Protection Act*. He did not provide the file to Ms X's lawyer, who had provided him with a consent on October 25, 2007, because the lawyer was not a "designated psychologist."

LEGISLATION:

[17] *The Psychologists Act, 1997* defines professional misconduct and professional incompetence in the following manner:

Professional misconduct

25 Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, that:

- (a) is harmful to the best interests of the public or the members of the college;

(b) tends to harm the standing of the profession;

(c) is a breach of this Act or the bylaws; or

(d) is a failure to comply with an order of the professional conduct committee, the discipline committee or the council;

is professional misconduct within the meaning of this Act.

Professional incompetence

26 Professional incompetence is a question of fact, but the display by a member of a lack of knowledge, skill or judgment, or a disregard for the welfare of a member of the public served by the profession of a nature or to an extent that demonstrates that the member is unfit to:

(a) continue in the practice of the profession; or

(b) provide one or more services ordinarily provided as a part of the practice of the profession;

is professional incompetence within the meaning of this Act.

[18] The Bylaws require adherence to the Code of Ethics:

14 Every member shall comply with the *Canadian Code of Ethics for Psychologists*, 3rd edition (2000).

[19] The Act also provides the Discipline Committee with the authority to impose penalties where it finds that a member is guilty of professional misconduct or professional incompetence:

Disciplinary powers

32(1) Where the discipline committee finds a member guilty of professional incompetence or professional misconduct, it may make one or more of the following orders:

(a) an order that the member be expelled from the college and that the member's name be struck from the register;

(b) an order that the member be suspended from the college for a specified period;

(c) an order that the member be suspended from the college pending the satisfaction and completion of any conditions specified in the order;

(d) an order that the member may continue to practise only under conditions specified in the order, which may include, but are not restricted to, an order that the member:

(i) not do specified types of work;

(ii) successfully complete specified classes or courses of instruction;

(iii) obtain treatment, counselling or both;

(e) an order that reprimands the member; or

(f) any other order that to it seems just.

(2) In addition to any order made pursuant to subsection (1), the discipline committee may order:

(a) that the member pay to the college within a fixed period:

(i) a fine in a specified amount not to exceed \$5,000; and

(ii) the costs of the investigation and hearing into the member's conduct and related costs, including the expenses of the professional conduct committee and the discipline committee and the costs of legal services and witnesses; and

(b) where a member fails to make payment in accordance with an order pursuant to clause (a), that the member be suspended from the college.

ANALYSIS:

Charge #1

[20] It is alleged by the Professional Conduct Committee that the acts complained of constitute professional misconduct and/or professional incompetence. In the context of *The Psychologists Act, 1997*, professional misconduct and professional incompetence are two distinct things.

[21] As is evident from the term as defined (as set out above), professional incompetence relates to a lack of skill, knowledge or judgment in the provision of professional services, or a disregard for the welfare of the recipient of such services, to the extent that it is demonstrated either that the member's practice should be limited or that the member should be expelled from

the profession. The standard of skill, knowledge, judgment or regard to be applied in any given situation is the standard considered appropriate by members of the profession of good repute and competency.

[22] As Mr. Justice Cory (now of the Supreme Court of Canada but then a member of the Ontario Court of Appeal) observed, speaking for the majority in *Re Milstein and Ontario College of Pharmacy et al (No. 2)*:

The power of self-discipline perpetuated in the enabling legislation must be based on the principle that members of the profession are uniquely and best qualified to establish the standards of professional conduct. Members of the profession can best determine whether the conduct of a fellow member has fallen below the requisite standards and determine the consequences. The peers of the professional person are deemed to have and, indeed, they must have special knowledge, training and skill that particularly adapts them to formulate their own professional standards and to judge the conduct of a member of their profession. No other body could appreciate as well the problems and frustrations that beset a fellow member.¹

[23] In this case, Mr. Swift has admitted that he inappropriately administered and used the MMPI-2 by allowing Ms X to complete it at home and then relying on the test results to develop and implement her treatment plan. Mr. Swift has acknowledged his failure to meet the required standard of professional practice in relation to the administration and use of the MMPI-2 and to that extent is guilty of professional incompetence.

Charge #2

[24] Professional misconduct, as defined in the Act, exists where a member engages in conduct that is harmful to the best interests of the public or the members of the college, or may harm the standing of the profession, or is a breach of the Act or the bylaws. Charges #2 and #3 relate to the manner in which Mr. Swift secured his files and his alleged failure to hand over Ms X's file when she requested it.

[25] With respect to charge #2, the Discipline Committee agrees with Mr. Swift's submission that the mere fact that a file has gone missing does not in and of itself prove that the files are not kept properly secure. While the Committee appreciates that Mr. Swift's submissions are not evidence, they do provide an explanation of his past practice that would appear to be consistent with what one would expect a reasonable professional person to do to safeguard their files. However, on the technical point of the charge as laid, the Committee repeats that the mere fact a file is missing is not sufficient to ground a charge that a member failed to keep their files secure. Since the facts provided to the Committee do not establish anything more than that a file could not be found at a particular point in time, there are no facts on which the Committee is able to determine that Mr. Swift failed to keep Ms X's file secure. The Committee therefore concludes that Mr. Swift is not guilty of charge #2.

1 (1976), 13 O.R. (2d) 700, at p. 707.

Charge #3

[26] However, the Committee has concluded that Mr. Swift is guilty of charge #3. In all of the circumstances, it is clear that Ms X was very concerned about her missing file. A reasonable member of the psychology profession would have understood the stress believing her file was missing would have caused her and would have acted proactively, in accordance with the requirements of the Code of Ethics. Paragraph II.2 of the Code states that a psychologist must “avoid doing harm to clients, students, research participants and others”. In addition, paragraph II.14 of the Code states that a psychologist must “be sufficiently sensitive to and knowledgeable about individual differences and vulnerabilities to discern what will benefit and not harm persons involved in their activities”. As well, paragraph II.18 of the Code requires that a psychologist “provide services which are coordinated over time and with other service providers, in order to avoid duplication or working at cross purposes. Such coordination would be promoted by the maintenance of adequate records and communication with other service providers”.

[27] In light of these ethical requirements imposed on psychologists, it is not appropriate for Mr. Swift as a member of the profession to stand on technicalities to avoid handing over the file, which he knew Ms X wanted from the moment she presented herself in his office on May 8, 2007 specifically to collect it. This is not to suggest that Mr. Swift should have ignored the advice of the College in relation to not having contact with her. However, he should have acted positively to find a means of ensuring that Ms X or her new psychologist received her file as soon as possible. There are many things he could have done. He could have contacted the College to enlist the College's aid in delivering her file to her instead of assuming that the College would know that his interpretation of the College's letter led him to conclude that he could not do this. Similarly, he could have provided the file to Ms X's lawyer as soon as the lawyer requested it, and provided her consent. Mr. Swift's explanation for this failure is that the lawyer was not a designated psychologist, which, apparently, was the information provided to him over the phone when he requested it from the Deputy Registrar. He then just ignored the request, rather than responding with his understanding of his legal obligation or contacting the College again for further clarification on the basis of these new circumstances. He could have phoned the new psychologist as soon as he received the letter indicating that a consent was enclosed, although it was not, rather than waiting for 10 or 11 days to write back to him. He could have assembled Ms X's file and sent it to the new psychologist as soon as he received the November 9, 2007 consent, rather than waiting for nearly three more weeks, even if that was within the time frame provided by *The Health Information Protection Act*. Compliance with the minimum standard required under that legislation is not necessarily sufficient to meet the standard required by one's profession, and in the circumstances of this case, the Committee has determined that a higher standard is required.

[28] The Committee therefore concludes that Mr. Swift is guilty of a breach of the Code of Ethics. Pursuant to section 14 of *The Saskatchewan College of Psychologists Regulatory Bylaws, 2004* a breach of the Code of Ethics is a breach of the bylaws of the College and as such constitutes professional misconduct pursuant to clause 25(c) of *The Psychologists Act, 1997*.

Penalty

[29] The courts have laid out a list of factors to which regard should be had in coming to a conclusion about the appropriate consequences resulting from a finding of professional

incompetence or professional misconduct, which includes the following:

1. The nature and gravity of the proven allegations;
2. The age of the offending member;
3. The age of the offended client or patient;
4. Evidence of the frequency of the commission of the particular acts of misconduct;
5. The presence or absence of mitigating circumstances, if any.
6. Specific deterrence;
7. General deterrence;
8. Previous record, if any, for the same, or similar, misconduct; the length of time that has elapsed between the date of any previous misconduct and conviction thereon; and, the member's (properly considered) conduct since that time;
9. Ensuring that the penalty imposed will, as mandated by the Act, protect the public and ensure the safe and proper practice of psychology;
10. The need to maintain the public's confidence in the integrity of the College's ability to properly supervise the professional conduct of its members;
11. Ensuring that the penalty imposed is not disparate with penalties previously imposed in this jurisdiction, particularly, and in other jurisdictions in general, for the same, or similar acts of misconduct.²

[30] In this case, the Discipline Committee has taken into account the evidence before it in relation to these factors. Mr. Swift has no prior discipline record and has taken responsibility for some of his actions without hesitation. The Committee is not aware of any generalized concerns relating to the administration and use of psychological tests or the security of client files. The Committee has come to its conclusions regarding penalty by balancing these considerations and after hearing the submissions of counsel for the Professional Conduct Committee, and by Mr. Swift on his own behalf. The Committee is particularly concerned to ensure that the penalties it imposes will protect the public and ensure the safe and proper practice of psychology and maintain public confidence in the profession.

2 *Camgoz v. College of Physicians and Surgeons of Saskatchewan*, [1993] S.J. No. 557 at paragraph 55

DECISION:

[31] Therefore, in light of its analysis and based on the reasons set out above, in accordance with section 32 of *The Psychologists Act, 1997*, the Discipline Committee makes the following orders:

1. That Charles Swift immediately provide notice to the test manufacturer of the MMPI-2 that he has admitted responsibility for the improper utilization of this psychological diagnostic tool and provide a copy of the notice to the Registrar of the College;
2. That Charles Swift secure supervision with a registered psychologist, holding an Authorized Practice Endorsement and approved by the Registration Committee of the College, to provide 160 hours of supervision, of which at least 40 hours are direct supervision, in accordance with a supervision plan that is approved by the Registration Committee and that relates to the testing and use of the MMPI-2 and related ethical issues, including the maintenance and submission of a supervision log;
3. That Charles Swift satisfactorily complete the ethics oral examination required by the College for new applicants for admission;
4. That Charles Swift pay to the Saskatchewan College of Psychologists a portion of the costs of the investigation and hearing into his conduct and related costs, in the amount of \$3,000.00, to be paid in full on or before the expiration of one year from the date of this decision, and that Charles Swift be and is hereby suspended from the Saskatchewan College of Psychologists after that date if the said costs are not paid on or before [that date], and shall remain suspended until the said \$3,000.00 is paid in full.

[32] The Discipline Committee recognizes that there is significant cost to Mr. Swift in obtaining supervision as required by its order and for that reason makes no order providing for a fine.

PUBLICATION:

[33] Section 32 of the Act contains a number of provisions relating to the distribution of the Discipline Committee's orders:

- (3) The discipline committee shall send a copy of any order made pursuant to this section to the member whose conduct is the subject of the order and to the person, if any, who made the complaint.
- (5) The discipline committee shall submit a written report, signed by the chairperson, of its decision to the council.
- (6) The discipline committee may inform a member's employer of the order made

against that member where that member has been found guilty of professional misconduct or professional incompetence

[34] In accordance with subsection 32(3) of the Act, a copy of this order is being provided to Mr. Swift and to the complainant. This decision is also being reported to the Council of the College as required by subsection 32(5). The Discipline Committee recommends to Council that a summary of its decision be placed on the College website as a means by which to educate both members of the College and members of the public about the standards of behaviour and competence expected of members.

Dated at Regina, Saskatchewan this 20th day of May, 2009.

SASKATCHEWAN COLLEGE OF
PSYCHOLOGISTS, DISCIPLINE COMMITTEE

Original signed by: _____
Dr. Mary Hampton, Chairperson